Obwolo v Republic (Criminal Appeal 39 of 2017) [2023] KECA 1085 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1085 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 39 OF 2017

PO KIAGE, M NGUGI & F TUIYOTT, JJA

SEPTEMBER 22, 2023

BETWEEN

TOBIAS ODOYO OBWOLO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Migori (H. A. Omondi J.) dated 7th November, 2016) in HCCRA No. 11 of 2016)

JUDGMENT

1. In this second appeal, the appellant, Tobias Odoyo Obwolo, challenges the decision of the High Court in which it upheld his conviction and sentence for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*.

2. The appellant and another had been charged with the offence before the Principal Magistrate's Court in Rongo. The particulars of the offence were that on the 6th of May 2015 at Chamgiwadu trading centre within Migori County, while armed with dangerous weapons namely rungus, they jointly robbed Esther Onyancha Davy of her mobile phones make Huawei, Nokia TS 90, Samsung and Kshs 7,000 all valued at Kshs. 63,000 and at the time of the said offence they assaulted the said Esther Onyancha Davy.

3. The facts before the trial court were that on 6th May 2015, Esther Onyancha Davy (PW1, Esther) was transporting sugarcane in a tractor registration number KAP 113 with her driver, Philip Olua and loader David Otiende to Ndhiwa. At Chamgiwadu Trading Centre, the tractor rolled off the road, and they began offloading the sugarcane onto another tractor with the help of other loaders. While she was standing by the roadside watching the tractor being pulled up, Esther was assaulted by two men and lost consciousness. Upon regaining consciousness, she realized she had been robbed of all

her possessions, including a handbag containing her clothes, two ATM cards, one identity card, two Huawei phones, two Nokia phones, one Samsung phone and Kshs. 7,000.

4. Esther testified that she knew the attackers as they had helped her to offload the sugarcane. There was a full moon at the time of the attack and another tractor with its full headlights on was at the scene. The appellant and his accomplice were not strangers as she had paid them for their services prior to the attack.

5. It was her testimony that after she had paid them, they left but returned shortly, pretending to pass by the scene, before assaulting her. She screamed and the persons who were driving the tractor away and the driver of a lorry parked nearby rushed to the scene but the attackers fled.

6. Daudi Otieno Mbuni (PW2, Daudi) was transporting sugar cane with Esther and one Otiende when the tractor they were using stalled at Chamgiwadu. They were assisted by five people, including the appellant, to off-load the sugarcane into another tractor. While they were offloading the sugar cane at 8:00 p.m., there was sufficient moonlight to see, and there was another tractor at the scene with full headlights on.

7. Daudi testified that after they finished off-loading and reloading the cane onto the tractor, they paid the loaders and the loaders left. They, however, returned shortly thereafter, armed with a rungu, and attacked Daudi and Esther. He was able to escape to a nearby homestead where he sought help. It was Daudi's testimony that while he had met the appellant's co-accused on the material day, he knew the appellant as he was a fellow tractor driver.

8. PW3, Edwin Owino Wasonga, was sitting in his lorry which had broken down at Chamgiwadu. He saw Esther's tractor roll to the side of the road while trying to pass his lorry. His testimony was that the appellant was among the people he saw assisting to off-load the tractor. He later saw the appellant following Esther and PW2 and heard Esther scream that she had been assaulted.

9. Esther and Daudi were examined after the incident by Kennedy Onunda (PW4) who classified the injuries sustained as harm and produced P3 forms in that regard.

10. CPL Pirauni Leparlenga (PW5) stationed at Ayora AP Post arrested the appellant. He had received a report about the attack from Esther's husband at 9:00 p.m. and was led to the appellant and his accomplice by members of the public. PW5 had earlier visited the scene and recovered 2 handbags and other papers. He had conducted a search in the appellant's house and recovered a National Bank ATM Card in the name of Onyancha. The ATM card was under a pillow on a bed inside a house which the appellant's parents had pointed out to PW5 as belonging to the appellant. A KCB ATM Card in Esther's name was also recovered from the trousers which the appellant was wearing.

11. When placed on his defence, the appellant gave an unsworn statement in which he confirmed that he did help in offloading the sugarcane as testified by Esther and Daudi. He maintained, however, that after he was paid, he left and was surprised to see police come to his house some days later, ransack it and arrest him on the allegations that he had attacked Esther. He stated that he was taken to the Police Station where he was also questioned about the items which had been stolen from Esther. It was his testimony that he did not own a bed or a pillow. The evidence of the appellant's two witnesses, an uncle and a former employer, did not relate to the offence but was confined to vouching for the appellant's good character.

12. Upon considering the evidence before it, the trial court found the prosecution had proved its case against the appellant and his co-accused and sentenced them to death.

13. The appellant and his co-accused appealed to the High Court, challenging their conviction and sentence on the grounds that their identification was not proper and no identification parade was conducted. After considering the proceedings and the judgment of the trial court, the High Court upheld both the conviction and sentence, leading to the present appeal.

14. In his memorandum of appeal dated 20th April 2022, the appellant raises eight grounds of appeal which, summarised, are that the trial and first appellate court erred in law and fact in:

   i. failing to find that the appellant was not identified conclusively;

   ii. failing to find that there were material contradictions and inconsistences which went to the root of the prosecution's case;

   iii. failing to find that the sentence of death meted against the appellant is excessive and unconstitutional;

   iv. in convicting the appellant with robbery with violence when the entire trial lacked all the ingredients of a fair hearing;

   v. in failing to find and hold that the offence of robbery with violence was not sufficiently proved;

   vi. convicting the appellant on evidence which did not meet the minimum threshold required by law, namely proof beyond reasonable doubt.

15. Perhaps realising that most of the grounds of appeal raise matters of fact which are outside the remit of this Court on a second appeal, the appellant's counsel on record, Byron Menezes, Advocate, in the submissions dated 20th April 2022, has reduced his grounds of appeal and identified two issues as arising for determination before us. These are:

   i. Whether the prosecution followed the principles of identification and carefully discharged the burden of proof;

   ii. Whether sentencing was in accordance with the *Constitution*.

16. Learned counsel, Mr. Akidiva, who held brief for Mr. Menezes, indicated to the Court that he would rely fully on the written submissions. It is argued in these submissions, first, that the prosecution adduced contradictory evidence, and that the charge against the appellant was not proved beyond reasonable doubt to secure a conviction on a charge of robbery with violence.

17. The appellant contends that in her evidence, PW1 admitted that her bag was found in the plantation and then stated that she was told by the police that her bag and ATM cards were found with the appellant. She had also testified that the ATM cards were not recovered but later changed this and said the appellant and his co-accused had been found with the cards. The appellant submits that the contradiction on where the ATM cards were found immediately raises the spectre of uncertainty.

18. The appellant further submits that at the time of his arrest, he had stated that he did not have a bed and had produced a receipt to demonstrate that he had just bought a bed, yet PW5 testified that he found the ATM card under the pillow on the appellant's bed. We observe that these submissions go to matters of fact, outside the remit of this Court which is confined to matters of law as provided under section 361(1) of the *Criminal Procedure Code*. The Court will not, in a second appeal, interfere with concurrent findings of fact by the two courts below except in rare occasions where it is shown that such findings are based on no evidence, are based on a misapprehension of the evidence, or the courts below are shown to have acted on wrong principles in making the findings-see *Samuel Warui Karimi v Republic* [2016] eKLR.

19. In any event, the appellant has identified and reduced the crux of his appeal to two issues, relating to his identification and the sentence imposed on him.

20. The appellant submits that his identification was not proper. He contends that PW3 admitted that he saw some people pass, following the complainant, but could not identify them. He also submits that PW3 further stated that there was moonlight, yet the court relied on this evidence. It is his submission that it was doubtful that the moonlight was sufficient for identification given the discrepancies in the witness testimonies on whether or not there was enough light for proper identification. The appellant relies for this submission on the case of *David Mwangi Wanjohi & 2 others v Republic* (1989) eKLR.

21. With regard to sentence, the appellant submits that the mandatory death sentence under section 296(2) of the *Penal Code* in a conviction for robbery with violence is unconstitutional and is contrary to the general rules of international law and or treaties and conventions ratified by Kenya. Further, its mandatory nature deprives a court of the discretion to consider the mitigating circumstances in which an offence was committed, reliance for this submission being placed on the case of *Francis Karioko Muruatetu & another v Republic* (2017) eKLR (Muruatetu 1). It is his submission that in view of the decision in *Muruatetu 1*, the death sentence imposed on him is cruel, even though the sentence is not outlawed in Kenya.

22. The respondent opposes the appeal and filed submissions dated 4th July, 2022 which were highlighted by learned counsel, Mr. Okango. It is the respondent's contention that the appellant was positively identified. He was well known to both PW1 and PW2, and they had spent considerable time with him, from 3 p.m. to 8 p.m., loading sugarcane onto the tractor, and the complainant was attacked immediately thereafter. The respondent submits further that in her evidence, PW1 told the court that she saw the attackers as they had helped her offload the cane and they were not new to her.

23. Regarding the appellant's contention that the prosecution evidence was contradictory, the respondent submits that the appellant did not raise the issue before the first appellate court, and he could therefore not raise it before this Court. In any event, according to the respondent, the main contradictions that the appellant raises relate to where and how the stolen property was recovered, which are very minor and do not negate the fact that a robbery was committed. The respondent further submits that the trial court invoked the doctrine of recent possession correctly as the complainant's ATM cards were recovered in the custody of the appellant.

24. With respect to the appellant's claim that the sentence imposed on him is harsh, excessive and unconstitutional in light of the Supreme Court decision in *Muruatetu 1*, the respondent submits that the decision is not applicable in the circumstances of this case.

25. We have considered the appellant's memorandum of appeal and the submissions of the parties. We have also considered the record of appeal and in particular, the proceedings and judgment of the first appellate court. As we noted earlier, a substantial part of the appellant's ground of appeal and submissions relate to factual matters which are outside our remit as a second appellate court. There are, as identified by the appellant, two issues for determination before us: whether his identification was proper, and whether the sentence imposed on him is constitutional in light of the *Muruatetu 1* decision.

26. The evidence of identification before the trial court, which the High Court re-evaluated and accepted as safe for a conviction emerged from the testimony of PW1, 2 and 3. PW1, the complainant, and PW2, her loader, had worked with the appellant and his co-accused from 2 p.m. to about 8 p.m. unloading the tractor which had rolled off the road. The appellant was known to PW2, whom he had worked with before. He and his co-accused were paid by PW1 after they unloaded the tractor, and they had

left. They had returned shortly thereafter, and PW2 had even spoken to them in Dholuo before they attacked him and the complainant.

27. PW3's testimony corroborated that of PW1 and 2. He was a lorry driver who was at the scene because his lorry had broken down. He saw the appellant and his co-accused assist PW1 and 2 in unloading the tractor. While seated in his lorry, he also saw the appellants walk towards PW1 and PW2, then heard PW1 scream that she had been attacked.

28. In his defence, the appellant confirmed that he had assisted PW1 and 2 in unloading the sugar cane from the tractor, a corroboration of their evidence that they knew him and had spent considerable time with him prior to the robbery. This was not a case of identification of a stranger but recognition of a person known to the witnesses. In upholding the decision of the trial court on identification, the first appellate court observed:

> " 38. PW3 stated that he had seen 1st appellant pass by following PW1 and PW2 first before they were attacked. He too confirmed that there was sufficient moonlight to enable him see. I take note that the (*sic*) both appellants were well known to PW1, PW2 and PW3 and their evidence placed them at the scene at the time of attack. This was not first identification of strangers, it was recognition – indeed PW1 said "they were not new to me..." Moreover they had spent a considerable time together with PW1 and PW2 off – loading and re-loading the cane onto the tractor."

29. We are persuaded that the first appellate court was correct in finding that the identification by recognition of the appellant was safe. He was not a stranger to the witnesses; he had spent considerable time in their company, from about 2.00-3.00 p.m. till about 8.p.m while offloading sugarcane from the PW 1's tractor under the supervision of PW1; he had been paid by PW1 shortly before he and his co-accused retraced their steps, went back and attacked PW1 and 2.

30. The evidence of recognition was supported by the evidence of recent possession of PW1's ATM cards. The appellant's argument is that PW1's ATM card could not have been found under his pillow as he did not have a bed, having purchased one after the incident. This argument was made and the receipt for the bed produced after the close of the defence case. In addressing itself to the argument, the first appellate court observed:

> " 39. Although the evidence of PW1 was a bit mixed up as to exactly where her handbag was recovered, it did not alter the fact that PW5 recovered the very recently stolen ATM Cards from the appellants. The evidence of CPL Leparlenga PW5 was that upon being led to the homes of the appellants he recovered PWI's KCB ATM card from the 1st appellant and her National Bank ATM Card from the 2nd appellant's house under his pillow – one does not need to have a bed so as to have a pillow. The appellants did not give an explanation as to how they came to be in possession of such recently stolen items, and indeed the trial magistrate correctly invoked the doctrine of recent possession. The doctrine of recent possession aptly applied here."

31. Having considered the decision of the first appellate court, we are satisfied that it was correct in its finding that the appellant was properly identified by recognition, evidence that was strongly supported by the recent possession by the appellant of the complainant's ATM cards. We therefore find no basis to interfere with the finding of the first appellate court that the conviction of the appellant for the

offence of robbery with violence was safe. There was evidence to justify the concurrent findings of fact by the two courts below.

32. In challenging the sentence of death prescribed under section 296(2) of the *Penal Code*, the appellant has relied on the decision of the Supreme Court in *Muruatetu 1*. In this decision, the Supreme Court considered and held unconstitutional the mandatory nature of the death sentence prescribed for the offence of murder under section 204 of the *Penal Code*. As submitted by the respondent however, in its directions in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2), the Supreme Court directed that its decision in *Muruatetu 1* only applied to the mandatory death sentence for the offence of murder under sections 203 as read with section 204 of the *Penal Code*.

33. The Supreme Court directed that with respect to offences such as treason under section 40(3) and robbery with violence under section 296(2) of the *Penal Code* respectively, challenges on the constitutional validity of the mandatory death penalty in those cases would have to be filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as in *Muruatetu 1* may be reached.

34. This Court has taken the view that the reasoning in *Muruatetu 1* ought to apply to cases for which the mandatory death penalty is prescribed, such as robbery with violence, but in the circumstances proposed in *Cyrus Kavai Onzere v Republic* [2023] eKLR. Accordingly, we are unable to interfere with the sentence imposed on the appellant by the trial court and upheld by the first appellate court. In any event, we have noted that this ground was not raised in the appeal before the High Court. It cannot, therefore, be properly raised in the appeal before this Court.

35. The upshot of our findings above is that the present appeal is without merit. It is hereby dismissed and the appellant's conviction and sentence upheld.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR