Kibata v Republic (Criminal Appeal 81 of 2016)
[2023] KECA 1466 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1466 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 81 OF 2016

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

NOVEMBER 24, 2023

BETWEEN

CHARLES MUIGA KIBATA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Nyeri (A. Mshila, J.) dated 29th September 2016 in Criminal Appeal No. 76 of 2016)

JUDGMENT

1. The appellant Charles Muiga Kibata was on September 23, 2014 convicted by the learned Acting Senior Resident Magistrate at Nyeri of robbery with violence contrary to section 296(2) of the *Penal Code*, and sentenced to death. The particulars of the offence were that on March 16, 2013 at about 22.30 Hours at Ruirii Village in Kieni West District within Nyeri County, jointly with others not before the court and being armed with dangerous weapons namely metal bars the appellant robbed Robert Muturi (PW 1) of Kshs.7000/-, Nokia phone 2630, National Star TV set, two batteries, three pieces of solar panels and one Sonotec radio all valued at Kshs.73,000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said PW 1 and killed one Boran cow, two sheep and three chicken.

2. The appellant was aggrieved by the conviction and sentence. He appealed to the High Court. On September 29, 2016 the learned Judge (A. Mshila, J.) dismissed the appeal. The appellant has now come before this court on second appeal. He filed the following grounds of appeal:-

   "1) That the appellate Judge erred in law and facts while supporting my conviction in reliance with the evidence of PW 1 identification by recognition at the scene of crime without considering the same remained doubtful since it was been obtained through darkness.

2. That the appellate court Judge lost direction while upholding my conviction in becoming impressed by the adduced evidence of arson and the alleged dead animals during the time the offence was committed without considering the grudge between me and the complainant (PW 1) my real brother due to land dispute.

3. That the appellate court Judge erred in law and fact in relying on where the prosecution proved their case without considering that the same was not adequately proved as the alleged charges were laid against me.

4. That the High Court Judge further erred in law and fact while supporting the trial court rejected my defence without putting into consideration the same was not displaced by the prosecution side as per section 212 of the CPC.

5. Since I can't recall all that transpired during the hearing I do hereby beg leave of this Honourable Court to serve me with my court proceedings which will enable me table reasonable ground at the hearing of this appeal and I wish to be present in person."

He followed them with supplementary grounds of appeal as follows:-

" 1) That the superior court erred both in law and in fact in not finding that section 214 of the *Criminal Procedure Code*, Cap 5 Laws of Kenya was not strictly adhered to by the trial court thus occasioning injustice to the appellant.

2. That the learned judge of the superior court misdirected herself in law and in fact in not finding that there was failure to call crucial witnesses and thus adverse inference ought to have been drawn against the prosecution case.

3. That the superior court erred both in law and in fact in shifting the burden of proof apropos of the defence of alibi raised by the appellant.

4. That the learned judge of the superior court erred in law in meting out or upholding mandatory death sentence."

He sought that the appeal be allowed, conviction quashed and the death sentence be set aside.

3. During the appeal, the appellant was represented by Mr. Makura. The State was represented by Mr. Ngetich. Each filed written submissions on which he relied on without highlighting.

4. The prosecution evidence on which the appellant was convicted was tendered by PW 1, his step-brother Daniel Faragu Kibata (PW 2), Doctor Lucila Niyinkunda (PW 4) of Nyeri Provincial General Hospital, APC Vincent Tanui (PW 3) who arrested the appellant on April 24, 2013, P.C. Wanyonyi (PW 5) of Scenes of Crime and Investigating Officer C. David Livingstone Wanyonyi (PW 6) of Nairutia Police Station. PW 1 was the only witness to the crime. His evidence was that on March 16, 2012 at about 10.30p.m. he was alone at home. He was tired following the events of the day. He put off the T.V and V.C.D. He had the electricity lights on and while going to sleep he heard a knock on the door. He asked who it was. The response was that these were police officers. Immediately the door was hit open by a stone and three armed people came into the house. He recognized one of them, the appellant, who is his younger brother. He had a panga and a metal bar. The two other attackers were armed, one with a metal bar and knife and the other with an iron bar. The appellant said -

" it is me and I want you to give me all the money you have together with the phone."

He recognised the appellant, he said, because the lights were on. The appellant then broke the light bulb, but they had torches which were shone on him. The appellant motioned him to the bedroom as the others pushed him while flushing torches in his face. The appellant demanded a phone while pushing him on the bed. He gave the appellant a Nokia 2630. He had Kshs.7,000/- under the bed which he gave to them. The appellant cut him with a panga before the other three hit him with the weapons. He was pulled outside the house, as he saw the TV, and DVD being taken. He was left for dead. After they were gone and he was able to regain consciousness, he went to a neighbor Joseph Karegi, who helped him with clothes to put on as he had been left naked. Joseph called neighbors Elizabeth Muthoni Muhoro, Charles Kariuki and another. They contacted PW 2 who came and took him to Nyeri Provincial General Hospital where he was admitted for two days. He later found out that the attackers had taken his TV, VCD, 3 solar panels, 2 batteries and a radio and had killed his cows, goat and chicken.

5. PW 4 found that the PW 1 had sustained a deep cut wound on the head and minor cuts on the left hand and left leg. He had suffered "harm" in terms of the degree of injury. PW 2 stated that PW 1 reported to him that the appellant was one of his attackers.

6. According to the prosecution, the appellant disappeared from home for about one year.

7. On his part, the appellant gave sworn defence in which he denied having robbed and/or attacked PW 1 as claimed, or at all. His evidence was that he was at the time of the alleged offence living and working in Nairobi. It was not until February 2013 that he returned home to engage in farming; that he was on 23rd February 2013 arrested and charged for something he knew nothing about. He stated that their father did not like him, had beaten him and chased him from home saying that he was born out of wedlock and would not get land from him. He stated that his father (he had since died) and PW 1 were in cahoots in not wanting him at home and had even pulled down his house. According to him, the charge had been framed on him because of the past family disagreement. He did not call any witnesses.

8. The magistrate's court found that the guilt of the appellant had been proved top the required standard of proof beyond doubt. The court found that the evidence had placed the appellant at the scene at the material time, and discounted the alibi defence that he had raised. The High Court accepted the findings of the trial court, and dismissed the appeal by the appellant.

9. The grounds of appeal and the written submissions by the appellant's counsel largely complained that the appellant had been convicted on doubtful identification evidence; the prosecution had not called crucial witnesses and therefore an adverse inference ought to have been drawn; and that his alibi defence had not been properly considered. The response by the State was that the conditions favouring positive identification were not difficult and that PW 1 had properly identified the appellant who was his brother; relying on section 143 of the *Evidence Act*, it was submitted that the non-calling of the neighbors had not materially affected the prosecution case; and that the alibi defence was an afterthought.

10. In *Karingo –v- Republic* [1982]KLR 213 it was stated that –

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari c/o Karanja vs. R (1950) 17 EACA 146)"

11. In *Adan Muraguri Mungara –v- R* [2010]eKLR this Court emphasised that, when dealing with a second appeal, it must–

> "pay homage to concurrent findings of fact by the two courts below unless such findings are based on no evidence, or unless on the totality of the evidence, no reasonable tribunal, properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

12. PW 1 and the appellant are brothers, and therefore the courts below were dealing with recognition and not identification. The trial court, after warning itself of the danger of relying on the evidence of a single identifying witness as was cautioned in *Maitanyi –v – Republic* [1986] KLR 198, observed as follows:-

> " .....it is me I want you to give me all the money you have together with the phone "

I again proceed to remind myself of the need to test PW 1's evidence with great care and also warn myself of the dangers of convicting on his evidence with respect to identification. I however find that the conditions favouring the accused identification were not difficult in the circumstances and further that being a brother to the accused herein the identification was that of recognition."

13. This is what the High Court stated:-

> "27. On re-evaluation of the evidence; the incident is found to have occurred at night and there was evidence adduced on the source of the light which was electric; the appellant had not even bothered to cover or hide his face; appellant was a brother of the complainant and was well known to him; it is this court's considered view that the lighting greatly enhanced the quality of recognition."

14. We have anxiously considered the evidence as recorded by the trial court. In his evidence in chief, PW 1 testified that the lights were on and he was able to identify the appellant. He then went on to state –

> " It is stated that I was unable to identify them. It is true. I said the lights were on. They were putting on masks and I was not able to see their faces clearly they had hoods on... "

When he was cross-examined he stated:

> " I said the others had hoods and masks and I couldn't identify them. You came and shown a torch towards me. It is not by your voice I saw you and you said it's me. I did not say that I wrote the above in my statement. I did not include that the said people had masks."

Further, PW 1 stated as follows:-

> "I said I was assaulted by 3 people including you. You're the one who identified yourself. I indicated the above in my statement. You entered the house first and identified yourself saying that you are the one then you put off the light. I said that you came in with no light.....There was electricity in my house and you said you're Muiga you put off the electricity. ..... When I went to report to the police station the police wrote the statement for me accused is the one who broke the bulb. When he entered the house the bulb was on "

15. It is quite evident that, in certain respects, what PW 1 testified in court was different from what he had stated in his police statement. The question whether the attackers had masked their faces featured in his testimony, and yet both courts did not delve into it to make a finding on the same. If the attackers had masked their faces, there was no way PW 1 could have identified or recognised them. Were the

lights on or the appellant was seen from the light of his torch? Whatever was the case, there was need to have been an inquiry regarding how long the light shone on the appellant's face for there to be certainty that he was sufficiently recognised. Was his face seen and recognised, or he was recognised through his voice? This did not clearly come out.

16. Further, the trial court found that the circumstances under which the offence was committed, and the appellant recognised, were not difficult. The High Court agreed with the observation. We find that the two courts fell into grave error on the point. PW1's case was that he was alone, just about to sleep at night, when he was violently attacked by three men who broke open the door and were each armed. They wanted his property, and attacked him by cutting him and beating him using other weapons. He was left for dead. These were certainly very difficult circumstances, and the evidence regarding recognition needed to be considered with the circumstances in mind. The two courts did not consider this.

17. It was observed in *Joseph Maina Mwangi -v- Republic* [2000]eKLR that in any trial there are bound to be discrepancies and an appellate court in considering these discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence. In this case, we find that had the two courts properly directed their mind to the evidence and the principles of law applicable, they would have come to the conclusion that the prosecution's evidence that PW1's had properly and correctly recognised the appellant as one of his attackers was insufficient and unsafe. The possibility that there could have been mistaken identity cannot be ruled out in the circumstances in which PW 1 was robbed.

18. The trial court found that the appellant had immediately following the attack disappeared from home and did not show up until it was one year later. The appellant's sworn defence was that he was during the time of the attack not staying at home, but was staying in Nairobi. He stated that he was staying away because of the differences he had with his father, before he died, and the rest of the family including PW 1.

19. PW 1 testified that the appellant –

> " never used to stay at home we have never stayed with him he was raised up by our mother and we were raised by our father. My mother used to stay in Nyeri and we used to stay at home. Our parents are separated....."

20. PW 1 further testified that the appellant had on June 26, 2011 burnt his (PW 1's) house and documents and had run away, and had never been arrested.

21. The appellant's evidence was that he was, according to his father, born out of wedlock; that both his father and PW 1 did not want him at home. That there was bad blood between the appellant and PW 1 was therefore evident. Both lower courts causally, in our view, rejected this crucial evidence of the existence of a family feud.

22. These are the circumstances under which the appellant alleged that PW 1 had framed him. This is why he wanted the neighbours that PW1's said he first met soon following the attack, to testify to confirm that PW 1 had indeed told them that he had recognised the appellant in the attack. Instead, PW 1 got his brother (PW 2) to testify. The appellant wanted a non-relative, an independent witness. In *Bukenya -v- R* [1972] EA 549, it was held that where the prosecution fails to call a witness and it transpires that the evidence in support of the charge against the accused is barely adequate, the court trying the case is perfectly entitled to draw an adverse inference that had the witness testified his evidence would have tended to be adverse to the prosecution's case.

23. We appreciate that under section 143 of the *Evidence Act*, there was no upper limit as to how many witnesses are required to establish a fact. However, given the peculiar facts of the case as outlined above, facts that the two lower courts did not pay particular attention to, it would have been interesting to hear what the neighbours Elizabeth Muthoni Muhoro and Charles Kariuki would had said. But more important, the alibi defence raised by the appellant should not have been dismissed offhand, without it being considered within the context of the admitted animosity and family circumstances that were alluded to by PW 1 and confirmed by the appellant in his defence.

24. In conclusion, we allow the appeal. The conviction entered against the appellant is quashed, and the sentence set aside.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF NOVEMBER 2023.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR