Nyambura v Republic (Criminal Appeal 44 of 2019)
[2023] KECA 1449 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1449 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 44 OF 2019

W KARANJA, J MOHAMMED & LK KIMARU, JJA

NOVEMBER 24, 2023

BETWEEN

CHARLES MWAI NYAMBURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of the High Court of Kenya at Nyeri (Ngaah, J.) delivered on 15th March, 2019 in High Court Criminal Case No. 41 of 2009)

JUDGMENT

1. This is a first appeal arising from the judgment of the High Court of Kenya sitting at Nyeri (Ngaah, J.) delivered on 15th March, 2019, in High Court Criminal Case No 41 of 2009.

2. A background of this appeal is that the appellant was charged alongside another before the High Court with the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. The particulars of the offence alleged that on 14th July, 2009, within Solio Village Phase V in the then Nyeri District of the then Central Province, the Appellant and his co- accused, jointly with others not before court, murdered Ewoi Kanyaman Kuyut.

3. These are the brief facts of the case according to the respondent: PW1, Silale Erega, is the deceased's widow. It was her testimony that on the material day of 14th July 2009, she was with the deceased at Solio Ranch, when a gang of about fifty people approached their home. She stated that they were armed with rungus and pangas. She told the court that the assailants attacked the deceased with a panga, and killed him on the spot. She stated that she fled from the scene and reported the incident at a nearby Administration Police Camp. PW1 told the court that she identified the appellant and his co-accused at Narumoru Police Station. Upon cross-examination, it was PW1's evidence that she informed the police that she was able to identify the deceased's attackers. She stated that when the gang arrived, they hit her on the face using the flat side of a panga, after which she fled from the scene.

4. PW2, Stanley Kiama Nyaguthio, told the court that on the material day, he received a call from the appellant, informing him that a group of young people needed transport from Lusoi to Solio Ranch. PW2 stated that he picked up a group of about fifty people, who were carrying tools in a sack, from Lusoi, at about 1.00 p.m. He stated that they alighted approximately 1km from Solio Ranch. They paid him Kshs. 1800 for the service. Four days later, on 18th July 2009, police officers came to his house. They inquired whether he had transported a group of people to Solio Ranch on 14th July, 2009. PW2 recalled that he recorded his statement at Narumoru Police Station, and that he gave the police the appellant's mobile phone number. Upon cross-examination, PW2 revealed that he was arrested by the police on 18th July 2009, and was held at Narumoru Police Station for nine days, on suspicion of having been a part of the gang that attacked the deceased. He stated that he had known the appellant prior to the day of the attack. It was his testimony that he did not attend any identification parade to identify the assailants. PW7, John Simon Gichohi, was one of the police officers who arrested PW2 and took him into custody.

5. PW3, Kanyaman Lemu, stated that he attended the Morgue when post mortem was performed on the body of the deceased. He identified the deceased. He was escorted by PW6, Corporal Everlyne Makena. PW4, Robert Louyongorot, testified that he worked with the deceased at Solio Ranch. It was his evidence that on 14th July, 2009, he was attacked by a group of about fifty people while at the ranch. He however managed to escape and later received medical attention. He stated that he was able to identify five of his attackers, but that he did not attend any identification parade mounted by the police to confirm his identification of his assailants. It was the evidence of PW5, PC Richard Achuka, that PW2, on 19th July 2009 led the police to the arrest of two suspects. He however stated that he was not involved in the arrest of the appellant.

6. The appellant, in his sworn statement denied attacking the deceased as alleged by the prosecution witnesses. He stated that he was working at his transport business on the material day and therefore could not have participated in the fatal assault of the deceased. He explained that he was arrested while at his house and was thereafter escorted to Narumoru Police Station.

7. After full trial, the appellant and his co-accused were convicted as charged. They were each sentenced to serve a custodial sentence of thirty years.

8. Aggrieved by his conviction and sentence, the appellant lodged the instant appeal. He advanced a total of thirteen grounds of appeal in his memorandum and supplementary memorandum of appeal. The gist of the appeal is that the appellant faulted the learned trial Judge for relying on PW1's evidence of identification, which he asserts was insufficient to sustain a conviction. He was aggrieved by the learned trial Judge's finding, that the evidence of PW2, corroborated the evidence of identification adduced by PW1. The appellant faulted the trial Judge for failing to find that the respondent failed to call material witnesses such as the officer who conducted the identification parade, the investigating officer, and the doctor who conducted the post mortem, without giving any plausible explanation.

9. The appellant complained that the identification parade form and the post mortem report were not produced into evidence by the respondent. He was aggrieved by the learned trial Judge's finding that the respondent proved its case against him to the required standard of proof beyond all reasonable doubt. He took issue with the fact that the learned Judge rejected his defence without giving any cogent reasons. He contended that he was not given a chance to offer any mitigation before he was sentenced to serve a harsh and excessive custodial sentence. In the circumstances therefore he urged the Court to allow his appeal in its entirety.

10. The appeal was heard by way of written submissions which were duly filed by both parties. Counsel for the appellant, Mr. Wahome, challenged the evidence of identification adduced by PW1. He submitted that PW1 did not inform the court how she was able to identify the appellant as one of the attackers in the hectic circumstances that the attack is said to have taken place.He stated that the learned Judge's finding that PW1 gave a description of the assailants in her statement to the police was not supported by the evidence on record. He asserted that although the respondent claimed that an identification parade was conducted, where PW1 picked out the appellant as one of the assailants, no evidence to support this claim was furnished before the trial court. Counsel faulted the trial court for failing to warn itself on the danger of relying on the evidence of a single identifying witness made in difficult circumstances.

11. Counsel was of the view that the evidence adduced by PW2 was self-serving, and could not therefore corroborate PW1's evidence as determined by the trial court. Counsel cited the cases of *Maitanyi v Republic* [1986] eKLR and *Gerald Muchiri Kiruma v Republic* [2007] eKLR in support of this submission. It was counsel's submission that the fact that the respondent failed to call crucial witnesses, namely the investigating officer, the doctor who conducted the post mortem as well as the police officer who conducted the identification parade, should be presumed to imply that their evidence, if produced, would have been unfavourable to the prosecution's case. He relied on the cases of *Juma Ngodia v Republic* [1982-88] KAR 454 and *Nguku v Republic* [1985] KLR 42. He added that the respondent failed to sufficiently prove the charge against the appellant to the required standard of proof beyond reasonable doubt. With respect to the sentence, counsel urged that the same was excessive in the circumstances of the case. He invited us to set aside the decision of the trial court and acquit the appellant.

12. The appeal is contested by the State. Learned State Counsel, Mr. Naulikha, submitted that the attack occurred in broad day light. He explained that PW1 identified the appellant and his co- accused, whom she told the court were at the forefront of the group of people that attacked the deceased. He stated that the evidence of identification of the appellant by PW2, who ferried the assailants to Solio Ranch, was that of recognition. It was his view that the evidence by the prosecution witnesses was cogent and corroborative, and pointed to the appellant as one of the perpetrators. Mr. Naulikha submitted that the absence of the expert reports was not detrimental to the prosecution's case, as the raw facts on record established that the deceased did not die of natural causes. With respect to the sentence meted by the trial court, Mr. Naulikha was of the opinion that the same was commensurate to the offence committed. He urged us to dismiss the appeal in its entirety as it lacked merit.

13. We have carefully considered the record of appeal, the submissions by both parties, and the applicable law. The duty of the first appellate court was stated by this Court in *Gabriel Kamau Njoroge v Republic* [1987] eKLR as follows:

> "As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see *Pandya v R* [1957] EA 336, *Ruwalla v R* [1957] EA 570)".

14. The issues falling for determination by this Court are: Whether the evidence of identification irresistibly pointed to the appellant as one of the perpetrators; whether the respondent failed to call crucial witnesses and if so, what effect does it have on the verdict of the Court; and whether the sentence meted on the appellant by the High Court was harsh and excessive.

15. The main bone of contention for the appellant in this appeal revolves around the evidence of identification. We have interrogated the circumstances under which identification was made in this case. PW1, the deceased's widow, was the only eye witness. It was her testimony that she saw a gang of about fifty approaching their house, and that she ran to warn her husband. That the gang, armed with rungus and pangas, attacked her husband. She stated that they slapped her with the side of the panga after which she fled the scene and ran to a nearby Administration Police Camp.

16. Though the attack occurred in broad day light, it is our considered opinion that the circumstances for identification were difficult. PW1 testified that she did not know any of the attackers prior to the attack. It is not clear from the evidence of PW1 what time it took for her to identify the assailants during the attack. PW1 stated that the assailants attacked the deceased, and then slapped her with a panga, after which she fled from the scene. PW1 testified that she was able to identify the appellant and his co-accused, as they were at the fore front of the group, and that they hit her with a panga.

17. In our re-evaluation of the evidence, we cannot rule out the possibility that in the hectic circumstances of the attack, especially noting the large group of assailants, and the fact that PW1 was running from her attackers after she had seen them fatally cut her husband with a panga, that PW1, who was in distress, could have been mistaken that she identified the appellant. This Court in the case of *Maitanyi v Republic* [1986] eKLR observed that where the evidence of identification is made in difficult circumstances, the court is required to consider whether the prosecution adduced other evidence to corroborate the evidence of identification. The Court also noted as follows:

> "There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained."

18. In this case, the appellant was arrested four days after the attack had occurred. PW1, upon cross-examination, told the court that she described the attackers in her statement to the police. She testified that she told the police that one assailant was dark and the other brown, and that one wore a white cloth and the other a yellow cloth. However, this was not featured in PW1's witness statement. Further, PW1 stated that she identified the appellant during an identification parade conducted at Narumoru Police Station. The prosecution did not adduce the identification parade form into evidence before the trial court. The officer who conducted the identification parade was not called to give evidence on the same. As such, the trial court could not determine that indeed PW1 picked out the appellant from the parade, and that the said identification parade was conducted in accordance with Police Force Standing Orders. The trial court's finding that the identification parade was conducted on the basis of PW1's description of the assailants was not as watertight as the law demands in such circumstances.

19. This Court observed as much in *Ibrahim Kigame Agevi & another v Republic* [2011] eKLR where it was held as follows:

> "Unfortunately, the police officer who conducted such parades was not called as a witness at the hearing and the parade forms were not produced at the hearing. Thus, it cannot be possible for a court of law seriously directing its mind to the issues before it, to, safely conclude that such parades met the standards of "a fair parade" ...Looking at the record, many aspects of the evidence on these parades could only be answered by the officer who

conducted the parades and the parade forms. Thus, that officer was a necessary witness for the prosecution in the entire case, for without him and the forms it could not be established as to whether the identification parades were fairly conducted. He was a witness that the prosecution needed to establish their case on identification beyond reasonable doubt.

He was not called; with the consequence, that in our view, the evidence establishing identification of the appellants was not before the court."

20. The High Court determined that the evidence of PW2 corroborated that of PW1 with respect to identification of the appellant. With respect, we disagree. PW2 was not at the scene of the attack, and he could therefore not place the appellant at the scene of crime.

21. In light of the above, and after our exhaustive analysis of the evidence adduced before the trial court, we are not persuaded that PW1 was able to isolate the face of the appellant from such a large group of about fifty people, who attacked her and her deceased husband. We do not share the view of the trial court that the appellant's identification was safe. In the absence of the evidence by the officer who conducted the identification parade and the parade form, PW1's evidence of identification remained mere dock identification. We cannot, in good conscience, reach the same finding as the trial court that PW1 positively identified the appellant during the attack. Further, we warn ourselves of the danger of relying on the evidence of a single identifying witness, especially an identification of a complete stranger made in the circumstances that PW1 is said to have identified the appellant. The predecessor of this Court discussed the danger of relying on such evidence without the court warning itself in *Roria v Republic* [1967] EA 583. It stated thus:

> "A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

22. The upshot of the above reasons is that the appellant's appeal has merit and is hereby allowed. The appellant's conviction is hereby quashed and sentence set aside We order that the appellant be set at liberty unless he is otherwise lawfully held.

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

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR