Ndungu v Republic (Criminal Appeal 100 of 2016)
[2023] KECA 1649 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KECA 1649 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 100 OF 2016

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

NOVEMBER 10, 2023

BETWEEN

HIRAM KARIUKI NDUNGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal against the orders from the judgment and decree of the High Court at Nyeri (A. Mshila, J.))

JUDGMENT

1. The complainants in this case, who were all close friends, had on the material date attended a Kikuyu traditional marriage ceremony in Ihithe, Nyeri, at the home of one of their friends, Alice Wanjiru. From the evidence on record, the parents were given a lumpsum amount of money. Later in the evening, some visitors who had come from far away stayed overnight to travel the following day. Unfortunately, the worst happened when at around 9.30 p.m. they were attacked by unknown people who took their precious time to steal from them and eventually took all the money the host (PW5) had been given. After an ordeal that lasted an hour, the attackers left the home. The matter was reported to the local Administration police officers who rushed to the scene immediately and laid an ambush at the home of a person who was said to have been a suspect. Later on, names of other suspects were given, all amounting to the six (6) who were arrested and arraigned in court.

2. After the trial, the court found that the prosecution had proved its case against the appellant and Lewis Mugo Nyawera, and they were convicted as charged under section 215 of the Criminal Procedure Code of robbery with violence and sentenced to death. In regard to the other accused persons, it was found that the prosecution had failed to prove its case against them, and they were acquitted.

3. Being aggrieved by the conviction and sentence by the trial court they filed their petitions of appeal on 30th April, 2014 and a further amended supplementary grounds of appeal. They faulted the trial

court for relying on circumstantial evidence to support the conviction of Hiram Kariuki Ndung'u, the appellant herein; that the prosecution failed to call crucial witnesses; that the prosecution failed to prove its case beyond reasonable doubt; that the appellant was not positively identified; that the trial court rejected his alibi defence and that the doctrine of recent possession was not sufficient to prove the prosecution's case.

4. The appellants were unrepresented at both the trial court and the High Court. Their appeals were consolidated and heard by way of written submissions. The state opposed the appeal.

5. The learned Judge (A.Mshila, J.) heard the appeal and framed issues as follows: whether the circumstantial evidence was sufficient to support the conviction of the 1st appellant; whether the trial court properly invoked the doctrine of recent possession against the 2nd appellant and whether the prosecution proved its case beyond reasonable doubt.

6. Upon re-evaluating the evidence, the learned Judge found that the attackers were masked but that PW5 had recognised the appellant by his clothing. On this, the court agreed with the trial court. The learned Judge upheld the trial court's finding that the circumstantial evidence was sufficient to support the conviction of the appellant.

7. Further, the Judge found that the trial court had properly invoked the doctrine of recent possession against Lewis Mugo Nyawera, for the reason that he had been found in possession of the two Samsung phones that had been stolen from the complainants and they were recovered after three (3) weeks.

8. Both appeals were found to lack merit and were disallowed and the conviction and sentence were both affirmed. The learned Judge found that the trial court had not passed sentences on the other five counts and sentenced the appellants to a mandatory death sentence on all the five counts which sentences were held in abeyance.

   Being aggrieved by the conviction and sentence, the appellant filed his appeal to this Court citing grounds, inter alia, that the learned Judge erred in law by upholding the conviction in the absence of his identification; upholding the trial court's conviction and sentence which was based on weak circumstantial evidence; upholding the conviction and sentence in the absence of key witnesses' testimony; upholding his conviction on the basis of PW5's evidence on the clothes he wore and rejecting his defence.

9. The appellant subsequently filed supplementary grounds of appeal dated 4th November, 2022 stating that the learned Judge erred in law in convicting him on circumstantial evidence and shifting the burden of proving facts on him; failing to evaluate the entire evidence of the lower court; affirming the conviction when the prosecution had not proved its case beyond any reasonable doubt; and failing to find that the mandatory sentence was unconstitutional and violated the right to a fair trial.

10. At the virtual plenary hearing of the appeal, on the 9th November, 2022 learned counsel Mr. Wahome appeared for the appellant while Mr. Ngetich appeared for the State. The appeal proceeded by way of written submissions with brief oral highlighting by both counsel.

11. In the written submissions, the appellant's counsel submitted that the trial magistrate shifted the burden of proof to the appellant when he held that the appellant had failed to explain where he was on the night of the robbery and how he came to have the amount of money he was found with, and when he explained where he was on the said night, it was held that he was to avail a witness in support of his assertion. While placing reliance on Sawe v. Republic [2003]eKLR, it was submitted that the burden of proving facts to justify the inference of guilt always remained with the prosecution and it never shifted to the appellant.

12. On identification of the appellant, it is submitted that he was not identified by PW5, the fact that PW5 testified that the appellant was present during the function and he was from the neighbourhood was not a justification to infer guilt. It was submitted that the trial magistrate relied on suspicion yet suspicion, however strong cannot be a basis for inferring guilt which has to be proved by evidence beyond reasonable doubt.

13. In addition to the above, while relying on the decision in Bodole Abala v. Republic [2019] eKLR, counsel submitted that there were other co-existing circumstances that would weaken or destroy the appellant's inference of guilt, for the reason that the appellant was not the only person in the neighbourhood who attended the function.

14. It was submitted further, that the failure by the High Court to evaluate the entire evidence on record was fatal and that had the learned Judge done this, then she would have found that the circumstantial evidence did not irresistibly point at the guilt of the appellant and, therefore, the prosecution had failed to prove its case beyond reasonable doubt.

15. On sentencing, it was submitted that in the event the appeal on conviction does not succeed then the death sentence be set aside and the period the appellant has been in custody be considered. Counsel urged us to consider the period the appellant had been in custody from the time of his arrest on the 6th November, 2011 to when he was sentenced on 27th December, 2012.

16. The appeal was opposed. In his written submissions, Mr. Ngetich submitted that the respondent had proved its case beyond reasonable doubt and the ingredients of the offence of robbery with violence pursuant to section 296(2) of the Penal Code had been satisfied as decided in a decision of this Court in Johana Ndung'u v. Republic [1996] eKLR; that proof of any one of the ingredients of robbery is enough to sustain a conviction under section 296(2) of the Penal Code. Learned counsel submitted that, it was proved that during the robbery the appellant was armed with an axe and a panga, he was accompanied by one or more persons and immediately after the robbery he used the weapon to either beat, strike, or wound a person. The evidence of PW5 supported the same because he had known the appellant prior to the attack and that he was armed with an axe which was used to hit him when he was ordered to surrender all the money he had.

17. On the sentence, while referring to the decision of this Court in Shadrack Kipchoge v. Republic, Criminal Appeal No. 253 of 2003, it was submitted that sentencing is an exercise of the trial court, and for this Court to interfere it must be shown that the trial court took into account an irrelevant factor or a wrong principle or that the sentence was too harsh. However, this Court should find that the law provides for a mandatory death sentence and the court took into account that the appellant was a first offender and that the sentence is not unconstitutional.

18. Lastly, it was submitted that the conviction was safe and that this being a second appeal we should not interfere with the same but rather uphold the conviction and affirm the sentence.

19. We have considered the record, both written and oral highlights and the case law relied on. This is a second appeal and our mandate is confined to a consideration of matters of law by dint of section 361(1) of the Criminal Procedure Code. In Karingo v. Republic[1982]KLR 213 the Court stated:

> "A second appeal must be confined to points of law 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 the second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari s/o Karanja v. R (1950) 17 EACA 146)"

20. The appellant's main contention is that the circumstantial evidence adduced before the trial court could not be relied on to support the finding that he had been properly recognised as having participated in the robbery, and that in the absence of such finding the burden of proof had been shifted to him.

21. This Court in the case of Oluoch v. Republic [1985]KLR, held that robbery with violence is committed in any of the following circumstances:

    a. the offender is armed with any dangerous and offensive weapon or instrument; or

    b. the offender is in company with one or more person or persons; or

    c. at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes, or uses other personal violence to any person.

22. The above three elements of the offence of robbery cited above under section 296(2) of the Penal Code are to be read disjunctively and not conjunctively. Thus, proof of one element beyond reasonable doubt founds an offence of robbery with violence. Were these ingredients proved to the required standard?

23. There are several facts that the prosecution invited us to consider as forming a series of circumstances leading to an inference or conclusion of the appellant's guilt. It behoved the prosecution to show that the circumstances from which this inference of guilt is drawn were proved beyond reasonable doubt.

24. In Neema Mwandoro Nduzya v. Republic [2008], this Court while reiterating the probative value of circumstantial evidence and the duty of the trial Court stated as follows:

> "It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in R. v. Taylor Weaver and Donovan(19280 21 Cr. App. R.20) But circumstantial evidence should be closely examined before basing a conviction on it."

25. It is not in dispute that the assailants were more than one. Grace Wamaitha Gichuki (PW1) told the court that the robbers had masked their faces and, therefore, she was unable to identify them. This evidence was corroborated by PW5 and PW6 who confirmed the same fact. None of the witnesses properly identified the attackers during the robbery and indeed the trial magistrate properly held so, a finding which was upheld by the learned Judge. These are concurrent findings of fact by the two courts below, which we are enjoined to defer to.

26. In the circumstances, we are called upon to determine whether there was sufficient circumstantial evidence upon which the trial court convicted the appellant and whether the learned Judge correctly confirmed the conviction. The other way of looking at it is whether the prosecution proved the guilt of the appellant beyond reasonable doubt; that it was the appellant and nobody else who had committed the unlawful act of robbery on the complainants. There being no direct evidence linking the appellant to the robbery, the prosecution case on this was pegged on circumstantial evidence. In Ahamad Abolfathi Mohammed & Another v. Republic[2018]eKLR this Court stated this:

> "However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables the court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence."

See also Abanga alias Onyango v. Republic Cr. App. No. 32 of 1990(UR).

27. The evidence on record tendered by Elijah Kiiru Theuri (PW5) was that on 3rd June, 2011 he had his daughter's function and that he had been given a sum of over Ksh.85,000 in dowry. He gave out Ksh.20,000 and remained with about Ksh60,000. The appellant found him outside his home and asked him where his son's wife was and he later went to sleep. He was woken up by the noise and when he looked up he saw a man who was armed with an axe standing next to him, he recognised him as the person who had earlier on inquired about his son's wife and that he knew him as the person employed by his neighbour. The person hit him with an axe and ordered him to surrender all the cash he had been given. Even though during the attack the appellant was masked, PW5 said he was able to identify him from the clothes he wore earlier when he talked to him. That the appellant had not changed his clothes. We can point out here, that the witness did not describe the clothes the appellant was wearing. There was nothing peculiar about the clothes that PW5 pointed to.

28. In his defence, the appellant told the court that on 5th June, 2011 he went with his wife to church and later he attended a meeting at Kamakwa in Nyeri till 10.00 p.m. He opted to sleep at his aunt's home and the following day he woke up and took a taxi to his home to check on his wife. He had with him Ksh.18,800 which after paying the taxi Ksh.1,000 he was left with Ksh17,800 and upon search by elders and 2 APs the said amount of money was taken. He was later taken to the scene of the crime and asked to explain the source of his money and where he had spent the night. The appellant insisted the money was his.

29. The trial magistrate in his judgment held:

> " Although the accused had no burden to discharge he was nevertheless expected to explain on a balance of probabilities where he had been on the night the robbers struck at the house of PW5 and although it was not unlawful for accused 1 to have such amount of money one would have expected him to explain, again on a balance of probabilities how he got the money."

30. It is trite law that the prosecution has the burden to prove its case. It was not upon the appellant to fill up the gaps created by the witnesses. The appellant had clearly told the trial court where he had spent the night. When the court stated that the appellant ought to have called a witness to support his alibi, it shifted the burden of proof onto the appellant, and that was legally unacceptable. It was the prosecution's duty to displace the appellant's alibi by calling evidence to place him at the scene of the robbery.

31. There was the money recovered from the appellant, whose source was questioned. He was asked where he had got such an amount of money from and that the fact that he had it would lead to the conclusion that he had taken the same from PW5. What really is disturbing is that, in absence of any scintilla of evidence it was concluded that the money belonged to PW5. The money was not marked and there was nothing whatsoever to connect it to PW5. The prosecution did not demonstrate that the said money belonged to PW5 and could not have been from any other source. This was an error which was also upheld by the learned Judge.

32. As this Court held in Sawe v. Republic (supra) that;

"in order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing

of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the party accused."

33. We find that the appellant had satisfactorily explained where he was on the night of the robbery and in fact when waylaid he was arriving at his home in the morning after spending the night at his aunt's place in Kamakwa, asking him to avail a witness amounted to shifting the burden on him.

34. In regard to the question on suspicion as raised by the appellant, we are fortified by the decision of this court in Mary Wanjiku Gichira v. Republic (Criminal Appeal No. 17 of 1998, unreported) where it was held that suspicion, however strong, could not provide a basis for inferring guilt which must be proved by evidence.

35. The evidence above clearly shows that the appellant was suspected by the crowd. This led to his arrest and ultimate charge with the offence of robbery with violence. All the witnesses (PW1 to PW6) testified that they did not see the appellant but he was suspected to be the person who had attacked them and he was even found with Ksh.17,800 whose source he could not explain. It was possible that the appellant was not a saint, or a morally upright person and would have been the first suspect when an incident such as this one happened in his village. Be that as it may, as has been held severally by this Court, suspicion alone, however strong, cannot found a conviction. The burden on the prosecution's shoulders to prove its case beyond reasonable doubt is constant and is not lessened by the character of the suspect.

36. It is our considered view that the evidence we have referred to in the foregoing did not meet the threshold set for circumstantial evidence to support or warrant the conviction of the appellant. We are unable to uphold the conviction and sentence. We allow the appeal in its entirety with the result that the conviction is hereby quashed and the death sentence passed on the appellant is accordingly set aside. We order that the appellant be set at liberty unless he is otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 10TH DAY OF NOVEMBER, 2023.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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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.

Deputy Registrar