Muchabi & another v Republic (Criminal Appeal 270 of 2018)
[2023] KECA 1555 (KLR) (15 December 2023) (Judgment)

Neutral citation: [2023] KECA 1555 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 270 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 15, 2023

BETWEEN

JULIUS MUCHABI ..... 1ST APPELLANT

BENARD HEZRON ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisii (W. A. Okwany, J) delivered on 5th March, 2018 in HCRA. No 52 of 2015)

JUDGMENT

-

1. Julius Muchabi and Benard Hezron, the 1st and 2nd appellants herein were jointly tried and convicted of the offence of robbery with violence contrary to section 296(2) of the *Penal Code* and the offence of gang rape contrary to Section 10 of the *Sexual Offences Act*. They were each sentenced to death on the charge of robbery with violence, and 15 years' imprisonment on each of the gang defilement and gang rape charges, with a rider that the sentences on the gang defilement/rape charges would be held in abeyance due to the death sentence that was imposed on the robbery with violence charge.

2. Aggrieved by the conviction and sentence, the appellants preferred an appeal to the High Court, which appeal was heard and dismissed. The appellants are now before us with this second appeal in which they fault the learned Judge in dismissing their appeal on several grounds, contending inter alia that the learned Judge erred:

    i. in failing to find that the prosecution did not establish the ingredients of the offence which the appellants were charged with;

ii. in failing to find that the evidence against the appellants was circumstantial evidence that did not meet the threshold to be a basis for his conviction;

iii. in failing to undertake her duty of re-assessing, re-analysing and re-evaluating the evidence on record to arrive at an independent decision;

iv. in failing to find that the burden of proof was wrongly shifted to the appellants;

v. in failing to find that the trial was a mistrial as the appellants were not given an opportunity to elect the language that they were conversant with; and

vi. in failing to find that the sentence that was imposed on the appellants was harsh and excessive.

3. In support of the appeal, the appellants filed written submissions through their advocate Mr. Richard Onsongo, who compressed the appellants' grounds of appeal into 5 grounds. First, the appellants faulted the learned Judge for failing to re- assess, re-evaluate and re-analyse the evidence by way of a re- hearing so as to arrive at her own conclusion. Counsel cited *Kiilu & another v Republic* [2005] I KLR, 174; and *David Njuguna Wairimu v R* [2017] eKLR, contending that had the High Court undertaken its duty properly it would have appreciated that there were serious and fatal contradictions in the prosecution case that raised reasonable doubt regarding the appellants' guilt.

4. Mr Onsongo pointed out that the contradictions in the prosecution case included the period and time that the robbers stayed in the complainant's house, the period taken by the assailants during the robbery, the mode of dressing of the attackers, the descriptions given by the witnesses, the accommodation of the witnesses during the identification parade and the statements recorded by the complainants.

5. On fair trial, counsel argued that the appellants' trial was a travesty of justice as the prosecution trampled upon their constitutional rights to a fair trial. This included the prosecution being allowed to present evidence in contravention of procedure and without regard to the appellants' vulnerable position as laymen.

6. Counsel further argued that the record did not indicate whether the appellants were accorded a chance of electing their most preferred language, and this was compounded by the fact that the 1st appellant was indicated in the charge sheet as "a male adult, Kuria by tribe" while the 2nd appellant was described as "a male adult, Kisii by tribe." In addition, the record did not indicate whether there was any interpretation and if so, which language. Further, counsel noted that the High Court did not indicate the language in which the proceedings were carried out. In support of his submission, Mr Onsongo cited several authorities including *Fredrick Kizito v Republic*, Criminal Appeal No 170 of 2006, *Albanus Mwasia Mutua v Republic*, Criminal Appeal No 120 of 2004 and *Gabriel Owang Otila & another v Republic* [2009] eKLR.

7. On the issue of identification, counsel for the appellants submitted that the circumstances under which the prosecution witnesses alleged that they identified the attackers, was not conducive for a positive identification. In this regard counsel cited *R v Turnbull & others* [1973] 3ALL ER 549, *Nzaro v Republic* [1991] KAR 212, *Michael Nyongesa & another v Republic* [2015] eKLR and *James Murigu Karumba v Republic* [2016] eKLR.

8. In addition, counsel argued that the identification parade was not conducted in accordance with the Force Standing Orders, as the identification parade was stage managed to have the appellants singled out. Counsel submitted that the complainants were not present during the arrest of the appellants and neither of the appellants were pointed out to the police before or at the time of their arrest. This raised the question of how the police came to arrest the appellants. Counsel also wondered why the witnesses

and the complainants did not record their statements before the arrest of the appellants. In this regard, counsel cited *R v Shabani Bin Donaldi* [1940] 7EACA 60 and *Terekali s/o Korongozi & others v R* [1952] 19EACA 259.

9. As regards the medical evidence, Mr Onsongo submitted that the prosecution did not lay a basis for the evidence to be produced by a person who was not the maker of the P3 form. In addition, the report did not indicate the approximate age of the injuries neither did it indicate the possible type of weapon that was used in causing the injury, nor did the prosecution eliminate the possibility of the injuries that were allegedly suffered during the sexual assault having occurred during consensual sexual intercourse.

10. Mr Onsongo dismissed the photographic evidence maintaining that the evidence was produced in breach of Section 78 of the *Evidence Act* as the witness who produced the photographic evidence was not competent to take or print the photographs nor did he have a certificate. In this regard, counsel relied on *Eric Indimuli Isaya v Republic* [2016] eKLR and *Republic v Jackson Ngara Nderitu* [2018] eKLR. Counsel also added that the judgment of the trial court was not in compliance with Section 169(1) of the *Criminal Procedure Code* and the High Court did not address itself on this failure. He cited *James Nyanamba v Republic* 1982 – 88] 1KAR 1165, 1983 eKLR as a case in point

11. Finally, on the issue of sentence, counsel for the appellants argued that sentencing is a matter within the discretion of a trial court and although a sentence of death is provided for under Section 296(2) of the *Penal Code* and is constitutional, it is a cruel sentence as Section 296(2) deprive the court of discretion to impose an alternative sentence where the circumstances do not justify the imposition of the death sentence. Counsel urged the Court to allow the appeal, quash the conviction and set aside the sentence.

12. The State was represented by Mr Patrick Martin Okango, a Senior Principal Prosecution Counsel in the office of the Director of Public Prosecutions. Mr Okango filed written submissions in which he cited *Njoroge v Republic* [1982] KLR 388 and urged the Court to exercise deference to the factual findings that were made by the trial court and the first appellate court as contained in the record of appeal. He also urged the Court to consider only issues that were raised before the trial court and the first appellate court. He urged that the appeal lacks merit and should be dismissed in totality.

13. On the ground that the High Court failed to re-examine, re- asses and re-evaluate the evidence on record, Mr Okango argued that the High Court was being wrongly castigated for not carrying out its mandate simply because it did not reach a finding favourable to the appellants. Mr Okango, citing *Alexander Ongasia & 8 others v Republic* [1993] eKLR, submitted that the High Court did not need to state that it had re-evaluated the evidence as it was enough that such re-evaluation was apparent on the face of the record. He pointed out that the learned Judge was alive to her role as a first appellate court.

14. On the issue of the alleged contradictions in the prosecution case, Mr Okango submitted that the issue was never raised before the High Court, and was therefore being improperly raised before us. Citing *MTG v Republic* KEHC 189 KLR, Mr Okango submitted that the contradictions if any, in this matter, were so remote that they were not fatal to the prosecution case. He argued that all the four key prosecution witnesses encountered the assailants and interacted with them differently. That the ordeal took a reasonable period of time of between 20 minutes to 1 hour, and the fact that they did not all state the exact time is not fatal to the case.

15. As regards the descriptions of the appellants, Mr Okango maintained that the fact that the witnesses gave general descriptions did not disclose any contradictions. On the description regarding the black Muslim cap that was allegedly recovered by one of the prosecution witnesses, counsel argued that that was an evidentiary issue and not a legal issue, and that in any case, PW2 described the assailants as one being short and brown and wearing an Islamic Cap. PW4 also mentioned an Islamic cap

black with stripes and therefore there was corroboration, and the variance in the description was not contradictory.

16. On breach of right to fair trial, Mr Okango submitted that this issue was raised before the 1st appellate court but was dismissed for lack of material evidence, and that apart from the mere statement that the prosecution was allowed to present evidence in breach of the law, no particulars were given and that ground should therefore be dismissed. As for the language used, it was submitted that the issue was being raised before this Court for the first time and should, therefore, be dismissed. Nevertheless, it was clear from the record that Kiswahili was the language the appellants understood and it is the one that was used.

17. On identification, Mr Okango submitted that contrary to the appellants' submissions that the circumstances were not conducive for positive identification, the first appellate court having appraised itself on the law regarding the evidence of identification, underscored the need for such evidence to be watertight and for the visual evidence to be treated with the greatest care. Counsel submitted that the High Court was correct in finding that the appellants faces were not covered, that there were sufficient lights from the torches, that the assailants

18. Regarding the allegations concerning the identification parade, Mr Okango argued that the appellants did not raise before the first appellate court, the issue of the identification parade not having complied with Section 6(c) (d) and (f) of the Forces Standing Orders and thus the first appellate court was not given a chance to render itself on this issue. The issues cannot therefore be raised on a second appeal for the first time.

19. Regarding the medical evidence and or documents, Mr Okango submitted that the same were produced before the trial court without any objection and that no issue was raised in the High Court concerningthe documents nor was there any objection to the production of the photographic evidence. The Court was therefore urged to find the ground misplaced.

20. As to the contention that the judgment of the court did not comply with Section 169(1) of the *Criminal Procedure Code*, counsel pointed out that that was not a ground before the High court and cannot therefore be raised for the first time on a second appeal. Further, counsel conceded that there was failure to indicate that judgment was read and delivered but maintained that this was a result of human error, and that the omission was in any case not fatal as to render the judgment null and void.

21. Finally, on sentence, Mr Okango pointed out that this ground was not raised in the High Court and that in any case the sentence meted out by the trial court was affirmed by the High Court and is the legally provided sentence and is therefore not harsh. Counsel referred to the Supreme Court decision in *Francis Karioko Muruatetu and another v Republic*, Supreme Court Petition No 15 of 2015, (Muruatetu 1), where the Supreme Court held that the death sentence in Section 204 of the *Penal Code* was unconstitutional, and *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others* (Muruatetu 2), where the Supreme Court clarified that Muruatetu 1 only applies for the offence of murder and not robbery with violence. Counsel pointed out that the appellants did not fault the sentence of 15 years imposed on the gang defilement and gang rape charges. Counsel concluded by urging the Court to uphold the appellants' conviction and affirm the death sentence.

22. This being a second appeal, this Court's duty as a second appellate court is confined to a consideration of issues of law only. As was succinctly articulated in *Karani v R* [2010] 1 KLR 73:

> "This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the *first*

appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

23. In brief, the concurrent findings of the trial court and the first appellate court reveal that, on the night of 26th August 2013 at about 2 am, AK1, was with his wife IK2, asleep in their house at Lolgorian, when they were rudely awoken up by intruders who broke down the door to the house, and stormed into the house. Two of the intruders who were armed with a gun and a panga entered AK's bedroom and robbed AK of cash of Kshs 10,000/=, two mobile phones and safari boots. AK was locked in the bedroom while his wife and PN3 (his 15-year-old daughter), were taken to the sitting room where three of the robbers raped/defiled them in turns. The robbers then left. Michael Chepkwony, a clinical officer at Lolgorian Sub County Hospital, examined and treated both IL and PN following the sexual violation ordeal. He produced the P3 form that was prepared by Dr Mbuthia who was not available to produce the P3 Form as he had gone for further studies. The P3 Forms indicated that IL and PN had been raped/defiled.

24. The matter was reported to the police who carried out investigations. On 18th September 2013 the police carried out a raid and arrested several suspects. Alfred Chege Muthua, the OCPD Transmara West, conducted identification parades in which AK, his wife and AK's niece JN4 identified the two appellants as having been among the people who robbed and sexually violated them. PN could not identify anyone at the identification parade as she was still in shock. Both the trial court and the first appellate court found that the two appellants were positively identified as having been amongst the robbers and having gang raped/defiled AK's wife and daughter, and therefore rejected their defences.

25. The issues of law that we discern for our consideration in this appeal, are, whether the learned Judge properly discharged her duty as a first appellate court, of re-considering and re-analysing the evidence that was adduced in the trial court, whether the appellants' identification was safe to rely on; whether there was sufficient evidence to support the finding that the charges against the appellants were proved to the required standard, and whether the sentence of death imposed on the appellants was unconstitutional.

26. At the outset, we note from the judgment, that the learned Judge properly directed herself by referring to *Okeno v Republic* [1977] EA 32; and *Mark Oiruri Mose v Republic* [2013] eKLR, that are appropriate authorities on the obligation of a first appellate Court.

27. The learned Judge was alive to her obligation as a first appellate court. This is clear in the manner the Judge considered and re-evaluated the evidence, and arrived at her own conclusion in regard to critical issues such as the evidence of identification, circumstantial evidence and proof of the charges against the appellants. For instance, on the issue of identification the learned Judge having quoted specific parts of witness evidence had this to say at paragraph 41 of her judgment:

> "From the above extracts of the testimonies of PW1, PW2, PW3 and PW4, I am satisfied that the conditions at the house of PW1 on the night of the robbery and sexual assault were favorable for proper identification. I say so because, firstly, the assailants did not conceal their faces and therefore their victims were able to see them properly without any obstruction. In fact, PW4 and PW3 were able to see the finer details of the appellants' appearance, complexion, and skin tone. Secondly, all the witnesses testified that there was sufficient light from at least 3 torches which the robbers placed on a cupboard as they went about robbing and raping their victims in turns. Needless to say, rape and defilement are crimes committed by an assailant whose body is literally locked in a very intimate contact with

the victim for a long time, in which case, the victims had ample time to see their attackers' appearance considering that they were assaulted in turns. Lastly, the entire incident took between 45 minutes to 1 hour and therefore, I find that the witnesses had sufficient time to see the appearances of attackers well and were later able to pick them out at an identification parade".

28. The learned Judge evaluated the issue of lighting, the proximity between the appellants and their victims, and the time that the victims were in contact with the assailants, before coming to the conclusion that the witnesses had opportunity and sufficient time to see the attackers well.

29. The fact that the learned Judge appropriately discharged her obligation is also apparent in regard to the identification parade, where after extensive evaluation and analysis, the learned Judge came to the conclusion that the identification parades were conducted in strict conformity with the Police Force Standing Orders, and that the witnesses were able to pick out the 1st and 2nd appellants at different times at identification parades that were properly conducted.

30. Likewise, the circumstantial evidence arising from the Islamic cap that was recovered from the 1st appellant, which cap PW2 and PW4 stated were worn by the 1st appellant on the material night was appropriately considered. While it is true that there were some inconsistencies in the evidence, there was no substantial inconsistency or material contradiction. The inconsistency regarding the time taken by the robbers was negligible and really a matter of perception of individual witnesses, given the stress that they were going through. We agree with the persuasive authority cited by Mr Okango *MTG v Republic* [2022] KEHC 189 (KLR), that the contradictions were not of such magnitude as to prejudice the appellants and render the prosecution case unbelievable.

31. As to whether the offence was proved to the required standard, in *Oluoch v Republic* [1985] KLR 549, it was 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 instruments; or

    (b) The offender is in company with one or more other person; 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.

32. In this case there was sufficient evidence that the complainant and his family were attacked and robbed, and that violence was visited upon them. It was also evident that the assailants were more than two and were armed with a gun and a panga. Each of these factors was sufficient to prove the offence of robbery with violence and therefore the offence of robbery with violence was established. As regards the offence of rape and defilement, apart from the evidence of the two victims, which was consistent with the evidence of AK, there was also the medical evidence. All these factors were considered by the learned Judge in coming to the conclusion that the offence of robbery with violence, rape and defilement were all proved to the required standard.

33. On the issues relating to breach of fair trial, the appellants have not placed any proper evidence before this Court in support of that allegation. The record indicates that there was interpretation from English to Kiswahili language; and the appellants did not raise this issue of the language used at the trial during the first appeal. It is not, therefore, open to them to bring it at this stage.

34. On the allegation concerning evidence that was allegedly adduced in breach of the law, such evidence has not been identified, nor was this ground argued before the first appellate court. Consequently,

we find that the ground regarding the breach of right to fair trial has not been substantiated and is accordingly rejected.

35. Finally, as regards the sentence, the appellants were sentenced to death as that was the mandatory sentence legally provided under Section 296(2) of the *Penal Code* for the offence of robbery with violence. The appellants cannot find refuge in the Supreme Court decision of *Francis Karioko Muruatetu & another v Republic* (Muruatetu 1), as that decision only addresses mandatory death sentence in regard to the offence of murder contrary to Section 203 and 204 of the *Penal Code*. The Supreme Court asserted in *Francis Karioko Muruateru & another v Republic, Katiba Institute and 5 others* [2021] eKLR (Muruatetu 2) that its decision in Muruatetu I does not apply to the mandatory death sentence provided under section 296(2) of the *Penal Code*.

36. Besides, the circumstances of the appellants' conviction show that the offences were committed in the most heinous manner. The appellants violently attacked and robbed the complainant, raped his wife and heartlessly defiled his 15-year-old daughter. We would reiterate what this Court stated in *Anaya alias Kibito v Republic* [2022] KECA 677 (KLR):

> "The facts of this case, ..., demonstrate a level of violence and depravity that, even a first offender, would probably call for the imposition of the death penalty. It should always be born in mind that even where Muruatetu 1 is applicable it is only the mandatory nature of the death penalty that was declared unconstitutional not the death penalty itself."

37. In the circumstances, we have no reason to interfere with the sentence that was imposed by the trial court and upheld by the High Court, as the sentence was in conformity with the law and the circumstances surrounding the offence were such that the sentence was deserved.

38. The upshot of the above is that we come to the conclusion that the appellants' appeal against conviction and sentence must fail. The appeals are accordingly dismissed in their entirety.

DATED AND DELIVERED AT KISUMU THIS 15TH DAY OF DECEMBER 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR