Barasio v Republic (Criminal Appeal 150 of 2018)
[2023] KECA 1494 (KLR) (8 December 2023) (Judgment)

Neutral citation: [2023] KECA 1494 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 150 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 8, 2023

BETWEEN

ISAAC BASWETI BARASIO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Migori, (Mrima, J) dated 23rd March 2017 in HCCRA No. 60 of 2016)

JUDGMENT

1. This is a second appeal by the appellant Isaac Basweti Barasio from his conviction and sentence of death for the offence of Robbery with violence contrary to Section 295 as read together with Section 296(2) of the *Penal Code*.

2. The appellant was tried by the Senior Resident Magistrate Court at Rongo and found to have jointly with others who were not before the court, violently robbed Tom Ogwendo Onyango of cash Kshs. 43,500 and one mobile phone make LG valued at Kshs. 4,500, and at the time of such robbery caused the said victim grievous harm. His first appeal against conviction and sentence was unsuccessful hence this second appeal.

3. In his memorandum and supplementary memorandum of appeal, the appellant raised 6 grounds in which he faulted the learned Judge for failing to properly take the plea by using a language that the appellant was not conversant with; failing to reconsider, re-analyse, and evaluate the entire evidence so as to arrive at its independent decision; making findings that were against the weight of the evidence; and imposing a sentence that was manifestly harsh.

4. In written submissions filed by learned counsel Mr. Richard Onsongo, the appellant submitted that there was a mis-trial in the trial court due to the manner in which the plea was taken; that although the proceedings indicate that there was interpretation in English/Kiwahili/Dholuo, the record does not

show that there was a clerk who could have undertaken the interpretation nor does the record show whether the appellant was accorded a chance of electing his preferred language; that the charge sheet indicated that the appellant was a male adult who was Kisii by tribe; and that the proceedings in the High Court did not also indicate the language in which the proceedings were carried out.

5. The appellant cited *Fredrick Kizito -vs- Republic Criminal Appeal No. 170 of 2006*; *Albanus Mwasia Mutua -vs- Republic, Criminal Appeal No. 120 of 2004*; and *Gabriel Owang Otila & Another -vs- Republic [2009]* eKLR, arguing that this Court has stated the danger of a court failing to record essential details in the proceedings such as the language used, and asserted that this is a violation of the appellant's constitutional rights.

6. The appellant, relying on *Kiilu & Another -vs- Republic [2005]* 1 KLR 174, maintained that the first appellate court had the duty to re-assess, re-evaluate and re-analyse the evidence that was adduced in the trial court so as to arrive at its own independent conclusion. He faulted the first appellate court for merely recapping and rehashing the evidence and failing to appreciate the shortcomings in the prosecution case.

7. On identification, the appellant, citing *Roria -vs- Republic* [1967] EA 583, submitted that the evidence on record was unreliable on the identification of the appellant as the evidence did not reveal the description that the complainant gave the police about his assailants, nor did it explain why the complainant recorded his statement a day after the appellant was arrested, which was several months after the offence was committed. Further, the appellant argued that it was not clear from the evidence where the complainant identified the appellant, whether it was at the cells or the crime office, and whether there was a deliberate manoeuvre by the investigating officer to expose the appellant to the complainant for purposes of having him identify the appellant. The appellant maintained that the complainant purported to give a description to the police after he had seen his missing left thumb at the crime office, and that the identification was crafted and manipulated to implicate the appellant because he had been arrested using the complainant's phone which was being tracked.

8. On fair trial, the appellant complained that he was not supplied with witness statements and his complaints in this regard were treated casually by the High Court. In this regard the appellant cited the Supreme Court decision in *Francis Karioko Muruatetu and Another -vs- Republic [2017]* eKLR for the proposition that the right to fair trial is one of the cornerstones of a just and democratic society.

9. The appellant submitted that the electronic evidence that was produced in court was not tendered in compliance with Section 65, 106(4) & 106B of the *Evidence Act*; that although the prosecution relied on a statement from equity Bank, and a certified extract of the documents from Equity Bank, it did not avail or tender in court a certificate establishing that the two exhibits complied with the requirements of Section 106B of the *Evidence Act*; that the documents produced in court had some entries inserted by hand which were not initialled; and that it was not clear who had inserted the information and whether the additions were part of the original documents. The appellant faulted the prosecution for failing to call the maker of the document as a witness. In support of these contentions, the appellant cited *County Assembly of Kisumu & 2 others -vs- County Assembly Service Board & 6 Others [2015]* eKLR; and *Republic -vs- Barisa Wayu Matuguda [2011]* eKLR.

10. Furthermore, the appellant challenged the medical evidence, arguing that the same was manipulated as there were alterations on the P3 Form. The appellant argued that had the High Court properly undertaken its obligation as a first appellate court, it would have found that there were serious shortcomings in the prosecution case that raised a reasonable doubt in his favour, and therefore his appeal against conviction should have been allowed.

11. In regard to the sentence, the appellant conceded that sentencing was a matter within the discretion of the trial court, but submitted that the mandatory death sentence for the offence of robbery with violence under Section 296(2) of the *Penal Code*, deprived the court of its discretion to sentence a convict to another sentence where the circumstances do not justify a death sentence. Citing *Dismus Wafula Kilwake -vs- Republic [2019]* eKLR, the appellant stated that the trial court did not exercise its discretion as it did not give any reasons as to why the appellant deserved the maximum sentence.

12. The State was represented by Senior Principal Prosecution Counsel Mr. Patrick Okango who filed written submissions in opposition to the appeal. Mr Okango cited *Njoroge -vs- Republic [1982]* KLR 388, for the proposition that on a second appeal, the court is only concerned with points of law and is bound by concurrent findings of facts arrived at in the two courts below unless it be shown that the findings were not based on evidence.

13. On the issue of the language used in the proceedings, Mr Okango submitted that the issue was being raised for the first time in the second appeal as it was not raised in the High Court nor is it one of the grounds of appeal. He therefore maintained that the issue was not properly before us, as the High Court has not rendered itself on it.

14. Mr Okango pointed out that the appellant did not allege that he did not understand the proceedings because of the language used, but his assertion was simply that the language used was not indicated in the record of proceedings. Mr Okango argued that the appellant understood the proceedings as the record indicates that during the trial there was always interpretation of English/Kiswahili and Dholuo, and the record indicates that the appellant himself testified in Kiswahili language, and therefore he cannot complain that he did not understand the proceedings.

15. Mr Okango further submitted that the High Court duly executed its mandate as a first appellate court, correctly appraised itself on the law and properly framed the issues for determinations. He cited *Alexander Ongasia & 8 Others – vs – Republic [1993]* eKLR, Mr Okango maintained that the re-evaluation of the evidence by the first appellate court was apparent and evident on the record. He submitted that the first appellate court did not have to reverse the trial court for it to be said that it has executed its mandate of re-evaluating the evidence, as there were situations where the first appellate court will agree with the findings of the trial court.

16. On identification, Mr Okango argued that the issue was raised in the High Court and properly addressed by the learned Judge; that the identification of the appellant was a case of recognition and not identification of a stranger; and that the identification of the appellant was buttress by the evidence regarding the phone number to which money from the complainant's account was transferred, which number the complainant had obtained from the Bank and given to the police who were able to trace the phone to the appellant.

17. Mr Okango urged the Court to dismiss the allegations of breach of right to fair trial as the same were unsubstantiated. He argued that the issue of electronic evidence was improperly before this Court as it was never raised before the High Court nor did the appellant object to the production of the evidence during the trial. As for the manipulation of the medical evidence, counsel argued that the allegations were unfounded and were improperly before this Court not having been raised before the High Court.

18. Finally, on sentence, counsel argued that the death sentence pronounced by the trial court and affirmed by the first appellate court is a legal and valid sentence. He found support in *Francis Karioko Muruatetu & Another; Katiba Institute & 5 Others (amicus curiae) [2021] eKLR* (Muruatetu 2), where the Supreme Court gave guidance that Muruatetu 1 does not apply to offences of Robbery with Violence. Mr Okango urged the Court to dismiss the appeal against both conviction and sentence.

19. This being a second appeal, we are guided by Section 361(1)(a) of the Criminal Procedure Code that mandates the Court to deal with issues of law only, and which section provides that severity of sentence is a matter of fact unless an issue of law arises therefrom.

20. In *Stephen M'Riungu and 3 Others v Republic [1983]* eKLR this Court explained that:

> " Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law, and it should not interfere with the decision of the trial court or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law."

21. Similar sentiments were also expressed by this Court in *Njoroge vs Republic [1982]* KLR 388. In his supplementary memorandum of appeal and the written submissions, the appellant has raised issues concerning his identification, proof of the ingredients of the offence of robbery with violence, unfair trial and the lack of exercise of discretion in the sentence imposed against him.

22. Having carefully considered the record of appeal in light of the rival submissions set out above, and the principles of law relied upon by the respective parties, the issues of law that fall for this Court's determination are: whether there was cogent evidence of identification of the appellant at the scene, whether the prosecution proved the elements of the offence of robbery with violence, whether the appellant's right to fair trial was breached and whether the sentence was properly imposed upon the appellant.

23. This Court in *Katana & another v Republic [2022]* KECA 1160 (KLR), reiterated the relevant factors in positive identification of a perpetrator of an offence, by restating what this Court (Omolo, Bosire & O'kubasu JJ.A) stated in *Francis Kariuki Njiru & 7 Others v Republic [2001]* eKLR as follows:

> " The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R.v.Turnbull [1976]63 Cr. App. R.132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all."

24. In the same case, the Court went on to synthesize the circumstances to be considered in determining whether the identification by a witness meets the positive threshold set out in Rv. Turnbull (supra) and in Wamunga vs. Republic, (1989) KLR 424 as follows:

> " a. The length of time the witness had the accused under observation and in what distance and light.
>
> b. Whether the observation by the witness was impeded in any way.
>
> c. Whether the witness had ever seen the accused before, and if so, how often.
>
> d. The length of time that elapsed between the original observation and the subsequent identification to the police.

e. Whether there is any material discrepancy between the description given by the witness and the actual appearance of the accused."

25. The two lower courts made concurrent findings that on 24th November, 2015 at 9.30 pm, the complainant was walking home when he encountered 4 people who pounced on him, assaulted him, threatened to kill him, and eventually stole his money and his twin-line cell phone make LG. The robbers demanded and were given the identification numbers (PINs) for both the Safaricom and Airtel lines. The complainant reported the matter to the police and his bankers the next day, when the bank confirmed that the sum of Kshs. 43,000/= had already been electronically withdrawn from his Equity Bank account.

26. In his evidence the complainant was emphatic that during the confrontation he managed to identify one of his assailants whom he recognised as the appellant, a person he had been seeing around. PC Edwin Korir testified that using the details that PC Noah Limo had obtained from the complainant regarding the telephone number that was used to remove money from his account, the number was tracked to the appellant who was arrested by PC Edwin Korir at Mai Mahiu.

27. The learned Judge having considered appropriate authorities including R vs Turnbull (supra) and Wamugu vs Republic (supra), addressed and analysed the identification evidence in his judgment as follows:

> "As I have pointed out elsewhere above in this judgment this is a case of identification by recognition. I am persuaded that in the unique circumstances of this case PW1 was able to recognize the appellant as one of the attackers. PW1 knew the appellant for well over one year. They spent time together. They talked. There was sufficient light from the full moon, the phone and the torch. PW1 saw the appellant's cut thumb which the trial court so confirmed as well. PW1 also gave a fitting description of the appellant at the police station.
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> 30. PW1's evidence was duly corroborated by PW4 and PW5. The evidence given by PW1 enabled the tracking and eventual arrest of the appellant thereby placing the appellant as one of the attackers. The evidence from PW1's bank on the electronic money transactions from PW1's account to the recipient number so confirmed PW1's version of what happened. That was corroboration. But even in cases where there is no corroboration a court can still convict on the uncorroborated evidence as long as the trial court warns itself of the dangers of acting on such evidence. .....
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> 31. As I come to the end of this issue, I wish to point out the allegation that the registered owner of the recipient number was not investigated and possibly charged or testify before the trial court does not hold any water. I say so because PW1 gave a fitting description of the appellant whom he knew well. Further, if anything the registered owner would have been treated as a joint offender with the appellant.
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> 32. In sum, I find that the appellant herein was properly and sufficiently identified by PW1 and that the identification evidence taken in totality was safe and free from error."

28. It is apparent from the above extract of the judgment that the learned judge properly analysed and evaluated all the circumstances of the appellant's identification in accordance with the relevant parameters set out in Francis Kariuki Njiru & 7 Others v Republic (supra), and concluded that the

appellant was properly identified. We find that the appellant's identification was safe to rely on as it was identification by recognition in circumstances that were favourable for a positive identification. Through the description and information given by the complainant the police were able to track and eventually arrest the appellant as one of the persons who attacked and robbed the complainant. In addition, the evidence tracing the electronic transfer of the moneys from the complainant's account to the recipient's number led to the appellant which confirmed that the appellant was culpable, and this was corroborative of the complainant's identification of the appellant.

29. With regard to the elements of the offence of robbery with violence, in Johana Ndungu vs Republic [1996] eKLR, this Court explained as follows:

> " The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after, to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
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> 1. If the offender is armed with any dangerous or offensive weapon or instrument, or
>
> 2. If he is in company with one or more other person or persons, or
>
> 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

30. In his testimony, the complainant told the court that he was accosted by four men who were armed with a panga and a long stick. Dr Sammy Arua Mwatela, a clinical officer, confirmed that the complainant suffered injuries which Dr Mwatela classified as 'grievous harm' in the P3 form which he produced in court. It is evident that the complainant was not only robbed but also actually injured as a result of violence inflicted upon him by his assailants. The ingredients of the offence of robbery with violence under Section 296 of the Penal Code were therefore sufficiently established.

31. The appellant contended that there was a mistrial because his plea was not properly taken, as the language used by the court was not consistent and he was not given the opportunity to elect a language that he was conversant with. Clearly, this ground is an afterthought as it was not raised before the High Court. Be that as it may, the record of the proceedings does not reveal any complaint on the part of the appellant regarding the language used. The record shows that there was interpretation in English, Kiswahili and Dholuo. Although there are occasions when the name of the interpreter was not indicated, it is apparent that the appellant understood what the witnesses stated and was able to cross examine them effectively. The appellant was also able to give a sworn statement in Kiswahili and to respond effectively to questions put to him in cross examination. We do not find any violation of the appellant's right to fair hearing arising from the language used during the trial, nor do we find that the appellant was prejudiced in any way.

32. As regards the allegation that prior to the hearing, the appellant was not given statements made by a witness who testified as PW5, although this was an issue that was raised by the appellant and addressed by the trial court, it was not raised as an issue before the High Court, nor was the issue of the admissibility of the electronic evidence raised before the High Court. Consequently, this Court does not have the benefit of the High Court's determination on the two issues and the issues are not open for our consideration.

33. On the issue of sentence, the appellant contends that although the death sentence as provided is constitutional, the said sentence was harsh as neither the trial court nor the 1st appellate court gave reasons for the decision to impose the death sentence. The appellant urges the court to set aside the death sentence and substitute it with a suitable sentence considering the mitigation on record and the term already served. On their part, the respondent submits that the sentence meted out by the trial court and affirmed by the first appellate court was not harsh as it is the legally provided sentence.

34. In light of the fact that the appellant was accompanied by three others during the robbery; that they were armed with dangerous weapons; and that violence was visited upon the complainant during the robbery; and the Doctor who examined the complainant confirmed that he suffered grievous harm, the sentence imposed by the trial court and upheld by the High Court was in conformity with Section 296(2) that provides the sentence of death for the offence of robbery with violence. Consequently, the sentence was legal.

35. As regards the severity of the sentence that was imposed upon the appellant, Section 361 of the Criminal Procedure Code states that severity of sentence is a matter of fact. The same section limits our jurisdiction to matters of law only, and therefore severity of sentence is not open for our consideration. Moreover, the appellant did not take up the issue of severity of sentence in the High Court, so as to preserve it for our consideration as an issue arising from the determination made by the High Court. In the circumstances, the appeal against sentence must fail.

36. For the afore stated reasons, we find that this appeal has no merit. It is accordingly dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF DECEMBER, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEA

I certify that this is a true copy of the original

DEPUTY REGISTRAR