Abuyabo & 2 others v Republic (Criminal Appeal 62 & 63 of 2016)
[2022] KECA 88 (KLR) (11 February 2022) (Judgment)

Neutral citation: [2022] KECA 88 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 62 & 63 OF 2016

J MOHAMMED, PO KIAGE & M NGUGI, JJA

FEBRUARY 11, 2022

BETWEEN

DAMSON OKUMU ABUYABO ..... 1ST APPELLANT

HESBON OKUMU WANGA ..... 2ND APPELLANT

RAMADHAN ASHIKO OMWIRA ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Kakamega (Hon. Sitati and Mrima JJ.) dated 26th January, 2016 in Criminal Appeal No. 174 of 2012)

JUDGMENT

1. The appellants were charged with five offences under the Penal Code. At count I, they faced a charge of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence were that on the 8th of April 2010 at Buchembe village Luchea location in Mumias District within Western Province jointly while armed with dangerous weapons namely rungus robbed Andrew Omwira Wanangasa of cash Kshs. 80,000, mobile phone make Nokia 1202, Motorolla-C115, a bag with assorted clothes all valued at Kshs. 87,000 and immediately before the time of such robbery used actual violence to the said Andrew Omwira Wanangesa.

2. In counts II, III, IV and V, the three appellants were jointly charged with the offence of causing grievous harm contrary to section 234 of the Penal Code. The particulars of the offence were that on the same day and place as in count I, they jointly unlawfully caused grievous harm to Samuel Kweyu (count II), Patrick Noah Wanga (count III) Frida Mango (count IV) and Ramadhan Otiato (count V). The appellants pleaded not guilty and after a full trial, they were convicted as charged in count I, II, III and V but were acquitted of the charge in count IV in the judgment of the trial court dated 21st July 2012. In

sentencing the appellants, the trial court noted that though the offence charged against them was one of robbery with violence under section 296(2) of the Penal Code, they had been charged under section 296(1) of the Penal Code, which provides for a charge of simple robbery. The trial court accordingly sentenced them to a term of ten (10) years imprisonment.

3. The prosecution evidence as presented through its eight witnesses was as follows. The complainant, Andrew Onchiri Wanangasa (PW1) had arrived at his home on the night of 8th April 2010 at about 11 p.m. from his business of ferrying sugarcane to West Kenya Sugar Factory. He had in his trouser pocket Kshs. 41,100 which was the proceeds from the business. He heard a knock on his door and was called outside by Daniel his worker. When he went out, he saw a group of young men and was able to recognize two of them, the 2nd and 3rd appellants. The two attacked him and robbed him of the money he had. He sustained injuries and sought treatment at St. Mary's hospital the following day. His injuries were confirmed by PW8 (Isaack Mukwana), the clinical officer, who had examined him and found that he had a cut wound measuring 7 centimeters long on the left side of his head.

4. PW2 (Samuel Kweyu Wanangasa) heard the appellants attacking PW1 and decided to go to PW1's home which was about 250 meters from his house. Along the way he met two people who followed him, then three others emerged from ahead of him and lit their torches. He turned back and was able to see the two who had followed him from behind. He recognized them as the 2nd and 3rd appellants. They descended on him using pangas and rungus and assaulted him. PW2 sustained a fracture, a cut wound measuring 8 centimeters long on his legs and his jaw was wired back. He suffered grievous harm. PW3 (Patrick Moah Keya) also responded to the distress call by the complainant but was attacked when he went to help. He recognized the 1st appellant among his attackers. As a result of the attack, he lost several teeth.

5. The evidence of PW 4 (Fridah Wanga) was that she also sustained injuries when she went to assist PW1, who was her son. PW5 (Ramadhan Mukulo Otiato) had also responded to the distress call by PW1. He opened his door, lit his torch and was able to see the 1st appellant standing outside. He was able to identify the 1st appellate as he was a neighbour. The 1st appellant hit him three times, twice on his left shoulders and once on his ribs.

6. Patrick Imanga Otinda (PW 6, referred to as Daniel by the complainant) had been with the complainant when he returned from Kenya Sugar Factory. It was PW6 whom the 2nd and 3rd appellants used to call PW1 out of his house. The appellants had confronted him at PW1's home on his way out and informed him that they were police officers. They had taken him back to PW1's house to confirm whether he was coming from work. PW6 was able to recognize the 2nd and 3rd appellants. He had seen the appellants assault PW1 with a rungu.

7. In their defence, the appellants denied committing the offence charged, the 1st appellant alleging that he had been admitted in hospital on the material day; the second appellant alleging that he was home sleeping on the day of the offence, while the third appellant's defence was that he had been attacked and cut up at his home by PW1 and PW2.

8. In their separate appeals to the first appellate court, the appellants raised essentially the same grounds of appeal. They challenged the decision of the trial court on the basis that the trial court erred in not finding that there was no first report made to police concerning the offence; that PW3 recorded his statements to police on 19th April 2010 after the offence was allegedly committed on 8th April 2012; that PW5 had an undated statement which was not clear when it was recorded; that the trial court did not consider their alibi defenses and that they had not been properly identified. They also challenged their conviction on the basis of the sufficiency of the prosecution evidence.

9. Upon considering the appellants' appeals and evaluating the evidence, the first appellate court (Sitati and Mrima, JJ) noted that the appellants had been recognised by the prosecution witnesses through the light of torches. It noted that identification of the appellants was through recognition, and that the witnesses had adversely mentioned the appellants, who were known to them prior to the incident. It also found no merit in the other grounds of appeal and it dismissed their appeal on conviction.

10. With regard to the sentence, the first appellate court agreed with the submission of the prosecution before it that the sentence should be enhanced as section 296(2) provides that anyone convicted of the offence of robbery with violence should be sentenced to death. The first appellate court therefore set aside the sentence of ten years imposed on the appellants by the trial court and substituted it with the sentence of death prescribed under section 296(2).

11. The appellants were dissatisfied with the decision of the first appellate court and have filed the present appeals. They raise the following five grounds of appeal in the Memorandum of Appeal dated 18th February, 2020:

    i. The Learned Judges erred in law and fact in failing to find that the prosecution did not prove their case beyond reasonable doubt.

    ii. The Learned Judges erred in law and fact by shifting the burden of proof to the appellants to prove their innocence and ignoring their defence all together.

    iii. The Learned judges erred in law by agreeing with the prosecution counsel that the Appellants sentence should be enhanced.

    iv. The Honourable Judges erred in law by meting out the sentence of death which was harsh and unconstitutional.

    v. The learned judges misapprehended the facts, applied wrong legal principles, and drew erroneous conclusion to the prejudice of the Appellants.

12. As this is a second appeal, our duty is confined to a consideration of matters of law. As was held in *Karani vs. 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."

13. The parties filed written submissions in support of their respective positions on the appeals. At the hearing of the appeals on 12th October 2021, the appellant's Counsel, Ms. Odinga, indicated that she would rely on the appellants' written submissions without highlighting the same. She however asked the Court to consider that the first appellate court had not warned the appellants that their sentence could be enhanced prior to proceeding with the appeal.

14. In the written submissions dated 18th February 2020, the appellants argue their 1st and 2nd grounds together, while they group grounds 3, 4 and 5 together. With respect to grounds 1 and 2, they argue that the burden of proof in a criminal case, with the standard of proof being beyond reasonable doubt, lies on the prosecution. They submit that the prosecution did not prove its case against them beyond

reasonable doubt as it did not produce in evidence the alleged flash lights that were said to have been used by the complainants to identify the appellants.

15. Regarding grounds 3, 4 and 5 which relate to the sentence imposed on them, the appellants submit that the decision of the first appellate court to sentence them to death is bad in law. They rely on the decision in *Francis Karioko Muruatetu & Another v Republic 2017 eKLR* to submit that the Supreme Court had held that the mandatory death sentence is unconstitutional. They contend that none of the victims or prosecution witnesses suffered grave injuries that left them with physical incapacities and none lost their life. Their submission therefore is that the sentence of death was harsh and should be substituted with a more lenient sentence. The appellants ask this Court to either quash their conviction, resentence them or reduce their sentence to ten years.

16. The respondent filed written submissions dated 19th February 2021. It notes that the appellants have raised matters of fact in a second appeal, which should not be entertained by this Court. With regard to the argument by the appellants that the prosecution did not produce the flashlights used to identify them, the respondent submits that the appellants were recognised by the complainant PW1, 2, 3, 5 and 6. These witnesses all recognised the appellants as they were known to them before the incident. The prosecution's evidence therefore was a matter of recognition and not identification.

17. Regarding the sentence, the respondent agrees with the submission of the appellants that the Supreme Court in Muruatetu had declared the mandatory nature of the death penalty unconstitutional. It submits that it would therefore leave the issue of sentencing to the discretion of the Court. It asks the Court, however, in exercising its discretion with regard to sentencing, to consider various aggravating factors, among them that the appellants were ruthless in their attack and caused the victims of the attack grievous harm.

18. At the hearing of the appeals, however, Mr. Shitsama, Counsel for the respondent, indicated that the State would concede the appeal with regard to the sentence as he had noted that the first appellate court had not warned the appellants about the likelihood of their sentence being enhanced should they proceed with their appeal. The State was however supporting the appeal with regard to conviction.

19. We have considered the appellants' grounds of appeal as well as their submissions with respect thereto. We have also considered the State's response. In light of the concession by the State with regard to the enhancement of the appellant's sentence, and having read the judgment of the first appellate court and found no indication that the appellants had been warned about the possibility that the sentence against them would be enhanced, we find that their appeals with respect to the sentence is merited. This Court has previously pronounced itself on the necessity of either notice of enhancement being given by the prosecution and/or the court issuing a warning before the sentence can be validly enhanced on appeal- see *Gushashi Lelesit v Republic [2016] eKLR*; *Isaac Muriithi Wambui v Republic [2016] eKLR* and *George Morara Achoki v Republic [2014] eKLR*.

20. Regarding the appellants' arguments on grounds i) and ii) which they have argued under the head of the burden of proof, we note that the grounds raise questions of fact, which are outside the ambit of this Court on a second appeal. Their argument on these grounds is that the prosecution did not produce the torches that the complainants used to identify the appellants as their assailants. We observe, first, that this issue was not raised on appeal before the first appellate court. In any event, we note that its re-evaluation of the evidence before the trial court led it to the conclusion that the prosecution witnesses, specifically PW1-6, had recognised the appellants as they were people they knew before the incident and who were their neighbours. Accordingly, we find no basis for interfering with the decision of the first appellate court as regards the conviction of the appellants. Their appeal against conviction is accordingly dismissed.

21. We observe in closing that the facts and circumstances of this case clearly showed that the offence disclosed was that of robbery with violence contrary to section 296(2) of the Penal Code. While the charge sheet indicated that the appellants were charged with the offence of robbery with violence contrary to section 296(1), which was clearly an error on the part of the prosecution, it was within the power of the trial court to amend the charge sheet. Nonetheless, given the concession by the State that the appellants were not warned that their sentence could be enhanced and our own finding that no such warning was given, we are constrained to find in favour of the appellants with respect to the issue of sentence.

22. In the result, we find that the appellants' appeal with respect to the sentence is merited. We set aside the sentence of death imposed by the first appellate court and substitute therefor the sentence of ten years' imprisonment imposed by the trial court.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF FEBRUARY, 2022

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR.