Ngugi v Republic (Criminal Appeal 128 of 2019)
[2022] KECA 26 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 26 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 128 OF 2019

MSA MAKHANDIA, A MBOGHOLI-MSAGHA & HA OMONDI, JJA

FEBRUARY 4, 2022

BETWEEN

JOHN KANGE'THE NGUGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the decision of the High Court of Kenya at Nairobi (Achode & Ochieng, JJ.) dated 21st December, 2012 in HCCRA NO. 207 OF 2008)

JUDGMENT

1 John Kange'the Ngugi, the appellant is trying his luck through this second and perhaps last appeal to this court. He was arrested, charged, convicted and sentenced to death by the chief Magistrate's court at Thika for the offence of Robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars that the appellant with three others, on the 8th January 2007 at Kiganjo village in Thika district within Central province, being armed with an offensive weapon namely a kitchen knife robbed Joseph Kimari Ngugi of his mobile phone make siemens C35 valued at Ksh. 8500/= and immediately before the time of such robbery used actual violence to the said Joseph Kimaru Ngugi. The appellant when arraigned in Court denied the charge and his trial soon thereafter ensued.

2. It was the prosecution's case that PW1 Joseph Kimathi Ngugi was walking towards Muhuhu Secondary School in Gatundu at about 9.00 am on 8th January 2007 when he met with some people on the way. He was immediately accosted and a knife held against his neck from behind by the said people. They demanded money and his phone, but before one of the people who turned out to be the appellant could remove the cash from his pocket, he hit him and he fell on the ground. The goggles and Marvin hat he was wearing fell off as a result and PW1 was able to see and recognize his face. PW1 screamed when the appellant tried to flee and members of the public came to his aid, chased and arrested the appellant. As the appellant ran he threw away the mobile phone, Marvin hat, the goggles, black pouch

and the knife. Following the arrest, he led the members of the public back to where, he had thrown the aforesaid items and were recovered.

3. Meanwhile, PW2, CIP Josiah Ngeno who was going about his other business and patrols bumped into the members of the public who had arrested and bound the appellant with a rope. Upon interrogating the members of the public and the appellant, he re-arrested the appellant and took possession of the exhibits and subsequently handed him over together with the recovered exhibits to PC Julius Ikiara PW3 who booked him at Gatundu Police Station and later charged him with the offence aforesaid.

4. The appellant denied the offence in his unsworn statement of defence. He testified that he had run into a crowd of people at 7.30 a.m. on the date in question while on his way to work. The crowd interrogated him and he was told that he was one of the people who had been robbing members of the public in that area. Police officers who were passing by arrested him and took him to Gatundu police station and he was subsequently charged with the offence which he knew nothing about. In addition, the appellant challenged the circumstances of his identification saying that none of the exhibits tendered in court were recovered from him at the time of his arrest.

5. Upon consideration of the evidence on record, the trial court held that the circumstances for the identification of the appellant were favourable as it was daytime. Further the appellant had led the members of the public to the recovery of the exhibits. The court was further satisfied that the ingredients for the offence of robbery with violence were met. The appellant was convicted of the offence and sentenced to death as already stated. His appeal to the High Court was for similar reasons dismissed by Achode and Ochieng, JJ.

6. Aggrieved by the judgment of the High Court the appellant filed this appeal and raised the following grounds of appeal; that he learned judges erred in law by not upholding the appellant's rights to be supplied with witness statements and occurrence book as requested hence there was no fair trial; by upholding the trial court's judgment without subjecting the evidence tendered in the that court to fresh and exhaustive interrogation as required by law; holding that the prosecution witnesses were credible, yet they contradicted themselves in material aspects and finally, that the sentence imposed was manifestly harsh and excessive.

7. At the hearing of the appeal the appellant was represented by Mrs. Chepseba learned counsel whereas, Ms. Matiru learned prosecution counsel appeared for the state. Counsel for the appellant urged that the High Court erred in upholding the findings of the trial court, since the appellant was never supplied with witness statements despite several requests. In the premises the appellant was not accorded a fair trial. She further submitted that several key and independent witnesses were not called to testify including the members of the public who chased and arrested him. In the premises the prosecution did not prove its case to the required standard. We were referred to the case of *Julius Kalewa Mutunga Vs. Republic* [2006] eKLR for this proposition.

8. It was submitted further that the High Court did not subject the evidence tendered in the trial Court to fresh and exhaustive examination and evaluation so as to reach its own independent conclusions as to the guilt or otherwise of the appellant. For this submission we were referred to the case of *Okeno Vs. Republic* [1972] E.A. 32. On sentence, we were urged to exercise our discretion and reduce the same in the light of the Supreme Court decision in the case of Francis Karioko Muruatetu & Another Vs. Republic [2017] eKLR.

9. The appeal was opposed on the basis that the prosecution witnesses who testified were credible and consistent and therefore their evidence was sufficient to sustain the conviction of the appellant. The appellant was never able to explain how he came by the complainant's items so soon after they had been robbed from him. That the appellant was represented by counsel throughout the trial and cannot

therefore be heard to claim that he was accorded an unfair trial on account of not being supplied with the witness statements and Occurrence Book. Finally, it was submitted that the sentence imposed was legal and that this court should uphold it.

10. This is a second appeal and our mandate has been succinctly set out in case of *Karani Vs. R* [2010] 1KLR 73 as follows:

> " 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 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."

11. Having carefully considered the record in the light of the rival submissions set out above and the principles of law relied upon by the respective parties, the issues of law that cry out for our determination are whether; the ingredients of robbery with violence were proved; the appellant was subjected to unfair trial by dint of not being supplied with witness statements and occurrence book; failure to call key witnesses impacted negatively on the prosecution case; the appellant's defence was considered and whether in the circumstances, sentence of death imposed on the appellant was manifestly harsh and excessive.

12. As already stated the appellant was charged with the offence robbery with violence contrary to section 296(2) of the penal code. The ingredients of the offence which the prosecution must prove so as to return a conviction, were set out in the case of *Johana Ndung'u Vs. Republic* [1996] eKLR thus:

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

    b. If he is in the company with one or more other person or

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

13. The prosecution however only needs to prove any one of the above ingredients. See *Oluoch Vs. Republic* [1985] KLR 549. The evidence tendered by the prosecution in support of any of the ingredients aforesaid has to be cogent though. In this case, PW1 testified that he was robbed on 18th January 2007 at about 9.00 a.m. by the appellant and other persons. In the process they violently held him from behind and placed a knife around his neck. Obviously, a knife in the circumstances in which it was being used in this case was a dangerous or offensive weapon. Further from the evidence of PW1 it is evident that those involved in the robbery were more than one. Further they visited violence on PW1 in the process. It is abundantly clear therefore that all the ingredients of the offence were established beyond peradventure, contrary to the submissions of the appellant. Accordingly, the trial court and 1st appellate court were all justified in concluding that the ingredients of the offence were met. We have no reason(s) to depart from those concurrent findings.

14 It is also instructive that PW1 freed himself just before the appellant and his cohorts could reach his pocket for the money. He knocked down the appellant and that is when he saw the face of the appellant when the goggles and Marvin that he was wearing fell off. Later and in the company of the members of the public they pursued and arrested the appellant. Following the arrest, he immediately identified him as the one who had just held a knife to his neck and robbed him of his belongings. Upon arrest the appellant led PW1 and members of the public to where he had thrown the phone, Marvin and

goggles and other exhibits. Given the foregoing the identity of the appellant as part of the gang that robbed PW1 cannot be in doubt. There is no evidence that throughout the chase and eventual arrest of the appellant by PW1 and members of the public, the chasers ever lost sight of him. Evidence of chase and arrest of an accused without losing sight of him in the process is good evidence that may find a conviction on it's own. There can be therefore no question of mistaken identity as all this was happening in broad daylight in any event. On the whole therefore there was sufficient evidence to connect the appellant with the crime.

15. On whether the trial was unfair, the appellant maintained that he was not supplied with witness statements and the occurrence book though he had requested for the same. Accordingly he was unable to adequately prepare his defence. Both section 77 of the *old Constitution* and Article 50 of the *current constitution* provide for the right to a fair hearing, which includes a right for the accused to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence. If this demand is not met, then the accused person would not have been accorded a fair trial. This was succinctly put by this court in *Thomas Patrick Gilbert Cholmondeley Vs. Republic* [2008] eKLR when it was held as follows:

> "We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items."

16. The record shows that the appellant made a request to be supplied with copies of witness statements and occurrence book long before the hearing of the case in the trial court commenced. Indeed an order was made to that effect. Thereafter the case came up for mention several times until 14th August 2007, when the hearing commenced. It is however not apparent on record whether the appellant's request was met. However, considering that the appellant was represented by counsel throughout the proceedings it is difficult to imagine that he would have agreed to the commencement of the hearing of the case without having availed the documents. It is thus safe to conclude that by the time the hearing commenced, the appellant was in possession of the documents and that is why he was rearing to go despite the record not showing so. If he was not ready for want of the OB and witness statements nothing would have stopped him from demanding and insisting on the same before the commencement of the trial. Indeed, from cross examination of the witness, it is quite clear that the appellant was conversant with the witness statements and the contents of the OB.

17. With regard to failure to call key witnesses, we note that the prosecution called three witnesses, the complainant and the two police officers. PW2 was the one who re- arrested the appellant from PW1 and members of the public. On the other hand PW3 was the one to whom PW2 handed over the appellant who proceeded to book him at Gatundu police station and later preferred the charge against him. These were crucial and vital witnesses in support of the prosecution case. The appellant urged that the members of the public who arrested him should have been called to testify. We do not think that, the appellant's argument suffices since the question of his arrest was never in dispute. In any event the circumstances leading to his arrest were clearly laid out by PW1 and PW2. As it has constantly been stated, the prosecution need not call a plethora of witnesses to prove a fact. Indeed section 143 of the *Evidence Act* reiterates this fact. That in the absence of a provision of the law, no particular number

of witnesses is required to prove a fact. In *Donald Majiwa Achilwa & 2 Others Vs. Republic* [2009] eKLR, this Court stated as follows:

> " The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses 'evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution with-holds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case."
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> (See also *Bukenya vs. Uganda* [1972] EA 549).

18. In this appeal, the evidence adduced by the prosecution was cogent enough to find a conviction, even without the additional evidence of the witnesses the appellant argues should have been called. The evidence was not bare as not to sustain the prosecution case. We therefore have no hesitation whatsoever in agreeing with the 1st appellate court that the evidence mounted by the prosecution was sufficient to return a conviction against the appellant.

19. On whether the appellant's defence was given due consideration, it was his submission that it was not and thus the trial court arrived at the wrong decision. On 28th May 2008, the appellant gave unsworn statement of defence. His defence was that he was accosted by people on his way to work who questioned and beat him on allegation that he had been stealing from people within the area. The trial court indeed considered the defence at length in the judgment and found it wanting. Similarly the 1st appellate court reviewed the defence and came to the same conclusion that it did not displace the prosecution case. It cannot therefore be true as submitted by the appellant that his defence was not considered by the two courts below. Lastly, these being concurrent findings of the two courts below, we have no reason to depart from them.

20. The appellant also raised the ground that the High Court erred in not subjecting the evidence tendered in the trial court to fresh and exhaustive re-evaluation and analysis so as to reach its independent conclusions on the evidence as required by law, in terms of Okeno Vs. Republic [1972] EA 32.

21. The record is clear that the High Court did subject the evidence tendered to exhaustive and fresh analysis before reaching its conclusion that the appeal was devoid of merit. Indeed, the court did make reference to the famous case of Okeno Vs. Republic aforesaid and did weigh conflicting evidence and drew its own conclusions. We appreciate that there is no set format for the re-evaluation of evidence. Each court has its own style of undertaking such an exercise. See *Salim Juma Dimiro Vs. Republic*, Criminal Appeal Number 114 of 2004 (UR). On the whole and having examined the judgment of the High Court, we think, with respect, that the criticism levelled against it is wholly unjustified.

22. The sentence for robbery with violence is death. The appellant urged us to exercise our discretion and reduce the sentence though. Mrs. Chepseba counsel for the appellant urged us to invoke Muruatetu case in this regard, which in her opinion, was applicable in the circumstances of this case. Recently however the Supreme Court of Kenya issue directions in the *Muruatetu case*, in terms:

> " It should be apparent from the foregoing that Muruatetucannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court. To clear the confusion

that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

23. It therefore follows that the Muruatetu case is not applicable to this appeal. We cannot therefore revisit the sentence imposed on the appellant as it was legal. In the result the appeal is devoid of merit and is accordingly dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY,2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

H. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR