Rashid & another v Republic (Criminal Appeal 118 of 2018)
[2022] KECA 37 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 37 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 118 OF 2018

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

FEBRUARY 4, 2022

BETWEEN

WAMADU KULOBA RASHID ..... 1ST APPELLANT

RICHARD SAM MAGAR ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Ogolla J. and Kamau J.) dated 13th November 2013 in Nairobi)

JUDGMENT

1. The appellants were charged before the Principal Magistrate's Court at Kikuyu in Criminal Case No. 41 of 2006 with three counts of robbery with violence contrary to Section 296 (2) of the *Penal Code*. To each of the three counts, the appellants also faced alternative charges of handling stolen property contrary to Section 322 of the Penal Code. The particulars of the main counts were that on the night of 16th December 2006 at Nyarugumu village in Kiambu District, the appellants jointly with others, armed with crude weapons robbed the complainant in count 1 of a VCD player and Kshs. 8,000/= and used actual violence on the complainant. In count 2 they allegedly robbed the complainant of Kshs. 5,070/= while threatening to use actual violence on her. On the same night at Kiambaa village in Kiambu District they were said to have robbed the complainant in count 3 of a television set, a radio, two mobile phones, three bed sheets, one bed cover and Kshs. 3,000/= and used actual violence on the complainant. They denied the offences and a trial followed.

2. At the conclusion of the trial the learned trial magistrate found that, while no identification parade was conducted, the evidence that the appellants were found with some of stolen items and thereafter led the police to a hideout where other items were recovered brought into play the doctrine of recent possession, and linked the appellants to the commission of the offences. The learned trial magistrate

found the appellants guilty and convicted them accordingly. At sentencing, the learned trial magistrate considered the mitigation by the appellants but held that, her hands were tied when it came to sentencing and accordingly sentenced the appellants to suffer death.

3. Aggrieved by the conviction and sentence, the appellants filed an appeal Nairobi High Court Criminal Appeal No. 311 of 2010. The 1st appellant's grounds were that, the learned magistrate erred in law and fact when she convicted him on the basis of identification by PW1 and PW3 without considering the same was mistaken; by convicting him without considering the items were never recovered in his control and that there was no inventory form, recovery form or search warrant; by convicting him without considering that he was just a mere victim of circumstances; by failing to find that the prosecution did not call vital and crucial witnesses to testify; by failing to note that the charge sheet was defective; and by rejecting the appellant's defence without giving good reasons, thus violating Section 169(1) of the *Criminal Procedure Code*.

4. The 2nd appellant's grounds were that, the learned trial magistrate erred in law and fact by failing: to apply the provisions of Section 214 (1) of the Criminal Procedure Code to amend the charge sheet, thereby rendering the charges defective; by applying the doctrine of recent possession yet the exhibits were not positively identified as required by law; failing to observe that the identification of the appellant was unreliable; by failing to observe that the evidence that they led the police to the recovery of the stolen items was not established as the law requires; and by failing to observe that the ingredients of robbery with violence were not proved beyond reasonable doubt.

5. In its judgment, the High Court observed that the issue for determination was whether or not the appellants were the people who committed the said offences; and that the issue was hinged on the identification of the appellants and the application of the doctrine of recent possession. It found the prosecution witnesses candid and truthful, holding that PW3 and PW4 clearly identified the appellants and if there should be any doubt about identification, the doctrine of recent possession corroborated the same beyond reasonable doubt. The evidence of PW6 to the effect that both appellants led the police to where other stolen items belonging to PW3 were found was crucial as the appellants, in their unsworn defence, did not give any explanation as to how they knew where the stolen items were hidden. The burden of proof fell on the appellants to give a plausible reason as to how they came into possession of some of the stolen items. The High Court however held that count 2 was not proved beyond reasonable doubt. The court upheld the conviction on counts 1 and 3 and set aside the conviction on count 2. On the sentence, the court upheld the sentence on count 1 and suspended the sentence on count 3.

6. Still aggrieved, the appellant filed the instant appeal on the grounds contained in their supplementary memorandum of appeal dated 15th February 2019. The grounds are that the High Court judges erred in law by:

    a) Basing their findings on assumptions rather than facts of the case as to why PW1 and PW2 could not identify the appellants.

    b) Copying most of the lower court's judgment and made little or no interrogation/observation of their own as required by law.

    c) Relying on hearsay evidence of the arresting officer and failing to hold that in the absence of the investigating officer's evidence, a fatal doubt was left in the prosecution case.

    d) Failing to hold that the lower court relied on non-credible and contradictory prosecution evidence to convict the appellants.

e) Failing to hold that dock identification was worthless without description of the suspects in the complainant's first report or an identification parade.

f) Failing to hold that voice identification was necessary if the appellants were to be placed at the scene of crime.

g) Failing to find that the prosecution failed to establish a prima facie case against the appellants and give them a benefit of doubt.

h) Upholding circumstantial evidence that was not watertight.

i) Upholding visual identification by PW3 and PW4 under difficult circumstances.

j) Upholding the application of the doctrine of recent possession by the lower courts out of context.

k) Upholding the death sentences yet it was declared unconstitutional.

7. Ms Chepseba, learned counsel for the appellants, filed written submissions and thereafter highlighted the same at the hearing. Counsel submitted that the High Court failed in its duty as the first appellate court to review the evidence, re-evaluate the same and arrive at an independent decision as required by law. Counsel relied on the cases of *Kiilu & another v Republic [2005] 1 KLR 174* and *Karianjah Waiganjo v R [2017]eKLR*. Instead counsel contended that the High Court copied most of the lower court's judgment thus denying the appellants the right to a fair trial as provided under Article 50 (2) of the *Constitution*.

8. Counsel submitted that the High Court failed to recognize the exclusion of crucial witnesses from testifying, particularly the evidence of PW6 the arresting officer ought to have been corroborated by the investigating officer and the persons who were at the recovery scene. Further, while it is trite law that the issue of whether a witness should be called by the prosecution was within the prosecution's discretion, the court can intervene where there is oblique motive in omission of certain crucial witnesses, as stated in *Julius Kalewa Mutunga v Republic [2006] eKLR*.

9. Counsel cited the Tanzanian Court of Appeal case of *January Makanta v Republic Criminal Appeal No. 194 of 2015* forthe proposition that the prosecution has a prima facie duty to call witnesses who are able to testify on material facts; and if such witnesses are within reach and are not called without sufficient reason being shown, the court may draw an inference adverse to the prosecution. Counsel submitted that the failure by the prosecution to produce key witnesses is in itself an infringement of the right to fair hearing, particularly Article 50(2)(b) which includes the right to be informed of the charge with sufficient details to answer it.

10. Ms Chepseba submitted that the High Court arrived at the unprecedented conclusion that there was no possibility of error in visual identification while the incident allegedly occurred at night and the victims were traumatised. Counsel cited *Francis Kariuki Njiru and others v R [2001] eKLR* for the propositionthat evidence relating to identification must be scrutinized carefully and should only be accepted and acted on if the court is satisfied that the identification is positive and free from the possibility of error. Counsel also cited *John Wachira Wandia & another v Republic [2006] eKLR* for the proposition thatevidence of identification/recognition at night must be absolutely watertight to justify conviction; and the Tanzanian Court of Appeal decision of *Hassan Said v Republic Criminal Appeal No. 246 of 2015* for the proposition that in identification of a stranger, clear evidence on source of light and its intensity is of paramount importance. Further, where visual identification is in question, it should be corroborated with other similar evidence such as voice identification or recognition.

11. The High Court was faulted for relying on the visual identification without considering the possibility that PW3 and PW4 were traumatised to the extent that they could not clearly see the culprits; and that the evidence was not corroborated with other evidence such as voice identification.

12. It was pointed out that PW 3 and PW4 identified the appellants in the dock without any first report made to the police on the suspects' appearance or any identification parade being conducted. In the event of identification of a stranger in difficult circumstances it is desirable that such identifications be preceded by a well conducted identification parade as was held in *Ajode v Republic [2004] eKLR*, *Gabriel Njoroge v Republic [1982-1988] 1 KAR 1134*. For the proposition thatfailure to adhere to identification parade guidelines will affect the evidential value of a resulting identification, counsel cited*David Arum Okullo & another v R [2007] eKLR*.

13. On the issue of the failure of the court to establish a prima facie case against the appellants, counsel submitted that there were a lot of contradictory statements made by the prosecution witnesses that should have left doubts in the prosecution case. There were contradictory statements regarding the number of robbers, the weapons the robbers had, how the robbers entered the house of PW4, whether actual violence was used on the victims and how some of the robbers met their deaths.

14. Counsel contended that these contradictions should have created as big doubt in the prosecution case. Any benefit of doubt is normally resolved in favour of the accused which should have been the case here. Counsel cited *Philip Muiruri Ndaruga v Republic [2016] eKLR* for the proposition that, even a single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient to give an accused the benefit of doubt.

15. On the issue of circumstantial evidence, counsel submitted that the circumstantial evidence that PW6 arrested the appellants with the alleged stolen items in the course of their foot patrol was vague. The appellants had not been described to the police officers by the time of the arrest and it was therefore misleading evidence that the police officers just approached the appellants and arrested them without any description of the robbers. Counsel cited *Abanga alias Onyango v Republic Criminal Appeal No. 32 of 1990 (unreported)* where this court stated that, when a case rests on circumstantial evidence, such evidence must satisfy three tests (i) the circumstances from which an inference of guilt is to be drawn must be cogently and firmly established (ii) those circumstances should be a definite tendency unerringly pointing towards the guilt of the accused (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. In the case of *Sawe v Republic [2003] KLR 203* another factor was added that, there must not be any co-existing facts or circumstance which may weaken or destroy that inference of guilt of the accused person.

16. On the issue of the doctrine of recent possession, Counsel cited the cases of *Erick Otieno Arum v Republic [2006] eKLR* and *Ng'ang'a Kahiga v Republic Cr. App. No. 272 of 2005 (UR)* for the proposition that before a court can rely on the doctrine of recent possession as a basis for conviction, there must be positive proof that the property was found with the suspect; that the property was positively the property of the complainant; that the property was stolen from the complainant; that the property was recently stolen from the complainant, with proof as to time depending on the easiness with which the stolen property can move from one person to another.

17. Counsel submitted that the High Court judges ought to have weighed whether the alleged stolen items found with the appellants were actually stolen by them. Regarding the items recovered in the bush, no inventory the recovery was prepared nor did the investigation officer testify. The item alleged to have been recovered by PW6 was a DVD and not a VCD as earlier recorded by PW1. Since

the principles guiding the application of the doctrine of recent possession were not adhered to, no rebuttable presumption arose.

18. Regarding the death sentences imposed on the appellants, counsel submitted that Article 26 of the Constitution provides that every person has a right to life and no person shall be deprived of this right intentionally. The mandatory nature of the death penalty under Section 296 of the Penal Code had been declared unconstitutional in various international conventions that Kenya is a party to, as well as precedents.

19. That the principles enunciated in *Francis Karioko Muruatetu v Republic (2017) eKLR* to the effect that themandatory nature of the death sentence provided under Sections 296 (2) and 297 (2) of the Penal Code was unconstitutional were also echoed in this Court's decision of *William Okungu Kittiny v Republic [2018] eKLR*. Counsel also referred to the United Nations Commission on Human Rights' Resolution number 2005/59 in which the Commission urged all states that maintain the death penalty not to impose it but for the most serious crimes and only pursuant to a final judgment rendered by an independent and impartial competent court, and to ensure the right of a fair trial and the right to seek pardon or commutation of sentence are adhered to.

20. Ms Margaret Matiru, counsel for the respondent opposed the appeal. On the issue of identification, counsel submitted that the appellants were properly identified by PW3 and PW4. Counsel contended that the High Court re-valuated the evidence and arrived at its own independent determination. The doctrine of recent possession was properly applied; the appellants were the ones who led the police to the stolen items and that there is no confusion as to how they knew where the stolen items had been hidden. The appellants must have had prior knowledge as to how the items got there, which can only lead to the conclusion that they were the ones who had stolen those items.

21. Counsel submitted that the circumstances under which the offence was committed were aggravated and the death sentence was merited. That the appellants were armed with clubs and pangas which made the victims apprehensive. PW3 ended up in a hospital having lost consciousness because of the injuries she received to her face, hands and mouth. It was clear that the appellants were out to cause grievous harm. Counsel submitted the sentence was safe and meted out according to the law.

22. The duty of this Court as the second appellate court was set out in *Chris Kasamba Karani v Republic [2010] eKLR*:

> " 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. The contention that the High Court's judgment was a mere copy-and paste of the lower court's judgment does not hold water as the two judgments are markedly different. While the lower court treated the identification of the appellants by PW3 and PW4 as dock identification, the learned judge made no such finding. Similarly, the learned judge found that PW1 and PW2 were too traumatised to identify the robbers, but the lower court reached no such conclusion. While the lower court found the evidence satisfactory to secure conviction on all three counts, the learned judge gave the appellants the benefit of doubt with respect to Count 2. It is clear that the High Court had done its duty of considering and evaluating the evidence afresh and drawing its own conclusions. PW3 and PW4 were

the only witnesses who stated that they were able to identify the appellants. Contrary to the assertions by the appellants that the visual identification was under difficult circumstances, the evidence indicates that the electric light in the house was on, enabling PW3 and PW4 to see the faces of the robbers well. There was no evidence to support the appellant's assertion that the witnesses were too traumatised as not to be able to identify the robbers. The appellants were not in any way disguised as to make their identification difficult. Further there is evidence that the appellants took time with the victims thereby giving ample time for the witness to identify them. There is no need to dwell on dock identification unless they were are discrediting the evidence of identification with the consequence that the trial court should not have relied on it to found a conviction!)

24. In the present case, the learned judge noted that PW3 and PW4 clearly identified the appellants which fact was confirmed by the High Court. These being concurrent findings of the two courts below, we have no reason or basis to depart from them.

25. Finally, the learned judge held that if there was any doubt as to the appellants' identification, then the doctrine of recent possession corroborates the same beyond any reasonable doubt. We agree with that finding though the appellants have taken issue with this finding.

In *Isaac Ng'ang'a Kahiga & another v Republic [2006] eKLR*, it was held:

> " It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."

And in *Hassan v Republic (2005) 2 KLR 11*, it was held:

> " Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver."

26. The two courts below were satisfied with the evidence of PW6 to the effect that soon after the robberies, the DVD was found in possession of the 2nd appellant and that both appellants later led PW6 to where the other stolen items were recovered. There is no reason for us to depart from these concurrent findings. The appellants were found by the police in possession of the DVD machine on the night of the robberies and when arrested. The machine was described differently by the various witnesses as a VCD machine, a DVD machine, or a video machine. However, when PW1 and PW2 were called to the police station to identify the machine, PW1 produced a receipt for an Aftron VCD player with the same model number and serial number as the machine that the appellants were found in possession of. Further, PW2 pointed out a distinguishing feature of the recovered machine; that it was missing a single rubber support that remained on top of the television at the scene. Any doubt that the machine recovered from the appellants was the same machine stolen from PW1's house was thereby disabused.

27. The evidence of PW6 indicates that while it was the 2nd appellant who was carrying the bag containing the machine, the 1st appellant did not disassociate himself from possession but was the one who offered

an explanation as to their possession of the same, to the effect that the 2nd appellant's mother had given them the machine to sell and raise fare. The appellants were unable to follow through with the explanation and take the police to their mothers. Instead, after interrogation, the appellants led the police to a bush where other stolen items were recovered. No explanation was offered as to how the appellants had come to know of where the other stolen items were.

28. The appellants also contended that the evidence of PW6 ought to have been corroborated by the investigating officer and persons at the recovery scene., Section 143 of the *Evidence Act* provides that no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact. The evidence of PW6 combined with the identification of the stolen items by the complainant was sufficient to secure a safe conviction with regard to Counts 1 and 3 based on the doctrine of recent possession.

29. The appellants faulted the learned judge for upholding the death sentence meted out by the lower court on the strength of the Supreme Court decision in *Francis Karioko Muruatetu v Republic* (*supra*) to the effect that Section 204 of the PenalCode is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder; and on the strength of the case of *William Okungu Kittiny v Republic* [2018] eKLR where this Court, differentlyconstituted, held that the findings of the Supreme Court in the *Muruatetu case* applies *mutatis mutandis* to offences underSection 296 (2) and 297 (2) of the Penal Code with regard to the mandatory death sentence for the offences of robbery with violence and attempted robbery with violence.

33. However, the Supreme Court on 6th July 2021 issued directions on the applicability of the Muruatetu case to mandatory sentences in offences other than murder (*Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR*). The Supreme Court was explicit that their findings were only applicable to cases of murder:

> " [14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentenc es are inconsistent with the Constitution...
>
> [15] 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 29(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."

34. Without a proper challenge on the constitutional validity of the mandatory death penalty for the offence of robbery with violence having been successfully argued before the relevant courts, there is no basis for interfering with the decision of the first appellate court.

35. The end result is that this appeal is dismissed.

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