Pius & another v Republic (Criminal Appeal 8 of 2018)
[2022] KECA 460 (KLR) (18 March 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 8 OF 2018

MSA MAKHANDIA, J MOHAMMED & KI LAIBUTA, JJA

MARCH 18, 2022

BETWEEN

ALFRED PETER PIUS ..... 1ST APPELLANT

EDWARD PAUL TESHA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kajiado (Nyakundi, J.) dated 16th December, 2016 in Criminal Appeal 5 of 2015)

JUDGMENT

1. The appellants, Alfred Peter Pius and Edward Paul Tesha, were jointly arraigned before the Principal Magistrate's Court at Kajiado on a charge of robbery with violence contrary to Section 296 (2) of the *Penal Code*. The particulars of the offence were that on the 28th day of October 2013 at 3.00 p.m. at Kiana Ndege in Loitoktok District within Kajiado County, while armed with a *panga* and *rungus* robbed James Mutua Mutate of a motor cycle registration number KMDC 360C Sky Go, the property of one, Sarah Wanjiku Njoroge, valued at Kshs. 72,000/- and a mobile phone make Techno valued at Kshs. 3,000/-, a pair of shoes worth Kshs. 500/- and cash 800/- the property of James Mutua Muteti and immediately after used actual violence by cutting him with a panga. They also faced an alternative charge of handling stolen property contrary to Section 322 of the Penal Code with the particulars being that on the same day, time and place otherwise than in the course of stealing, dishonestly received the motor cycle registration number KMDC-360C Sky Go blue in colour knowing and believing it to have been stolen.

2. The appellants denied both charges prompting a trial in which the prosecution called four witnesses in support of the charges. From the record, PW1 James Mutua Muteti who was the complainant testified that he is a *bodaboda* operator employed by PW2, Serah Wanjiku Njoroge and that on 28th October

2013 whilst on his normal duties, at a place known as Kisilu, he was beckoned by a person who asked him to drop him at the Airstrip. That while at the airstrip, and as they negotiated the fare, two people emerged from both sides and started assaulting him with rungus and pangas and the Pillion passenger he had ferried pushed him off the motor cycle and he fell down. The three men then took possession of the motor cycle and rode off. He raised alarm and members of the public came to his rescue. He requested them to help him trace his motor cycle. He was rushed to Loitoktok Hospital and later learnt that the motor cycle had been traced and recovered.

3. PW2 Serah Wanjiku Njoroge on her part testified that she was the owner of the motor cycle which she bought at a cost of Kshs. 72,000/- and gave the same to PW1 to carry out *bodaboda* business on her behalf. She confirmed receiving information of the motor cycle having been violently stolen from PW1, who had been admitted at Loitoktok Hospital for treatment as a result.

4. PW3, Dr. Stephen Mutiso, a medical practitioner gave evidence on behalf of Dr. Odhiambo who had been transferred from Loitoktok Hospital. He testified that Dr. Odhiambo had filled a P3 Form for PW1 which showed that he had a cut wound on the head and the probable weapon used was sharp. He had also performed a post- mortem examination on one Vincent Mandashia on 4th November 2013 and reached the conclusion that the cause of his death was severe head injury and exposed brain tissue. The deceased was alleged to have been among the three who confronted and robbed PW1 of the motor cycle

5. The investigating officer, PW4 one Munga Mbwana, testified that on the 28th October 2013 at around 4.30 p.m. while in the office he was called by Deputy Officer Commanding Police Station and informed that some people were being assaulted by a mob at Ngama area on suspicion of having stolen a motor cycle and, upon arrival at the scene, he found his colleagues who had rescued one person that was critically injured and later died. That person was the deceased, Vincent Mandasia. The other two were still being assaulted by the mob but he managed to rescue them. They were all in critical condition and were rushed to Loitoktok District Hospital for treatment. At the hospital they found PW1 who was being treated for head injuries, and who immediately identified the two as being among those who had violently robbed him of the motor cycle. These are the appellants. When they were discharged from hospital, they were taken to the Police Station for interrogation and were later charged. That there was no need for an identification parade to be conducted in respect of the appellants as the offence was committed in broad day light and PW1 had seen them well.

6. At the conclusion of the prosecution's case, the appellants were placed on their defence and they opted to give unsworn statements. The 1st appellant raised the defence of alibi while the 2nd appellant merely denied committing the offence.

7. The trial magistrate, found the appellants guilty, convicted them and sentenced them to suffer death in count 1. The appellants were aggrieved and appealed to the High Court raising various grounds. In the judgment delivered on 16th December 2016, Nyakundi, J. dismissed the appeals and confirmed the appellants' convictions and sentence.

   The appellants are now before us on a second and perhaps last appeal. The grounds of appeal are that the 1st appellate court failed in its statutory duty to re-evaluate, re-assess and re-analyse the evidence tendered in the trial court so as to reach its own independent conclusions on the evidence; that the doctrine of recent possession was wrongly invoked; that the prosecution case was not proved beyond reasonable doubt and finally; the sentence imposed was manifestly harsh and excessive.

8. When the appeal came up for hearing, Mr. Mutune, learned counsel, appeared for the appellants whilst Ms. Matiru, learned prosecution counsel appeared for the respondent.

9. On the first issue, the appellants submitted that the High Court did not re-evaluate the evidence adduced before the trial Court on Six grounds when; it wrongly concluded that PW1 had the opportunity to see the appellants before the attack in good light yet it was clear that he was attacked while they were negotiating charges and could not therefore have seen the appellants. Secondly, that PW1 was not a reliable witness and no weight should have been attached to his identification evidence.

10. Thirdly, that the High Court failed to take notice that the P3 forms did not match as they exhibited different dates yet the conviction was upheld on the basis of injury to PW1. Fourthly, that the High Court failed to observe that the trial Court did not warn itself of the dangers of mistaken identity and the evidence of a single identifying witness. Further, that the chain of events was broken and there was therefore need for corroboration from crucial eye witnesses who were never called and, lastly, there was inconsistency in the evidence of PW4, which the court ought to have considered and resolved in favour of the appellants.

11. On the second issue, the appellants submitted that the court failed to find that the appellants were in constructive possession and not actual possession of the motor cycle as the deceased attacker was the one who was in control of the motor cycle. Accordingly, the doctrine of recent possession was inapplicable in the circumstances.

12. On the third issue, the appellants submitted that the prosecution did not prove the case against them to the required standard as PW1 could not identify the appellants in court as the perpetrators of the crime.

13. Lastly, the appellants submitted that the mandatory death sentence for capital offences had been deemed unconstitutional by the Supreme Court and therefore this Court ought to reconsider the death sentence imposed on them. Further, that this Court ought to consider the fact that the injuries sustained by PW1 were not fatal and the motor cycle was recovered.

14. Opposing the appeal, the respondent submitted that the High Court did re-evaluate and re-examine the evidence and drew its own conclusion on the evidence tendered in the trial court contrary to the submissions by the appellants. Indeed, in so doing, it adverted to the much-celebrated case of *Okeno Vs. Republic 1972 EA 32*.

15. That there are instances where the 1st appellate court will arrive at findings similar to those of the trial court and there are also instances where the 1st appellate will reach different conclusions, only that the findings are based on evidence and the law. That even though the 1st appellate court introduced the aspect of positive visual identification of the appellants, the conviction of the appellants was not solely hinged on the evidence of visual identification, but also evidence of recent possession. That the two courts below made concurrent findings on the doctrine of recent possession guided by the decision of *Adan Muraguri Mungara Vs. Republic [2010] eKLR*, this Court should not interfere with such concurrent findings. The argument that the appellants were in constructive possession while the deceased was in actual possession is not well founded in law but a matter of semantics. That the error as to time when the offence was committed can be cured under Section 382 of the Criminal Procedure Code and, in any event, the error did not occasion any injustice to the appellants.

    Lastly, on the unconstitutionality of death sentence imposed, the respondent submitted that the assertion by the appellants has been overtaken by events following the directions given by the Supreme Court on 6th July 2021 in the case of *Francis Karioko Muruatetu & Another Vs. Republic;Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR* in which the court directed that the holding was only applicable in cases of murder contrary to Section 203 as read with Section 204 of the Penal Code. That this court in the case of *Joseph Njuguna Mwaura & 2 Others Vs. Republic [2013] eKLR* , had

determined that death penalty was still lawful and can still be imposed in cases of robbery with violence contrary to Section 296 (2) of the Penal Code.

16. As was stated in *Karingo Vs. Republic [1982] KLR 214*, a second appellate court will only deal with matters of law and as a general rule will not interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. This was further emphasized in *Chemagong Vs. Republic [1984] KL*R 213 when this Court held *inter alia* : -

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."

17. We have examined the record before us, the grounds of appeal raised by the appellants and considered them in the light of the rival arguments set out above. In our view, four issues of law that arise for our determination are whether: the first appellate court discharged its mandate as required by law; the case against the appellants was proved beyond reasonable doubt to warrant the conviction and sentence; the appellants' visual identification at the scene of the robberies was free from error; and whether the death sentence imposed should be reviewed.

18. With regard to the straight forward issue number one, our perusal of the record reveals that the 1st appellate court took a correct approach in the discharge of its mandate, consistent with the duty of a fresh and exhaustive re-analysis and re-evaluation of the entire evidence tendered in the trial court so as to reach its independent conclusions in terms of Okeno Vs. Republic (supra). We appreciate that there is no set formula or criterion for carrying out that mandate. However, the record must demonstrate deference to this statutory requirement. We have no doubt that the 1st appellate court performed this task admirably and the appellants' submissions to the contrary has no basis at all.

19. On the second issue regarding whether the case of robbery with violence was proved, we must advert to the ingredients of the offence of robbery with violence. This were clearly set out by this Court in the case of *Oluoch Vs. Republic [1985] KLR* as follows:

> 'Robbery with violence is committed in any of the following circumstances:
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> The offender is armed with any dangerous and offensive weapon or instrument; or
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> The offender is in company with one or more person or persons; or
>
> 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 ..."

20. It was further stated that the use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish the offence of robbery with violence under Section 296(2) of the Penal Code.

21. We have gone through the record and are satisfied with the concurrent findings of both courts below that the above ingredients were all proved beyond reasonable doubt. There was evidence that the robbers were armed with rungus and pangas which in the circumstances were dangerous and offensive weapons. Further, there was evidence the robbers were more than one. Indeed, they were three. Finally, the robbers inflicted serious injuries on PW1 using the *pangas* and *rungus* that led to severe injuries and the admission of PW1 in Loitoktok Hospital. Turning to the third issue, there is no doubt that the 1st appellate court was alive to the fact that the determination of the issue of identification of the

appellants at the scene of the robbery was key in the success or otherwise of the appeal before it. This is borne out by the following observations on the record: -

> Having reviewed the evidence and applicable law I am satisfied that the trial magistrate rightly convicted the appellants with the offence of robbery with violence. In the same manner the appellants challenged the prosecution evidence on identification. With regard to identification, I will rely on the Court of Appeal, Case of Muiruri & 2 Others v Republic[2002] 1KLR 274 . The Court of Appeal discussing the value of dock identification stated as follows:
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> "It is believed that because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of the crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of.
>
> But the holding in Gabriel Njoroge Case [1982 – 88] 1KAR 1134 appears to be too broadly touched. We do not think it can be said that all dock identification is worthless if that were to be the case then decisions like Abdalla Bin Wendo v Republic [1953] 20 EACA 166, Roria v Republic [1967] EA 583 and Charles Maitanyi v Republic [1986] 2 KAR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single witness on identification will have no place in our jurisprudence.**
>
> In those cases, courts have emphazed the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to find a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and prior thereto the court duly warns itself of the possible danger of mistaken identification."**
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> Applying these principles to this appeal it should be pointed out that according to PW1, the attack and robbery took place at 3.00 pm in broad day-light. PW1 had the opportunity to view the appellants before the attack in good light. There was no chance of mistaken identity. Furthermore, this was corroborated by the doctrine of recent possession. The complainant's explanation about the motorcycle was overwhelming and the police officers' evidence was rightly accepted by the trial court.
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> The appellants invited the court attention that there was no clear description of the stolen motorcycle by the complainant (PW1) and PW2. On the issue of possession, the appellants had made attempt to dispute the receipts as a form of proof of ownership of motorcycle alleging fabrication of evidence. The motorcycle stolen from PW1 was recovered a few minutes after the robbery. This answers the vital question relating to the appellants' possession of the complainant's property. The possession was not just recent, but followed the robbery.
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> What is the irresistible inference to be drawn from the evidence? I find guidance in the case of Gideon M. Koyiet v Republic [2013] eKLR where the Court of Appeal held on the doctrine of recent possession thus:**
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> a. The property must have been found with the suspect.
>
> b. The property must positively identified as the property of the complainant.

c. The property must be proved to have been recently stolen from the complainant.

Once the prosecution present evidence on possession, the burden to disapprove shifts to the appellants. In Paul Mwita Robi v Republic Cr. Appeal 200 of 2008 the Court of Appeal said:

"Thus, while the law is that generally in criminal trials the prosecution has the burden of proving the case against the accused throughout and that burden does not shift to the accused, however in a case where one is found in possession of a recently stolen property like in this case, the evidence burden shifts to him to explain his possession. That explanation only needs to be plausible but he needs to put it forward for the court's consideration."

22. We have no reason to fault this reasoning. The learned judge correctly found that the appellants had been clearly identified by PW1 as at the time of commission of the offence, there was light since it was 3pm in the day and PW1 had all the time to see the attackers.

23. Further, the appellants and their deceased cohort were arrested by the members of the public shortly after seizing the motor cycle from PW1. It is instructive to note that at the time they were arrested, the three were still riding on the motorcycle just like PW1 had described to the members of the public. The appellants had the motorcycle, which belonged to PW2. Although they tried to deny ownership of the motor cycle by PW2, they did not persuade the trial court that they had documents that showed that the same belonged to them either. When the appellants were taken to the hospital by the police who rescued them, they were identified by PW1 as the persons who had just assaulted him and stolen his motor cycle. There is no evidence on record that the appellants were hooded or disguised as to make their identification difficult. It should be appreciated that their identification by PW1 was hardly an hour after the incident.

In the case of *Mwaura Vs. Republic [1987] KLR*,the Court of Appeal held:

'In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of the time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light.'

24. The 1st appellate court upheld the trial magistrate's findings as to the correctness of the identification of the appellants at the scene of the robbery because PW1 had spent a considerable time with their attackers. The flow of events from the time of the robbery to the mob justice being meted out to the appellants, their rescue by the police and being taken to hospital where they were equally identified by PW1 left no doubt that they were indeed the persons who committed the robbery. Given the circumstances, the identification of the appellants cannot be said to have been dock identification as claimed by the appellants.

25. The appellants in essence admit the fact that they were found in possession of the motor cycle, but insist that they should have been treated as being in constructive possession as opposed to actual possession. However, possession is defined in Section 4 of the Penal Code in the following terms:

a. "be in possession of" or "have in possession" includes not only having in one's own personal possession but also knowingly having anything in the actual possession or custody of any other person, or having in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person;

b. if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed taken to be in the custody and possession of each and all of them.

26. Further, in *Hussein Vs. Republic (1980) KLR 139*,this Court differently constituted stated that,

> "In this definition on possession. It does not mean that any legal title had to be proved, nor that access to the complete exclusion of all other persons to be shown, but that a possession must have such access to and physical control over the thing that he is in a possession to deal with it as an owner could to the exclusion of strangers."

27. From the above definitions, possession may be actual or constructive. Actual possession, denotes physical custody or control of an item or object. In that case the person in possession has immediate contact. Whereas, in constructive possession an individual has actual control over the goods or property without actually having physical control of the same assets. At law, a person with constructive possession stands in the same legal position as a person with actual possession.

28. From the record, members of the public who heard the cry for help from PW1 pursued the appellants and cornered them hardly thirty minutes after the incident. They were found in actual possession of the motor cycle. The same was, as it were, not stored at a different place from where they were, so that constructive possession could be inferred. Yes, the deceased may have been the one who was actually riding the motor cycle with the appellants as pillion passengers thereon but they were all accomplices in the crime and cannot be heard to say they were merely in constructive possession. Either way, they were found by members of the public in possession of the motor cycle that had been stolen from PW1. The appellants did not claim that they had hired the deceased to take them somewhere on the motorcycle. Given the circumstances, there is no doubt that the doctrine of recent possession was properly invoked.

29. The appellants cited some inconsistencies and contradictions in the prosecution case, for instance, the time the incident happened. In *Peter Ngure Mwangi Vs. Republic [2014] eKLR*, this Court, when dealing with the question of alleged inconsistencies in evidence, took the position that the main consideration should be whether the inconsistencies were material enough to weaken the probative value of the prosecution evidence. The Court stated as follows: -

> " We, therefore find that on the totality of the evidence before us, any difference there may have been in the evidence adduced by the prosecution consisted of minor discrepancies and inconsistencies. We find that these were not material and did not weaken the probative value of the evidence tendered by the prosecution in support of their case."

30. In our view, the alleged inconsistencies were minor and inconsequential. They did not go to the root of the prosecution case and did not occasion any injustice to the appellants. In any event, the issues of when, where, how and what time the appellants were arrested are actually factual matters which we are barred by statute from interrogating on second appeal.

31. As to the sentence meted out to the appellants, we agree with the respondents' position that the same has been overtaken by events following the directions given by the Supreme Court on 6th July 2021 in the case of Francis Karioko Muruatetu & Another Vs. Republic ; Katiba Institute & 5 Others (supra) The learned judges stated thus; -

> It should be apparent from the foregoing that Muruatetu cannot be the authority for stating thatall 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.

> [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 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.

32. Therefore, being cognizant of the above position from the apex court, we find no justifiable ground to disturb the sentence of death imposed on the appellants by the trial court and confirmed by the 1st appellate court as the same is in line with the law.

33. On the totality of the foregoing, we are satisfied that the appeal is devoid of merit and we order that it be and is hereby dismissed.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF MARCH, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR