Kesusa & another v Republic (Criminal Appeal 235 of 2018)
[2022] KECA 546 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KECA 546 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 235 OF 2018

PO KIAGE, A MBOGHOLI-MSAGHA & F TUIYOTT, JJA

APRIL 28, 2022

BETWEEN

HEWET VOSENA KESUSA ..... 1ST APPELLANT

TERENCE ATSANGO SHIKUTWA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret (Kimondo & Ngenye, JJ.) dated 31st July, 2014 in HCRA No 180 & 181 of 2011)

JUDGMENT

1. The two appellants Hewett Vusena Kesusa and Terence Atsango Shikutwa are condemned prisoners having been sentenced to death by the High Court at Eldoret, (Kimondo & Ngenye, JJ.) in a judgment delivered on 31st July 2014. The learned Judges did so while dismissing the appellants' appeal by which they had challenged their conviction and sentence of 14 years imposed by the Kapsabet Senior Resident Magistrate (Hon. Lorot) on 7th September, 2011 for the offence of robbery with violence. The learned Judges found the term sentence to be illegal and enhanced it to death.

2. In so enhancing the sentence, the learned Judges were cognizant that the State had not cross-appealed or given a notice of enhancement of sentence and that it had not itself warned or cautioned the appellants that, there was the likelihood of such enhancement were they to proceed with their appeals before that court. Finding umbrage under the decision of *Stanley Nkunja v Republi*c[2013] eKLR by a differently constituted bench of this Court sitting at Nyeri; the learned Judges took the view that where the sentence is illegal, the court is entitled to enhance it without notice. And so it did.

3. We think, with respect, that an appellant is entitled, as a matter of procedural and substantive due process or natural justice, if you like, to be given notice of the possibility of so grave a possibility as

enhancement of a sentence, especially when it is as dire as converting a 14-year term to a death sentence. It is a matter of fairness and a recognition of the inherent dignity of the prisoner. It implicates fair trial rights more so where, as here, the appellants did not have the benefit of legal representation before the High Court. It cannot be right or fair, whichever way one looks at it, that so grave a consequence should be sprung upon an appellant by the court at judgment stage. It does seem to us to be an unfair tackle and a terrible ambush that cannot be countenanced. An appellant should be warned of the possibility of enhancement so that he makes an informed choice whether or not to take the risk by prosecuting the appeal. It matters not that the sentence is an illegal one - fairness demands notice and/or warning and this Court has said so in a consistent line of authorities.

4. In *Sammy Omboke & another v Republic* [2019] eKLR, this Court sitting in Kisumu (Asike-Makhandia, Kiage and Odek, JJA.) made reference to some of those authorities and warrants citation at length;

> "21. A ground urged in this appeal relates to enhancement of sentence without warning, notice or a cross-appeal. This Court in *Samwel Mbugua Kihwanga v Republic,* Cr App No 239 of 2011, explained that although the practice of warning the appellant before enhancing the sentence was not a requirement of law, it was a matter of practice that had gained notoriety and served to put the appellant on notice of the consequences that would befall him depending on the outcome of the appeal. It is worth recalling that in *Ogolla s/o Owuor,* [1954] EACA 270 the predecessor of this Court stated:
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> > "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."
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> 22. Further, in *EGK v Republic,* [2018] eKLR this Court observed:
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> > "Be that as it may, we note that the first appellate court enhanced the appellant's sentence from 40 years' imprisonment to life imprisonment. In so doing, the 1st appellate court cited the provisions of section 354 (3) of the Criminal Procedure Code. In our view, the trial magistrate had no discretion to sentence the appellant to 40 years as opposed to a sentence of life imprisonment. The sentence for incest under S. 20 (i) of the Sexual Offences Act is life imprisonment. In our view, the 1st appellate court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant.This court has had occasion to consider an enhancement of sentence without a cross-appeal and without warning an appellant in the decision of *JJW v Republic*[2013] eKLR wherein it states:
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> > "We now consider the sentence and here we have difficulties in appreciating what the learned judge did and why he did it. As indicated above, we toofeel the sentence that was pronounced upon the appellant and his colleague by the Senior Resident Magistrate was not commensurate with the nature of the offence committed and the antecedents of the appellant which were in any case not stated save that they were first offenders and had been in custody for two (2) years. We too think the circumstances of the case called for a more severe sentence than what was awarded. However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under section 354(3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that

> cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

23. Moreover, this Court in *JOA v Republic,* Cr App No 25 of 2011 and Charles Muriuki Mwangi vs. Republic, Cr App No 24 of 2014 held that in the absence of a cross-appeal, it was necessary for the court to warn the appellant that the sentence was likely to be enhanced, and having failed to do so, the appeal against sentence was allowed. In *Mutuku v Republic,* [1980] KLR 532, this Court set aside enhancement of sentence by the High Court due to inordinate delay on the part of the prosecution in making an application for enhancement.

24. In *Josea Kibet Koech v Republic,* Criminal Appeal No. 126 of 2009, this Court expressed;

> "Similarly, the State did not give any notice of enhancement of the sentence. In his submissions before us Mr. Omutelema conceded that the learned Judge of the superior court had no jurisdiction to enhance the sentence.
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> The learned Judge may be entitled to condemn the manner the offence was committed but in view of the foregoing we agree with Mr. Omutelema's submission that as there was no notice to enhance the sentence then what the learned Judge did was without jurisdiction. In the circumstances, this appeal is allowed to the extent that the sentence of 30 years' imprisonment imposed by the High Court is set aside and in its place we reinstate the sentence of seven (7) years imprisonment to commence from the date the appellant was sentenced by the Senior Resident Magistrate."

25. In *H O W v Republic,* Criminal Appeal No. 326 of 2010, this Court likewise expressed;

> "Lastly on that aspect of sentence, the record shows that after the appellant had pleaded for leniency on sentence, the learned Judge recorded that he warned the appellant that the sentence could be enhanced. With respect that was not of any effect. The warning should have been done before the full hearing started and the appellant should have been asked if he understood the warning and should have been given a chance to choose his next action on the matter in view of the warning. (Emphasis supplied)
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> All this was not done and thus the recorded warning after the appellant had addressed the court was a lip service to the course of justice We think we have said enough to indicate that this appeal must succeed. The appeal is allowed. Conviction quashed and the sentence set aside. The appellant is set at liberty forthwith unless otherwise lawfully held."

> 26. In the instant appeal, there was no cross-appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by court that the sentence meted upon then could be enhanced; and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-appeal and notice and or warning the judge had no jurisdiction to enhance the sentence".

5. The sentence of death passed by the High Court cannot therefore stand and, were we to uphold the conviction, we would restore the 14-year sentence imposed by the trial court on the basis only of lack of notice or warning which render the enhancement a nullity for want of jurisdiction.

6. We now turn to the question of whether the appellants were properly convicted. Mr. Oyaro, learned counsel who argued the appeal on behalf of the appellants addressed us on the *"Supplementary Grounds of Appeal"* filed on 15th July, 2020 which should properly have been titled Supplementary Memorandum of Appeal. In it, the first appellate court is faulted for falling into error by, *inter alia*; basing the conviction on inconsistent and incredible recognition and/or identification evidence which had a high probability of error in the circumstances; failing to find that an identification parade was necessary; failing to determine whether the charge was properly investigated; upholding, the conviction without any recoveries having been made; and failing to find that the appellants were not informed of their rights, including the right to call witnesses.

7. Learned counsel pointed out that no weapons were produced to prove that the assailants were armed and that the investigating officer, a crucial witness, was not called to testify and no reason was tendered for that omission. Turning to identification, Mr. Oyaro submitted that the offence is alleged to have occurred at 11.00p.m. in the night and that there was only one identifying witness (PW2) to the alleged offence, which was to the effect that on 17th November, 2005 at Kapchesir Village, Koibarak Location of Nandi South District, the appellants jointly with others not before the court robbed Gilbert Adede of various household goods, personal apparel and documents, all valued at Kshs.676,500, and at the time of such robbery wounded the said Gilbert Adede.

8 It is common ground that the complainant was unable to identify any of the assailants and the appellants' conviction was based solely on the evidence of his wife Judith Khadede (PW2). In dealing with her evidence, the learned Judges had this to say;

> "14. When we appraise the evidence, we find that there was a single identifying witness, PW2. We have warned ourselves of the dangers of relying on evidence of a sole identifying witness. But we are satisfied from the description of the location where PW2 was hiding that she could see the sitting room and the doors to the bedrooms. PW1 was attacked at the sitting room. PW2 identified the 1st appellant clearly when 1st appellant shone his torch on PW1. PW1 had testified that the attackers had powerful torches that were reflecting on the cupboard. The 1st appellant had worked for PW1 and PW2. He was not a stranger to PW2. We have accordingly reached the conclusion that the 1st appellant was recognized by PW2. His identification was positive.
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> 15. From where PW2 was hiding, she heard the 2nd appellant telling PW1 to "surrender the money". The 2nd appellant was her neighbor. He was equally not a stranger. PW3 said her father mentioned the 2nd appellant's name immediately he recovered. In voice recognition, the words uttered are material. In *Limbambula v Republic* [2003] KLR 683, the Court of Appeal stated that evidence of voice identification is receivable so long as the person giving the evidence is familiar with it, recognizes it and there is no mistake in testifying to that

which was said and who said it. We are satisfied that the 2nd appellant was in the company of the 1st appellant and other assailants. He was positively identified by PW2. In sum, the appellants were identified by both visual and voice identification."

9. The issue that arises in this appeal is whether the learned Judges properly appraised and re-evaluated the evidence of identification or recognition by the single identifying witness, and whether the same was free for the possibility of error. In her testimony, she stated that she was asleep with her husband when she heard noises outside. The door to their 5-bedroom house was broken and she saw a large group of people. She then said, tellingly,

> "All the lamps in the house were destroyed,and they entered after the darkness had engulfed the house. I saw them cut my daughter. I knew their faces and names but they were not arrested." (Our emphasis)

She later on stated that she saw the 1st appellant who had been their worker, leading the group and that she "recognized them from their touches and his voice." When cross-examined by the said appellant, she is recorded as answering thus;

> "I saw you, as you lit your torches on the PW1. I saw your face. (witness refuses to answer, when asked if he saw the type of clothing that the 1st accused was wearing. We went with the policemen to your house; but we didn't recover anything. You know all the items that is in my house." (Our emphasis)

10. And on being cross-examined by the 2nd appellant, the witness is recorded as having testified as follows;

> "I recorded my statement the next morning with the police. I told them it was Mmaitsi, Terence, Vosena, Okwemba. In my statement I have not said I saw any of the named suspects. I did not give their names. I have only stated that I only recognized the voices of the above named suspects. The 2nd accused stays ½ a kilometer. The neighbours who came were Rachel Adabaga, Reuben, Yakobo, Moses Mswahili and his children. I didn't tell them that we had been attacked by Terence. They asked where the things were. When we came with the police in the next morning. I didn't take them directly to the house of Terence. If you are in the hideout room, you can see the sitting room, bedroom and all the other four doors. I was not send by anyone to report. I knew the names of the rest of the suspects. Mmaitsi was arrested but released."

11. It is of significance that whereas PW2 did not say so in the course of her testimony, her husband **PW1,** in cross-examination stated that when the assailants entered the house PW2 ran and hid in the bedroom and remained in *"the hideout"* until after the thugs had escaped. In fact, they asked him where his wife was because they did not see her during the incident.

12. Bearing in mind the self-evident fact, recognized in many judicial pronouncements, that identification, especially in difficult conditions is a fertile ground for miscarriage of justice due to the ever-present risk of mistaken identity, which calls for a great deal of conscious circumspection on the part of the court to ensure that the identification or recognition is free from the possibility of error, we are far from satisfied that the testimony of PW2 as captured above lends assurance that no error did or could have occurred. We note in particular the witness' failure to answer the critical question of what type of clothing the 1st appellant was wearing; her failure to mention the assailants she mentioned in court when she recorded her statement with the police; her failure to mention the appellants to the neighbours who came to her house after the incident; and her not taking the police to their houses. Indeed, we find it incredible that she should have been so confident in fingering the appellants as being part of the gang of thugs

not having herself been in close proximity to them, as she was in hiding, when her husband (PW1) and daughter (PW3) who had close and personal, if traumatic, encounters with them were unable to do so. In fact, PW3 was very categorical that the appellants were her neighbours at home but; "I did not see the two in the attack. I was attacked by many people. There was no light." This last part of the evidence was clearly exculpatory and we find it difficult to appreciate how the two courts below felt confident to return and affirm the convictions in the circumstances.

13. It is worth repeating what this Court stated in *Kiarie -vs- Republic* [1984] KLR 739;

> "It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction."

14. We are not persuaded that the evidence tendered by the prosecution in this matter was anything close to watertight. The learned Judges did refer to that very decision and it is a surprise to us that they nonetheless upheld the conviction of the appellants given the state of the evidence.

15. The law on identification was later succinctly rendered by this Court in *Wamunga v Republic* [1989] KLR 424 at p.430 thus;

> "Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach evidence of visual identification was succinctly s//[1976] 3 AII ER 549 at page 552 where he said
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> > 'Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometime made.'"

16. We think, with respect, that had the learned Judges paid full attention to the law and applied it scrupulously to the evidence beyond merely citing it, they could have come to the inescapable conclusion that the circumstances of the robbery were not free from the possibility of error, the evidence was neither cogent nor watertight, and that the conviction of the appellants was therefore unsafe.

17. Having come to that conclusion, we do not consider it necessary for us to delve into the rest of the grounds urged by the learned counsel for the appellants and responded to by Miss Githaiga, learned counsel for the Republic. We commend both counsel for the industry they displayed in the preparation for the appeal as evidenced by the written submissions and bundle of authorities filed herein.

18 The upshot of our consideration of this appeal is that it is for allowing. We quash the conviction and set aside the sentence. In consequence, the appellants shall be set at liberty forthwith, unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF APRIL, 2022

P. O. KIAGE

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR