Kiprono v Republic (Criminal Appeal 50 of 2014)
[2022] KECA 790 (KLR) (24 June 2022) (Judgment)

Neutral citation: [2022] KECA 790 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 50 OF 2014

HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

JUNE 24, 2022

BETWEEN

GILBERT KIPRONO ALIAS RASTA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kericho (J. K. Sergon and H. A. Omondi, JJ.) delivered on 17th July 2014 in HCCRA No. 61 of 2012 Consolidated with HCCRA No. 60 of 2012)

JUDGMENT

1. This is a second appeal from the judgment of the Senior Principal Magistrate's Court at Bomet (J. Kwena) delivered on 13th September 2012 in Criminal Case No. 844 of 2011.

2. The brief background is that the appellant was charged jointly with 2 others (Hillary Kiprotich Ng'etich and Davis Kiprono Rop) in the Senior Principal Magistrate's Court at Bomet in Criminal Case No. 844 of 2011 with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence were that on 30th October 2011 at Bomet Township in Bomet District, jointly with others robbed Wilson Koskei of his jacket valued at KShs. 450, a pair of shoes valued at KShs. 400, a cap valued at KShs. 90, a Motorolla phone C118 valued at KShs. 1,900, a Nokia phone valued at KShs. 2,000 and cash amounting to KShs. 700 and, immediately before the time of that robbery, threatened to use actual violence on the said Wilson Koskei.

3. The appellant and the two co-accused denied the offence, whereupon the matter proceeded to trial with the prosecution calling five witnesses.

4. The complainant, Wilson Koskei (PW1), told the court that, on 30th October 2011 at about 9.30Pm., he was on his way to Koiwa from Bomet; that he boarded a motorcycle whose rider he identified as

Hillary Kiprotich Rotich (Kiprotich); that he intended to alight at Tenwek junction and informed Kiprotich as much; that, before reaching Tenwek, Kiprotich branched off and stopped; that two other people appeared from the junction; that Kiprotich drew a knife and pressed it on PW1's right side; that the other two people ordered PW1 to produce money; that they ransacked him and robbed him of the above- mentioned items; that Kiprotich threatened to stab him if he resisted; that, after the robbery, the three rode off in Kiprotich's motorcycle heading towards the bus stage; that he returned to the stage where he had boarded the motorcycle and inquired as to the identity of the owner, who was known to other motorcycle riders; and that they (the riders) offered to search for Kiprotich, who was known to them.

5. PW3 (Emmanuel Kipng'etich Mutai), who was one of the motorcycle riders, told the court that he mobilised other riders, including Geoffrey Kimweno Rotich (PW4), to search for Kiprotich; that they met a lady, who led them to Kiprotich's home and found him in; that they apprehended him, whereupon he led them to where he and his companions had hidden the stolen items; that, on their way, they found the appellant, whom Kiprotich pointed out as one of the persons with whom he had robbed PW1; that the group also apprehended the appellant, who led them to a third person referred to as Kiki, but that, before they got to Kiki, the appellant and Kiprotich ran for safety from some traffic police officers, who were in the vicinity; that, immediately thereafter, the group sought and apprehended Kiki, who led them to Davis Kiprono Rop's house where the stolen items were hidden; that they recovered PW1's jacket, one phone and KShs. 605; that Kiki suddenly escaped, whereupon the group arrested Kiprono and led him to Bomet Police Station.

6. In his testimony, PW4 (Geoffrey Kimweno Rotich) corroborated PW3's testimony and added that he witnessed PW1 boarding Kiprotich's motorcycle after which the appellant boarded another motorcycle and followed them.

7. PW2 (Sgt. Atandi Mosota) told the court that he was on traffic duty on the night of 30th October 2011 along Sotik-Bomet Road; that a large group of motorcycle riders approached, whereupon the appellant and Kiprotch broke free from the group, held onto his arm and pleaded with him for protection; that the group informed him that the two had robbed PW1, and that they were escorting the two to go and show them where they had hidden the stolen items; and that he subsequently escorted them to the police station where the appellant, Kiprotich and Kiprono were charged with the offence of robbery with violence.

8. PW5 (PC. Patrick Maina), who was based at Bomet Crime Section, told the court that on 31st October 2011 at 6.30Am., PW2 brought two suspects (the appellant and Kiprotich) who had been arrested by members of public for robbery; that he took up the case for investigation, whereupon he charged the two together with Kiprono with the offence in issue. At the trial, PW5 produced the stolen items recovered from the accused as exhibits.

9. In his defence, the appellant gave an unsworn statement. He told the court that he was a watchman at Soko Moja in Boment; that he was on his way to work on the morning of 31st October 2011 at about 6.00am when he met a group of motorcycle riders, who led him towards his workplace; that, on the way, he saw a police officer and ran towards him; that Kiprono mentioned him in connection with a robbery, and yet they were not known to each other; and that he prayed for leniency.

10. After the trial, the Hon. Senior Principal Magistrate (J. Kwena) delivered her judgment on 13th September 2012 convicting the appellant and Kiprotich, and consequently sentencing each to death.

11. Aggrieved by the conviction and sentence, the appellant appealed to the High Court of Kenya at Kericho. In its judgment in HCCr Appeal No. 61 of 2012 consolidated with Criminal Appeal No. 60

of 2012 delivered on 17th July 2017, the High Court (J. K. Sergon and H. A. Omondi, JJ.) dismissed the appellant's appeal and upheld the conviction and sentence meted by the trial court.

12. Being further aggrieved, the appellant appealed to this Court on 5 substantive grounds set out in his undated Memorandum of Appeal. According to the appellant, the learned Judges erred in law: in dismissing his appeal without considering that the evidence adduced by PW1, PW2, PW3 and PW5 was contradictory; by overlooking the fact that there was no identification parade conducted to identify the appellant; by relying on evidence not adduced t at the trial; by dismissing without cogent reason the appellant's submissions concerning the co-accused Davis Kiprono Rop, from whom the exhibits were recovered; and in failing to consider his unsworn defence.

13. In support of the appeal, learned counsel for the appellant (Mr. Maragia) made oral submissions stating that no inventory was prepared in respect of the recovered items; that the items were recovered in the absence of the appellant; that PW1 was drunk at the time of the alleged robbery; and that the evidence of PW3 and PW4 conflicted. He urged the Court to allow the appeal.

14. There was no representation on the part of the State at the hearing of the appeal before us, nor did the ODPP file any written submissions.

15. This Court's mandate on a second appeal is conferred by Section 361(1) (a) of the *Criminal Procedure Code*, which provides:

> " 361 (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section—
>
> (a) on a matter of fact, and severity of sentence is a matter of fact."

16. The jurisdiction of this Court on a second appeal, as is the case here, has been the subject of judicial pronouncements in various cases, such as *Stephen M'Irungi& Another v Republic* [1982-88] 1 KAR p.360 where it was held:

> " Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

17. We also agree with what this Court had to say in *Samuel Warui Karimi -V Republic* [2016] eKLR:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

18. In view of the foregoing, we confine ourselves to the points of law raised in this appeal, including the question as to: whether the concurrent findings of fact in the two courts were based on either no evidence or on misapprehension of evidence; and whether the trial court and the High Court acted on wrong principles in making the findings of evidence leading to the appellant's conviction and sentence, and the subsequent decision to dismiss his first appeal.

19. Out of the 5 grounds on which this appeal is anchored, only two qualify as points of law namely: that no identification parade was conducted to identify the appellant; and that no inventory was made of the items, which were recovered in the absence of the appellant.

20. With regard to the first ground relating to identification , it is instructive that the appellant was apprehended with the assistance of a co-accused (Kiprotich), who was well-known to him, and who led the group of fellow motorcycle riders to him (the appellant) resulting in his apprehension and arrest; that Kiprotich knew the appellant well; that, on being arrested, the appellant implicated the 3rd accused (Kiprono), who PW3, PW4 and the accompanying riders sought and had arrested; and that, in the circumstances, an identification parade was not necessary to identify the appellant.

21. In our considered view, it was sufficient for the complainant to describe the appellant and his accomplices to fellow motorcycle riders, who knew them well, and who immediately pursued and apprehended them, with one leading them to the others and, ultimately, to the place where the stolen items were recovered. PW1's description of the appellant and his co-accused was aided by a light post under which he boarded Kiprotich's motorcycle. The sequence of events leading to the appellant's apprehension and arrest with Kiprotich's help are suggestive of positive recognition of the appellant and his co-accused by people who knew them well. In the circumstances, this is a case of dock identification with regard to which we find no fault.

22. This Court in *Muiruri & Others vs. Republic* (2002) 1KLR 274 had this to say on dock identification:

> " It is believed 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 cause a witness to point him out as the person he identified at the scene of a 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...we do not think it can be said that all dock identification is worthless. If that were to be the case then decisions like Abdulla bin Wendo versus Republic (1953) 20 EACA 166, Roria versus Republic (1967) EA 583 and Charles Maitanyi versus Republic (1986) 2KLR 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 the courts have emphasised 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 found a conviction. We do not think that the evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if it is satisfied on facts and circumstances of the case the evidence must be true and if prior thereto the court warns itself of the possible danger of mistaken identification."

23. We find nothing on record to suggest that PW1 was mistaken in his description of the person whose motorcycle he boarded; or that Kiprotich's fellow riders knew him; or that Kiprotich was mistaken in leading the group to the appellant, then to Kiprono, and ultimately to the recovery of the items stolen from PW1. Accordingly, we find no fault in the judgment of the two court's below as to the identity of the appellant as the person responsible, together with others, for the offence with which he was charged. Moreover, the circumstances under which the three were identified or recognised were favourable and devoid of the possibility of error.

24. In *Wamunga vs. Republic* (1989) KLR 426 this Court stated as under –

> "It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

25. It is noteworthy that the sequence of events leading to the apprehension and arrest of the appellant and his co-accused was uninterrupted; that PW1 was in close proximity with Kiprotich, who subsequently led the group to the appellant; that the light post enabled PW1 to clearly identify Kiprotich as the person whose motorcycle he boarded; PW1's observations were not impeded, leading to clear description of those involved; that the group of motorcycle riders who apprehended the three were well known to them; and that, accordingly, the riders had good reason to remember the appellant, a watchman stationed in an area where they ordinarily carried on business; and that their apprehension culminated in their immediate arrest and subsequent charge (see *Gabriel Kamau Njoroge vs. Republic* [1987] eKLR; and *Republic vs. Turnbull* [1976] 3 All ER 549).

26. In *Gabriel Kamau Njoroge v Republic* [1987] eKLR this Court noted:

> "If one is to test the evidence with the greatest care, this was the way that the Court of Appeal in England in Republic v Turnbull [1976] 3 All ER 549 saw the examination. The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused's actual appearance?"

27. With regard to the inventory of the recovered items having not been made in the appellant's presence, we take note of the fact that this was not one of the appellant's grounds of appeal, but was only raised in submissions at the hearing. Neither was it raised at the trial or in the High Court on the first appeal. Be that as it may, we consider it prudent to pronounce ourselves on the matter and hasten to observe that failure to compile an inventory, or to compile an inventory in the presence of the appellant, does not of itself warrant acquittal.

28. As this Court held in *Leonard Odhiambo Ouma and Another vs. Republic* [2011] eKLR –

> "Failure to compile an inventory as contended in ground 5, is in our view a procedural step which in the circumstances, did not prejudice the Appellants in any way and for this reason, the omission did not vitiate the trial. We find no substance in this ground as well."

29. In the same vein, the High Court observed in *Stephen Kimani Robe and Others vs. Republic* [2013] eKLR that –

> "The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the

exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence."

30. Having carefully considered the proceedings at the trial court, the record of appeal in the High Court and in this Court, the grounds on which that appeal and the second appeal before us are anchored, the appellant's submissions, and the afore-cited authorities, we find nothing in the proceedings before the two courts below to suggest that the concurrent findings of fact in the two courts were based on either no evidence or on misapprehension of evidence. Nor do we find anything to lead to the conclusion that the trial court and the High Court acted on wrong principles in making the findings of evidence leading to the appellant's conviction and sentence, and the subsequent decision to dismiss his first appeal. Accordingly, there is nothing on record to warrant our interference with the lower courts' concurrent findings of fact. With regard to the points of law raised in the appeal before us, we also find and hold that the appellant's appeal has no merit, and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR