Onsongo v Republic (Criminal Appeal 40 of 2019)
[2022] KECA 1181 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KECA 1181 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 40 OF 2019

PO KIAGE, M NGUGI & F TUIYOTT, JJA

OCTOBER 21, 2022

BETWEEN

JOSEPH SERETI ONSONGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Nyamira (E.N. Maina, J.) dated 21st February, 2019 in HC.CR.A. No. 79 of 2019)

JUDGMENT

1. In the early evening of March 14, 2017 at about 7.00pm, Monica Nyaboke (PW1) was just getting to her home at Mochenwa village from the grazing field when she saw a man armed with a panga running towards her. Alarmed, she quickly got into her house and locked it. To her utter terror, the man started breaking the window at which PW1 desperately tried to hide behind her bed. Shortly, the man managed to enter the house and dragged her from under the bed towards the door. He then viciously set upon her and cut her several times on the head and legs. She let out two screams as the man went back into the house. There he helped himself to some Kshs.50,000 in cash that was in a box containing fish, ignoring PW1's pleas begging him not to steal the money sent to her by her daughter. That man was Momanyi, one well-known to her and the 1st appellant herein.

2. Momanyi was joined by another person, Josephat Sereti, the second appellant who had at first been standing by the gate. When he got to PW1, he was armed with a stick with which he beat her. He then incited Momanyi, asking him to kill her lest she should testify against them. They beat her some more but did not kill her. They then left, leaving her semi-conscious. She dragged herself to her bed where she was found, bleeding profusely, by a woman called Naomi Nyanchoka (PW4) a neighbour who came in response to PW1's screams. On her way there, PW4 saw Robert Momanyi leaving PW1's house carrying a panga. She found PW1 writhing in pain, bleeding from the face. Using PW1's phone, PW4 called PW1's son, Gideon Omosa (PW2), informing him what had befallen his mother who resided at

Kijauri, received news of his mother's serious injuries and rushed home the next morning. He saw that she had severe cuts to the heard and the door was bold-stained. He rushed her to Keroka Hospital but was advised to take her to Christian Marian where she was stitched on the head and legs. As he took PW1 to hospital, he met Josephat Sereti who taunted and threatened him that he would cut and kill him as they had done PW1.

3. PW1 was later examined by Joel Ongero (PW3) a Chief Clinical Officer at Nyarurui Hospital. He observed the stitched cut wounds on the head and legs and concluded that they were caused by a sharp object. He classified the injuries as 'Harm' in the P3 form which he completed and later produced in court.

4. Those are the facts that were established by the prosecution when the appellants were arrested, charged and tried for the offence of robbery with violence before the Principal Magistrate's Court at Keroka. The trial magistrate found that a *prima facie* case had been made out and placed them on their defence. They each testified on oath but called no witness. They denied involvement in the attack on PW1 whom they acknowledged was their neighbour. They stated that they were at their respective houses when they were arrested.

5. At the conclusion of the trial, the learned magistrate found the offence proved, convicted the appellants and sentenced each of them to suffer death. They filed appeals against conviction and sentence before the High Court at Nyamira. The same were heard by E.M. Maina, J. who by a judgment dated February 21, 2019 dismissed it in entirety, provoking the present appeal.

6. In a memorandum of appeal filed by their advocates, Maua & Co. Associates, the appellants complain that the learned judge "erred in law and fact" by, to paraphrase;Failing to appreciate that the prosecution case was insufficient, fabricative (sic), inconsistent and lacking in probative value.Failing to appreciate that there was material irregularity in prosecutional (sic) non-disclosure of relevant evidence.Failing to find existence of circumstances reducing the inference of guilt due to non-proof of ownership of items.Failing to find the indictment to be bad for duplicityImposing the death penalty an arbitral (sic) inhumane and degrading punishment.Failing to find the appellant's conviction as based on a set-up and in conspiracy, with the doctrine of recent possession unproven.Shifting the burden of proof to the defense.Relying on weak circumstantial and inconclusive identification evidence.

7. In support of the appeal, the appellant's learned counsel filed written submissions dated October 2, 2019 in which he expounded on the grounds of appeal. Citing *Oluoch vs. Republic* [1985] EA 752, he submitted that the prosecution did not prove the offence of robbery with violence as the element of stealing of the Kshs.50,000 was not proved beyond reasonable doubt.

8. Turning to identification, counsel urged that the evidence led was inconclusive as PW4 testified reluctantly and under coercion, and that 7.00pm, the time of the alleged robbery, must have been dark. He also added that even though it was stated that PW1 and PW4 recognized the appellants, mistakes in recognition of close relatives and friends can occur as was stated in *Republic vs. Turnbul*l [1976] 3 ALL ER 549. He reiterated that visual identification can cause miscarriage of justice and should be carefully tested. He cited this Court's decision in *Wamunga vs. Republic* [1989] KLR 424.

9. On the alleged inconsistencies in the prosecution evidence, counsel cited *Pandya vs. Republic* [1975] EACA 102 and urged that the evidence of PW4 should have been rejected. In his view, the inconsistencies were material enough to weaken the probative value of the prosecution evidence.

10. As this is a second appeal, our jurisdiction is confined to a consideration of questions of law only by dint of section 361(1)(a) of the *Criminal Procedure Code*. This has been restated in many decisions of the Court including *David Njoroge Macharia vs. Republic* [2011] eKLR in which the Court stated: -

> "That being so only matters of law fall for consideration–see section 361 of the *Criminal Procedure Code*. As 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 *Chemagong vs. R* [1984] KLR 611."

11. It is thus clear that when in the memoranda of appeal, counsel for the appellants raises grounds to the effect that the learned Judge's erred "in law and fact" as we have set them out hereinabove, he is clearly misguided. Memorandum of appeal on second appeals to this Court ought to be confined, as a jurisdictional imperative, to points of law only. We will therefore deal only with the questions of law that arise from the memorandum of appeal, ignoring the factual issues raised. The issues of law can be narrowed down to two, namely; whether the prosecution proved the elements of the offence of robbery with violence beyond reasonable doubt, and whether there was cogent evidence of identification of the appellants at the scene.

12. The evidence on record, on which the two courts below made concurrent findings leading to the conclusion that the offence had been proved, clearly established the requisite elements thereof namely that at the time of the robbery in which PW1 lost her Kshs.50,000;

    a. The offenders were armed with dangerous and offensive weapons or instruments namely pangas.

    b. The appellants were two thereby satisfying the requirement that the offender is in company with one or more persons.

    c. Immediately before and after the robbery the appellants violently struck, beat and wounded PW1.

13. The elements are rendered in disjunctive terms and any one of them is sufficient to establish the guilt of the appellants. In the present case, all three elements were present. From the record, it is quite clear that PW1 had some Kshs.50,000 in her house which she had received a few days earlier from her daughter. It would seem the main motive of and purpose for the attack on her was so that the appellants would lay their hands on the cash. We do not consider it to be fatal to the case against the appellants that the cash was not recovered when the appellants were arrested. Cash is, from its nature, a fluid, free-moving and easily concealable item. Indeed, unless circumstances were such as the same would be searched for immediately after the theft or robbery at or close to the scene, it would be to require an impossibly high threshold of proof were guilt to be negated by non-recovery of cash.

14. Turning to the next main point of law raised, we think that there was cogent and satisfactory evidence that the appellants were positively identified, nay recognized, as the robbers. PW1 gave a detailed account of what the 1st appellant did right from the time he started running towards her armed with a panga. She saw him break the window. After he succeeded, he dragged her from under the bed before hacking her with the panga. This was violence at close quarters. She observed him as she went to the box where she kept the money and took it away. He was a man he knew by name as he was a neighbour and a relation.

15. Equally detailed was PW1's description of what the 2nd appellant did, right from the time he came in through the gate. He beat her up with a stick and cut her leg with a panga. He even nudged the 1st appellant to finish her off lest she should testify against them. PW1 mentioned him by his two names and added that he was her nephew and neighbour.

16. There was no possibility of error in the recognition of the two appellants and we endorse the concurrent factual findings of the two courts below as borne out by the record.

17. Given that PW1 was just getting home from her grazing field, we are not persuaded by the argument that as it was about 7.00pm, it must have been dark. We think that the issue is raised as an afterthought as it was never suggested to the witness during cross-examination by the appellants that she could not see them clearly due to inadequacy of light or that she was in any way mistaken in her recognition of the duo as her assailants.

18. The conduct of the appellants the next morning, in which they taunted and threatened to kill PW2 as he took PW1 to hospital that they would cut him as they had done his mother, and making those threatens while still wielding pangas, is confirmatory and corroborative of the evidence of PW1 as to the identity of the persons who robbed her.

19. Thus, while we are fully cognizant of the potential for miscarriage of justice where the prosecution case is based wholly or mainly on the evidence of one or several identifying witnesses as stated in many cases including those cited by learned counsel for the appellants, we think there was sufficient basis for relying on the more assured evidence of recognition presented in this case. We are satisfied that the two courts below were fully justified to find as they did that there was not possibility of error in the appellants' identification, which was recognition. With respect, therefore, the complaint that such evidence was inconclusive is devoid of substance.

20. The conclusion is thus inescapable that the appellants' convictions were safe as argued by Ms. Lubanga, the learned prosecution counsel, and the appeal against the same is accordingly disallowed.

21. That now leaves us with the question of sentence. The assault on the death sentence imposed is framed in ground 5 of the memorandum of appeal as being arbitrary, inhuman and degrading punishment that "is against international law and against the dictates of *the Constitution* of Kenya." In the filed submissions on this point, reliance was placed on the Supreme Court decision in *Francis Karioko Muruatetu & anor vs. Republic* [2017]eKLR. First, we do not agree that the sentence of death per se is against the dictates of international law or *the Constitution*. To the contrary, *the Constitution* does in fact recognize a lawful execution of a sentence of death as a proper limitation to the right to life in Article 26 of *the Constitution*.

22. As to the Muruatetu decision itself, it did not proscribe or abrogate the death sentence in Kenya. What the apex court did hold was that the mandatory death sentence in murder cases was unconstitutional for depriving courts of judicial discretion in sentencing, yet sentencing is a judicial function. The court thus left open the possibility of imposition of the death penalty in cases deserving of such sentence.

23. We have considered the brief plea at the end of the appellants' submissions that we "indulge them and resentence them based on the *Muruatetu case*." Given, however, the viciousness of the attack on PW1 and the menacing threats made to PW2 the next morning, showing impunity and remorselessness writ large in the conduct and attitude of the appellants, it is clear there were aggravating circumstances with nothing to mitigate the heinous crime. We thus find no basis upon which the sentence of death meted out should be reduced. The appeal on sentence therefore fails as well.

24. In the result, the appeal before us in respect of both appellants lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF OCTOBER, 2022.

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR