Osewe & another v Republic (Criminal Appeal 115 of 2016)
[2022] KECA 1073 (KLR) (7 October 2022) (Judgment)

Neutral citation: [2022] KECA 1073 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 115 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

OCTOBER 7, 2022

BETWEEN

ISAACK OMONDI OSEWE ..... 1ST APPELLANT

ISMAEL OPAR KONDO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kisumu (H.K. Chemitei, J) Dated 23rd March, 2016) in HCCRA No. 100 of 2015)

JUDGMENT

1. This is a second appeal in which our remit is circumscribed by section 361 of the *Criminal Procedure Code* to matters of law only. In this remit we are duty bound to pay due homage to concurrent findings of fact by the two courts below save where the findings are not based on the evidence at trial. Only then do the findings of fact become matters of law.

2. Isaac Omondi Osewe (the 1st appellant) and Ismael Opar Kondo (the 2nd appellant) were both charged and convicted of two counts of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars of the first count are that on the 27th day of April 2014 at about 2.00pm at United Millers along the railway line in Kisumu East District within Kisumu County, jointly with another not before court while armed with dangerous weapons namely a panga and knife robbed Eunice Awino Odongo of cash Kshs. 2,500, one mobile phone make Techno and a pair of slippers all valued at Kshs. 5,200 and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Eunice Awino Odongo. Regarding the second count, it was alleged that on the same date, time and place, while similarly armed and in similar circumstances jointly with another robbed Repha Khendi Marende of cash Kshs. 3,200, one

bag containing clothes all valued at Kshs. 4,100 and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Repha Khendi Marende.

3. Upon conviction both were sentenced to death on each count. Execution of the sentence on the second count was, properly, put in abeyance. A first appeal against both convictions and sentence failed in a judgement delivered by Chemitei, J on 23rd March, 2016. This second appeal is mounted on grounds that the learned magistrate erred in law and fact by failing to evaluate the evidence as a whole and finding that the prosecution had proved its case beyond reasonable doubt: by relying on evidence of identification without observing that the conditions prevailing at the scene of crime were absolutely difficult for a witness to make any rightful identification; relying on contradictory and inconsistent evidence; rejecting sworn statements of defence; convicting the appellants on an amended charge sheet without considering the provisions of Section 217 of the Criminal Procedure Rules; and sentencing the appellants to death without exploring other forms of punishment other than the death sentence. The appellants' prayers are that the conviction be quashed, the sentences be set aside and they be set free.

4. At the time material to this case, Eunice Awino Odongo (PW1) and Refa Khendi Morende (PW2) both worked at the port in Kisumu. On 27th April, 2014 at 2.00pm, the two made their way from work and on reaching the premises of United Millers Company, three people emerged from a bush. It was the evidence of PW1 that the 1st appellant who was armed with a knife, pointed it at her and ordered her to give him money. He snatched a purse which had Kshs. 2,500 from her, and also robbed her of her cell phone, make Tecno, and shoes.

5. At this point she ran away and as she ran to safety she met some boys on the road whom she told of the robbery. In the company of the boys, she returned to the scene where they found the 1st appellant armed with a panga. There was a confrontation. The boys arrested the 1st appellant. In the process of PW1 helping the boys effect the arrest, the 1st appellant cut her on the head.

6. It was the further evidence of PW1 that she also saw the 2nd appellant rob PW2 of her handbag. PW2, too, saw the three emerge from a banana plantation. One had a panga and another a knife. She did not state whether the third was armed. In her handbag was Kshs. 3,200, clothes, shoes, a comb and hair lotion. Traumatized by the attack, she ran home. She was later to see both appellants at the police station, under arrest.

7. One of the persons who PW1 met after the robbery and informed of what had just befallen her was Paul Otieno Athoga (PW3). He and others in the company of PW1, walked along the railway in search of the assailants. After sometime, PW1 identified three people as those who had robbed her. PW3 was amongst the people who pursued them. They arrested two while one escaped. The two are the two appellants. A panga was recovered from the 1st appellant. Members of the public, who included PW3, escorted the two suspects to Kisumu Railway Police Station where they were re-arrested by PC Naftali Nyamauni. A panga was also handed to him.

8. Upon considering the evidence presented by the prosecution, the trial court placed the appellants on their defence.

9. In his sworn evidence, the 1st appellant stated that on the date of the alleged offence, he was at his place of work in a hotel called Lwangni. At 3.30 pm, some people approached him, one armed with a panga, confronted him and cut him. He fell down unconscious and found himself in hospital. He was later arrested. He denied the offence.

10. As for the 2nd appellant, he too, in sworn evidence told Court that he was at Kichinjio beach to buy fish. He saw people run towards someone who was washing utensils, presumably the 1st appellant. They

got to where the man was and he saw the man fall down. The 2nd appellant rushed there and when he asked them why they had attacked the fallen man, one of the assailants slapped him with a panga. He was bundled with the 1st appellant and escorted to Railway Police Station. He, like the 1st appellant, denied the offence.

11. It was on this evidence that the appellants were convicted and their conviction upheld by the High Court.

12. Arguing the appeal on behalf of the appellants, learned counsel, Ms Anyango, submitted that although the attack took place in daylight, it was sudden and traumatic, an unfavourable environment for identification. It was counsel's submission that as the complainant did not know the appellants before the incident, it was possible for a mistake to be made on the identity of the attackers. Counsel further submitted that PW1 attempted to identify the appellants by the clothes they wore but the witness only got the dressing of the appellants after the two had been arrested.

13. On alleged contradictions in the prosecution evidence, counsel submitted that PW1 was not consistent as to where the 1st appellant was arrested. Was it at the scene as she stated in her evidence in-chief or at a place "a bit far" as she testified in cross-examination? Another contradiction, it was proposed, was that PW1 had stated that she did not know what the appellants had done to PW2 but in another instance said that she saw the 2nd appellant struggle with PW2. On the evidence of PW2, it was pointed out that she had in cross-examination stated that there were no people near the incident which differed from her position in evidence in-chief when she stated that she and PW1 had passed a group of men moments before they were attacked.

14. It was further submitted that PW1 only knew the 1st appellant as Moi and that she was told that he must have been the thief because he always stole from others. Counsel argued that the 1st appellant was profiled then arrested.

15. This Court will not consider or determine the arguments made regarding the charge sheet as this was not raised in the first appeal. It cannot be raised for the first time in a second appeal. See *Alfayo Gombe Okello v Republic* [2010] eKLR where this Court held:

> " Firstly, the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

16. On the sentence, we were told that in light of the decision of the Supreme Court in *Francis Karioko Muruatetu –Vs- Republic* (2017) eKLR (Muruatetu 1), where the mandatory death sentence was declared unconstitutional, the appellants should not have been sentenced to death. We were asked to consider that the value of the items that the complainants were robbed of was Kshs. 7,700 and that the complainants had suffered no injury. We were urged to find that the 6 years spent in custody by the appellants is sufficient punishment for the offence.

17. Learned Principal Prosecution Counsel, Mr. Onanda, appearing for the State, submitted that PW1 and PW2 were emphatic that: they knew the attackers by identification; PW1 was attacked using a panga and robbed; and PW1 and PW2 identified the appellants by their clothes. Counsel also argued that an identification parade was not necessary as PW1 and PW2 knew the appellants as village mates; there was ample time for the witnesses to recognize their assailants as the offence occurred at around 2.30 pm; and the appellants were arrested at the scene while their accomplice escaped.

18. As to sentence, the Court was asked to find that the appellants had not demonstrated reform or remorse but that should we deem it fit to resentence, then a prison term that is commensurate to the boldness with which the crime was committed be meted out.

19. We understand the appellants to be criticizing the conviction on two fronts. That the appellants were not properly identified and that there were material inconsistencies and contradictions in the prosecution case which rendered the conviction unsafe.

20. On the first issue, the trial court held:

> "Lastly, on the issue of identify (sic) of the robbers, both PW1 and PW2 said the offence occurred at 2 p.m. There is no evidence that the accused had covered their faces. The incidence occurred in broad daylight and PW1 and PW2 having watched the accused approach them, they indeed had sufficient time to identify them. PW1 was categorical that, it was the 1st accused who robbed her and PW2 said she saw the 2nd accused as the one who robbed her. When PW1 reported to PW3 of the incidence and a search conducted, she was able to identify the accused and they were arrested. Although PW1 had difficulties in estimation of time, I am convinced that, the accused were arrested on the same day of the robbery. PW2 who went to the Police Station the following day also vividly identified the accused as her attackers.
>
> It is my finding that, in view of Section 214(2) of the *Criminal Procedure Code*, the variation/variance in time is not a material defect in this matter."

21. In affirming this finding, the High Court stated:

> "15. There's no doubt that the incident took place at around 2.30 p.m. or thereabouts. Both the appellants as well as the complainants have no dispute on this. In the premises it cannot be said that the complainants were prevented in any way from identifying their assailants. PW1 stated that the assailants approached them from the front and she clearly saw them. She said that the 1st appellant had panga and threatened her with it. The panga was equally identified by PW2 and the same was later recovered.
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> 16. Although counsel for the 1st appellant argued that there was discrepancy on time, the same in my respectful finding does not materially change the circumstances. The incident took place at around 2 p.m. and thereafter in a span of less than one hour or thereabouts the appellants were arrested. At that particular time it would be difficult to argue that the victims were in a position to appreciate the time. All that was necessary was a reasonable estimation. Infact the courts proceedings show that she was unable to read well the court's clock.
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> 17. The question of identification was well buttressed by the way the witness were able to describe the clothes worn by each appellant. It is worthy to note that the incident generally did not take such a long time that one can argue that the witnesses would be unable to describe their assailants.
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> 18. Further PW3 apparently knew appellant No.1. He said that he used to work at his mother's hotel at the beach a fact not disputed by the 1st appellant."

22. PW1 and PW2 gave evidence of how they were robbed and each corroborated the other. It was the evidence of PW1 and supported by that of PW3 that after the incident she sought the help of members of the public who, shortly after (between 10 and 30 minutes), arrested both appellants, the 1st appellant armed with a panga. The speed with which the appellants were arrested; the close proximity of the place of arrest to the scene; and the arrest of one of them while still armed with the weapon of attack supports the finding of the two lower courts that the appellants were properly identified. The findings by those two courts, which deserve some deference from us, were not perverse to the evidence presented at trial nor reached in violation of any principle of law.

23. Two witnesses looking at an incident from different angles or even from one position may not have a perfect recollection of how the incident unfolded and, once in a while, there is bound to be inconsistences in evidence of witnesses. What matters is whether the inconsistences are so material as to destroy the veracity of the evidence as a whole. See *Richard Munene v Republic*[2018] eKLR where this Court stated:

> "It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

24. This Court has been invited to find that there are certain inconsistences or contradictions in the evidence by the prosecution witnesses. The first is whether or not there were people other than the victims at the scene or the time of the robbery. The evidence of PW2 was:

> "…. We saw some boys seated under a tree we passed them as we headed to house (sic). After passing them, some three boys emerged from a banana plantation and approached us."

In cross-examination:

> "People were not very near the incidence"

We do not discern an inconsistency. The people who the victims had just passed may not have been "very near" by the time the attack happened.

25. We turn to the contention that there was inconsistency in the evidence of PW1 regarding where the appellants were arrested. At one time her evidence was that it was at the scene of the robbery. In cross examination, she stated that it was "a bit far" from the scene. This apparent inconsistency can be explained by the evidence of PW3 who was one of the persons who arrested the appellants. It was his testimony that they had to pursue them before arresting them. The chase may have started at the scene of the robbery and ended a short distance away. The contradiction in the evidence of PW1 may not amount to much.

26. We turn to PW1's evidence of what she saw happen to PW2. At one point the witness testified:

> "The other two boys who were with 1st accused chased after my colleague and I don't know what they did."

27. Yet it is not true as suggested by the appellants, in submissions, that PW1 also testified that she saw the 2nd appellant struggle with PW2. The evidence was that the struggle was between the 1st appellant and his accomplices over a handbag. Her testimony was;

> "On the day of robbery, I saw accused 2 struggling with his accomplice over Kendi's bag which they had robbed her."

28. We do not agree with counsel for the appellant that there were such material inconsistences as to dent the prosecution case. The conviction was safe and we uphold it.

29. On sentence, the appellant cannot find comfort in Muruatetu 1 because the directions of the Supreme Court in Muruatetu 2 clarified that the decision in Muruatetu 1 only applied to the death sentence in murder and that the constitutionality of sentences of similar genre need to be specifically tested through petitions. We know that the minimum sentences prescribed under the Sexual Offences Acthave been the subject of successful challenge before the High Court (see *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEELC 2936 (KLR) (17 May 2022) (Judgment) and *Edwin Wachira & 9 others v Republic:* Mombasa Petition Nos. 97, 88, 90 and 57 of 2021 (Consolidated) (Unreported)). We are not aware of similar challenge in respect to the sentence for robbery with violence. The appellants will have to take advice on the options open to them but for now we defer to directions in Muruatetu 2.

30. Accordingly, the appeal is dismissed on both conviction and sentence.

DATED AND DELIVERED AT KISUMU THIS 7TH 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.

DEPUTY REGISTRAR