Zakayo v Republic (Criminal Appeal 18 of 2019)
[2022] KECA 1244 (KLR) (4 November 2022) (Judgment)

Neutral citation: [2022] KECA 1244 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 18 OF 2019

W KARANJA, MSA MAKHANDIA & AK MURGOR, JJA

NOVEMBER 4, 2022

BETWEEN

SIMON NGUGI ZAKAYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment High Court at Kitui (Mutende, J.) delivered on 14th September 2017 and delivered at Kiambu (J. Ngugi, J.) on 14th October 2017 in Criminal Appeal No. 48 of 2017)

JUDGMENT

1. The appellant, Simon Ngugi Zakayo was charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. The particulars of the charge were that on April 17, 2010 at [Particulars Withheld] Estate in Thika District of the former Central Province, he jointly with others not before the court while armed with crude weapons, an axe and pangas robbed BIM (the deceased) of 2 mobile phones make Nokia 1600 and Nokia 1200 and cash money Kshs 12,400 all valued at Kshs 17,500 and immediately after the time of such robbery murdered the deceased.

2. The appellant faced a second count of rape contrary to section 3 (1)(a) of the *Sexual Offences Act*, the particulars of which are that on the same day at [particulars withheld] in Thika District of the former Central Province he intentionally and unlawfully committed an act which caused penetration by inserting his male organ (penis) into the female genital organ (vagina) of WMI, PW1 without her consent.

3. He also faced an alternative charge of an indecent act with an adult contrary to section 11 (1) (6) of the *Sexual Offences Act*. The particulars are that on the same day he committed an indecent act with W by touching her breast, thighs and buttocks without her consent.

4. The appellant faced a third Count of rape contrary to section 3 (1)(a) of the *Sexual Offences Act*, the particulars are that on the same day at [particulars withheld] in Thika District of the former Central

Province, he intentionally and unlawfully committed an act which caused penetration by inserting his male organ (penis) into the female genital organ (vagina) of MWM, PW3 without her consent.

5. He also faced an alternative charge of an indecent act with an adult contrary to section 11 (1) (6)of the *Sexual Offences Act*. The particulars are that on the same day he committed an indecent act with M by touching her breast, thighs and buttocks without her consent.

6. The appellant pleaded not guilty to the charges. At the hearing, the prosecution called 9 witnesses.

7. The trial magistrate convicted him for the offence of robbery with violence having found that the offence was proved to the required standard, and was thereafter sentenced to death as by law prescribed. The trial court also sentenced him to 10 years for the offence of rape of PW1 which sentence was suspended. But he was acquitted on Count three for rape and indecent act against PW3. The appellant was aggrieved by that decision and appealed to the High Court which upheld the conviction and sentence.

8. The appellant was further aggrieved, and has appealed to this Court on grounds as set out in an amended memorandum which are that the learned judge did not appreciate that no proper identification parade was carried out by the prosecution; that the evidence was not conclusive that the appellant carried out the robbery; that the High Court confirmed the conviction and sentence without evaluating the evidence; that the conviction and sentence delivered by the trial magistrate was not free from error; that the evidence of the prosecution witnesses was not free from error; that the evidence was inconclusive, so that any doubt should be construed in the appellant's favour; that the evidence was not supportive of the conviction and sentence, and that the High Court did not take into account the appellant's mitigation.

9. The prosecution's case was that at about 10 pm on the night in question, PW1 and her husband the deceased were in their bedroom. Their children, save for PW2, were in bed, and PW1's father was in the guestroom. All of a sudden, PW1 and the deceased heard her father scream. As the deceased rushed to his room to find out what was happening, the windows of the house were shattered, and the deceased ran back to the bedroom with two people armed with an axe and a hoe handle in pursuit. The assailants entered the bedroom and the appellant demanded for money from the deceased. After he gave them Kshs 10,000, the appellant who was armed with the hoe handle hit him on the head, and another assailant cut his head with the axe. The deceased fell down and lost consciousness.

10. The appellant then turned on PW1 and threatened to kill her unless she gave him money. She retrieved Kshs 2,400 that was in an envelope addressed to a church. As they threatened to kill PW1, PW3 who was hiding under a mattress came out from under it, and attracted the attention of the other assailant. He pulled her into another room where he raped her. In the commotion, PW1 went to hide in the toilet, but the appellant broke down the door and pulled her back into the bedroom, where he raped her. The assailants left shortly thereafter. With the help of neighbours PW1 and PW3 were rushed to the hospital and the deceased was admitted in the Intensive Care Unit, Kenyatta National Hospital on April 23, 2010, but he later succumbed to his injuries.

11. As the police were investigating the attack, they received information from an informer on the whereabouts of the appellant, and he was arrested shortly thereafter. An identification parade was conducted where both PW1 and PW3 identified the appellant. In his defence, the appellant gave an unsworn statement and denied committing the offence. He stated that he was arrested as he was waiting to meet a church elder; that he was beaten by the police who demanded to know where he had hidden a gun. He claimed that the police were given Kshs 10,000 shillings to force him to admit having committed the offence which is why he confessed. He stated that this has caused him to suffer mental lapses.

12. When the appeal came up before us, learned counsel, Mr Ratemo Amenya who appeared for the appellant submitted that the appeal should be allowed on account of the contradictions and inconsistencies in the evidence particularly that of PW1 and PW3; that they had stated that they identified the appellant as the lights were on and at an identification parade which was conducted soon after the attack; that the evidence of PW1 was that of a single witness testimony which was not sufficient to secure a conviction. It was further submitted that the prosecution failed to carry out a DNA test of the appellant to link him with the offence of rape.

13. On the sentence, counsel submitted that this Court should remit the case back to the High Court for resentencing pursuant to the Supreme Court case of *Francis Karioko Muruatetu & Anor vs Republic*, [2017] eKLR.

14. Mr Njeru, learned counsel for the State opposed the appeal. Counsel submitted that the appellant was charged with aggravated robbery and rape; that the charges were not duplicated since the offence for which the appellant was charged was robbery with violence and not murder; that all the ingredients were established that proved that the appellant and his co assailants used force and fatally injured the deceased; that they were properly identified as the lights were on when the robbers entered the house; that after the lights were put off, the assailants torch lights enabled the witnesses to see their faces. It was further submitted that the ordeal took about 20 minutes which was sufficient time to enable PW1 and PW3 identify the appellant.

15. On the charge of rape, it was submitted that, the appellant was convicted of raping PW 1 and that the conviction was safe. That the appellant had spoken to her as he demanded money, she was able to identify him by his voice as he questioned her, while raping her; that she did not consent to being raped. Counsel stated that the appellant was given the benefit of doubt in the case of rape against PW3, as she had stated that she was also raped by the other members of the gang; that no inconsistencies were highlighted by the appellant. Counsel concluded by submitting that, all the ingredients for the offence were proved and both the trial court and the High Court properly evaluated the evidence, and reached the correct conclusion that the appellant was the person who had committed the offences.

16. This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law and not matters of fact. See *Joseph Njoroge vs Republic* [1982] KLR 388. Bearing this in mind, we ascertain the issues for consideration are;

    i. whether the appellant was properly identified;

    ii. whether the identification parade was properly conducted;

    iii. whether the appellant required to be subjected to a DNA test;

    iv. whether the prosecution's evidence was contradictory and inconsistent;

    v. whether trial Court and the High Court properly evaluated the evidence and whether the offences of robbery with violence and rape were proved to the required standard; and

    vi. whether the High Court took into account the appellant's mitigation.

17. Beginning with whether the appellant was properly identified, PW1 testified that the assailants forcefully entered the house at about 10:10 pm on the material evening. At the time, the lights in the house were on and she clearly saw the appellant who was carrying a hoe handle. He demanded money from the deceased who gave him Kshs 10,000. She clearly saw the appellant hit the deceased over the head with the hoe handle. She again identified the appellant when he turned to face her whilst

demanding money, and she gave him Kshs 2,400; that the attack took about 20 minutes before the lights were switched off which enabled her to identify the appellant.

18. After giving him the money, she ran to hide in the toilet, but the appellant broke down the door, dragged her out and proceeded to raped. She stated that when he raped her the lights were switched off. But as he did so, he spoke to her and she was able to recognise him by his voice. He called her a dog, and asked her if she had sex with her husband; that after raping them, they fled into the darkness.

19. On voice recognition, this Court stated in the case of *Karani vs Republic*, (1985) KLR 290, that;

> "Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification."

20. The inference from the above is that, it was also possible for PW1 to recognise the appellant from his voice. He had spoken severally during the ordeal whilst demanding for money and threatening the witnesses. So that when he taunted PW1 while raping her, she was also able to recognise the appellant from his voice.

21. The appellant's counsel has argued that the appellant was only identified by PW1 as a single identifying witness, and as a consequence her evidence should not have been relied on by the courts below. We do not agree. The record is clear that PW3, whilst hiding under the mattress, saw the appellant threatening her mother. The circumstances at the time enabled her to identify the appellant. Subsequently, both PW1 and PW3 positively identified the appellant during the identification parade as the person who broke into their house and violently robbed and raped PW1 on the material night.

22. Having said that, the appellant's next grievance is that the identification parade was not conducted in accordance with the Police Standing Orders; that Standing Order 6 (iv) (d) states that, a suspect can choose his position among the eight people with the same height, colour, stature, race and dressing in one identification parade. He added that there should only be one suspect in a single parade, but in this case PW 1 stated that she was able to identify three suspects in one parade which was contrary to the guidelines.

23. According to the evidence, IP Gedion Kivaa No xxx PW4 conducted the identification parade. He stated that eight people were involved in the parade. They were of the same age and stature and size as the appellant; that the appellant agreed to be involved in the parade and stood between number 5 and 6. PW 1 identified him by touching his shoulder as did PW3 in a later line up. The appellant thereafter signed the parade forms.

24. When PW4's evidence is considered alongside that of PW 1, she stated that during the parade, she identified the appellant and two others; that PW4 changed the positions of the suspects two or three times and each time, she identified the appellant. We can find nothing unsatisfactory about the way in which the parade was conducted, so that this ground accordingly fails.

25. Having analysed the evidence on identification, we are satisfied that both the trial court and the High Court, found that the conditions that prevailed at the time of the attack were favourable for a positive identification of the appellant by PW1 and PW2. And likewise, we too have reached a similar finding that the appellant was properly identified.

26. With respect to whether a DNA test should have been conducted on the appellant to connect him to the offence, this Court has variously stated that a DNA test is not mandatory. Interpreting section 36

(1) of the *Sexual Offences Act* in the case of *Robert Mutungi Mumbi vs Republic*, Malindi Cr App No 52 of 2014 this Court stated:

> "Section 36 (1) of the Act empowers the Court to direct a Person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

27. Having regard to the above, what is of relevance in this case is that, PW1 identified the appellant as the person who had raped her. The conditions were suitable for her to identify him. She later picked him out in an identification parade. This was not a case of mistaken identity so as to warrant a DNA test to be conducted to connect the appellant to the offence. We therefore find that though a DNA test was not conducted, it was not necessary having regard to the circumstances. This ground also fails.

28. As to whether there were any inconsistencies in the evidence of PW1 and PW3, we have reanalysed their testimonies and are satisfied that there were no significant inconsistences in the evidence before the trial court. We therefore find this ground to be without basis.

29. The appellant has complained that the High Court did not evaluate the evidence, and had it done so, the court would have decided differently. As to what constitutes the offence of robbery with violence under section 296 (2) of the *Penal Code* was set out in the case of *Johana Ndungu vs Republic*, Criminal Appeal No 116 pf 1995 (unreported) thus;

> "(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.
>
> (1) If the offender is armed with any dangerous or offensive weapon or instrument, or
>
> 2. If he is in company with one or more of a person or persons, or
>
> 3. If at all immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

30. Moreover, in the case of *Mehtab AhmedAli Hussein Shah vs Republic*, Criminal Appeal No 85 of 2019, it was emphasised that;

> "The Court is not required to look for the presence of all three ingredients, as proof of one of the ingredients will suffice to secure a conviction. The ingredients are distinctive, not conjunctive."

31. In finding that the offence was proved, High Court concluded;

> "The attackers of the complainants herein were armed with an axe and hoe handle. These are implements that are used at homestead but were adapted as crude weapons to cause damage. The person who attacked the complainant were more than one BIM was fatally wounded in the circumstances by the persons. A post mortem conducted on his body showed that he sustained multiple skull fractures at the sites of cut wounds. The cause of death was the

severe head injury secondary to the multiple cut wounds. All ingredients of the offense were proved beyond reasonable doubt."

32. In relation to the above, we have reanalysed the evidence and have reached the conclusion that the courts below correctly evaluated the evidence and came to the right conclusion that the offence of robbery with violence was proved and that the conviction was safe.

33. We are also satisfied that the offence of rape was proved to the required standard, and that both the trial court and the High Court properly evaluated the evidence. PW1's evidence was corroborated by the medical report of George Maingi PW7, the clinical officer at Thika Medical Hospital that showed that there was penetration, demonstrated by the presence of pus cells and spermatozoa. She had injuries on her thighs and her vagina consistent with forceful penetration without consent. As such, the conviction for rape was also safe. Accordingly, as did the High Court, we uphold the conviction for the offences of robbery with violence and rape.

34. The appellant was sentenced to life imprisonment for the offence of robbery with violence. He was also sentenced to 10 years suspended sentence for the offence of rape. He has urged us to consider his mitigation and to review the sentence of life imprisonment imposed in terms of the Supreme Court decision in the *Francis Muruatetu* case (*supra*).

35. The *Francis Muruatetu* case (supra) notwithstanding, on July 6, 2021, the Supreme Court issued guidelines which limited the application of the decision to "sentences of murder under Sections 203 and 204 of the *Penal Code*". Therefore, this being a sentence concerning the offence of robbery with violence, this Court, has no discretion to interfere with the sentence by invoking the decision in the *Francis Muruatetu* case (*supra*).

36. In sum, the appeal against the conviction and sentence is unmerited and is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2022.

W. KARANJA

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR