Kiboi v Republic (Criminal Appeal 107 of 2019)
[2022] KECA 1416 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KECA 1416 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 107 OF 2019

W KARANJA, HM OKWENGU & MSA MAKHANDIA, JJA

DECEMBER 16, 2022

BETWEEN

PETER MWAI KIBOI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the Conviction and Sentence of the High Court in Nairobi (Ochieng & Achode, JJ.) dated the 15th day of October 2012 in HC.CR. A. NO. 796 OF 2007)

JUDGMENT

1. This is a second appeal by the appellant Peter Mwai Kiboi against his conviction and sentence. He was first tried, convicted and sentenced to death by the Senior Resident Magistrate's Court at Githunguri, for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. His first appeal against his conviction and sentence was dismissed by the High Court (Ochieng, & Achode, JJ). Undeterred the appellant is now before us.

2. During the trial, the prosecution called 5 witnesses, while the appellant gave unsworn evidence. The two main witnesses were Ann Wangui Njuguna (Ann) the complainant, and her brother, Peter Ndingui Njuguna. In brief, Ann was walking within Githunguri outskirts with her 8-year-old daughter, on their way home when she realized the appellant was following her. The appellant then came from behind her pulled a panga from his jacket and grabbed her handbag. Ann let go of her bag and started screaming. Members of the public responded to her screams including her brother Peter, but only managed to recover the panga, the appellant having escaped. Ann handed over the panga to the police and reported the matter. She identified the appellant as a person well known to her.

3. Peter testified that he was behind Ann and the appellant, when he saw the appellant grab Ann's handbag and realized that it was her sister being robbed. Peter swore that he saw the appellant, and that he knew him before. Sometime later the appellant was spotted and Ann alerted the police who

arrested him. The appellant denied having committed the offence maintaining that he was arrested for something he knew nothing about.

4. The trial magistrate found the evidence of Ann well corroborated by that of Peter. He was satisfied that Ann knew the appellant well before the incident, and the possibility of mistaken identification did not therefore arise. The trial magistrate, therefore, found the prosecution case proved to the required standard and found the appellant guilty.

5. During the first appeal, the appellant's main complaint was his identification, as he contended that the conditions were not conducive to a positive identification, and that the prosecution witnesses lacked credibility. In dismissing the appeal, the learned Judges of the first appellate court rendered themselves as follows:

> "7. The offence occurred at 2 pm in broad daylight as stated by the learned state counsel. PW1 and her 8 years old daughter, PW3, saw the appellant well when he emerged from a gage just ahead of them, and stood beside the road where they passed him by. PW1 saw him again when she turned back and notice (sic) that he was following them. She saw him again when he finally attacked her. There were no impediments at the scene to interfere with her observation of the appellant.
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> 8. PW2 saw what transpired from a distance. He identified the complainant as his sister and the appellant as a person known to him as hand cart pusher. He ran towards them but the appellant ran into a footpath and disappeared before he could catch up with him. Both PW1 and PW2 therefore, identified the attacker as someone they knew prior to that day as a hand cart pusher at Githunguri market, and whose hand cart services PW1 had employed before.
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> 9. Section 296(2) requires that the offender be armed with any dangerous or offensive weapon or instrument, or be in company with one or more other person or persons, or that, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.
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> 10. The appellant was alone at the time of the attack, but according to particulars in the charge sheet and the evidence adduced, he was armed with "simi (panga)", with which he threatened to kill PW1. During the attack he robbed her of the property listed in the charge sheet.
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> 11. We were alive to the fact that, this being a criminal case the appellant was under no obligation to prove his innocence or indeed to defend himself. He however opted to give a defence which was a mere denial, and which was considered and discarded by the learned trial magistrate, as having failed to cast any doubt on the prosecution's case."

6. In an effort to establish that the learned Judge of the High Court erred in dismissing his appeal, the appellant relied on a memorandum of appeal raising 13 grounds in which he contends, inter alia, that the prosecution case was not proved beyond reasonable doubt; that the learned judge failed to note that the trial magistrate disregarded the appellant's evidence; that the credibility of the prosecution witnesses was in doubt, and the testimony of the witnesses inconsistent; that the charge sheet was defective and lacked particulars; that the learned judge erred in upholding the appellant's conviction

which was based on identification by a single witness whose evidence was not corroborated; and that the appellate judge erred in upholding the mandatory death sentence.

7. The appellant was represented by counsel who filed written submissions, in which he identified 5 issues for determination. That is: whether the complainant and the prosecution witnesses properly identified the appellant; whether the prosecution discharged its burden of proof beyond reasonable doubt; whether the prosecution testimonies were reliable; whether the sentence passed was proper; and whether the appellant has right to remission.

8. It was submitted that the evidence of the complainant who was a single identifying witness was unreliable and uncorroborated by material particulars by another independent witness. The court was referred to the case of *Cleophas Otieno Wamunga v Republic* [1989] KLR 424 in which the court stated that 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. Also referred to is the caution in *Republic v Turnbull* [1976] 3 All ER 549 that recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone who he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

9. On the issue of burden of proof, the court was urged that the burden of proof in criminal matters lies on the prosecution, and that the accused need not give evidence to the contrary. It was reiterated that the appellant was not properly identified by the prosecution witnesses; that the appellant was not arrested with the panga that was allegedly used in the robbery but the same was recovered in a nearby bush, and there were no special features nor was there any evidence linking the appellant to the panga or scene of crime. Further, it was argued that the evidence of the prosecution witnesses was inconsistent, contradictory and unreliable

10. As regards the sentence, it was submitted that the sentence imposed upon the appellant was improper as it was mandatory in nature, and this was declared unconstitutional by the v Supreme Court in *Francis Karioko Muruatetu & Others v Republic* [2017] eKLR (Muruatetu Supreme Court decision). It was submitted that section 204 of the *Penal Code* that provides for a mandatory death sentence is antithetical to the constitutional provisions for protection against inhuman or degrading punishment and fair trial.

11. In addition, the learned Judge was faulted for ignoring the appellant's mitigation and the fact that he was a first offender. Relying on *Joseph Kaberia Kahinga & others v The Attorney General* [2006] eKLR, it was submitted that mitigation is an important part of the trial, where the Court obtains information in the form of evidence or report, giving circumstances either of the offender or the victim or their respective families.

12. Finally, it was submitted that the appellant has a right to remission as section 46 of the Prisons Act that prohibited remission for offences under section 296(2) was declared unconstitutional by the High Court in *Sammy Musembi Mbugua & 4 others v the Attorney General & another* [2019] eKLR

13. The respondent also filed written submissions in which it was submitted that the learned Judges of the first appellate court properly re-assessed and re-evaluated the evidence and agreed with the findings of fact made by the trial court. It was argued that the ingredients of the offence of robbery with violence were proved; that the appellant was properly identified as Ann knew him before the attack and the robbery occurred at 2 p.m. in broad daylight.

14. Further, that Ann's evidence was corroborated by that of her brother Peter who clearly saw the appellant who was armed with a panga rob Ann. It was submitted that the appellant stole Ann's

handbag containing a scarf, keys, medicine, and a phone and the offence of robbery was established as the appellant was armed with a panga which was an offensive weapon.

15. Under section 361 of the *Criminal Procedure Code*, the appeal before us being a second appeal, this court's jurisdiction is limited to considering issues of law. In *Karingo v Republic* [1992] KLR 219 this court stated:

> "A second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari S/O Karanja v Republic [1950] 17 EACA 146)."

16. This was restated by this Court in *Dzombo Mataza v Republic* [2014] eKLR thus:

> "By dint of the provisions of section 361(1)(a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence, they were plainly wrong."

17. Having carefully considered the memorandum of appeal, the written submissions and the record, we discern the following four main points of law for consideration: Whether the charge against the appellant was defective; whether the appellant was properly identified; whether the charge against the appellant was proved beyond reasonable doubt; and whether the sentence imposed upon the appellant was proper.

18. As regards the charge sheet, the charge against the appellant is stated as "robbery with violence contrary to section 296(2) of the *Penal Code*." the particulars being that:

> "On 27th day of June 2007 at Githunguri village in Kiambu District, within the central province being armed with dangerous weapons namely simis (panga) robbed Ann Wangui Njuguna a bag containing one mobile phone, make Sonic Ericson and valued at Kshs. 5,500, one covering scarf valued at Kshs. 600, bunches of keys and medic tablets and at or immediately before or immediately after the time of such robbery, threatened to kill the said Ann Wangui Njuguna."

19. The appellant has not stated or established in what way the charge sheet was defective. Under section 134 of the *Criminal Procedure Code*, a charge is sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. In this regard the particulars of the charge against the appellant as stated in the charge sheet were clear and supported the charge of robbery with violence.

20. We note that no evidence was adduced to prove the value of the things which were allegedly stolen. However, this is of no consequence. As was stated by this court in *Ogaro v Republic* [1981] eKLR:

> "Under section 267(1) of the Penal code, every inanimate thing whatever which is the property of any person, and which is movable is capable of being stolen. A file is capable of being stolen. The omission to prove the value of the thing stolen is not fatal to the charge inasmuch as section 137 (c) (i) of the Criminal Procedure Code provides that if the property is described with reasonable clearness in a charge or information it shall not be

necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property."

21. The learned Judges of the first appellate court properly considered the particulars of the charge and found that they were consistent with the charge of robbery with violence and were established. We reiterate what this court stated in *Bernard Ombuna v Republic* 2019 eKLR:

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence. Was this the case here."

22. In this case the particulars were clear and the appellant suffered no prejudice as he was able to defend himself. We find no defect in the charge and therefore reject this ground of appeal.

23. As regards the issue of identification the learned Judges of the High Court properly directed themselves by referring to *Joseph Ngumbau Nzalo v. Republic* [1991] 2KAR 21, in which this court cautioned that:

> " A careful direction regarding the conditions prevailing at the time of identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error was essential."

24. At paragraph 7 and 8 of the judgment of the High Court which we have quoted above, the learned Judges reviewed and evaluated the evidence of identification. We on our part have done the same and we are satisfied that the appellant was recognized by both Ann and Peter. The evidence of identification was not that of a single witness. Even leaving aside the evidence of the 8-year-old minor, Ann's evidence was corroborated by the evidence of Peter. The incident occurred at 2.00pm in broad daylight and there was no possibility of a mistaken identification. We come to the conclusion that the charge against the appellant was proved beyond reasonable doubt, and the appellant was properly convicted.

25. The trial magistrate in sentencing the appellant stated:

> " Accused mitigation is considered. Although a first offender, the offence committed is very serious and prevalent. The sentence is however mandatory and in the aforegoing accused sentenced to death penalty."

26. The learned judges of the High Court did not address the issue of sentence, and this is not surprising because the issue of mandatory death sentence being unconstitutional, only came up with the Muruatetu Supreme Court decision that was delivered on December 14, 2017, long after the judgment of the High Court which was delivered on October 15, 2012. The issue was not raised before the first appellate court, and in any case as at that time the sentence imposed was the proper sentence.

27. In addition, in *Francis Karioko Muruatetu & another v Republic: Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR, the Supreme Court clarified that the ratio decidendi of the Muruatetu Supreme Court decision was that, notwithstanding the finding of the Supreme Court that section 204 of the *Penal Code* is inconsistent with the *Constitution* and invalid to the extent that it provides for mandatory sentence for murder, the decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment. The Supreme Court reiterated that the Muruatetu Supreme

Court decision did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the Sexual Offences Act, or any other Statute.

28. For these reasons, we find no merit in this appeal. It is accordingly dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY DECEMBER, 2022.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE MAKHANDIA

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR