Wangari v Republic (Criminal Appeal 16 of 2020)
[2022] KECA 1322 (KLR) (2 December 2022) (Judgment)

Neutral citation: [2022] KECA 1322 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 16 OF 2020

HM OKWENGU, MSA MAKHANDIA & S OLE KANTAI, JJA

DECEMBER 2, 2022

BETWEEN

MICHAEL GACHANJA WANGARI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the conviction and sentence of the High Court of Kenya at Nairobi (Mbogholi & Achode, JJ) delivered on 2nd July 2013 in H.C. CR. A. No. 441 of 2007)

JUDGMENT

1. The appellant Michael Gachanja Wangari, was convicted and sentenced to death by the Magistrate's Court at Kibera for two counts of the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. His first appeal to the High Court was dismissed. He is now before us with this second appeal in which he seeks to have his conviction quashed and sentence set aside.

2. The trial court upon hearing the evidence of 5 prosecution witnesses and the sworn evidence of the appellant, in which he denied having committed the offences, found that the appellant was properly identified through recognition as the person who attacked and robbed the two complainants Bill David Onyango (Bill) and Caroline Nyaguthe Bore (Caroline). It, therefore, rejected the appellant's defence and convicted him of the two offences. In his first appeal, the appellant raised the issue of his identification and whether the charge against him was properly proved.

3. The High Court (Mbogholi & Achode, JJ) (as they then were) found that Bill was attacked by three people one of whom he recognized as the appellant. He later informed his friends that it was the appellant who had attacked him and Bill's friends caused the appellant to be arrested. The learned Judges also found the evidence of Bill consistent with that of his girlfriend Caroline who was also robbed during the attack.

4. In his grounds of appeal, the appellant has faulted the learned Judges for upholding his conviction: without appreciating that there was a variance between the charge sheet and the evidence on record contrary to section 214 of the *Criminal Procedure Code*; in relying on contradictory and uncorroborated evidence; without taking into account that the Occurrence Book (OB) relating to the complainant's report, related to an entirely different suspect; in relying on the identification of the appellant by witnesses to whom the appellant had been exposed; in failing to note that the prosecution case was not proved beyond reasonable doubt as some witnesses were not summoned; and in falling to note that the appellant's defence was improperly rejected.

5. This being a second appeal, our role was succinctly set out in *Karani vs R* [2010] 1 KLR 73 wherein this Court expressed itself as follows:-

> " 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. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

6. We have considered this appeal and in our view, it turns on three main issues of law. This is, whether the charge sheet upon which the appellant was convicted was defective; whether the learned judges properly evaluated the evidence and came to the correct conclusion in regard to proof of the charge against the appellant; and whether the appellant was properly identified as having robbed Bill and Caroline.

7. According to the charge sheet, the appellant was charged with two counts of robbery with violence contrary to section 296(2) of the *Penal Code*, the first count involving Bill while the second count involved Caroline. The particulars of the offences against the appellant allege that they were committed on July 12, 2006, and that the two complainants were robbed of various items. Both Bill and Caroline testified to this. The appellant has not specified in what way the particulars of the charge and the evidence were at variance

8. In *Bernard Ombuna vs Republic* 2019 eKLR, this Court stated:

> 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"

9. Our perusal of the charge sheet and the evidence on record does not reveal any variance. Moreover, the appellant does not appear to have been prejudiced in any way as he was able to respond to the charges appropriately in his defence. We, therefore, reject this ground.

10. It is evident that the first appellate court in its judgment made similar findings of fact as those of the trial court, to wit, that the complainants were attacked and robbed by a gang of three people, and that they recognized the appellant as one of the three robbers. The question is whether there is justification to interfere with the concurrent findings of fact that were made by the two lower courts.

11. The ingredients of the offence of robbery with violence were clearly set out by this Court in *Oluoch vs Republic* [1985] KLR 549 at page 556, where this Court stated that:

> "Under section 296 of the *Penal Code* robbery with violence is committed in any of the following circumstances:
>
> 1. The offender is armed with any dangerous and offensive weapon or instrument, or
> 2. The offender is in company with one or more person or persons, or
> 3. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

12. The use of the word or in the above context means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the *Penal Code*. In this case, Bill described the incident as follows; that it was at night, but the street was illuminated by street lights; that he recognized the appellant who was in the company of two others, as he had seen him before the incident and knew where he lived; that the appellant was armed with a panga and demanded that Caroline hands over her handbag; that Bill, who was the boyfriend to Caroline took the handbag and refused to hand it over; that using the said panga, the appellant cut Bill on the head, ear and wrist, leaving him unconscious; that Bill was treated at Masaba hospital and the appellant was later arrested by the police and that Bill identified him at the police station.

13. The trial magistrate as well as the first appellate court did give due consideration to the appellant's defence which was basically a denial and rejected it. In light of the evidence of Bill and Caroline which clearly put the appellant at the scene of the crime, we find no reason to depart from the concurrent findings of the two lower courts. The learned Judges properly considered the circumstances under which the appellant was identified, and were satisfied that the witnesses knew the appellant, and that there was no possibility of mistaken identification. We find that the appellant was properly identified as one of the culprits who attacked Bill and Caroline.

14. The appellant was in the company of two others, he was armed with a panga which he used during the robbery, and it is clear that both Bill and Caroline lost their personal properties which were stolen during the robbery. Accordingly, we are satisfied that the ingredients of the charge of robbery with violence under section 296(2) of the *Penal Code* were established and that in dismissing the appellant's first appeal, the learned Judges of the first appellate court properly analyzed and evaluated the evidence.

15. From the foregoing, we think that the appellant's appeal is unmeritorious. We uphold his conviction and sentence and dismiss the appeal in its entirety.

Dated and delivered at Nairobi this 2nd day of December, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR