Ingotsi & another v Republic (Criminal Appeal 109 of 2016)
[2021] KECA 60 (KLR) (8 October 2021) (Judgment)

Neutral citation: [2021] KECA 60 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 109 OF 2016

RN NAMBUYE, MSA MAKHANDIA & HM OKWENGU, JJA

OCTOBER 8, 2021

BETWEEN

OSCAR INGOTSI ..... 1ST APPELLANT

GODFREY SHIMONYO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kakamega (Onyancha & Lenaola JJ) delivered on 23rd February 2011 in H.C.CR CONSOLIDATED APPEALS NO. 83 & 84 OF 2009)

JUDGMENT

1 The appellants were charged jointly with two counts of Robbery with violence contrary to Section 296(2) of the *Penal Code*. The particulars of the first count were that, on 22nd August 2008 at Rosterman Village, Shirere Sub-location, Central Kakamega District within Western Province, jointly with another not before the court while armed with dangerous weapons, namely Pangas and Rungus robbed Angelina Muteshi of cash Kshs. 1,300/- ten packets of Supermatch cigarettes, four bedsheets, five dozen cups, three dozen plates, three sufurias and two radios valued at Kshs. 10,300/- and at or immediately after the time of such robbery threatened to use actual violence on the said Angelina Muteshi. On the second count, it was alleged that on the same date and place and armed with the same weapons, robbed Patrick Embali of cash Kshs. 600/-and a mobile phone make Motorolla C 113 and four kilograms of sugar all valued at Kshs. 4,400/- and immediately before the time of such robbery threatened to use actual violence on the said Patrick Embali.

2 In support of the case against the appellants, the prosecution called a total of Six witnesses. Angeline Muteshi (PW1) testified that on 22nd August, 2008 whilst sleeping in her house, she heard people shouting “we are Police open the door” which order she obliged and upon opening she found three persons, one of whom had a police jungle jacket. They had torches and they forced her back to the

house and caused her to sit on the children's bed and asked her to remove everything she had, while being threatened with handcuffs as they took away her Kshs. 8,000/- which she had received from a women's group and some utensils. That she was able to identify the 1st appellant from the light from the torches in their possession, she even knew his voice and that he is known as P.O. by many people as he always wore police clothes.

3 Chrispus Mkaisi Pw2 testified that on 22nd August, 2008 at 3.30 a.m. whilst asleep in his house he heard cries of a woman, coming from the home of PW1 and he specifically heard her say "Hannah's Children Oscar and Shimonyo want to kill her" that in the company of a neighbour who is an administration Police officer he went to PW1's residence and found her door broken and items scattered all over. That the three children of PW1 present informed them that they saw Oscar and Shimonyo during the commission of the crime. That he knew the 2nd appellant as Shimonyo. He also knew the 1st appellant as he used to sell Mandazi in the neighbourhood.

4 Patrick Embali, PW3 on his part stated that on 21st August 2008 while in his house at around 1:00 a.m. he heard the door being banged and three people including the appellants entered. The 2nd appellant ordered him to sit down, hit him in the face and handcuffed him. He had put on the light as the appellants had claimed that they were police officers conducting a search. He knew both appellants. The 2nd appellant took away his phone, 4 Kgs of sugar and Kshs. 600/-.

5 He reported the incident to the police station and categorically stated that it was Oscar the 1st appellant and Shimonyo the 2nd appellant who had attacked and robbed him. That the 1st appellant was arrested as he tried to run away when confronted at PW1's house and the 2nd appellant was arrested when he came to see the 1st appellant. The jungle police uniform was soon recovered in the house of the 2nd appellant.

6 SB PW4 a minor, stated in evidence that on 22nd August, 2008 the appellants broke their door and tied her mother (PW1) to the bed. That her mother lit a tin lamp and the appellants also had torches both sources of light enabled her to recognize the appellants as she knew them before. The 2nd appellant was arrested when he came to PW1's house and though he tried to run, he was confronted and arrested by a crowd and when the 1st appellant came to check on him he was Similarly arrested.

7 Christine Mukwangu PW5 stated that on 21st August, 2008 in the night she heard a knock on her door by people who claimed to be police officers. She lit the lamp and opened the door and three men entered and ordered her to sit down. Her husband (PW3) came to the sitting room and was slapped and ordered to sit down as well whereupon he was handcuffed. The lights from the lamp and the torches that the appellants had helped her recognize the appellants as they were people she knew very well as the 1st appellant sold mandazi in the neighborhood whereas the 2nd appellant usually walked around in police jungle uniform. They searched the house and took away 4 kgs of sugar, a phone and Kshs. 600. That she saw the 2nd appellant as he slapped her husband through the lamp light and torch light and equally recognized the 1st appellant through the same light.

8 C Benson Oluoch PW6 a police officer attached to Kakamega police station, received the appellants who had been arrested by the shieywe assistant chief and administration police officers from Roaster man over accusations of robbery with violence that had been committed earlier and after further investigations charged them with the offence.

9 At the conclusion of the prosecution case, the appellants were found with a case to answer and in their defence, gave unsworn statements and called no witnesses. The 1st appellant claimed that on 23rd August, 2008 he was at home attending a funeral when he heard noises, and when he went to check

on the road, he saw a crowd of people which included his step mother who pointed out to them that he was involved in the robbery and was arrested. That the step mother had a grudge against him.

10 On the part of the 2nd appellant, he testified that on the 23rd August, 2008 after closing his mandazi business he went to the house of PW1 to drink a local brew known as Busaa. He bought some for which he paid Kshs. 100 and later left for his home only to be called back on claims that he had not paid for his drink. In the process he was arrested and beaten up by members of the public. Otherwise, he knew nothing about the case.

11 The trial court in its judgment acquitted the appellants of count 1 under Section 215 of the *Criminal Procedure code* but found them guilty on count II. Upon conviction the appellants were sentenced to death.

12 The appellants were dissatisfied by the conviction and sentence and moved to the High Court at kakamega on appeal. They both complained that their alleged recognition at the scene of crime was not proved beyond reasonable doubt, PW3 did not mention their names to the police while making the initial report; the prosecution evidence was riddled with contradictions that should have been resolved in their favour and finally, that their statements in defence were not considered at all.

13 The appeal was heard by Onyancha and Lenaola JJ (the latter as he then was) who by a judgment dated 23rd February, 2011 dismissed the appeals in their entirety.

14 That setback in the High court did not dim the appellants' quest for freedom. On 26th October, 2016 the appellants jointly lodged this second and perhaps last appeal in this court. They sought to impugn the judgment of the two courts below on the grounds that the charge sheet was defective, the trial court failed to evaluate the evidence of witnesses especially with regard to identification by recognition, that the prosecution evidence was speculative and full of conjecture, thereby failing to prove ingredients of the offence of robbery with violence; and finally, that the sentence imposed was unconstitutional.

15 The appeal came up for virtual hearing before us on 12th May, 2021. Mr. Omondi, learned counsel holding brief for Magwa learned counsel for the appellants relied entirely on his written submissions that he had filed. In the submissions, counsel pointed out that the prosecution did not prove its case beyond reasonable doubt as none of the ingredients of the offence of robbery with violence were proved beyond reasonable doubt as required in law. That the two courts below did not-interrogate, re-evaluate and re-analyse the evidence afresh as required in law. Further that the evidence of identification by recognition of the appellants was not interrogated at all. As far as the appellants were concerned, they were convicted on unbelievable and insufficient identification evidence.

16 Further, the appellants submitted that there were several inconsistencies and contradictions in the prosecution evidence which weakened the probative value of the evidence and which contradictions should have been resolved in favour of the appellants. Finally, the appellants submitted that the sentence imposed on them was harsh, excessive and unconstitutional.

17 Mr. Shitsama, the learned Prosecution Counsel for the respondent too relied on his written submissions. He contended that contrary to the appellants' assertion, the 1st appellate court re-analyzed and re-evaluated the evidence of the trial court before reaching its conclusions, that the ingredients of the offence of robbery with violence were proved; that the appellants were well known to PW3 and PW5 and they even mentioned their names while reporting the incident to the police and even in their testimony in court. Counsel submitted that all the ingredients of robbery with violence which are exclusive and require the prosecution to prove only one of them for the offence to be held to have been committed were proved to the required standard. The ingredients are that the offender was in the company of one or more persons, was armed with a dangerous and offensive weapon or instrument

or the offender, at or immediately before or immediately after the time of the robbery wounds, beats, strikes or uses other personal violence to any person. Counsel submitted that the prosecution evidence placed the appellants at the scene of the crime and went further to prove that three persons were involved in the robbery, they were armed and visited violence on PW3. Thus the offence was succinctly proved.

18 On the harsh and excessive sentence, the respondent submitted that he does not oppose the application of the case of *Francis Kiroko Muruatetu & Another v Republic* [2017] eKLR to this appeal. However, the appellants had not presented any evidence showing that either they had reformed or were remorseful so as to benefit from a reduction of sentences meted out on them.

19 We have considered the record, the rival written submissions and the law. The appeal before us is a second appeal and hence this court's mandate pursuant to section 361 of the criminal Procedure code is restricted to addressing itself to matters of law only. This Court will however not interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence or they are based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making the findings.

In the case of *Hamisi Mbela & Another v Republic Mombasa* Court of Appeal Criminal Appeal No. 319 of 2009 (UR) this Court stated: -

> this being a second appeal, this court is mandated under section 361(1) of the Criminal Procedure Code to consider only issues of law. As was held in M'Riungu vs Republic [1983] KLR 445.

20 Where a right of appeal is confined to questions of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law *(Martin v Glyneed Distributors Ltd (t/a MBS Fastenings)*."

21 The issues for determination before us are whether there was proof of the offence of robbery with violence, whether the trial court properly evaluated the evidence of identification by recognition of the appellants and whether the sentence meted out on the appellants was harsh, excessive and unconstitutional. We consider all these to be matters of law.

22 Both courts found that the evidence of PW3 and PW5 was concrete and not shaken even in cross examination by the appellants. Further, the two courts below concurrently found that the identification of the appellants was beyond reproach and the evidence placed the appellants at the scene of the crime. We have no reason to depart from these concurrent findings. The ingredients of the offence of robbery with violence were clearly set out by this Court in the case of *Oluoch v Republic* , [1985] KLR 549 where it was held:

> Robbery with violence is committed in any of the following circumstances.
>
> (i) The offender is armed with any dangerous and offensive weapon or instrument; or
>
> (ii) The offender is in company with one or more person or persons; or

(iii) 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 ....."

23 The evidence on record clearly shows that the offence was committed by more than one person. Indeed, they were three in number among them, the appellants. In this appeal the prosecution through the testimony of PW3 and PW5 Led evidence that proved this fact. Thus, one of the ingredients of the offence of robbery with violence was proved. The second ingredient for the offence is proof that the accused person 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. The evidence on record from the testimony of PW3 is that,

> "the first accused said that we sit down. As I came out the 1st accused hit me on the face and handcuffed me..."

this clearly proves the ingredient of use of violence by the appellants and that they were armed with dangerous and offensive weapons which is the last ingredient. Based on the foregoing we are satisfied just like the two courts below that the ingredients of the offence of robbery with violence were proved contrary to the submissions by the appellants.

24 On identification of the appellants as the persons who committed the offence, PW3 and PW5 were categorical and candid that when PW5 heard the door being banged, she put on the light, opened the door and three men entered the house claiming to be police officers and she recognized the appellants as they were people known to her. Similarly, when PW3 came out of the bedroom, the lights were on courtesy of the lamp and the torchlight that the appellants had. This enabled him to positively identify and recognize the appellants. Both PW3 and PW5 testified that they knew the appellants very well and thus they were persons they were familiar with.

25 Both courts below made concurrent findings that the appellants were positively identified by recognition at the scene of crime. We have no reason to depart from this concurrent findings unless it is demonstrated, and it has not, that those findings on the face of the evidence on record were plainly wrong. We do not discern such misdirection in the circumstances of this case.

26 We are only too aware that where the only evidence against an accused is evidence of identification, a trial court as well as a first appellate court are enjoined to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction. Even if it is a case of recognition the court should bear in mind that recognition may be more reliable than identification of a stranger but still mistakes in recognition of close relatives and friends are sometimes made. See *Wamunga v Republic* [1989] KLR 424 and *Roria v Republic* (1967) EA 583.

27 The appellants submitted that the incident happened at 1:am and was very dark in the night and that there was no source of light mentioned that was used to identify them and that the two Courts below failed to make inquiries into the source of light that was used in their identification. From the evidence on record, PW3 and PW5 mentioned the light used in the identification of the appellants. This was light from the lamp they had lit as well as from the torches in the possession of the appellants. It is therefore not true as the appellants have contended that the source of light used in their identification was not shown, mentioned or even inquired into. We note from the evidence on the record that the appellants stayed with PW3 and PW5 for sometime as they went about ransacking the house in search of items to steal. They were thus in close proximity. Further the appellants had not camouflaged themselves at all as to make their recognition difficult. Given the foregoing circumstances we are

satisfied just like the two courts below that the appellants were recognized at the scene of the crime. Their conviction on this account cannot be faulted.

28 In our view the High Court did a splendid job in the re-evaluation of the evidence tendered before the trial court, more so on the question of identification of the appellants. In undertaking the task, the High Court reverted to the often quoted case of *Okeno Vs. Republic* [1972] E.A 32. We appreciate that there is no set format for the re-evaluation of evidence. But in the circumstances of this case the re-evaluation was done and the appellants' submissions to the contrary have no basis at all

29 On the alleged contradictions in the evidence of the prosecution, we find this ground of appeal has no merit. The alleged contradictions are minor and not material. They did not dent, dislodge nor cast doubt on the prosecution case. In reaching this determination we revert to the decision of this Court in *John Nyaga Njuki & 4 others v Republic*, [2002] eKLR where it was stated:

> *But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused."

30 Accordingly, we are satisfied that the 1st appellate court properly re-evaluated the evidence tendered in the trial court and came to the conclusion, rightly so in our view that the appellant's conviction was safe. The appellant's appeal against conviction is accordingly dismissed.

31 The appellants contend that the sentence of death that was meted out on them was manifestly harsh, excessive and unconstitutional in the circumstances of the case. It is clear that the sentence imposed was the prescribed sentence for the offence at the time. The trial court noted that its hands were tied by the law which provided for a mandatory death sentence for the offence. The High Court on appeal upheld the sentence on the same grounds.

32 The Supreme Court of Kenya in the case of *Francis Karioko Muruatetu & Another vs Republic* [2017] eKLR found that:

> Section 204 of the Penal Code deprived the Court of the use of judicial discretion in a matter of life and death. Such law could only be regarded as harsh, unjust and unfair. The mandatory nature deprived the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listened to mitigating circumstances but had, nonetheless, to impose a set sentence, the sentence imposed failed to conform to the tenets of fair trial that accrued to accused persons under Article 25 of the Constitution which was an absolute right."

33 The Supreme Court in the said case went ahead to outline some mitigating factors that should be considered in resentencing as follows: -

> As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:
>
> a. age of the offender;
>
> b. being a first offender;
>
> c. whether the offender pleaded guilty;

d. character and record of the offender;

e. commission of the offence in response to gender-based violence;

f. remorsefulness of the offender;

g. the possibility of reform and social re-adaptation of the offender;

h. any other factor that the Court considers relevant."

34 Applying the foregoing parameters to the instant appeal, we note that the appellants have been in custody for the last 12 years and though they expressed no remorse at the time of sentencing, nonetheless they mitigated and we see no reason to remit this matter to the trial Court for a rehearing on sentencing. We have also taken into account the submissions by counsel for the appellant on the issue and also the fact that the offence committed was not aggravated.

35 We would in the circumstances interfere with the sentence imposed. Accordingly dismiss the appeal against conviction but allow the appeal on sentence. We set aside the death sentence meted upon the appellants and substitute thereof with a sentence of 25 years' imprisonment with effect from 17th June, 2009 when the trial court passed sentence.

Dated and delivered at Nairobi this 8th day of October, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR