Stephen & 3 others v Republic (Criminal Appeal 45 of 2016)
[2021] KECA 213 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 213 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 45 OF 2016

MSA MAKHANDIA, F SICHALE & DK MUSINGA, JJA

NOVEMBER 19, 2021

BETWEEN

ALFRED MWITA STEPHEN ALIAS COMMANDER ..... 1ST APPELLANT

MOSES NYANGI MWITA ..... 2ND APPELLANT

OTAIGO STEPHEN MATHIAS ..... 3RD APPELLANT

DEVSON MWITA MEYA ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from a judgment of the High Court of Kenya at Kisii (Sitati and Langat, JJ.) dated 22nd March 2012.) in HC. CRA No.s 5,6,7 and 8 of 2011-Consolidated.)

JUDGMENT

1. Alfred Mwita Stephen alias Commander, Moses Nyangi Mwita, Otaigo Stephen Mathias and Devson Mwita Meya (the appellants herein) have preferred this second appeal against the judgment of Sitati and Langa, JJ. dated 22nd March 2012, in which they dismissed their consolidated appeals. The appellants were in the trial court jointly charged and convicted of the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*.

2. The particulars of the offence were that during the night of 31st December 2009 at Ntimaru Trading Centre at the then Kuria East District, Alfred Mwita Stephen (alias Commander), Moses Nyangi Mwita, Otaigo Stephen Mathias and Devson Mwita Meya, while armed with dangerous weapons namely; pangas and wooden rungus they robbed Monica Gati Joseph, a DVD video player make; Sony, a coloured TV set make Flamingo 14", one tiger generator, two motor vehicle batteries, three mobile phones make; Nokia, six crates of beer, assorted wines and spirits and other assorted goods and

cash Kshs 2,500/= and on immediately before or immediately after the time of the robbery, beat the complainant.

3. The 2nd appellant, Moses Nyangi Mwita, further faced a second count of rape contrary to Section 3 (3) of the *Sexual Offences Act* and in the alternative indecent assault contrary to Section 11 (6) of the same Act. The particulars for the offence of rape were that during the time of the robbery, he intentionally and unlawfully penetrated with his genital organ the genital organ of MGJ and in the alternative unlawfully and indecently assaulted MGJ by touching her vagina and breasts.

4. The appellants denied the charges after which a trial ensued. In a judgment delivered on 31st January 2011, Hon. J.R Ndururi, the then Senior Resident Magistrate at Kehancha Law Courts, convicted and sentenced the appellants to death. The trial court further found that having sentenced each of the appellants to death, it was not necessary to sentence the 1st appellant in respect to count II.

5. Being aggrieved with both the conviction and sentence, the appellants moved to the High Court on appeal and vide a judgment delivered on 22nd March 2012, Sitati & Langat, JJ. found the appeals lacking in merit and dismissed them, thereby upholding the conviction and sentence. However, in agreement with the State Counsel's opinion, they reversed the trial court's judgment in respect to the 1st appellant on the second account and sentenced him to 10 years' imprisonment which they suspended pending execution of the sentence of death.

6. Undeterred, the appellants filed this appeal vide their undated memorandum of appeals on diverse dates raising several grounds of appeal and subsequently on 28th January 2021, through their counsel raising the following grounds of appeal:

    1. The 1st appellate court erred in law in failing to notice that the identification evidence by PW2 relied upon by the prosecution fell short of the required guidelines.

    2. The 1st appellate court erred in law in failing to subject evidence on record to fresh scrutiny, re-evaluate the same and analyse as required.

    3. The 1st appellate court erred in law in disregarding the appellants' defence and merely dismissing it without considering and giving it due effect.

    4. The Learned Judge erred in law and fact in passing a harsh and excessive sentence against the appellants."

7. Briefly, the background to this appeal is that on the night of 31st December 2009, between 11-12 pm, MGJ i.e. (PW2) a resident of [Particulars Withheld] trading centre and a waitress at [Particulars Withheld] Bar owned by her brother in-law (PW4), was asleep in a room behind the bar when she heard a bang on the back door to the bar and that after the second bang, the door caved in. That, she lit her torch and saw two people enter the bar and that one was brown and short while the other was tall with long hair and that they argued for about 5 minutes while demanding for money and her mobile phone.

8. It was her evidence that each was armed with a panga and an iron rod and that the brown one said that he wanted to have sex with her and tore her dress with a panga and that her torch was still on and she could see their faces clearly. The brown one then tripped her and she fell down and proceeded to rape her as the other one ransacked her bag; that when the brown one was done, the other one raped her as well and ordered her to sleep and not scream. She pretended to be asleep and when they were gone, she peeped outside and saw 4 people leaving.

9. She further testified that when they left, she dashed out naked and screamed and saw two people coming towards her and since she was scared, she started running away but they caught up with her

and informed her that they were police officers and she told them that she had been raped and robbed, whereupon she showed them the direction that the assailants had taken. In pursuit of the robbers the police officers came across a lady who told them that she had seen some people enter a certain house and she showed them the house whose door was a jar. When they entered the house they found 4 people therein. Among them the complainant identified the two people who had raped her by their faces and by the clothes they were wearing; that the tall dark person had a red shirt while the brown one was wearing a reddish t-shirt with black stripes along the sleeves. She further testified that the two were the 1st and the 2nd appellants and that they were wearing the same clothes when they found them in that house and subsequently arrested them.

10. PW1 on the other hand was David Ondieki the clinical officer in charge of Ntimaru Sub District Hospital. It was his evidence that he had examined PW2 who had a history of rape. She had been treated at the hospital on 1st January 2010. At the time she had a torn gown with no blood stains. As he examined her on 11th January, 2010, he found that her genitalia was normal. He also examined the 2nd appellant who was a suspect of rape and robbery and that upon examining him on his private parts, there was wetness and discharge indicative of sexual intercourse.

11. PW3 was Evans Omuga, the then Officer Commanding Station (OCS), Ntimaru police station. He testified that he received a call from a member of the public on 31st December 2010, about a robbery that had occurred whereupon he immediately called PC Onyango Mutere (PW5) and PC Nelson Kangongo (PW6) who were patrolling the area. They informed him that they had heard screams and were proceeding to the scene. They later informed him that they had tracked down and arrested four suspects. That, the following day he went to the scene and saw the boulder that had been used to break the door whereupon he retraced the route that the robbers had taken and recovered a generator make tiger and a pair of shoes and interrogated the complainant who told him that she recognized the men who robbed and raped her from their appearance and clothes they were wearing. It was his further evidence that he knew the 1st appellant who was a habitual burglar and the 4th appellant who had been previously arrested severally over theft cases.

12. PW4 was Gabriel Chacha Gisare, the owner of the bar where the robbery and rape took place. It was his evidence that he was telephoned by a neighbour who informed him of the incident, whereupon he proceeded to the scene and found the door wide open and established that a TV, a generator, a DVD player, sodas and beers were among items stolen and that he proceeded to the hospital to see PW2 who was in the building at the time of the robbery. She narrated to him the events of that fateful night and that she had been raped. It was his further evidence that he identified some of the stolen items which had been recovered by the police. He knew the 1st, 2nd and 4th appellants as neighbours.

13. PW5 was PC Onyango Mutere. It was his evidence that on 31stDecember 2009, at about 11:30PM he was on patrol together with PC Nelson Kagongo (PW6) within Ntimaru trading center when they heard the screams of a woman. That, they rushed in the direction from where the screams were coming from and found a woman (PW2) who started running away whereupon they identified themselves as policemen. It was his evidence that PW2 told them that some thugs had broken into her house and stolen some items and that two of the thugs had also raped her; that she was able to see their faces from the light of the torch that they had and that as one was raping her, the other one was flashing the torch around and she saw their faces and that one of the assailants was dark and tall while the other one was short and brown.

14. It was his evidence that as they trailed the thugs, came across another woman who told them that she had seen some men carrying items and showed them the direction they had taken and upon following that direction, they came to a certain house which was not locked from inside and upon opening the door, they found four young men and that one of them was sleeping on the ground while the others

were sleeping on the bed with their clothes on and their trousers appeared to be wet. That, PW2 who was with them identified two of the men who had just robbed and raped her from their appearances and the clothes they were wearing.

15. It was his further evidence that as they were pursuing the thugs, they recovered one video player, one speaker and pair of shoes which had been stolen from the bar and that PW2 told them that a generator, a TV and one crate of soda and beer and other assorted items had been stolen and that she identified the video player, the speaker and the shoes. That, PW2 was able to identify the 1st and the 2nd appellant and that they found the 3rd and the 4th appellant together with the 1st and 2nd appellant in the same house.

16. PW6 gave similar account as PW5.

17. When put on their defences, the appellants in their unsworn statements denied having committed the offence.

18. When the matter came up for plenary hearing on 10th May 2021, Ms. Imbaya learned counsel for the appellants relied on her written submissions she had filed on behalf of the appellants. Mr. Shitsama, learned prosecution counsel for the respondent also relied on his written submissions dated 7th May 2021. We have considered the record, the rival written submissions, the authorities cited and the law.

19. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code* we are mandated to consider only matters of law. In *Kados vs. Republic Nyeri Cr. Appeal No. 149 of 2006 (UR)* this Court rendered itself thus on this issue:

> "...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."In *David Njoroge Macharia vs. Republic* [2011] eKLR it was stated that under Section 361 of the Criminal Procedure Code:
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> "Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also Chemagong vs. Republic [1984] KLR 213)."

20. With regard to the first issue, the appellants faulted the High Court for failing to notice that the identification evidence by PW2 relied upon by the prosecution fell short of the required guidelines. It was submitted for the appellants that both the trial court and the 1st appellate court held that the torches provided sufficient light but there was no evidence on record regarding the intensity of the light that would have enabled PW2 to satisfactorily identify the 1st and 2nd appellants and that additionally, both the trial court and the first appellate court did not make any such enquiry as to whether the lighting was dim or bright considering the torch used by PW2 was re-chargeable, meaning that after a lengthy use of the same, its brightness is more likely to reduce; further, that the type of torch used by the 1st and the 2nd appellants was also not stated and the intensity of the light they emitted and in absence of such inquiry, the evidence of visual identification may not be held to be free from error.

21. PW2 testified *inter alia* as follows:

> "I was alone. I heard some bang on the back door to the bar. After a second bang, the door opened. I lit my torch and saw two people enter the bar. One was brown and short and the other was tall with long hair. They were standing near the window. They entered the bar. The 2 were strangers to me. We argued for about 5 minutes." (Emphasis added).

> "...my torch was still on and I could see their faces clearly. I identified the two who had raped me. I identified them by their faces. I identified them from their clothes. I had earlier seen the clothes they were wearing the tall dark one had a red shirt. The other had a reddish t-shirt with black stripes along the sleeves." (Emphasis added).

22. While being cross examined by the 2nd appellant, PW2 stated thus:

> "yes I saw you. I spotted my torch at your face and saw you. You left with the torch. My torch was rechargeable. Each one of you had a big torch." (Emphasis supplied.)

23. The evidence of this particular witness remained firm and consistent even under cross examination. She further categorically stated that the 2nd appellant was the one who raped her first and that she identified him by his face and the clothes he was wearing.

24. The trial court while analyzing the evidence of identification stated thus;

> "secondly, the prosecution's case relies on the complainant's identification of the 1st and 2nd accused persons. Since the robbery happened at night and the complainant did not know either the 1st or the 2nd accused persons, it is important that I warn myself of the inherent dangers of such identification. I have examined the complainant's evidence and it is clear to me that the circumstances were such that she could see both the 1st and 2nd accused persons. The light from the three torches and fact that the two accused persons took some time in her room was sufficient to enable her see both clearly. It is notable that she described their physical appearance to PW5 and 6 shortly after the robbery. She also identified them as soon as they were found in the said house. She also identified the t-shirts each one was wearing, which t-shirts were produced herein court as P. Exh 9 and 10 respectively." (Emphasis added).

25. The trial court further went on to state as follows:

> "the prosecution's evidence against the 3rd and 4th accused person's is circumstantial. This is because the complainant did not identify them at the time of the robbery. They were arrested firstly, they were sleeping in the same room as the 1st and 2nd accused persons and in suspicious manner, as described by PW5 and 6. Secondly, PW5 and 6 noted some wetness and mud on the pair of trousers, and at that time there was a drizzle."

26. Nobody could have said it better than the learned trial magistrate who had the opportunity of seeing the witnesses testify. The High Court on the other hand while *inter alia* analyzing the evidence of PW2 stated as follows:

> "In Maitanyi v Republic (1968) EA the Court of Appeal held that where identification is based on the evidence of a single witness such must be subjected to intense testing. This is particularly so where the conditions favouring a correct identification were difficult. In such circumstances the court must carefully test the testimony of the single witness to assure itself that it is free from the possibility of error. See Abdallah Bin Wendo v Republic (1953) 20 EACA 16. We have carefully considered the testimony of PW2. The incident took place at night making identification under condition favouring a correct identification difficult. However, we have considered that although it was at night, it was possible for PW2 to identify the 1st and 3rd appellants because they had been in close proximity with her. She stated that they argued for about five minutes when they ordered her to give them money and the phone as she pleaded with them not to kill her.Each was armed with a panga and an

iron rod. The short brown one tore her dress, biker and panties, tripped her and proceeded to rape her when she fell down. After a while the co- perpetrator told him to get off so that he could also rape her and proceeded to do so. All the while when they raped and robbed her, the torches were on providing sufficient light. We therefore reject the appellants' contention that it was not possible for PW2 to identify them." (Emphasis added).

27. As we observed earlier on in this judgment, PW 2 testified that she had a torch and she was able to see the 1st and 2nd appellants clearly and while being cross examined by the 2nd appellant she stated that each of the appellants had a big torch. It is also not in dispute that the 1st and 2nd appellants took some time as they ransacked the house and raped PW2 in turns. The evidence of PW2 remained firm and unshaken even under intense cross examination. Moreover, PW2 was able to identify the 1st and the 2nd appellants and even clearly described their heights, complexion and the clothes that they wore shortly after the robbery, who were later found in the same house together with the 3rd and the 4th appellants in suspicious manner by PW2, 5 and 6. We may also add that the said appellant did not hide their faces by masking them so as to make their identification difficult. From the circumstances of this case we are satisfied nonetheless, that even though it was at night and conditions for positive identification might not have been favourable, the identification of the 1st and the 2nd appellants by PW2 was free from the possibility of any error and was safe and we see no reason to fault both the trial court and the High Court for their findings on this issue. As a matter of fact, we note that both the trial court and the High Court warned themselves on the dangers of such identification. Consequently, this ground of appeal must fail. As regards the 3rd and 4th appellants, the two were found sleeping in the room as the 1st and 2nd appellants. Their trousers were wet and had mud and given that there had been a drizzle, they must have been with the 1st and 2nd appellants in that robbery, as some of the stolen items were recovered from within and around the house. We are satisfied that the conviction of the 3rd and 4th appellants was also properly grounded.

28. The High Court was further faulted for failing to subject the evidence on record to a fresh scrutiny, re-evaluation and analysis as required. The High Court while reminding itself of this duty stated thus:

> "as a first appellate court we must consider and evaluate the evidence afresh. In this duty, we are guided by precedent in Pandya v Republic (1954) EA 336; Okeno v Republic (1972) EA and Abdul Hameed Saif v Ali Mohammed Sholan (1955) 22 EACA 270. In evaluating the evidence however we are mindful of the fact that unlike the trial court we can neither see nor hear the witnesses to benefit from observing their demeanor."

29. The court further proceeded to frame the issues for determination as follows:

"

1. Whether or not there was proper identification of the 1st and 3rd appellants (2nd and 1st accused respectively) by the complainant (PW2).
2. Whether there was sufficient circumstantial evidence to link the 2nd and 4th the appellants (4th and 3rd accused respectively) to the robbery.
3. Whether there was sufficient evidence to convict the 1st appellant/2nd accused of rape.
4. Whether the failure of the prosecution to cause the woman alleged to have directed the police to the place of arrest of the accused was fatal to the prosecution."

30. Taking into totality all the circumstances of this case and having carefully considered the record and contrary to the appellants' contention, we find that the first appellate court was very thorough in re-analyzing the record before it. It considered substantively all the issues raised by the appellants based

on the evidence on record. The reasoning was well balanced, fortified by principles of law and we find no fault in the approach taken by the first appellate court. Consequently, this ground of appeal must as well fail.

31. The High Court was further faulted for disregarding the appellants' defence and merely dismissing it without considering and giving it due consideration. First of all, we note that this issue was not raised before the High Court. Similarly, the appellants did not submit on the same. Be that as it may, the trial court observed that:

> "each of the accused person in their unsworn testimony merely denied having committed any of the offences herein. Their testimony being unsworn and uncorroborated is of very little value."

32. The High Court on the other hand stated as follows as regards the appellants defences:

> "The trial court put the appellants (accused) on their defence. Each of the accused gave unsworn testimony and denied having committed the offence of robbery with violence. The 1st appellant/2nd accused pleaded not guilty to the additional charge of rape. None of the appellants/ accused called any defence witnesses. The learned trial magistrate found the charges proved and duly convicted and sentenced each of the accused to death."

33. From the circumstances of this case, the appellants merely denied having committed the offence. The trial court found their defences to be of little value as the evidence against the appellants was watertight and was not rebutted at all by the defences given by the appellants. Consequently, this ground of appeal must as well fall by the wayside.

34. Accordingly, we are satisfied that the conviction of the appellants was safe and sound and hence, we hereby dismiss their appeals on conviction.

35. Finally, the High Court was faulted for passing a harsh and excessive sentence against the appellants. We were therefore urged to re-consider the sentence passed upon the appellants in light of the decision by the Supreme Court in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR* and find that the sentence passed by the trial court and confirmed by the High Court was unconstitutional and excessive in the circumstances.

36. The respondent on the other hand while partly appearing to concede that indeed the sentence passed against the appellants was harsh and excessive, submitted that the appellants had not even attempted to inform the Court with sufficient reasons and documentation as to their ability to benefit from reduction of sentence and that if the court deems it fit to review the sentence imposed on the appellants, then they be sentenced to a minimum of 25 years' imprisonment.

37. Contrary to the appellants' submissions, the Supreme Court in Muruatetu Case (Supra) did not disturb the validity of the death penalty. It merely stated that it is the mandatory nature of the sentence that was unconstitutional. In addition, more recently the Supreme Court of Kenya on 6th July 2021,gave further directions with regard to the Muruatetu case inter alia thus:

> "We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

38. The Court at para ix further opined:

> "These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under Section 204 of the Penal Code before the decision in Muruatetu."

39. Given the fact that the Muruatetu decision faulted the lack of discretion of the trial court and given the mitigation on record by the appellants we are inclined to interfere with the sentence imposed on the appellants. Accordingly, we substitute the sentence of death with a term of imprisonment of thirty (30) years from the date of conviction and sentence of the appellants.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR