Wanjiku v Republic (Criminal Appeal 23 of 2019)
[2021] KECA 330 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KECA 330 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 23 OF 2019

HM OKWENGU, MA WARSAME & J MOHAMMED, JJA

DECEMBER 17, 2021

BETWEEN

JOHN NDUNG'U WANJIKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kiambu, (Mutende & Ngugi, JJ.) dated 9th October 2017 in HCCR.A. No. 80 of 2016)

JUDGMENT

1. The appellant, John Ndung'u Wanjiku was convicted and sentenced to death by the Chief Magistrate's Court for the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*. He appealed against the conviction and sentence to the High Court but the appeal was dismissed in its entirety, hence the appeal before us.

2. The circumstances leading to the appellants' conviction were that on or about midnight on 5th July, 2009 Patrick Ndunge Muthoni the complainant was going home from a funeral arrangement meeting, when he was accosted by three people who were armed with slashers. From the three, he recognized the appellant (known to him as Ndung'u) and one Nahashon Kuria. It was the complainant's testimony that the three called him by name, insulted, hit and knocked him down. The complainant suffered injuries to the hands and ribs and the robbers took his Motorola C138 mobile phone valued at Kshs. 2,300 and Kshs. 1,500 cash as he screamed.

3. Francis Kungu Mwaura (PW2) was also on the material date on his way to the funeral meeting when he heard someone screaming at about 8.30 PM. He ran towards the screams and from about 87 meters away saw the complainant being beaten by three people who were armed with slashers. His account was that the moonlight was bright and he recognized two of the assailants as Kuria and Harrison, both known to him before the incident. He also screamed and called other people to go to their aid.

4. Shortly thereafter, other people, including Samuel Muiruri Mwangi (PW5) arrived at the scene and they chased the assailants. They caught the appellant and took him back to the scene where the complainant identified him as one of his assailants. Thereafter, the appellant was taken to the police station.

5. Based on these facts, the appellant was placed on his defence. He gave unsworn evidence that on or about midnight on the material date he heard screams while at Kihara's farm where he worked. He rushed towards the direction of the screams and was arrested and charged for an offence he knew nothing about.

6. The trial court found that the prosecution had proved the charge against the appellant and rejected the appellant's defence. The trial court convicted the appellant for the offence of robbery with violence and sentenced him to death as provided by Section 296(2) of the Penal Code.

7. Dissatisfied by the judgment of the trial court, the appellant filed an appeal to the High Court against both conviction and sentence as alluded to earlier in this judgment. The grounds of appeal were that the charge was bad for duplicity; the elements of robbery with violence were not established; identification of the appellant in the circumstances was not positive; prosecution witnesses gave contradictory accounts of the time the offence was alleged to have been committed; the trial magistrate barred the investigating officer from testifying thereby perpetuating the lacuna in the prosecution's case; and that the authenticity of the defence statement was not considered.

8. Regarding identification, the learned Judge found that the trial court did not err in finding that the witnesses recognized the appellant, a person they knew previously. On the discrepancy concerning the time of the offence, the learned Judge found that it was a simple minor contradiction of witnesses not being able to tell the exact time that the offence was committed. Finally, the learned Judge found that the trial court considered the appellant's defence, disregarded it and found the prosecution evidence truthful. The learned Judge of the 1st appellate court (Mutende, J.) upheld the appellants' conviction and sentence.

9. Undeterred, the appellant filed the instant appeal on the grounds: that the High Court failed to re-assess the evidence adduced in the trial court; that the identification of the appellant was not satisfactory; that the evidence adduced in the trial court was contradictory and inconsistent; and that the appellant's defence was not considered.

10. At the hearing of the appeal, the appellant was represented by learned counsel, Ms Nyamongo who submitted that the appellant's trial was not fair as, after plea-taking, he was taken to court 13 times without explanation. She added that the trial was concluded without the investigating officer's evidence.

11. Counsel further submitted that the evidence of the complainant and Francis (PW2) was contradictory in that their evidence differed on the time when the incident is alleged to have occurred. She further challenged the evidence of identification by recognition in that the complainant could not have made a positive identification of the appellant from a distance of 87 meters. Counsel contended that when the appellant was arrested he did not have the stolen items and that the arresting officer confirmed that there was nothing recovered from the appellant.

12. Counsel further submitted that the learned Judge who heard the 1st appeal, (Mutende, J.) heard the appeal as a single Judge contrary to Section 359 (1) of the *Criminal Procedure Code.* Counsel contended that there was nothing on record to indicate that the learned Judge had the authority of the Chief Justice to sit as a single Judge to hear and determine the 1st appeal.

13. Mr. Hassan Abdi, the learned State Counsel for the State contended that the 1st appeal was heard by two Judges of the High Court, Mutende and J. Ngugi, JJ. Counsel urged us to find that the learned Judges properly reconsidered and re-evaluated the evidence as required on a first appeal. He submitted that the appellant's evidence placed him at the scene and that the conviction was safe. Counsel further urged this Court to find that the sentence imposed on the appellant was lawful.

Determination

14. We have considered the record, the rival submissions, the authorities cited and the law.This being a second appeal the jurisdiction of this Court is limited to consideration of matters of law only as stipulated under Section 361 of the Criminal Procedure Code as follows:-

> "
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> "361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section
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> a. on a matter of fact, and severity of sentence is a matter of fact; or
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> b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

15. Nonetheless, the second appellate court may interfere with findings of fact that are based on no evidence. In this regard, the predecessor of this Court in the case of *Karingo v R. [1982] KLR 213 at p. 210* stated that:-

> "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 -vs- R (1956) 17 EACA 146)" See also *Chemagong v Republic [1984] KLR 213*

16. Counsel for the appellant raised the issue that the 1st appeal was heard and determined by one judge, contrary to Section 359 (1) of the Criminal Procedure Code. The said section provides as follows:

> "Appeals from subordinate courts shall be heard by two judges of the High Court, except when in any particular case, the Chief Justice has given authority in writing, directs that the appeal be heard by one judge of the High Court." [Emphasis supplied].

17. From the record, on 19th July, 2017, Mutende, J. heard the 1st appeal and directed that the impugned judgment would be delivered on notice. Subsequently, on 9th October, 2017, the judgment was delivered by Ngugi, J. From the record, we find that the 1st appeal was heard and determined by Mutende, J. as a single judge and judgment delivered by Ngugi, J. We are fortified in so finding in view

of the fact that in the penultimate paragraph of the impugned judgment, the learned Judge (Mutende, J.) stated as follows:

> " Having re-evaluated the evidence adduced at trial a fresh (sic), I am satisfied that the trial court convicted the appellant properly for the offence of robbery with violence as charged. Accordingly, I dismiss his appeal in its entirety." [Emphasis supplied].

18. The schedule to the *High Court (Organization and Administration) Act* No. 27 of 2015 amended Section 359 (1) by deleting the words "two judges" appearing immediately after the word "by" and substituted the same by the words "one judge". The date of assent of the said Act (No. 27 of 2015) was 15th December, 2015 while the date of commencement was 2nd January, 2016. That being the case, the 1st appeal heard by one judge in 2017 was lawful.

19. The High Court (Organization & Administration) Act 2015 provides as follows:-

> " Quorum of the Court
>
> (1) Except as otherwise provided under any written law, the Court shall be properly constituted for the purposes of any proceedings before the Court by a single judge".

20. In *Francis Irungu Muthoni vs. Republic, Criminal Appeal No. 9 of 2016 [2017] eKLR*, this court while referring to the said amendment to Section 359(1) of the Criminal Procedure stated as follows:

> " This has of course changed with the amendment to Section 359(1) replacing two judges with one judge. See the schedule to the High Court (Organization and Adminstration) Act 2015.

21. In the circumstances the hearing and determination of the 1st appeal by one Judge (Mutende, J.) was lawful. This ground of appeal fails.

22. On the ground that the 1st appellate court failed to re-assess the evidence adduced in the trial court. A failure of the 1st appellate court to perform its duty as stated amounts to a matter of law that is for consideration by this court. See: *Alexander Ongasia & 8 others v Republic [1993] eKLR Criminal Appeal 88 of 1992*. It is alsonotable that:

> " there is no set format on how such an exercise should be undertaken. Every court will have its own way of doing so. What is not in doubt is that the re-evaluation must be self-evident in the judgment" See Jeremiah Nyaga & 2 others v Republic [2016] eKLR Criminal Appeal 35 of 2015**."

23. We note from the record that the learned Judge considered and analysed the grounds of appeal raised and the evidence on record and concluded that the trial court did not err in reaching the conclusions made.

24. On the ground that the identification of the appellant was not satisfactory. In Paul Etole & another v Republic [2001] eKLR the Court restated the need for caution while receiving all forms of identification evidence as follows:

> " [identification] evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused,

the Court should warn itself of the special need for caution before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the Court should remind itself that mistakes in recognition of close relatives and friends are sometimes made." [Emphasis supplied].

25. In the instant appeal, the evidence against the appellant was that of recognition. The complainant recognized the appellant as one of his attackers as he had known him for several months and indicated that the appellant was from a place called Karagu. Further PW3 found the assailants in the act of assaulting the complainant. He testified that he was aided by the full moon to see the assailants and that he knew the appellant prior to the incident. It was his further testimony that when people responded to the distress call, they chased after the asailants and arrested the appellant while two of the assailants escaped. It was his evidence that the appellant was therefore arrested at the locus in quo.

26. From the record, all the ingredients of the offence of robbery were present. See *Johana Ndungu vs. R, Criminal Appeal No. 116 of 1995.* From the evidence of Patrick Ndungu Muthoni, (PW1) & PW2, the appellant was armed with a slasher; he was in the company of two others; and that he and his accomplices used violence on the complainant.

27. We therefore find that the first appellate court did not err in upholding the appellant's conviction and that there is no basis to interfere with the findings of the first appellate court on the conviction of the appellant for the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

28. On sentence, it is clear that the trial magistrate was of the view that the only lawful sentence for robbery with violence under Section 296(2) of the Penal Code is death. This is a clear indication that the trial magistrate did not exercise her discretion in sentencing. Although the appellant did not say anything in mitigation, he was treated as a first offender and therefore ought not to have been given the maximum penalty of death. This was a factor not considered by the first appellate court. We find that in the circumstances of this case given the injuries suffered by the complainant and the items of which he was robbed, and the appellant being treated as a first offender, a term of twenty (20) years imprisonment would be an appropriate sentence. We therefore, allow the appellant's appeal against sentence and substitute the sentence of death with a term of twenty (20) years imprisonment.

29. The upshot of the above is that we dismiss the appellant's appeal against conviction but allow his appeal against sentence to the extent of substituting the death sentence with a term of twenty (20) years imprisonment effective from the date of his conviction. Those shall be the orders of the Court.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR