Joseph v Republic (Criminal Appeal 56 of 2014)
[2014] KECA 199 (KLR) (16 December 2014) (Judgment)

Francis Muchiri Joseph v Republic [2014] eKLR

Neutral citation: [2014] KECA 199 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 56 OF 2014

ARM VISRAM, MK KOOME & JO ODEK, JJA

DECEMBER 16, 2014

BETWEEN

FRANCIS MUCHIRI JOSEPH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Embu (Khaminwa &Makhadia, JJ.) dated the 1st July, 2008)

JUDGMENT

1. On the 14th May 2006, at about 2:00 a.m. in the morning, in Kirinyaga District, the family of JMK (PW2), his wife AWN (PW1) and their daughter CM (PW3) were viciously attacked by a gang of robbers. They were woken from their sleep by loud bang on the door of their house. About seven thugs armed with crude weapons forcefully entered their house and demanded to be given a power saw, radio cassette and money. Julius asked them who they were; the thugs claimed they were police officers and they were looking for stolen items. When they demanded for cash Julius gave them Kshs. 4,000/= but they demanded for Kshs. 10,000/=. The thugs had torches and J was able to identify John Njiru who was the 5th accused person before the trial magistrate. The thugs hit J on the head with an axe, he became unconscious.

2. The thugs also cut A with a panga on the head and she fell down. As if that was not enough, they went on to gang-rape her. A testified that she was able to identify the attackers. This is what she said in a pertinent portion of her evidence;-

> " The man who severally hit me with a rungu as I resisted rape is on the dock. He is Mr. Njiru. He is the fifth (sic) armed person. I knew him before that day (accused 5 pointed at). As

> Njiru was beating me, accused 4 one Macharia started raping me. I also identified accused 1, one Gitari. I knew him before. He is the one who stood on the bedroom door. He watched as I was being raped. I did not identify accused 2 and 3. Njiru insisted that they had to rape me. It was Njiru who raped me first. Gitari (accused 1) was the second one to rape me... Macharia was the 3rd one to rape me. They raped me in my bedroom. They pulled me off the bed."

3. One of the thugs proceeded to the children's bedroom and raped A's daughter CM (PW3) who was by then pregnant. PW3 was able to identify only one assailant, whom she named as Gitari (1st accused). After the ordeal, the thugs tied J and A on their legs and hands and locked them in the house from the outside. The thugs made away with a power saw, radio cassette, two mobile phones, sewing machine, assorted clothes, TV. and kitchen ware. None of the stolen items was recovered.

4. After the thugs took off, A's son went out through the widow, opened the door and alerted relatives. The relatives administered first aid to the victims and took them to Kianyaga Police Station where a report was made. The report was recorded by Police Constable Boniface Kirimi Mbaka (PW4) and it was produced as an exhibit. A testified that she recorded with the police that she could identify the persons who attacked and raped her. Her statement indicated that she recognized one of the assailants by the name Macharia. During cross examination, by the appellant, PC Kirimi however stated that only Njiru and Gatembe 1st and 5th accused persons respectively were named by the victims of the attack and their names were indicated in the occurrence book when the robbery was reported at Kianyaga police station.

5. Five persons, namely Charles Gitari Gatembe, (1st accused) Octabian Gichovi Murage (2nd accused) John Kariuki Mwangi (3rd accused) Francis Muchiri Joseph, (appellant) and John Njiru Njine (5th accused) , were jointly charged with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* and 10 counts of rape contrary to Section 140 of the *Penal Code*. They all pleaded not guilty to all the charges and after the prosecution's case, the 2nd and 3rd accused persons were found to have no case to answer. They were accordingly acquitted of the charges under the provisions of Section 210 of the *Criminal Procedure Code*. The 1st, 4th and 5th accused persons were placed on their defence and at the conclusion thereof, the three were found guilty of the offence of robbery with violence. The learned trial magistrate dismissed the charges of rape as he posited there was "lack of sufficient evidence".

6. Charles Gitari Gatembe, Francis Muchiri Joseph, (appellant) and John Njiru Njine were all convicted and sentenced to suffer death. They appealed before the High Court, and the appeals by Charles Gitari Gatembe and John Niru Njine were allowed on the grounds that upon their respective arrests by the police, their detention by the police was contrary to the provisions of Section 72(3) (b) of the retired *Constitution* of Kenya. Thus the appeal by Charles Gaitari and John Njiru were allowed. However the appellant's appeal was dismissed for lacking in merit. This is what the learned Judges concluded in their judgment;-

> " On our part, we are satisfied that the evidence of recognition of the appellant was free from possibility of error and therefore the appellant was properly convicted. In the result, we would allow the appeal, quash the conviction and set aside the sentence of death imposed on the 1st and 2nd appellants and order that each one of them is released from prison forthwith unless otherwise held for some other lawful cause. As for the 3rd appellant, his appeal stands dismissed and sentence imposed confirmed"

7. It is that decision that has provoked the instant appeal that was argued by Mr. Njuguna, learned counsel for the appellant, on the basis of three grounds of appeal as stated in the supplementary memorandum of appeal to wit;-

   I. That the learned Judges of the Superior Court erred in law in failing to find that the participation of the appellant in the robbery was doubtful as PW1 did not include his name in the initial report contained in the Occurrence Book.

   II. That the intensity of the torch light at the scene to support the recognition of the appellant by PW1 was not proved to the required standard.

   III. That there was no corroboration of PW1 'S evidence that the appellant participated in the commission of the offence.

8. Submitting on the evidence of identification through recognition, Mr. Njuguna pointed out that the appellant was convicted based on the sole evidence of A, who testified that, she recognized the appellant. A emphasized in her evidence that she knew the appellant very well;-

   " I know accused 1, 4 and 5 as our neighbor. I had no grudge with them. Accused 4's sister is my great friend. She is known as Wanjiku".

9. The question that was posed by counsel was, if A, knew the appellant that well, it was only logical that she should have given his name to the police when the matter was reported. The name of the appellant was not noted in the Occurrence Book this is what PW4 who was the investigating officer in this matter stated when being cross examined by the appellant:-

   " I am not the one who arrested you. You were named by the complainant. Accused 1 also named you. Your names were given as Muchiri. I was given the names of Gatembe, Muchiri and Njiru. I have a diary report in court. It is the OB. The OB says that only Njiru (accused 5) and Gatembe (accused 1) who were identified. I do not know why your name is missing in the OB".

10. According to counsel for the appellant, going by A's testimony, it was obvious she must have known the appellant more than the other co- accused persons, yet she did not give his name when the 1st report was made. What was also disturbing was the fact that Julius said he had not seen the appellant during the attack, yet according to the evidence of the investigating officer, it was him who led the police to the arrest of the appellant.

11. Submitting on the evidence of the lighting that emitted from the torches that aided Alice to see the appellant, counsel was of the view that there was no analysis of the intensity, distance and direction of the torches that was undertaken by the two courts below. J said he had two torches that were taken from him but from the entire evidence, A did not say that the torches were directed to her face. Considering the house was made of timber that does not reflect the light, the two courts below had a duty to consider the intensity of the lighting.

12. Finally, counsel cited the authority of *James Chege Wanja & Another v Republic*, [2014] eKLR, where this court was dealing with an issue of identification under difficult circumstances and stated as follows;

   " On the intensity of the torch light and the lantern lamp, it is our considered view that the Judges did not interrogate and evaluate the intensity of the light from the torch and the lantern lamp that PW1, PW2 and PW3 alluded to. The time of the alleged offence was 3:30 a.m. No evidence was adduced to show where PW 2 was positioned in relation to the lantern

which she said was on, how much light it produced and whether it was behind or before her when the assailants entered her house. If she opened the door to the assailants as she states, the lantern lamp would be behind PW 2 and she would have obstructed the light that should have shone on the faces of her attackers to enable her identify or recognize them. (See *Stephen Mbondola & 2 Others v R*, Court of Appeal Mombasa Criminal Appeal No. 162 of 2000)."

13. Also in the case of *James Omondi Onyango v Republic*, [2014] eKLR the Court of Appeal sitting in Kisumu had occasion to consider a possibility of a mistaken identity by persons who claim to know each other as village mates or neighbors. In such a case of recognition the fact that the name of the perpetrator is not given to the police when the report is made tends to weaken the evidence of identification.

14. Mr. Kaigai, learned Assistant Deputy Public Prosecutor, opposed this appeal and supported the conviction of the appellant. He submitted that the evidence of PW 1 was cogent; she was with the appellant for about an hour and a half. It was not contradicted at all that the appellant was a neighbor, that being so, the possibility of mistaken identity was remote. The two courts, especially the trial court that had the opportunity of seeing the witnesses as they testified, believed PW1. The Judges of the High Court concurred with the trial court, thus counsel urged us to dismiss this appeal.

15. This is a second appeal, by dint of the provisions of Section 361 (1) (a) of the *Criminal Procedure Code*, only matters of law fall for our determination unless it is demonstrated that the two courts below failed to consider matters they should have considered or looking at the entire case, their decisions on such matters of fact were plainly wrong in which case this Court will consider such omission or action as matters of law. See *Kavingo v R*, (1982) KLR 214, where it was held that a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence. In *David Njoroge Macharia v R*, [2011] eKLR it was stated that under Section 361 of the *Criminal Procedure Code*:

> "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 v Republic* (1984) KLR 213)."

16. The only issue raised in this appeal is one of identification of the appellant by Alice through recognition. It was only Alice who testified that she recognized the appellant and gave his name to the police when she reported the robbery. This is the crux of this appeal that turns on the point of law of whether there was positive identification of the appellant through recognition. In the case of *Wamunga v R*, [1989] KLR 424 this Court while dealing with the complexities of an identification of an assailant stated as follows;-

> "It is trite law that where the only evidence against a defendant is evidence of identification of recognition, a trial Court is enjoined to examine such evidence carefully and to 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".

17. The name of the appellant was however not noted in the occurrence book which was available during the trial and was examined in court. PW 4, the investigating officer testified that the name of the appellant was indicated as Macharia in the statement that he recorded from A. The issue that arises is whether the 'Macharia' who is mentioned in the police statement that was recorded by A referred

to the appellant. If indeed this was the case, this evidence was not clearly led before the trial court. It was imperative upon the prosecution to lead evidence on this particular aspect and demonstrate to the satisfaction of the court that 'Macharia' was the same person as the appellant. Also the charge sheet should have indicated the names of the appellant alias 'Macharia' to remove any doubt or confusion that may have arisen. As the matters were left, we are not sure whether 'Macharia' named in the statement is the appellant. It is most likely he was the one, but that weakens the case against the appellant.

17. The person who was mentioned to the police at the earliest opportunity by the complainant in the instant appeal was 'Macharia': we find this evidence was weak because the connection was not properly established by cogent evidence. It was just mentioned as a by the way that the appellant was also known as 'Macharia'. The appellant did not bear any burden to disprove that he was not 'Macharia'. In the case of *George Bundi M'Rimberia v R*, Criminal Appeal No. 352 of 2006, it was stated that a more serious aspect arises when a witness fails to mention the name of an assailant at the earliest opportunity as this can weaken the evidence. It is our considered view that failure by A to properly mention in her statement to the police the name of the appellant weakened her evidence of identification through recognition.

18. In *Lesarau v R*, 1988 KLR 783, this Court emphasized that where identification is based on recognition by reason of long acquaintance, there is no better mode of identification than by name. In *R v Turnbull*, (1976) 3 All ER 551, Lord Widgery CJ observed that the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger. He went on to state;-

> "Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

19. In *Simiyu & Another v R*, [2005] 1 KLR 192 at 195, this Court faced with facts similar to the instant case expressed itself as follows:

> "If PW1 and PW3 recognized the appellants as their immediate neighbours then why did they not give their names to the police soon after the attack upon them? In every case in which there is a question as to the identity of the accused, the fact of there having been a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused and then by the person or person to whom the description was given (See *R v Kabogo s/o Wagunyu* 23 (1) KLR 50). The omission on the part of the complainants to mention their attackers to the police goes to show that the complainants were not sure of the attacker's identity. The failure by the superior court to consider this aspect of the evidence shows that the superior court dealt with the evidence in a perfunctory manner. There was no exhaustive appraisal of the evidence tending to connect each appellant with the commission of the offences to see whether their respective convictions were safe.... Though the prosecution case against the appellants was presented as one of recognition or visual identification, it is manifest that the quality of identification by the witnesses was not good and gives rise to a danger of mistaken identification.... In the circumstances, we have no doubt that the appellants' convictions are both unsafe and unsatisfactory".

20. Further, this Court in *James Omondi Onyango v R* – Criminal Appeal No. 27 of 2012, observed as follows:-

> "If indeed Otieno and Odongo had recognized the appellant at the scene as they alleged in their evidence, why was the name not given to the police when Otieno reported the matter the next morning?"

21. Although the learned trial magistrate warned himself of the danger of convicting the appellant based on the evidence of a sole identifying witness, the factors that weakened the evidence of A were not well considered. Had the two courts below considered the possibility of an injustice likely to be occasioned on the appellant due to mistaken identity, for reasons that the appellant's name was not given in the first report; the statement recorded by A with the police named a "Macharia" as one of the people who attacked her; there was no evidence to show that the appellant was also known as "Macharia". A also testified that she recognized the appellant's voice and there was no voice identification that was carried out; the light emitting from the torches was not tested as there was no evidence of the direction, distance or its intensity. If all these factors were brought to bear, the two courts below would have arrived at a different conclusion

22. Upon consideration of the entire appeal, we are not satisfied that the evidence of identification of the appellant through recognition by A was free from error for the reasons aforementioned and the plethora of authorities we have cited. The High Court Judges failed in their duty of re- evaluating the evidence of identification through recognition independently and merely concurred with the trial court. Accordingly, we find merit in this appeal which we allow. The conviction of the appellant is quashed; the death sentence is set aside. Unless the appellant is otherwise lawfully held, he is to be set at liberty forthwith.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF DECEMBER, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR