Kisaka & 2 others v Republic (Criminal Appeal 163 of 2016)
[2022] KECA 1220 (KLR) (4 November 2022) (Judgment)

Neutral citation: [2022] KECA 1220 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 163 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

NOVEMBER 4, 2022

BETWEEN

JOSEPH WAKHUNGU KISAKA ..... 1ST APPELLANT

CATHERINE ASHIKA ..... 2ND APPELLANT

JOHN WESONGA MAKOKHA ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kakamega (Chitembwe, Wasilwa, JJ) dated December 11, 2013 in HCCRA No 105 of 2012)

JUDGMENT

1. The appellants were arrested and arraigned before the Senior Principal Magistrate's Court at Mumias and jointly charged with robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence were that on September 28, 2010 at Lutasio village in Musambaa sub-location in Matungu District within Kakamega County, jointly with another not before the court, and armed with dangerous weapons namely *pangas* and *rungus* they robbed Dismas Wesonga of a motor cycle make boxer, registration number KMCK 132H, one Samsung mobile phone, one Unitex wrist watch and Kshs 6,500 in cash, all valued at Kshs 89,000 and at the time of the robbery used actual violence on Dismas thus injuring him.

2. The appellants denied the charge leading to a trial in which the prosecution called 5 witnesses in support of its case. Dismas Wesonga Okiya (complainant), a *boda boda* operator, testified as PW1. It was his testimony that on September 28, 2010 at around 12:45pm, he received a call from one Lawrence, his fellow *boda boda* operator, to go and collect a motor cycle registration number KMCK 132H belonging to Musanda Youth Group. He proceeded to Musanda Trading Centre and collected it.

3. Later, in the evening, the 1st and 2nd appellants asked to be ferried to a place known as Lutasio. They agreed to each pay Kshs 20 for the ride. After about 700 meters, the 2nd appellant asked him to stop the motor cycle as she claimed to have dropped her slipper. Once PW1 stopped, the 3rd appellant and another person not before the court approached them from a thicket. Suddenly, the 1st appellant stabbed him several times on his thigh and both arms while the 3rd appellant cut him on his arms. When the complainant fell down in pain, the appellants robbed him of his watch, mobile phone, Kshs 6,500 in cash and made away with the motor cycle.

4. The complainant was so severely injured that he was unable to walk. Fortunately, a fellow operator called Saakai passed by with a customer and spotted him. He called Lawrence and together they took him to Bungoma District Hospital where he was admitted for 5 days. It came to light that PW1 identified the appellants by recognition. He testified that he had known the 1st appellant for three years as the husband to the 2nd appellant whom he had known since birth as they were neighbours. She was sister to the 3rd appellant, who had been his classmate and childhood friend.

5. Lawrence Bukhegi Kagai, a *boda boda* operator, testified as PW2. He confirmed that he was in possession of the motor cycle by virtue of being an employee of Musanda Youth Group. He gave the motor cycle to the complainant on the fateful day as he was unwell and he needed to go for treatment. At around 6 pm, he returned to Musanda Trading Centre where he met the 1st and 2nd appellants. They informed him that they needed to go to Lutasio and agreed to pay Kshs 25 for the trip. He called the complainant and asked him to ferry them. About 10 minutes after they left, one Saakai called PW2 and informed him that the complainant had been attacked and the motor cycle stolen. Saakai took him to the scene of the crime which was about 500 meters away where they found the complainant bleeding from cuts on his head, hands, leg and fingers. They noted that the motor bike was missing from the scene. Together with another man called Tom, they rushed the complainant to Bungoma District Hospital where he was admitted.

6. The following day, they reported the matter to Harambee Police Station. After investigations, the police were led by the 2nd appellant to Simon Masosi's house. PW2 accompanied them and identified a mudguard and a tube inside it that were part of the stolen motor cycle.

7. Nixon Simiyu, PW3, a preacher at African Divine Church at Musumbura corroborated the testimony of PW2. He testified that he was at the Trading Centre when the 1st and 2nd appellants were ferried by the complainant. He also heard about the attack and also rushed to the scene of the crime. He confirmed that the complainant had cuts on his head, left arm, shoulders and his left leg which was swollen. The complainant narrated to them what happened before he was rushed to the hospital. With the assistance of other boda boda riders they were able to arrest the appellants and took them to the police station.

8. Dr Mugunya Echesa, PW4, a consultant surgeon based at Bungoma District Hospital indicated that the complainant suffered grievous harm as a result of the sharp objects used during the attack. He produced the duly filed and signed P3 form and discharge summary. These showed that the complainant; suffered severe wounds on his head, neck, shoulders and left wrist; was stitched and plastered on his broken arm; and was admitted in the hospital for 5 days.

9. Police Constable John Muntabo, PW5, was the investigating officer attached to the Harambee Police Station. He took over the investigation from his colleague police constable Timothy Jibu who had since been transferred. He received the police file and never conducted further investigations as the matter was already in court. He produced the motor cycle's certificate of insurance and a mud guard which were identified by the complainant as being part of the stolen motor cycle.

10. At the close of the prosecution's case, the trial magistrate found that the appellants had a case to answer and placed them on their defense. The 1st appellant gave a sworn statement and denied committing the crime. He testified that on the fateful day, he was at the car wash where he was employed. On October 29, 2010, without cause, he was arrested by a crowd of people and taken to Bungoma Police Station. Subsequently he was taken to Mumias Police Station prior to his arraignment before the trial court.

11. The 2nd appellant, who sold *changaa* for a living, gave an unsworn statement. She testified that she got arrested on the allegation that she sold *changaa* to thieves and was arraigned before court and charged with the offence which she denied committing. She even averred that she had separated from the 3rd appellant, who was her husband.

12. The 3rd appellant gave a sworn statement and stated that on September 29, 2010, while at the farm digging, a crowd of people approached him and told him that a motor cycle had been stolen and they needed his help to find it. He was taken to Harambee police station and later arraigned before the trial court. He denied committing the offence, being related to or even knowing the 1st and 2nd appellants.

13. H Wandere, PM considered the evidence tendered by the prosecution and the defence of the appellants and found that the prosecution proved its case beyond a reasonable doubt. He held that the prosecution not only relied on the complainant's eye witness account, they also relied on the corroborative testimony of PW2 and PW3 which was based on identification by recognition. In the end, he found that the appellants were guilty of the offence and sentenced them to life imprisonment.

14. Aggrieved by the judgment and sentence meted against them by the trial court, the appellants appealed to the High Court. Chitembwe, Wasilwa, JJ, heard the appeal and similarly held that the identification of the appellants was purely by recognition and it connected them to the commission of the offence. They affirmed the conviction and sentence and subsequently dismissed the appeal as they found it to be unmeritorious.

15. Dissatisfied with the decision of the High Court, the appellants filed the instant appeal on two grounds, that the learned Judges erred by;

    a. Upholding the conviction and sentence meted on the appellants while the prosecution failed to discharge the burden of proof.

    b. Affirming the sentence meted out by the subordinate court when the same was harsh, unconstitutional and excessive under the circumstances.

16. In the end the appellants prayed that the conviction and sentence be quashed.

17. On March 22, 2022, during the hearing of the appeal learned counsel Ms Olonyi appeared for the 2nd appellant while the learned principal prosecution counsel Mr Onanda appeared for the respondent. The court was informed by Ms Olonyi that the 1st appellant was deceased and the 3rd appellant had withdrawn his appeal. A letter from dated September 25, 2019 from the officer in- charge Kisumu maximum prison confirmed the death of the 1st appellant. Subsequently, this court made an order of even date which marked the 1st appellant's appeal as abated and the 3rd appellant's appeal as withdrawn. The order marking the 3rd appellant's appeal as withdrawn was subsequently rescinded when counsel clarified that she had sought it in error.

18. Ms Olonyi submitted that the prosecution failed on its mandate to prove their case beyond reasonable doubt. The prosecution had only one witness to rely on and the entire case was at best a based on circumstantial evidence that did not meet the required threshold. Further, the evidence tendered had contradictions that fundamentally affected the strength of the prosecution's case hence the conviction

was not proper. She pointed out that PW5 who testified as the investigating officer was not the one who conducted the investigation.

19. Lastly, on sentence, counsel sought the court to address its mind to the legality of the mandatory sentence in accordance to the finding in oft cited *Francis Karioko Muruatetu & another -vs- Republic* [2017] eKLR, commonly referred to as Muruatetu 1. She urged us to quash the sentence, noting that the appellants had been in prison since 2012 and have atoned for their sins.

20. Mr Onanda for the state contended that the burden of proof was discharged by the prosecution. The identification of the appellants was safe as the same was through recognition as per the testimony of PW1 and PW2. Regarding the investigation officer, counsel opined that there is no law requiring that the officer who investigated a crime be the one to testify. Counsel left the question of sentence to the Court's discretion.

21. We have considered the record of appeal as well as submissions made by learned counsel for the appellants and for the respondent. We appreciate our role as the second appellate court and our jurisdiction which is limited to matters of law as stipulated in section 361 of the *Criminal Procedure Code*. This was affirmed by this Court in *David Njoroge Macharia vs Republic* [2011] eKLR as follows;

> That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. As this court has stated many times before, it 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 Chemagong v R [1984] KLR 611."

22. Counsel for the appellants is calling upon us to find that the concurrent findings of the two courts below were erroneous. It is her contention that the prosecution failed to prove its case beyond reasonable doubt and as a result the conviction of the appellants was unsafe.

23. From the record, we have no basis to conclude that the finding of the two courts below were based on no evidence; or based on misapprehension of evidence; or based on wrong principles. We cannot but conclude that they properly directed their minds in their analysis and re-evaluation of the evidence. The length of interaction between the complainant and assailants coupled by the time of day the offence was committed was enough for the complainant to properly recognize his assailants. Furthermore, the identification of the appellants by the complainant, and as corroborated by PW2 and PW3 was by recognition. This court places a lot of weight on identification by recognition as was elucidated in *Hashon Bundi Gitonga v Republic* [2016] eKLR as follows;

> It is trite law that recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. See: Anjononi & Others v Republic [1980] KLR 59."

24. As a result, we are satisfied that the appellants committed the crime. The prosecution's evidence was water tight and the conviction was safe. We have no reason to interfere with the conviction of the appellants.

25. On the issue of sentence, counsel urged us to quash the sentence due to its harshness and unconstitutionality. She called upon us to rely on Muruatetu 1. The said Muruatetu 1 speaks to the unconstitutional nature of mandatory sentences as they deprive the courts of their legitimate jurisdiction to exercise discretion so as not to impose the death sentence in appropriate cases. However,

when a court finds that an accused person is deserving of the death sentence based on the circumstances of a case then it cannot be said that the death sentence so imposed is unconstitutional.

26. Based on the circumstances of this case, the appellants are deserving of the death sentence as meted by the trial court and affirmed by the High Court and we find no reason to depart from that finding. The commission of the crime by the appellant was clearly premeditated; this is evidenced from the sequence of the crime, from the negotiation of the fare to a destination they had no intention to go to, at least not with the complainant, to the "accidental" fall of the 2nd appellants' slipper at the exact location where the 3rd appellant appeared from the bushes.

27. Additionally, the vicious attack on the complaint was deliberate and unnecessary. The severe injuries inflicted on the appellant, which caused him to be admitted in hospital for five days, coupled with the fact that they left him by the road side to die, shows that the appellants have no respect for life. This exceptional depravity against the complainant was completely undeserving of a person who was simply trying to make an honest living. Nothing here makes the death sentence inappropriate.

28. The upshot is that, this appeal lacks merit and we dismiss it in its entirety in respect of both appellants.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 4TH DAY OF NOVEMBER, 2022.

P O KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.