Oluoch & another v Republic (Criminal Appeal 98 of 2016)
[2022] KECA 1260 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KECA 1260 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 98 OF 2016

PO KIAGE, J MOHAMMED & KI LAIBUTA, JJA

NOVEMBER 18, 2022

BETWEEN

GEORGE ONYANGO OLUOCH ..... 1ST APPELLANT

GEORGE OKOTH OSODO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Homa Bay, (D. S. Majanja, J.) dated 1st March, 2016 in HCCRA NO. 89 OF 2014)

JUDGMENT

Background

1. The appellants, George Onyango Oluoch and George Okoth Osodo, were charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*.

2. The particulars of the offence were that on August 31, 2005 at Rakwaro Sub-Location in Rachuonyo District within Nyanza Province, while armed with dangerous weapons, namely stones, they jointly robbed Walter Muga Nyaliech of Kshs. 40,000/- and, at or immediately before or immediately after the said robbery, used personal violence on the said Walter Muga Nyaliech.

3. At the conclusion of the trial, the appellants were found guilty of the offence of robbery with violence and convicted accordingly, and subsequently sentenced to death.

4. Aggrieved, the appellants appealed against the conviction and sentence before the High Court (Majanja, J.). By a judgment dated March 1, 2016, the appellants' conviction and sentence were affirmed.

5. The learned Judge, in his determination, noted the obligation he had under the law to consider the entire evidence, evaluate it and arrive at an independent conclusion. The learned Judge proceeded to hold that in a prosecution for robbery with violence under Section 295 as read with Section 296 (2) of the *Penal Code*, the prosecution must prove theft as a central element of the offence as was held in the case of *John Mwikya Musyoka v Republic* Mombasa CRA No.38/99 (UR), while the other elements of the offence of robbery with violence were as elaborated by this Court in the case of *Ganzi & 2 others v Republic* [2005] 1 KLR 52.

6. With regard to theft, the learned Judge found the testimony of Walter Muga Nyaliech (PW1) to be clear and consistent. According to PW1, he was counting money when he was confronted by two assailants. The circumstances that he was in his shop at the close of business supported the fact that Kshs. 40,000/- was stolen. The learned Judge held that the fact that the money was not recovered did not undermine PW1's testimony, as it could have been disposed of by the 1st appellant who had run away, and was arrested the following day.

7. The court proceeded to find that it was not in doubt that the assailants were more than one in number and that they were armed with a weapon, namely stones with which they assaulted PW1. The assault complained of was confirmed by the Clinical Officer, Silas Ochieng (PW7) and was consistent with the injuries observed by Jane Adhiambo Muga (PW2), Samwel Onyango Oguma (PW3), Peter Gendia Nyaliech, (PW4) and Mathews Onyango Obunya (PW8). The learned Judge made a finding that all the elements of robbery with violence were proved by the prosecution.

8. On whether the appellants were the persons who perpetrated the offence, the 1st appellate court observed that this was a case of recognition rather than identification of a stranger, and relied on the case of *Anjononi & Others vs. Republic* [1980] KLR p.59 at p.60. The learned Judge relied on the testimony of PW1 and PW2, who testified that they were familiar with the appellants, although they did not know their names. The learned Judge noted that PW1 testified that he informed the police when he recorded his statement that he knew the assailants, but did not know their names. The learned Judge was satisfied that the circumstances surrounding the incident were favorable for positive identification as PW1 recalled that there was sufficient light in his shop while he was counting money, and PW2 recalled that she had seen both appellants enter the shop. The learned Judge found that the time taken to demand the money from PW1 and the interaction between them removed any doubt as to the appellants' identity. The fact that the 2nd appellant was arrested immediately thereafter and the 1st appellant arrested the following morning rendered the prosecution case watertight. The appellants, in their respective defences, confirmed that they were together at PW1's shop on the material night, and had some form of altercation with PW1. The learned Judge dismissed the appeal against both conviction and sentence.

9. Aggrieved by the judgment, the appellants filed a memorandum of appeal to this Court in which they raised four (4) grounds of appeal to wit that the learned Judge erred in law and in fact in: convicting and sentencing the appellants when the prosecution evidence did not support the offence as charged; failing to take into consideration that a necessary step in identification of the appellants as required by law was not followed; finding the appellants guilty and convicting them, even though the prosecution evidence was marred with inconsistencies and did not meet the requisite standard of proof beyond reasonable doubt; and in condemning the appellants to a sentence which under the circumstances was excessive, harsh, unconstitutional and unlawful.

Submissions by counsel

10. The appeal was heard by way of written submissions with oral highlights.

Learned counsel Ms. Kagoya represented the appellants while Mr. Onanda represented the State.

11. In their written submissions, learned counsel for the appellants submitted that an identification parade was not conducted to identify the appellants given that the offence occurred at night at around 8:00pm. There was not sufficient evidence tendered by the prosecution to facilitate positive identification of the appellants; and that the evidence relied upon was merely circumstantial and should not have secured the conviction and sentencing of the appellants.

12. Counsel submitted that the appellants were not at the scene, despite their initial testimony that they were at the scene to pick the 1st appellant's girlfriend, and that they even had an altercation with PW1, that none of the alleged stolen items were recovered on their person or premises. The trial court erred in relying on circumstantial evidence, which did not point to the appellants as the sole perpetrators of the offence to the exclusion of all others.

13. As regards the sentence, counsel submitted that the mandatory death sentence is not only inimical to international law and customs, but that it is also unconstitutional as it violates Articles 25 (a) and (c), 28 and 29 (f) of *the Constitution*. In light of the Supreme Court's decision in *Francis Karioko Muruatetu and Another vs. Republic* [2017] eKLR, (the Muruatetu case) the death sentence meted out by the trial court and upheld by the 1st appellate court was harsh, unlawful, excessive, illegal and unconstitutional, and that it should be set aside.

14. Relying on the case of *Reuben Taabu Anjononi & 2 Others vs. Republic* [1980] eKLR, counsel for the respondent maintained that there was no need for an identification parade, as this was a case of recognition and not of identification, since the appellants were well known to PW1 and PW2, as they came from the same village. The offence occurred at around 8:00 pm with lights on while the complainant was counting the day's sales; that the appellants took some time outside the shop before forcing themselves inside. An identification parade was therefore not necessary. PW1, PW2, PW3, PW4 & PW5 confirmed that the 1st appellant was arrested at the scene of crime while the 2nd appellant was subsequently arrested in an abandoned house with injuries as corroborated by Mathews Onyango Obunya (PW8).

15. Counsel further submitted that the appellants' argument that the evidence adduced by the prosecution did not meet the threshold to warrant a conviction boiled down to the question as to whether the ingredients of robbery with violence were proved by the prosecution. Relying on the case of *Oluoch vs. R* [1985] KLR and the evidence of PW1 that he was attacked in his shop by two boys, was assaulted using a stone, was robbed of money and that he knew the assailants as his village mates, the essential ingredients of the offence of robbery with violence were established.

16. With regard to circumstantial evidence, the respondent maintained that it was not in dispute that the appellants were at the scene of crime as they stated that they had gone to pick PW2's sister, who was the 1st appellant's girlfriend. The respondent relied on the case of *Sawe vs. Republic* [2003] KLR 365 in support of this submission.

17. On whether the sentence was unconstitutional, the respondent submitted that, in light of the decision in *Muruatetu vs. Republic* [2017] eKLR, this Court was at liberty to revisit the sentence. The respondent urged that the prosecution case had been proved beyond reasonable doubt and that the appeal should be dismissed.

Determination

18. This is a second appeal. Our jurisdiction is limited to consideration of matters of law only. Accordingly, we are generally bound by the concurrent findings of fact by the two courts below, departing therefrom

only in the rarest of cases where they are not based on any evidence or proceed from a misapprehension of the evidence, or are plainly untenable. See *Karingo vs. Republic* [1982] KLR 219 and Section 361 of the *Criminal Procedure Code*.

19. We have carefully considered the record, the impugned judgment in light of the criticism levelled against it, the respective submissions by learned counsel for the appellants and learned counsel for the respondent, and the law. The main issues for determination are whether the offence of robbery with violence was proved beyond reasonable doubt against the appellant; which is closely linked with whether the appellants were properly identified; whether the circumstantial evidence was sufficient to sustain a conviction; and whether we should interfere with the sentence.

20. For the prosecution to sustain a conviction for the offence of robbery with violence, it needs to establish and prove three essential ingredients as provided for under Section 296(2) of the *Penal Code*, stated in the case of *Oluoch v. Republic* (*supra*) as follows:

> " The offender is armed with any dangerous or offensive weapon or instrument; the offender is in the company of one or more person or persons; or 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." [Emphasis supplied].

21. From the evidence on record, there were two assailants who were armed with stones and used them to injure PW1 as confirmed by PW7 and as witnessed by PW2, PW3, PW4 and PW8.

22. As regards the evidence of identification, the appellants submitted that no identification parade was conducted, while the respondent submits that this was a case of recognition. It is common ground that the appellants were placed at PW1's shop prior to the incident by PW2 as well as the appellants' respective testimonies, which confirmed that they were at the scene as they had gone to pick the 1st appellant's girlfriend where they had an altercation with PW1. The learned Judge, in his judgment, noted that the time taken to demand money from PW1 left no doubt that the appellants were at the scene at the time of the incident. The appellants were well known to PW1 and PW2, even though they did not know their names. There was sufficient light in the shop given that PW1 was counting money at the time the assailants came in. This fact was captured by PW1 in his statement to the police. Further, the 1st appellant was arrested at the scene while the 2nd appellant was arrested the following morning with injuries that he had sustained the previous night in an abandoned house. There was no evidence to the contrary, or that the appellants were not at the scene.

23. We find, therefore, that PW1 and PW2 were able to positively identify the appellants through recognition, and that the other witnesses never left the 1st appellant's side until he was handed over to the police. It follows, therefore, that we uphold the learned Judge's finding that the appellants were properly identified through recognition, and that there was no need for an identification parade. In *Reuben Taabu Anjononi & 2 Others vs. Republic* [1980] eKLR, Madan J.A (as he then was) stated as follows:

> " This, however, was a case of recognition, not identification, of the assailants; 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."

24. The appellants' argument is that they were convicted on circumstantial evidence, while the respondent maintains that the appellants were placed at the scene of the crime. In the case of S*awe vs. Republic* (supra), the Court, addressing itself on the issue of circumstantial evidence, held thus:

> "In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. Circumstantial evidence can only be the basis of a conviction if there are no other existing circumstances weakening the chain of circumstances relied on. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused".

25. In the instant case, the appellants were found at the scene and beaten up.

The 2nd appellant escaped and was arrested the following morning while in hiding, and injured. We find that, in the circumstances, the act of running away was inconsistent with the innocence of the 2nd appellant. The 1st appellant was arrested at the scene and handed over to the police. The chain of events leading to the arrest of the appellants was not broken but, rather, pointed unerringly to their guilt. The evidence of PW1 was corroborated by that of the other prosecution witnesses.

26. In the instant case, it is not in dispute that the appellants were present at the scene of crime as they testified that they had gone to PW1's house to pick PW2's sister who was the 2nd appellant's girlfriend. This assertion places the appellants at the scene of crime. We therefore find that the evidence adduced and circumstances surrounding the robbery was sufficient to sustain a conviction. The appellants' appeal against conviction therefore fails.

27. As regards the sentence, the offence of robbery with violence attracts a death penalty. The appellants were sentenced to death. The appellants urged this Court to exercise its discretion and reduce the sentence in light of the Muruatetu case.

28. On July 6, 2021, in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR, the Supreme Court clarified that its decision in 2017 in the Muruatetu case only in respect to sentences under sections 203 as read with section 204 of the Penal Code. The Supreme Court directed as follows:

> "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."

29. This Court in the recent case of *Omudi v Republic* (Criminal Appeal 84 of 2018) [2022] KECA 436(KLR) stated as follows:

> "22. The Supreme Court emphasized that Muruatetu as it now stands cannot directly be applicable to cases such as treason under section 40(3), robbery with violence under section 296(2), and attempted robbery with violence under section 297(2) of the *Penal Code*. Challenges on the constitutional validity of the mandatory death penalty in those cases would have to be filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in the Muruatetu case may be reached.

23. Notwithstanding, therefore, this Court's understanding of the rationale of the 2017 Supreme Court decision in Muruatetu to be that judicial discretion in sentencing cannot be restricted by legislative prescription of mandatory sentences, because of the principle of stare decisis and the binding nature of decisions of superior courts, we are constrained to give deference to the 2021 Supreme Court Directions in Muruatetu." [Emphasis supplied].

30. By parity of reasoning, in the circumstances of this appeal, we are unable to interfere with the decision of the trial court which was upheld by the High Court as it was in conformity with the *Penal Code*. The upshot is that the appellants' appeal against sentence must therefore also fail. Accordingly, this appeal has no merit and is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR