Barasa v Republic (Criminal Appeal E037 of 2021)
[2024] KEHC 8908 (KLR) (25 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8908 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E037 OF 2021

AC MRIMA, J

JULY 25, 2024

BETWEEN

DANIEL BARASA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. C.M Kesse (Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. 535 of 2020 delivered on 14th April 2021)

JUDGMENT

Background:

1. Daniel Barasa, the Appellant herein, was charged with two counts. The first one was Robbery with violence contrary to Section 296(2) of the Penal Code.

2. The particulars of the offence were that on the 16th day of January 2020 in Sirende area within Trans-Nzoia County, jointly with others not before Court, being armed with dangerous weapons namely, metal bar, robbed Ann Lillian Nafula of her mobile phone valued at Kshs. 16,500/- hard cash of Kshs. 750, M-Pesa amount transfer of Kshs. 3950/- all total value of Kshs. 21,200/-.

3. The second count was of Conspiracy to Murder contrary to Section 224 of the Penal Code.

4. The particulars thereof were that on the 16th day of January 2020 in Sirende area within Trans-Nzoia County, the Appellant conspired with others not before Court to kill Erick Juma Wafula.

5. The Appellant denied all the counts.

6. He was subsequently tried, found culpable and convicted of the offence of Robbery with violence.

7. He was sentenced to 20 years imprisonment.

The Appeal

8. The Appellant was dissatisfied with the conviction and sentence. In his undated Petition of Appeal, he asserted grounds of appeal as hereunder: -

    1. That the Learned Magistrate erred in failing to hold that I was never identified by PW1 at the alleged scene and further there were no descriptions given to police under section 5 of the Police Act Cap 5 laws of Kenya to validate the alleged identification parade by PW1.

    2. That the Learned Magistrate erred in failing to find that the ownership of the alleged phone was not proved beyond reasonable doubt and there were discrepancies in the amount of money sent and the phone number and the production of the M-Pesa statements by PW4 was contrary to section 77 of the *Evidence Act* Cap 80 Laws of Kenya.

    3. That the Learned Magistrate erred in failing to find that the prosecution failed to call key witness under Section 146 & 150 of the Criminal Procedure Code.

    4. That the Learned Magistrate erred in failing to consider the credible defence put forth by the Appellant.

9. The Appellant urged his case through undated written submissions. It was his case that his description was not given to the Police as per the evidence of PW4, the Investigating Officer. It was his case that he was not at the alleged scene of crime and as such the evidence on identification did not meet the threshold of beyond reasonable doubt.

10. The Appellant further submitted that he was not subjected to an identification parade and that PW1's evidence to that end was unbelievable and untenable. It was his case that he was not pointed at and picked out among other cellmates before being charged.

11. In submitting on ground No. 2, it was his case that PW1 did not produce any receipt to demonstrate that she was the owner of phone sold to PW2.

12. As regards the M-Pesa statements, it was the Appellant's case that they were not properly adduced in Court by the Investigating officer and that there was no expert officer from Safaricom to prove that the alleged statement was retrieved from the phone contrary to Section 77 of the *Evidence Act*.

The Respondent's case:

13. The State opposed the Appeal through written submissions dated 17th July 2023. In making the argument that the ingredients of the offence of Robbery with violence were met, it submitted that under Section 296(1) of the Penal Code, the disjunctive word 'OR' means that proof of any one of the ingredients is sufficient to establish the offence.

14. The Respondent was of the position that the Identification of the Appellant was proper and that there was no evidence to show that it was flawed.

15. It maintained that it had discharged its burden beyond reasonable doubt and that the trial Court's conviction was safe. It urged this Court to dismiss the appeal.

Analysis:

16. Having appreciated the Appellant's case through the grounds of appeal, the parties' submissions and the Respondent's case, the issues that arise for determination are as follows: -

i. Whether the ingredients of the offence of robbery with violence were proved;

ii. Whether the identification of the Appellant was free from error.

17. This being a first appeal, it is the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent findings and conclusions (See Okono vs. Republic [1972] EA 74).

18. In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as so held in Ajode v. Republic [2004] KLR 81.

19. Having laid the role of this Court, next is a consideration of the issues.

Proof of the offence of robbery with violence:

20. Before delving into the merits of the appeal, as guided by foregoing decisions, this Court will first deal with the offence of robbery with violence, the requisite ingredients and how Courts have appreciated its prosecution.

21. The Penal Code defines robbery is section 295 as follows;

> Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

22. In the process of prescribing punishment for the offence of Robbery, the Penal Code in Section 296(2) provides for the offence of Robbery with Violence in the following manner;

> If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

23. In Criminal Appeal No. 116 of 2005 (UR),Johana Ndungu v Republic the Court of Appeal listed the ingredients of the offence or robbery with violence as follows;

i. If the offender is armed with any dangerous weapon or instrument; or

ii. If he is in the company of one or more other person or persons, or;

iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.

24. In Criminal Appeal No. 300 of 2007, Dima Denge Dima & Others vs Republic, the Court stated that the ingredients of the offence of robbery with violence are appreciated disjunctively. It is, therefore, proper to convict an offender in instances where only one of the ingredients is proved. The Court observed: -

> .....The elements of the offence under Section 296(2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence....

25. In the case of Oluoch -vs- Republic {1985} KLR 549, the Court observed that proof of any one of the above ingredients is enough to sustain a conviction under Section 296(2) of the Penal Code.

26. Deriving from the foregoing, the offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the aspect of violence.

27. Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft, the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto.

28. Two things must, therefore, be proved for the offence of robbery to be established. They are theft and the use of or threat to use actual violence.

29. Once the offence of robbery is proved on one hand, the offence of robbery with violence, on the other hand, is committed when robbery is proved and further if any one of the following three ingredients are also established that is the offender is armed with any dangerous or offensive weapon or instrument, or, the offender is in the company of one or more other person or persons, or the offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

30. This Court is alive to the confusion which has lingered over time in distinguishing the offence of robbery from that of robbery with violence.

31. To this Court, the confusion is real. The description of any of the two offences leads to the other. Indeed, that was one of the findings by an expanded Bench of the High Court in Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR which called for law reform to address the ambiguity.

32. Be that as it may, for purposes of establishing the offences pending any law reform which is far too long overdue, the difference between the two offences ought to relate to the circumstances under which they are committed and the gravity of the injuries sustained. This Court will, therefore, adopt an intermediate approach. The approach is that whereas both offences connote theft and violence, for the offence of robbery with violence to be established, there must be evidence of actual use of violence on the person of the victim and not a threat to such violence.

33. Therefore, if in the course of stealing, the offender only threatens to use violence on the victim, but no more than the threat, then the offence of robbery, and not robbery with violence, may be committed. Further, in such circumstances, the offence of robbery with violence cannot stand even if it is proved that the offender was armed with any dangerous or offensive weapon or instrument and/or the offender was in the company of one or more other person or persons as long as there was no evidence of actual use of violence.

34. Having said as much, this Court joins the calling for immediate law reform to address the legal ambiguity.

35. Returning to the case at hand, the record has it that the complainant was attacked and injured by an assailant yielding a weapon. Although the charge sheet indicated that the attacker was in the company of others not before Court, no such evidence was tendered at trial. As such, this Court hereby finds and hold that the attacker was only one.

36. As to the nature of the weapon the assailant was armed with, it was not clear whether it was a metal rod or a knife.

37. Irrespective of that inconsistency, however, there was uncontroverted and corroborated evidence that the assailant put aside the rod/knife and instead exerted some form of physical violence using his hands on the Complainant.

38. The testimony by PW1, that the assailant harmed her was fortified by the medical examination report produced as PExh 6a by Geoffrey Nyongesa, a Clinical officer at Kitale County Hospital, who testified as PW5.

39. It was PW5's evidence that the Complainant visited the hospital and he treated her for injuries sustained at the neck after the assailant tried to strangle her. The injuries were caused by a blunt object.

40. PW5 classified the injuries as harm. He stated that the injuries were not serious.

41. In this case, there is no doubt that the complainant's property was stolen [being phones and money]. It is also true that the complainant sustained light injuries in the cause of the theft.

42. Given that the assailant was alone and considering the nature of the injuries suffered by the complainant, coupled with the intermediate approach adopted above, this Court finds that the offence of robbery, and not that of robbery with violence, was committed.

43. Having so found, this Court wishes to state that the offence of robbery in this case is a cognate offence to that of robbery with violence. [See the Court of Appeal in Malindi in Criminal Appeal No. 5 of 2013 Robert Mutungi Muumbi vs. Republic [2015] eKLR among others].

44. In the end, the offence of robbery was committed in the circumstances of this case.

Identification:

45. The Appellant vehemently contested that he was not identified as the one who committed the offence. He further averred that there was no description of the attacker to the police and that no identification parade was conducted to test the complainant's memory.

46. The importance of a flawless identification of an accused person cannot be gain said. It forms the basis upon which a Court of law can convict authoritatively.

47. In Crim App 140 of 00[1], Peter Mwangi Mungai -vs- Republic [2002] eKLR, the Court of Appeal referred to its own decision where the following was stated;

> .... In Owen *Kimotho Kiarie v. R. Criminal Appeal No.93 of 1983*, (unreported) this Court held that dock identification of a suspect is worthless unless it is preceded by a properly conducted identification parade. The principle was re-echoed in the case of Charles O. Maitanyi v. Republic [1985] 2 KAR 75. In that case it was also held that even where the dock identification is preceded by a properly conducted identification parade the evidence of a single identifying witness must be tested with the greatest care before a conviction is entered. The court there said:
>
> .... That cannot be done unless the identifying witness had made a report as to whether he could identify the accused and given a description. His ability to identify the accused is then to be tested on an identification parade ... If one is to test the evidence with the greatest care this was the way that Court of Appeal in England in R.v. Turnbull [1976]3 ALL ER 549 saw the examination. The Judge ... examines closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g. by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the

police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by him and the accused's actual appearance...

48. The objective of an identification parade is to test the correctness of a witness's identification of a suspect. It is done in respect of strangers, whom witnesses claim that given a chance, they can be able to identify an assailant.

49. Having carefully appreciated the circumstances of this suit, it is apparent that the principles applicable in testing the propriety of an identification parade in so far as the Complainant [testified as PW1] is concerned are not applicable. I say so because in her evidence at the trial Court, she could not identify her assailant and did not give a description of him to the police.

50. If the police were to conduct an identification parade in the foregoing circumstances, such will not aid the investigations in any way. In this case, the police did not, therefore, err in not conducting the parade.

51. The Court now turns the evidence of Justus Wamalwa who testified as PW2. He is the person who was eventually caught with the complainant's stolen phone.

52. PW2 testified that on 23rd April 2020 as he made his way home at about 6.30 to 7.00pm in the company of two other people, he met the Appellant herein stranded. It was his testimony that the Appellant was heading to Eldoret but had no fare of getting to Eldoret. He thus was selling his phone.

53. PW2 stated that he bought it unaware that it was being traced.

54. He testified that the Appellant left after he bought the phone and on 30th June 2020, he was arrested. It was his evidence that before he was released, the complainant identified her phone and the Appellant whose pictures he had taken using the said phone.

55. On cross-examination, it was PW2's evidence that he marked the Appellant's face when he sold him the phone. It was his evidence that the Appellant was selling it as 'Josephat from Kisumu' because he was stranded and needed money to go to Eldoret.

56. By virtue of the forgoing transaction, it is evident that PW2 had direct and close interaction with the Appellant. He established familiarity that yielded identification by way of recognition.

57. Further to the foregoing, the evidence of photos of the Appellant found on the stolen phone recovered from PW2 corroborated the identity of the Appellant. In evidence at the trial Court, the Appellant admitted that his photos were captured in the complainant's phone after the robbery.

58. No. 22988 PC Jonathan Achieng Agumba the investigating officer testified as PW4. It was his evidence that the complainant reported the robbery at Sirende Police Station on 16th September at 1900hrs.

59. He narrated how he recovered the stolen phone using the phone's IMEI number from PW2. He stated further that he recovered images taken from 16th -19th January 2020 from the phone and PW2 was able to identify the Appellant.

60. It is noteworthy that before the trial Court, the Appellant admitted that the photos recovered from the phone were his.

61. This Court has also had occasion to go through the trial Court's judgment. In a bid to establish whether indeed the photos in the stolen phone were the Appellant's, the Court viewed the photos in the gallery and asked the Appellant whether the photos therein were his, a question he answered in the affirmative.

62. The Court saw that the Appellant as pictured in the photos wore a red Tee-shirt, the same one he wore during trial.

63. Even though an identification parade was not carried out on PW2, which in this Court's assessment would not be of much value, there was ample evidence at the trial Court that left no doubt that the Appellant was properly identified by way of recognition by PW2.

64. More importantly, it was not contested by the Appellant that indeed he is the one who sold the phone to PW2.

65. Additionally, the dates which the Appellant took the said personal pictures of himself namely; 16th-19th January 2020 fell immediately on the days after the robbery took place.

66. In the premise, the identification evidence, in the unique circumstances of the case, was free from error, was sufficiently corroborated and placed the Appellant right at the heart of the robbery.

67. This Court, hence, affirms the finding of the trial Court that the Appellant was positively, and without error, identified as the one who committed the robbery.

Other ground:

68. The Appellant raised one more ground. He claimed that the Respondent failed to call a crucial witness in the case which failure occasioned him an injustice.

69. The Appellant's argument is sound. However, the decision to call or not to call a witness by the prosecution has been settled by Superior Court whose decisions are binding on this Court. For instance, in Criminal Appeal No. 31 of 2005, Julius Kalewa Mutunga -vs- Republic, the Court of Appeal discussed the failure by the prosecution to call a witness as follows: -

> ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal Court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.

70. Further in Bukenya & Others -vs- Uganda {1972} E.A.549, the East African Court of Appeal held as follows: -

    i. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

    ii. The Court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

    iii. Where the evidence called barely is adequate the Court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

71. This Court has reviewed the evidence on record. It is satisfied that the evidence was sufficient to prove the charge of robbery. As a result, the Appellant's claim is without basis and is for rejection.

72. Having dealt with all the grounds of appeal raised and having found that the Appellant ought to have, instead, been found guilty of robbery and not of robbery with violence, then the conviction on the offence of robbery with violence is hereby quashed. Consequently, the Appellant is hereby convicted of the offence of robbery.

Sentence:

73. The Appellant was sentenced to 20 years imprisonment for the offence of robbery with violence after tendering mitigations.

74. Section 296(1) of the Penal Code ascribes the penalty for robbery as follows: -

> Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

75. As the Appellant is now serving a sentence that exceeds the one prescribed in law for the offence of robbery, this Court is under a legal duty to review the sentence.

76. There is no doubt the offence of robbery is serious and indeed inhumane. It was also committed against an innocent woman.

77. By considering the circumstances of the case, the mitigations on record, the maximum sentence in law and the fact that the Appellant has been behind bars since February 2020, this Court finds that the Appellant has by now served a sufficient sentence.

78. The sentence is hereby reviewed to the period served.

Disposition:

79. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 thereby mostly being away from the station. Apologies galore.

80. In the end, this Court makes the following final orders: -

    a. The appeal on the conviction for the offence of robbery with violence is hereby allowed. The conviction is quashed and the sentence of 20 years' imprisonment is hereby set-aside.

    b. The Appellant is, however, convicted of the offence of Robbery under Section 295 as read with Section 296(1) of the Penal Code.

    c. As the Appellant has been in custody since February 2020, he is sentenced to the period already served.

    d. Consequently, the Appellant is hereby set at liberty unless otherwise lawfully held.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JULY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Daniel Barasa, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.