**Amwogo v Republic (Criminal Appeal E067 of 2021)**
**[2024] KEHC 10129 (KLR) (12 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10129 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL APPEAL E067 OF 2021**

**RN NYAKUNDI, J**

**AUGUST 12, 2024**

**BETWEEN**

**ISAAC AMWOGO .......................................................................... APPELLANT**

**AND**

**REPUBLIC ............................................................................................ RESPONDENT**

***((Being an appeal from the judgment of Hon. R. Odenyo (SPM); in Eldoret law court Cr. Case No. E2458 of 2018))***

**JUDGMENT**

1. The Appellant before this court were charged with robbery with violence contrary to Section 295 as read with section 296(2) of the Penal Code. Particulars are that on the 7th day of June, 2018 at Upper Elgon View Estate in Kapseret sub-county within Uasin Gishu County, being armed with a panga, he robbed Margaret amount of Kshs. 5,000/= and a mobile phone make itel valued at Kshs. 1,500/= and immediately before the robbery wounded the said Margaret Oroni.
2. The Appellant was convicted of the charge and sentenced to 30 years in prison.
3. Being aggrieved by both the conviction and sentence, he filed the present appeal, relying on the following grounds:
    i. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the essential ingredients of the offence of Robbery with violence under section 296(2) of the Penal Code were not proved against the appellant.
    ii. That the learned trial magistrate erred in law by upholding that the appellant's conviction and sentence but failed to note that evidence of identification was based on a single identifying witness on difficult circumstances thus not free from possibilities of errors.

iii. That the learned trial magistrate erred in both law and facts in finding that the identification parade conducted by (IP) Joshua Nyambu Shoka) was properly procured while there were glaring irregularities and procedural technicalities.

iv. That the appellant's defence was not considered.

The appellant filed his submissions on 5th January, 2024 whereas the respondent filed his submissions on 17th January, 2024.

**Appellants' submissions**

4. The appellant submitted that there was no sufficient evidence to convict the appellant for the offence of robbery with violence. That the prosecution must prove theft as a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft. He equally cited the case of Gazi & 2 others vs Republic (2005) 1 KLR and in Johanna Ndungu v Republic, where the court noted the following elements:

    a. If the offender is armed with any dangerous or offensive weapon or instrument or

    b. If he is in the company with one or more other person or persons or

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

5. The appellant submitted that in the present case, it is clear from the evidence of PW1, PW4 and PW6 that, items worth Kshs. 1,500/= and cash of Kshs. 5000/= were stolen and PW1 was wounded. He submitted that although theft was proved, it was not proved as against the appellant since no evidence was brought or adduced that showed or implicated the appellant as the thief on identification. On this he cited the case of Johanna Ndungu vs Republic (Supra).

6. It was submitted by the appellant that the prosecution witness in her evidence did not identify the man with a panga who attacked her. That she did not clearly identify the assailant and therefore without proper identification the conviction was not proper. On the issue of identification, the submissions made by the appellant were pegged on the issue surrounding evidence of identification based on a single identifying witness.

7. According to the appellant, when he was arrested no panga was recovered but a panga recovered later could not be connected to the crime in question since the appellant was not arrested in possession of any dangerous weapon.

8. Further, it was submitted by the appellant that he was not the offender within the meaning of section 296(2) of the Penal Code as there is no evidence that he committed the act of robbery with violence neither was he identified in the robbery in question. He submitted that there was an error in judging the intensity of the light and distance in identifying the assailants.

9. Additionally, the appellant submitted that the identification parade was no conducted fairly. On this, he relied on numerous authorities and stated that if an identification parade is not properly conducted, then it follows that the accused was not properly identified.

10. Finally, the appellant posited that his defence was not considered. He stated that he gave a sworn statement of defence and told the court that the case was fabricated by PW6 who is his rival over a woman whom PW6 had employed to sell liquor at his club. He produced two bus tickets showing that on 7/6/2018 he was travelling from Nairobi. For the said reasons, he submitted that the conviction and sentence should be quashed.

**Respondent's submissions**

11. The Respondent argued in two limbs. The first limb is on whether the charge sheet was defective and whether the prosecution evidence was consistent and corroborated.

12. On the first issue, I have noted that from the appellant's submissions, he appears to have abandoned the initial grounds of appeal. Therefore, I elect not to consider submissions by the Respondent on this front.

13. As to whether the evidence was consistent and corroborated, the respondent submitted that the doctrine of recent possession was effectively applied during trial. PW1 testified that she was accosted by the appellant who was armed with a panga and she stated that the appellant hit her and she fell on the ditch. The Respondent maintained that the victim testified that she was able to positively identify the appellant because there was moonlight and enough security light at the scene of crime. The prosecution produced an identification parade form which corroborated the testimony of PW-1.

14. According to the Respondent, PW2 and P3 corroborated the testimony of PW1 and PW4 who testified that the items were recovered from the house of the Appellant thus placing him at the Locus in quo.

15. Further, the Respondent stated that PW5 the doctor testified to the injuries sustained by the victim which was consistent with the evidence adduced by PW1 and all prosecution witnesses. PW6 brought out the doctrine of recent possession, which is anchored in law, he testified that he went to the appellant's house and recovered the stolen items which were positively identified by the victim.

16. In sum the Respondent submitted that the learned magistrate properly analyzed the evidence on record and rightly agreed with the prosecution witnesses.

17. On sentence, it was submitted for the Respondent that mitigation was taken into account and the court meted a very lenient sentence of 30 years instead of life imprisonment which is anchored in Law. He therefore prayed that the prayer for reduction should be dismissed.

**Analysis And Determination**

18. This being the first appellate court, my duty is to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court should however bear in mind that it did not see witnesses testify and give due consideration for that.

19. The Supreme Court of India explained the duty of a first appellate court in K. Anbazhagan v State of Karnataka and Others Criminal Appeal No. 637 of 2015 as follows: -

> " The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable

from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

20. Having considered the grounds of appeal, and evidence adduced before the trial court, I shall proceed to determine whether the conviction and sentence were safe.

21. The offence of robbery with violence is contained in Sections 295 and 296(2) of the Penal Code as follows:

> " 295. 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.
>
> 296(2). 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

22. In Jeremiah Oloo Odira v Republic [2018] eKLR the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:

> " 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. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.
>
> On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -
>
> i. The offender is armed with any dangerous or offensive weapon or instrument, or
>
> ii. The offender is in the company of one or more other person or persons, or
>
> iii. 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" See Olouch v Republic (1985) KLR)

23. Regarding the first element, PW4 testified that when they got to the Appellant's home, they did a search and among the recovered items was a panga and the stolen items. PW5 testified that she examined the Complainant and confirmed that she sustained injuries and on cross examination he testified that the injuries were caused by a blunt object but he did not see any injuries on her.

24. In her testimony, PW1, the complainant told the court that on the night of 7/6/2018 she was coming from the market and alighted at Jumbo stage at about 9:00PM. It had rained heavily that day and therefore boda boda riders were unwilling to take her since the road was muddy. There was moonlight and so she decided to walk. When she reached a plot called Sensor Court, she saw a person coming from behind and she thought he was going to overtake her. Suddenly the man held her near the neck and started pushing her into the thicket as he held a panga telling her "If you scream I will finish you".

25. I have considered the testimonies of the aforementioned witnesses and the conclusion I draw is that the offender was armed with a dangerous weapon.

26. On the element of identification, PW4 testified that the complainant told the police that she was able to identify her attacker had a Luhya accent. That she gave some physical description of the attacker including shaved head. That on the said date there was moonlight and nearby security lights and therefore she was able to identify the assailant. The trial court equally concluded that she was able to see the assailant clearly given the circumstances.

27. The appellant took issue with the manner in which he was identified. According to him the identification parade was not properly conducted. He also stated that the trial court did not consider that it was at night and it is not clear how the complainant identified the appellant.

28. The correct procedure of conducting an identification parade is provided for under chapter 42 paragraph 7 of the National Police Service Standing Orders. For an identification parade to be fruitful and of evidential value, the identification rules ought to be adhered to.

29. The Court of Appeal in Samuel Kilonzo Musau v Republic[24] stated: -

> " The purpose of an identification parade, as explained in Kinyanjui & 2 Others v Republic (1989) KLR 60, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion." It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification."

30. The rules and procedure of identification as per the National Police Service Standing Orders were expounded in the case of R v Mwango s/o Manaa as follows:

    a. The accused has the right to have an advocate or friend present at the parade;

    b. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;

    c. Witnesses should be shown the parade separately and should not discuss the parade among themselves;

    d. The number of suspects in the parade should be eight (or 10 in the case of two suspects);

    e. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;

    f. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and

    g. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

31. PW7 PC No. 2337726 CIP Joshua testified as the officer in charge of conducting the identification parade. He testified that he went to the suspect, one Isaack Amwuoga and told him the purpose of the parade. He voluntarily agreed to participate in the parade. He signed the form which the witness gave him for signing his consent to participate.

32. The witness further asked the appellant if he wanted any advocate or friend to be present and he replied in the negative, saying he had none in Eldoret. The witness stated that he was able to assemble members of the parade who had nearly the same features as the suspect.

33. The officer testified that he put the members in a secure place where they could not be seen by anybody. The exercise was conducted and the complainant was able to identify the appellant. The appellant expressed dissatisfaction on the exercise and the same was recorded.

34. I have gone through the record and the judgment of the trial court, I am of the view that the based on the highlighted legal provisions on identification parade, the identification parade herein was properly conducted. The trial court noted that the doctrine of recent possession could not favor the appellant. The items in question were stolen from the complainant on 7/6/2018 at about 9:00PM were recovered while in possession of the accused on 8/6/2018 at about 7:00PM. When the appellant was put on his defence, he pleaded a defence of alibi and stated that he was in Nairobi on that material date.

35. In the South African case of Ricky Ganda vs. The State, [2012] ZAFSHC 59, the Free State High Court, Bloemfontein held:

> " The acceptance of the evidence on behalf of the state cannot by itself be sufficient basis for rejecting the alibi evidence. Something more is required. The evidence must be considered in its totality. In order to convict there must be no reasonable doubt that the evidence implicating him is true...the correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses...it is acceptable in totality in evaluating the evidence to consider the inherent probabilities...The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favor of the state as to exclude any reasonable doubt about the accused's guilt."

36. In R v Mahoney {1979} 50 CCC it was held:

> " The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early time to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it."

37. From the record, the appellant raised the alibi defence during the defence hearing and going by the above authority, the prosecution could not have commenced investigations during defence hearing. Had the appellant disclosed his defence prior to the said defence hearing, the prosecution would have investigated it.

38. In any event, I concur with the trial court that the doctrine of recent possession does not favor the appellant.

39. The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal

summarized the essential elements of the doctrine of recent possession in Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR, where the court stated as follows:

> In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

40. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be a plausible (see Malingi v Republic [1988] KLR 225. In *Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008*, the Court of Appeal observed that;

> Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.

41. The explanation advanced by the Appellant for possession of stolen items was that he picked them by the road. I agree with the trial court's findings that such an explanation is not reasonable enough to exonerate the appellant.

42. In the end, I do not find any fault in the appellant's conviction which is hereby upheld.

**On sentence**

43. The Penal Code prescribes a death sentence for the offence of robbery with violence contrary to Section 296 (2) of the penal code. In a wellrecognized landmark decision by Supreme Court of Kenya, mandatory death sentence under Section 203 as read with Section 204 was declared unconstitutional. This new model of jurisprudence on mandatory sentence of death, cannot be denied the same class of convicts under Section 296 (2) of the Penal Code. The main thrust of the Muruatetu dicta was that mandatory death penalty which is imposed without complying with Article 50 of *the constitution* on the fair trial rights. Therefore, since Muruatetu any imposition of sentence of mandatory death penalty is unconstitutional. The same constitution in Article 26 states that the right to life shall be respected and protected. Although sub section 3 creates an exception to enjoyment of his right but one has to bear in mind whether passing a sentence of death does not negate Article 25 (a) of the same constitution. I find these principles applicable to this case.

44. It is also trite that an Appeal's court does not have power to interfere or review an order on sentence imposed by the trial court unless the facts meets the criteria outlined in Bernard Kimani Gacheru vs R 2002 eKLR. The court of Appeal was on point thus that: "it is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate court feels that the sentence is heavy and that the Appellate court might itself not have passed that sentence, these alone are not sufficient

grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matte4rs already states is shown to exist.”

Courts are urged to take various factors into consideration when sentencing such as retribution, deterrence, rehabilitation, restorative justice, community protection, denunciation, reconciliation and reintegration. Additionally, the trial court ought to consider the accused’s mitigation. It must be understood that once parliament has prescribed the penalties for an offence judges in Kenya do not have carte blanche platform to impose any sanction they see it fit. They are of course bound by precedent sentences from similar cases and circumstances that must always appropriate a sentence which is fair and proportionate to the offence. I think I have said enough on this matter and in summary I am of the view that the particulars of this offence as drafted by the prosecution which ultimately was used to make a finding of guilty under conviction by the trial court could not have attracted a maximum sentence of the death penalty. There is obviously a paradigm shift on mandatory minimum sentences in Kenya and judicial discretion is permitted to set in to achieve the sentencing principles and objectives together with the proportionality test as variables in punishing the offender.

45. Having read through the judgment of the trial court, I am of the considered view that all these factors discussed elsewhere in this judgement were never taken into account by the trial court it could have sentenced the Appellant to a lesser offence. Given the strength of principles in Benard Gacheru case the death sentence reviewed and substituted with a terminable period of 15 years penalty with a residual clause of giving credit for the period spent in remand custody consistent with Section 333(2) of the CPC. In sum the Appeal on conviction is lost save for the sentence on death penalty which is hereby reviewed to the custodial sentence captured above. As a consequence the committal warrant shall be effected from 27.9.2021.

46. It is so ordered.

**DATED AND SIGNED AT ELDORET THIS 12 DAY OF AUGUST , 2024**

**R. NYAKUNDI**

**JUDGE**