Njoroge & another v Republic (Criminal Appeal 122 & 124 of 2023 (Consolidated)) [2024] KEHC 11517 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11517 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 122 & 124 OF 2023 (CONSOLIDATED)

DR KAVEDZA, J

SEPTEMBER 30, 2024

BETWEEN

ANDREW KAMAU NJOROGE ..... 1ST APPELLANT

IAN LEIYAN MAINA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. E. Boke (S.P.M) on 8th February 2019 at Kibera Chief Magistrate's Court Criminal Case No. 172 of 2017 Republic v Andrew Kamau Njoroge and Ian Leiyan Maina)

JUDGMENT

1. Andrew Kamau Njoroge and Ian Leiyan Maina, the 1st and 2nd appellants herein were jointly charged with two counts of robbery with violence contrary to section 295 as read with section 296 (2) of the *penal code*. They also faced an alternative charge to count one: handling stolen goods contrary to section 322 (1) of the *penal code*. They pleaded not guilty and after a full trial were convicted on the two main counts. They were each sentenced to serve twenty (20) years imprisonment on each count. The sentences were to run concurrently.

2. Being aggrieved, the appellants challenged their conviction and sentence on appeal. In their respective petitions of appeal, and amended grounds of appeal, the appellants complained that the charge sheet was defective for duplicity. They challenged the totality of the prosecution's evidence against which they was convicted. They argued that their identification was not proper. In addition, the sentence imposed was harsh and excessive. The appellants urged the court to quash their conviction and set aside the sentence imposed.

3. The appeal was canvassed by way of written submissions which have been duly considered and there is no need to rehash them herein.

4. Before delving into the specific re-evaluation of the evidence on record, I will deal with the preliminary issue raised by the appellants thus: the charge sheet was defective for duplicity. The appellants contended that they were charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) are two separate offences intertwined as one. They argued that as a consequence, their conviction on a defective charge sheet was unsafe.

5. The Court of Appeal in *Paul Katana Njuguna v Republic* [2016] eKLR considered the issue of duplicity where the appellant had been charged with the offence of robbery with violence contrary to Section 295 as read with section 296(2) of the *Penal Code*. The Court observed as follows;

> " Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the *Penal Code*? We observe that the offence under Sections 295 and 296 (2) were not framed in the alternative. So, following the decision in *Cherere s/o Gakuli v R* (*supra*) *Laban Koti v R.* (*supra*) and *Dickson Muchino Mahero v R.* (*supra*), the defect in the charge herein is not necessarily fatal."

6. In this case, the appellants understood the charge against them, participated in the hearing by cross-examining the witnesses, and mounted their respective defence at the close of the prosecution case. They did not raise any complaint before the trial court and in the circumstance, I find that there was no miscarriage of justice on the ground that the charge was duplex.

7. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32).

8. The key ingredients for a robbery with violence charge are found in section 296(2) of the *Penal Code*. It provides as follows-

> " 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".

9. As regards the offence of robbery with violence, the issues for consideration by this court are whether the appellants were positively identified and whether the prosecution did prove its case beyond reasonable doubt.

10. The prosecution case was that on 8th September 2015, David Maina (PW1), a driver, and his conductor, James Thairu Macharia (PW2), were hired by two individuals to transport hay from Narok. After travelling with the 1st appellant they were joined by the 2nd appellant in Narok. The appellants then led them to a remote location. As they neared the supposed destination, two men appeared on the road and they stopped.

11. When they stopped, one of the men reached into the vehicle, turned off the engine, and a violent assault began by the four assailants. Both PW1 and PW2 were pulled from the truck, beaten, and forced into another car, driven by one of their assailants. The assailants threatened to kill them but they begged for their lives. They were forced to drink a suspicious concoction and then abandoned in an unknown area. They later regained consciousness at a Maasai homestead where they made a phone

call to their employer to inform them of their ordeal. They were later taken to hospital for examination and treatment.

12. PW1 testified that he was robbed of Kshs 4,600 and his phone, while PW2's spectacles were damaged. After discharge, both men identified their assailants who had been arrested with the stolen vehicle.

13. Peris Njeri (PW3), the owner of the motor vehicle, received a frantic call from her driver, PW1, shortly after the robbery. Shocked, she immediately reported the theft to the police and used the canter's tracking system to trace its location. The stolen vehicle was eventually found, and she was called in to identify it.

14. CPL Moses Mwenda (PW4) stationed at Ongata Rongai police station, received a report from PW3's brother about the missing canter. While investigating, he learned the vehicle had been recovered in Suswa and that the driver and conductor had been assaulted and admitted to Narok Hospital. When PW4 visited the hospital, he found the two men with injuries. He then proceeded to Narok police station, where he saw the suspects, who had been caught with the stolen canter.

15. CPL Mwangi (PW5), a police officer in Suswa, shared how they set up a roadblock after receiving a tip about the stolen canter. When the vehicle appeared, the appellants were inside. Despite claiming they were sent by their boss, they refused to reveal who it was, leading to their arrest.

16. The evidence on record does prove that the complainants were lured to Narok town where they were attacked by four assailants among them the appellants. During the attack, they proceeded to steal motor vehicle registration no. KBY 846R Isuzu NKR, a wrist watch, cash, and a phone. During the ordeal, the assailants were armed with a gun that was used to threaten the complainants. In addition, the complainants sustained injuries as a result of their assault.

17. This evidence was corroborated by the evidence of Dr Stephen Nyamai Makau (PW6), from Narok County Referral Hospital testified on behalf of Dr. Ezra Mageto who had examined the complainants but had since left the facility. Upon their examination, they were dizzy and had facial injuries. They were treated for poisoning after indicating that they had been forced to ingest an unknown concoction. He produced their discharge summaries.

18. In his defence, the 1st appellant gave sworn testimony admitting to selling bhang in Narok County and paying police officers to allow the illegal business. He told the court that he was arrested for possession of five rolls of bhang after failing to pay a bribe. He was detained at Ollasit police post and transferred to Narok police station, where he was unexpectedly charged with robbery instead of drug possession. He denied knowing the complainants and argued that no identification parade was conducted, which would have been necessary if he had been involved in the alleged robbery.

19. The 2nd appellant stated that on the day in question, he had gone to visit his aunt when he encountered a crowd watching comedians. While observing, two police officers approached and demanded his ID. However, he did not have it and they arrested him. He was taken to Olasit police post, where an officer demanded Kshs 5,000 for his release. Unable to reach anyone, he was transferred to Narok police station and charged alongside a stranger.

20. Nevertheless, the evidence of PW1 and PW2 contradicts the appellants account. Both witnesses positively identified the appellant, having spent over 20 minutes with them before the robbery. In addition, the 1st appellant was in the company of PW1 and PW2 from Rongai to Narok which was sufficient time to recognise him. The incident also occurred during the day, minimizing the chance of mistaken identity. Additionally, the stolen motor vehicle was found in the possession of the appellants and it was positively identified by PW3 as the vehicle in the possession of PW1 and PW2 at the time of the robbery. Furthermore, the appellant's failure to provide a credible explanation for his possession

of the stolen vehicle further invokes the doctrine of recent possession, which supports the charge of robbery with violence against him.

21. I have also considered the defence put forward by the appellant and hold that it did not displace the otherwise strong culpatory evidence adduced by the prosecution. I hold that the prosecution proved its case to the required standard of proof on the charge of robbery with violence against the appellants beyond reasonable doubt. The conviction by the trial court on both counts is therefore affirmed.

22. On sentence, the trial court sentenced each of the appellants to twenty (20) years imprisonment on each count. During sentencing, the trial court considered their mitigation and that they were first offenders. Although the trial court indicated that the said period had been considered, the court was not specific on what amount of time was considered. Guided by the law, the court is of the view that the period ought to be specifically noted, as failure to do so would amount to denying the applicant a right due to the failure of the court to discharge an obligation bestowed upon it by law (See *Ahmed Abolfathi Mohamed v Republic* [2018] eKLR)

23. The upshot of the above is that the appeal is found to be lacking in merit and is dismissed. However, the sentence of twenty years imprisonment imposed by the trial court on counts I and II shall run concurrently from 8th September 2015 date of the 1st and 2nd appellant's arrest pursuant to section 333(2) of the *Criminal Procedure Code*, Cap 75 Laws of Kenya.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF SEPTEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Maroro for the Respondent

Achode Court Assistant