Republic v Lumiti (Criminal Appeal E069 of 2023)
[2024] KEHC 11466 (KLR) (30 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11466 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E069 OF 2023

DK KEMEI, J

SEPTEMBER 30, 2024

BETWEEN

REPUBLIC ..... APPELLANT

AND

DICKSON OSUMBA LUMITI ..... RESPONDENT

(Being an appeal from the judgement of Hon. C.A.S. Mutai S.P.M in Bungoma Criminal Case No. 1436 of 2020 dated 28th May 2023 and delivered on 9th June 2023)

JUDGMENT

1. Dickson Osumba Lumiti, hereinafter "the Respondent" was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. Particulars of the offence being that on the 9th day of November 2020 at around 2100hrs at Nasimbo Village in Bumula Sub-County within Bungoma County jointly with another not before Court, while armed with dangerous weapons namely axes, pangas and rungus, robbed Fidelis Nekesa Wafula one mobile phone make HTC valued at Kshs. 15,000/=, one mobile phone make Wiko valued at Kshs. 12,000/=, one laptop make Toshiba valued at Kshs. 35,000/=, money -Kshs. 18,000/=, one handbag (black in colour) valued at Kshs. 5,000/=and a key and immediately at the time of such robbery used actual violence on the said Fidelis Nekesa Wafula.
2. After a full trial, the trial court established that the prosecution did not prove its case beyond the requisite standard of proof and thereafter acquitted the Respondent and set him free.
3. Being dissatisfied with the conviction and sentence the Appellant now appeals on grounds that; -
    i. The learned magistrate erred in law and in fact and misdirected himself by holding that the Prosecution had failed to prove its case beyond reasonable doubt.

ii. The learned magistrate erred in law and in fact by holding that the Respondent was not properly identified by the complainant and her witnesses.

iii. The learned magistrate erred in law and in fact in failing to properly evaluate the evidence and find that every element of the offence of robbery with violence was proved beyond reasonable doubt.

iv. The learned magistrate erred in law and in fact by failing to convict the Respondent in the prosecution's case when identification of the Respondent was free from the possibility of error.

v. The learned magistrate erred in law and in fact by placing undue weight on the defence testimony when the Respondent even admitted being at the scene of the crime.

4. According to the Prosecution's case, on 9th November 2020, PW1, Fidelis Nekesa Wafula, the complainant herein was at her house at about 9.00 pm in the company of her husband and child aged five years computing her business accounts when she heard people talking outside the house. Her husband proceeded to go outside and she heard commotions and on following suit, she saw someone who was armed with a panga and a rungu and another person lying down. She told the Court that the security lights were on. She testified that she was suddenly slapped by a blade of panga by someone and warned against raising any alarm. The individual forced her back inside her house and demanded for some money from her. She informed him that she did not have any money whereupon he hit her on her left rib cage and threatened to kill her. She gave him Kshs. 18,000/= that was on top of the table and another person who came inside her house ordered her assailant to pursue her husband who was able to flee the scene. She identified the Respondent herein as the person who hit her with a rungu on her left rib cage and told the Court that she was able to identify him with the aide of the light inside their house. She told the Court that she was not able to identify the other person who walked into her house to order the Respondent herein to pursue her husband who managed to flee the scene. That the other suspect ransacked the clothes inside the house and that the two attackers took a laptop brand name Toshiba valued at Kshs. 35,000/=, two mobile phones one HTC brand and a Wiko valued at 15,000/= and 12,000/= respectively. That they took her to the house of one Samuel Wafula who sells fuel for her and found a handbag which they took noting that it was what they were looking for. That they proceeded to lock her and her child in that house. She told the Court that as soon as the robbers left, she raised alarm and that her neighbours came to her rescue. Thereafter she reported the matter to the police. The Respondent was arrested. One cellphone brand name Wiko, was found in somebody's farm. She testified that she was able to identify the Respondent from the identification parade. The Respondent was also wearing a hat, green rain coat, black shirt and a black hair with some metal. She further added that she was able to identify the green jacket before Court as that of the Respondent. She insisted that she was able to identify the accused persons via the lights in her house and that the incident occurred for a period of around 30 minutes. She told the Court that prior to the incident and/or identification parade, she had never seen the accused person.

5. After a brief voire dire examination, the Court formed the view that the child does comprehend the sanctity of oath taking and therefore directed her to tender her sworn evidence.

6. Doreen Veronicah Masika was PW2 who testified that on 9th November 2020at around 8.00 pm while sleeping with her grandmother and her cousin (Samuel Wafula) in the sitting room, she heard people talking and that Samuel told her grandmother that the policemen were looking for her. The next thing she saw was Samuel being held by the neck and pushed into the bedroom and that she spotted two people but only one held Samuel by the neck. They pushed him between the two beds in the bedroom and could not recall what they were saying. She told the Court that she was able to see the person. She told the Court that they hit Samuel with an axe on the head and asked her grandmother what it was

that Samuel did for a living. The person who held Samuel slapped him and they brought their attention to her asking her what it was Samuel did. She told them that Samuel sells Petrol. The attackers tied them up with ropes and they beat up Samuel with a panga and axe, and that the same person who held Samuel by the neck beat him up with a panga and an axe. They carried out a search of Samuel who informed them that he left the money at Kimwanga and that they continued to beat him up. She begged them not to kill them. According to her, the person who was getting instructions had a face mask and was wearing a blue rain coat and grey trouser, and that the other suspect was wearing a green rain coat and a hat like the ones worn by the police. She told the Court that he was not wearing any mask and identified him as the accused person who was before Court but that she had never seen him before as that was her first time to see him. She was able to identify the jacket in Court as the same one the accused person was wearing. On cross-examination, she stated that the Respondent herein di not cover his face and that he had a scar on his face. She added that she was not able to identify the other suspect. On re-examination, she stated that she was able to identify the Respondent herein because of his facial appearance and that he had a scar on the forehead,

7. PW3 was Norah Masika who testified that on 9th November 2020 at 8pm while sleeping her grandson, Samuel Wafula, entered her house with people following him. These people blindfolded her thus could not tell how many they were and covered her with a blanket. She confirmed that her house had light but she could not identify them. She told the Court that they tied their legs and hands and even attacked her grandson as he was bleeding a lot. She told the Court that the moment the attackers left her house alarm was raised and her neighbours came to their rescue. On cross-examination, she stated that she does not know the accused person and that she had never seen him before.

8. PW4 was Samuel Wafula who told the Court that on 9th November 2020 at bout 8.20pm while at his grandmother's house, he saw people walking towards his grandmother's house. They quickly switched off the lights after entry and directed the torch light at him. They ordered him to face the opposite direction and downwards. He told the Court that he saw a green rain coat which was worn by one of them. He told the Court that he was attacked by an axe on his head and that he lost consciousness and could not testify to what happened thereafter. He identified the green rain coat as the one before the Court. He added that he gained his consciousness two days later on while at the hospital. He stated that he later learnt that he had lost Kshs 24, 000/ which was proceeds from his petrol business as well as a further sum of Kshs 20, 000/ which were proceeds from the sale of a cow and further that he lost several items such as a watch, pair of shoes, mobile phone. He finally stated that he did not see the Respondent during the material date.

9. PW5 was Evans Masika who testified that on 9th November 2020 at about 9.00 pm while at homme, he heard PW2 walking outside with some people but could not recognize their voices. He proceeded outside and these people informed him that they were looking for Samuel (PW4). On asking who they were, one of them removed a knife and he was able to see them with the aide of security lights. A torch light was shone on his face and he saw one of them who had a hammer was about to land him a knock but he ducked and the hammer fell on the ground. The other attacker tried to cut him with an axe but he managed to push him aside and run from the scene. He quickly raised alarm. He told the Court that the attackers were two in number with one having a covered face while also wearing a green hat. He was able to identify the accused person as he was wearing a green rain coat and blue jeans long trouser while the other attacker wore a black rain coat. He identified that green rain coat as the one before the Court. He told the Court that he sustained injuries on his left foot but could not tell what injured him but he was hit by a hammer on his head. He reported the incident to the police. He told the Court that he did not identify the accused person during the identification parade but knew that he attacked him and that prior to the incident he had never seen him.

10. PW6 was No. 260607 PC Kipkemboi Felix who testified that he was the investigating officer in this matter. According to him, on 9th November 2020 he received a telephone call from DCIO Chief Inspector Omare alerting him of an ongoing robbery incident at Nasimbo area. In the company of his colleague Inspector Jillo, they proceeded to Kimwanga Centre where they met an individual coming from the opposite direction and they stopped him. They asked what he was doing and on failing to explain himself they arrested him and took him back to the scene. At the scene they begun their investigations and after interrogating PW4 they established that one of the attackers wore a green rain coat and they found that the suspect they had arrested wore a green rain coat. They recorded the statements of the victims and issued P3 forms. An identification parade was conducted on 10th November 2020 at Bumula Police Patrol Base by chief inspector Inspector Omare Julius with five witnesses and eight parade members and other remandees. The accused person selected his standing position and that PW1 identified him by touching him. The accused changed his standing position and that PW2 was able to identify him from the line-up. The identification parade ended and that the accused signed the identification form as did Chief inspector Omare. He produced the form in Court as PEXH.7. After three days, they recovered some mobile phones picked from some field, an Itel make phone belonging to one Leonora. He produced the phone in Court as PEXH.3; another Wiko make phone belonging to PW1 which he produced in Court as PEX.1. He identified the accused person as the one he arrested and that he was wearing a green rain coat. On cross-examination, he told the Court that the accused was arrested along the way and that nothing was recovered on him. He established that the accused and PW1 are neighbours. On re-examination, he confirmed that at that time of the arrest of the accused person the curfew rules were in operation.

11. PW7 was Wenslaus Sudi Wafula who testified that on 10th November 2023 he attended to a patient named Robert Sifuna who gave a history of assault. On examination, he noted the patient had laceration and bruises on his upper eye lid left eye. He prepared his P3 form which he produced in Court as PEXH. 13 b and the Patient book as PEXH.13a. The other patient was PW5 who complained of pain in his left knee and head. On examination he noted swelling on his left knee joint. He prepared his P3 form which he produced in Court as PEXH. 12 b and the Patient book as PEXH.12a. He also attended to PW1 who gave a history of assault. On examination he noted swelling on her left rib cage and swelling on her head. He prepared her P3 form which he produced in Court as PEXH. 5 b

12. PW8 was Dr. Wena Claudia Wafula who testified that she was in Court to testify on behalf of Clinical officer Masinde who filled the P3 form of PW4 as he was currently on transfer. On examination of the patient, she observed that he had stitched wound on the occipital region of the head, the area was swollen and tender and the patient had a fracture of the jaws. The injuries were approximated to be one week and that the probable weapon of attack was deemed to be sharp and blunt. The injuries were classified as grievous harm. She produced the P3 form in Court as PEXH.8, a copy of PW4's discharge summary as 10 b.

13. The Court duly complied with Section 211 of the Criminal Procedure Code. The Respondent having understood the requirements of the provision opted to give a sworn statement and called no witnesses.

14. In his defence, the Respondent stated that the complainants are his neighbours and that on 9th November 2020 at around 2000hrs he was heading home when he came across a police vehicle which stopped and the police in the vehicle alighted and arrested him. He was later subjected to a police parade where the complainant and her husband identified him. He was later charged in Court. On cross-examination, he told the Court that on that day at 7.00 pm he was at his place of business and that he runs the business alone. He told the Court that he closed his business at 7.00 pm and later went to a chang'aa den where he left to ensure he was home by 9.00 pm due to curfew which was then in force.

15. The appeal was canvassed by way of written submissions. It is only the Appellant who complied.

16. This being the first appellate, its duty is to re-evaluate the evidence tendered before the trial court and subject it to a fresh examination and come-up with its own conclusions. (See Okeno versus Republic [1972] E.A. 32).

17. I have perused the record of proceedings and evidence in the trial Court as well as the filed submissions. The issue for determination is whether the trial Court erred in acquitting the Respondent as it did.

18. The Respondent faced a charge of robbery with violence. The ingredients of robbery with violence were clearly set out by the Court of Appeal in the case of Olouch versus Republic [1985] KLR 549 where it stated thus:-

> " Robbery with violence is committed in any of the following circumstances:-
>
> a) The offender is armed with any dangerous and offensive weapon or instrument;- or
>
> b) The offender is in company with one or more persons; or
>
> c) 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..."

19. The charge is as drawn as stipulated in the ingredient 'C' aforestated of the charge of robbery with violence.

20. In criminal cases, the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J (as he then was) in Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR expressed himself as hereunder:

> " To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

21. Also, it was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as follows:

> " What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
>
> 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

22. Proof of any one of the above ingredients is enough to sustain a conviction under Section 296 (2) of the Penal Code. (See Olouch vs Republic {1985} KLR 549) The assailants were armed with rungus and pangas. They violently robbed PW1, PW4 and PW5. They threatened them if any of them decided not to comply with their instructions. PW1 was injured in the ribs and head. With this uncontroverted evidence, the suggestion that the ingredients of the offence were not proved cannot stand.

23. Before addressing the question of identification, it is important to recall that the quality of a witness memory may have as much to do with the absence of other distractions as with duration. (S v Henderson 27 A 3d 872 (NJ 2011). Human memory is not foolproof. It is not like a video recording that a witness needs only to replay to remember what happened. Memory is far more complex. Memory has been described as consisting of three stages: acquisition –

> " the perception of the original event"; retention - "the period of time that passes between the event and the eventual recollection of a particular piece of information"; and retrieval - the "stage during which a person recalls stored information."

24. PW1 and PW2 testified that the Respondent together with another jointly participated in the attack, with PW1 testifying that the Respondent attacked her and PW2 testifying that she witnessed PW4 getting attacked by the Respondent with dangerous and/or offensive weapons. Both PW1 and PW2 testified that the attack occurred under proper lighting and that they were able to identify the Respondent herein in Court.

25. It is my considered view that the Respondent was properly and positively identified by PW1 and PW2. They stated that they didn't know the accused person prior to the incident even though he was a neighbor, as it was established by PW6. An identification parade was duly conducted and the victims PWI and PW2 were able to identify the Respondent. I find that the testimony of PW1, PW2 and PW4 to be reliable direct evidence of visual identification against the Appellant. In this case, PW1 was able to identify the Respondent as she clearly described his facial features to the police prior to the parade. She was able to touch the Respondent as the person who attacked and robbed her on that fateful date and that the Respondent was not wearing the green rain coat or black hat that he had on at the time of attack and robbery. Again, the evidence of the investigating officer (PW7) is that they bumped onto the Respondent emerging from the bush near the scene and was promptly arrested and subsequently identified in an identification parade by the witnesses. Further, the Respondent in his defence evidence confirmed that the two witnesses identified him at the parade exercise. The Respondent was arrested just a few minutes after the robbery incident.

26. In the circumstances, therefore, this Court is satisfied that the prosecution did indeed establish to the required standard of proof beyond reasonable doubt that indeed the Respondent had been identified

as being one of the persons who robbed the complainant on the material night of the robbery. The prosecution established that indeed the circumstances under which the complainant is said to have identified the Respondent were conducive to positive identification and therefore raise no reasonable doubt that the Respondent was in actual fact identified as one of the robbers in the robbery incident. In any event, the complainant had indicated to the police that one of the suspects had some scars on his face during her interrogation with the Police.

27. Secondly, this Court is satisfied that the Respondent was properly identified by PW1 during the identification parade carried out by Inspector Omare which the Respondent signed and stated that he was satisfied with the outcome. Again, the Respondent in his defence evidence confirmed that he was indeed identified by the two witnesses at the parade.

28. This Court having found that the identification parade was properly conducted and that the Respondent was properly identified by the complainant, and being that the circumstances under which the Respondent was arrested are well explained by the investigating officer, being that the Respondent was suspected of being involved in the robbery, as such he was subjected to the identification parade, this Court is satisfied that the arrest was not biased and unlawfully targeted towards the Respondent. The defence claim that he had a land dispute with the complainant is far-fetched and unrelated to the incident of robbery and that the same did not shake the evidence of the prosecution which was overwhelming against him. In any event, the Respondent in his evidence confirmed that he was indeed identified during the parade by the witnesses.

29. This ground of appeal is allowed as it is found to be of merit.

30. Inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. The question to be addressed is whether PW1's testimony is contradictory on the occurrence of the event and whether the contradictions (if any) are grave and point to deliberate untruthfulness or whether they affect the substance of the charge. In this regard, we stand to benefit from the definition by the Court of Appeal of Nigeria in David Ojeabuo v Federal Republic of Nigeria {2014} LPELR-22555(CA), Adamu JA; Ngolika JA; Orji-Abadua JA; & Abiru JA. that:-

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

31. Applying the above tests to this case, i find no contradictions in PW1's evidence and even if there are any, they are not substantial to the extent of affecting the conviction. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it can say it feels an abiding conviction to a moral certainty of the truth of the charge. Further, the evidence in question is to be considered together with the rest of the evidence including the defense. Accordingly, the argument that PW1's evidence was tainted by inconsistencies and contradictions fails.

32. The evidence adduced by the complainant incriminating the Respondent was not discredited. No explanation having been rendered the evidence adduced proved the charge. There was misdirection on the part of the trial magistrate in reaching the finding that the Appellant failed to prove beyond reasonable doubt that the elements of robbery with violence were established nor satisfactorily explained which inconsistencies and contradictions that led him to acquit the Respondent and dismiss

the suit under Section 251 of the Criminal Procedure Code. The finding of acquittal by the learned trial magistrate was therefore arrived at in error and must be interfered with.

33. In view of the foregoing analysis, it is clear that the evidence tendered by the Appellant was quite overwhelming against the Respondent and that the charge had been proved beyond reasonable doubt. The evidence tendered squarely placed the Respondent at the scene of crime. Consequently, the Respondent ought to have been found guilty and convicted accordingly. To that extent, the finding of an acquittal by the learned trial magistrate was arrived at in error and must be set aside.

34. In the result, it is my finding that the Appellant's appeal has merit. The same is allowed as prayed. The judgement of the trial court delivered on 9.6.2023 is hereby set aside and substituted with a finding that the Respondent herein Dickson Osumba Limiti is guilty as charged and is convicted accordingly. The Respondent is hereby ordered to be presented before the trial court on the 2.10.2024 for purposes of mitigation and sentencing.

    It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF SEPTEMBER 2024.

D. KEMEI

JUDGE

In the presence of:

Miss Kibet for Appellant

Dickson Osumba Limiti Respondent

Kizito Court Assistant