Mwangala v Republic (Criminal Appeal E008 (E018) of 2024)
[2024] KEHC 11527 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11527 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E008 (E018) OF 2024

AC BETT, J

SEPTEMBER 27, 2024

BETWEEN

PETER MUTIMBA MWANGALA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgement written by Hon D. Alego and delivered by Hon J. Ndururi on 30th January 2024 in Kakamega CMC Criminal Case No 411 of 2015)

JUDGMENT

1. The appellant alongside 10 others were charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. It was stated that on the night of 8th February 2015 and 9th February 2015, in Navakholo sub-county within Kakamega County, alongside others not before court, they committed several robberies against various persons and immediately after the robberies used actual violence on their victims. The appellant and his co-accused faced 12 counts of robbery with violence.

2. After hearing the prosecution and the defence case, the learned trial magistrate found all the accused persons guilty of all the charges and convicted them accordingly. Upon conviction, the court that delivered the judgement sentenced each of the accused, the appellant included, to death.

3. The appellant was dissatisfied with the conviction and sentence of the trial court and immediately filed a petition of appeal which was later amended. In his amended petition of appeal, the appellant faulted the trial court and set down the following grounds of appeal:-

> "1. That the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution case was built on fabrication lacking in material particulars and probative value to warrant a conviction.

2. That the learned trial magistrate erred in law and in fact by convicting the appellant on insufficient evidence that never pointed to the appellant committing the charges convicted of.

3. That the learned trial magistrate erred in law and in fact by convicting the appellant with no direct evidence tying the appellant to the charges convicted of.

4. That the learned trial magistrate erred in law and in fact by charging the appellant where the prosecution had failed to discharge the burden of proof.

5. That the learned trial magistrate erred in law and in fact by failing to consider the defense put forth by the appellant.

6. That the learned magistrate erred in law and in fact by failing to consider that the appellant was not positively identified by the witnesses as one of the robbers.

7. That the learned magistrate erred in law and in act by failing to consider the appellant being a first-time offender and meting out the harshest sentence."

4. The appellant urged the court to allow his appeal and set aside the entire conviction and sentence.

5. The appeal was admitted to hearing and both parties directed to file written submissions. On the day set for the parties to highlight their submissions, both parties indicated that they did not wish to highlight anything and asked for a judgement date.

6. This being a first appeal, the duty of the court is to re-evaluate the evidence and arrive at its own conclusion as laid down in the case of *Okeno v Republic* [1972] EA.

6. The appellant submitted that no evidence was adduced by the prosecution linking him to any of the charges. He faulted the trial court for failing to appreciate that no evidence was led to prove that any of the stolen items or the weapons used during the robbery were recovered from his house. It was also his further submissions that there was no direct or circumstantial evidence linking him to the robberies and that he was not identified by any of the witnesses as having been among the approximately 50 robbers who attacked the complainants and in the absence of an identification parade, the prosecution did not prove that he was one of the offenders. The appellant relied on the case of *Elizabeth Gitiri Gachanja and 7 others v Republic* [2011] eKLR where the court stated that evidence relied upon to convict in capital offences must be of high quality, credible and beyond reasonable doubt.

7. The respondent did not oppose the appeal. It submitted that from the evidence adduced by the prosecution, no nexus was created between the appellant and the crime in that the investigating officer did not identify the specific items recovered from the appellant, how they were recovered, and how the said items were connected to the robbery. The respondent also submitted that the items allegedly recovered from the appellant were not presented to the witnesses for identification and therefore the investigating officer's evidence lacked corroboration.

8. The main issue in this appeal is whether the appellant was positively identified as having taken part in the robberies. There was no direct evidence placing the appellant in the vicinity of any of the robberies, hence the prosecution relied on circumstantial evidence.

9. It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests namely: -

a) The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.

b) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.

c) The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and no one else. See *Teper v Republic* [1952] ALL ER 480 and *Musoke v Republic* [1958]EA 715.

10. The evidence before the trial court was that there was a spate of robberies on the fateful night in which assorted items were stolen from the complainants. During the robberies, threatened and actual violence was used. Two of the victims succumbed to the injuries inflicted upon them by the armed gang which also raped a woman who was seven months pregnant. Several of the victims were left with serious and life-threatening injuries. It was a most distressful and gruesome attack on the residents of the area.

11. I have carefully analyzed the evidence. The robberies occurred at night. The robbers were said to be between 10 and 50 in number. Most of them wore masks. The appellant was not identified by any of the witnesses. No identification parade was conducted to confirm the identity of the assailants. The appellant was not found with any of the victims' stolen items. In the circumstances, there was no basis upon which the trial court could draw an inference of guilt upon the appellant.

12. The standard of proof in a criminal case is one beyond reasonable doubt. Upon analysis of the evidence, I am constrained to agree with the appellant and the respondent that the offence was not proved to the required legal standard as against the appellant. The conviction and resultant sentence cannot therefore stand.

13. Accordingly, I hereby quash the conviction against the appellant and set aside the sentence imposed subsequent to the conviction. The appellant is hereby ordered released immediately unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF SEPTEMBER 2024.

A.C. BETT

JUDGE

In the presence of:

Ms. Chala for State

Ms. Mulama for Appellant

Court Assistant: Polycap