Wanjala v Republic (Criminal Appeal E020 of 2023)
[2024] KEHC 11246 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11246 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E020 OF 2023

AC MRIMA, J

SEPTEMBER 27, 2024

BETWEEN

EMMANUEL WANJALA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the judgment, conviction and sentence of Hon. S.K Mutai (SPM) in Kitale Chief Magistrate's Court Criminal Case No. E2112 of 2022 delivered on 4 th May 2023)

JUDGMENT

Backround

1. Emmanuel Wanjala, the Appellant herein, was charged with the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.

2. The particulars of the offence were that on the 14th day of May 2022 in Sokomoko Village in Trans-Nzoia East Sub-County within Trans-Nzoia County jointly with others not before Court robbed Michael Kipruto David of Sukuma-Wiki, Sugar 1Kg, half a kilogram of meat all valued at Kshs. 350/- and his mobile phone make Neon Seven valued at Kshs. 16,000/- and immediately after the time of such robbery beat Michael Kipruto David.

3. The Appellant pleaded not guilty to the charge. In support of the prosecution's case, a total of 4 witnesses testified. The Complainant, Michael Kipruto David, testified as PW1. Jacob Wekesa Simiyu testified as PW2. Raphael Kiplimo, a Clinical Officer at Kitale County hospital testified as PW3. No. 225322, CPL Moses Kibet, the Investigating Officer, testified as PW4.

4. Upon close of the prosecution's case, it was found that a prima-facie case had been established against the Appellant. Accordingly, he was placed on his defence.

5. The Appellant was the sole defence witness. He gave sworn testimony.

6. Upon considering the merits of the case, the trial Court found that the prosecution had proved its case beyond reasonable doubt. It convicted the Appellant accordingly and sentenced him to 10 years' imprisonment.

The Appeal:

7. The Appellant was dissatisfied with the conviction and sentence. He sought to quash the conviction and to set-aside the sentence through an Amended Grounds of Appeal couched in the following terms: -

    1. That the learned magistrate erred in failing to hold that I the Appellant was not identified at the alleged scene.

    2. That the learned magistrate erred in failing to find that I was not found in possession and the alleged sim card was recovered 2 months after my arrest and further its production was contrary to section 77 of the *Evidence Act* Cap 80 and inventory was not produced.

    3. That the learned trial magistrate erred in failing to find that crucial witnesses under section 146 and 150 of the Criminal Procedure Code (sic)

The Submissions:

8. The Appellant filed undated written submissions. It was his case that the conditions in which he was identified were not favourable as to yield a positive identification. He claimed that the Complainant gave evidence that there was no light and that the PW2's evidence that he identified him through the motorbike's headlights was not sufficient.

9. The Appellant referred this Court to R-vs- Sebwato [1960] E.A 174 where the Court observed that: -

> Where the evidence alleged to implicate the Accused person is entirely of identification, that evidence must be absolutely water tight to justify a conviction.

10. The Appellant further submitted that the goods which he was found in possession of were not proved beyond reasonable doubt that they belonged to the Complainant.

11. He further submitted that the SIM card of No. 0725132813, that he was found with had no value to the prosecution's case. It was his case that it was inadmissible and contrary to Section 77 of the *Evidence Act*. He relied on the decision in Mutongi -vs- R (1982) eKLR where it was observed that expert evidence is given by a skilled and experienced person in some profession or special sphere of knowledge from facts reported to him or discovered by him by measurements and the like.

12. The Appellant submitted further that the Complainant did not produce any documentary evidence like a receipt to prove that the mobile phone in question belonged to him.

13. The Appellant faulted the prosecution for not producing an inventory in respect of the shirt, cap and sim card that were recovered from him.

14. In conclusion, the Appellant submitted that the prosecution's failure to call material witnesses to testify deprived it of the ability to discharge its burden of proof.

15. The Appellant prayed that the appeal be allowed, conviction quashed and the sentence set-aside.

The Respondent's case:

16. The Respondent challenged the appeal through written submissions dated 6th September 2023. It was it its case that it proved all the ingredients necessary to establish the offence of robbery with violence, beyond reasonable doubt.

17. The State prayed that the appeal be dismissed.

Analysis:

18. Having appreciated the parties' respective cases, the only issue that arises for determination is whether the ingredients for the offence of robbery with violence were proved to the required standard.

19. 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).

20. This Court is, however, required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court. It ought, therefore, to make due allowance in that regard (See: Ajode v. Republic [2004] KLR 81.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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....

26. 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.

27. 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.

28. 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.

29. 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.

30. 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.

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

32. 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.

33. 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.

34. 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.

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

36. Returning to the case at hand, PW1 testified that on 14th May 2022, at about 7.00pm, he went to Rombe Shopping Centre to buy meat, vegetables and sugar. That, as he made his way back home, at the edge of the market where there was no light, he saw one woman standing. Suddenly a person held him from behind and strangled him. In the process, four other people joined and they beat PW1 as the woman held PW1's leg.

37. PW1 further testified that the assailants took his phone make Neon 7 (turbo) from his shirt and Kshs. 350/, a black Tee-shirt and a white cap. PW1 also testified that in the process, he was hit on the ribs and neck.

38. As PW1 wrestled himself from the attackers, a motorcycle rider arrived and raised alarm. The attackers were scared off and ran away.

39. The rider then took PW1 to Guyuna Medical Clinic where he was subsequently referred to Kitale County Referral Hospital where he was treated.

40. On 20th May 2022, 6 days after being attacked, PW1 stated that he heard screams from villagers saying 'mwizi! mwizi!. It was his evidence that on going to the scene, the people there told him that they had caught a thief who had been found milking a cow.

41. PW1 stated that he identified the said thief as the one who had attacked and robbed him on 14th May 2022. He stated that when the thief was led to his house, he retrieved and gave PW1 his SIM Card and asked for forgiveness.

42. Jacob Wekesa Simiyu, PW2, testified that on 14th May 2022 at about 7.30pm, he was riding his motorbike heading home when he saw five people attacking PW1. He recognized the Appellant from the motorbike's headlights that shone on him. He stated that he had seen the Appellant two weeks before the incident.

43. It was further his evidence that the PW1 was injured on his neck and that his shirt was torn. He stated that he took him to Sibanga Police Station where he reported the incident.

44. When cross-examined, he stated that as he approached the crime scene, he recognized the Appellant but the other attackers ran before he could also recognize them.

45. Raphael Kiplimo, the Clinical Officer at Kitale Referral Hospital gave his evidence as PW3. He stated that he treated PW1 on 21st May 2022. He classified the injuries on the hand and neck as harm. He produced the treatment notes and the P3 Form as exhibits.

46. No. 225322 CPL Moses Kibet, the Investigating Officer from Sibanga Police Post testified as PW4. He stated that PW1 reported the offence on 14th May 2022 and that on 8th July 2022, the Appellant was arrested by members of the public with stolen property among them PW1's SIM card for No. 0725132813. The Card was produced in evidence.

47. It was PW4's case that he also recovered PW1's cap which he also produced before Court.

48. It was on the basis of the above evidence that the Appellant was placed on his defence.

49. The Appellant gave sworn testimony. He stated that he is a student in Form 3 at St. Kizito Primary School and that on the material date, he was in Mayanja within Bungoma County and that he only came to Trans-Nzoia County on 29th May 2022 to visit her sister.

50. On cross-examination, the Appellant reiterated that on 14th May 2022, he was with his parents at home in Bungoma.

51. The foregoing evidence is what this Court is called upon to review in this appeal. The Court will, therefore, deal with the ingredients of the offence of robbery with violence.

Identification:

52. The Appellant vehemently denied committing the offence and raised an alibi.

53. On the part of PW1 and PW2, they stated that they both saw the Appellant among those who attacked and robbed PW1.

54. When the Appellant was caught by the villagers, PW1 was able to recognize him as one of those who attacked him on the fateful day.

55. The evidence on the identification of the Appellant was, hence, hotly contested.

56. In giving guidance on how the issue of identification ought to be handled, the Court of Appeal in Peter Musau Mwanzia vs. Republic (2008) eKLR, Court stated as follows: -

> .... We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.

57. In R -vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court had the following to say on recognition: -

> ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? 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 them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

58. Further, the Court of Appeal in upholding the evidence of recognition at night in Douglas Muthanwa Ntoribi vs Republic (2014) eKLR held as follows: -

> On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.

> The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...

59. Again, the Court of Appeal in Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs R (unreported) had this to say on the evidence of recognition at night: -

> .... We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.

60. On the need to have properly conducted identification parades, the Court of Appeal in Crim App 140 of 00[1], Peter Mwangi Mungai -vs- Republic [2002] eKLR, had the following to say: -

> .... 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. Mailanyi 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...

61. The above decisions in essence emphasized on witnesses laying sound basis for recognizing alleged assailants. A Court must, therefore, be satisfied that the evidence on recognition or identification of a stranger is watertight so as not to cause an injustice to an innocent accused.

62. Returning to the case at hand, it is on record that the attack on PW1 occurred at night. According to PW1, he was attacked at the edge of the market where there was no light. He saw a woman standing ahead of him. Suddenly a person held him from behind and strangled him. It was possible that the woman, who later held PW1's leg as PW1 was being robbed, was part of the gang and just posed to distract PW1. In the process, four other people joined and they beat PW1.

63. The attack was, therefore, sudden and in the dark. Further, PW1 was held from the back and was strangled. He definitely must have struggled to free himself. In the process, more attackers appeared and pounced on him.

64. The record did not indicate whether PW1 previously knew the Appellant and even if he so knew him, the record is still silent on how PW1 managed to recognize the Appellant as one of the attackers in such circumstances.

65. PW2 who was a rider stated that he recognized the Appellant from the motorbike's headlights that shone on him as he rode home and came across a group of people attacking PW1. PW2 stated that he had seen the Appellant two weeks before the incident. PW2 did not elaborate on any features on the Appellant that enabled him to recognise the Appellant as the one he had seen two weeks earlier.

66. On a careful analysis of the evidence, this Court finds that this was a matter that called for the aspect of identification to have been handled in a more detailed manner. There was need for an identification parade. The dock identification herein was shrouded in lots of credible doubts. Such identification was worthless.

67. The Court is, therefore, not satisfied that the identification of the Appellant as the perpetrator of the offence was erroneous. As such, the conviction cannot hold.

68. With such a finding, the sentence also has no legal leg to stand.

69. Consequently, the following final orders do hereby issue: -

    a. The appeal hereby succeeds. The conviction is hereby quashed and the sentence of 10 years imprisonment set-aside.

    b. The Appellant is hereby set at liberty unless otherwise lawfully held.

    It is so ordered.

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

A. C. MRIMA

JUDGE

JUDGMENT DELIVERED VIRTUALLY AND IN THE PRESENCE OF: -

Emmanuel Wanjala, 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.