



Mwiti v Office of the Director of Public Prosecutions (Criminal Appeal E041 of 2022) [2024] KEHC 13693 (KLR) (29 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E041 OF 2022
LW GITARI, J
OCTOBER 29, 2024**

BETWEEN

JOHN MWITI APPELLANT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ... RESPONDENT

JUDGMENT

1. Grounds of appeal.
 1. That the learned trial magistrate erred in both matters of law and fact by failing to note that the charge sheet was defective since the evidence adduced by the complainant in court differ with his testimony he gave in police station.
 2. That the learned trial court magistrate erred in law and fact by failing to note that there were inconsistencies and contradictions on the evidence adduced by the prosecution witnesses.
 3. That the learned trial magistrate erred in both law and fact by failing to note that the parade rules were contravened hence the trial was unfair as required by the law.
 4. That the trial court magistrate erred in both matters of law and fact where he failed to consider the time that was spent in custody while undergoing trial as part of my sentence pursuant to section 333 (2) of the Criminal Procedure Code.
2. The appeal arises from the decision in Chief Magistrate’s court at Maua Cr. Case No. 1156/2020 where the appellant was charged with the offence of robbery with violence Contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars of the charge were that on 30th June 2020 at Katherwa village, Akirangondu Location in Igembe central sub county within Meru county jointly with another not before court while armed with a dangerous weapon, namely a rifle robbed Kelvin Karithi motor cycle make Captain Registration Number KMER 913 L Chases (sic) No. JA 900XXXX



valued at Kshs. 100,000/= mobile phone make ITEL valued at Kshs.1000/=, a pair of shoes valued at Kshs. 400/= and Kshs. 600/= and immediately before the time of the robber threatened to use violence against the said Kelvin Kariithi.

3. The appellant denied the charge. The appellant faced a second charge of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code in that on 30th June 2020 at Katherwa village Akirangondu location in Igembe central sub-county jointly with another not before the court while armed with dangerous weapons namely a rifle robbed Joseph Kithinji a mobile phone make Tecno valued at Kshs. 1100/= a pair of shoes valued at Kshs. 200/- and Kshs. 150/= and immediately before the time of such robbery threatened to use violence against the said Joseph Kithinji. In the alternative the appellant was charged with handling stolen goods contrary to Section 322 (1) and (2) of the Penal Code in that on 17th July, 2020 at Katherwa village Akirangondu location in Igembe central sub county within Meru County otherwise than in the course of stealing retained a motor cycle make Captain, red in colour Chases No. JZA 900XXXXX knowing or having reason to believe it to be stolen.
4. The appellant denied the charges. He was tried and in a judgment delivered on 24th November, 2021 the appellant was found guilty on the 1st and 2nd count and sentenced to serve fifteen (15) years imprisonment. The appellant was dissatisfied with that turn of events and filed this appeal which was initially based on seven grounds and subsequently amended to four (4) grounds. He prays that the appeal be allowed, the conviction be quashed, the sentence be set aside and he be set at liberty
5. The respondent opposed the appeal and prayed that it be dismissed.

The Prosecution's Case

6. The prosecution called Kelvin Mutwiri Ntonjira the complainant on the first count who testified that on 30th June 2020 at about 8.00 a.m, he was buying miraa at Kiengu and he had given his motor cycle to Kareithi (P.W 2) to work with it. He was called by Kareithi who reported that he had been robbed the motor cycle by armed people. He was also robbed off the money and had no fare. He was slightly injured. He hired another motor cycle and went and rescued Kareithi and one Kithinji. He then reported the matter to Maua Police station. Later he was called at Rare Police post and informed that the motor cycle had been recovered. He went and identified the said motor cycle No. KMER 918Z make Captain red in colour. He identified the photographs of the motor cycle and a sale agreement.
7. Kelvin Kareithi testified that on 30th June 2020 at about 8.00 a.m. he went to buy miraa with Kithinji and on the way they met two people and one of them was Mutembei and he was with the appellant. He carried the two as they wanted to go to Katherwa. Before reaching Laare at a school called Irinde they ordered him to turn and the appellant told Mutembei that they should change route. P.W 2 told them he could not go to that route and he stopped. He refused to proceed and demanded fare from them. Mutembei removed the keys of the motor bike and the appellant took it. P.W 2 realized that the two were robbers and surrendered. They took his phone and Kshs. 150/=. The two were armed with a pistol. P.W 2 and Kithinji ran away and left the motor bike behind. The appellant drove off the motor bike. P.W 2 – called P.W 2 and told him what happened. The matter was reported to the police. A month later police called them and informed them that the motor cycle was recovered. The appellant is the one who had the motor cycle. A parade was arranged. P.W 2 identified the appellant from an identification parade with fifteen members. The other one was not arrested.
8. Joseph Kithinji testified that on 30th June 2020 at 8 a.m. he was with Kareithi (PW2) on the way to Laare to buy miraa. On the way they met two people who requested to be taken to Kathelwa. One was the appellant and the other was known to P.W 2. On the way the two people asked them to go off to another route that does not lead to Kathelwa. P.W 2 said he could not go on that route. One



grabbed the keys of the motor cycle and asked P.W 2 what he wanted. The appellant flashed out a gun and demanded the keys and money. They robbed them mobile phones and money Kshs. 150. The two ordered P.W 2 & 3 to go back to where they had come. They went and reported the matter at Laare Police station. Later they were informed that the motor cycle was recovered and one suspect who is the appellant was arrested.

9. 4 Inspector of Police Stephen Safari testified that on 19th July, 2020 at 4.00 p.m to 4.30 p.m. he conducted an identification parade for the appellant who was a suspect of capital robbery. He had two witnesses namely,

1. Kelvin Karithi of Kiengu
2. Joseph Kithinji of Kiengu

He looked for eight people of the same height and build and complexion. He also ensured that the witnesses had not seen the suspect before the parade. He conducted the identification parade and the appellant was identified by the two witnesses.

4 police constable (P.C) James Njogu testified that he is the one who investigated the case. He testified that on 17th July, 2020 he was at Laare Police station when he received the report that there was a suspicious character saying he was selling a motor cycle. He became suspicious considering the price and the condition of the motor cycle. He went on patrol with other police officers and found the suspect who is the appellant in this case near a petrol station. The appellant was sitting on a motorcycle and the keys were on the ignition. They managed to arrest him and took him to the police station. The P.W 5 testified that there were many complaints of theft of motor cycles and some had information sharing platform where he circulated the details of the theft of the motor cycle. He got a report from Maua Police station about a motor cycle that was stolen at Kathelwa. He was directed to the reportees who are Kelvin Mutwiri, Kelvin Karithi and Joseph Kithinji. They went and identified the motor cycle which had no number plates. He checked the chassis number and it matched those of the motor cycle of P.W 1 which were listed on the sale agreement of the motor cycle which was JA 900XXXX. Kelvin Kariithi narrated to the witness how the motor cycle was stolen from him at gun point on 30th June 2020. P.W 5 was satisfied that the appellant had robbed the motor cycle from the reportees. An identification parade was conducted and witnesses identified him. He was then charged. The appellant was then charged. The appellant was put on his defence and said in unsworn statement of defence that he did not commit the offence. He stated that he was arrested for violating the curfew. Later a parade was conducted. He stated that he did not commit the offence and the allegations was based on suspicion.

The Appeal

10. The appeal was canvassed by way of written submissions. The appellant submits that the charge sheet was defective since the evidence adduced by the complainant and the witnesses differ from the testimony he gave at the police station. The contention by the appellant is that the evidence does not support the particulars of the charge. The appellant relies on Section 134 of the Criminal Procedure Code and *Sigilan Vs Republic* (2004) 2KLR 480. Cr. Appeal No. 92/2007 Court of Appeal. Tanzania, *Dickson Elia Nsamba Shapatwa Vs R.*

11. The appellant further submits that the learned magistrate erred by failing to note that the parade rules were contravened and therefore the trial was unfair.

The appellant further submits that the trial magistrate erred by failing to take into account the period spent in custody as required under Section 333(2) of the Criminal Procedure Code.



The appellant further submits that the learned magistrate rejected his defence without giving cogent reasons.

Respondents Submissions

12. The respondent submits that the offence of robbery with violence was proved to the required standards. He relies on *R Vs Turnbull and another* (1976) 3 ALL ER 548.

On the ground that the charge sheet was defective, the respondent submits that the error was not fatal. He relies on *Benard Ombuna Vs Republic* (2019) EKLK and section 382 of the Criminal Procedure Code.

On sentence the respondent concedes to the fact that the time spent in custody was not considered.

Analysis and Determination

13. I have considered the proceedings before the trial court, the grounds of appeal and the submissions. The issue of determination is -;

1. Whether the charge against the accused was proved beyond any reasonable doubts

This is the first appellate court and this court has a duty to analyse the evidence tendered before the trial court, evaluate it and come up with its own independent finding while bearing in mind that it did not have an opportunity to see the witnesses when they testified and leave room for that. See *Okeno Vs Republic* (1972) EA 32.

In *Padya Vs Republic* (1957) EA 336 at 337 it was stated-;

“On first appeal from a conviction by a judge or a magistrate sitting without a jury the appellant is entitled to have the appellant’s court own consideration and view of the evidence as a whole and its own decision there on. It has the duty to hear the case and consider and reconsider the witnesses before the judge or magistrate with such other material and its own decision thereon”

14. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses (see *Peters Vs Sunday post* (1958) EA 424) In this case the appellant was charged with robbery contrary to section 295 as read with section 296(2) of the Penal Code. The sections provides:-

“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 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”

The ingredients which the prosecution seeks to prove in order to secure a conviction are



- a) The offender is armed with any dangerous or offensive weapon or instrument
- b) the offender is in company with one or more person or persons
- 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 in order to retain the thing being stolen and to overcome resistance. See *Oluoch Vs Republic (1985) KLR.*

15. In *Dima Denge and others Vs Republic Criminal Appeal No.300/2007* it was stated that the element 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. The appellant contends that the evidence differs from the evidence he gave at the police station. The court considers the charge and its particulars to determine whether the charge is proper and whether ingredients are proved to the required standards. The court is not party to what happens at the police station.
16. I note that the appellant is stating that what is listed on the particulars of the charge and the evidence adduced does not tally. The appellant submits that the P.W 2 testified that he was robbed of Kshs. 150 while the charge sheet states that he was robbed Kshs. 600/= . The P.W 2 said he was robbed off money, mobile phone, shoes and the motor bike. Failure to prove that all the items listed on the charge sheet does not render the charge sheet to be defective. A defect that is fatal to the charge is the one that will lead to the charge sheet being declared fatally defective. See *Benard Mbuma Vs Republic (2019) EKLR.* The issues of defective charge sheet was addressed as follows;

“In a nutshell the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up, appropriate defence.”

Section 382 of the Criminal Procedure Code provides as follows-;

“382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

I find that a discrepancy between the charge sheet and the evidence adduced about what was reported as stolen does not invalidate a charge and the charge sheet need not be amended. It is a discrepancy which does require the charge sheet to be amended. In *Obed Kilonzo Kivevo V Republic*, court of appeal Criminal appeal No. 77/2015 the Court of Appeal held that the fact that the charge sheet indicated that the offence occurred a month before the date established by the evidence did not prejudice the appellant



and curable under Section 275 (2) and 382 of the Criminal Procedure Code. The discrepancy on the money stolen as stated on the charge sheet did not prejudice the appellant. The appellant contends that there were inconsistencies and contradictions in the evidence adduced by the prosecution witnesses. In *Twehangane Alfred Vs Uganda Court of Appeal Uganda* which was cited with approval by the Court of Appeal in the case of *Erick Onyango Odeng –v- Republic* (2014) eKLR

with regard to contradictions in the prosecution case the law is set out in numerous authority in that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate unfaithfulness or it that do not affect the main substance of the prosecution’s case.”

In this case no contradictions and inconsistencies which points to deliberate attempts by the witnesses to tell lies. Minor discrepancies must be ignored. The discrepancies on registration number of the motor cycle and the chassis number are typing errors. The appellant faults the identification parade and submits that the parade rules were contravened. He submits that a police officer pointed him out to P.W 3 who stated that he did not know Mwiti before. P.W 3 was stating that he did not know Mwiti before. That is what P.W 3 maintained in his evidence that he did not know the appellant before.

4 conducted an identification parade and stated that the appellant was identified by P.W 1 & 2. The parade forms exhibit 3 shows that the appellant participated in the parade and said the parade was well conducted and it was fair. The appellant was not prejudiced and his right to fair trial was not violated. The appellant was identified by P.W 2 and P.W 3. The offence was committed in broad day light. P.W 2 could not have failed to identify the appellant. Furthermore, the stolen motor bike was recovered from the appellant by P.W 3. The fact that the appellant was placed at the scene of the robbery and was arrested with the stolen motor bike which he was trying to dispose off by selling it at a throw away price proves beyond any reasonable doubts that the appellant is the one who robbed the complainant while armed with a gun.

The appellant was arraigned in court on 20th July, 020 and remained in custody upto 24th November,2021 when the sentence was passed. He was in custody for one year and four months. Under Section 333(2) of the Criminal Procedure Code the learned magistrate should have taken into account the period spent in court awaiting trial to reduce the sentence which he ultimately imposed. For the reasons stated I find that the appeal lacks merit and is dismissed. The sentence of fifteen years shall be reduced by one year and four months to take into account the period spent in custody awaiting trial.

DATED, SIGNED AND DELIVERED AT MERU THIS 29TH DAY OF OCTOBER, 2024.

L.W. GITARI

JUDGE

29/10/2024

In the presence of

C/Pros- Joan – (ADPP)

C/A Muriuki

Appellant- present, virtually from Meru Prison.

L.W. GITARI

JUDGE

29/10/2024

