Timbwa v Republic (Criminal Appeal E002 of 2024)
[2024] KEHC 13540 (KLR) (29 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13540 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E002 OF 2024

JN KAMAU, J

OCTOBER 29, 2024

BETWEEN

JACKSON BULIMO TIMBWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon R. M. Ndombi (SRM) delivered at Vihiga in Senior Principal Magistrate's Court in Criminal Case No 828 of 2019 on 4th May 2022)

JUDGMENT

Introduction

1. The Appellant herein was charged jointly with four (4) others with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya) and gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*.

2. He was tried by the Learned Trial Magistrate, Hon R. M. Ndombi (SRM) who discharged him under Section 215 of the Criminal Procedure Code on the offence of gang rape but was convicted and sentenced to thirty (30) years imprisonment for the offence of robbery with violence.

3. Being dissatisfied with the said Judgement, on 15th January 2024, he lodged the Appeal herein. The same was dated 27th November 2023. He set out seven (7) grounds of appeal. In his Written Submissions dated 19th March 2024 and filed on 11th April 2024, he incorporated Supplementary Grounds of Appeal. He set out five (5) supplementary grounds of Appeal.

4. His Written Submissions were dated 19th March 2024 and filed on 11th April 2024 while those of the Respondent were dated 5th June 2024 and filed on 10th June 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Petition of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the charge sheet was defective

    b. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. Charge Sheet

9. The Appellant placed reliance on the case of Mary Waithera Kamau vs Republic [2016] eKLR without highlighting the holding he relied therein and submitted that the main charge for which he was convicted was framed as a charge for robbery with violence contrary to Section 295 as read with 296(2) of the Penal Code, which in accordance with the authority of Mwaura vs (sic) Supra, the court rendered it duplex.

10. The issues of Section 295 and 296 of the Penal Code were set out in the Court of Appeal in Johana Ndungu vs Republic [1996] eKLR where the court stated:-

> "In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is the use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery is pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
>
> a. If the offender is armed with any dangerous or offensive weapon or instrument, or
>
> b. If he is in company with one or more other person or persons, or

c. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other violence to any person.

11. Further, in the case of Joseph Onyango Owuor & Cliff Ochieng Oduor vs Republic [2010] eKLR, the court stated that Section 295 and Section 296 had to be read together as Section 295 of the Penal Code defined the offence of robbery while Section 296(1) and 292(2) of the Penal Code, had a common marginal note, namely "punishment of robbery."

12. Based on the above-mentioned authorities, Section 295, did not deal with the degree of violence being merely a definition section. Sections 296 (1) and 296 (2) of the Penal Code dealt with the specific degrees of the offence of robbery and had been framed as such.

13. Notably, Section 382 of the Criminal Procedure Code Cap 75 (Laws of Kenya) provides as follows:-

> " 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."

14. In the instant appeal, the robbery involved the use of crude weapons. This court found that quoting Section 295 of the Penal Code in the Charge Sheet did not occasion an injustice. The Appellant was aware of the charges facing him during the trial process. He did not raise the issue of defective charge sheet during trial and proceeded to cross-examine the witnesses accordingly. This was a clear indication that there was no confusion during trial and thus the charge sheet not fatally defective.

II. Proof Of Prosecution Case

15. Grounds of Appeal Nos (1), (2), (3) and (7) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1), (2), (3) and (4) were dealt under this head.

16. The Appellant submitted that PN (hereinafter referred to as "PW 1(sic)") and JNO (hereinafter referred to as "PW 2"), her mother only identified him by face but did not give the description of his face. He argued that the identification parade was not carried out in fairness. He added that PW 1 (sic) and PW 2 did not state that the electricity lights were on or that they identified the attackers under the strength of electricity light.

17. He further contended that Inspector Andrew Chege (hereinafter referred to as "PW 5")'s comments on the source of light during the incident from PW 1(sic) and PW 2's report was an afterthought. In this regard, he placed reliance on the case of Terekali & Another vs Rex [1952] EACA where it was held that truth will always come from a witness when recollection is very fresh and there had been no time for consultation with others.

18. He asserted that the exhibits were recovered from his Co-Accused person's house and not from his house and that the Prosecution did not establish that he had physical control of the recovered exhibits. In this regard, he relied on the case of Rabeka A. Boka vs Republic Criminal Appeal No 552 of 1992

(eKLR citation not given) where an accused was found not to have had physical control over property that had been recovered from another person's house.

19. He argued that the search of the said exhibits was unlawful and contrary to Section 26 and 119 of the Criminal Procedure Code and Articles 31 and 50(4) of *the Constitution* of Kenya, 2010. To buttress his point, he placed reliance on the cases of Hamisi vs Director of Public Prosecution [1952] AC 694 where it was held that admission of some piece of evidence obtained from the accused person by trick would be in no doubt ruled out by a judge and Atibu Juma vs Republic [1983] KLR where it was held that any stop, search and detention should be conducted by an authorised person contrary to which an accused may be acquitted. He submitted that the search herein was done by PW 1 (sic) and PW 2 who were unauthorised persons and as such he refused to sign the inventory.

20. He denied having been among the attackers that were arrested in the house that material night. He was emphatic that his arrest did not connect him to the crime herein or link him to the other attackers. He added that the other attackers denied ever having associated with him and hence the doctrine of common intention was displaced by evidence and circumstances. In this regard, he cited the case of Eunice Musenya Ndui vs Republic [2011] eKLR where it was held that the principle on common intention was based on the presumption which should not be readily applied.

21. He also cited the case of *Dima Denge Dima & Others vs Republic Criminal Appeal No 300 of 2007* (eKLR citation not given) where it was held that the three (3) elements of robbery with violence were to be read disjunctively and not conjunctively. He argued that although the evidence that was adduced by the Prosecution was that the Appellant was armed with a panga on the material day, the same was not produced as an exhibit before the Trial Court and consequently, the Prosecution failed to prove the offence against him to the required standard.

22. On its part, the Respondent placed reliance on the case of Oluoch vs Republic [1985] KLR where the Court of Appeal set out the elements of robbery with violence as being that at the time the offence was committed, the offender was armed with any dangerous and offensive weapon or instrument or the offender was in company with one or more person or persons or at or immediately before or after the time of the robbery the offender wounded, beat, struck or used other personal violence to any person.

23. It also relied on the case of *Dima Denge Dima & Others vs Republic Criminal Appeal No 300 of 2007* (Supra) where it was expressed that one (1) element of the three (3) stated above was enough to prove an offence of robbery with violence.

24. It reiterated PW 1 (sic)'s and PW 2's testimony and explained how the Appellant and his Co-Accused persons attacked them and how they were identified as there was adequate lighting.

25. It submitted that it was apparent that the Appellant was armed and that he was in company of others at the time of robbery and that he used actual violence on persons immediately before or during or immediately after the robbery.

26. A perusal of the proceedings of the lower court showed that on 23rd May 2019, at midnight, PW 1(sic) and PW 2 testified that they were asleep when they had a loud bang at the door. PW 2 stated that when she switched on the light of the one (1) bedroomed, they saw several men standing before them. PW 1(sic) said that she was able to see the faces of her attackers as the electric light was on. She told the Trial Court that at some point, her attackers blindfolded her but she removed the piece of cloth and saw their faces.

27. PW 5 carried out an identification parade and both PW 1(sic) and PW 2 identified the Appellant as having been part of the gang that broke into their house to rob them on two (2) occasions being on 23rd May 2019 at 12.00 midnight and 24th May 2019 at 4.00am.

28. In her cross-examination, PW 1 (sic) confirmed that she was able to identify the Appellant by voice, description and/or face. PW 2 testified that she saw the Appellant and his Co-Accused carry items out of her house. She added that she was able to identify him at the identification parade because she had seen him before.

29. The lighting conditions in the one-bedroomed house were conducive for positive identification. The attackers interacted with PW 1(sic) and PW 2 for quite some time. That was sufficient for PW 1(sic) and PW 2 not to have been mistaken about his face.

30. In addition, the Appellant was not a stranger to both PW 1(sic) and PW 2 as they hailed from the same area at Ebusikhale. It was therefore clear from the evidence that was adduced by the Prosecution that PW 1 (sic) and PW 2 positively identified the Appellant as having been one of the attackers on the two (2) material nights. His argument that he was not part of those that were arrested in the house that material night therefore fell on the wayside.

31. The fact that several items that were stolen from PW 1's(sic) and PW 2's house were found in his Co-Accused person's house squarely placed the Appellant herein as one of the perpetrators.

32. Turning to the issue of whether or not the Prosecution demonstrated the elements of the offence of robbery with violence herein, Section 295 of the Penal Code stipulates that the elements of robbery with violence are :-

    a. That the offender is armed with any dangerous weapon or offensive weapon or instrument;

    b. That the offender is in the company of one or more persons;

    c. That 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.

33. PW 1(sic) confirmed having seen the Appellant's Co-Accused person namely, Bouston and Alex armed with knives. Her evidence was that they held her neck and she started struggling with them. As a result, they injured her cheek and neck. The Clinical Officer, Paul Muturi Mbuoo (hereinafter referred to as "PW 1") tendered in evidence the Post Rape Care (PRC) Form and P3 Form which showed that PW 1(sic) sustained injuries during the atrocious attacks by the Appellant and his Co-Accused persons.

34. It was evident from the evidence of both PW 1(sic) and PW 2 that the Appellant was in the company of others during the attacks. There was robbery. Indeed, PW 2 testified that the Appellant and his Co-Accused persons robbed them of their bags, sheets, duvets, plastic chair, sugar and curtains and ran off.

35. Her further evidence was that he and his Co-Accused persons took sufurias, jiko, clothes, three (3) curtains and PW 1's (sic) clothes, Kshs 190/= and bags during the second attack. She stated that their attackers were armed with pangas, knives, metal rods and torches. Her evidence was corroborated by that of PW 1(sic) and that of No 111246 PC Dismas Kibet (hereinafter referred to as "PW 3") and No 73329 Sgt Jared Atoni (hereinafter referred to as "PW 4").

36. PW 4 tendered in evidence assorted clothes, photo album, NHIF card, Exercise Book Chama, Sisco Phone (black), Death Certificate, Birth Certificate for PW 1, Bus fare receipt, Bag (white and black), inventory and receipt for the Sisco phone which were recovered from the said Alex's house.

37. It was clear from the aforesaid evidence that the Appellant was in the company of his Co-Accused persons, they were armed with a sharp object and that during, immediately before and after the offence they wounded PW 1(sic). They placed a panga on PW 2's neck as they raped PW 1 (sic) and robbed them of the items that were recovered from the Appellant's Co-Accused person's house.

38. The chain of events was unbroken. The Trial Court thus proceeded correctly when it found that all the ingredients of proving the offence of robbery with violence had been satisfied and hence convicted him accordingly.

39. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and (7) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1), (2), (3) and (4) were not merited and the same be and are hereby dismissed.

III. Sentencing

40. Grounds of Appeal Nos (4), (5) and (6) of the Petition of Appeal and Supplementary Ground of Appeal No (5) were dealt with under this head.

41. The Appellant placed reliance on the case of Sabastian Salim Ramadhan vs Republic & 8 Others (citation not given) where it was held that the mandatory nature of the death sentence under Section 296(2) of the Penal Code was under the discretion of court. He submitted that where a prisoner is incarcerated without the possibility of having his sentence reviewed, there was the risk that he can never atone for his offence.

42. He further relied on the case of Willy Joel Makudo vs Republic [2019] eKLR where the court considered the mitigation of the Appellant who had been found guilty of the offence of robbery with violence and sentenced him to seven (7) years imprisonment.

43. He pleaded with court to consider that he was a first offender, was a young man of nineteen (19) years of age during the incident and was the sole breadwinner of his young family. He asserted that he was also an orphan and that the court considers that part of what was alleged to have been stolen had been recovered. He pointed out that he had spent five (5) years in custody and urged the court to consider meting out a less prescribed sentence bearing in mind Section 333(2) of the Criminal Procedure Code and Section 38 (1) of the Penal Code.

44. On its part, the Respondent submitted that the sentence was lawful and should be upheld considering the nature of the offences and the trauma that was caused to the victims.

45. Notably, the Appellant was found guilty of the offence of robbery with violence.

46. Section 295 of the Penal Code states that:-

> " 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."

47. Further, Section 296 (1) and (2) of the Penal Code provides as follows:-

    1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

    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.

48. The Trial Court sentenced the Appellant to thirty (30) years imprisonment, for the offence of robbery with violence.

49. In view of the atrocity that was meted on PW 1 (sic) and PW 2 herein, bearing in mind that the offence of robbery with violence was committed on two (2) consecutive days, the crimes smacked of pure malice and impunity. This court found and held that this was one of the instances that the sentence ought to be higher than what was meted upon the Appellant. However, in view of this court's discretion on sentencing, it left the sentence of thirty (30) years imprisonment undisturbed.

50. Going further, this court was mandated to consider the period the Accused person spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

51. The said Section 333(2) of the Criminal Procedure Code provides that:-

> " Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court).

52. Further, the Judiciary Sentencing Policy Guidelines provide that:-

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

53. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.

54. The Accused person was arrested on 24th May 2019. He was sentenced on 13th June 2022. He therefore spent about three (3) years nineteen (19) days in custody during trial. A perusal of the lower court proceedings indicated that the Trial Court did not take into consideration the said period while sentencing the Appellant. This was a period that therefore ought to be taken into consideration while computing his sentence.

Disposition

55. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated 27th November 2023 and lodged on 15th January 2024 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and is hereby upheld as they were both safe.

56. For the avoidance of doubt, the period from 24th May 2019 until 12th June 2022 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

57. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF OCTOBER 2024

J. KAMAU

JUDGE