Muthui v Republic (Criminal Appeal E042 of 2022)
[2024] KEHC 14652 (KLR) (25 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14652 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E042 OF 2022

JN ONYIEGO, J

NOVEMBER 25, 2024

BETWEEN

DAVID MUTINDA MUTHUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment and sentence of Hon. Tanchu in Criminal Case No. E005 of 2022 at CM's court at Garissa)

JUDGMENT

1. The appellant herein was charged alongside one, Maluki Ngunia with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 16.09.2020 at about 0000hrs at Mororo area, Madogo Location, Tana North Sub County within Tana River County jointly while armed with motorcycle air pump robbed Wilson Muema of his mobile phone make Itel black in colour valued at Kes. 1,500/- and cash Kes. 2,950 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Wilson Muema.

2. He faced an alternative charge of handling stolen property contrary to section 332(1) (2) of the Penal Code with particulars being that on16.09.2020 at about 0000hrs at Mororo area, Madogo Location, Tana North Sub County within Tana River County otherwise than in the course of stealing dishonestly received or retained one mobile phone make Itel black in colour knowing or having reason to believe it to be stolen item.

3. The appellant was tried, convicted and thereafter sentenced to 20 years' imprisonment.

4. It is the said conviction and sentence which necessitated the appeal herein. Vide a petition of appeal amended and filed in court on 14.03.2023, the appellant set out five (5) grounds of appeal as follows:

i. That the learned trial magistrate erred in law and in fact by convicting the appellant without appreciating the fact that the prosecution did not prove its case to the required standards as positive identification was not proved.

ii. That the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution's evidence was marred with contradictions and inconsistencies.

iii. That the learned trial magistrate erred in law and fact by failing to appreciate that the doctrine of recent possession did not apply in this case.

iv. That the learned trial magistrate erred in law and fact by failing to call the essential witnesses.

v. That the learned trial magistrate erred in law and fact by meting out a harsh sentence.

5. The court directed that the appeal be disposed off by way of written submissions.

6. The appellant via submissions filed in court on 14.03.2024 submitted that the identification was not positively supported for the reason that the complainant did not describe him to the authority. Additionally, no identification parade was done to enable his positive identification. He contended that as a consequence of the above, his conviction was not safe. He relied on the case of Abel Monari Nyanamba & 4 others vs Republic [1996] eKLR where the court underscored the need for a beyond reasonable doubt identification or recognition of an assailant.

7. He also argued that the doctrine of recent possession was not established to the requisite threshold. That this is so for the reason that in the absence of positive identification of the 1st accused person as one of the persons who robbed PW1, then the said doctrine could neither prove nor support the appellant's guilt. He argued that the item which the complainant claimed to have been robbed was not proved as to how it was found on him. In the same breadth, nothing was produced to demonstrate that such item was in possession of the appellant.

8. On the alleged contradictions presented in the respondent's case, the appellant submitted that the same were material in nature and therefore, cannot be overlooked. Equally, that the non-production of essential witnesses was a blow to the prosecution's case and further, the court erred by failing to consider his defence. It was his submission that his unsworn defence brought out the fact that the evidence in the record did not link him to the alleged offence herein. To that end, he urged this court to allow his appeal and set him at liberty.

9. The respondent while relying on submissions dated 16.09.2024 urged that the prosecution proved the offence to the required standards as opposed to the allegations of the appellant. It was submitted that the evidence by the prosecution was well corroborated hence all the elements of the offence were proved. To that end, reliance was placed on the Court of Appeal decision in the case of Oluoch vs Republic [1985] eKLR where the elements of the offence of robbery with violence were described. This court was therefore urged to dismiss the appeal and uphold the finding by the trial court.

10. The court has considered the grounds of appeal and the written submissions by the appellant. This being the first appellate court, its duty as stipulated in Okeno v Republic [1972] EA 32 is to subject the evidence on record to a fresh and exhaustive examination so as to arrive at an independent decision but giving allowance to the fact that the court did not have the advantage of hearing and seeing the witnesses testify.

11. The issues for determination are:

i. Whether the prosecution proved the elements of the offence of robbery with violence to the required standard.

ii. Whether the sentence by the trial court was harsh in the given circumstance.

12. PW1, Wilson Muema Nzau testified that on 15.09.2020, he left his home for Garissa. That he arrived at 1.00 pm and then went to Mororo for some drinks with friends. He stated that he stayed there till curfew hours and upon failing to see his host, he asked the appellant together with another, to help him find a lodging. However, the appellant together with the other man convinced him to spend the night in their house. He thus gave them Kes. 200/- for their kind gesture. Upon reaching the said house, the appellant with his partner left him in the house but returned at midnight and ordered him to vacate their house.

13. It was his evidence that they forcefully ejected him out of the house and in the process, took his money and phone. He stated that the appellant threatened to beat him with an old rusty pump. Upon leaving the house to his place of work, he explained his predicament to the people he found there. That after some time, he saw the 2nd accused walking along the road. with the help of some people, they approached and interrogated the 2nd accused demanding to know why he took his money. He reiterated that the 2nd accused said that it was his partner (appellant) who took the money and so, he agreed to take them to Tana bridge where they found the appellant his co-suspect. That the matter was subsequently reported to the police at Madogo police station where Itel phone was recovered by the police from the pockets of the appellant.

14. PW2, Francis Mwangangi testified that on the material day, the complainant called him and thereafter went to his place of work. That PW1 had arrived the previous night from home and had met with a person with whom he shared his problems and further gave Kes. 200 in order to get a place to spend the night. Upon reaching the said house, the person left only to return with another known as Mutinda who assaulted him, took his money and a phone.

15. He went further to state that at about 10.00 a.m., PW1 called him informing him that he had spotted one of the suspects and so together with the complainant, they interrogated one Ngunia Maluki who instead led them to Tana Bridge where the appellant was. After talking, the appellant and Maluki Ngunia stated that they had used the money but they were willing to return the phone. He stated that they went to Madogo Police station where they reported the issue and when the appellant was searched, the complainant's phone was found in his pocket. He recalled that the complainant sustained injuries on his healing left hand which had previous injuries which had been treated at Kenyatta Hospital.

16. PW3, No. 100392 PC Kioko Mwinzi, the investigating officer testified that while at the station, the appellant together with Maluki Ngunia were brought to the station by members of the public and the complainant. That he directed them to the report office but after a while, the OCS instructed him to investigate the matter. It was his evidence that when he entered the report office, an officer informed him that when he searched the assailants, an itel phone was recovered. He therefore recorded the statements of the complainant and the witnesses.

17. PW4, No. 92518 PC Boniface Kiptalai recalled that on the material day, he was at the office when four men arrived at the station seeking for assistance. That the complainant had alleged that his money together with his phone had been stolen by the appellant and Maluki Ngunia. He recorded the report and then proceeded to search Maluki Ngunia and the appellant from whom he recovered an Itel phone from his pocket.

18. DW1, David Mutinda Muthui testified that on the material day, he left his house for work and thereafter visited Ntinyiri area for some drinks. He averred that the complainant had wanted to go sleep in his house but he refused and at 10 O'clock, he left for his house. That at the club, the complainant had a woman in his company. He stated that on the following day, he left for work and on his way, he was arrested by people who asked him whether he was David Mutinda to which he said yes. Thereafter, they asked him whether he had taken away any money.

19. That after noting that this people were armed with metal bars, he urged them to take them to the police station. They were referred to Madogo Police station wherein the complainant reported his case. He denied committing the offence.

20. I have considered the record of appeal herein, grounds of appeal and submissions by both parties. The Issue for determination is whether the prosecution proved its case beyond reasonable doubt.

21. In proving the offence herein, the prosecution was bound to prove that at least one of the elements of the offence of robbery with violence was proved to the required standards. The court in the case of Stephen Nguli Mulili v Republic [2014] eKLR held that:

> " It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP v Woolmington, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati Murwa vs R [2013] eKLR."

22. The appellant was convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code and sentenced to 20 years' imprisonment. Section 296(2) thus provide as follows:

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.

23. In Johana Ndungu vs Republic [1996] eKLR, the Court stated thus:

> " 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 ingredients of robbery under section 295 is 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 are 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:
>
> 1. If the offender is armed with any dangerous or offensive weapon or instrument, or
> 2. If he is in company with one or more other person or persons, or
> 3. 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.

24. From the facts herein, PW1 testified how the appellant together with Maluki Ngunia forcefully ejected him from the house after taking his money and his phone and further, threatened to beat him with a rusty pump, which was produced before the court as Pex 2. Similarly, PW2 testified that the complainant previously had sustained injuries on his left hand as the assailants further assaulted him using the said tyre pump.

25. That at the time of his attack, the complainant's hand was in the process of healing when the appellant forcefully straightened it thus causing the complainant bleed and later died out of bleeding three days after testifying. Further, when the appellant was arrested by members of the public, he was escorted to Madogo police station where upon conducting search on him, the stolen phone belonging to the complainant was recovered by pw4 the police officer who conducted search. Pw2 confirmed and corroborated the evidence of pw1 and pw4 that the stolen phone was recovered from the appellant. From this chain of events and evidence, I do not find the appellants' claim that he was framed sustainable.

26. Although there was nobody present during the attack, pw1 gave a detailed testimony which the trial court referred to as persuasive. It is trite that a court can convict based on the evidence of a single witness as long as the court is satisfied that the witness is truthful and that there is no danger in so he relying. See Abdallah Bin Wendo & another vs Republic (1953)20EACA 166.

27. After analyzing the entire prosecution evidence, it is apparent that the complainant was attacked during the material night by people he had shared drinks with and then proceeded to sleep together only to be attacked by the same people the appellant among them.

28. It is not disputed that the complainant met the appellant well before the robbery incident happened and had spent a lot of time together. The appellant also in his evidence did not deny knowing and or meeting the complainant prior to the occurrence of the incidence herein. It follows therefore that the appellant was positively identified as the perpetrator of the offence. The court in Wamunga vs Republic (1989) KLR 424 at 426 had this to say regarding identification:

> "Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

29. Therefore, it is my finding that pw1 was attacked by more than one person and his cash and phone stolen thus proving the key ingredients of robbery with violence. The complainant had no reason to fabricate a case of this nature against the two. There was no existing grudge against them. The defence of alibi does not hold water as the evidence of pw1 consistent. Accordingly, I am satisfied that the appellant was properly convicted.

30. On sentencing, the punishment of robbery with violence is stipulated as follows:

    1. ...

    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

31. The appellant was sentenced to 20-year imprisonment of which I find that the same is lawful given that nothing has been presented before the court to show that the trial court acted upon wrong principles

or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle [See Shadrack Kipkoech Kogo vs R., and Wilson Waitegei vs Republic [2021] eKLR].

32. The offence of robbery with violence attracts a sentence of death. Am aware of the Muruatetu 1 case which states that death penalty is not mandatory. Muruatetu 2 clarified that Muruatetu 1 only applies to murder cases. Recently in the case of Republic v Mwangi. Initiative for strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)(2024)KESC 34(KLR) the supreme court held that courts have no business derogating from minimum mandatory sentences until amended by parliament. In the circumstances therefore, the sentence imposed by the trial court was not harsh nor excessive as the trial court was even lenient. Accordingly, the appeal herein is dismissed in its entirety for lack of merit.

ROA

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 25TH DAY OF NOVEMBER 2024.

J. N. ONYIEGO

JUDGE