Mogaka alias Bashir v Republic (Criminal Appeal E012 of 2023)
[2024] KEHC 16199 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16199 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E012 OF 2023

WA OKWANY, J

DECEMBER 18, 2024

BETWEEN

KELVIN NYACHUBA MOGAKA ALIAS BASHIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Sentence in the Senior Principal Magistrate's Court at Keroka, MCCR No. E1300 of 2021 delivered by Hon. B.M. Kimtai, Senior Principal Magistrate on 4th May 2023)

JUDGMENT

1. The Appellant herein was convicted for the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that on 14th day of November 2021 at Nyansira 1 village in Masaba-North Sub-County within Nyamira County, jointly with others not before the court, armed with pangas and iron bars robbed David Moruri Mose cash Kshs. 10,000/=, Safaricom and Airtel Credit Cards worth Kshs. 2,000/= all valued at Kshs. 12,000/= and immediately after the time of such robbery, used threat to the said David Moruri Mose.

2. The Appellant was, upon conviction, sentenced to serve thirty (30) years imprisonment.

3. Dissatisfied with the trial court's decision on conviction and sentence, the Appellant filed the present appeal challenging the trial court's decision on the basis that; -

    a. The offence of robbery with violence was not proved beyond reasonable doubt,

    b. The sentence was harsh and manifestly excessive.

    c. The complainant did not give a description to the police to ascertain that indeed the Appellant was the culprit and the assailant.

d. The evidence was fabricated, contradictory and was not corroborated.

4. The Appellant filed supplementary grounds of appeal wherein he raised the issue of violation of his constitutional rights to a fair trial. He stated that he was held in police custody for more than 5 days before being arraigned in court and that he was not informed of his right to legal representation as required by Article 50 of *the Constitution*. He added that his right to a fair trial was prejudiced by the virtual hearings which were marred with poor internet challenges.

5. The Appeal was canvassed by way of written submissions which I have considered.

6. It is trite that the first appellate is required to reanalyse and re-evaluate the evidence presented before the trial court with a view to arriving at its own independent conclusions while bearing in mind the fact that it neither heard nor saw the witnesses testify and give an allowance for that.(See Okeno vs. Republic [1972] EA 32).

7. The Prosecution presented the evidence of 6 witnesses as follows: -

8. PW1, David Moruri Mose, the complainant herein was in his house on the night of 14th November 2021, when 4 people broke down his door, entered into the house, got hold of him and assaulted him before making away with his money (Kshs. 10,000) and bank cards. He sustained injuries on the head, right hand and ribs. He raised an alarm and neighbours came to his rescue. He stated that the rescuers pursued the assailants and were able to flush out the Appellant from his grandmother's house after a heated standoff. PW testified that he was able to identify the Appellant as one of his assailants as he knew him prior to the incident and that there was electricity at the scene of the robbery.

9. PW2, Jason Mose, was among the people who responded to the Complainant's distress call/screams on the night in question. He testified that he rushed to the scene of the attack and noted that complainant's door was broken. They pursued the attackers by following the Appellant to his grandmother's house. They surrounded the house before calling the area chief to the scene.

10. PW3, Eric Marando, the Senior Assistant Chief of Nyankoba, received information about the attack and proceeded to the crime scene where he noted that the complainant's doors had been broken. He stated that he knew the Appellant and that he (the Appellant) had a criminal record.

11. PW4, Dennis Masese, the Clinical Officer, examined and treated PW1 on 15th November 2021. He filled the P3 Form which he produced as (PExh.4). He also produced the Treatment Notes as (P.Exh3). He noted that PW1 was bleeding from the face and had swelling on the right hand. He assessed the degree of injury as "harm".

12. PW5, No. 232224 P.C. Nicodemus Munyoki and PW6, No. 80123 Cpl. Jonathan Napikwe were on duty on the night of 15th November 2021 when the complainant, PW3 and members of the public reported the robbery incident. PW5 stated that the complainant informed them that the Appellant as one of the robbers. They proceeded to the Appellant's grandmother's house but could not gain entry into the house which was locked. He stated that the Appellant refused to open the door but they broke it open and arrested the Appellant. They recovered a blood stained panga under the Appellant's bed. PW6 produced the metal rod (P.Exh1) and the panga (P.Exh2).

13. When placed on his defence, the Appellant gave a sworn testimony in which he stated that he was, on 14th November 2021, asleep at his home when he heard a knock at his door and that no sooner had he opened the door than the police officers broke it down and arrested him. He stated that he was not informed of the reasons for his arrest. He added that the police did not recover any items from the house despite a thorough search. He maintained that he did not commit the offence.

14. The appeal was canvassed by way of written submissions. The duty of a first appellate court was explained in the case of Pandya vs. Republic (1957) EA 336 thus: -

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence."

15. The Appellant submitted that the Prosecution did not discharge its duty of proving the charge against him because the incident happened at night when proper identification was not possible. He noted that the exhibits that were allegedly recovered from his house were not subjected to forensic examination to establish their nexus to the robbery. He argued that he was unfairly targeted in this case because of his previous convictions and prison sentences.

16. The Appellant argued that there were numerous inconsistencies in the Prosecution case and that his rights, as an accused person, were violated because he was neither arraigned before the court within 24 hours nor informed of the right to legal presentation. He urged this Court to quash the conviction and set aside or reduce the sentence.

17. The Respondent, on its part, submitted that the Prosecution proved that the robbers who attacked the victim were armed with a metal rod and a panga. He note that the victim was able to identify the Appellant amongst the four people who robbed him because he had known him prior to the date in question and that he was able to identify him using light from electricity. It was submitted that the Appellant was positively identified by the victim and the other Prosecution witnesses.

Analysis and determination

18. I have considered the grounds of appeal and the submissions before me. The issues for my determination are:-

    i. Whether the Appellant's Constitutional Rights were violated;

    ii. Whether the Prosecution proved its case to the required standard; and

    iii. Whether the sentence was appropriate and legal.

i. Whether the Appellant's Constitutional Rights were violated

19. The Appellant submitted that his constitutional rights under Article 49 (1) (f), which required him to be arraigned in court within the 24 hours, were violated. He added that his right to a fair trial was also violated when the trial court failed to inform him of his right to legal representation, when it failed to provide him with legal representation and when he was given statements on 27th October 2022 and forced to proceed with the hearing the very same day without being accorded adequate time and facilities to prepare a defence. He also raised the issue of poor network/internet challenges in prison during the hearing of the case in his supplementary Grounds of Appeal.

20. Article 49 of *the Constitution* guarantees the rights of an accused person to be arraigned before a court of law without unreasonable delay. It states as follows: -

    (1) An arrested person has the right –

        (f) to be brought before a court as soon as reasonably possible, but not later than –

            i. . Twenty – four hours after being arrested; or

ii. If the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.

21. A perusal of the proceedings reveals that the Appellant was arrested on the night of 14th November 2021 and first arraigned before the trial court on 19th November 2021. It was however not clear why the police presented the Appellant in court 4 days after his arrest as opposed to the 24 hour period that is provided for under Article 49 of *the Constitution*. I note that the issue of the Appellant's late presentation in court was not during the trial so as to elicit an explanation from the Prosecution.

22. Be that as it may, it is trite that failure to arraign a suspect in court within the 24-hour rule is not a basis for an automatic acquittal, particularly where the offence is as serious as in the present case, which was capital in nature. This Court however finds that the Appellant's claim for violation of rights under Article 49 of *the Constitution* can still be addressed through a Petition for compensation in damages for unlawful detention. This is the position that was taken in Hussein Khalid and 16 others vs. Attorney General & 2 others [2019] eKLR where it was held thus: -

> "(122) Consequently, without downplaying the Appellants' allegations of infringement, we find that they have recourse under Article 22 against the specific violations they may have undergone in the manner of their arrest, detention and arraignment. They may seek damages or other reliefs available to them. We do not think that such violations in themselves should warrant the vitiating of the trial processes. There exist constitutional safeguards that extend to the right to fair trial and the attendant mechanisms to protect the Appellants. We are persuaded by the holding in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69 where it was stated that:
>
> > "The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means. Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence."
>
> (123) Consequently, we are not persuaded, just like the High Court and the Court of Appeal, that this is an instance where this Court should intervene in order to quash the proceedings before the trial Court. The criminal proceedings pending before the trial Court should be allowed to continue expeditiously given the amount of time it has taken."

23. Similarly, in Fappyton Mutuku Ngui vs. Republic [2014] eKLR the Court of Appeal held that: -

> "The correct position in law was set out in Julius Kamau Mbugua v Republic (2010) eKLR where the Court stated that the violation of the appellant's right to be produced in court within twenty-four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy, in damages, for the violation of his constitutional rights."

24. I have also considered the issue of the witness statements and the network challenges raised by the Appellant in this Appeal, which he alleges, hampered his ability to properly follow the proceedings and prepare for his defence. I note that this is the first time that he is raising the said challenges as the same is not mentioned in the trial court's proceedings. It is now a well-known fact that the Judiciary has embraced the use of technology as a way of ensuring efficient and effective discharge of its functions in the administration of justice. The use of virtual court proceedings are now common in our courts as one of the methods now employed in hearing and determining cases.

25. It is my view that if indeed the Appellant experienced network challenges, which may have impeded his ability to follow the proceedings, he should have notified the court or the prison officials so as to get a solution. Furthermore, nothing stopped the Appellant from requesting the trial court to recall the witnesses whose testimonies he may have missed out. It is my view that the Appellant was not being candid concerning the issue of the internet challenges. As for the issue for the statements, it is also my finding that his failure to request for an adjournment so as to prepare for the hearing meant that he had no issue with the case proceeding on the said date.

26. Turning to the issue of legal representation, Article 50 of *the Constitution* provides as follows: -

> (2) Every accused person has the right to a fair trial, which includes the right –
>
> (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> (h) to have an advocate assigned to the accused person by the State and at State expense if substantial injustice would otherwise result, and to be informed of this right promptly.

27. The *Legal Aid Act* No. 6 of 2016 at Section 43 provides that it is the duty of the court to inform an accused person of this right as follows: -

> 43.
>
> (1) A court before which an unrepresented accused person is presented shall-
>
> (a) promptly inform the accused of his or her right to legal representation;

28. The question that arises is whether the failure, by the trial court, to inform the Appellant of his right to legal representation and to be afforded a lawyer at the State's expense could vitiate the proceedings before the trial court. In the case of Karisa Chengo & 2 Others vs. R, Criminal Appeal Nos. 44, 45 & 76 of 2014 the Court of Appeal observed as follows: -

> "It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. *The Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation

pursuant to which the trial is compromised in one way or another only then would the State obligation to provide legal representation arise."

29. The test therefore is the nature of the offence that an accused person is facing and whether substantial injustice would occur if they were not afforded such legal representation. In David Njoroge Macharia vs. Republic [2011] eKLR the Court of Appeal held: -

> "Under the new Constitution, State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at State expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at State expense."

30. In S vs. Halgryn 2002, (2) SACR 211 (SCA) para 11, however, the Court of Appeal held that the right to legal representation is not absolute. Harms JA stated thus: -

> "Although the right to choose a legal representative is a fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations?"

31. I have considered the nature of the offence in question and the manner in which the proceedings were conducted. I find that even though the trial court did not inform the Appellant of his right to legal representation, he still competently participated in the proceedings and cross-examined all the Prosecution witnesses. I also note that he ably presented his defence and stated that he knew and understood the charge he was facing. It is my finding that there was no instance where the lack of legal counsel prejudiced the Appellant in any way as he understood and followed the proceedings from the onset of the trial to the end. I find no violation of his constitutional rights as he alleged.

ii. Whether the Prosecution proved the offence to the required standard

32. Sections 295 as read with 296 (2) of the Penal Code stipulates as follows: -

> 295. Definition of robbery
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> 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. Punishment of robbery
>
> (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.

33. In the case of Johana Ndungu vs. Republic CRA. 116/1995, [1996] eKLR the Court of Appeal outlined the ingredients of the offence of robbery with violence as follows: -

> " In order to appreciate properly as to what acts, constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is 'use of or threat to use' actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore -described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved, will constitute the offence under the subsection:
>
> i. If the offender is armed with any dangerous or offensive weapon or instrument; or
>
> ii. If he is in company with one or more other person or persons; or
>
> iii. 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."
>
> (See also Oluoch vs. Republic [1985] KLR).

34. In the instant case, the complainant testified that he was on the material night attacked by 4 men who injured him on the head, arm and ribs. A metal rod was recovered outside his kiosk. On cross-examination, he stated that he was stabbed with a sharp object. His testimony was corroborated by the Clinical Officer (PW4) who confirmed the injuries as shown in the Treatment Notes (P.Exh3) and the P3 Form (P.Exh4).

35. PW2 testified that the Appellant was armed with a panga while PW5testified that they recovered a blood-stained panga from underneath the Appellant's bed. It is my finding that the Prosecution proved that the victim was attacked by more than one person, that they were armed with offensive weapons namely the metal rod and panga and that they inflicted bodily injuries on the victim during the said robbery. I find that all the ingredients of the offence, which are to be considered disjunctively, were proved to the required standard.

36. Turning to the issue of identification of the Appellant as one of the people who attacked and robbed the complainant, the PW1 testified that he was able to see and identify the Appellant as he was well known to him as his neighbour. PW1 testified as follows during examination in chief: -

> " Accused came to my house with three others. I was able to identify him since there was electric light. I had known him before since he has been in our locality for long. They broke my door; I was asleep and lights were on. They got hold of me and put me down. They injured me on my head..... I screamed and neighbours came, they saw someone ran away having a spotlight and they followed the person. It was accused and he entered into his grandmother's house. I had told my neighbours Kevin (accused) was among those who had attacked me."

37. On cross-examination, the complainant stated that: -

> " I know you, I have known him for long. I have known him as a thief. You were imprisoned and released recently. Then you came attacking me. You had a Muslim cap on. I did not see you after arrest. I do not know if the cap is an exhibit."

38. From the above extracts of the complainant's testimony, he states that he recognized the Appellant as one of his assailants since the lights in his house were on. He also explained that the Appellant was well known to him as a neighbour. In the case of R vs. Turnbull [1976] 3 All ER 549, the court pronounced itself on identification by recognition as follows: -

> " ....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."

39. Taking a cue from the warning in the above cited case, this court is reminded that mistakes may often occur in recognition of even close relatives and friends thus calling for extra caution in matters of recognition of people who may be well known to the victim. In this case, the complainant's case was that he was asleep and lights were on. The court was however not told about the nature of the light, the distance from the position of the light to the accused and the strength of the lighting so as to enable the court to determine if the light was bright enough to facilitate proper identification of the Appellant.

40. Still on the identification of the Appellant, the complainant testified that he informed the people who responded to his distress call that the Appellant was one of the assailants. I however note that PW2, the only witness who testified that he responded to the complainant's screams, did not state that the complainant informed him that the Appellant was one of the robbers.

41. PW2 testified as follows on his encounter with the Appellant on the night in question: -

> " I took only 5 minutes to the scene. I saw several people but we pursued you to your house. From the scene to where the spotlight was like 100 meters. You were running away from the scene. Dickson is a witness. I know you. We chased you and you entered this house through the window."

42. The above testimony of PW2 leaves this court with more questions than answers such as, how was PW2 able to see and identify the Appellant considering that the incident happened at midnight when it was obviously dark? PW2 testified that there were several people at the vicinity of the scene of crime as there was a funeral night vigil in the area. Did that mean that anybody running away that night was a robber? Could the Appellant have been running away out of fear of attack when the complainant raised an alarm? Even though it was alleged that the Appellant was wearing a white Muslim cap and had a torch on the material night, a search carried out in his house following his arrest on the night in question did not yield the white cap or a torch. The above questions lead me to the conclusion that the identification of the Appellant, as one of the perpetrators of the offence of robbery with violence, was not full proof. It is trite that the evidence of identification at night must be absolutely watertight to sustain a conviction. (See Nzaro vs. Republic [1991] KAR 212)

43. I have also considered the exhibits produced by the prosecution during the trial, especially the panga that was allegedly recovered from the Appellant's house. It was also alleged that the said panga had blood stains on it. It is however instructive to note that the said panga was not subjected to forensic analysis so as to establish if indeed it had human blood stains and if the said blood belonged the complainant. This court is of the view that forensic analysis of the stains on the panga could have solved the case conclusively. I find that the failure to subject the panga to forensic analysis dealt a fatal blow on the Prosecution's case as the court is left with only the possibility of doing guess work when determining if indeed the panga was used in the robbery in question or at all.

44. My finding is that the gaps that I have noted in the Prosecution's case can only lead to the conclusion that the prosecution did not prove its case beyond reasonable doubt and that the trial court's conviction was therefore unsafe.

45. Consequently, I find that the appeal herein is merited and I therefore allow it by quashing the conviction and setting aside the sentence passed by the trial court. I direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

46. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 18TH DAY OF DECEMBER 2024.

W. A. OKWANY

JUDGE