Mbiti v Republic (Criminal Appeal 33 of 2018)
[2023] KEHC 499 (KLR) (Crim) (31 January 2023) (Judgment)

Neutral citation: [2023] KEHC 499 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 33 OF 2018

DO OGEMBO, J

JANUARY 31, 2023

BETWEEN

MWANZIA MBITI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence arising from Criminal Case No. 1658 of 2016 in SPM's Court, at Milimani, Hon. Onkwani, SRM, and Judgment delivered on 15.2.2018)

JUDGMENT

1. The appellant, Mwanzia Mbiti, was charged before the lower court, with a single count of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on 22.10.2016 along Ronald Ngala street in Nairobi, within Nairobi County, jointly with others not before court, he robbed Abdi Ahmed Hussein of 15 mobile phones make Techno and 1 Itel all valued at Ksh.183,050/= and immediately before the time of such robbery, used actual violence against the said Abdi Ahmed Hussein.

2. In a judgment read out on 15.2.2018, the appellant was convicted of the offence. The court sentenced the appellant to death on 15.12.2018. The appellant, aggrieved, has appealed to this court.

3. In the grounds of appeal filed in court on 27.2.2018, the appellant has listed the following grounds of appeal:

    1. That the learned trial magistrate erred both in law and fact when he convicted the appellant, yet failed to find that the purported, visual identification wasn't free from error or mistake.

    2. That the learned trial magistrate erred both in law and fact when he relied on evidence of chase and arrest, yet failed to find that the same was not sound.

3. That the learned trial magistrate erred both in law and fact when he relied on unsatisfactory evidence to convict.

4. That the learned trial magistrate (sic pundit trial), erred both in law and fact when he imposed an unconstitutional sentence as the same is not mandatory.

5. That the learned trial magistrate erred both in law and fact when he dismissed the defence of the appellant.

4. The appellant has pleaded that his appeal be allowed, conviction quashed and that his sentence be set aside. By an agreement of the parties, this appeal was canvassed by way of written submissions, which both sides duly filed.

5. In the submissions filed by the appellant, the appellant has listed fresh grounds of appeal. These were filed without leave of the court. I will however consider the submissions as filed.

6. The appellant has submitted that the prosecution never proved the ingredients of the offence. He relied on section 296(2) of the *Penal Code* and *Johana Ndungu Versus Republic* Criminal Appeal No. 116 of 1995 , that the ingredients of the charge of robbery with violence were stated to be;

i. If the offender is armed with any dangerous or offensive weapon or instruments, 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 robbery, he wounds, beats strikes or use any other violence to any person.

7. That whereas the case of the prosecution was not there were 3 assailants, only the appellant was arrested and no weapon was recovered from him. That the prosecution also failed to prove the element of violence as PW1 did not testify as to the same.

8. The appellant further submitted that there was lack of positive identification of the appellant and that there was mistaken identify in this case. He relied on *Wamunga versus Republic* (1989)KLR 424 , that;

> " ... . It is trite law that 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 a basis of a conviction."

9. The appellant also submitted on inconsistencies in the evidence of PW1 and PW2 on the arrest of the appellant. Further, that nothing was recovered from the appellant. He relied on the English case of *Woolmington Versus DPP* (1935)AC 462 , that;

> " If there is any reasonable doubt created by the evidence brought forward by the prosecution, then the case for the prosecution is not proved and the prisoner is entitled to an acquittal."

10. On the defence of the appellant, it was submitted that the same was dismissed without any reason being given by the court. Lastly, it was submitted that the trial court failed to comply with section 169 of the *Criminal Procedure Code* in as far as failing to contain the points for determination and the reasons for the decision.

11. On the side of the prosecution, it was submitted that the prosecution duly established the 3 ingredients of the offence charged. That evidence proved that the attackers were more that I and that they accosted the complainant causing him injuries. And that the appellant was properly identified. That this

incident was in broad daylight and the complainant followed and caught the appellant immediately. And that the appellant was found with the stolen phone. That though PW1 was the sole eye witness, the court properly warned itself of the dangers of a single identifying witness. Further, that any contradictions, if any in the prosecutions' case do not go to the ingredients of the offence. And that the court indeed considered the defence of the appellant at page 3 of the Judgment, before dismissing the same. And lastly, on the issue of sentence, counsel submitted that the death sentence appropriate and legal. Court was urged to dismiss this appeal.

12. The duty of the 1st appellate court is well settled. In *David Njuguna Kariuki versus republic* (2010)eKLR , it was held;

> " The duty of the 1 st appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself came to its own conclusion."

13. It is therefore imperative that this court do consider such evidence tendered by the parties before the trial court and to come to its independent determination.

14. From the record of the Proceedings the case of the prosecution opened with the evidence of PW1 Abdi Ahmed Hussein , that he sells phones at Luthuli Avenue, Kings communication. That on 22.10.2016 at about 9:00Am, he was at Mfangano street carrying phones in a box when 3 people appeared. That one held him from the back while another took away the phones, 16 smart phones valued at Ksh.183,050/= which he had been taking to a customer. That the man who blocked him is the appellant (then accused). That the one who took the phones ran away with them. That he fought with the appellant who then started running away. He however followed him and caught him. Police who appeared assisted him in arresting the appellant who was then taken to central police station. The witness was then referred to hospital as he had injury on the ankle. He identified his prescription and P3 forms in court (MFI-1,2).

15. He confirmed that appellant had been with 2 other people and that no body assisted him except the police officers. That appellant blocked him. The witness denied that he arrested the appellant at the stage.

16. PW2 PC Benjamin Neibo of central police station recalled that on 22.10.2016 he was on patrol in GK B637M with PC Wainaina and PC Kimani , at about 10-11:00am, along Mfangano street when he heard shouts. They headed towards the direction of the shouts. A man was being pursued. He found when the appellant had been stopped by members of the public, and they re-arrested him while about to be lynched. They duly took him to the police station.

17. And PW3 Corporal Elias Kiptum, the investigating officer herein, recalled that PW2 and his 2 colleagues and handed over the appellant at central police station. He issued the complainant with a P3 form and referred him to the police Doctor. He later charged the appellant. He produced the delivery notes of the stolen phones (Exh.1), and also Exh. 2 and 3. Again this witness denied that the appellant had been at the stage. And Dr. Maundu (PW4), produced the P3 form of the complainant (Exh.2). He noted that on examination, the complainant had tenderness at the back of the left ankle, classified as harm.

18. When he was put to his own defence, the appellant gave an unsworn defence in which he testified that on 22.10.2016 he was headed to work when police officers stopped him and asked him for his ID card and Kshs.5,000/= before arresting him. He denied the charges.

19. This basically is the evidence on record. This is a case of robbery with violence contrary to section 296(2) of the *Penal Code* . The said provision gives the ingredients of the offence, thus;

> " If the offender is armed with any dangerous or offensive weapon or instruments, 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, beat, strikes or uses any other personal violence to any person, he shall be sentenced to death."

20. The appellant's submissions, while replying on the case of Johana Ndungu Versus Republic, Criminal Appeal No. 116 of 1995, clearly captures the above 3 ingredients of the offence. So did the prosecution prove at least 1 of the 3 ingredients?

21. The evidence of PW1 was clear that he was attacked by 3 men. That one held him as another forcefully took the box of phones he was carrying. The appellant was injured in the process and had to seek treatment. The P3 form produced by Dr. Maundu (PW4), confirm the injury he suffered, classified as harm. This court therefore is convinced that the prosecution duly proved at least 2 ingredients of the offence of robbery with violence. That the attackers were 3 in number and the actual violence was occasioned on the appellant at the time of robbery.

22. PW1 went further to testify that he was robbed of the box containing, 16 smart phones. In court, the investigating officer produced the relevant delivery notes of the stolen phones, confirming that indeed the complainant was robbed of the phones while on his way to make delivery of the same.

23. The only issue remaining for determining in this appeal is whether the appellant was positively and properly identified as one of the assailants. On this score, it is noted that only 1 eye witness (PW1) testified as to how this robbery was executed. It is therefore necessary that this court considered keenly the circumstances at the time to determine if indeed the identification by PW1 was accurate (Wamunga Versus Republic, Supra).

24. This incident took place in broad daylight at about 9:00Am. The evidence of PW1 was that as he walked along Mfangano street, he was suddenly held. That 1 man held him, his property was being taken by the other. But that he fought or had a confrontation with the appellant. That when the appellant set to run away, he ran after him and caught him. The police including PW2 immediately appeared and rearrested the appellant.

25. From the evidence of PW1, he did not lose sight of the appellant. He caught appellant immediately after the robbery. He came face to face with the appellant in broad daylight. This court is convinced that the circumstances pertaining were such that complainant was able to and indeed positively and property identify the appellant as one of the assailants who robbed him on the material date.

26. The appellant has in his defence (unsworn) that he was arrested while on his way to work. I find the defence of the appellant rather indifferent. During the hearing of the evidence of the prosecution's witnesses, the appellant seemed to suggest that he was arrested at the bus stage, a fact denied by both PW1 and 2. On the other hand, during his defence, his testimony was that he was arrested when he met police officers who asked for his Identity card and Ksh. 5,000/=. This defence therefore must have been an afterthought as when he had the chance with the prosecution witnesses, the appellant never raised this issue with the witnesses, PW1 and PW2. I therefore do not find any merit in this defence which I dismiss.

27. As to the issue raised by the appellant regarding any inconsistencies in the prosecution's case, with respect I do not find any.

28. Lastly on the issue of sentence, section 296(2) of the *Penal Code* provides for death sentence for the offence of robbery with violence. Death sentence still remains legal. It is therefore incorrect to state that the sentence meted out herein was unconstitutional as alluded to by the appellant at ground 4 of the grounds of appeal. For avoidance of doubt, what the Supreme Court decision in the Muruatetu case declared to be unconstitutional is the mandatory nature of the death sentence, and not the sentence itself.

29. The record shows that before the sentence was passed, the trial magistrate accorded the appellant the opportunity to mitigate which he did and which mitigation the court duly took into account. The Court of Appeal dealt with the issue of sentence in the case of *Bernard Kimani Gicher Versus Republic*(2002)eKLR, when it held;

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trail court. Similarly, sentence must depend of the facts of each case. On appeal, the appellate court will not easily interfere with the sentence, unless the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factors, or took into account, some wrong material, or acted on a wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed the sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence, unless any one of the matters already stated is shown to exist."

30. As observed above, the sentence passed herein by the trial court is both proper and legal. This court therefore has no reason or justification to interfere with the same.

31. The sum total is that the appeal of the appellant filed herein on 27.2.2018 totally lacks in any merit. I dismiss the same wholly. It is so ordered.

HON. D. O. OGEMBO

JUDGE

31ST JANUARY 2023.

Court:

JUDGMENT READ OUT IN COURT (ON-LINE) IN PRESENCE OF THE APPELLANT (KAMITI MAXIMUM) AND MS. AKUNJA FOR THE STATE.

D. O. OGEMBO

JUDGE

31ST JANUARY 2023.