Olokurarru v Republic (Criminal Appeal 20 of 2019)
[2023] KEHC 557 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEHC 557 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL 20 OF 2019

F GIKONYO, J

JANUARY 31, 2023

BETWEEN

SIMAT OLOKURARRU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence of Hon. W. Juma (C.M) in Narok CMCR No. 1388 of 2017 on 29th March 2019)

JUDGMENT

1. The trial court convicted the appellant and sentenced him to 35 years imprisonment for the offence of robbery with violence under section 296(2) of the Penal Code.

2. Being dissatisfied with the said conviction and sentence he preferred an appeal *vide* the petition of appeal dated 1/4/2019 received in court on 2nd April 2019. He has set out 9 grounds of appeal. On July 25, 2022, the appellant sought leave to amend the grounds of appeal pursuant to provisions of Section 350 (2) (v) of the *CPC* as follows;

    i. That the learned trial magistrate erred both in law and facts in accepting the prosecution evidence of identification without considering the fact that PW1 was a single identifying witness. He was attacked at night, there was no clear explanation of the intensity of the night, and there was no clear explanation of the intensity of the light used. PW1 did not give marks of identification to the police or the people whom he met police or the people whom he met first. It was an error in law to rely on such flimsy information.

    ii. That the learned trial magistrate erred in both law and facts in finding that the identification parade conducted by PW5 was properly procured while there were glaring irregularities, and procedural technicalities were flawed.

iii. That the learned trial magistrate erred in both matters of law and facts by holding that the recovered rifles, magazines, and spent cartridges were circumstantially connected to the appellant with the robbery committed to Charles Lekaipei. This was an error in law.

iv. That the learned trial magistrate erred in both matters of law and facts in misconstruction of the circumstances of the arrest of the appellant in connecting him with the robbery committed to Charles Lekaipei but failed to note that the people (members of the public) who arrested him were never called as witnesses.

3. The appeal was canvassed by way of written submissions.

Appellant's submissions.

4. The appellant submitted that he was not identified as one of the robbers. That according to the circumstances that prevailed it was almost impossible to identify a stranger given the short time the robbery took place.

5. The appellant submitted that the procedures and rules of conducting an identification parade were not followed thus the parade conducted by PW5 was a nullity.

6. The appellant submitted that the evidence of recovered rifle, magazine and spent cartridges was circumstantial in nature therefore not able to connect the appellant with the robbery.

7. The appellant submitted that the arrest of the appellant was not connected to this robbery.

8. The appellant relied on the following authorities;

i. Section 5 of the *Police Act*.

ii. *R v Turnbull* (1976)

iii. *Joseph Muchangi Nyaga And Another v Republic* (1013) eKLR

iv. *Kariuki Njiru And Seven Others v Rep* Cr. App. No. 6 of 2001(Unreported)

v. *Jackebali And Others v Rep* Volume 10 (1952) EA.

vi. *Ajode v Rep* [2004] 2 KLR, 81

vii. *David Mwita Wanja And 2 Others v Rep* Cr. App No. 47 /2005 [UR]

viii. *Republic v Mwango S/O Manaa* [1936] 3 EACA 29

ix. *David Mwita Wanja v Republic* (2007) eKLR.

x. *Maina And 3 Others v Republic* [1986] eKLR.

xi. *K. Njunga v Republic* [1965] E.A. 773

xii. *Chha Bildas D. Somaiya v R* (1953) 20 EACA 144

xiii. *Abanga (Onyango) V Republic*

xiv. *Bukenya v Uganda* (1972) EA 549

xv. *Michael Norman Mbaachu Njoroge and Another v Rep* [2016] eKLR

xvi. *Kiarie v Republic* [1984] KLR 739.

The respondent's submissions.

9. The respondent submitted that the fact the appellant was positively identified by PW1 squarely placed the appellant at the scene of the robbery in which PW1, PW4, and a neighbour were shot and became victims. The identification was positive and free from error.

10. The respondent submitted that the trial court not only relied on circumstantial evidence but also the evidence of positive identification of the appellant by the complainant.

11. The respondent submitted that failure to give the description did not invalidate the identification parade. The complainant and his sister did not give a description of their assailants to the police at the time of reporting. They however participated in a well-conducted ID parade where the complainant positively identified the appellant.

12. The respondent submitted that the trial court relied on the evidence tendered by the prosecution and not extraneous matters not provided in evidence. The evidence of the prosecution was watertight and did not leave an iota of doubt that the appellant was one of the robbers. There is no single time during the trial that the burden of proof was shifted to the appellant.

13. On the allegation that no exhibit was recovered from the appellant, the respondent submitted that the robbery took place on 6/11/2017 and the appellant was arrested on November 22, 2017 a period of sixteen days after the robbery. It is possible to have disposed of the weapons used during the robbery within that period. further that the other evidence placed the appellant at the scene of the robbery despite the non-recovery of any exhibit from him.

14. The respondent submitted that the trial court considered the appellant's defence and rejected it in light of the evidence adduced by the prosecution which was water tight and cogent.

15. The respondent submitted that the sentence passed by the trial court is legal in accordance with the law. It is not harsh considering the aggravating circumstances of the case. Dangerous weapons such as G3 rifles were used by the appellant during the robbery.

16. In the end, the respondent submitted that the conviction was safe and the sentence meted was appropriate in the circumstances. They, therefore, urged this court to dismiss the appeal on conviction and sentence and uphold the conviction as well as the sentence.

17. The respondent relied on the following authorities;

    i. Co-accused, Kirako Ole Kiserian, the appellant in Narok appeal no. 19 of 2019. *Kirako Ole Kiserian v Republic* [2021] eKLR

    ii. *Republic v Richard Itweka Wahiti*[2020] eKLR

    iii. *John Mwangi Kamau v Republic* [2014] eKLR

Analysis and Determination.

Court's duty

18. As a first appellate court, this court is obligated to re-evaluate the evidence afresh, and make its own conclusions, except, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno v Republic* [1972] E.A 32

19. I have considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. I find the main issues for determination are;

    i. Whether the prosecution proved its case beyond a reasonable doubt.

    ii. Whether the sentence is excessive.

Elements of the offence of robbery with violence

20. The elements of the offence of robbery with violence were set out by the Court of Appeal in the case of *Oluoch –vs – Republic* [1985] KLR thus:

> " Robbery with violence is committed in any of the following circumstances:
>
> a) The offender is armed with any dangerous and offensive weapon or instrument; or
>
> b) The offender is in company with one or more person or persons; or
>
> 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 ....."

21. And the three elements of the offence under section 296(2) of the *Penal Code* '...are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence." (*Dima Denge Dima & Others vs Republic*,Criminal Appeal No. 300 of 2007)

22. In this case, PW1, the complainant told the trial court that he was attacked by four men. Two, had guns and the other two had swords. One Moses Sembele was shot four times by the robbers and he died. They hit PW1; the complainant with a gun on his left hand, another victim was hit on the left face and Stephen was shot on the leg. – The evidence was sufficiently corroborated by the other witnesses as shall become clear later.

23. Nonetheless, as the incident occurred at night, care should be taken to ensure the appellants were positively identified as the perpetrators of the offence. The court in *Wamunga v Republic* (1989) KLR 424 at 426 had this to say:

> " 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."

24. I have interrogated the circumstances under which identification was done. PW4 and PW1 testified that they saw the appellants under electric light in the shop at the time of the robbery. PW1 identified the appellant in the identification parade as one who had both ears pierced. PW1 did not know the appellant prior to the incident. PW4 testified that the first time she was in shock and could not identify the robbers but on a second time she identified the appellant. Although the incident occurred at night PW1 testified that on that particular night their shop had electricity and the attackers did not have their faces concealed. The evidence shows that there was sufficient electric light in the shop under which the witnesses saw the robbers. The robbers had not concealed their faces. The witnesses clearly saw them and were able to identify them in an identification parade duly conducted by the police. I cannot find any element of mistake identity or delusion on the part of the witnesses in the identification of

the appellant and 1st accused as one of the people who robbed the complainant on the fateful night. The circumstances favour positive identification and do not exhibit any particular difficulty in the identification of the assailants.

25. Further evidence shows that the appellant and 2nd accused were in constant communication with the robbery suspect who was gunned down at Tipis School. Evidence by the police also shows that information given by the appellant and the 2nd accused led to the tracing of the suspect who was gunned down. From him, a rifle was recovered. According to PW2, a ballistic expert, the rifle had been used in various incidents of crime, and it tallied with the ammunitions and cartridges recovered at the Duka Moja robbery- this is the scene of the offence herein. There is therefore circumstantial evidence that leads to an irresistible conclusion that the appellant was amongst the persons who committed the robbery herein. The connection is clearly visualized through the evidence.

26. Accordingly, the prosecution proved beyond reasonable doubt that; (i) the offenders were armed with a dangerous and offensive weapon or instrument; (ii) the offender was in company with one or more person or persons; and (iii) at or immediately before or immediately after the time of the robbery the offenders wounded, beat, strike or used other personal violence on them.

27. Accordingly, the appeal on conviction fails.

Sentence

28. The *Penal Code* prescribes a death sentence for the offence of robbery with violence. The trial court imposed a sentence of 35 years after taking into account the appellant's mitigation, and circumstances of the offence, and upon proper guidance by recent jurisprudence on the court's discretion in sentencing. The trial court broke away from the bidding of mandatory sentences and properly exercised discretion in passing sentence on the appellant. Accordingly, it has not been shown that the trial court overlooked some material factors or took into account some wrong or irrelevant factors, or acted on a wrong principle in imposing the sentence. Consequently, I find no reason to interfere with the sentence meted upon the appellant by the trial court.

29. The upshot of this analysis is that the appeal lacks merit and is hereby dismissed.

30. It is so ordered

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 31ST DAY OF JANUARY, 2023.

.....

F. GIKONYO M.

JUDGE

In the presence of:

1. Ms. Koina for DPP

2. The Appellant

3. Mr. Kasaso - CA