Njue & another v Republic (Criminal Appeal E020 of 2022)
[2023] KEHC 256 (KLR) (25 January 2023) (Judgment)

Neutral citation: [2023] KEHC 256 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E020 OF 2022

LM NJUGUNA, J

JANUARY 25, 2023

BETWEEN

ERIC NJERU NJUE ..... 1ST APPELLANT

CHARLES NGARI NDISII ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgement of the Principal Magistrate's Court at Siakago in Criminal Case No 416 of 2019 delivered on May 31, 2021.)

JUDGMENT

1. The appellants herein were charged jointly with others not before the court before the Principal Magistrate's Court at Siakago, in Criminal Case No 416 of 2019, with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code*. The particulars of the offence being that on April 6, 2019 at Rukira village, Nthawa Location in Mbeere North within Embu County, jointly with others not before the court, while armed with crude weapons namely pangas and rungus robbed Enos Muriithi Mate of cash Kshs 80,000/= and a motor cycle registration number KMEM 566U Skygo all valued at Kshs 170,000/= and immediately after the time of such robbery killed the said Enos Muriithi Mate. They pleaded not guilty to the charge and the prosecution called 7 witnesses to support its case.

2. By a judgment dated May 31, 2021, the trial court convicted the two appellants and sentenced them to Imprisonment for a period of 20 years. The appellants having been aggrieved by the said judgment, have filed the appeal herein citing the grounds as enunciated on their petition of appeal.

3. The appellants have thus urged this court to quash the conviction and set aside the sentence of the trial court.

4. The court directed that the appeal be canvassed by way of written submissions and the parties complied with the directions.

5. The 1st appellant generally submitted that the standard of proof in the case was too far below the required standard. That the 1st appellant was arrested for the reason that the proceeds from the sale of the motor cycle was sent to his Mpesa line and that he was placed at the scene of crime by the use of communication network and technology. The appellants contended that the disparity in time cast doubt on the evidence of the prosecution in that, had the appellants been in different locations, then the same could have read different coordinates. Reliance was placed on the case of *Ali v Republic* [1990] KLR 154. Further, the 1st appellant submitted that given that the trial magistrate had previously tried and convicted him in three different cases, the same could have influenced the court to view him as a repeat offender. That the 1st appellant being a miraa businessman, who buys miraa from different places at different times knew nothing about the alleged scene of crime and further, the appellants herein had no duty to disprove their innocence and as such, they pleaded with this court to quash their conviction and set them at liberty.

6. The respondent submitted that the trial court having considered the evidence of the prosecution witnesses together with that of the appellants, rightly convicted and thereafter sentenced the appellants to twenty years imprisonment. In response to the 1st and 2nd grounds, the respondent submitted that the prosecution witnesses adduced cogent, credible and consistent evidence linking the appellants to the offence herein.

7. That PW5 stated that upon the arrest of the appellants, investigations revealed that Kshs 14,000/= was sent to the 1st appellant's registered number 0740xxxx which prompted forensic investigations on the movement of the mobile phone number on the night of the incident. Further that, he conducted communication data analysis of the mobile phone of the deceased being 070xxx together with that of the 1st appellant being 0740xxxx. That the analysis revealed that the location of the deceased number and that of the 1st appellant on the night of the incident was the same being xxxxx EC 0612.

8. It was submitted that the evidence of PW5 and PW8 corroborated each other as the mobile phone of the 1st appellant recovered from him after the arrest revealed that he was at the same location with the deceased. Further, it was contended that PW8 also stated that upon carrying out communication data analysis of the deceased and the 2nd appellant's mobile phone numbers, he found that the location of mobile phone 0713xxxx registered under the identity Card No xxxx belonging to the 2nd appellant was indicated as xxxxxx EC 0612 Siakago. That the trial court rightly found that the appellants did not give any explanation as to what they were doing at the residence of the deceased on the night of the incident.

9. In response to ground 2, the respondent submitted that there was proof beyond reasonable doubt that the appellants jointly with others while armed with weapons, robbed one Enos Muriithi of cash and a motorcycle and immediately killed him. The respondent conceded that none of the prosecution witnesses identified the appellants but through the circumstantial evidence adduced by PW5 and PW8, the prosecution managed to prove its case. Reliance was placed on the cases of *Ahamad Abofathi Mohammed and another v Republic* [2018] eKLR and *Chiragu & another v Republic* Criminal Appeal 104 of 2018 [2021] KECA 342 (KLR). On whether the trial court was influenced by previous record of the 1st appellant, it was submitted that the trial court only referred to the previous convictions after the appellants had been convicted in the present charge and that the trial court invited the appellants to tender their mitigation before passing the sentence and that the court passed a lesser sentence of 20 years imprisonment and therefore, this court was urged to find that the appeal herein is not merited.

10. I have considered the grounds of appeal, the evidence on record, the submissions and authorities relied upon.

11. This being a first appeal, this court is expected to review and analyze the evidence afresh in order to form an independent opinion and draw its own conclusions bearing in mind that it did not have the benefit of seeing and observing the witnesses. [See *Okeno v Republic* [1972] EA 32 and *Kiilu & another v Republic* [2005] 1 KLR 174].

12. The offence of robbery with violence is provided for under the section 296(2) of the *Penal Code* as follows:

> " 296. Punishment of robbery
>
> (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."

13. The ingredients of this offence were aptly discussed by Cockar, CJ, Akiwumi & Shah, JJA in the case of *Johana Ndungu v Republic* CRA 116/1995, [1996] eKLR where the Court of Appeal in Mombasa stated as follows:-

> " In order to appreciate properly as to what acts constitute an offence under section 296 (2) of the *Penal Code* 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 v Republic* [1985] KLR 549].

14. Similarly, in Criminal Appeal No 300 of 2007 *Dima Denge & others v Republic* (2013) eKLR, the Court of Appeal stated as follows:

> " the elements of the offence under section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

15. In the case herein, PW1 testified that while in the house with her husband(deceased) and their child, she heard some people approach the door, knocked it and then demanded that the same be opened.

That they pushed the door open and started hitting her with a rod and though she did not identify any of the suspects, PW5 testified that, in the course of his investigations, the 1st appellant herein showed him the metal bar that they used to break the door. PW7 who conducted the post mortem on the body of the deceased testified that the deceased's death had been caused by sub-dural haematoma secondary to a penetrating head injury. In his report, he stated that the deceased had two deep cuts on the occipital region measuring 5*1 cm deep.

16. Accordingly, the prosecution proved beyond reasonable doubt that;

    i. the offenders were armed with dangerous and offensive weapon or instrument;

    ii. the offender were in company of one or more person or persons; and

    iii. at or immediately before or immediately after the time of the robbery the offenders wounded, beat, struck or used other personal violence against the deceased and PW1.

    [See *Paul Njoroge Ndungu v Republic* [2021] eKLR.

17. In a case such as this, identification of the offenders is key given that it is the link that connects an accused person to an alleged act that constitutes the offence. Identification has been defined in the *Black's Law Dictionary* 2nd Edition as:

> " Proof of identity; the proving that a person, subject, or article before the court is the very same that he or it is alleged, charged, or reputed to be; as where a witness recognizes the prisoner at the bar as the same person whom he saw committing the crime; or where handwriting, stolen goods, counterfeit coin, etc., are recognized as the same which once passed under the observation of the person identifying them –'Identitas vera colligitur ex multitu- dine signorum'".

18. As the incident occurred at night, care must 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."

19. I have interrogated the circumstances under which the offence was committed, the 1st appellant submitted that he was a miraa trader and as such, distanced himself from the offence herein. The respondent on the other hand conceded that indeed, there was no witness who identified the appellants herein. Of importance to note is the fact that, PW1 who was present in the house at around 11.00 p.m. when the perpetrators attacked the deceased testified that when they entered the house, they asked for the keys to the motor cycle and when she was allowed to get the same from a different room, she escaped to raise alarm for help. On cross examination, she was categorical that she did not identify any person.

20. In the case of *Abdalla Wendo v Republic* (1953) 20 EACA 166 it was held that:

> " Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct

pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

21. As I have already noted, there was no prosecution witness who saw or identified the appellants herein. The prosecution relied on circumstantial evidence. It is trite law that before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances which could weaken or destroy the inference of guilt [see *Sawe v Republic* [2003] KLR 364]. It is also settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests namely: the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else [see *Teper v Republic* [1952] ALL ER 480 and *Musoke v Republic* [1958] EA 715].

22. In the case herein, the investigating officer testified that after the 1st appellant was arrested, in his house, was recovered some suspected stolen goods. That after interrogation, he revealed a series of attacks that he had carried out with his gang members whom he named, the 2nd appellant included. That the 1st appellant informed him that the alleged stolen motor cycle was sold at Juja at a place known as Kenyatta Road. Further, it was his evidence that he had Safaricom statements and communication data showing the movement of the 1st appellant on the material night and that the same data placed the appellants at the scene when the incident took place. It was his evidence that the 1st appellant mentioned the 2nd appellant herein and upon analysis of the data, it was discovered that both were at the deceased's compound on the night the incident took place.

23. PW8 in his evidence corroborated the evidence of the investigating officer that upon carrying out investigations, he discovered that the number of the deceased and those of the appellants herein were in one position on the night the deceased was murdered. That he also stated that the 1st appellant had registered another ID number xxxx which was indicated by the DCI Siakago as 0792xxxx; the three numbers were with the appellants herein, at the same time with that of the deceased at the time of the alleged robbery. That upon writing a letter to Safaricom, he got a data card for 0740xxxx and the same was registered in the name of the 1st appellant. That in the document from Safaricom, the location of the number used by the accused was xxxxxx - EC 612 Siakago and that is the same location the deceased was killed.

24. That he requested for the data call from 0713xxxx which also indicated the location of the number where the incident was as xxxxx MK CO 612; and the number registered by ID number xxxx belonging to Charles Ndisi, the 2nd appellant herein; that he requested the data for No 070xxxx belonging to the deceased and the location of the data was xxxx – MK ECO 612 Siakago, which is the location of the deceased person. The same was trailed upto the place where the appellants herein allegedly sold the motor cycle belonging to the deceased and receipt of the money received after the alleged sale.

25. It was his testimony that indeed the appellants herein were the ones who robbed the deceased and thereafter killed him in the same location where the deceased's phone and the appellants' phones were, at the very time of the robbery. That the said location refers to the deceased's person's home.

26. It is trite that once the primary facts are established and the prosecution discharges its legal burden of proof, the accused bears the evidential burden to offer a reasonable explanation for the same, in this case, being place at the locus of the deceased herein. In the premises, I find that the prosecution's evidence placed upon the appellants a burden to discharge a rebuttable presumption of having been in

the deceased location and they ought to have explained how they found themselves there. The statutory rebuttable presumption is spelt out under sections 111(1) and 119 of the *Evidence Act*. These sections stipulate as follows:

> 111. (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:
>
> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:
>
> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."
>
> 119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

27. The court has looked at the evidence which was adduced by the appellants in their defence, it did not cast any shadow of doubt on the evidence by the prosecution. They did not give a plausible explanation as to why and what they were doing in the deceased's *locus quo*.

28. On the ground that the prosecution's evidence was marred with inconsistencies and that it was contradictory, I note that the appellants did not submit on the same or point out the alleged contradictions and/or inconsistencies. But that notwithstanding, the Ugandan Court of Appeal in the case of *Twehangane Alfred v Uganda* held thus;

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

As Mativo, J (as then was) stated in the case of *AHM v R* (Criminal Appeal E043 of 2021);

> inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected.

29. The question to be addressed is whether the contradictions mentioned are grave and point to deliberate untruthfulness, or whether they affect the substance of the charge. Defining contractions, the Court of Appeal of Nigeria in *David Ojeabuo v Federal Republic of Nigeria* stated;

> "Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while

> a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.

30. In the above cited case, it was held that contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to the benefit therefrom.

31. Therefore, each case must be considered on its own particular circumstances. There are cases where the inconsistency is so minor that clearly it will be of little effect and certainly does not necessarily mean that the witness is lying or that his testimony cannot be relied on. The judge must take all the evidence and all the circumstances of the case into account in deciding whether to accept a witness's evidence or any part of his testimony. (Nyakisia v REACA Crim App 35-D-71; -/5/71; Duffus, P; Spry, VP; & Lutta, JA in the East African Court of Appeal).I have independently gone through the record, and I find that the evidence by the prosecution flowed well and that there was nothing material to discredit the same. The appellant's attempt to discredit the prosecution's evidence citing inconsistencies does not pass the test.

32. On whether the trial court convicted the 1st appellant based on previous convictions, the *Sentencing Policy* gives guidelines on sentencing with respect to 1st offenders and misdemeanors and it states;

> In deciding whether to impose a custodial or a non-custodial sentence, the following factors should be taken into account:
>
> 1. Gravity of the offence: In the absence of aggravating circumstances or any other circumstance that render a non-custodial sentence unsuitable, a sentence of imprisonment should be avoided in respect to misdemeanors.
>
> 2. Criminal history of the offender: Taking into account the seriousness of the offence, first offenders should be considered for non-custodial sentences in the absence of other factors impinging on the suitability of such a sentence.
>
> Repeat offenders should be ordered to serve a non-custodial sentence only when it is evident that it is the most suitable sentence in the circumstances.

33. The above notwithstanding, I have perused the record and I note that during mitigation, and sentencing, the prosecution informed the court of the previous convictions of the 1st appellant herein, a fact that he also confirmed. Could the same have made the trial magistrate misdirect herself in sentencing the 1st appellant herein? Of importance to note is the fact that the conviction of the appellants herein was based on evidence. On sentencing for the offence of robbery with violence, the *Penal Code* stipulates that;

> 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."

34. The appellants herein were sentenced to 20 years imprisonment which is lawful given that nothing has been shown to proof 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 to be an error of principle [See *Shadrack Kipkoech Kogo v R*, and *Wilson Waitegei v Republic* [2021] eKLR].

35. On the allegation that the appellants' defences were not considered, from the record, the appellants in their sworn evidence mainly denied the allegations and as the trial magistrate noted in her judgement, they were both technologically placed at the scene of murder. From their defence, they did not cast any doubt on the prosecution's case or explain their presence at the deceased's home on the material night.

36. In the end, I find that the conviction and the sentence of the appellants herein were safe and sound. I therefore uphold the determination by the trial magistrate.

37. The appeal is hereby dismissed.

38. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 25TH DAY OF JANUARY, 2023.

L NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent