Ndegwa v Republic (Criminal Appeal E076 of 2018)
[2023] KEHC 2147 (KLR) (27 February 2023) (Judgment)

Neutral citation: [2023] KEHC 2147 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E076 OF 2018

SM MOHOCHI, J

FEBRUARY 27, 2023

BETWEEN

SIMON GITHUA NDEGWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against conviction and sentence in CM Cr Case No. 4997 of 2018 - Eldoret, Republic v Simon Githua Ndegwa, delivered by Hon. C. Obulutsa, C.M. delivered on 24.09.2018)

JUDGMENT

Introduction

1. This is an Appeal against conviction and sentence canvassed by way of an undated Petition of Appeal filed on 5th October 2018, and an undated amended Grounds of Appeal and written submissions both filed on 18th January 2023 and oral submissions by the Appellant on the 19th January 2023.

2. The Appeal refined the Grounds of the Appeal as: -

    i. The trial magistrate erred in law and in fact in accepting the Identification Evidence without considering the fact that PW1 was a sole identifying witness who never described the light conditions or give clear description of the assailant(s) and that the identification of the back jacked was flimsy.

    ii. The trial magistrate erred in law and in fact in holding that the Offence of robbery with violence contrary to Section 296(2) of the Penal code was proved beyond reasonable doubt and failed to note that the ingredients of the offence were not proved.

iii. The trial magistrate erred in law and in fact in misconstruing the circumstances of the arrest of the appellant by connecting him with a robbery of one Patrick otabo (PW1)

iv. The trial magistrate erred in law and in fact in shifting the burden of proof to the appellant and failing to evaluate the appellant alibi defence.

3. The Appellant orally mitigated in hearing while praying that his appeal be allowed.

4. The Respondent filed written submissions dated 16th April 2023 and relied on the same in opposition and arguing that: -

i. The case(s) of Ogeto vs R (2004) eKLR, Wamunga Vs R (1989) KLR 426, Nzaro Vs R (1991) KAR 212 and R vs Turnbull & Ors (1976) 3 ALL ER 549 that identification by a sole witness is permissible with care, that such evidence must be examined carefully to be satisfied that the conditions for identification were favorable and that the same must be watertight to sustain a conviction. The Respondent argued that all tests were deployed in arriving at the conviction.

ii. That Section 143 of the Evidence Act enables identification by a sole witness.

iii. That the record bears witness that the Appellant fully participated in trial and no prosecution witness testified in the absence of the appellant.

iv. That the Appellant was afforded his rights under section 211 of the Criminal Procedure Code as is exhibited on record.

v. That the evidence of PW was cogent and coherent and was never contradicted by any witness; and

vi. That the sentence imposed on the Appellant was lawful and constitutional.

5. The Respondent urged the Court to disallow the appeal and dismiss the same.

6. The Appellant had been charged with one count of Robbery with violence contrary to section 295 as read together with section 296(2) of the penal code, the particulars were that: -

> On the 28th August 2015 at Bacon Estate in Eldoret West district within Uasin Gishu County, jointly with others not before the court, while armed with offensive weapons namely "stones", robbed Patrick Okutubonjwa Okongra, a bag, one mobile phone make, Nokia 2690, one mobile phone make, Tecno M3, one leather jacket and cash Kshs 2,000/- all valued at kshs 24,650/- and immediately before such robbery injured the said Patrick Okutubonjwa Okongra.

Prosecution Case

7. The prosecution called a total of 5 witnesses and two exhibits; a P3 form duly filled and a Jacket were marked for identification as MFI1 and MFI2 but never produced.

8. PW1 Patrick Okutubonjwa testified that on the 28th of August 2015 he traveled from Eldoret to Nairobi and arrived at 9 p.m. He alighted at the Shell petrol station near "mile nne" and saw a person sitting on a bench while waiting to cross the road, the person stood where he was. From the light, he saw him and discovered he was his neighbor, he crossed the road while the person remained behind.

9. The witness was carrying a bag of clothes and two pullovers, he turned to enter his house he was hit on the head and passed out and only recovered after about 30 minutes when he went and alerted his neighbors that he had been injured and lost teeth, he had been hit with blow, his bag containing his jacket and his clothes was taken and he had been stripped naked and remained with his vest and underwear and the robbers left him with 50 shillings.

10. He went around looking for the suspect but didn't get them. The next day he called a friend Patrick Wekesa who took him to hospital at the station car which he found his ID and that the oncoming people and was told there was a suspect had been arrested and was at the AP post. He went and saw the suspect who he could not identify, while there the suspect called a number and when the person called came he recognized the person (the appellant) as the one who had attacked him and was still dressed in a black jacket as the previous night and he pointed him out and he was arrested, he reported that the Baharini Police Station and was given a P3 form, he identified the jacket -MFI1 and also identified the P3 form that was filled - MFI2.

11. On cross-examination, the witness identified the Appellant as the attacker who robbed him and that they were only two along the road and that the Appellant stood with him while he was waiting to cross the road and that from the light he had enough time to see the Appellant and marking well, he stated that the Appellant was a student and that he had hit him with a stone on the head and that he saw the stone that was used, at the scene, and that he lost property worth 25000 shillings.

12. On re-examination, the Witness stated that it was only the appellant and who followed him.

13. PW2 was a APC Peter Kamari service number 200872043 attached to the Huruma Administrative Police Station, that he was on patrol duties at 9 p.m with inspector of police Langat, Sergeant Apela and Cpl Pro Odembo Omondi and that they got information from Bernard Matambo who claimed to have been attacked by two people within the area who tried to rob him and the person had come to his rescue and he identified two of the attackers. He led the witness to the home of the suspect whom they didn't get.

14. The witness returned to the house of these suspect in the morning and arrested him and took him to the AP Camp. The suspect arrested was known as Dennis Oluoch, the witness claimed that the suspect identified his accomplice as Simon Gathua.

15. The witness asked the suspect to call Simon which he did, and he came to the police station. The witness questioned the appellant and requested to search his house but I'm reaching Shauri Moyo he changed to say that he stays in town and they took him back to the camp. The other suspect was identified as the one who had attacked Benard.

16. That members of the public came to the camp on learning of the arrest. One Patrick came to report that he had been attacked and while there, he pointed out to the appellant who was there, the witness identified the appellant in the dock.

17. On cross-examination, the witness stated that the appellant was called on phone by the suspect. The witness admitted that he never arrested the appellant with anything and that they took him to Shauri Moyo then he changed and claimed that he lived in town.

18. On re-examination the Witness stated that the suspect (not the Appellant) was asked to the record a statement.

19. PW3 was a Clinical Officer, Moses Komen who testified on the contents of the P3 form of PW1, injuries and classification of the injury as “harm” duly filled.

20. On cross-examination, the witness stated that the examination was conducted two days after the incident and that PW1 had indicated he knew the attacker and it was for the police to find out the attacker. He further stated that the degree of injury was assessed as "maim" owing to the loss of teeth.

21. PW4 Patrick Wekesa Barasa briefly testified how he was called at 11a.m by his friend PW1, that he had been beaten by thugs and he responded and took PW1 to hospital where PW1was admitted for one (1) day and that he was asked to record his statement the next day.

22. On cross-examination, the witness stated that he never knew those who beat up PW1.

23. PW5 CPL George Khisa of Baharini Police Station was the Investigating officer, his brief testimony was that PW1 reported being assaulted and that Appellant was brought from the AP Camp having been identified by PW1 at the Huruma AP camp and he was with another suspect that was charged in a separately with the offence of preparation to commit a felony. He stated that the Appellant had been identified by the Black jacket (PMFI2) which the IO further identified.

24. On cross-examination, the witness stated that the Appellant had been identified at the AP Camp, he was not arrested with any stolen item and that PW1 documents had been found at the corner.

25. The prosecution closed their case and the appellant was found with a case to answer.

Defence Case

26. The Appellant gave sworn testimony without calling any witness by denying involvement and stating that on the material day he was called by his friend Dennis to the AP Camp where Dennis had been arrested and when he went there to see him he was detained with other people then he saw PW1 claiming that he was one of the thieves and he was arrested and transferred to the station over the weekend then charged alone after Dennis had been released.

27. On cross-examination, the Appellant admitted going to the AP Camp where PW1 who was there claimed he was one of the thieves.

Judgment

28. The trial court in analyzing and determining the case found that PW1 went to the AP Camp having been told of a suspect who had been arrested and on reaching the camp he could not identify the suspect but while there he saw the Appellant whom he identified with a black jacket he was wearing as the attacker who had a black jacket the previous night and that PW1 was issued with a P3 form that he presented in court.

29. The trial court refined the issues for determination as whether;

    i. The complainant was attacked and had his bag, clothes, cash and phone stolen

    ii. The accused had been identified as one of the attackers.

    iii. He was armed with a stone.

    iv. He was in the company of others and used violent on the complainant.

30. The Trial Court further considered the Appellants defense and written submission which contested the manner of his identification claiming that the complainant had been described to him prior, no identification parade was conducted and that no stolen item was recovered on him and that his black jacket presented to court could not implicate him.

31. The Trial Court while relying on the case of Titus Wambua vs Republic found that the prosecution was only required to prove one element in the particulars and in the instant case the Court found that PW1 positively identified the Appellant as a person he saw seated on the bench alone, that the lights from the petrol station enabled him to see clearly, that it was the Appellant who tracked PW1 and attacked him, robbing him and occasioning upon him bodily injuries and that, the defense did not challenge the prosecution case and that the charge had been proved beyond reasonable doubt.

32. This is a first appeal. The duty of the first appellate court in criminal cases was restated in the case of Charles Mwita –vs- Republic, C. A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that: -

> " In Okeno v R [1972] E.A. 32 at page 36 the predecessor of this Court stated: - "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –v- R [1957] EA. 336) and to the appellate court's own decision on the evidence".

33. Being a 1st Appeal Court I must, weigh conflicting evidence and draw conclusions, (Shantilal M. Ruwalla –v- R [1957] EA 570) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424."

34. The Court has re-valuated the entire body of evidence as it is enjoined to do and as it was established in the case of Gabriel Njoroge v. Republic [1988-85]1 KAR 1134, that: -

> " As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see Pandya v. R. [1957] E.A 336, Ruwala v. R [1957] E.A. 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly, misdirection and non-directions on material points are matters of law."

35. The fresh and exhaustive examination of this Appeal has given rise to the following issues for determination: -

    i. Whether the Prosecution established proof beyond reasonable doubt?

    ii. Whether Circumstantial evidence can sustain a charge and conviction in the absence of positive identification?

    iii. Whether the identification by clothing was watertight?

36. This Court has agonized while evaluating the Trial Court record, recalling the seriousness of the charges facing the Appellant and the irreversible penalty subsisting upon conviction. The Appellant was unrepresented while the Respondent was represented by Prosecution counsel.

37. The Prosecution's case did not have any positive identification of the robbers and further, it is trite law that an identification made at the scene of a crime is useless, unless the said identification is confirmed by an identification parade held by the police. In Kiarie –versus- Republic [1984] KLR 739 at page 744, the Court of Appeal held that, an identification made in Court by a complainant (i.e. dock identification) is almost worthless without an earlier identification parade.

38. Positive identification of an accused person is an indispensable element where only circumstantial evidence is to be relied upon to sustain a charge of Robbery with violence and consequently satisfy the ingredients of the charge.

39. This Court associates itself with the Court of Appeal as was held in Odeny v Republic (Criminal Appeal 124 of 2017) [2023] KECA 42 (KLR) that: -

> " the evidence of identification/recognition at night must be tested with the greatest care using the guidelines enunciated in Republic - v- Turnbull, (1976) 3 All ER 549 and that such evidence must be watertight to justify conviction. (See, for example, Nzaro -v- Republic, 1991 KAR 212 and Kiarie - v- Republic, 1984 KLR 739). In Maitanyi -v- Republic 1986 KLR 198, this Court stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect".

40. In Blackstone's Criminal Practice 2015 at F18(2) rightfully holds that: -

> " the mere description of the culprit of his clothing is not identification evidence, even if it closely matches the appearance or clothing of the defendant, in relying on identification evidence our courts have come up with legal principles and rules which must guide the prosecution presenting evidence at the trial court. The circumstances under which the identification took place must be explained.

41. The source of light where the offence occurred at night, the intensity of the light must also be explained. The position and distance of the identifying witness visa vis the suspect being identified. The identifying witness must give the physical description of the assailants as seen at the time of the robbery. The source of light its size and its position relative to the suspect. This was discussed in the case of Simiyu & Another Vs. Republic (2005) KLR 192: -

> " In every case in which there is a question as to the identity of the accused, the fact of there being a description given and the terms of that description are matters of the highest importance of which evidence ought always to be given first of all by person or persons who gave the description and purport to identify the accused, and then by the person or persons to whom the description was given".

42. Analyzing the evidence on record in the present case, it is painfully clear that the learned magistrate never made a conscious inquiry about the nature of the light and its brightness. Consequently, is un-persuaded that in this case, there was proper testing of the evidence of identification and recognition by the trial court; and that it was free from error.

43. After re-evaluating the evidence on record, the Court discount this evidence of identification. The Appellant was not properly identified. It would be unsafe to convict the Appellant based on PW1's evidence on identification.

44. The Court finds that the prosecution had a cardinal obligation to demonstrate ownership of the stolen items and production of exhibits (if any) the record of Appeal however reveals that only 2 documents were accordingly marked as (PMFI1&2) but the items were never produced as exhibits.

45. It is equally noteworthy from the Record of Appeal that no inventory of exhibits was prepared in this trial.

46. In the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR the Court of Appeal extensively dealt with the issue by holding as follows: -

> " The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case" Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved?
>
> First, when the document is filed, the document though on file does not become part of the judicial record.
>
> Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.
>
> Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document.
>
> When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record".

47. The Court thus finds that no exhibits were produced and proved by the prosecution and that the mere marking of a document does not dispense with the proof of the document.

48. The Court therefore hold that the prosecution failed to prove, to the required standard proof beyond reasonable doubt, that it is the Appellant who robbed the two complainants.

49. The Court holds and finds that sum effect of the analysis reveals that the conviction by the Trial Court was unsafe, I hasten to add that it is a constitutional requirement to safeguard, promote and protect fundamental rights of accused person and that a miscarriage of justice occurred with the plethora of misdirection(s).

50. This Court thus finds favor with the Appellant, shall allow the appeal, quash the conviction of the Appellant; the offence of robbery with violence contrary to section 296(2) of the Penal Code.

51. The Appellant shall be forthwith set free from prison custody unless he is otherwise lawfully held.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 27TH FEBRUARY 2023

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MOHOCHI S.M

JUDGE

<u>In the Presence of:</u>

Appellant in Person

Mr. Mugun for the Republic

Mr. Kenei C.A