EOO v Republic (Criminal Appeal E046 of 2021)
[2023] KEHC 2859 (KLR) (29 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2859 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E046 OF 2021

JN KAMAU, J

MARCH 29, 2023

BETWEEN

EOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. O. Temu (SPM) delivered at Nyando Senior Principal Magistrate's Court in Criminal Case No 602 of 2018 on 26th October 2021)

JUDGMENT

Introduction

1. The Appellant herein was jointly charged with others on three (3) counts of the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code* and on one count with the offence of gang rape contrary to Section 10 of *Sexual Offences Act* no 3 of 2006. The Learned Trial Magistrate, Hon. S. O. Temu (SPM) convicted him on the first two (2) counts of robbery with violence and rape and sentenced him to twenty (20) years imprisonment for Count I, twenty (20) years imprisonment for Count II and ten (10) years imprisonment for Count III. He directed that the sentences would run concurrently because the Appellant was a first offender.

2. Being dissatisfied with the said Judgement, on 24th November 2021, the Appellant lodged the Appeal herein. His Petition of Appeal was undated. He relied on five (5) grounds of appeal.

3. His undated Written Submissions were filed on 11th October 2022 while those of the Respondent were dated 17th October 2022 and were filed on 19th October 2022. This Judgment is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

6. Having looked at the said Grounds of Appeal and the respective Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt;

    b. Whether or not the sentence that was meted upon the Appellant by the Trial Court was lawful and/ or warranted.

7. The court dealt with the two (2) issues under the following distinct and separate heads.

I. Proof of Prosecution's Case

A. Identification

8. Grounds of Appeal nos (1) and (2) of the Petition of Appeal were dealt with together under this head as they were both related.

9. The Appellant submitted that there were inconsistencies in the evidence that was adduced by the Prosecution. He asserted that it was not clear whether he was part of the gang that robbed and raped the Complainant (sic) as the incident took place in total darkness as the lights were off and everyone ran in different directions making it hard to identify anybody.

10. He contended that the Prosecution did not prove the nature, source, location and intensity of light and time that was taken by the witnesses so as to be able to identify the assailants.

11. He added that VOA (hereinafter referred to as "PW 1") was hit with a rungu on the back which made it impossible for him to identify his attackers. He further contended that the Trial Court did not also consider the issue of the mask as it was not clear whether he had a mask on or not and/or whether it was a head or face mask.

12. He was emphatic that the Trial Court failed to give consideration to his sworn defence which clearly indicated that he was not at the scene of the crime.

13. It was his submission that the factors favourable for identification were not proved and were not properly addressed. In that regard, he relied on the case of *R v Turnbull* (1967) 3 ALL ER 549 where it was held that the court must bear in mind that even when parties had prior or close relationship, mistakes could still be made in identification hence court must still exercise a level of caution.

14. The Respondent further submitted that the Complainants stated in their testimony that the Appellant was their neighbour and that when PW 1 called his name he asked him not to call his name. It contended that NRA (hereinafter referred to as "PW 4") was positive that it was the Appellant who raped he as she was able to identify him as they were neighbours.

15. It added that the place where the incident took place had electricity and the phone the assailants used had light which the witnesses said enabled them see the Appellant, a person they knew as a neighbour. It was its argument that the witnesses positively identified the Appellant as the perpetrator.

16. It asserted that the Appellant's defence of *alibi* was an afterthought and it was therefore properly dismissed. In this regard, it placed reliance on the case of *Karanja v R* [1983] KLR 501 where it was held that in testing a defence of *alibi*, the court should consider the defence of alibi ought to be at an early stage in the case so that it could be tested by those responsible for investigation and prevent any suggestion of afterthought, which was not the case herein.

17. According to PW 1, JA (hereinafter referred to as "PW 2") and PW 4, at about midnight on 17th August 2018, they were walking home at Awasi from a funeral when they were confronted by two (2) men and they ran in different directions. Their testimony was that PW 1 called the Appellant's name and he asked him why he was calling his name.

18. PW 1 stated that he had fought with the Appellant for ten (10) minutes and that he was able to identify him as he knew him well as they were neighbours and had gone to the same school. He further stated that the Appellant had a mask on which fell off as he struggled with him. He was clear that he was able to see the Appellant night but he did not know the other persons who had accompanied the Appellant.

19. PW 2 stated that she did not recognise the people who attacked them. She, however, stated that it was the Appellant who attacked PW 1.

20. HA (hereinafter referred to as "PW 3) told the Trial Court that on the material night, she was at home when she heard PW 2 screaming and when she opened the door, PW 2 told her that there were people who were killing her son whereupon they screamed for help and ran to the gate. She said that PW 1 was screaming that one Onyango had killed him. Her further evidence was that people gathered and went to look for the Appellant in his house but he was not there.

21. In his sworn evidence, the Appellant stated that on the material date at 5.00 am, he went to his barber shop and as he was washing, he heard people knocking. He said that he thought that they were clients and opened the door. However, the people who entered started searching his shop and informed him that they were police officers whereupon they arrested him.

22. Section 108 of the *Evidence Act* Cap 80 (Laws of Kenya) states that:-

> " The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

23. Further, Section 109 of the *Evidence Act* stipulates that:-

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

24. Notably, the Appellant did not deny knowing PW 1, PW 2 and PW 4. He did not challenge the evidence of PW 1 and PW 3 who testified that they went to his house on the material night after the incident but did not find him in his house. He did not explain to the court where he was between 2.00 am when the incident occurred and 5.00 am when he went to his barber shop.

25. He was obligated to call a witness to corroborate his alibi defence in order to rebut the Prosecution's evidence, the burden of proof having shifted to him. Having failed to call such a witness, he failed to prove his alibi evidence and hence failed to outweigh the Prosecution's evidence on his identification.

26. It was also clear that PW 1, PW 4 and the Appellant herein were not strangers. Both PW 1 and PW 4 identified him as having been at the scene of the crime as they interacted with him for some time. PW 4 said that there were security lights nearby and her phone had light which enabled her identify the Appellant as the first person who raped her.

27. On his part, PW 1 fought with the Appellant for about ten (10) minutes and the mask the Appellant was wearing fell off. PW 1 asked the Appellant why he was killing him and the Appellant asked him why he was calling out his name. He also identified him from his voice as they were neighbours and had been in the same school.

28. The evidence that was adduced by PW 1 and PW 4 showed that there was electricity light illuminating where the incident occurred which was favourable for identification. This court was thus satisfied that the Appellant was positively identified as the perpetrator by PW 1 and PW 4 by way of recognition as they were all known to each other.

B. Robbery With Violence

29. The Appellant submitted that PW 1 testified that he lost a mobile phone (touch screen) and some amount of money (ksh 2000/=). It was his argument that touch screen phones did not exist in 2003. He further averred that the receipt for the phone was not availed and that recovery of the said phone was not documented.

30. It was therefore his submission that the Prosecution did not prove the offence of stealing to warrant a conviction. In that respect, he placed reliance on the case of *Ndung'u Kimani v Republic* [1979] eKLR where it was held that the court would only rely on the evidence of a witness who did not create an impression that he was not a straight forward person or raised a suspicion about his trustworthiness.

31. He contended that no 56682 Sgt Andrew Momanyi (hereinafter referred to as "PW 6") did not conduct a conclusive probe in this case because he did not disclose how he concluded that on the material day, money was transferred from PW 4's phone to another number because the M-pesa statement was for 12th August 2018 and not 17th August 2018. He averred that his evidence was micromanaged (sic) as he never made efforts to pursue the recipient of the said money.

32. On its part, the Respondent submitted that the Prosecution proved its case against the Appellant beyond reasonable doubt and that there were no inconsistencies in the Prosecution's case. It added that the Prosecution proved the ingredients of the offence of robbery which in the case of *Oluoch v Republic* [1985] KLR they were said to be that the offender must be armed with a dangerous and offensive weapon or instrument, that the offender was in company with one or more person or persons or immediately before and/or that immediately after the time of robbery the offender wounded, beat, struck or used other personal violence to any person.

33. It asserted that in the instant case, the Appellant was with others who were never identified by the witnesses and that he was armed with a "rungu" and he used violence against the Complainants. It added that the Appellant transferred the sum of ksh 6,550/= from PW 4's mobile phone number 0721xxxx36 to 0706xxxx08.

34. The offence of robbery with violence consists of two (2) element, the first being stealing and the second being violence. It is for that reason that one is charged with the offence of Section 295 as read with Section 296(2) of the *Penal Code* Cap 63 (Laws of Kenya).

35. Notably, Sections 295 of the *Penal Code* provides that:-

> " 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."

36. Further, Section 296(2) of the *Penal Code* states 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...."

37. It therefore followed that for an accused person to be found culpable of the offence of robbery with violence, the Prosecution was required to prove the following ingredients:-

1. The offender is armed with a dangerous or offensive weapon; or
2. The offender is in the company of one or more other person; or
3. The offender immediately before or after the robbery wounds, beats, strikes or uses any other personal violence to any person.

38. PW 1 testified that on the material date, the Appellant herein took his phone and a sum of ksh 2,000/=. He further averred that the Appellant hit him with a rungu. PW 2 told the Trial Court her "lesso" was taken away while PW 4 stated that the Appellant transferred the sum of ksh 6,550/= from her mobile phone number 0721xxxx36 to 0706xxxx08..

39. PW 3 confirmed that they took PW 1 to hospital and went to look for PW 4 and later reported the matter to Awasi Police Station. PW 4's evidence corroborated that of PW 1, PW 2 and PW 3.

40. There was overwhelming consistent evidence that was adduced by the Prosecution to show that it was the Appellant who robbed PW 1 of his phone and money. These items were never recovered. It was therefore reasonable and believable that PW 1 lost his items in the attack and that constituted theft.

41. Going further, PW 4's money in the sum of ksh 6,550/= was also transferred from her mobile phone to another number of one Joseph Oidho at 2.15 am on the material day. An M-pesa statement was produced in court as proof of that fact. Contrary to the Appellant's assertion, PW 6 adduced in evidence an M-pesa Statement for the period between 12th August 2018 and 18th August 2018. It showed a transfer of the said sum of money to the said Joseph Oidho at 2.15.21 am. This was proof he robbed her of the sum of ksh 6,550/=. The theft from PW a1 nd PW 4 satisfied the first ingredient of the two (2) Counts of the offence of robbery with violence.

42. It was immaterial that the second person was not identified and/or arrested. It was sufficient that the Appellant was in the company of another person and they executed a common intention. This satisfied the second ingredient of the offence of robbery with violence.

43. At the material time, the Appellant was armed with a "rungu" which he hit PW 1 with and injured him. Nelson Mandera (hereinafter referred to as "PW 5") who attended to PW 1 at the hospital observed that PW 1's clothes had blood stains and that he had swellings on the right side of the forehead and tenderness on the chest. The P3 Form which was produced as an exhibit showed that PW 1 sustained injuries that were classified as "harm". This was sufficient proof that the Appellant, in the company of another used actual violence on PW 1. This also satisfied the second ingredient of the offence of robbery with violence.

44. PW 4 told the Trial Court that she saw the Appellant beat PW 1 with a club as she ran away. As PW 1 sustained injuries, the "rungu" was a dangerous weapon for all purposes and intent. This satisfied the third ingredient of the offence of robbery with violence.

45. In the circumstances of this case, the upshot is that all the ingredients of the offence of robbery with violence against the Appellant were proved. The Appellant was hence rightly found guilty and convicted on Count I and II of the offence of robbery.

C. Rape

46. The Appellant submitted that the evidence did not show if his organs came into contact with those of PW 4. He argued that PW 4 had no ample time to see who was raping her because the scene was totally dark. He added that medical evidence showed that all the tests were negative and there were no spermatozoa seen. He asserted that there were no forensic medical tendered as he was not subjected to the tests and examination to ensure that the samples matched.

47. On the other hand, the Respondent submitted that the Prosecution proved the charge for the offence of rape. It contended that PW 4 testified that she was raped by two (2) people and the Appellant was one of the assailants and that she was treated at Hope Dispensary and then referred to Ahero Hospital.

48. The offence of gang rape is provided in Section 10 of the *Sexual Offences Act*. The same states as follows: -

> " Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."

49. The key ingredients of the offence of gang rape therefore include proof of rape or defilement and proof that the assailant was in association with another or other persons in committing the offence of rape or defilement or that the assailant did not per se commit the offence of rape or defilement but with common intent, was in the company of another or others who committed the offence.

50. According to PW 4, she was raped by two (2) people in turns and the Appellant was one of them. She tendered in evidence the treatment notes and P3 Form as proof that indeed she was raped on the material date. PW 5 who examined her confirmed that her genitals had been injured due to trauma and that she had been raped. There was no indication that the Appellant cross-examined PW 5 and/or that he sought to cross-examine him after he was stood down on 8th March 2021 and on 9th Mach 2021 when PW 2 was said to have been busy.

51. Be that as it may, the same was not fatal to the Prosecution's case as the court could still have relied on PW 4's evidence only by virtue of Section 124 of the *Evidence Act* Cap 80 (Laws of Kenya) that stipulates as follows:-

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth (emphasis court)."

52. Nonetheless, this court noted that PW 4 was taken to Hope Hospital Awasi on the material night. PW 5 relied treatment notes from the said hospital which showed that PW 4 had mucus in the vagina and as a result of which he concluded that she had been raped.

53. From the circumstances of this case, it was unlikely that PW 1 consented to the sexual act. She testified that when the Appellant took her to a secluded place and that he asked her to remove her clothes whereupon he raped her. When he saw some torches approaching, he told her to move to the other side of the road where he continued raping her. The other assailant raped her too. It was her evidence that the Appellant told her to cooperate or else he would beat her up. It was this court's finding that PW 4 did not freely consent to the sexual activities with the two (2) assailants.

54. Since it had already been proved that the Appellant was in the company of the other attacker and had carnal knowledge of PW 4 in turns, the offence of gang rape was therefore proved.

55. Having analysed all the evidence that was adduced during trial, this court determined that the Appellant's assertions on contradictions did not reach the threshold of creating any reasonable doubt in the mind of this court. They were so minor and did not go into the root of the findings by the Learned Trial Magistrate.

56. This court therefore found and held that the Learned Trial Magistrate did not therefore err when he convicted the Appellant of the offence of gang rape as the Prosecution proved its case against the Appellant herein beyond reasonable doubt which is the required standard for criminal cases.

57. In the circumstances foregoing, this court found and held that Grounds of Appeal nos (1) and (2) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

II. Sentence

58. Grounds of Appeal nos (3) and (4) of the Petition of Appeal were dealt with under this head.

59. The Appellant urged the court to consider his mitigation and set aside the sentence.

60. On its part, the Respondent submitted that the Learned Trial Magistrate was too lenient to the Appellant considering the sentence in Section 296(2) of the *Penal Code* was death and that under Section 10 of the *Sexual Offences Act*, the minimum sentence was fifteen (15) years imprisonment. It contended that the courts have addressed the issue of constitutionality of mandatory minimum sentences.

61. In that respect, it relied on the cases of *Maingi & 5 Others v DPP & Another* [2022] KEHC 13118 (KLR) and Nyeri Criminal Appeal no 84 of 2015 *Joshua Gichuki Mwangi v R* (eKLR citation not given) where the common thread was that mandatory sentences by the Legislature took away the trial court's discretion to impose appropriate sentences which conflicted with the principle of separation of powers and independence of the Judiciary. It urged the court to uphold the Appellant's sentence as it was lawful.

62. Section 296(2) of the *Penal Code* states 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."

63. On the other hand, Section 10 of the *Sexual Offences Act* stipulates that:-

> "Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life."

64. The penalty for robbery with violence was death. It was therefore the considered view of this court that the Learned Trial Magistrate was very lenient when he sentenced the Appellant to twenty (20) years imprisonment on for the offence of robbery with violence.

65. Notably, in its directions of 6th July 2021 in respect of the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, the Supreme Court clarified that the death sentence had not been declared unconstitutional and that discretion in sentencing could only be exercised in cases of murder only.

66. This court also noted that the sentence of ten (10) years imprisonment for the offence of gang rape was too lenient as the minimum sentence was fifteen (15) years while the maximum was a life sentence.

67. This court formed the opinion that the Learned Trial Magistrate did not adhere to the sentences that were prescribed by the law and for which this court could interfere with the same and enhance the same. However, this court took cognisance of the fact that it is a neutral arbiter and since the Respondent had not given the Appellant notice that it would be seeking an enhancement of the sentences whereupon it could have cautioned the Appellant herein so that he could have made an informed decision of whether or not to continue with the Appeal herein, it opted not to interfere with the sentences that had been meted upon the Appellant herein.

68. In the circumstances foregoing, this court found and held that Grounds of Appeal nos (3) and (4) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

Disposition

69. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 24th November 2021 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and are hereby upheld as it was safe to do so.

70. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF MARCH 2023

J. KAMAU

JUDGE