Mutua v Republic (Criminal Appeal E032 of 2022)
[2023] KEHC 3375 (KLR) (25 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3375 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E032 OF 2022

PM MULWA, J

APRIL 25, 2023

BETWEEN

ANTONY KALUNGU MUTUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment delivered by Hon. E. Riany – SRM on 31st March, 2022 in Thika Criminal Case No. 6539 of 2017)

JUDGMENT

1. The Appellant Antony Kalungu Mutuawas the first accused in the lower court. He had been charged alongside five others with two counts of the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence in the first count were that on 19th December 2017 at Membley area in Ruiru Sub-County, jointly while armed with dangerous weapons, namely pistol, robbed Rajpal Katana Kazungu of cash Kshs. 100,000/= and after or before the time of the robbery, used actual violence to the said Rajpal Katana Kazungu. And in the second count the particulars were that on 19th December 2017 at Membley area in Ruiru Sub-County, jointly while armed with dangerous weapon, namely pistol, robbed Frankline Mugambi Mugo of cash Kshs. 400,000/= and immediately after or before the time of the robbery used actual violence and injured him as a result of which he succumbed to injuries on 6th January 2018 while undergoing treatment at Aga Khan Hospital.

2. After a full trial the appellant and the second accused in the lower court were found guilty, convicted and sentenced to suffer death.

3. The conviction and sentence provoked the appellant herein to file this appeal.

4. The appellant's grounds of appeal are as follows: -

   (a) That the learned trial magistrate erred in law and fact in convicting the appellant in a charge that had not been proved beyond reasonable doubt.

   (b) That the learned trial magistrate erred in law and fact in failing to find that the prosecution failed to prove its case beyond reasonable doubt.

   (c) That the learned trial magistrate erred in law and fact in convicting the appellant where the essential ingredients of the charge of robbery with violence had not been proved by the prosecution.

   (d) That the learned trial magistrate erred in law and fact by shifting the burden of proof from the prosecution to the appellant.

   (e) That the learned trial magistrate erred in both law and fact by convicting the appellant based on irrelevant considerations.

   (f) The learned trial magistrate erred in law and fact by not considering the testimony and defence given by the appellant and find that it was credible and true.

   (g) The learned trial magistrate erred in law and fact in failing to find that the evidence on record was not sufficient to sustain a conviction.

   (h) The learned trial magistrate erred in law and fact in convicting the appellant based on insufficient circumstantial evidence.

      (i) The learned trial magistrate erred in law and fact in convicting the appellant based on inept investigations.

   (j) The learned trial magistrate erred in law and fact in convicting by relying on inconsistent evidence.

   (k) The learned trial magistrate erred in law and fact in convicting the appellant as charged yet the prosecution failed to prove mens rea.

5. At the hearing of the appeal, Ms. Maina, counsel for the appellant relied on her written submissions whereas Mr. Muriuki, learned state counsel orally submitted that they were conceding the appeal. According to Mr. Muriuki the appellant was erroneously charged in the lower court, simply because he only hired out a motor vehicle to the second accused in the lower court proceedings.

6. This is the first appellate court and as such I have subjected the entire evidence adduced before the trial court to a fresh evaluation and analysis while bearing in mind that I did not have the opportunity to see and hear the witnesses and so I cannot comment on their demeanour. I have drawn my conclusions after due allowance. I am guided by The Court of Appeal case of *Okeno vs Republic* (1972) E.A. 32 where the Court set out the duties of a first appellate court thus: -

> " 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 vs. Republic* (1957) E.A. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala Vs. R.* (1957) E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding 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 vs. Sunday Post*, (1958) E.A. 434)"

7. The prosecution's case forms part of the record of appeal and I need not reproduce the same, however I purpose to summarize the prosecution's case and the defence.

8. PW1, Rajpal Katana Kazungu said that they were carjacked and robbed by five people. That he only saw a sixth person in the police cells. PW3, Fredrick Owino Osando confirmed he had given out his motor vehicle KCH 904D to one Antony Mutua (appellant) who does car hire business. That Antony was to use the vehicle for one week. He then learned the car had allegedly been used to commit a crime. A police officer Cpl Wilson Kakali (PW5) stated that he carried out an identification parade. That the 1st accused (appellant herein) did not participate in the parade. Pc Fredrick Okoth (PW6) was on patrol when he heard gunshots around Membley area. Upon rushing to the scene, they found motor vehicle KCH 904D. Two people in the vehicle who were injured were taken to hospital. The owner of the vehicle was traced and he told the police that he had given the same to the 1st Accused who had then hired out the vehicle.

9. The appellant (DW1 in the lower court) denied the offence and stated that he used to do car business employed by Current Holiday Tours who he used to connect with clients and then earn a commission. He confirmed he did business with PW3 in respect of a vehicle which he hired out to the 2nd accused. He produced all payment transactions to that effect. When the car was traced having been involved in an accident the 2nd accused had switched off his phone. David Ngugi Mbugua (DW2) confirmed knowing the appellant as one who undertook car hire business.

10. In the case of *Martin Mungathia V R.* [2015] eKLR the Court of Appeal sitting at Nyeri, quoted with approval from the case of Johana Ndungu vs Republic - Criminal Appeal No. 116 of 1995, what the ingredients for a charge of robbery with violence are, that is;

    (i) The offender is armed with a dangerous or offensive weapon or instrument, or

    (ii) If he is in company with one or more than other person or persons, or

    (iii) If, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.

11. It is enough for the prosecution to prove at least one of the three ingredients if not all.

12. The appellant's grounds of appeal can be summed up as follows; that the learned trial magistrate erred in law and fact by basing a conviction on irrelevant considerations and insufficient circumstantial evidence. In essence the appellant urged the court to find that the lower court relied on the agreement over the alleged car hire to connect him with the commission of the offence which evidence ought to have exonerated him from the offence. In convicting the appellant on the issue of car hire, the trial magistrate stated as follows:

    "...evidence revealed that Accused 1 is the one who gave out the vehicle that was used to commit the offence herein...These were people who clearly planned the robbery herein..."

13. Clearly, there is no other evidence linking the appellant to the robbery other than the fact that he hired out to DW2 a motor vehicle that was used in the commission of a crime. There is uncontested details and documentation on how the hiring process was done. There was no evidence that the appellant

was at the scene of the robbery. According to submissions by counsel for the appellant, which I agree with, the entirety of the prosecution case did not demonstrate any conspiracy between the appellant and the 2nd accused.

14. In the instant case the evidence against the appellants was circumstantial. In *Sawe vs Republic* (2013) KLR 364 the Court of Appeal held: -

> " As we have already pointed out, the evidence in this case was entirely circumstantial. In order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other co-existing circumstances weakening the chain of circumstances relied on. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of the innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused."

15. In the instant case, the prosecution's case was based on mere suspicion. Mere suspicion in my view cannot be used to justify the conviction. In Mary Wanjiko Gachira vs Republic - Criminal Appeal No. 17 of 1998, the Court of Appeal held that suspicion however strong, cannot provide a basis for inferring guilt which must be proved by evidence.

16. Having carefully evaluated the lower court record, I have found that other than appreciating that the appellant was the one who gave the 2nd accused the vehicle linked to the robbery, the learned trial magistrate never considered his defence. The appellant clearly stated that his role was just to connect car owners with clients for hire and that is exactly what he did in the instant case. That he was only called and notified of an accident involving this particular motor vehicle and later learnt that it was in connection with the commission of a robbery.

17. Having come to the above conclusion, I find that the prosecution failed to prove the charge of robbery with violence against the appellant to the required standard of proof which is beyond any reasonable doubt. I find the appeal has merit and should be allowed.

18.

Final Orders

a. The appeal herein is allowed. I hereby quash the conviction and set aside the sentences.

b. I order the appellant be set at liberty forthwith unless otherwise lawfully held.

JUDGMENT delivered virtually, signed and dated at KIAMBU this 25{{^TH} day of APRIL, 2023****

MULWA

JUDGE

In the presence of:

Kinyua/Duale– Court Assistants

Ms. Maina- for Appellant

Mr. Muriuki (State Counsel) -for Respondent