Kiplangat v Republic (Criminal Appeal 94 of 2018)
[2023] KEHC 17892 (KLR) (Crim) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17892 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 94 OF 2018

LN MUTENDE, J

MAY 31, 2023

BETWEEN

JOHN OSHEA KIPLANGAT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No. 447 of 2016 at the Chief Magistrates' Court Kibera by Hon. F. Mutuku -SRM on 14th May, 2018)

JUDGMENT

1. John Oshea Kiplangat, the Appellant, was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. Particulars of the offence being that on the 28th day of January, 2016 at Nairobi Dam Estate in Langata District within Nairobi County jointly with another not before court while armed with a dangerous weapon namely a toy pistol robbed Jerotich Gladys a handbag containing personal effects valued at Ksh 2000/- and at time of such robbery threatened to injure the said Jerotich Gladys.

2. Upon being taken through full trial he was found guilty, convicted and sentenced to suffer death.

3. Aggrieved, the appellant proffered the instant appeal. At the outset he filed the appeal in person but subsequently retained services of Kakai Mugalo & Co Advocates. Through Counsel Chacha Mwita the appellant filed an amended appeal based on grounds that ingredients of the offence of robbery with violence were not proven beyond reasonable doubt; the conclusion that identification for the appellant as the assailant was without error was misapprehension of evidence as obvious contradictions, inconsistences and want of corroboration was disregarded; critical witnesses to the arrest of the appellant and alleged recovery of a spray gun were not called as witnesses and an adverse inference should have been made in favour of the appellant; the burden of proof was shifted to

the appellant and the sworn defence evidence was disregarded; the sentence preferred was harsh and excessive despite mitigation and tender age of the appellant; and, that Section 333(2) of the *Criminal Procedure Code* was ignored.

4. The appeal was canvassed through written submissions. It is urged for the appellant that the offence of robbery with violence should have been brought pursuant to Section 296 (2) of the *Penal Code*, and the finding of the trial magistrate that the error was curable under Section 382 of the *Criminal Procedure Code* was erroneous having occasioned a failure of justice as the appellant personally knew the charges he was facing.

5. That the charge was incurably defective as it was not explained to the appellant an unlearned person in law and he was not informed properly at the commencement of the trial of the right to engage legal representation either at his expense or that of the State as required by Article 50 (2) (g) (h) of the *Constitution*. In that regard it is argued that the trial should be declared a mistrial and dismissed so that the appellant can be acquitted. Reliance was placed on the case of *Joseph Ndungu Kagiri vs Republic* (2016) eKLR.

6. On the actual arguments in support of the grounds of appeal it is submitted that regarding ingredients of robbery with violence, there was no evidence of violence; the item thought to have been a dangerous/ offensive weapon was not one as it did not present any danger. That there was no finger print dusting/ lifting to establish between the toy pistol and the appellant.

7. That there was need to establish the mysterious boy alleged to have been ahead of the complainant who said that the boys who snatched a handbag were thieves but not robbers, to be identified since there was contradictory evidence adduced by PW1 and PW3 as to how the handbag was snatched, dropped and recovered; which was evidence that there was no robbery.

8. That the parameter of identification of the appellant as one of the assailant was not beyond reproach.

9. That the sworn defence evidence tendered by the appellant was not considered.

10. On sentence, it was argued that despite the fact of directions given by the Supreme Court in the case of *Francis Karioko Muruatetu & Another vs Republic, Katiba Institute & 5 others (Amicus Curiae)*(2021)eKLR to the effect that the mandatory nature of death penalty is unconstitutional but limited to murder offences, the sentence meted out is harsh and manifestly excessive.

11. The Respondent through Ms Joyce Adhiambo, Principal Prosecution Counsel, opposed the appeal arguing that the prosecution discharged its burden of proof beyond reasonable doubt and the appellant had not demonstrated any unusual circumstances to warrant the appeal being upheld. It is urged that ingredients of the offence were established. That PW1 and PW3 identified the appellant at the scene and he was later brought by members of public, and, the offence having been committed in broad daylight, the identification was satisfactory.

12. On the question of the charge being defective, the court was called upon to be persuaded by the case of *Stephen Kambo and Another vs Republic* (2021)eklr where the court stated that:

> "In the instant appeal, the theft involved the use of crude weapons. I find that quoting section 295 in the charge sheet would not occasion an injustice. The appellants were aware of the charges facing them during the trial process, they failed to raise the issue of defective charge sheet at trial they proceeded to cross-examine the witnesses accordingly. This is a clear indication that no confusion during the trial and thus not fatally defective. It is clear from

the particulars of the charge quoted above that they support the offence of robbery with violence."

13. Briefly facts of the case were that on the 28th day of January, 2016 at about 5.00 pm, PW3 Jerotich Gladys was crossing the road at Highrise when two (2) men emerged. One of them held her hand and pointed an object that resembled a gun at her as the other one snatched her handbag. As they acted PW1 Corporal Albert Okemo of Kenya Prisons service was some approximately 10 meters behind. There was a boy who was in front of the lady who called PW1 stating that the individuals were thieves. As a result, the individual who had snatched the bag threw it. She picked the bag and proceeded home as she had not sustained any injuries.

14. Subsequently, PW1 was called by the officer in-charge. He found the suspect whom he identified as the one who had stolen the handbag. He had been beaten and the pistol-like object had been recovered. PW3 was called to identify the person who had been allegedly rescued from the mob. Both PW1 and PW3 identified the appellant as the person who had robbed her as he was the light skinned one and who possessed the pistol. He wore the same jacket he had at the time of the incident but it was torn. The appellant was taken to Langat Police Station where he was received by PW2 No 500xxx PC Peter Kalui at 8.14 pm, booked and placed him in cells. He took possession of an item that resembled a gun that was handed over.

15. Investigations in the matter were conducted by PW5 No 768XXX Corporal Fredrick Muia with the assistance of Corporal Daniel Mutisya, colleague. They caused the item to be taken to the Ballistic expert for examination. PW4 No 2342XXX Chief Inspector James Onyango a Firearm Examiner of DCI Forensic Division examined the metallic device. He found the exhibit presented lacking loading nor firing provisions hence not capable of being fired. Based on the examination, he formed the opinion that the item was a component part of a spray gun and not a firearm. Upon conclusion of the investigations the appellant was charged.

16. Upon being placed on his defence the appellant stated that he was from his place of work when he encountered an officer who arrested and beat him for no apparent reason. He was taken to the Police Station and subsequently charged with the offence of robbery that he was not aware of. He denied the charges. On cross-examination he stated that he was arrested by four (4) officers but not members of the public and that he was beaten because he was resisting arrest. He denied having been carrying anything.

17. This being a first appellate court, its duty is to reconsider and re-evaluate evidence adduced before the trial court so as to reach its own independent conclusion bearing in mind that it had no opportunity of hearing or seeing witnesses who testified so as to asses their demeanor. In the case of *Njoroge Vs Republic* (1987) KLR 19,22 it was held 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 as on the questions of facts as on law, to demand a decision of the court of first appeal, and that 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 or heard the witnesses and to make due allowance in this respect (see *Pandya v R* [1957] ea 336, *Ruwalla v R* [1957] EA 570)"

18. At the outset, I wish to point out that this court will restrict itself to grounds of appeal as amended. It will not digress from the grounds raised and venture into a fishing expedition with a purpose of considering other issues brought up in submissions that were not included on the grounds of appeal.

19. To prove the case beyond reasonable doubt the prosecution was required to establish ingredients of the offence of robbery with violence. In the case of *Olouch vs Republic* (1985) KLR the Court of Appeal stated that

> " 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
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> b. The offender is in company with one or more other 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."

20. In the case of *Dima Denge Dima & others vs Republic* (2013) eKLR the Court of Appeal stated that:

> " The elements of the offence under Section 29 (2) are three in number and they are to be read, not conjunctively, but disjunctively. One element is enough to found a conviction."

21. PW1 and PW3 testified to the light skinned assailant having been armed with a gun/pistol. Upon the appellant being taken to the Police Station by prison officers, Sergeant Andrew Mackenzie (not a witness) and Corporal Albert (PW1) they handed over to the receiving officer (PW2) an object that looked like a gun. Upon examination by the firearm examiner (PW4) the object was a component part of a spray-gun but it was not a firearm. The object was described in the particulars of the offence as a dangerous weapon.

22. It is argued by counsel for the appellant that whatever was thought to be a pistol/gun was not one and it did not present any danger nor was it offensive. In the case of *John Maina Kimemia and another Vs Republic* Criminal Appeal Nos. 105 and 110 of 2003 (UR) the Court of Appeal held that the word dangerous or offensive weapon in Section 296(2) of the *Penal code* bears the same meaning as defined in Section 89(4) of the *Penal Code* which provides as follows:

> " offensive weapon" means any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use."

23. According to evidence adduced by PW3. the individual who possessed the item which according to them resembled a gun or pistol, pointed the object at her. That article (component of a spray gun) clearly was adapted for use as the assailant pointed it at PW3 which was away of threatening her with harm. This definitely put into her some fear of imminent danger.

24. According to evidence of PW1 and PW3 the assailants were two, hence the offender was in company of another person.

25. From the foregoing what existed was some threat to use violence and no evidence was called to the offender having wounded, beaten or used any other personal violence on the person of the complainant.

26. On the question of identification of the assailant, as correctly submitted by Counsel for the respondent, the question of identification of an assailant by a victim is crucial.

27. In the case of *R vs Turnbull & Others* (1973) 3 ALLER 549 it was held that:

> "The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance. "

28. The offence was stated to have been committed at 5.00 pm. There was light that could have not impeded a person from making an observation. The act occurred as the complainant was crossing the road. She saw two (2) lads, one was light skinned while the other was dark. The light skinned one that she identified as the appellant pointed an object that resembled a gun and held her right hand as the other individual snatched her handbag. There was a man ahead of her and another behind her who shouted at them to leave her handbag that is when they threw it. As a result, nothing was stolen from her. These were people not known to her.

29. PW1 stated that one of the boys who stole from the lady (PW3) was light skinned of a height of around 8 feet and was wearing a white jacket. The other one who had a green jacket is the one who snatched the handbag. That the light boy had a pistol inside his jacket, silver in colour. Evidence adduced by PW1 suggests that he did not witness the assailant pointing the object at the complainant.

30. There is a lacuna as to how the appellant was arrested. PW1 parted with PW3 after she took possession of her handbag. According to PW1, he went to work while PW3 went home. PW1 was later called by his in-charge whose name was not given. He found a lad seated on the floor. His in-charge asked him whether he knew him and he told him that he was the one who had stolen the bag. He stated that the lad had been beaten, the lady was called and the pistol which the lad had was recovered from him.

31. PW3 stated that her husband Emmanuel Ruto told her to go and identify the person who had been rescued from the mob. She went and found it was the same person who stole from her, the light skinned one per her description.

32. No evidence was tendered as to whether the complainant had made a report at any Police Station prior to the appellant being arrested. But, PW2 who was on duty at Langata Police Station alluded to the appellant having been taken to the station by PW1 and another officer. The Investigating Officer (PW5) stated that the appellant was arrested by members of public at Nairobi dam and escorted to Nairobi West Prison.

33. In the case of *Bukenya vs Uganda*(1972)EA 349, the court stated that:

> "...First, there is a duty on the director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but the duty to call any person whose evidence appears essential to the just decision of the case ?.Thirdly, while the director is not required to call a superfluity of witnesses, if, he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses if called, would have been or would have tended to be adverse to the prosecution's case. "

34. Evidence adduced having left a gap, the evidence lacunae needed to be filled. At least one of the persons who arrested the appellant and escorted him to Nairobi West Prison should have recorded a statement. Secondly, the officer in-charge was a crucial witness. The prosecution having failed to call these important witnesses, the only reasonable inference that should have been drawn is that their evidence may have been detrimental to Its case.

35. It was not sufficient for PW1 and PW3 to say casually that the person was light skinned. As to whether he had the object which he pointed at PW1 or had it in his pocket after his arrest, this was a contradiction that should have been resolved. Evidence on identification of the assailant being barely enough to prove the case against the appellant, I find that a doubt was created which should have resulted into an acquittal of the appellant.

36. The upshot of the above is that the appellant benefits from the doubt. Consequently, I quash the conviction and set aside the sentence imposed. The appellant shall hence be set at liberty forthwith unless otherwise lawfully held.

37. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 31ST DAY OF MAY, 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Ms. Chege - ODPP

Court Assistant – Mutai