Kitili v Republic (Criminal Appeal E125 of 2022)
[2023] KEHC 20981 (KLR) (Crim) (28 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20981 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E125 OF 2022

DR KAVEDZA, J

JULY 28, 2023

BETWEEN

DORCAS MUMBI KITILI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence imposed by Hon. Gandani (CM) delivered on 9th August 2021 at Kibera Chief Magistrate's Court Criminal Case no. 4557 of 2013 Republic vs Dorcas Mumbi Kitili)

JUDGMENT

1. The appellant and another not before this court were charged with three counts for the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code* (Cap 63) Laws of Kenya. After a full trial, she was sentenced to serve fifteen (15) years imprisonment on each count. The sentence was to run concurrently. Being aggrieved, she filed the present appeal challenging her conviction and sentence.

2. In her appeal, she raised 7 grounds which have been summarised as follows. She challenged the totality of the prosecution's evidence against which she was convicted. She contended that the prosecution failed to call vital witnesses. She challenged the decision of the trial court to convict her maintaining that her defence was not considered.

3. In response, the respondent filed grounds of opposition dated 6th February 2023. The grounds raised are that the appeal is misconceived and unsubstantiated. The appeal is an abuse of the court process and the appellant was properly convicted before the trial court and the prosecution discharged their burden of proof properly. The appeal lacks merit.

4. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno v Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose v Republic* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

5. The prosecution called a total of eight (8) witnesses to support their case. Hon. Maina Wanjigi (PW 1) testified that on 22nd November 2013 at around 8.30 pm, he was in his house in Karen in the company of his wife PW 2, and visitor PW 5. Also, in the house, were two house-helps (the appellant and PW 3). Suddenly, four armed men came to the sitting room area. One of them was armed with a gun while the others were armed with machetes. The two house-helps were escorted to the sitting area and their hands and legs were tied. The assailant with a gun ordered him to take them to his bedroom which he obliged. They demanded to know the location of his guns. When he tried to trick them, they assaulted him and threatened to kill him.

6. Subsequently, the assailants took the safe, two Samsung Mobile Phones each valued at Kshs. 54,000, a Rolex watch valued at around Kshs. 200,000, jewellery valued at around Kshs. 500,000 and Kshs. 17,000 in cash. They also took his second gun which was hidden behind his bed after questioning him. He told the court that the questioning involved being tortured with a hot iron box that was placed on his body. Thereafter, he was ordered to lie down and his hands and legs were tied. The assailants also took a Tv set and left the premises after serving themselves a drink. He testified that he was able to untie himself at around 2.30 pm and sought assistance by pressing their alarm. He further narrated that he was taken to hospital by his son Jimmy and contacted the police who arrived at the scene.

7. Mary Wambui Wanjigi (PW 2) the wife of PW 1 reiterated the testimony of PW 1. In addition, she testified that the assailants demanded money. PW 1 told her that he only had Kshs. 17,000 while she had Kshs. 4,000. This seemed to anger the assailants and they burnt her with a hot iron. They also demanded the keys to the safe and they were given. From the safe, they took all her jewellery. She told the court that after they had left, they discovered that the electric fence had been cut.

8. Eunice Nungari Wanjiru (PW 3) one of the house-helps of PW 1 and PW 2 told the court that the material night she was in the company of the appellant in the kitchen. They were preparing a meal for a guest who was around. Suddenly, 3 people forcefully opened the kitchen door. They were wielding machetes. They threatened them and ordered them not to scream. They forced them to the sitting room area where PW 1 and PW 2 were. They tied their hands and legs and made them lie down. She told the court PW 1 and PW 2 were taken upstairs one by one. After their ordeal, the assailants left and she cut herself free and pressed the alarm bell.

9. No. 43992 Sgt. John Njoroge (PW 4) testified that he is attached to the Flying Squad in Nairobi. He told the court that he was directed to investigate the theft of mobile phones. One of the stolen phones was tracked and traced in Kibera. The person found in possession was a lady known as Hilda, the appellant's co-accused. She informed him that she had bought the phone from two individuals, Kitiku and Malonza. The two were also traced and when the police tried to arrest them, a gunfire ensued which resulted in their deaths.

10. He narrated that after they recovered mobile phones from the deceased which indicated that they had been in communication with the appellant. They proceeded to arrest the appellant who claimed that one of the deceased had seduced her and was known to her.

11. Florence Mugure Gitonga (PW 5) told the court that she had gone to visit Mr. and Mrs Wanjigi when the robbers attacked them. They were forced to lie on the floor and their hands and legs tied. The assailants assaulted PW 1 and PW 2 and left the premises with valuables. During the ordeal, she lost her mobile phone make Nokia 2680. Later on, she was informed by the OCS that her phone had been recovered and she should identify it. She identified the exhibit produced in court as her phone. However, she was unable to identify the perpetrators of the robbery.

12. No. 233377 C.I Stanley Gitobu (PW 6) testified that he the OCS Karen Police at the material time. After the incident was reported, he visited the scene, recorded witness statements, and assigned an officer to commence investigations. He told the court that on 30th November 2013, the appellant was brought before him intending to confess. He cautioned her and prepared a certificate of caution. He testified that the appellant confessed that she had been in a romantic relationship with one Mabonga from around 2011. That said Mabonga made inquiries about the nature of her work and her employer. Mabonga proposed that she make arrangements for them to visit her employer's premises and steal from him since he was rich.

13. During the said communication, the appellant disclosed her employer's residence. On the night of 22nd and 23rd November 2013, the appellant confessed that Mabonga called her informing her that they had arrived at PW 1's premises and were cutting the fence. The appellant was supposed to open the door for them to let them in the house. At the time, she was in the kitchen with Eunice, PW 3. Mabonga in the company of his accomplices entered the premises, tied up its occupants, and robbed and assaulted them. He produced the confession by the appellant.

14. On cross-examination, he testified that the appellant was neither threatened nor coerced or intimidated into giving her confession. He contended that he informed her of her right to have an advocate before giving her confession. He stated that he did not counter-sign the handwritten confession. Further, there was no female officer present when he was taking the confession. In addition, once the appellant signed the confession on each page, a copy was issued to her.

15. No. 56299 CPL Francis Singila (PW 7) the investigating officer reiterated the evidence of PW 1 on how the assailants gained entry into his premises and robbed them assaulting him in the process. He traced one of the phones that had been stolen from PW 5 to Kibera. He arrested the person found in possession of the phone and she directed them to Mabonga, who had allegedly sold her the phone. Data from Safaricom confirmed that Mabonga had been in contact with the appellant on the night of the robbery. In the company of other officers, he arrested the appellant who later confessed to being involved in planning the robbery.

16. No. 62180 CPL Daniel Mutisya (PW 8) testified that he accompanied PW 7 to arrest a suspect of robbery. However, the appellant started confessing. Since he did not have the appropriate rank to take a confession, he took the appellant to C.I Gitobu, PW 7.

17. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on her defence. She gave a sworn testimony and did not call any witnesses. She narrated that on the material night, she was in the kitchen with her colleague Eunice preparing a meal for their employers and guest. Suddenly, two armed came to the house and threatened them. They tied them up and ransacked the house for some time and then left. Eunice was able to untie herself and called for help. Security personnel arrived and assisted them. A week later, she was arrested and taken to Integrity Centre where was beaten up. Later on, she was transferred to Lang'ata Police Station and charged. She told the court that she was also forced to sign a confession. She denied being an accomplice to the robbery. She also denied knowing Mabonga and Katiku who were the alleged perpetrators of the robbery.

Analysis and Determination.

18. In this appeal, the appellant challenged the totality of the prosecution's evidence against which she was convicted. The appellant submitted that the ingredients of the offence of robbery with violence were not established by the prosecution. Firstly, she was one of the victims of the offence and as such was not among the four male attackers who robbed her employers. Secondly, she was not armed with a dangerous weapon as she was among the victims of the attack. She also contended that she was not in the company of the perpetrators of the offence during the incident. Furthermore, the stolen goods were not found in her possession.

19. In addition, the appellant submitted that the alleged confession relied on by the trial court did not meet the threshold set by section 25A of the *Evidence Act* (Cap 80) Laws of Kenya.

20. In rebuttal, the respondent submitted that the prosecution proved all the ingredients of the offence of robbery with violence and that the appellant was rightly convicted.

21. The key ingredients for a robbery with violence charge are found in section 296(2) of the *Penal Code*. It provides as follows-

> "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".

22. I have re-evaluated all the evidence on record. I have found that the appellant was well known to PW 1 and his wife PW 2 who were her employers. She was employed as a house help on their premises. She was therefore well known to PW 1 and his wife PW 2. On the material day, PW 1 testified that he was attacked in his home by four armed men. One of the men was armed with a gun while the others were armed with machetes. He was in the company of his wife and PW 5 who was a guest. The assailants assaulted him and burnt him with an iron box. They also stole two Samsung Mobile Phones, a Rolex watch, two firearms with rounds of ammunition, jewellery, and Kshs. 17,000 in cash.

23. In his view, the appellant was one of the victims during the incident. PW 2 and PW 5 who were in the house at the material time gave similar evidence. PW 2 added that she was also assaulted and lost an additional Kshs. 4,000 to the assailants. On her part, PW 5 lost a mobile phone Nokia 2680 which was later recovered. This phone is what led the investigators to the appellant.

24. The evidence of Sgt. John Njoroge PW 4 and CPL Francis Singila PW 7 was that PW 5's phone was traced and found in possession of one Hilda Nabweko. The officers told the court that the said Hilda informed them that she had bought the phone from Kitiku and Malonza. However, when the police tried to arrest the said Kitiku and Malonza, a gunfight ensued and the two died in the process. The witnesses stated they recovered call data records from Safaricom which indicated that one of the slain assailants was in communication with the appellant. Subsequently, the appellant was arrested and later confessed to having been involved in the commission of the offence.

25. From the record, it is clear that there is no evidence provided by the prosecution to show that the appellant participated directly in the crime or that she personally committed these acts. PW 1, PW 2, PW 3, and PW 5 all confirmed that at the time of the crime, the appellant was in the house with them during the ordeal. To the best of their knowledge, she was also a victim of the crime. The evidence relied on by the prosecution and ultimately the trial court was the fact that the appellant confessed

to being an accomplice of the perpetrators of the offence, and secondly, the circumstantial evidence tendered linked her to the crime.

26. In this appeal, the appellant challenged the confession for failing to meet the threshold set under section 25A of the *Evidence Act*. She maintained that the statement made was not voluntary and was obtained after being subjected to severe beatings.

27. Section 25A of the *Evidence Act* defines what amounts to a confession thus:

> '25A (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.'

28. The allegations that the confession was not recorded voluntarily need to be examined further. C.I Stanley Gitobu PW 6, the officer who recorded the confession maintained that her statement was made voluntarily and without coercion. He testified that he cautioned the appellant before she made her confession and she chose not to have a witness present during the confession. The appellant admitted in her evidence that she signed the statement of confession. She also confirmed that she understood English language which is the language in which the confession was recorded. She, however, testified that she was coerced into signing the statement after being compelled to do so by the recording officer. She denied being an accomplice to the crime.

29. In essence, the appellant retracted her statement. Such a statement was defined in *Tuwamoi versus Uganda* (1967) EA 84 at page 88 where the Court of Appeal of Eastern Africa said:-

> " ... a retracted statement occurs when the accused person admits that he made the statement recorded but now seeks to retract, to take back what he said, generally on the ground that he had been forced or induced to make the statement, in other words that statement was not a voluntary one."

The court also stated the legal implications of such a statement and said:-

> " We would summarise the position thus-a trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution, and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually, a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court. But corroboration is necessary in law and the court may act on a confession alone if it is fully satisfied after considering all the material points and surrounding circumstances that the confession cannot but be true."

30. The same court was of the view in *Toyi v R* (1960) EA 760 that there is no rule of law or practice requiring corroboration of a retracted statement or confession before it can be acted upon. It was held that it is, however, dangerous to act upon it in the absence of corroboration in material particular or unless the court after a full consideration of the circumstances, is satisfied of its truth.

31. Despite the fact that the appellant repudiated that confession, the trial court proceeded to accept it into evidence without further scrutiny. In so doing, the learned trial magistrate erred. Courts must exercise extreme care in accepting into evidence any alleged confession. All the conditions set out in Section 25A of the *Evidence Act* must be met. Where (as happened here) an accused repudiates a confession

then the proper procedure is for a trial-within-a-trial to be conducted to determine the admissibility or otherwise of such a confession. The Court of Appeal in *Musili Tulo v Republic* [2014] eKLR discussed the importance of a trial-within-a-trial thus:

> " It is evident therefore that there was objection made to the admissibility of the extra-judicial statements and it was not accurate for the trial court to state that there was none. Once the objection was raised, it was the duty of the trial court to make an order for a 'trial within the trial' and to deliver a ruling to determine such admissibility, even before the statements were marked for identification. The purpose is to determine the voluntariness of the statement intended to be tendered for the prosecution, because a statement by an accused person is not admissible in evidence against him unless it is proved to have been voluntary. It is a matter of law and is for judge alone to decide upon hearing evidence - see *Shah v Republic* 1984 [KLR] 674. Indeed it is an aspect of fair trial. We do not know what decision the trial court would have arrived at had it held a trial within the trial. What we can say for certain is that the court fell into error by failing to determine the issue of admissibility of the two extra-judicial statements."

Similarly, the High Court in *Republic v Elly Waga Omondi* [2015] eKLR stated thus:

> " A trial within a trial in our criminal justice system is an enquiry into the manner in which a statement by an accused person in respect to the case before the court was recorded. It seeks to determine the voluntariness of that statement."

32. In my view, the trial magistrate erred in proceeding to admit the alleged confession into evidence without conducting a trial within a trial. The confession ought not to have been admitted by the trial court before a trial within a trial is conducted to determine its admissibility. This was an affront to her right to a fair trial guaranteed under Article 50 of th *Constitution* of Kenya. As such I will not grant the same any consideration.

33. The additional evidence relied upon to convict the appellant was that the call data records produced linked the appellant to the alleged perpetrators of the robbery. This is circumstantial evidence. The question, therefore, is whether the circumstantial evidence was sufficient for the trial court to convict the appellant. The court of appeal in *Sawe v Republic* [2003] KLR 364, the Court of Appeal held: -

> " 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 reasonable hypotheses than that of his guilt. There must be no 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 is on the prosecution and always remains with the prosecution. It is a burden, which never shifts to the party accused."

34. The Court of Appeal in *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR laid down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction stating that: -

> " Before circumstantial evidence can form the basis of a conviction, however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:

"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

(i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused;

(iii) 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.

In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken on destroy the inference of guilt."

35. In the instant case, the question is whether the evidence on record connects the appellant to the crime. In particular, the circumstances are that the appellant was in contact with Mabonga and Kitiku who were the alleged perpetrators of the offence. In coming to its conclusion, the trial court drew an inference of guilt on the appellant on the basis of the call data records produced by the investigating officer.

36. The records relied on by the prosecution were related to mobile numbers 0722828452, 0733610081, 0703413675, and 0723609580. Call data relating to 0723609580, allegedly registered to the appellant was produced and related to 15th November 2013 to 20th November 2013. The prosecution produced evidence to show that on the material day of the robbery, the appellant was in communication with some individuals who were the alleged perpetrators of the offence. A request for subscriber details of the appellant's alleged number was produced. However, the subscriber details sought were never produced in evidence.

37. It is also important to note that call data transcripts produced in court did not bear any identity card number that would otherwise have linked the appellant to the number, or any transaction between her number and the perpetrators of the offence. Therefore, the prosecution did not prove beyond reasonable doubt that the number 0723609580 belonged to the appellant and she was the user of it at the material time.

38. What is also striking about the said documentary evidence is that it was produced by the investigating officer. From the trial court's record, this court is unable to find a basis upon which the said mobile data record was produced by a person who was not the author or who developed and obtained said data from the mobile phones allegedly used in the commission of the crime. It was expected that Safaricom Liaison Officer would be called to produce the said exhibits. The investigating officer did not lay a basis upon which the maker of the data could not be present in court to produce the documents, as required by law.

39. In addition, the court notes that the trial court proceeded to allow production and reliance on the said electronic evidence without the Prosecution fulfilling the conditions for the production of such evidence as stipulated in Section 106 B of the *Evidence Act*. In my humble view, section 106B of the *Evidence Act* Cap 80 rendered the said document inadmissible as evidence before the Trial Court. The Section 106B of the *Evidence Act* provides:

" 106B (1) Notwithstanding, anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or

electro-magnetic media produced by a computer (herein referred to as a computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible."

40. Under sub-section (4), where a party seeks to give evidence by virtue of section 106B he/she has, among other things, to tender a certificate dealing with any matters to which the conditions above relate. The certificate should further:

> " a) identify the electronic record containing the statement and describing the manner in which it was produced; and
>
> b) give such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer."

41. From the above provisions, electronic data material is inadmissible in evidence unless they meet the criteria stipulated in Section 106 B of the *Evidence Act*. In this case, the convicting evidence was adduced by a person who was not the maker of the documents without any basis being laid before the Court and no certificate was produced before the Court identifying or authenticating the electronic records containing the mobile data statement and describing the manner in which it was produced.

42. The identification of the appellant as the perpetrator and her nexus to the offence depended on the records from Safaricom Limited and the documents retrieved from the National Registration Bureau. I take issue with how this evidence was admitted and handled by the trial court. Bearing in mind that there was no direct evidence linking the appellant to the crime, it is now safe to conclude that the circumstantial evidence adduced was extremely remote to link her to the robbery. It was then not safe to convict the appellant.

43. In the end, I find that the prosecution did not prove their case beyond all reasonable doubt. This appeal has merit and I allow the same. I quash the conviction, set aside the sentence, and order that the appellant be and is hereby forthwith set free unless otherwise lawfully held. It is so ordered.

Orders accordingly.

DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY 2023.

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D. KAVEDZA

JUDGE

In the presence of:

Ms. Chege for the State.

Appellant present virtually.

Joy C/A