Juma v Republic (Criminal Appeal E032 of 2022)
[2023] KEHC 21351 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21351 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E032 OF 2022

REA OUGO, J

JULY 26, 2023

BETWEEN

VITALIS SIMIYU JUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in a judgment dated 25th March 2022 in SRM's Court at Webuye by Hon. M. Munyekenye (SPM))

JUDGMENT

1. Vitalis Simiyu Juma, the Appellant, was charged with the offence of robbery contrary to section 295 as read with section 296 (1) of the *Penal Code*.

2. The particulars as per the charge sheet were that on the on 9th November at Webuye town in Webuye township within Bungoma county, jointly with others not before court robbed Deflex Otieno the following items: four (4) 43' inch smart Tv, two of the make Skyworth s/no 1810262m00145 and s/no. 1810262m00030 and two of the make Synix s/no 020LD030BK180500409 and s/no 020LD028BK170800280; four play console (i) s/no 03-274522-53-5713596, (ii) s/no 03-27452439-5754103, (iii) s/no 3291143 and (iv) s/no 5016066301-8, one set of décor with four cameras, one Lenovo laptop ampex music system with three speakers, two cooling fans, charging clock, two power extension and a mobile phone make smart opus all valued at Kshs 305,000/- the properties of Samson Nambone Kibigo and immediately before the time of such robbery threatened to use actual violence to the said Deflex Otieno.

3. He also was charged with a second count of impersonating a police officer contrary to section 101 (1) (B) of the *National Police Service Act* No. 11A of 2011. The particulars of the offence were that on the November 9, 2019 at Webuye town within Bungoma County, jointly with others not before the court with the court with the intent to commit felony namely robbery with violence, falsely presented

himself as Police Officer by demanding to conduct a search in the dwelling house of Samson Nambone Kibigo.

4. The accused person pleaded not guilty and the matter went to full trial. The prosecution called five witnesses in support of its case and the appellant gave sworn testimony in his defence. The trial magistrate found that the prosecution had proved its case to the required standard and convicted the appellant on both counts and sentenced him to 14 years in respect of count 1 and 10 years in respect of count 2. The sentences were to run concurrently.

5. The Appellant being aggrieved by the conviction and sentence of the learned trial Magistrate lodged his petition of appeal on April 1, 2022 and subsequently on 10th January 2023 lodged his amended grounds of appeal. The appeal by the appellant is on the following grounds;

    1. That the learned trial magistrate erred both in law and in fact when she relied on evidence of purported visual identification by Pw3 a single witness on difficult circumstances.

    2. That the learned trial magistrate erred in both law and facts in finding that the identification parade conducted by Pw5 was proper but failed to note that the evidence was not properly procured, there were glaring irregularities and procedural technicalities were flawed.

    3. That the learned trial magistrate erred in both matters of law and fact by holding that the offence of robbery with violence contrary to section 296 (1) of the Penal Code was proved against the appellant but failed to note that the elements of the offence were not proved as against the appellant.

    4. The learned trial magistrate erred in law by failure to consider the appellants defence of alibi

    5. The learned trial magistrate erred in law by holding that count 2 was proved but failed to note that there was no supporting evidence to prove the same.

6. This being a first appeal, it is the duty of this to reconsider, re-evaluate and reanalyze the evidence afresh and come to its own conclusion bearing in mind that the trial court had the advantage of seeing the witnesses as they testified and give due allowance for that. (See *Okeno v Republic* [1972] E A 32.) The evidence that emerged at the trial court were as follows:

7. Deflex Otieno (Pw3) testified that in 2019 he was living in Webuye Township, employed by Samson Nambonge Kibigo (Pw1) at his play station business in Lions area. He testified that he lived within the premises but his sleeping quarter was in a different room. He recalled that on the night of 9/11/2019 he was sleeping and at around 2:00 p.m. he heard some noise from a motor vehicle outside the building. He woke up to check the CCTV and saw 4 people 2 whom were dressed in full combat, a hat, jungle green coat and police uniform that looked like that for KDF. There were also two people dressed in civilian clothing armed with knives and metal bars. He testified that the two who were dressed in full combat were armed with guns. He heard them knock on the back window and they asked for the owner of the business when they said 'Sam, Sam open, we are the police'. Pw3 doubted them and went to check the CCTV. One of the assailants had broken in through the window and pointed the gun at Pw3. Pw3 was ordered to order to open the door or else the assailant would shoot and he obeyed the order. Immediately he opened the door, Pw3 was hit on the face with a torch and asked for the whereabouts of Pw1. They asked him to call Pw1 and when Pw3 removed his phone to make the call they slapped him and took his opus phone away. They begun taking the items and told Pw3 that they were taking them to the police station. Pw3 was instructed to lie down and it took them 10 minutes to carry the items out. The assailants broke the cameras. Pw3 recalled that when the assailants went out, he went to the door and saw them load the items on to a white probox. One of the assailants remained with Pw3 telling him not to scream. Pw3 testified that the lights in the room and the security lights

were on. He testified that the appellant wore a hat, wore a jungle uniform of the KDF that was green and brown in colour. Pw3 testified that when they left, he raised an alarm and his neighbour Evalyne Mutumwe (Pw2) responded. Pw2 then called Pw1 to inform him of what had transpired. Pw2 testified that her house and her neighbours shop were adjacent. She recalled that on the material day she heard people calling her neighbour. She went to the window and saw someone leaning on the car wearing a black trouser and a white shirt. They called Pw3 who then opened the door and they entered. Pw2 heard the assailants tell him to lie down. Pw2 then saw the assailants take various items from the shop. Once they left Pw3 ran to her door telling her that they have taken all the items and that Pw3 was hurt. Pw2 had called the officer in charge of the Administration Police as she felt that something sinister was happening but the officers arrived after the assailants had left.

8. Pw1 testified that he has an entertainment business involving virtual gaming in Lions area. He explained that the virtual gaming requires a television and a machine called Sony play station which is a play station 4. He had employed Pw3 in the establishment. Pw1 testified that he had four smart TV that were 43' inch. He had obtained a license from the Kenya Films Board and other licenses from Bungoma County Government. He recalled that on 8/11/2019 he went to Lions to close the play station business at around 11:00 p.m. and spoke with Pw3. On 9/11/2019 between 2:50 a.m. and 3:00 a.m. he received a phone call from Pw2 informing her of the theft and that she was with Pw3 as well as police officers. Pw3 left home and went to the business premise and realized that all his property had been stolen. Pw1 testified that he lost 4 televisions, 4 play stations and the CCTV cameras were broken. The music system, 2 fans, all the games, one laptop, charging docks and Pw3's phone had also been stolen. He produced the receipts for the items that had been stolen. He further testified that there was light inside the premises and that it also had lights at the front and back door.

9. Pw3 testified that there were lights in the room and that the security lights were also on. A suspect was arrested on November 11, 2019 and Pw3 was called to identify him in an identification parade. Pw3 went to Webuye Police Station and all suspects in custody were brought out. Pw3 identified the accused person who had long hair and the hat could not cover his head completely. Pw3 testified that he identified the accused person from the side burns. Pw3 testified that the accused person talked to him several times during the robbery. Pw3 testified that he identified the appellant by touching him. On cross examination Pw3 testified that the person who attacked him had long hair with side burns, was tall and chocolate in colour. He could not tell whether the other people in the parade were tall or had long hair. He testified that he spent some time with the appellant and talked to him and that it was the appellant who beat him.

10. No. 236144 IP Patrick Wafula (Pw5) testified that he conducted an identification parade after the appellant agreed to the parade. The investigating officer brought 7 people of the same height, physique and appearance. He took the appellant from the cells to the parade in front of the CID office inside the police station. Pw3 who was to identify the appellant was outside the police station at the police canteen and did not see the people prior to the parade. The appellant chose where he wished to stand. He took his position between no. 1 and no. 2. Pw3 then came and identified the appellant by touching him. When the identification parade was over, Pw5 asked the appellant if he was satisfied with the parade and he stated that he was not satisfied with how the parade had been conducted.

11. The investigating officer in this case was No. 77480 corporal Ochieng Amollo (Pw4) who took over the investigations from Corporal Isaac Tamu who was transferred. He testified that on the material day they received information from an informant on the robbery of Link entertainment shop at Lions area and corporal Isaac Tamu and Bonface Mutungi who were on duty went to the scene to confirm the information. Upon arrival they found Pw1 and Pw3 and after interrogating the two they established that four suspects had gone to the shop, 3 wore police uniform and one was in civilian attire. They

had gone to the shop using a motor vehicle probox. The assailants broke a window and the crime scene personnel processed the picture of the broken window. Pw3 was asked to open the door and the appellant was the first to go in. The assailants robbed the shop and Pw3 violently. The officers at the scene took inventory of what had been stolen and investigations commenced. On 11/12/2019 the appellant was arrested at his home in Milimani. A search was conducted at his house and a police uniform, jungle trouser, jungle shirt, jungle beret, jungle hat and a weapon resembling a gun were found at his house. An identification parade was conducted and Pw3 identified him. Pw4 testified that although no recovery was made, Pw1 showed the police the boxes of the items that had been stolen that contained their serial numbers and receipts for the items. The shop had a single business permit that was produced as Pexh1 and license from Kenya Film & Licensing Board, Pexh 2. The receipts in respect of the stolen items were produced as Pexh 3, 4, 5, 6, 7, 8, and 9. The various boxes that had various electronics were produced as Pexh10, Pexh 16 and Pexh18. He also produced pictures of the crime scene as Pexh 11 (a) and 11 (b). The police uniforms recovered from the appellant were produced as Pexh 13, 14, 15 and 20. The imitation of a pistol that was recovered from the appellant's home was produced as Pexh 21 and Pw4 testified that the same was identified by Pw3 as the weapon that threatened him.

12. The appellant when placed in his defence testified that on 11/12/2019 he was at home cutting a tree so as to make posts for his fence. Unfortunately, the tree fell on his neighbours farm and destroyed his sugar cane. The neighbour demanded that he pays for the damages but they could not find an agreeable solution. On the same night, his neighbour in the company of 3 police men knocked his door and he was asked to show the police the damage caused to the crops. He was then taken to the police station and on 12/12/2019 a parade was conducted. On the police uniforms recovered by the police, he testified that he first saw them in court.

Submissions By The Parties

13. The appellant submits that the circumstance for identification was difficult as Pw3 was all alone and had little time with the assailants. It was expressed that the assailants were strangers to Pw3 according to his statement. Pw3 did not give description of the assailants, that is, their physical appearance, complexion, colour and the distance of where the appellants were and where he was. He also disputed that the Pw3 did not properly describe the source of the electric light, was it a fluorescent tubes or bulbs and what was the distance of the source of light and the assailants. He cited the case of *Said Bakari Ali & 2 others v Republic*, CR NO 900 of 2003. The trial magistrate also failed to warn herself of the danger of a single witness.

14. He submitted further that the manner in which the identification parade was conducted was flawed. That in Pw3's initial statement he did not identify any of the assailants. He cited the case of *Oluoch v Republic* where the Court of Appeal observed that:

> "In an identification parade, it is dangerous to suggest to an identifying witness that the person to be identified is believed to be present in the parade. The value of the parade as evidence in this case was considerably depreciated"

15. That Pw5 testified that he briefed the witness, Pw3, to walk around and identify the person he knows. The appellant suggests that the sentiment by Pw5 was a suggestion that the suspect was within the parade. It was submitted identified the assailant as having worn a hat, jungle uniform and police boots. Rule 6 (iv) (d) demands that a suspect will be placed among at least 8 persons of similar age, height, general appearance and class of life as himself. Pw5 ought to have looked for uniforms that were described by Pw3 and let all members of the parade be dressed in the attire.

16. The appellant submitted that the ingredients of the offence were not proved. That Pw3 testified that the robbers were armed with knives and metal bars while others had guns however the charge sheet does not mention any weapon. That he could not have been the offender as he was not found in possession of the stolen property or found with any of the dangerous weapon. There was no medical evidence to show that Pw3 was assaulted and Pw3 testified that he did not go to the hospital. The prosecution simply demonstrated simple theft. It was further submitted that the appellant raised the defence of alibi.

17. The appeal was opposed by the respondent. The prosecution submit that Pw3 testified that the 4 assailants broke the window and asked him to open the door. They took his phone and the items at the shop. Pw1 also testified that his items had been stolen and Pw2 also testified that she saw the robbers put items in their white probox.

18. On identification, it was submitted that Pw3 was close to the appellant and gave a description that the appellant had long hair and side buns. The appellant was therefore positively identified.

Analysis And Determination

19. The issues raised by the appeal are whether the identification was safe; whether the charge sheet was properly drafted and whether the ingredients of the offence were sufficiently proved.

20. It is not contested that it was Pw3 was the only person that saw the appellant. It is also not in dispute that the incident took place at about 2:00 a.m. In *Ogeto Ogeto v Republic* (2004) KLR 19 the Court of Appeal cautioned:

> "It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."

21. The appellant submits that Pw3 in his statement did not know the assailants and that given that he was attacked at night, spent little time with the assailants and therefore the circumstances were difficult for positive identification. The appellant maintains that Pw3 did not give the description of the appellant as required before the identification parade was conducted.

22. The court in*John Mwangi Kamau v Republic* [2014] eKLR found thatparade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The court observed as follows:

> 16. Ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. In this instant case, the appellant contends that the failure to do so rendered the identification parade worthless. So, what is the consequence of the said failure? In Nathan Kamau Mugwe –vs- Republic- Criminal Appeal No. 63 of 2008 this Court faced with a similar situation expressed itself as follows:-
>
> "As to the compliant in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he

cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

23. There was sufficient evidence from the prosecution on the source of light. Pw1 and Pw3 testified that there was enough lighting and the front and back doors both had lights. Pw3 testified that he spent 10-15 minutes with the assailants and was in close proximity with the appellant. It was Pw3's testimony that the appellant was dressed in a hat, jungle green police uniform and boots. The appellant carried a gun and a metallic item. He also recalled that it was the appellant who beat him. Prior to the identification parade, there is no evidence suggesting that Pw3 had informed the police about the appellant's physical appearance. It was only after the parade that Pw3 identified the appellant based on his distinctive long hair with side burns, his height and had a chocolate complexion. There was also evidence from Pw3 that he looked at his assailants on the CCTV before they broke it and clearly saw the appellant.

24. Pw5 who conducted the parade testified that the people in the parade were 8 including the appellant and were of the same height, physique and appearance. The appellant chose his position and at the end of the parade was identified by Pw3 by touching the appellant. It is therefore my finding having considered the evidence of Pw3 and Pw5 that the appellant was adequately identified by Pw3 and therefore properly linked to the said offence. The parade that was done by Pw5 was valid and Pw3 identified the appellant at the said parade.

25. The next issue is whether the prosecution proved the ingredients for the offence of robbery. In *Jeremiah Oloo Odira v Republic* [2018] eKLR the court found that the offence is proved once the prosecution establishes the element of theft and the use of or threat to use actual violence. The court stated:

> "Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

26. Similarly the court in *Oluoch V. Republic* [1985] KLR 549, the Court held: -

> "The ingredients of the offence of robbery under section 296(1) of the Penal Code are:
>
> a. stealing anything and
>
> b. at or immediately before or immediately after the time of stealing,

c. using or threatening 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."

27. Sections 295 and 296 (1) of the *Penal Code* provides as follows:

295. Definition of robbery

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.

296. Punishment of robbery

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

28. The appellant in his submissions challenged the charge sheet on grounds that it failed to mention any weapon used yet the testimony of Pw3 was that the robbers were armed with knives and metal bars. However,the mere fact that weapons used in the robbery are not disclosed in the charge sheet does not render it defective. In *Stephen Njuguna Njeri v Republic* [2006] eKLR the Court of Appeal held that:

> However we shall comment very briefly on the submissions by the Appellants that the charge sheet was defective because the weapons used in the robbery were not described at all in the charge sheet. In our view the fact that the weapon or instrument used in the robbery is not disclosed in the charge sheet does not necessarily make the charge sheet defective. Just as failure to describe such a weapon or instrument as a dangerous or offensive weapon would not necessarily make the charge sheet defective. It is sufficient, if the weapon though not described in the charge sheet is shown by evidence to have been intended for use to cause injury.

29. In the present appeal, the prosecution successfully demonstrated that, during the time of the robbery, the Appellant was in the presence of individuals who were not presented before the trial court. Pw3 testified that he was attacked by 4 people who stole his phone, then proceeded to carry all the items that were in the premises. Pw2 saw the assailants carry the televisions on to the white probox. Further Pw3 testified that the assailants pointed a gun at him asked him to open the door or they will shoot him. He was hit by a torch and when he removed his phone the appellant slapped him and took away his phone. The evidence of Pw1 and Pw3 was that the appellant and the other assailants stole the items enumerated in the charge sheet from Pw1's virtual gaming business. I find that the ingredients of the offence of robbery were established by the prosecution in respect of count I facing the appellant. There is no merit on this ground.

30. The appellant also faced second count of impersonating a police officer contrary to section 101 (1) (B) of the *National Police Service Act* No. 11A of 2011. The said section provides as follows:

> A person other than a police officer who, without the written authority of the Inspector-General in any way pretends to be a police officer for any purpose which he would not by law be entitled to do of his own authority, commits an offence and shall be liable on conviction to a fine not exceeding one million shillings or to a term of imprisonment not exceeding ten years, or to both.

31. The testimony of Pw3 is clear that the appellant pretended to be a police officer on the material night. Pw3 testified as follows:

> "I saw 4 people, 2 dressed in full combat, a hat, jungle green coat and police uniform that looked like for KDF. The 2 with full combat hard armed themselves with guns...they called out the name of my employer saying 'Sam Sam open, we are police."

32. Pw3 after an identification parade identified the appellant as the person who wore the police uniform. I agree with the finding of the trial magistrate that the testimony of Pw3 was further corroborated by Pw4 who testified that when the appellant was arrested and a search conducted at his house, he was found to be in possession of the police uniforms as described by Pw3.

33. On the issue of sentence, the trial magistrate imposed the maximum sentence for both counts. The appellant is a first offender and in his mitigation he sought leniency as he is a family man with a wife and children. In Zacharia Okai Magaki v State [2019] eKLR andJohn Karanja Kihara v Republic [2017] eKLR the court reduced the appellant's sentence to 4 years, however I note that they stole items that were valued below Kshs 10,000/-. In this case the appellants stole items worth Kshs 305,000/-. Despite being beaten during the incident, Pw3 testified that seeking medical attention was unnecessary, implying that the injuries sustained were minor in nature.

34. Therefore, having considered that the appellant was a first offender and his mitigation and the injuries sustained by Pw3, I find that the sentence meted by the trial court was excessive in the circumstance. Consequently, I set aside the sentence meted by the trial magistrate and order that the appellant is sentenced to serve imprisonment for eight (8) years for offence of robbery contrary to section 295 as read with section 296 (1) of the *Penal Code* charged in Count I and imprisonment for a term of three (3) years for impersonating a police officer contrary to section 101 (1) (b) of the *National Police Service Act* No. 11A of 2011.

35. The sentences will be served concurrently, and commence on December 13, 2019 as ordered by the trial court.

DATED, SIGNED AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAMS THIS 26TH DAY OF JULY 2023.

R.E. OUGO

JUDGE

In the presence of:

Vitalis Simiyu Juma - Appellant

Miss Omondi - For the Respondent

Wilkister/ Okwaro - C/A