Ng'olua v Republic (Criminal Appeal E090 of 2022)
[2023] KEHC 21868 (KLR) (10 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21868 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E090 OF 2022

MS SHARIFF, J

AUGUST 10, 2023

BETWEEN

MOSES NG'OLUA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal arising from the conviction and sentence delivered by Hon. P.M Wechuli SRM in Tigania PMC's Criminal Case No. E1363 of 2021 on 14/06/2022)

JUDGMENT

1. The appellant was charged with robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. The particulars were that on November 24, 2021 at Buuri Location in Tigania East Sub County within Meru County jointly with another not before court while armed with dangerous weapons namely knife robbed Japeth Thuranira a he-goat valued at Kshs 4,000/- and at the time of such robbery threatened to use actual violence to Japeth Thuranira.

2. The appellant also faced an alternative charge of handling stolen goods contrary to Section 322(1)(2) of the *Penal Code*.

3. Upon taking plea, the appellant denied the charges and the matter proceeded to hearing. PW-1 Japeth Thuranira stated that on the said date, he was on the road heading home with a goat. He met the appellant who was with another person on a motorcycle. The appellant removed a knife tied to his waist and took the goat from him. He screamed and the people from the nearby village came. The assailants ran away. Initially they had run away with the goat but as villagers responded they abandoned the goat, a motorcycle, shoes and a cap.

4. PW-2 Priscilla Nkirote responded to PW-1's screaming. She found the appellant had taken the goat. The appellant had been stopped and left the goat on the road and ran away. She had never known the appellant before the incident.

5. PW-3 James Mwenda also responded to the screams at around 7 pm. On approaching the scene, the motorcycle moved and he phoned ahead. The appellant was arrested later.

6. PW-4 David Kaindia stated that he was informed by a neighbor of the robbery. He proceeded to the scene and called the OCS Muthara Police Station.

7. PW-5 PC Daniel Paren of Muthara police station investigated the incident and arrested the appellant who had already been held by members of the public.

8. After considering the evidence, the trial magistrate found the appellant had a case to answer and put him on his defence. He elected to give unsworn statement.

9. He stated that on the said date, he was from Isiolo and was riding his motor cycle to Mikinduri to buy miraa. On the way, he was stopped by people he didn't know and they planted the goat on him and took his items. He denied committing the offence.

10. Subsequently, the trial magistrate found him guilty on the main count and sentenced him to suffer death. The appellant was aggrieved and moved this court by petition of appeal raising the following grounds;

    a. The trial magistrate erred by failing to note that there was a grudge between the appellant and the complainant's relatives.

    b. The trial magistrate erred by failing to note that the prosecution's case was not proved beyond reasonable doubt.

    c. The learned trial magistrate erred by failing to note that key witnesses were not called.

    d. The learned trial magistrate erred by relying on uncorroborated and contradictory evidence tendered by the prosecution.

    e. The learned trial magistrate erred by failing to consider the appellant's defence.

11. By directions of the court, the appeal proceeded by way of written submissions. Both parties filed their respective submissions which have been considered.

Analysis and determination.

12. My duty as first appellate court was stated in *Okeno v Republic* [1972] EA 32 where it was stated;

> " 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 v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. 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 findings and conclusions; 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 v. Sunday Post, [1958] E. A. 424."

13. The offence of robbery with violence is created by Section 296(2) of the *penal Code* which states;

(2) 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."

14. The necessary ingredients to be proved therefore are;

a. the offender is armed with any dangerous or offensive weapon or instrument, or;

b. he is in the company with one or more other person or persons, or;

c. at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

15. The court in *Suleiman Kamau Nyambura V Republic* [2015] eKLR held that proof of any of the ingredients is sufficient to secure a conviction under the Section.

16. The facts herein are that the appellant in the company of another person accosted the complainant and robbed him of his he goat by threatening to stab him with a knife that the appellant had strapped onto his waist. The complainant released the goat to the assailants and raised an alarm and thus alerted the neighbours who respondent to the alarm. The appellant and his accomplice fled on the motor cycle with the goat. The appellant was intercepted by members of the public who then effected a citizens' arrest while his accomplice successfully escaped the dragnet.

17. The issue that emerges for determination is whether the appellant was properly identified considering that the offence was committed at night time.

18. The paramountcy of identification in a criminal trial as was elucidated in *Abdalla Bin Wendo & Another vs Republic* (1953) EACA 20 where the court rendered itself as follows;

> "Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult".

19. In *Republic -v- Turnbull* (1971) QR 227, it was stated;

> "... 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? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

20. Having examined the record, the trial magistrate analyzed the issue and found the appellant to have been properly identified by virtue of the time the incident took place and the interaction between the appellant and the complainant. The magistrate found that the complainant's evidence was

corroborated by PW-2, PW-3, PW-4 and PW-5 as they were present when the appellant was cornered and beaten by the public.

21. The appellant's defence on the other hand was to the effect that the goat was planted on him and that he had nothing to do with the robbery.

22. The trial court found that the appellant's defence did not shake the evidence tendered by the Respondent.

23. I have re-analyzed, re-evaluated and scrutinized the evidence on record and I do find that there is overwhelming evidence that the appellant committed the offence that he was charged with; he was apprehended by members of the public while on flight. He then abandoned the ram, his motor cycle and a cap.

24. In his defence the appellant admitted that the motor cycle was his but he maintained that the ram was planted on him and that the charges were thus fabricated. I find that defence incredulous and a sham. The same is an afterthought. The allegation that the ram was planted on the appellant is devoid of any factual basis and must be rejected. I cannot therefore fault the trial court for rejecting the appellant's defence.

25. The conclusion cannot be escaped that the offence of robbery with violence was proved against the appellant to the required standards.

26. Although the issue of sentence was not challenged in this appeal, I find it prudent to mention that the objective of sentencing as per the judiciary sentencing policy guidelines inter alia are to meet the objectives of retribution, rehabilitation, restorative justice, community protection and denunciation.

27. The trial magistrate upon convicting the appellant sentenced him to death. That is the sentence provided for by the Section 296(2) of the Penal code. Sentencing is also a prerogative within the trial court's discretion as established by case law.

28. The circumstances in this case show that the appellant in the company of another robbed the complainant of his goat, no violence however was meted on the complainant other than the threat of violence.

29. Gikonyo J while reducing a sentence handed down in a robbery with violence case to 35 years in *Paul Njoroge Ndungu v Republic* [2021] eKLR, held;

> 39. In the case before me, all the ingredients of robbery with violence have been met. The appellant, who was in the company of others, robbed the complainants, and in the course of the robbery, the appellant not only used force, but was armed with a dangerous weapon with which he used to beat or hit the complainants causing bodily injuries. The PW1 assessed the degree of injury as harm.
>
> 40. The level of violence unleashed on the complainants is sufficiently serious to warrant long term imprisonment. The violence did not cause death or grievous harm.

30. Similar sentiments were expressed by Ngugi J (as he then was) in *James Kariuki Wagana vs Republic* [2018] eKLR observed *inter alia*

> while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just

> in the circumstances. ..... the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. ..... while force had been used in the case, it could not be said that the appellant used excessive force, nor did he "unnecessarily injure the Complainant during the robbery" and was not armed during the robbery.

31. This court is also bound by the decision in *Francis Karioki Muruatetu & Another Vs Republic* (2017)eKLR where the Supreme Court held that death sentence is unconstitutional as it violated a convicts right to life, human dignity and non-discrimination in the enjoyment of one's human rights as envisaged in our *Constitution* and the *Universal Declaration of Human and Peoples Rights*. Further that statutory mandatory sentences contravene the principle of separation of powers between the legislature and the judiciary and the same interfere with a trial court's judicial independence and discretion in sentencing.

32. I have considered he extenuating circumstances under which the offence was committed and I do find that actual violence was not used albeit threatened. Further that the ram, the subject of the robbery, was recovered. The appellant was also assaulted by irate members of the public who intercepted him during flight. I have also considered the pretrial term spent in custody pursuant to the provisions of section 333(2) of the *criminal Procedure Code*.

33. On the balance, whereas the appellant's appeal on conviction is disallowed, I am inclined to commute the appellant's sentence to a definite imprisonment term of 25 years to be computed from the date of his arrest that is November 22, 2021.

34. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT MERU THIS 10TH DAY OF AUGUST 2023.

MWANAISHA. S. SHARIFF

JUDGE

In the presence of: