Mohammed v Republic (Criminal Appeal 38 of 2021)
[2023] KEHC 23553 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 23553 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL 38 OF 2021

JN ONYIEGO, J

SEPTEMBER 29, 2023

BETWEEN

HUSSEIN ABDULLAHI MOHAMMED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. A. Mokoross in Criminal Case No. E311 of 2021 delivered on 20.09.2021 at Wajir)

JUDGMENT

1. The appellant was charged with another -not before the court on four counts:In respect to count one, he was charged with the offence of Arson contrary to section 332(b) of the Penal Code with particulars being that; on 19.06.2021 at Makoror Location in Wajir East Sub County within Wajir County jointly with others not before court willfully and unlawfully set fire on a vessel namely; a generator valued at Kes. 35,000.00, the property of Kathra Abdille.

2. Count two he was faced with the offence of Malicious damage to property contrary to section 339(1) of the Penal Code with particulars being that; on 19.06.2021 at Makoror Location in Wajir East Sub County within Wajir County jointly with others not before court willfully and unlawfully destroyed/ damaged 150 building blocks valued at Kes. 15,000.00, the property of Kathra Abdille.

3. Count three, he was also charged with Malicious damage to property contrary to section 339(1) of the Penal Code with particulars being that on 19.06.2021 at Makoror Location in Wajir East Sub County jointly with others not before the court willfully and unlawfully destroyed/damaged the building/ structure valued at Kes. 33,500.00, the property of Mohamed Ibrahim Kaithar.

4. Count four, he was charged with the offence of creating disturbance in a manner likely to cause a breach of peace contrary to section 95(1) (b) of the Penal Code. Particulars were that, on 19.06.2021 at Makoror Location in Wajir East Sub County within Wajir County jointly with others not before

the court created a disturbance in a manner likely to cause a breach of the peace by chasing away one namely Emilio Bundi from his place and also dumping his assorted clothes valued at Kes. 20,500.00 into a well.

5. Having returned a plea of not guilty, the case proceeded to full trial. Upon conclusion of the hearing, the appellant was convicted in respect of counts two, three and four. Accordingly, he was sentenced to serve 2 years' imprisonment on each of the count 2 and 3 and 6 months on count four. Sentences were to run concurrently.

6. Aggrieved by the said conviction and sentence, the appellant through his advocates Kinaro & Associates preferred the instant petition of appeal dated 05.10.2021. The main ground of appeal was that the prosecution did not prove its case to the required standard in law and more particularly, there was no positive identification on the appellant. That the sentence out was so severe and disproportionate to the offence.

7. The court gave directions that the appeal be canvassed by way of written submissions. It was the appellant's submission that there was no positive identification to connect him with the commission of the offences in question. It was the appellant's contention that the prosecution did not discharge its burden of proof to the required degree. In that regard the court was referred Section107 (1)(2) of the Evidence to Act to express the position that he who alleges bears the burden of proof.

8. Further reliance was placed on the holding in the case of Republic v Ismail Hussein Ibrahim [2018] eKLR to urge the position that the prosecution did not discharge its burden on each ingredient of the various counts and therefore, the conviction by the trial court was unsafe. In the same breadth, the appellant argued that the appellant was not properly recognized as the person who destroyed the said properties under the obtaining circumstances.

9. It was contended that the court ought to have warned itself of the dangers of convicting on the evidence of a single witness and to that end, reliance was placed on the case of Chila v Republic (1967) E.A. 722. The appellant discredited the identifying witness as one who was not honest. In to sentencing, it was opined that the same was not only manifestly excessive but also unproportionate to the offence allegedly committed having in mind that the appellant was a first-time offender. The appellant placed reliance on the case of Josephine Arissol v Republic [1957] EA 447 to buttress the fact that a maximum sentence ought not be imposed upon a first offender unless there are aggravating circumstances. In the end, he urged this court to allow the appeal herein.

10. The respondent represented by Mr. Kihara, argued that the evidence of the single witness was sufficient to convict the appellant in that there is no particular number of witnesses required of the prosecution to prove its case. In buttressing the same principle further, the respondent relied on the case of Abdalla Wendo v Republic [1953] eKLR. He argued that the prosecution proved that the appellant in company of other persons not before the court chased PW2 using violence from his place of abode and further, threw his clothes all over.

11. In regards to the sentence, the respondent submitted that the sentence invoked by the trial court was legal and appropriate bearing in mind the circumstances of the case and therefore, the same ought to be upheld. He therefore urged this court to dismiss the appeal for lack of merit.

12. Being the first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of Okeno vs. R (1972) EA 32 and further in the Court of Appeal case of Mark Oiruri Mose vs. R (2013) eKLR that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own 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 due allowance for that.

13. PW1, Kathra Abdulle Mohamed testified that on 20.06.2021, her husband called her informing that their generator had been set on fire. That she proceeded to the farm and met PW2 who told her that on the previous night, five people had gone to the farm and shown a torch at him and given that he also had a torch, he shown light to the five people before taking off. It was her evidence that PW2 did not go far as he managed to hide in a nearby bush when he saw the faces of the assailants who by that time had set fire on the dash, broke a pipe and further burn a generator. That the said men further took two spades and threw the clothes of PW2 inside a well. She testified that PW2 thereafter followed the tracks of the men and the same led to the home of the appellant. On cross examination, she stated that PW2 did not know the appellant prior to the incident but all in all PW2 managed to identify the appellant and further, the tracks led to the direction of the house of the appellant.

14. PW2, Emilio Bundi testified that on the material night, he was asleep when he heard people talking outside. That each of the men carried a club and so they gave him a chase and after running for about 100 metres, he hid in the bush. He stated that while at his hiding place, he turned back and saw smoke emanating from the house. That upon returning the following morning, he found that the house, generator, water pipes and his clothes had been burned. He informed PW1 who in the company of two others went to the farm when they followed the footprints of the assailants to the home of the appellant. He was categorical that he did not join PW1 and the others in following the said footprints but reiterated that he managed to identify the appellant herein.

15. PW3, Faria Ragow Ali stated that she was with PW1 when they visited the farm wherein they saw the burnt generator together with the house. She also reiterated the evidence of PW1 that they followed the footsteps that led them to the home of the appellant. That she knew the appellant and it is him who mentioned the 2nd accused person as amongst the persons responsible for the offences herein.

16. PW4, Mutembi Muthiri testified on behalf of the investigating officer who was on leave at the material time. He reiterated the evidence of PW1 and PW2 to wit that the appellant was responsible for the offences preferred against him. He stated that the appellant was arrested by members of the public and that PW2 positively identified the appellant herein. He produced the photos of the burned generator, clothes and damaged plastic pipes as Pex 1-6.

17. I have carefully considered the grounds of appeal, the evidence adduced before the trial court as well as the submissions made on behalf of the appellant and the State. I have also read the judgment of the learned trial magistrate. From the above, I find that the main issues for determination are:

    i. Whether the prosecution proved its case to the required standard.

    ii. Whether the sentence meted out by the trial court was illegal and/or excessive in the circumstances of the case.

18. The appellant was charged with four counts. In regards to count 1, he was charged with Arson c/s 332(b) of the penal code which provides that;

    Any person who wilfully and unlawfully sets fire to –

    a. .....

    b. Any vessel, whether completed or not; is guilty of a felony and is liable to life imprisonment for life.

19. In this case, and more so in Count 1, the appellant was charged with willfully and unlawfully setting on fire a vessel namely; a generator valued at Kes. 35,000.00, the property of Kathra Abdille.

20. In his judgment, which this court equally agrees with, the trial court stated that count I could not hold for the reason that the charge as drafted was not proved having in mind that a 'vessel' includes any ship, a boat and every other kind of vessel used in navigation either on the sea or in inland waters and includes aircraft. To that extent, a generator is not a vessel. To that extent the charge was defective hence no safe conviction could be founded on it.

21. On count two and three in regards to malicious damage to property c/s 339 (1), the law provides as follows;

> "(1) Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and is liable, if no other punishment is provided, to imprisonment for five years".

22. In his judgment, the learned trial magistrate accepted PW1 and PW3's evidence that they corroborated each other and that he observed PW2 despite him being the identifying witness, that he was objective, consistent and credible. He proceeded that his objectivity was manifested in the fact that all through the proceedings despite there being two accused persons, he was firm that he had only recognized the 1st accused, the appellant herein and no one else.

23. The above notwithstanding, it is my humble view that the trial magistrate did not interrogate the evidence to establish how PW2 had allegedly seen the appellant considering that the offence was committed at night. Were the conditions conducive for positive identification.

24. From the evidence on record, there is no doubt that PW1and PW3 knew the appellant well prior to the material date but considering that the incident took place at night, it was incumbent upon the prosecution to tender evidence to prove that the circumstances then prevailing were conducive to a positive, accurate and reliable identification or recognition of the offender.

25. In cases where the prosecution's case is based solely on the evidence of identification such as the present one, such evidence must be interrogated with a lot of caution to ensure that the identification did not leave any room for a possibility of mistaken identity. The court of appeal emphasized this legal position in Wamunga v Republic, [1989] KLR 424 when it stated as follows:

> "It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction."

26. In R v Turnbull & Others [1973] 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> "... 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."

27. The above does not however mean that there cannot be safe recognition even at night. The Court of Appeal in Douglas Muthanwa Ntoribi v Republic [2014] eKLR in upholding the evidence of recognition at night held as follows: -

> "On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -
>
> "I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant."

28. The Learned Judge further noted;

> "...that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error..."

29. Considering that the incident took place at night, could it be authoritatively be said that PW2 managed to see and identify the appellant herein? Why is it that pw2 did not inform pw1 and pw3 that he had identified the appellant as one of the attackers? The claim by pw1 and pw3 that they relied on foot prints which let them to the appellant's home is not sufficient evidence. There was no proof that those foot prints were connected with the appellant's feet. Somebody else could have passed through the appellant's home.

30. In my humble view, I state that the appellant was arrested and thereafter charged for the reason that the alleged footprints headed to his home and nothing else. Further, the evidence of PW2 was to the effect that he did follow the alleged footprints as opposed to that of PW1 who testified that PW2 followed the footprints which led him to the home of the appellant. In the same breadth, the alleged distance of 100 meters from which PW2 hid himself, could not possibly enable him to see the happenings whether the appellant herein was the person responsible for the destruction of the said properties or not. It is doubtful that one would clearly see somebody from a distance of 100metres at night using torch light. The intensity of the torch light was not even stated.

31. I find that the circumstances prevailing at the time were not conducive for a proper, positive and reliable identification or recognition of the appellant as the person who perpetrated the offence. I am thus satisfied that the evidence regarding the alleged recognition of the appellant was not clear and watertight. It left a large room for a possibility of error.

32. My independent analysis of the evidence on record leads me to the conclusion that it was insufficient to prove the charge preferred against the appellant beyond any reasonable doubt. As a consequence of the above, it would be an academic exercise determining whether count IV was proved beyond reasonable doubt.

33. For the foregoing stated reasons, I am satisfied that the appellant's conviction was unsafe. Consequently, I find merit in this appeal and the same is hereby allowed. Consequently, the appellant's

conviction is hereby quashed and the sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held.

ROA 14 days

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 29TH DAY OF SEPTEMBER 2023

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J. N. ONYIEGO

JUDGE