Mutugi v Republic (Criminal Appeal E021 of 2022)
[2023] KEHC 24215 (KLR) (25 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24215 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E021 OF 2022

FN MUCHEMI, J

OCTOBER 25, 2023

BETWEEN

SIMON WACHIRA MUTUGI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal against the conviction and sentence in the Senior Principal Magistrate Court in Baricho by Honourable A. K. Mwicigi (SPM), in Criminal Case No. 86 of 2020 on 23rd September 2021)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Senior Principal Magistrate Baricho where he was charged and convicted of the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* and was sentenced to death.

2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 5 grounds which can be summarised as follows:-

   a. The learned trial magistrate erred in law and in passing the judgment convicting the appellant without proof of the offence by the prosecution;

   b. The learned trial magistrate erred in law and in fact in meting out the mandatory sentence against the appellant which is unconstitutional;

   c. The learned trial magistrate erred in law and in fact in failing to acquit the appellant on the failure by the prosecution to comply with Article 49(f)(1)(2) of *the Constitution* of Kenya and the unprocedural amendment of the charge contrary to Section 214(1)(2) of the *Criminal Procedure Code*.

3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions

4. The appellant submits that the charge sheet was defective as it refers to one Kennedy Wachira Nginga as the complainant. Furthermore, the charge sheet indicates that the appellant was charged with robbing the complainant with an excel mobile phone yet the prosecution evidence relates to a techno mobile phone. He thus argues that the evidence does not prove the charges and urges the court to acquit him.

5. The appellant further argued that the prosecution did not prove its case beyond reasonable doubt. The appellant further submitted that PW3, the investigating officer testified that PW1 reported that a techno phone was stolen from her yet PW1 denied during the trial that the techno K7 was her phone. The appellant further argues that PW1 testified that she did not have the receipts proving ownership of the stolen items and neither could she remember the make of the phone and the power bank. The appellant further argues that the prosecution failed to prove the existence of the alleged items and neither did they call the shopkeeper, one Njeri to ascertain that PW1 bought the said items from her. As such, the appellant argues that the prosecution did not prove that PW1 owned the alleged stolen items and was using them at her free will before they were stolen.

6. It was further submitted that the prosecution evidence was filled with material inconsistencies as to when the complainant was injured, what and who caused her injuries thus creating doubt on the prosecution's case. The appellant argues that PW1 testified that her attacker slapped her on her face and took off yet PW3, the clinical officer asserted that the complainant was attacked using kicks and blows and that she sustained injuries on her legs, eyes and lower lips. The appellant further submitted that the treatment notes from the private hospital attended by PW1 were not produced as exhibits. The prosecution only produced the P3 Form for the injuries caused on 19/11/2019.

7. The appellant submitted that from the charge sheet he was arrested on 2/12/2019 and reported to court on 23/1/2020. He further stated that a correction was made on the arresting date and a signature appended against the correction but he argues that the said amendment was not made before the court and the court did not call him to plead to the altered charge pursuant to Section 214 of the *Criminal Procedure Code*.

8. The appellant relies on the case of *Mithu Singh v State of Punjab* 1983 AIR and submits that the mandatory nature of the sentence under Section 296(2) of the *Penal Code* is unconstitutional and contrary to Articles 24, 29(f) and 50(2)(p) of *the Constitution* of Kenya.

9. The appellant submitted that the trial court did not consider his defence that PW1 concocted the charges against him because their love turned sour and that she was jealous of his other girlfriends. He further testified that on the material day he was in Nairobi to deliver avocados.

The Respondent's Submissions

10. The respondent relies on the case of *Jeremiah Oloo Odira v Republic* [2018] eKLR and submits that the prosecution proved the elements of the offence of robbery with violence. PW1, the complainant testified that on 16/11/2019 at 10pm she was headed home at busy bee area when she was pulled by the jacket and the appellant moved in front of her. She further testified that he demanded that she buy him alcohol and when she told him that she did not have any money, he inserted his hands in her pockets and took her phone and power bank. She further testified that a struggle ensued between them and then the appellant slapped her on her face inuring her left eye. She stated that the appellant threatened to kill her if she did not move out of the Kagio area and told her that she could do nothing to him. PW2,

the clinical officer examined the complainant on 6th December 2019 and confirmed that she sustained soft tissue injuries secondary to assault. The witness produced the treatment notes as an exhibit. PW3, the police officer attached to Kagio Police Station confirmed that the complainant made a report at the police station on 16th November 2019 at 2200 hours. She further testified that she was assigned to investigate the case but the appellant went underground until 2nd December 2019. Thus based on the evidence, the respondent submitted that the prosecution proved its case. Moreover, the respondent submits that the appellant testified in his defence that on the material day he was in Nairobi taking avocados for export. He however did not call any witness to corroborate his alibi.

11. The respondent further submitted that the appellant has not demonstrated how his rights under Article 49(1) of *the Constitution* were violated.

Issues for determination

12. The appellant has cited 5 grounds of appeal which can be compressed into three main issues:-

    a. Whether the charge was defective ;

    b. Whether the prosecution proved its case beyond any reasonable doubt;

    c. Whether the appellant's defence was considered.

The Law

13. This being a first appeal, this court is guided by the principles set out in the case of *David Njuguna Wairimu v Republic* [2010] eKLR where the Court of Appeal stated:-

> "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

14. Similarly in the case of *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> "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 Republic* (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R* (1957) EA 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 finding and 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]EA 424." This was also set out in the case of *Kiilu & another v Republic* [2005] KLR 174.

Whether the charge sheet was defective.

15. Section 134 of the *Criminal Procedure Code* provides:-

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

16. The appellant argues that the charge sheet was defective as it referred to one Kennedy Wachira Nginga as the complainant and further points out that the defect in the charge sheet is in the make of the phone whose make was Excel yet the prosecution led evidence which relates to a techno phone.

17. The Court of Appeal in *Bernard Ombuna v Republic* [2019] eKLR addressed the issue of a defective charge sheet in the following terms:-

> In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.

18. On perusal of the charge sheet, it is noted that the complainant is named as Rose Wanjiku Gitari. On perusal of the proceedings, it is confirmed that the name of the complainant was as stated in the charge. On the issue of the type of phone, it is my considered view that an error on the type of phone does not vitiate a charge. In *Ogaro v Republic* [1981] eKLR the Court of Appeal held as follows:-

> Under Section 267(1) of the Penal Code, every inanimate thing whatever which is the property of any person, and which is movable is capable of being stolen. A file is capable of being stolen. The omission to prove the value of the thing stolen is not fatal to the charge in as much as Section 137(c)(i) of the Criminal Procedure Code provides that if the property is described with reasonableness clearness in a charge or information it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name to whom the property belongs or the value of the property.

19. The record shows that the charge was read and explained to the appellant and he pleaded to it as required by the law. For that reason, it is not in doubt that the appellant from the time of plea was fully aware that he faced a charge of robbery with violence. The particulars of the charge made reference to the offence of robbery with violence and stated the date the offence. Thus the fact that the type of phone was mistaken did not in any way prejudice the appellant. Moreover, the complainant testified that the techno k7 phone was not hers. It is clear on record that the prosecution evidence did not relate to the techno phone as alleged by the appellant.

20. The appellant argues that the charge was defective for he was arrested on 2/12/2019 and taken to court on 23/1/2020 and the date of arrest was corrected. He states that the correction of the date was made and signature appended against the correction but the said amendment was not made before the court and the court did not call him to plead to the altered charge pursuant to Section 214 of the *Criminal Procedure Code*. Contrary to the submissions of the appellant, the record shows that the charge sheet has no amendment. Even if there was, such a discrepancy cannot affect the validity of the charge. The

signature the appellant speaks of is the signature of the Honourable Magistrate who signed the charge sheet on the day the appellant took plea which must be always affixed during plea taking.

Whether the prosecution proved its case beyond any reasonable doubt;

21. The elements of the offence of robbery with violence were set out by the Court of Appeal in the case of *Oluoch v Republic* [1985] KLR:-

> 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
>
> b. The offender is in company with one or more person or persons; or
>
> c. At or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses other personal violence to any person….

22. According to the case of *Dima Denge Dima & Others v Republic* Criminal Appeal no 300 of 2007:-

> The elements of the offence under Section 296(2) are three in number and they are to be treated not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.

23. The term robbery has been defined in *Shadrack Karanja v Republic* Criminal Appeal no 119 of 2005 [2006] eKLR, the Court of Appeal stated as follows:-

> The same issue was raised in *Moneni Ngumbao Mangi v Republic* Criminal Appeal no 141/2005 (UR) and this court examined in detail the essential ingredients of the offence of robbery with violence under Section 296(2) of the Penal Code as analysed in *Johana Ndungu v Republic*, Criminal Appeal no 116 of 1995 (UR). After noting that the charge sheet in that case stated, as it does in this case, that the appellants "robbed" the complainant, the court continued:-
>
>> The word robbed is a term of art and connotes not simply theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property.

24. From the evidence of the prosecution, the complainant was alone when she was accosted by the appellant and her mobile phone and power bank were taken. In the course of the act, the appellant slapped the complainant injuring her left eye and he threatened to kill her if she did not move out of Kagio area. The incident took place at around 10pm according to PW3 was the investigating officer. He testified that the complainant made a report that on 16/11/2019 after 10pm she was on her way home when she was attacked by the appellant who forcibly took her mobile phone and power bank. She further stated that the appellant slapped her on her face and injured her left eye. The complainant was sent to hospital for treatment and later the P3 Form was filled. PW2, a clinical officer stated that he examined the complainant who complained of left eye pain, lower lip wound and that she was in pain for about three weeks. The witness stated that the complainant had been treated at a private hospital on 17/11/2019 following an assault that occurred on 16/11/2019. The clinical officer examined her and found that her left eye was red and she had suffered soft tissue injuries. He formed the opinion that the probable type of weapon was a blunt object.

25. The incident took place at night and therefore care should be taken to ensure that the appellant was positively identified as the person who committed the offence. The court in *Wamunga v Republic* (1989) KLR 424 at 426 had this to say:-

> Where the only evidence against a defendant is evidence 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 possibility of error before it can safely make it the basis of a conviction.

26. The complainant said that she recognized the appellant because she used to see him around the neighbourhood of Kagio market and that there was electric light at the scene at the material time. As the appellant accosted her, she said she was able to positively identify him. The witness further stated that she knew him as Simo. The appellant in his defence testified that on the material day he was in Nairobi taking avocados for export. He further testified that he knew the complainant for more than 6 years as she was his girlfriend. The appellant admitted to knowing the complainant and therefore the issue of identification was established. Furthermore, the trial court considered the appellant's defence of alibi and noted that it was a mere denial and an afterthought. It is therefore my considered view that positive identification was proved.

27. The appellant submitted that the complainant did not prove that the items allegedly stolen belonged to her because she did not produce receipts or call witnesses. The complainant in her evidence said she had bought the power bank from one Mama Njeri and the phone from another shop. The complainant did not produce receipts for the said items. The appellant's contention is that he should not have been convicted since there was no proof of ownership. Its important to note that the appellant or any other person did not claim ownership of the power bank and the phone. The trial court dealt with the issue and observed that it was not necessary to produce receipt in all cases of this nature. He further stated that ownership entails several rights including right of use to manage, enjoy and the right to convey property to others. I take judicial notice that in most cases after purchasing a power bank or a mobile phone, one may not keep receipts. Some documents could be misplaced and not found when one needs them. The appellant does not dispute that the complainant was in possession of the two items and that he took them from her. His bone of contention is only lack of proof of ownership. The reasoning of the trial court was that it was not necessary to produce receipts to prove the offence of robbery. In my view, this reasoning was correct in that failure to produce a receipt is not fatal to a case of this nature. The appellant was not charged with theft but with robbery with violence. The ingredients of robbery with violence are different from those of theft. In this case, the prosecution are required to prove that the appellant took property of the complainant using force or threats at, or immediately before or after the robbery. It is important to note that the items stolen were not recovered and were therefore not in court for identification by the complainant. The fact that the investigating officer talked of a techno phone having been stolen and which the complainant said that her phone was not techno type cannot be taken to mean the phone was not robbed of the complainant. The trial court believed her evidence and gave its reasoning on ownership which I agree with.

28. It is my considered view that failure to produce receipts for the phone and the power bank is not fatal to the prosecution's case given the circumstances of this case.

29. I have carefully perused the evidence on record. I am of the considered view that the prosecution proved the case of robbery with violence as required by the law. It is my finding therefore that the conviction was based on cogent evidence.

Whether the sentence is harsh and excessive

30. The appellant was sentenced in 2021 which is post Muruatetu petition of the Supreme Court whereas the apex court declared unconstitutional the mandatory nature death sentence. However, the death sentence is still a lawful sentence where it is found to be deserving. The accused gave his mitigation. He told the court that he had been in custody for 23 months and that his family had suffered due to his absence. It is on record that the complainant and the appellant knew one another even by name. The complainant gave the full names of the appellant to the investigating officer. There is some alleged intimate relationship between them as intimated by the appellant. The complainant did not dispute it but said in cross examination that the two were not married. This suggests that the two were intimate friends some time before the incident. The value of the properties stolen was Kshs. 7,700/- which is a small amount in the general standards of living. The trial magistrate does not seem to have considered this factor in sentencing though he had the discretion to do so. The accused was a first offender for there were no previous convictions presented to the court by the prosecution. It is my considered view that the trail magistrate failed to take into consideration several important factors in sentencing the appellant. This omission resulted in imposing a harsh and excessive sentence to the offender. It is further noted that he trial court did not take into consideration that the appellant spent one year and nine (9) months in custody pending trial. Section 333(2) of the *Criminal Procedure Code* provides that such period be considered during sentencing. For this reason, this court is empowered to review the sentence of death meted to the appellant.

Conclusion

31. It is my finding that this appeal is partly successful. I hereby make the following orders:-

    a. That the conviction is hereby upheld.

    b. That the sentence of death imposed on 23/09/2021 is hereby set aside and substituted with ten (10) years imprisonment to commence from the date of arrest 2nd December 2019.

32. It is hereby so ordered.

DATED AND SIGNED AT KERUGOYA THIS 25TH DAY OF OCTOBER, 2023.

F. MUCHEMI

JUDGE

Judgement delivered through video link this 25th day of October , 2023