John v Republic (Criminal Appeal E060 of 2022)
[2023] KEHC 26165 (KLR) (30 November 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E060 OF 2022

DK KEMEI, J

NOVEMBER 30, 2023

BETWEEN

JOSEPH MWENDA JOHN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from Original Conviction and Sentence in Nanyuki CM Criminal Case No 1328 of 2019– B Mararo, SPM)

JUDGMENT

1. The Appellant in this appeal, Joseph Mwenda John was convicted after trial for an offence of robbery with violence contrary to section 296(2) of the Penal Code. On 08/09/2022, he was sentenced to twenty (20) years' imprisonment. The particulars of the charge were that on the 12/10/2019 at Kwa Ng'ang'a Area, Timau Buuri West Sub-County Meru County, jointly with another not before court, robbed Nicholas Mwirigi of cash Kshs.7,740/- and at or immediately before or immediately after the time of such robbery, used actual violence to the said Nicholas Mwirigi.

2. The Appellant was dissatisfied with the conviction and sentence hence his appeal on the following grounds;

    i. The learned magistrate erred by failing to note that the evidence tendered by the prosecution was not enough to secure a conviction.

    ii. The learned magistrate failed to note that the prosecution did not prove their case beyond reasonable doubt.

    iii. The learned magistrate failed to note that this was a case of mistaken identity.

iv. The learned magistrate erred by failing to note that the complainant was intoxicated and that the Appellant's duty was to transport him and could not commit such an act since the complainant was directed to the Appellant by someone known to the Appellant.

v. The learned magistrate failed to note that the prosecution's case was marred with discrepancies, inconsistencies hence not reliable.

vi. That the sentence was harsh, excessive and exorbitant.

vii. That he is a pauper and the only breadwinner to his young family.

3. The appeal was canvassed by way of written submissions. Briefly, the Appellant submitted that the case was not properly investigated; that from the evidence of PW1, PW2 and PW3, it is not known what exactly happened. He submitted that there was duplicity of the charge since he was charged under section 295 and 296 of the Penal Code. Reliance was placed on the case of Joseph Njuguna Mwaura & 2 Others vs R (2013) KLR. He submitted that the learned magistrate erred by relying on the evidence of a single witness, PW1 without cautioning himself on probability of errors. That the witnesses' evidence could not be trusted as they were speaking lies and that their evidence was marred with contradictions and inconsistencies. That the evidence adduced fell short of the required standard and that the learned magistrate imposed a harsh and excessive sentence without considering and evaluating the evidence that was tendered and the circumstances in which the crime is alleged to have been committed.

4. The Respondent's counsel supported the conviction and sentence. Vide submissions dated 27/7/2023, learned counsel submitted that the prosecution proved the ingredients of robbery with violence since the evidence revealed that the Appellant was in company of another person and who robbed the complainant of his cash. On identification, counsel submitted that the complainant could properly see the Appellant assisted by the lights around the scene and that they even negotiated on the fare and that the complainant was the one who led the police to his arrest. Further, the court warned itself while relying on the single witness evidence and was properly convinced that the Appellant was properly identified. That there was no mistaken identity since the Appellant was properly identified by the victim. It was also submitted that there were no contradictions and if they were, they were immaterial as they did not go to the ingredients of the offence. On the sentence, the counsel submitted that the sentence of 20 years' imprisonment was proper as it was commensurate to the crime since the law provides for even a harsh sentence of death.

5. That is the summary of submissions filed by the respective parties herein. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

6. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court in order to evaluate all the evidence placed before it and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.

7. Before considering whether the case against the Appellant was proved to the required standard, the Appellant raised a preliminary point of law in his submissions. He submitted that the charge was duplex since he was charged under section 295 as read with section 296(2) of the Penal Code. Reliance was placed in the case of Joseph Njuguna Mwaura (supra).

8. I have perused the charge sheet and it is true that the Appellant was charged with 'robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code'. The question is whether the

charge sheet was defective. I find the answer in the Court of Appeal decision quoted by the Appellant in Joseph Njuguna Mwaura(supra) which discussed in detail the effect of duplicity when it was faced with a similar issue. The court stated as follows;

> " This issue has been dealt with by this Court before in Simon Materu Munialu V Republic [2007] eKLR (Criminal Appeal 302 of 2005). This Court was confronted with the issue whether a charge sheet citing only section 296 (2) of the Penal Code was sufficient. This Court in that appeal considered the submission that section 295 of the Penal Code creates the offence of robbery, but held that:
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> > " '...the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the Penal Code as that would not contain the ingredients that are in section 296(2) of the Penal Code and might create confusion.'
> >
> > .....
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> We agree that this is the correct proposition of the law. Indeed, as pointed out in Joseph Onyango Owuor& Cliff Ochieng Oduor v R (Supra) the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.
>
> The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that 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 to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."

9. From the foregoing Court of Appeal decisions, the instant charge is duplex. The question is whether that duplicity is fatal. I found the answer in Paul Katana Njuguna v Republic [2016] eKLR where the Court observed:

> " We have considered the law on duplicity in charges as expounded in case law and academic treatises and find an interesting trend which seems to have emerged... The Court cited with approval the case of Cherere s/o Gakuli -v- R. [1955] 622 EACA, where the predecessor of this Court reviewed the cases on the subject of the effect of a charge which is found to be duplex and concluded that "The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some

extent upon the circumstances of the case and the nature of the duplicity"... In that case, the court held that the appellant was left in no doubt from the time when the first prosecution witness testified, as to the case which he had to meet and he could not, therefore, be said to have been prejudiced in any way.

Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the Penal Code. We observe that the offence under Section 295 and 296 (2) were not framed in the alternative. So, following the decision in Cherere s/o Gakuli -v- R (supra) Laban Koti -v- R. (supra) and Dickson Muchino Mahero v R. (supra), the defect in the charge herein is not necessarily fatal.

We appreciate that Section 296 (2) of the Penal Code creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in Section 296 (2) of the Penal Code. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under Section 296 (2) were absent or were not demonstrated by the prosecution.

In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.

10. In this case, the Appellant understood the charges against him, he participated in the hearing by cross examining the witnesses and mounted a defence at the close of the prosecution case. He raised no complaint before the trial court and in the circumstances, I find that there was no miscarriage or failure of justice on the ground that the charge was duplex.

11. As to whether the charge was proved to the required standard, the evidence before the trial court was as follows.

12. PW1 Nicholas Mwirigi Kirigia was the complainant. He testified that on the material date he met with his employer and that he was paid his salary. He proceeded to a bar and took some drinks. At 10.00pm, he left the bar and found a motorbike that was parked outside. He enquired from Charles who was just nearby about the owner of the motorbike and that Charles brought the Appellant. They negotiated on the fare which he duly paid.

13. They left and along the way, the Appellant called another man who joined them and sat behind the complainant. The Appellant passed the turning point where he had instructed him to drop him but led him to a forest where he stopped and held his neck in a choke hold and then instructed the other person to frisk him. The other person retrieved kshs.7,790/- from his pocket. The Appellant strangled him and threw him into a ditch and that they fled leaving him in the forest. He went to Timau police

station where he reported the matter and that the next day, he recorded his statement. He testified that the Appellant was arrested at his place of work with the assistance of Charles.

14. He testified that he was able to identify the Appellant and the motorbike when they found him at his place of work. He stated that he was able to identify him on the previous night since there was enough light from the pub as the street lights were bright and was covering a wide radius. That he even negotiated the price with the Appellant hence he could remember him. He testified that he did not see the other person who sat behind him. He maintained on cross examination that the Appellant was near the lights when he saw him and he clearly saw him when they negotiated the fare. He stated that the Appellant hit his eyes with his phone.

15. PW2 was Simon Gitau, the arresting officer. He testified that he was instructed by the officer in charge Timau police station to arrest someone who was within his jurisdiction. They were directed to Batian Flower Farm by Charles who claimed that the Appellant was an employee at Batian and with the help of the management, he arrested the Appellant and took his motorbike which had been used during robbery. He testified that the complainant identified the Appellant. He testified on cross examination that Charles identified the Appellant.

16. PW3, Cyrus Kitetu was the investigating officer. He recorded the witness statements and only reported what the complainant informed him on what transpired during the night of the robbery. He stated that he visited the scene of crime. The Appellant was arrested and his motorbike was taken and he was charged.

17. On his defence, the Appellant gave unsworn testimony. He testified that the complainant was his customer and that he took him to where he wanted to go. He stated that he did not take PW1's money.

18. That was the totality of the evidence before the trial court.

19. The Appellant was charged with the offence of robbery with violence. Section 296(2) of the Penal Code states that;

> (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.

20. The Court of Appeal in the case of OLUOCH –VS – REPUBLIC [1985] KLR discussed the ingredients of the offence of robbery with violence and held that:

> " Robbery with violence is committed in any of the following circumstances:
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> a. The offender is armed with any dangerous and offensive weapon or instrument; or
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> 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 the robbery the offender wounds, beats, strikes or uses other personal violence to any person ....."

21. The use of the word or in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. The prosecution's duty was

therefore to establish any of the above ingredients and to show the court that the Appellant robbed the complainant.

22. The evidence by the complainant was that the Appellant was in company of another person. That as the Appellant held PW1 on choke hold, the other person was frisking his pocket. The other person is the one who took the money and that the Appellant threw the complainant to a nearby ditch. He stated that the other person was called by the Appellant and joined them while on their way. PW1 testified that the Appellant wanted the other man to accompany the Appellant while going back after dropping PW1. The money was never recovered.

23. That evidence was not controverted by the Appellant during cross examination of PW1 and even during his defence. He did not deny in his defence that on the material day he was paid by PW1 to take him home. He did not dispute the fact that he was in company of another person. The appellant confirmed in his defence that the complainant had been his customer and thus there was no doubt about his identity and was thus placed at the scene of crime.

24. It therefore follows that the prosecution was able to establish that the Appellant was in company of another person hence the prosecution was able to prove at least one of the ingredients of robbery with violence provided for under section 296(2) of the Penal Code.

25. The Appellant did not deny ferrying the complainant on the material night he was robbed. He indeed said in his testimony that PW1 was his customer and that he took him to where he wanted to go. Therefore, the issue of identity is not in doubt.

26. The Appellant however faulted the evidence of PW1. He claimed that the trial magistrate erred in convicting him on evidence of a single witness without cautioning himself. This is not true as the magistrate clearly recognised that the complainant was the only sole identifying witness but was satisfied with his evidence which was not challenged by the Appellant. The magistrate also found the complainant's evidence to be clear and cogent. This clearly shows that the trial magistrate was live to what was required of him when dealing with single witness evidence.

27. It is trite law that evidence of a single identifying witness can still prove a fact in a criminal trial thus leading to a conviction. In Robert Onchiri Ogeto v Republic [2004] KLR 19, the Court of Appeal stated:

> "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."

28. In Roria v Republic [1967] EA 583, the court warned on the dangers of convicting on the evidence of a single identifying witness, stating:

> "A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification."

29. In this case, PW1 was subjected to cross-examination but his evidence was not shaken. He saw the Appellant on the night of robbery. He stated that the lights outside the bar and lights from the street assisted him to see the Appellant clearly. They even negotiated on the fare and this gave him enough

time to see him. With the assistance of Charles, he led PW2 to the arrest of the Appellant who was arrested at his place of work together with his motorbike. This coupled with the fact that the Appellant did not deny ferrying the complainant on the material night places the Appellant squarely at the scene of crime.

30. The evidence further revealed that the Appellant was arrested through assistance of one Charles. Charles is said to have known the Appellant when PW1 inquired about the ownership of the motor cycle parked outside the bar. Charles brought the Appellant to PW1 as the owner of the motor cycle. Charles was not called as a witness but PW2, the arresting officer told the court that Charles led them to Batian farm where the Appellant who was an employee was arrested as he was the person who had robbed PW1.

31. From the foregoing, this was not a case of mistaken identity as the Appellant claimed. It is my humble view that his conviction was founded on sound evidence.

32. He further claimed that the prosecution's evidence was inconsistent and contradictory. He however did not highlight the instances where the evidence was contradictory or inconsistent. I have also read the witnesses testimony and I did not find the evidence to be contradictory. In sum, iam satisfied that the evidence availed was quite overwhelming against the appellant and thus the prosecution had proved its case beyond any doubt. The finding on conviction by the trial court was thus safe and that there is no reason to disturb the same.

33. As to sentences, the Appellant was sentenced to 20 years imprisonment. The Appellant submitted that the sentence was harsh and excessive given the circumstances of the case.

34. The offence under section 296(2) provides for death sentence. However, the trial court sentenced the Appellant to 20 years' imprisonment which is neither harsh nor excessive. He was even lucky to have gotten 20 years' imprisonment while the law provides for death penalty.

35. In the result, it is my finding that the appeal is devoid of any merit. The same is dismissed.

DATED AND DELIVERED AT BUNGOMA (VIRTUALLY) THIS 30TH DAYOF NOVEMBR, 2023.

D.KEMEI

JUDGE

In the presence of :

Joseph Mwenda John Appellant

Miss Kimani for Respondent

Savuni Court Assistant