Ayase v Republic (Criminal Appeal 4 of 2021)
[2023] KEHC 25928 (KLR) (28 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25928 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL 4 OF 2021

JN KAMAU, J

NOVEMBER 28, 2023

BETWEEN

ALFRED AYASE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon J. K. Ngar'ngar' (SPM) delivered at Hamisi in Senior Principal Magistrate's Court in Criminal Case No 422 of 2012 on 26th May 2014)

JUDGMENT

Introduction

1. The Appellant herein together with two (2) others was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya). He was convicted by Hon J.K. Ngar'ngar (SPM) and sentenced him to death.

2. Being dissatisfied with the said Judgement, on 20th June 2023, the Appellant lodged the Appeal herein. The same was undated. He set out eleven (11) grounds of appeal.

3. His Written Submissions were also undated and filed on 20th June 2023. The Respondent's Written Submissions were also dated. They were filed on 21st August 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

6. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

   a. Whether or not the Charge Sheet was defective?

   b. Whether or not the Prosecution proved its case beyond reasonable doubt; and

   c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/or warranted.

7. The court dealt with the said issues under the following distinct and separate heads.

I. Charge Sheet

8. Ground of Appeal No (1) of the Petition of Appeal was dealt with under this head.

9. The Appellant submitted that the substitution of the charge was illegal as he objected to the same as a result of which his rights to fair trial as enshrined in Article 25 and 50(2) of *the Constitution* were violated. The Respondent did not address itself to this issue.

10. Notably, the said Section 214 (1)(i) of Criminal Procedure Code stipulates that:-

> " Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:
>
> Provided that—
>
> i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge"

11. It was not clear what the Appellant's argument relating to Section 214(1)(i) of the Criminal Procedure Code Cap 75 (Laws of Kenya) was. Be that as it may, a perusal of the proceedings of 9th July 2012 showed that the Appellant and his co-Accused denied the charge. On 12th November 2012, the Prosecution applied to the court to substitute the charge. The Appellant questioned how the Prosecution could substitute the same. The Prosecution submitted that it could substitute the charge which application was allowed by the Trial Court. The substituted charge was read to the Appellant and his co-Accused and they pleaded guilty to the same.

12. As a charge sheet could be amended at any time before the close of the Prosecution's case and the charge read to the accused person to plead again pursuant to Section 214(1)(i) of the Criminal Procedure Code, this court was not persuaded that the Appellant's right to fair trial under Article 25(2) and 50(2) of *the Constitution* of Kenya, 201 was violated, infringed upon and/or contravened.

13. In the premises foregoing, this court found and held that Ground of Appeal No (1) of the Petition of Appeal was not merited and the same be and is hereby dismissed.

II. Proof of Prosecution's Case

14. Grounds of Appeal Nos (2), (3), (4), (5), (6), (7), (9), (10), (11) and (14) of the Petition of Appeal were dealt with under this head as they were all related.

15. The Appellant submitted that the Trial Court convicted him on evidence that was full of contradictions, inconsistent, doubtful and incredible. It was his submission that a witness in a criminal case should not create the impression that he was not a straight forward person or raise any suspicion about his trustworthiness as was held in the case of Ndungu Kimanyi vs Republic (1979) KLR 283.

16. He averred that vital witnesses were not called. He emphasised that no dusting expert examined the exhibits that were recovered.

17. He asserted that the investigations that were carried out were shoddy and lacked comprehensive and confirmatory procedure of his identification as he was a passer-by.

18. He argued that although PW 1 knew him as a neighbour removing the error of his identification, he did not participate in the robbery as he was a passer-by. He urged this court to treat PW 1's evidence as a single witness with caution. In this regard, he placed reliance on several cases amongst them the case of Roria vs Republic (1967) KLR 549 where the common thread was that evidence of a single witness on identification must be tested with greatest care.

19. He pointed out that PW 1 told the Trial Court that he did not know who broke into his house and was only called hours later by his brother, Thomas Aduma.

20. On its part, the Respondent set out the Prosecution's case and submitted that the Trial Court concluded that PW 1's evidence was overwhelming as PW 2 found the Appellant in his (PW 1's) house, the Appellant injured him (PW 2) and PW 3 and PW 4 arrested the Appellant there. The Respondent therefore urged this court to dismiss the Appeal as it lacked merit.

21. It is well settled that evidence on identification should be treated with a lot of care and that the court has to satisfy itself that it is safe to act on the evidence by ensuring that it was free from the possibility of error, a position that this very court acknowledged in the case of Ronald Said vs Republic [2016] eKLR.

22. Notably, in the case of Wamunga vs Republic (1989) KLR 424, the Court of Appeal stated that where the only evidence against a defendant was evidence of identification or recognition, a trial court was 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 could safely make it the basis of a conviction.

23. Further, in the case of Roria vs Republic (Supra), the East Africa Court of Appeal held that although it did not mean that a conviction based on identification by a single witness could not be upheld, it was the duty of the appellate court to satisfy itself that in all circumstances it was safe to act on such identification.

24. In the case of Abdala bin Wendo & Another vs Republic (1953), 20 EACA 166, the Court of Appeal of East Africa also held that a fact could be proved by the testimony of a single witness but this did not lessen the need for testing with the greatest care especially when the conditions favouring a correct identification of an accused person were difficult. It added that in such circumstances, there was need

for circumstantial or direct evidence pointing to the guilt of an accused person based on evidence that could be safely accepted as being free from the possibility of error.

25. A perusal of the proceedings of the Trial Court showed that on 3rd July 2012, Hamisi Aduma Memba (hereinafter referred to as "PW 1") was away at work when his brother, Thomas Aduma (hereinafter referred to as "PW 2") called him and told him that his house had been broken into. When he got home on 6th August 2012, he found that his box had been tampered with and his four (4) bedsheets, two (2) blankets, two (2) dozen cups, one (1) dozen plates, tray and his and his child's assorted clothes had been taken. He identified two (2) shirts at Serem Police Station.

26. PW 2 had testified that he was woken up by one Dickson Kisigwa (hereinafter referred to as "PW 4") who was sleeping in PW 1's house and informed him that people had broken into the house. He rushed there with a torch and on flashing it, he identified one of the Appellant's co-Accused. Two (2) other co-Accused persons escaped from the scene.

27. At the time, the Appellant had climbed a wall and had a checked shirt. When he asked him (the Appellant) what he was doing, he (the Appellant) came down and hit him on the head with a metal bar. He (PW 2) screamed and he and the Appellant struggled for about ten (10) minutes. Neigbhours came and arrested him (the Appellant).

28. PW 2 identified the blood stained shirt that he was wearing on the material date and the metal bar that the Appellant hit him with. When he was cross-examined, he was emphatic that he also saw the Appellant's co-Accused.

29. Albert Onzere (hereinafter referred to as "PW 3") confirmed having gone to the scene of the incident and found the Appellant having been made to sit down. He told the Trial Court that the Appellant was arrested at the scene and that he had been tied.

30. PW 4 said that he saw three (3) people standing by the window of PW 1's house where he used to sleep and that there was moonlight on that material night. He also confirmed that the Appellant was arrested by members of public on that night and that he knew him and his Co-Accused persons.

31. Dennis Chirchir (hereinafter referred to as "PW 5") tendered in evidence the P3 Form in respect of PW 2 confirming that he sustained a head injury on the material night and that his shirt and trouser were blood stained.

32. The testimony of No 93051090 APC Lodwin Naira (hereinafter referred to as "PW 6") was that members of public handed over the Appellant herein to him. As the Appellant was badly injured, he took him to hospital and then escorted him to Serem Police Station.

33. No 83936 PC Michael Atieno Athunga (hereinafter referred to as "PW 7") was the Investigating Officer. He reiterated the evidence of the Prosecution witnesses and confirmed that PW 2 found the Appellant in PW 1's house and locked him inside.

34. While this court noted the Appellant's submissions on his identification, it was evident that he was arrested outside PW 1's house and was positively identified by PW 2, PW 3 and PW 4. The cases that he relied upon could not therefore assist his case as his identification was not based on a single witness.

35. According to Section 296 (2) of the Penal Code that has been set out hereinbelow, the elements of robbery with violence are :-

    a. That the offender should armed with any dangerous weapon or offensive weapon or instrument;

b. That the offender is in the company of one or more persons;

c. That 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.

36. From the facts of this case, it was clear that all the ingredients that constituted the offence of robbery with violence were present herein. The Appellant was armed with an offensive weapon. He was in the company of others and he hit PW 2 on his head injuring him. One of the shirts which was stolen from PW 1's house was recovered from the home of the Appellant's Co-Accused.

37. It was not necessary for the recovered shirt to have been subjected for analysis by an expert, the doctrine of recent possession having become applicable herein.

38. In any event, the Director of Public Prosecutions retains the mandate of the number of witnesses or they type of witnesses he shall call to prove any fact in a case. He cannot be directed by any party on which witnesses to call to prove the Prosecution case.

39. The independence of the Director of Public Prosecution is well enshrined in Article 157(10) of *the Constitution* of Kenya which states that:-

> " The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority (emphasis court)."

40. Further, Section 143 of the *Evidence Act* that states as follows:-

> " No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

41. This court was therefore persuaded to find and hold that all witnesses who were relevant to the case were called to testify and in fact proved the case to the required standard, which in criminal cases is proof beyond reasonable doubt. The evidence of all the witnesses was cogent, consistent and believable and was devoid of contradictions and inconsistencies as the Appellant had alleged.

42. It was this court's conclusive finding that the Trial Court therefore proceeded correctly when it found that all the ingredients of proving the offence of robbery with violence had been satisfied and hence convicted him accordingly. The Appellant's assertions that the case against him was not proved thus fell by the wayside.

43. In the premises foregoing, Grounds of Appeal Nos (2), (3), (4), (5), (6), (7), (9), (11) and (14) of the Petition of Appeal were not merited and the same be and is hereby dismissed.

III. Sentence

44. Grounds of Appeal Nos (8) and (13) of the Petition of Appeal were dealt with under this head as they were both related.

45. The Appellant asserted that the sentence was manifestly excessive in circumstances as the Trial Court did not consider his mitigation and meted upon him the maximum sentence. On its part, the Respondent submitted that the sentence was lawful as it was prescribed in Section 296(2) of the Penal Code.

46. Section 295 of the Penal Code states 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 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."

47. Further, Section 296 (1) and (2) of the Penal Code provides as follows:-

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

    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.

48. Notably, on 6th July 2021, the Supreme Court of Kenya gave guidelines in the case of Francis Karioko Muruatetu & Another vs Republic (Supra) to the effect that the said decision only applied in respect to sentences of murder under Sections 203 and 204 of the Penal Code and that it was not applicable to capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the Penal Code.

49. The holding in the case of Francis Karioko Muruatetu & Another vs Republic (Supra) was inapplicable herein as the Applicant had been charged and convicted of the offence of robbery with violence and not murder as was emphasised by the Supreme Court in its aforesaid guidelines. Until such time that further directions were given in respect of sentences in robbery with violence cases, the hands of this court were tied and could only mete out the punishment that was presented by law, which was death.

50. In the premises foregoing, Grounds of Appeal Nos (8) and (13) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

Disposition

51. For the foregoing reasons, the upshot of this court's decision was that the Appellant's undated Petition of Appeal that was lodged on 29th February 2020 was not merited and the same be and is hereby dismissed. The Appellant's conviction and death sentence be and are hereby upheld as they were both safe.

52. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 28TH DAY OF NOVEMBER 2023

J. KAMAU

JUDGE