Tila v Republic (Criminal Appeal 3 of 2020)
[2023] KEHC 25849 (KLR) (23 November 2023) (Judgment)

Neutral citation: [2023] KEHC 25849 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAROK

CRIMINAL APPEAL 3 OF 2020

F GIKONYO, J

NOVEMBER 23, 2023

BETWEEN

AMOS OLE KIPUS TILA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. W. Juma (CM) in Narok CMCR No. 764 of 2015 delivered on 17.12.2019)

JUDGMENT

1. The appellant was charged with two counts of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.
2. It is alleged that on the night of 19.05.2015 at an unknown time at Talek Trading Center, Narok South Sub-County, jointly with others not before the court robbed of Wallace Ngugi Munene his two mobile phones make Samsung GT-E1080F and ITEL 5170 all valued at Kshs. 10,000/= and during the time of such robbery killed the said Wallace Ngugi Munene.
3. The prosecution called 5 witnesses while the defense gave sworn testimony and did not call any witnesses.
4. The appellant was found guilty, convicted and sentenced to serve 25 years imprisonment.
5. Having been dissatisfied with the conviction and sentence he filed this appeal.
6. The appellant filed grounds of appeal dated 24.12.2019 and amended the grounds pursuant to section 350 (2)(v) Criminal Procedure Code as follows;
    i. That the learned trial magistrate erred in law and facts in relying on circumstantial evidence without caution.

ii. That learned magistrate on page 48(printed) line 23-24 expressed herself as follows; 'the evidence there is, is circumstantial in so far as the actual robbery is concerned'

Directions of the court

7. The appeal was canvassed by way of written submissions.

The appellant's submissions.

8. The appellant submitted that the evidence on record does not fit the common law. That what was alleged to have been stolen was Kshs. 10,000 and a phone Itel make. That there was no positive identification of the phone to point out the guilt of the appellant. All that was presented were mere allegations. The appellant relied on the cases of Neema Mwandoro Ndurya Vs Republic [2008] eKLR, Teper V R [1952] AC at p. 489 and Sawe Vs Republic [2003] KLR 364., and Kipkering Arap Koskei & Another [1949] 16 EACA 135.

9. The appellant submitted that all the evidence is all hearsay. That the evidence from Safaricom were not produced since a witness from Safaricom was not availed or not available therefore the information cannot be connected to the appellant. The learned magistrate as stated above opined that the Safaricom answers are not documented but made a grave error to rely on those answers. That this was in breach of article 50(4) Constitution. The appellant relied on Section 63, 78 of the *Evidence Act*, Uganda V Katumba Matayo [2018] UGHCCRD33, Junga V R [1952] AC4580, Donald Atemia Sipendi V Republic [2019] Eklr, Republic Vs Mark Lloyd Stevenson [2016] eKLR.

10. The learned magistrate opined that the accused in his defence agreed that an inventory was prepared and he signed it. The appellant relied in the case of Punjab Vs Singh [1974] 3 SCC 227, Dr. Christopher Murungaru V Sag and Another, Civil Application No. Nai. 43 of 2006(24/2006), Crowcher V Crowcher [1972] 1WLR 425, 430.

11. The appellant submitted that the ingredients of robbery with violence were not proved. In the present case, there is no single evidence to show that the accused appellant herein, was armed with a dangerous weapon or instrument. Neither was any recovered from him. Secondly, there is no mention whatsoever that he was in the company of another person or persons. Thirdly, no evidence that shows if at or immediately after the time of the robbery, he wounded, beat strike or used violence on the victim. The charges show that he killed which is not an element in this case then he was to be charged with murder of the victim. The appellant relied on the case of Donald Atemia Sipendi Vs Republic [2019] cited Johana Ndungu Vs Republic Criminal Appeal No. 116 of 2005 (unreported).

12. The appellant submitted that the sentence is harsh and excessive. The appellant relied on the case of Elizabeth Waithiegeni Gatimu Vs Republic [2015] eKLR.

The respondent's submissions

13. The prosecution submitted that the appellant is said to have been drinking with the deceased the night the deceased was killed and immediately the following day he was found in possession of the deceased phone. PW1 worked at wines and spirits. He had seen the deceased on 19.05.2015 and he left for their sister bar where he continued drinking. He got information the following day that the deceased was found dead. None of the witnesses saw the appellant attack or rob the deceased. However, the appellant was the last person to be seen with deceased given by the description of his clothing at the drinking spree. PW4 confirmed that when the appellant was arrested, he was found in possession of the phone which was established as per their IMEI numbers to belong to the deceased. The appellant did not give any explanation as to how he came into possession of the phone or even explain the

circumstances surrounding his arrest. This therefore was a case dependent on circumstantial evidence which must leave no other inference. The respondent relied on the cases of Mombasa Criminal Appeal 13/2017 Mohammed Ali Versus the Republic [2013] eKLR, Dima Denge Dima & others Vs Republic, Criminal Appeal No. 300 of 2007, Arum V Republic, Court of Appeal at Kisumu Criminal Appeal No. 85 of 2005, and Nzivo V Republic [2005] 1KLR 699.

14. The respondent submitted that the trial magistrate put into consideration the appellants' mitigating factors, nature, and circumstances of the offence prior to passing on the 25 years sentence which was within the law.

Analysis And Determination

Court's Duty

15. As the first appellate court, will re-evaluate the evidence adduced at the trial and draw its own conclusions. Except, bearing in mind that the court neither saw nor heard the witnesses firsthand. Thus, demeanor is best observed by the trial court (Okeno vs. Republic [1972] E.A 32).

16. The court has perused and considered the lower court record, the written submissions, and judicial authorities relied upon by both parties. The broad issues arising herein are: -

    i. Whether the prosecution proved its case beyond reasonable doubt.; and

    ii. What sentence is appropriate to the offence in the circumstances?

Elements of robbery with violence

17. According to the Court of Appeal in the case of Oluoch vs. 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 the robbery the offender wounds, beats, strikes or uses other personal violence to any person ....."

18. The three elements of the offence of robbery with violence under section 296(2) of the Penal Code are, however, to be read disjunctively and not conjunctively. Thus, proof of one element beyond reasonable doubt founds a conviction for the offence of robbery with violence (Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007)

19. PW1-Ketri Ongachi Olibe testified that he worked at a wines and spirit shop in Masaai Mara Talek. On 19.05.2015, he saw the deceased at wines and spirit shop- where PW1 worked. The deceased drunk liquor and one Nganga bought him beer. The deceased left. PW1 went to their sister bar where he found the deceased drinking. He closed business at 12.30 p.m. The next day he was informed by his friend that the mzee who had drunk at their place was dead.

20. PW3 a police officer with tourist police unit received information that the suspect in the murder of the deceased was seen at Talek trading centre. They moved with a team after receiving a description of how the appellant was dressed. They moved to a bar and identified the appellant from the description of his dressing. They arrested and searched the appellant and recovered two phones a Samsung and Itel. He also had a 500-shilling note and a mutilated 100-shillings note.

21. PW4 PC Jackton Ingolo of DCI Ilmenti testified that on 20.05.2015 he investigated a case of murder of the deceased. He investigated the two mobile phones to ascertain their owners. He found that the IMEI details belong to the Deceased. He produced the Samsung and Itel phones as P Exh 1 and 2. He also produced the currency as P Exh 3 and 4. He swore an affidavit to get a warrant to investigate the phones produced as P Exh 7. The Safaricom gave him the phone number which was confirmed to be the number of the deceased.

22. On cross-examination, he stated that CPL Njoroge prepared an inventory of the recoveries. He was not present when the phones were recovered. The inventory was done in Narok Police station. The inventory was written in English but translation was done for the accused. The money recovered was Kshs. 4,300 and mutilated currency was not indicated in the inventory. The Kshs. 4,300/= was not handed over to him, he does not know if it was returned to the appellant. The kshs. 600/= was suspected to have been stolen from the deceased. The phones were not dusted for finger prints. The phones had no sim cards. Nobody saw the appellant hitting the deceased. The murder weapon was not recovered. PW4 did not inquire from the appellant as to how he got the phones. He claimed to have picked them. He agrees that the evidence against the appellant is circumstantial.

23. PW5 Dr. Titus Ngulungu conducted post mortem on the body of the deceased on 22.05.2015 the body was preserved and fresh. He stated that the deceased must have lacked oxygen before death. There was cyanosis. The right side of the head had a swelling. The neck was bruised and left index finger was also bruised. There was an haematoma on upper chest wall, a blood forced trauma. The hyacid bone above thyroid cartilage was fractured showing a tight grip on the area. There was blockage of arteries around the neck and fluid was retained at the brain. The opinion was that the cause of death was asphyxia-the holding of the throat which stopped oxygen flow to the systems and this is in line with strangulation. The injury to the index finger shows that the deceased could have struggled with the assailant. There were no external wounds. The deceased could have been attacked while lying down.

24. The appellant gave his sworn defence. He stated that on 19.05.2015 he was at Talek trading centre chewing miraa at queens bar. He went there at 6 pam and left at 11 p.m. He stated that he did not see the deceased that night and does not know him. He did not have a disagreement with the deceased. There was no fracas in the bar that night. He contends that nothing was recovered from him. He confirmed that he signed the inventory but was not given a copy. He stated that he was beaten to admit that the phones were his but he never complained of the beatings in court. His finger prints were taken but were not traced on the phones.

25. The evidence against the appellant is circumstantial. Although the appellant denied being with the deceased on the fateful night, the evidence adduced connects him with the offence. The deceased was drinking in the liquor shop and was found dead the following day. See evidence of PW1. The police received information that the suspect was seen at the trading Talak Trading Centre. They were also provided with the description of the clothes the appellant wore the night before. PW3 stated that they embarked on tracing him at Talek trading centre where they found him in a bar. They arrested and searched the appellant and recovered two phones- a Samsung and Itel. The IMEI details provided by Safaricom showed the phones belonged to the deceased.

26. The appellant was found with these phones one day after the deceased was killed and robbed. The appellant claimed that he had found the phones. This was not a plausible explanation as to how he came into possession of the phones. The phones did not have the sim cards when they were retrieved from the appellant. Nothing showed that he had declared or informed anyone of these phones as lost and found items.

27. ‘It is... necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.’ (Teper v. R (2) [1952] A. C. 480 and Simon Musoke v. R [1958] EA 715)

28. In this case, there is nothing that suggests a coincidence that the appellant was found with the two phones belonging to the deceased one day after his death. The appellant was found with the phones which belonged to the deceased. It bears repeating that the phones did not have sim cards in them when and they were recovered from the appellant. No reasonable explanation was provided by the appellant as to how he came into possession of the phones. His claim that he had found them was merely an afterthought. The circumstantial evidence connects the appellant to the robbery of the deceased. There is no any other possible hypothesis other than that of guilt of the appellant.

29. The medical evidence show that personal violence was used upon the deceased as he died of strangulation of the neck and his index finger was injured. Therefore, the overall impression of the evidence is that the prosecution proved beyond reasonable doubt that the appellant jointly with others not before court robbed the deceased of his property and during the robbery, they used actual violence on the deceased as a result of which he died.

30. Accordingly, the appeal on conviction fails and is dismissed.

Sentence

31. In the case before me, force and violence were used upon the deceased. The deceased also died. The appellant was found in possession of the two phones belonging to the deceased.

32. The level of violence unleashed on the deceased is sufficiently serious to warrant a death sentence or long period of imprisonment.

33. The Penal Code prescribes death sentence as the maximum sentence for the offence of robbery with violence. The trial court was guided by the Muruatetu decision on the exercise of judicial discretion in cases where mandatory sentence is prescribed. Therefore, sentence of imprisonment imposed herein was properly meted out and appropriate. Accordingly, there is no reason or justification to interfere with the sentence meted upon the Appellant by the trial court.

34. In the upshot, the appeal on conviction and sentence is dismissed for lack of merit. The sentence is upheld.

35. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 23RD DAY OF NOVEMBER, 2023.

HON. F. GIKONYO M.

JUDGE

In the presence of:-

1. Mr. Muraguri – C/A

2. Ms. Koina for DPP

3.Appellant.