Mageywa v Republic (Criminal Appeal 49 of 2021)
[2023] KEHC 27086 (KLR) (19 December 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL 49 OF 2021

JN KAMAU, J

DECEMBER 19, 2023

BETWEEN

DAVID LUBANGA MAGEYWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon Dennis Ogal (SRM) delivered at Hamisi in Principal Magistrate's Court in Criminal Case No 1272 of 2018 on 16th August 2018)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* Cap 63 (Laws of Kenya).

2. He was tried and convicted by the Learned Trial Magistrate, Hon Dennis Okal, Senior Resident who sentenced him to fifteen (15) years imprisonment.

3. Being dissatisfied with the said Judgement, on 1st September 2020, he lodged the Appeal herein. The same was undated. He set out five (5) grounds of appeal.

4. His undated Written Submissions were filed on 22nd June 2023. The Respondent's Written Submissions were also undated and filed on 16th November 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. 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.

6. 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.

7. 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 Appellant was accorded a fair trial;

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

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

I. Fair Trial

9. Ground of Appeal Nos (4) and (5) of the Petition of Appeal were dealt with under this head.

10. The Appellant submitted that his right to fair trial was breached contrary to Article 50(2)(j) and (k) (sic). He asserted that he was not given the Government Chemist Analyst Report in advance and the Investigating Dairy that the Investigating Officer No 62088 CPL Jasetha Gacheru (hereinafter referred to as "PW 6") relied upon and consequently, he was not able to access the evidence in advance.

11. On its part, the Respondent asserted that at no given time during trial did the Appellant raise the issue that he was not supplied with all the documentary exhibits and that he cross-examined all the witnesses. It asserted that his case was properly heard during trial.

12. In this regard, it placed reliance on the case of *Badi Mohammed Nagi vs Republic* [2016] eKLR where it was held that an accused person who claimed that his or her right to fair trial had been infringed upon ought to have raised the issue during trial.

13. A perusal of the proceedings showed that the charge was read to him in Kiswahili, a language that he understood and he pleaded "Not guilty". He was informed of his right to appoint an advocate. He indicated that he would represent himself. He cross-examined witnesses.

14. On 25th February 2019, he informed the Trial Court that he was unable to proceed as he had not been supplied with a P3 Form, which the Trial Court directed he should be furnished with. On 25th April 2019, he indicated that he was ready to take the evidence of the Government Chemist Kisumu (hereinafter referred to as "PW 5") and PW 6.

15. On 29th April 2019, the Trial Court found that a prima facie case had been established against him. He was then put on his defence and provisions of Section 211 of the Criminal Procedure Code were explained to him. He indicated that he would give sworn evidence without calling any other additional witnesses. He adduced his evidence on 26th June 2019.

16. Having gone through all the proceedings, this court was satisfied that the trial was conducted properly and that the Appellant was accorded a fair trial as was envisaged in Article 50(2) of the *Constitution* of Kenya, 2010 and he could not purport to aver that he was ambushed when PW 5 and PW 6 adduced evidence.

17. In the premises foregoing, Grounds of Appeal Nos (4) and (5) were not merited and the same be and are hereby dismissed.

II. Proof Of Prosecution's Case

18. Grounds of Appeal Nos (1), (2) and (3) of the Petition of Appeal were dealt with under this head as they were all related but under different and distinct heads.

A. DNA Analysis

19. The Appellant submitted that the evidence of the sampling of the fifteen (15) Kshs 200/= notes was not admissible because it was ordered by an officer below the rank of an inspector contrary to Section 122A (1) and 122D of the *Penal Code*.

20. On its part, the Respondent asserted that no blood sample was taken from the Appellant and hence there was no misapplication of Section 112A of the *Penal Code*.

21. Section 122A(1) of the *Penal Code* Cap 63 (Laws of Kenya) provides as follows:-

    1. A police officer of or above the rank of inspector may (emphasis) by order in writing require a person suspected of having committed a serious offence to undergo a DNA sampling procedure if there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed the alleged offence.

    2. In this section—

        "DNA sampling procedure" means a procedure, carried out by a medical practitioner, consisting of—

        a. the taking of a sample of saliva or a sample by buccal swab;

        b. the taking of a sample of blood;

        c. the taking of a sample of hair from the head or underarm; or

        d. the taking of a sample from a fingernail or toenail or from under the nail, for the purpose of performing a test or analysis upon the sample in order to confirm or disprove a supposition concerning the identity of the person who committed a particular crime;

        "serious offence" means an offence punishable by imprisonment for a term of twelve months or more.

22. Further, Section 122D of the *Penal Code* states that:-

    "The results of any test or analysis carried out on a sample obtained from a DNA sampling procedure within the meaning of section 122A shall not be admissible in evidence at the request of the prosecution in any proceedings against the suspect unless an order under section 122A or a consent under 122C is first proven to have been made or given."

23. It was evident from Section 122A(1) of the *Penal Code* that it was not mandatory that DNA sampling be taken. The use of the word "may" connoted that an officer beyond the rank of an inspector could order for a DNA sample to be taken. The DNA sampling envisaged therein included that of an Accused person and the victim. The difference between the taking of DNA from a victim and from an Accused person was that the admissibility of evidence of DNA analysis from an Accused person could only be pursuant to a court order or his or her consent.

24. According to PW 5, he was given an Exhibit Memo and fifteen (15) notes of Kshs 200/= and a grey jacket that were blood stained. He took a buccal swab of the Complainant, Judith Endesha (hereinafter referred to as "PW 1"). After subjecting them to an analysis, he established that the blood on the notes and grey jacket matched her saliva sample.

25. As the provisions of Section 122A(1) and Section 122D were there not applicable to the Appellant herein as no DNA sample was taken from him, his submissions that PW 6 contravened the said provisions did not therefore hold any water.

B. Identification

26. The Appellant asserted that he was not subjected to a voice identification parade to confirm that PW 1 identified his voice and thus did not make any mistake. He urged this court to consider that his identification was by a single witness in difficult conditions which called for his acquittal.

27. The Respondent submitted that voice recognition could carry as much weight as visual identification provided that the conditions of voice recognition ensured that there was no mistake as was held in the case of *Choge vs Republic* [1985] KLR. It averred that it was voice recognition that led to the Appellant's arrest.

28. PW 1 told the Trial Court that on the material date of 20th November 2018, she heard some noise in the bedroom. She struggled for sometime with the person who demanded money from her. Although it was dark, she was able to identify his voice and when she called him by his name, he got angry and cut her more. She lost consciousness after he cut her all over her body. When she woke up, she told the people that it was the Appellant who had attacked her. It was her further evidence that it was only his father who knew that she had been given tea bonus.

29. Voice recognition was acceptable to identify an accused person provided that the same was free from error. In this case, the chain of events was unbroken from the time PW 1 recognised Appellant's voice. PW 1's identification led members of public to his house where fifteen (15) Kshs 200/= notes, her grey jacket and pink panty which were all bloodstained were recovered. The blood on the recovered items matched her saliva that was analysed by PW 5.

30. The Appellant was placed at the scene of the crime by scientific evidence that was adduced by PW 5. In this regard, this court found and held that PW 1 positively identified the Appellant as her attacker.

C. Recovery And Possession Of Stolen Goods

31. The Appellant argued that there was no duly filled inventory to verify that the fifteen (15) Kshs 200/= notes and grey jacket were recovered from his house and not at any other place. He pointed out that there were no other witnesses other than No 76716 CPL Chesire (hereinafter referred to as "PW 3") and PW 6.

32. He placed reliance on the case of *Stephen Kimani Robe & 2 Others vs Republic* [2013] eKLR where it was held that other witnesses apart from the officers who made the recovery should confirm the existence of the exhibits in the absence of an inventory.

33. The Respondent contended that the first responders led to the Appellant's arrest and the fifteen (15) Kshs 200/= notes and grey jacket were recovered in his house. Failure for the police to write an inventory was not fatal to the Prosecution's case.

34. Evans Mugwere (hereinafter referred to as "PW 2") testified that on the material date at 11.00pm, his son informed him that PW 1 had been attacked. He went with one Moses Mudavadi to his house. She

told them that it was the Appellant who had attacked her. They found the Appellant in his father's house. When they knocked on the door, he came out holding a panga. His vest and shoes had blood stains.

35. On his part, PW 3 stated that they went to the Appellant's house the following day and recovered fifteen (15) Kshs 200/= notes, blood stained grey jacket, blood stained pink pant, blood stained black shirt, a bucket and a spade that had fresh soil. The found a hole that had been dug in PW 1's house and there was a spot where the grass was disturbed connoting a struggle. Although the Accused person led them to his accomplice's house, they did not recover anything.

36. As was pointed out hereinabove, the fifteen (15) Kshs 200/= and the grey jacket that were all bloodstained matched PW 1's saliva. There was no clearer evidence that the doctrine of recent possession was applicable herein. It was not necessary for the Prosecution to have called other witnesses other than PW 5 and PW 6 to verify that PW 1's items were found in the Appellant's house.

37. PW 6 was emphatic that the items were recovered during broad daylight in the presence of the Appellant's father and neighbours. Bearing in mind PW 5's evidence, the Appellant's defence that nothing was recovered from his house rendered his arguments moot.

38. Rono (hereinafter referred to as "PW 4"), a Clinician at Mbale Referral Hospital confirmed the injuries that PW 1 sustained.

39. According to Section 295 of the Penal Code, the elements of robbery with violence are :-

    a. That the offender is 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.

40. In this case, the Appellant robbed PW 1 while armed with a dangerous weapon. Immediately before, during and after the robbery, he cut her all over her body.

41. The Trial Court therefore proceeded correctly when it found that The Prosecution had demonstrated that all the ingredients of proving the offence of robbery with violence had been satisfied and hence convicted him accordingly.

42. In the premises foregoing, Grounds of Appeal Nos (1), (2) and (3) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

III. Sentence

43. Neither the Appellant nor the Respondent herein submitted on this issue.

44. Be that as it may, this court noted that 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."

45. 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.

46. 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*.

47. 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.

48. However, as the Appellant was sentenced to fifteen (15) years prior to aforesaid guidelines when courts were meting out custodial sentences and the Respondent had not appealed against the same, this court opted not to interfere with the said sentence.

Disposition

49. For the foregoing reasons, the upshot of this court's decision was that the Appellant's undated Petition of Appeal that was lodged on 1st September 2020 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and are hereby upheld as they were both safe.

50. It is hereby directed that the period the Appellant spent in prison from 22nd November 2018 and 15th August 2019, being the date of his arrest and the date he was sentence be and are hereby taken into account while computing his sentence as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

51. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 19TH DAY OF DECEMBER 2023

J. KAMAU

JUDGE