Wanyonyi & 3 others v Republic (Criminal Appeal E115, E116, E117 & E118 of 2021 (Consolidated)) [2023] KEHC 26736 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26736 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E115, E116, E117 & E118 OF 2021 (CONSOLIDATED)

DK KEMEI, J

DECEMBER 19, 2023

BETWEEN

MOSES WANYONYI ..... 1ST APPELLANT

ANTONY MASINDE ..... 2ND APPELLANT

GIDEON KITUI ..... 3RD APPELLANT

IDDI MOHAMMED KARIM ..... 4TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal arising from the Judgement delivered on 25th November 2021 in Criminal Case No. 1075 of 2021 at Chief Magistrate's Court Bungoma by Hon. A. Odawo-SRM)

JUDGMENT

1. The Appellants herein were charged before the lower Court with various offences under the Penal Code as follows:

    i. In count one, they were charged jointly with the offence of breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. The particulars of the offence were that between the night of 21st and morning of 22nd May 2021, at Kanduyi Township Bungoma County, jointly with others not before Court, broke into a building of Collins Okwang' Ayel being, Oasis Electronics Shop and committed a felony of stealing assorted smart phones valued at Kshs. 1, 147, 250/= and damaged four (4) flat screen smart TV's valued at Kshs. 20,000/= each, the property of Collins Okwang' Ayel.

    ii. In count two, the 3rd and 4th Appellants were charged with the offence of preparation to commit a felony contrary to section 308(1) of the Penal Code. The particulars of the offence were that

between the night of 21st and morning of 22nd May 2021, at Kanduyi Township Bungoma County, the Appellants were captured on CCTV footage, trying to break into a shop while carrying a metal bar and having camouflaged themselves wearing women clothes.

iii. In Count three, the 3rd and 4th Appellants were charged with the offence of malicious damage to property contrary to Section 339(1) of the Penal Code. The particulars of the offence were that between the night of 21st and morning of 22nd May 2021, at Kanduyi Township Bungoma County, maliciously damaged the shop of Collins Okwang' Ayel by digging a hole to gain entry and damaged television sets while accessing the inside of the shop.

iv. In Count four, the 3rd Appellant was charged with the offence of handling stolen property contrary to section 322(1) of the Penal Code. The particulars of the offence were that on 22nd May 2021, at Chatambe in Musikoma area within Bungoma County, he was found to be in possession of one mobile phone which was part of stolen goods and a metal bar which was also captured on CCTV.

v. In Count five, the 3rd Appellant and another not before the Court were charged with the offence of conveying stolen goods contrary to section 323 of the Penal Code. The particulars of the offence were that on 22nd May 2021, at Chatambe in Musikoma area within Bungoma County, jointly with other before Court, he was found to be in possession of one mobile phone which was part of stolen goods in his home in Chitambe, the property of Collins Okwang' Ayel.

2. All the Appellants entered a plea of not guilty and the matter was set down for hearing.

3. Vide the lower Court Judgement issued on 25th November 2021, the trial magistrate established that the Respondent had established its case beyond reasonable doubt against the Appellants in the respective counts as preferred and proceeded to convict them.

4. Being dissatisfied with the said judgement, the Appellants in a nutshell preferred an appeal as set out in their grounds of appeal as follows:

i. That the trial magistrate erred in law and fact in convicting the Appellants by relying on the CCTV footage that was blurry and difficult to identify the face of the Appellants

ii. That the trial magistrate erred in law and fact by arriving at a decision based on evidence full of contradictions.

iii. That no government analyst report was availed with regard to the 3rd and 4th Appellants.

5. Ultimately, the Appellants prayed that their conviction and sentences be set aside and that they be set at liberty.

6. The appeal was canvassed by way of written submissions. Both parties filed and exchanged their submissions.

7. As a first appellate Court, i should re-evaluate the evidence afresh and arrive at own independent conclusions. I am however reminded to bear in mind that i neither saw nor heard the witnesses and give due regard for that. See Njoroge v Republic (1987) KLR, 19 & Okeno v Republic (1972) E.A, 32

8. After carefully considering the rival arguments of the parties and the record of appeal, the grounds of appeal may be collapsed into one ground namely whether the prosecution proved their case beyond reasonable doubt.

9. The legal burden of proof in criminal cases rests on the shoulders of the prosecution; to prove the guilt of the accused beyond reasonable doubt. Viscount Sankey L.C H.L.(E)* WOOLMINGTON v DPP [1935] A.C 462 pp 481 puts it more subtly;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception...No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

Count One

10. Section 306(a) and 306(b) of the Penal Code provides as follows:

> " A person who -
>
> (a) Breaks and enters a school house, shop, warehouse, store, office, counting house, garage, pavilion, club, factory or workshop or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor or a building which is adjacent to a dwelling house and occupied with it but is not part of it, or any building used as a place of worship, and commits a felony therein; or
>
> (b) Breaks out of the same having committed any felony therein; is guilty of a felony and is liable to imprisonment for seven years".

11. The Prosecution witness PW1 testified that the Appellants broke into his shop with the aim of gaining access to the shop that belonged to PW2 (a neighbouring shop). He confirmed that nothing was stolen from his shop but he found clothes belonging to a person not before this Court and chewed khat on his floor. On perusing the CCTV footage for the CCTV camera that was connected to PW2's shop he identified the 1st, 2nd and 4th Appellants. PW2 testified that prior to the incident, he had known the 1st, 2nd and 4th Appellants and that he was able to recognize them. PW3 testified that he knew PW2 as the owner of Oasis Electronics and further told the Court that he knew all the Appellants prior to the incident and that he saw the PW2's shop getting broken into while on his way to work. He further testified that he was able to view the CCTV footage and was able to recognize the 3rd and 4 Appellants. PW4 testified that he knew the 4th Appellant prior to the incident and that he saw PW2's shop getting broken into on that material day, and that he was amongst the individuals that viewed the CCTV footage. Finally, PW5 testified that prior to the incident, he had known the 3rd and 4th Appellant and that he saw them break into PW2's shop on that material day and that he watched the CCTV footage and was able to recognize them.

12. Each of the witnesses narrated on how they knew the Appellants prior to the incident and that they were able to recognize them from the CCTV footage in addition to most of them seeing them in the act.

13. Before addressing the question of identification, it is important to recall that the quality of a witness' memory may have as much to do with the absence of other distractions as with duration. Human memory is not full proof. It is not like a video recording that a witness needs only to replay to remember what happened. The fundamental aim of eyewitness identification evidence is reliably to convict the guilty and to protect the innocent.

14. This is a case of video recording, eye witnesses and Recognition Evidence. Recognition Evidence is the evidence from a witness that he or she recognizes a person or object as the person or object that he or she saw, heard or perceived on a relevant occasion. The Prosecution witnesses were able to recognize the Appellants.

15. PW6 produced in Court the video recording from cameras 1, 7, 8 and 3 as P. Exhibit 4-P. Exhibit 7 and the metal rod that was used to break into the shops as P. Exhibit 8.

16. The Appellants did not produce substantive evidence to cast any doubts on the evidence adduced by the Respondent.

17. Under this Count, i concur with the holding of the trial Court that the offence of breaking into a building and committing a felony contrary to Section 306 (a) of the Penal Code against the Appellants was well proved beyond reasonable doubt by the Respondents.

Count Two

18. Section 308(1) of the Penal Code provides thus;

> " Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years."

19. Pursuant to the Court of Appeal case of Manuel Legasiani & 3 others v Republic [2000] eKLR the Court defined the offence as follows;

> " The word 'Preparation' is not a term of art. In its ordinary meaning it means "the act or an instance of preparing" or "the process of being prepared". This is the meaning ascribed to the word "Preparation" in the Concise Oxford Dictionary, Eighth Edition. To prove the offence in question some overt act, to show that a felony was about to be committed, has to be shown. Mere possession of a fire-arm not coupled with such an overt act is not an offence under section 308(1) of the Penal Code."

20. In P v Murray (14 Cal. 159) it was held that:

> " Preparation consists in devising or arranging the means or measures for the commission of the offence; the attempt is the direct movement toward the commission after the preparations are made."

21. In view of the foregoing judicial precedent, it is intrinsic that the Prosecution proves the felonious intent on the part of the 3rd and 4th Appellant or the preparation to execute a felony. This can be seen from the circumstances under which the Appellants were arrested. The phrase "dangerous or offensive weapon" is not defined in section 308 of the Penal Code or in section 4 – the interpretation section of the Penal Code. Section 89(1) of the Penal Code creates the offence of possession of a firearm or other "offensive weapon" etc and section 89(4) of the Penal Code defines "offensive weapon" for purposes of section 89 as meaning:

> " any article made or adapted for use for causing injury to the person or intended by the person having it in his possession or under his control for such use".

22. In the case of Mwaura and Others v Republic [1973] EA 373 the High Court in dealing with the question whether a panga, an iron bar, a wheel spanner, a king shaft, screw driver, a stone and a chisel were "dangerous or offensive weapon" for the purposes of the offence of preparation to commit a felony under section 308 (1) of the Penal Code held at page 375 ;

> " In our view "dangerous or offensive weapons" means any articles made or adapted for use for causing injury to the person such as a knuckleduster or revolver or any article intended, by the persons found with them for use in causing injury to the person".

23. It can therefore be argued that, although a metal rod is not made for purposes of causing injury to a person, it can suffice to be a dangerous weapon in terms of section 308 of the Penal Code if the 3rd Appellant in wielding it in the course of burglary intend to use it for burglary or causing injury to any person.

24. PW2 testified that in reference to camera 8, it showed the Appellants breaking into his shop and the 1st person to gain access, on success, was the 3rd Appellant and that it was the other witnesses who identified him. The second one to enter was the 4th Appellant and that he had known him as his neighbour and that he was also referred to as Scorpion. He told the Court that the weapon was recovered in the home of the 3rd Appellant. PW6, on the other hand testified that he recovered the metal rod that was used to dig and break into the shop from the house of the 3rd Appellant and proceeded to produce the same in Court as P. Exhibit 8.

25. I believe the Prosecution did adduce evidence which proximate the possession of the dangerous weapon with the commission of a felony. I am therefore satisfied that the metal rod which the 3rd Appellant had in this case was intended to be used and was used to commit a felony.

26. The 3rd and 4th Appellants did not adduce substantive evidence to cast any doubts on the evidence adduced by the Respondent.

27. I therefore uphold the holding of the trial Court under this Count.

Count Three

28. Section 339(1) of the Penal Code provides that any person who wilfully and unlawfully destroys property, commits a felony, and shall upon conviction, if no other punishment is provided, be liable to imprisonment for five years.

29. In Kiilu & Another v Republic [2005]1 KLR 174, the Court of Appeal stated thus:

> " An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> 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 findings 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."

30. I agree with the finding of Ngenye Macharia J (as she then was) in Wilson Gathungu Chuchu v Republic [2018] eKLR that under the above definition, the elements of the offence may be dissected

as proof of ownership of the property; proof that the property was destroyed or damaged; proof that the destruction or damage was occasioned by the accused; and proof that the destruction was wilful and unlawful.

31. I reviewed the availed prosecution exhibits video recordings (camera 3 and 8) and it was evident how the 3rd and 4th Appellants were trampling on the smart television sets as they gained vast access of PW2's shop and even breaking cabinets at the shop. It is elaborate that the prosecution was able to establish ownership of the property, the property was destroyed or damaged and that that the destruction or damage was occasioned by the 3rd and 4th Appellants. The destroyed Tv sets were produced in Court as P. Exhibits No. 13-16. Also, the Certificate of installation of the CCTV cameras was produced as P. Exhibit 14.

32. The 3rd and 4th Appellants did not present substantive evidence to cast any doubts on the evidence adduced by the Respondent.

33. I therefore uphold the holding of the trial Court under this Count.

Count Iv

34. The principle is that if recently stolen goods are found in possession of an accused who cannot explain his possession, there is a presumption that the person is the thief or handler of the stolen goods. In Chaama Hassan Hasa v. Republic (1976) KLR 6, 10, the Court (Trevelyan & Hancox, JJ.) put the matter as follows:

> " [W]hat is generally referred to as the doctrine of recent possession, often expressed in this way: that where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (through not by way of retaining). But this doctrine does not apply to all the cases. What has been laid down is that, where it is proved that property has been stolen and very soon after the stealing the accused has been found in possession of it, it is open to the tribunal of fact to find him guilty of stealing, or of handling it by way of receiving: see R v Seymour (1954) 38 Cr App Rep. 68;

35. During his testimony, PW6 told the Court that at the 3rd Appellant's house they recovered a phone make ITEL which matched with the lost inventory of lost phones and the IMEI numbers given by PW2. He proceeded to produce the phone in Court as P. Exhibit 12.

36. The 3rd Appellant did not avail substantive evidence to cast any doubts on the evidence adduced by the Respondent and further failed to render an account of how the recently stolen goods came to his possession.

37. I therefore uphold the holding of the trial Court under this Count.

Count V

38. The offence with which the 3rd Appellant was charged with is defined by section 323 of the Penal Code, Cap 63, as follows:-

Section 323 – "Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected or having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court or how he came by the same, is guilty of a misdemeanour."

39. In Charo v. R. [1982] KLR 1 Muli J., (as he then was) summarized the ingredients of the offence under section 323 of the Penal Code thus:-

> " 1. The ingredients of a charge under Section 323 of the Penal Code are that a person must have been detained pursuant to Section 26 of the Criminal Procedure Code (Cap 75); the person must be charged with having in his possession or conveying anything reasonably suspected of having been stolen or unlawfully obtained; and the person must have failed to give an account to the satisfaction of the court of how he came by the thing so suspected to have been stolen."

40. During his defence hearing, the 3rd Appellant failed to sufficiently explain to the satisfaction of the lower Court how he found himself in possession of the items recovered in his house yet he was the one who led the Police and members of the public to his house. I am convinced that the Prosecution proved this Count beyond reasonable doubt.

41. A careful evaluation of the entire trial record leaves no doubt that the trial was conducted properly in accordance with the law and all the legal and procedural safeguards were observed. It follows that the argument citing violation of the appellant's constitutional rights are unmerited.

42. Flowing from my analysis and conclusions on all the issues discussed above, it is my finding that the trial Court did not misdirect itself in returning a finding of guilty. I find that the conviction is supported by evidence and hence, i see no reason to disturb it.

43. As for the sentence, it is noted that the Appellants were sentenced to serve for each count, and, the sentences to run concurrently. I have already found that the prosecution proved its case on the main charges beyond reasonable doubt and it is essential that the Appellants serve sentences under the same. It is trite that sentencing is the discretion of the trial court and that an appellate court should not be too eager to interfere with the same. It is noted that some of the appellants have been sentenced on the alternative counts. There is no hard and fast rule that a person cannot be sentenced on a main charge as well as the alternative charge. As the sentences imposed are not excessive and due to the fact that they have been ordered to run concurrently, Iam inclined not to interfere with them. The said sentences are neither harsh nor excessive in any way. The same are upheld.

44. The result of the foregoing observations is that the consolidated appeals lack merit. The same are hereby dismissed.

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

D. KEMEI

JUDGE

In the presence of:

Moses Wanyonyi 1st Appellant

Antony Masinde 2nd Appellant

Gideon Kituyi 3rd Appellant

Iddi Mohammed 4th Appellant

Mwaniki for Respondent

Kizito Court Assistant