Sakala v Republic (Criminal Appeal 225 of 2019)
[2022] KEHC 10711 (KLR) (Crim) (28 March 2022) (Judgment)

Neutral citation: [2022] KEHC 10711 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 225 OF 2019

DO CHEPKWONY, J

MARCH 28, 2022

BETWEEN

ENOCK BARAZA SAKALA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence by Hon. F. Mutuku (SRM) on 9th August 2019 in Kibera Chief Magistrate's Case No. 1098 of 2014)

JUDGMENT

1. The appellant, Enock Barasa Sakala, was charged, tried and convicted of five(5) counts of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The particulars of each count are as per the charge sheet.

2. On March 19, 2014, the appellant pleaded 'not guilty' on all charges and the case proceeded to a full hearing. The prosecution called nine witnesses while the appellant opted to give sworn evidence in defence and did not call any witness.

3. At the conclusion of the trial, the trial court acquitted the appellant on count I and proceeded to convict him on counts II, III, IV and V whereby he was to serve 35 years imprisonment in each of the counts. The sentences are to run consecutively. The appellant was aggrieved by the conviction and sentence, hence this appeal.

4. The appellant filed a petition of appeal together with a memorandum of appeal on October 17, 2019. He subsequently filed amended grounds of appeal on December 2, 2021 together with written submissions albeit without leave of the court. These grounds are as follows;

    a) That the learned trial magistrate erred in both law and fact in finding that the appellant was properly and positively identified by the prosecution witnesses notwithstanding that the prevailing conditions at the scene were not favorable for positive identification;

    b) That the testimonies tendered to establish the appellant's mode of arrest was ridiculed with doubts and was not enough to sustain a conviction as the prosecution failed to call the 'cashier';

    c) That the learned trial magistrate erred in both law and fact by failing to find that the prosecution witnesses narration of events was unbelievable and incomprehensible;

    d) That the learned trial magistrate erred in law by failing to appreciate the prosecution evidence was based on mere suspicion;

    e) That the learned magistrate did not consider the totality of evidence which was indeed doubtful in the circumstances;

    f) That the learned trial magistrate erred in both law and facts by failing to find that PW9 (investigating officer) did not conduct any investigation save for conducting the parade;

    g) That the learned trial magistrate erred in both law and facts by failing to appreciate that the prosecution had failed to prove its case to the standard required by law that is to prove beyond reasonable doubt

5. Briefly, on March 15, 2014, PW5, AC Adan Abdikadir has visited his brother Isaac Abdikadir Adan (herein referred to as PW4) at his Asas Supermarket where they were with employees and customers. That PW5 was at the entrance of the said supermarket when one of the men who had come to rob in the supermarket fired. He got into the supermarket and held one of the robbers from behind and a struggle ensued between them. It was in the process of this that another robber shot him on his right arm.

6. PW4, was in his office at the supermarket when he heard gunshots and he got out. He then met two men whereby one of them unleashed a gun and pointed it at his forehead. PW4 told court that by then his brother, Aden (PW5) had been shot on the right arm. That two of his customers a female and male were also shot whereby the female died at Kenyatta National Hospital while the male died on the spot. PW4 told court that two of his phones were stolen and PW5 was robbed of Kshs 17,000/= and one Nokia 2300 phone.

7. PW1, PC Daniel Muraguri was called to the scene where he found three people injured but the robbers had fled. They escorted the injured to hospital but two of them died. According to PW1 and PW3, Corporal Samwel Mureithi, on March 17, 2014, they received a report from one Aden who was working at the supermarket that he had seen two of the robbers. They rushed to where the two were and Aden identified the two men to them. They arrested the two men but recovered nothing from then.

8. PW3, Dr Andrew Kanyi, a pathologist, testified that on March 21, 2014, he performed a post mortem examination on the body of Stephen Simiyu Nganya who had been shot by unknown people at a supermarket and he produced a post mortem report which he filed and signed detailing the cause of the

said deceased's death as Exhibit P1. He also produced a post mortem report on behalf of Dr Waweru who had conducted a post mortem examination on the body of Hellen Okaya Atwete who had been shot at a supermarket as Exhibit P2.

9. PW7, Dr Zephania Kamau examined PW5 who had been shot and assessed the degree of injuries he sustained as grevious harm. PW9, Pauline Njoki conducted an identification parade where PW4 and Adan Ali were to identify the two suspects in the robbery incident. She testified that PW4 identified the appellant by touching him but Adan Ali did not.

10. The appellant was placed on defence and he stated in his sworn evidence that he was arrested at a market on March 17, 2014 by two police officers and taken to the police station where he was informed that they had robbed properties at Asas Supermarket. He denied the allegations. He said that he saw the complainants on February 15, 2014 at the identification parade.

11. After analyzing the evidence which was adduced before court by both the prosecution and defence, the trial Magistrate had this to say:-

> ' After carefully evaluating the evidence adduced by the prosecution and that of the defence as well as the submissions and authorities herein, I find the prosecution has proved count 2, 3, 4, and 5 against the accused beyond reasonable doubt. I proceed to convict him on the said charges under section 215 of the *Criminal Procedure Code*'.

12. At the hearing, both the appellant and the respondent chose to rely entirely on their written submissions.

13. In his submissions, the appellant singled out three issues for determinations in the appeal, being:-

    a) Whether the appellant stole money from PW4.

    b) Whether the appellant was properly identified as required by law.

    c) Whether the prosecution proved their case to the required standard of proof.

14. On whether the appellant stole money from PW4m the appellant submitted that he was arrested purely on suspicion and that nothing was recovered from him. It is his contention that suspicion cannot sustain a conviction however strong it may be.

15. With regard to whether he was properly identified as per the requirements of the law, the appellant submitted that the trial court misdirected itself in convicting him based on the evidence of PW5 and PW4 that they had identified him at the scene of crime without warning itself as to the existence of a possibility of mistaken identity as to the persons who robbed them. He pointed out that PW5 did not state that he did not mention in his evidence in chief that he identified him at the scene but only did so when cross-examined. That PW5 also testified that he was not able to know what the appellant had because he had been shot. As for PW4, it was the appellant's submissions that he was able to identify him by his voice.

16. The appellant submitted that the identifying witnesses did not come out clearly in their evidence as to how they were able to identify the assailants and there is no indication that they gave prior description of the robbers to anyone before the appellant's arrest. As for the identification parade, the appellant submitted that there was inconsistency in the evidence of the witnesses on where the same took place.

17. The appellant also submitted that there was dire need for corroboration to the scanty and flimsy evidence of the prosecution because one Adan, who was the cashier and identified him to the police

was not called as a witness. He contended that the only reason why the prosecution failed to avail its witnesses was because his evidence would have been adverse to it.

18. On the issue of whether the prosecution proved their case against the appellant to the required standards, the appellant submitted that the prosecution never ascertained where and how he was identified, hence his arrest. That there was no concrete evidence to prove the assertions by the prosecution and therefore it failed to prove beyond reasonable doubt that the appellant was involved in the robbery.

19. As for the sentence that was meted against him, the appellant submitted that the offences he was charged with were alleged to have been committed in the same transaction even though against different complainants and therefore the trial court ought to have imposed concurrent sentences against him instead of consecutive sentence. The appellant then urged the court to set aside the conviction and acquit him.

Respondent's submissions

20. The respondents through their learned counsel M/S Joy Adhiambo, submitted that the evidence of PW1, was corroborated by that of PW2 while PW4's evidence was corroborated by that of PW5.

21. She also submitted that PW4 and PW5's evidence confirmed that the two were able to identify the attackers during the incident and that PW4 identified the appellant whom he alleged he had met on the streets and engaged him in a conversation and later at the identification parade.

22. M/S Joy, counsel for the prosecution urged the court to find that the conviction and sentence against the appellant in all counts was sage and proper and dismiss the appeal for lack of merit.

23. This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the appellants. As was held by the Court of Appeal in the case of *Okeno v Republic [1972] EA 32* the Court of Appeal

therein stated as follows:

> ' An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M Ruwala v R [1957] EA 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see Peters vs Sunday Post [1958] EA 424.'

24. I have carefully considered the grounds of appeal, the entire evidence presented before the trial court and the written submissions filed by both the appellant and the respondent. I have also read the judgment of the learned trial magistrate.

25. Having done so, I find that three main issues emerge for determination. These are:

    a) Whether the appellant's identification was proper;

b) Whether the prosecution's case had been proved to the required standard of proof;

c) Whether the sentence imposed on the appellant was lawful

26. Turning to the first issue of identification, the appellant asserts that he was wrongly identified. However, the same is unsupported by any evidence. From the testimonies of PW4 and PW5, it is clear that the prosecution was able to place the appellant at the scene of the crime as he was positively identified by them.

27. In addition, the fact that the crime took place in a supermarket which was a well-lit area and was still in operation at the time and as such PW4 and PW5 were able to clearly see and identify the appellant. It is also clear from the evidence that PW4 spoke with the appellant during the ordeal. As such, there is no doubt in my mind that the appellant was at the scene of the crime. In this regard, I am guided by the decision in the case of *Mwaura v Republic [1987] KLR 645*, where the court held as follows:

> ' In cases of visual identification by one or more witnesses, a reference to the circumstances usually require a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light.'

28. Further in *Republic –vs- Turnball & Others [1976] 3 ALLER 549* the court highlighted the questions to be asked when it comes to the identification of a perpetrator by the victim. In this regard, the court noted that the following questions are critical:

a) How long did the witness have the accused under observations?

b) What was the sufficiency of lighting?

c) Was the observation impeded in any way as for example by passing traffic of group of people?

d) Had the witness seen the accused before and if so, how often?

e) Were there any special features about the accused?

f) How much time elapsed between the original observation and the subsequent identification to the police by the complainant when first seen and the actual appearance?

29. Taking into account the above factors, in my view, there was more than sufficient time and lightning for PW4 and PW5 to recognize and identify the appellant.

30. As regards the second issue, on whether the prosecution proved its case against the appellant beyond any reasonable doubt. The prosecution was under a duty to establish the elements of the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. section 295 of the *Penal Code* provides as follows: -

> ' Any person who steals anything, and, or 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.'

31. On the other hand, section 296 2) of the *Penal Code* further provides that:-

> ' If the offender is armed with any dangerous or offensive weapon or instrument, or is in the 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.'

32. Therefore, to prove an offence of robbery with violence under section 296(2) of the *Penal Code*, all that the prosecution was required to show was that the following ingredients were present at the time of commission of the offence: -

a. That the offender was armed with any dangerous or offensive weapon or instrument, or

b. That he was in the company with one or more other person or persons, or

c. That at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other violence to any person.

33. It is clear that the appellant was indeed armed with a gun which constitutes a dangerous or offensive weapon. This is confirmed by PW4 who testified that the appellant and his co-accused pointed the gun on his forehead.

34. There is also no doubt that the appellant was in the company of his co-assailants. This was confirmed by PW4 who stated that he was inside his office when he had a gunshot and got out when he was met by two men, one of whom pointed a gun to his forehead. Further PW5, also confirmed that he was at the entrance of the supermarket when two men entered the supermarket and fired a gun, as a trained officer, he went in and wrestled the man who had fired and as they were wrestling another man came from behind and shot him. Therefore, there is no doubt in that the appellant was in the company of the other co-accused person.

35. Further, during the incident, PW5 was shot and injured while two customers were also shot and died as evidenced by the post mortem reports on the court record.

36. In view of the foregoing, I am in agreement with the trial court's finding that the prosecution in this case proved its case against the appellant beyond any reasonable doubt. In my view the appellant was properly convicted.

37. Finally, on sentence, the appellant faulted the learned magistrate on imposing a consecutive sentence which in his opinion went against the proportional legal tenets of punishment and the objectives of sentencing. He thus urged the court to set aside the consecutive sentences and substitute the same with concurrent sentences.

38. The penalty prescribed by the law for the offence of robbery with violence is death. It is provided for under section 296 (2) of the *Penal Code* further provides that: -

> ' If the offender is armed with any dangerous or offensive weapon or instrument, or is in the 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.'

39. It is important to note that, an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive.

40. In *Shadrack Kipchoge Kogo v Republic Criminal Appeal No 253 of 2003*, the Court of Appeal stated the following on principles of sentencing:-

> ' Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred.'

41. Therefore, the question on whether the sentences imposed herein should run concurrently or consecutively have arisen. Section 14 of the *Criminal Procedure Code* provides as follows:

> ' (1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefore which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.'

42. The sentencing policy guidelines provides when sentences should run consecutively or concurrently as follows:-

7.13 Where the offences emanate from a single transaction, the sentences should run concurrently. However, where the offences are committed in the course of multiple transactions and where there are multiple victims, the sentence should run consecutively.

7.14 The discretion to impose concurrent or consecutive sentences lies in the court.

43. In the case of *Peter Mageria v Republic [1983] eKLR*, the court held that:-

> ' It has been said many times that where different offences form part of one transaction and are committed at the same time as was the case here then the sentences should be made to run concurrently unless there are exceptional circumstances for not doing so.'

44. In *Peter Mbugua Kabui –vs- Republic [2016] eKLR*, the court of appeal stated as follows:-

> ' As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.'

45. Therefore, although a court of law may impose a concurrent or consecutive sentence as per the circumstances of a case and the law permit. However, this discretion should be exercised upon defined principles of law as discussed above.

46. From the court record, the offences in issue were committed on the same day and in the same transactions but the trial court imposed consecutive sentences. In my view, the trial court erred in imposing consecutive sentences.

47. I thus agree with the appellant that his sentences ought to run from the date of arrest, which is March 17, 2014. I therefore find that the sentences meted against the appellant run concurrently and the same to run from the date of his arrest, being March 17, 2014.

Orders accordingly.

RULING DELIVERED VIRTUALLY at NAIROBI on this 28TH day of MARCH, 2022.

DO CHEPKWONY

JUDGE

In the presence of:

Appellant in person

M/S Kibathi counsel for the Respondent

Court Assistant - Jackline