Makokha v Republic (Criminal Appeal E083 of 2021)
[2022] KEHC 10798 (KLR) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10798 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E083 OF 2021

SN RIECHI, J

MAY 31, 2022

BETWEEN

GODFREY WAFULA MAKOKHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal arising from the conviction and sentence by Hon R. Oigara (SRM) in original Kimilili PMC's Criminal Case No. 199/2008 delivered on 8th July, 2009)

JUDGMENT

1. The appellant alongside 2 others were charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* the particulars being that on the nights of 4th and 5th April, 2008 at about 9.00 p.m at Kimilili Township, Kimilili Location in Bungoma North District, Western Province jointly with others robbed Omar Nyukuri Karandini one mobile phone make Siemens C35, identity card, Vigilant Certificate, Bank Plate Card, Employers Card, N.H.I.F Card, one wallet, voters card and cash Kshs 8,000/= all valued at Kshs 12,000/= and at or immediately before or immediately after the time of such robbery, wounded the said Omar Nyukuri Karandini.

2. In the ensuing trial that saw 5 prosecution witnesses testify; PW-1, the complainant stated that on 4th April, 2008 while on his way home on foot, he was accosted by 3 assailants near the office of the chief who took away his wallet and mobile phone. A passing motorcycle forced the assailants to run towards the market. He recognized them from the light of the motorcycle and their voices where he reported the incident at Kimilili Police Station and later treated at Kimilili District Hospital where the P3 form was filled.

3. PW-2 PC George Mandu was the investigating officer in the matter while PW-3, a vigilant helped in recovery and retrieval of the wallet from a pit latrine within the appellant's compound.

4. PW-4, a Clinical Officer from Kimilili Hospital produced the P3 form showing that the complainant had a swelling and tenderness on the right side of the face while PW-5, Hassan Wafula had bought the mobile phone stolen from the appellant.

5. The appellant was put on his defence and elected to give unsworn evidence. They were subsequently convicted and sentenced to suffer death thus the appeal which is anchored on the following grounds.

    1. That the trial magistrate erred in law and fact by failing to find that the appellant was not positively identified by way of recognition.

    2. That the learned trial magistrate erred in law and fact by failing to find that the appellant was not armed with any dangerous or offensive weapon.

    3. That the learned trial magistrate erred in law and fact by finding that the appellant wounded and or threatened the complainant.

    4. That the learned trial magistrate erred in law and fact by not considering that the prosecution did not prove the ingredients of robbery with violence beyond reasonable doubt.

    5. That the learned trial magistrate erred in law and in fact by convicting the appellant on inconsistent and contradictory evidence.

    6. That the learned trial magistrate erred in law and in fact by not considering that the appellant was not supplied with witness statements.

    7. That the learned trial magistrate erred in law and in fact by failing to ask the appellant whether he objected to the production of the P3 form by PW-4 who was not the treating doctor.

    8. That the learned trial magistrate erred in law and in fact by meting an excessive sentence.

    9. That the learned trial magistrate erred in law and in fact by failing to consider the age of the appellant at the time of his arrest.

    10. That the learned trial magistrate erred in law and fact by failing to call for a probation officer's report before sentencing the appellant.

6. By directions of the court, the appeal was canvassed by way of written submissions. The appellant through Ms Wakoli counsel submits as follows;

7. On the issue of whether there was proper recognition of the appellant, counsel submits that the complainant connected the appellant with the robbery on account of his wallet being recovered in the accused person's family home since the complainant could not identify which of the 3 assailants hit him with the gumboot.

8. On whether the proceedings were defective, it is submitted that when the complainant first testified before the consolidation of charges, he had not been supplied with witness statements despite applying for them, there is no evidence that the same were supplied. This infringed on his rights under article 50 and 35(1)(b) of *the Constitution*. The case of *Jacob Mwangoma Mwandigha vs Republic* (2017)eKLR has been cited in support of this proposition. Counsel also taken issue with the manner of production of the P3 form filled by one Doctor Eric Soita and produced by another person. On this, counsel contends that the court ought to have inquired from the appellant whether he objected to its production.

9. On whether the appellant was guilty of the charge, counsel submits that the link between the appellant and the crime was that he sold the complainant's phone to PW-5 and that the complainant did not

testify of the appellant having been armed with the panga which was allegedly recovered from the appellant's house.

10. On the fourth issue, counsel submits that the trial court handed down the maximum sentence against the appellant. She urges the court to consider the decision in *William Okungu Kittiny vs Republic* (2018)eKLR for the proposition that the sentence under section 297(2) is discretionary.

11. The respondent through Ms Omondi submits as regards identification that in as much as the appellant was not identified by recognition, there was strong circumstantial evidence linking him with the offence through the recovery of the Siemens phone that was lost during the incident and subsequently sold to PW-5 by the appellant. That when the appellant was put on his defence, he never testified on how he came by the said phone.

12. As regards whether the proceedings were defective, counsel submits that there is no evidence that the appellant raised the issue of lack of witness statements when the trial commenced. That the appellant never objected to the production of the P3 form thus there was no infringement on his rights.

13. On whether the appellant was guilty of the offence charged, counsel submits that the prosecution established all the necessary ingredients of the offence.

14. On the issue of sentence, it is submitted that the trial court meted out a proper sentence and, in any case, the decision in *Francis Karioko Muruatetu & anor Vs Republic*(2017) eKLR applies only to offences under section 203 and 204 of the *Penal Code*.

15. In a first appeal, the duty of the court as was held in *Mark Oiruri Mose vs. R* (2013) eKLR is; to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

16. Upon careful scrutiny of the record as well as the submissions, the only issue in this appeal is whether the prosecution proved its case to the required standards. In doing that, the court will analyze the issues in chronology as identified by counsel.

17. The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code* which provides;

> 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.

18. The essential ingredients under the section therefore as held in *Oluoch – Vs – Republic* [1985] KLR are:

    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.

19. The first issue is that of recognition. It is clear from the record that the offence took place at night around 9.30 p.m when the complainant was accosted by 3 people on his way home. It is apparent from the record that it was dark and the only light was that of a passing motorcycle which shone on their faces prompting the assailants to run towards the market.

20. The complainant stated that he recognized the assailants by their voices. He stated that Wekesa Makokha was his neigbour at home, Wanjala was staying with his uncle while he could not identify the third one.

21. Having perused the trial court record, the court notes that the only evidence on identity of the assailants is that of the complainant. On this issue, the court in *Abdullah bin Wendo Vs. Republic* (1953) 20 EACA 166, stated;

> That evidence of identification should be tested with great care especially when it is known that conditions favouring a correct identification were difficult. The witness who testified that they could identify an appellant in circumstances of shock and fear could easily be mistaken because the duration of observation was short. .....

22. The court proceeded to hold;

> Subject to certain well-known exceptions, it is trite law that a fact may be proved by a testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt from which a Judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can safely be accepted as free from the possibility of error.

23. Similarly, in *Michael Nganga Kinyanjui vs Republic* (2014) eKLR the Court of Appeal held;

> Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification.

24. Under the doctrine of recent possession, the court is entitled to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal stated the essential elements of the doctrine in *Eric Otieno Arum Vs Republic* (2006) eKLR, thus;

> In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

25. Once this has been established, the accused bears the burden of how he came by the item recently stolen. This does not however exonerate the prosecution from establishing its case beyond reasonable doubt. This was explained in *Paul Mwita Robi vs Republic* (2010)eKLR, where it was observed;

> Thus while the law is that generally in criminal trials, the prosecution has the burden of proving the case against the accused throughout and that burden does not shift to the accused, however, in a case where one is found in possession of a recently stolen property like in this case, the

evidential burden shifts to him to explain his possession. That explanation only needs to be a plausible one but he needs to put it forward for the court's consideration.

26. Even if the appellant would say that he never participated in the robbery, there is no way the wallet could be found in a toilet within a compound he lives in. Secondly, the phone that was stolen was sold by the appellant to PW-5. All these taken together points to one conclusion; he was part of the gang that robbed the complainant so that even if he was not positively identified at the scene of the crime, there is ample evidence connecting him with the offence. The appellant did not explain how he came by the mobile phone he sold to PW-5 that had been violently robbed from the complainant the previous night.

27. On the second issue of whether the proceedings were defective, it is true as pointed out by the appellant's counsel that the appellant prayed to be supplied with witness statements. Subsequently, the trial proceeded without a mention of whether they were supplied or not.

28. On this issue, Mativo J in *Joseph Ndungu Kagiri V Republic* (2016) eKLR where the learned judge held:

> The next issue for determination is whether failure by the prosecution to provide the accused persons with witness statements amounted to a violation of their constitutional rights to a fair trial. It is not disputed that the accused persons were not provided with witness statements prior to the trial or during the trial yet all the four prosecution witnesses testified and the trial magistrate never addressed himself to this issue. Counsel for DPP Mr. Njue submitted that no prejudice was occasioned to the accused persons because the record shows that they ably cross-examined all the prosecution witnesses.

29. This court is alive to the fact that the appellant has constitutionally entrenched rights protected under article 50 to be tried fairly. The court appreciates that an accused is entitled to be supplied with the evidence that prosecution intends to rely on before-hand so that he can cross examine as well prepare his defence.

30. The court further appreciates that the appellant indeed raised the issue to be supplied with witness statements and an attendant order in those terms was made. There is no evidence however that the appellant followed up on the issue with the court or the prosecution. He did not raise the issue again in the trial court only to for the allegation to surface in this appeal.

31. As regards the production of the P3, PW-4 stated that he wished to produce the P3 form was signed by one Dr. Eric Soita who was said to be attending a workshop in Kakamega on that day and would not attend court without delay. The witness stated he had worked with the said Soita for 3 years before being transferred to Naitiri. The record doesn't show that the appellant raised any objection at the time. Clearly, the court finds this limb an afterthought.

32. In the circumstances, the court finds no merit in this ground and the invitation to declare such proceedings defective is hereby declined.

33. On whether the appellant committed the offence, as discussed in the preceding paragraphs, in as much as the appellant was not positively identified due to darkness, the items recovered after the ordeal points to his participation in the crime. The preceding analysis therefore puts to rest this issue.

34. On the sentence handed down, In *James Kariuki Wagana vs Republic* (2018) eKLR, Prof. Ngugi J observed that;

> ....while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest

and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he "unnecessarily injure the Complainant during the robbery" and was not armed during the robbery.

35. The learned judge then reduced the appellant's sentence of death to imprisonment for fifteen years, from the date of conviction.

36. In the circumstances of this case, taking into consideration the nature of the offence, the fact that the appellant did not tender in any mitigation and all the other factors taken into consideration, it is worth noting that the sentence handed down is still legal sentence in our land.

37. Under the sentencing policy guidelines, the court ought to mete out sentences that meet objectives such as retribution deterrence, rehabilitation, restorative justice, community protection and denunciation.

38. The sum total of the above analysis is that I find no merit in this appeal which is hereby dismissed.

DATED AT BUNGOMA THIS 31ST DAY OF MAY, 2022.

S. N. RIECHI

JUDGE