Mutwiri v Republic (Criminal Case 61 of 2020)
[2022] KEHC 11503 (KLR) (31 May 2022) (Judgment)

Neutral citation: [2022] KEHC 11503 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL CASE 61 OF 2020

EM MURIITHI, J

MAY 31, 2022

BETWEEN

JOSPHAT MUTWIRI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

[1] The appellant, Josphat Mutwiri "Alias Godfrey Mutwiri, Duncan Kimathi" Anampiu, was charged with robbery with violence c/s 296 (2) of the *Penal Code* on particulars that –

> "on the 22nd day of April 2019 at around 23.00hrs at Nkubu village, Anjuki location in Tigania Central Sub-County, robbed Fridah Kaimuri of her mobile phone make Techno SA6 valued at Ksh.6,339/= and at, immediately before the time of such robbery used actual violence to the said Fridah Kaimuri by grabbing her on the neck using his hand and biting her on the left cheek."

[2] Upon full trial, the trial court, found the minor charge of simple robbery proved and convicted the appellant under section 296 (1) of the *Penal Code* finding a "saving grace for the accused [in] that the complainant suffered no profound injuries in her unfortunate encounter with him". The appellant was sentenced to imprisonment for 5 years, the court taking into account his previous conviction for escape from custody and sentenced to imprisonment for 2 years in criminal case no. 2354 of 2015.

[3] Of the three witnesses called by the Prosecution, PW1 Fridah Kaimuri the complainant, as the eye witness, must be the one whose is evidence is relied on in the event of any inconsistency with that of the other witnesses, the police Investigation Officer, Stanley Kipchumba, PW2 and he clinical officer, Martha Njeri Murumba, PW3 who examined the complainant 10 days after the incident.

[4] PW1 said of her ordeal:

> "On 22/4/2019 I was heading home from work around 11.00pm and as I opened my gate someone grabbed me by my neck and demanded for all my valuables. I dropped my cellphone and the assailant picked it up and fled. It was a Techno cellphone which I had bought for Ksh.8,000/. I managed to see my assailant one Mutwiri with the aid of security lighting nearby and I also heard his voice.
>
> ....
>
> Accused is someone I knew quite well because he was my regular customer at Tappas bar."

[5] The embellished evidence as to the accused having "accosted from behind and grabbed her neck, punched here in the mouth and bitten her left cheek" as testified by Investigating Officer and apparently supported by medical evidence of PW3 that "the patient had a swollen tender bruised anterior neck and human bite marks on her left cheek" (on examination 10 days after the fact), is corroborative of the only evidence given by PW1 that she was assaulted by being grabbed on her neck. This court would agree that the assault and injury was not aggravated at all, only amounting to simple robbery.

[6] The ingredients of the aggravated robbery with violence under section 296(2) of the *Penal Code* requiring attack by dangerous weapon, or by more than one person, and the striking, beating or wounding any person in the course of the robbery cannot be proved on the evidence herein.

[7] As regards the identification of appellant as the assailant, the complainant's evidence was that she knew the attacker as her patron at her Tappas bar invoking the principle of recognition upon seeing him by security lighting and voice. The court notes that the circumstances for identification of appellant in security lighting were not difficult, and in any event, the evidence of PW1 was one of recognition rather than mere identification (see *Anjononi & others v. Republic* [1980] KLR 59).

[8] In addition, and without lightening the Prosecution's burden of proof, the appellant confirmed being known to the complainant when he said in his defence that "I owed the complainant Ksh.400/- on account of alcoholic drinks that I had consumed in her bar and that is why she has levelled these false charges against me."

[9] The complainant's recognition evidence is carefully weighed against the accused's Alibi defence in consideration with the evidence as a whole (see *Wang'ombe v. Republic* (1980) KLR 149, [1976-80] KLR 1683; *Karanja v. Republic* [1983] KLR 501 and *Kiarie v. Republic* [1984] KLR 739 to establish whether a reasonable doubt is raised.

[10] The court considers the appellant's defence was raised as an afterthought as it was not taken early in the proceedings. Indeed, in his cross-examination of the complainant, the only defence alluded to by his questing was that he had got into a dispute with the complainant over some unpaid beer eliciting the answer "It is not true that I have fabricated this case because of a dispute over beer that I sold to you that night." The alibi defence, however, is rejected as an afterthought for its incoherence with the previous statements.

[11] In addition, again without diminishing the Prosecution burden of proof, the defence appeared to concede in cross-examination as having been with the complainant on the night of the alleged robbery incident as follows:

> "It is true that in my statement I said I was enjoying drinks at Tapas bar. I assaulted Kaimuri because of splashing water on me on April 22, 2019. It is therefore true that I was at Kaimuri's bar on the date and time stated in the charge sheet. I told police that I owed Kaimuri money. I was not with Kaimuri at the time stated in the charge sheet."

[12] The evidence of the complainant Fridah Kaimuri, PW1, recognising the appellant whom she knew well as a customer at her Tappas bar as the attacker is cogent, and the court although cautious in convicting on the identification evidence of a single witness as counselled in *Roria v. R*. [1967] E.A 583, 584 D – H, citing *Abdala Wendo and another v. R* (1953) 20 E.A.C.A. 166) finds that the circumstances of the identification were conducive to positive identification especially on the basis of recognition, and the alibi set up by the accused did not raise any reasonable doubt. This court feels satisfied that in all circumstances it is safe to act on the identification as the attacker through of the appellant recognition by the complainant PW1.

[13] For the reasons set out above, the court is satisfied that the Prosecution has proved the offence of robbery under section 296(1) of the *penal Code* and consequently, agree with the comprehensive and incisive consideration by the trial court of the evidence presented in the trial. The trial court properly invoked section 179 (2) of the *Criminal Procedure Code* to convict for the minor cognate offence of robbery under section 296(1) of the *Penal Code* even though the appellant had been charged with robbery with violence c/s 296(2) of the *Penal Code*.

Sentence

[14] On the sentence, however, on the principle of appellate interference of the sentencing discretion of the trial court as held in *Wanjema v. R* (1971) EA 493. I consider that owing to the modest value of the stolen items (See *Mathai v. R* (1983) KLR 422 and *Ambani v. R* (1990) KLR 161) at Ksh.6339/- value of the Techno mobile phone as stated in the charge sheet dated June 4, 2019, and the non-aggravated nature of the attack, the sentence of imprisonment for 5 years, even considering the previous record of conviction for escape from lawful custody, is still excessive. This is so especially considering that the sentence in this trial would, in accordance with section 37 of the *Penal Code*, take effect upon completion of the imprisonment for two years.

[15] The sentence of imprisonment for 5 years shall be reduced to one of three (3) years taking effect in terms of section 37(2) of the *Penal Code* upon completion of the sentence in the previous conviction for escape from lawful custody.

Orders

[16] Accordingly, for the reasons set out above, the appellant's appeal from conviction for the offence of robbery under section 296(1) of the *Penal Code* is dismissed.

17. The appellant's appeal from sentence is allowed to the extent that pursuant to section 354(3) (b) of the *Criminal Procedure Code*, the sentence of imprisonment is reduced to a sentence of three (3) years.

18. As the Proceedings of the trial court of 19/12/2019 show that accused was serving imprisonment sentence there shall be an order in terms of section 37 (2) of the Penal Code that the sentence of imprisonment for three (3) years in this trial shall commence upon completion by the appellant of

the sentence in the previous conviction, as the offences of escape from lawful custody and the present offence of robbery were not committed as part of the same criminal transaction.

Order accordingly.

DATED AND DELIVERED ON THIS 31ST DAY OF MAY, 2022.

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

M/s Nandwa,Prosecution Counsel for the DPP.