Mwachi v Republic (Criminal Appeal 132 of 2019)
[2022] KEHC 11658 (KLR) (25 May 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 132 OF 2019

EKO OGOLA, J

MAY 25, 2022

BETWEEN

ALBERT MWACHI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being appeal from the Judgment of CMCR. No.4379 of 2017 by Hon. Naomi Wairimu-PM)

JUDGMENT

Inttroduction & Background

1. The appellant was charged with the offence of robbery contrary to Section 295 as read with Section 296(2) of the Penal Code, the particulars of which were that on the 16th day of October 2017 at Lelmolok Village in Kesses Sub-County within the Uasin Gishu County, jointly with others not before Court, being armed with a dangerous weapon namely an AK-47 rifle robbed Susan Jepkemoi Bittok of Safaricom airtime, credit cards of assorted denominations, four pairs of gumboots, four pairs of rubber shoes, a pair of leather shoes, three pangas, three pliers, two boxes of biscuits all valued at Kshs 17,350/= and money the sum of Kshs 42,700 the property of the said SJB.

2. He pleaded not guilty to the charges and was tried with the prosecution calling 7 witnesses and thereafter convicted and sentenced to serve 30 years imprisonment. Being dissatisfied with the said conviction and sentence, the appellant filed this appeal and raised the following grounds of appeal:

    a. That the learned trial magistrate erred in law and fact in conducting proceedings that violated the right of the appellant as per provisions of the laws of Kenya hence null and void

    b. That the learned trial magistrate erred in law in arriving at a decision basing on evidences that were full of contradiction without analyzing the same.

c. That the trial magistrate erred in both law and facts in delivering her verdict in the matter that was poorly investigated.

d. That the trial magistrate erred in both law and fact in acting basely by relying on the prosecution evidences without considering his alibi defence.

e. That the trial magistrate erred in both law and facts in considering extraneous factors in the decision making.

f. That the data delivered by PW7 was not accompanied by certificate neither an operator from Safaricom thus was against the provision of the *evidence act* hence null and void.

g. That the sentence imposed is harsh and excess in the circumstances putting into consideration that the sentence is not remittable.

h. That more grounds to be adduced later.

3. When the appeal came up for hearing, the appellant who was not represented, filed supplementary grounds of appeal and written submission which he relied upon. The respondent also filed its submissions through Emma Okok, prosecution counsel.

4. In the supplementary grounds of appeal, the appellant raised the following grounds.

a. That the trial magistrate erred in law and facts by failing to consider that the evidence adduced was full of contradictions.

b. That the trial court erred in law and facts when it failed to note that the charge sheet was defective that could not hold such a harsh penalty.

c. That the trial magistrate erred in law and facts when it failed on the totality to notice that the investigation was poorly done not to be relied on.

d. That the trial magistrate erred in law and fact when she arrived at the conclusion of a harsh penalty even after having in mind that the alleged exhibits were not availed before court to support the prosecution evidence.

e. That the trial magistrate erred in law and facts when she failed to note that the identification was not proved at any level hence breaching Chapter 46 of Police Standing orders that demand identification parade to be conducted.

f. That the matter herein lacks cogent and merit reason to safeguard conviction.

Submissions

5. In his written submissions, the appellant contended under grounds 1 and 2 of the supplementary grounds of appeal that there was lots of contradiction in the prosecution case. Notably, he submitted that PW1 in evidence noted that her phone was stolen but proceeded to note that she called her husband. Accordingly, the appellant submitted that it is not discernable how PW1 could call the husband yet her phone had been stolen.

6. The appellant also submitted that there are contradictions as to the time the culprits spent at the scene of crime. For example, he noted that PW1 testified that the attackers were in the house for about 1 hour while PW2 stated that he lay on the ground until about 10.00p.m and PW4 stated that they took about 3 minutes then they left. He therefore posed who among the three is to be believed?

7. The appellant further submitted that there was contradiction as to what the appellant was carrying during the attack. He pointed our that whereas PW3 testified that the appellant was carrying a torch he changed the same on cross and noted that the appellant was in fact carrying a gun. He also submitted that PW4 also testified that the appellant had a torch and not a gun. The appellant therefore questioned the truthfulness of the evidence and submitted that the contradictions in the evidence suffice to make the conviction unsafe.

8. The second limb of his submissions was that the charge sheet was defective since it showed that he was arrested on the 14th of November 2017 whereas he was taken to the police station on the October 17, 2017. He thus noted that any amendments to the charge sheet ought to have been done before the close of the prosecution case. Failure to do so in his view renders the conviction invalid.

9. On grounds 3, 4 and 5, the appellant submitted that the investigations conducted were shallow. In particular, it was his position that the prosecution failed to prove its case beyond all reasonable doubt since the prosecution did not consider factors such as the weapon used, the light, the exhibits, whether the ID parade was conducted and recognition of the appellant. he further submitted that whereas PW5 testified that the appellant was arrested on the October 17, 2017, PW6 testified that it was on the November 14, 2017. He therefore challenged their evidence arguing that since they cannot corroborate the other, it is unsafe to affirm the conviction.

10. Finally, the appellant submitted that the failure to conduct the identification parade is fatal to the prosecution case since his identification/recognition was not conclusive and therefore urged court to allow the appeal.

Respondent's Submissions

11. The state through prosecution counsel Emma Okok submitted that the conviction and sentence was proper since the prosecution proved its case to the required standard.

12. The state submitted that the appellant was well identified by PW1, PW2, PW3 and PW4 who were present during the attack and were clear that the lights were on during the incident. It was submitted that PW1 identified the appellant as the person whom who was talking with during the robbery and as the person who stood next to her as she made the Mpesa transactions. PW3 also stated that he saw the appellant with a torch and on cross, with a gun. The respondent also submitted that the time the robbers spent at the crime scene was sufficient for the witnesses to have positively identified them. As regards contradictions on the evidence of identification, the state submitted that the same did not go to the root of the case.

13. On the issue of defective charge sheet, the respondent conceded that the same was duplex but submitted that the appellant was not prejudiced at all as he was able to understand the charge facing him and he cross-examined the witnesses. The state thus relied on the case of Paul Katana Njuguna vs Republic [2016] eKLR noting that the defect in the charge was not fatal and was curable under Section 382 of the *Criminal Procedure Code*.

14. On the issue of different dates of arrest, the state submitted that this error does not make the charge sheet defective since the particulars of the charge revealed an offence known in law.

15. On the issue of poor investigations, the state submitted that it was able to prove that the complainant was robbed and that the appellant was present at the scene. They therefore submitted that the offence of robbery with violence was proved beyond all reasonable doubt.

16. Finally, on sentence, the state submitted that the appellant and his accomplices were armed with a gun which could easily have caused death. It was their submission therefore that the sentence was sufficient as a deterrent one and urged court to confirm the same.

Determination

17. Having set out the respective parties' positions as above, it is my most considered view that the issues for determination are as follows:

    i. Whether the prosecution proved the charge against the Appellant beyond any reasonable doubts; and if so,

    ii. Whether the sentence meted upon the Appellant by the trial court was appropriate.

18. This is a first appeal. The law is well settled that the first appellate court has a duty to re-evaluate the evidence adduced before the trial court, analyse it and come up with its own independent finding. The court is however supposed to make allowance for the fact that the trial court had the benefit of seeing and hearing the witnesses and assess their demeanour. In *Kiilu & Another v Republic [2005]* 1 KLR 174 the Court of Appeal stated that:

> " 1. 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.
>
> 2. 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; it must make its own findings. 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."

19. See also *Okeno v Republic [1972]* EA 32 on the same subject.

20. In this case, the trial magistrate found that the prosecution had proved the charges against the Appellant to the requisite standard of beyond any reasonable doubt. This court is therefore called upon to consider afresh the evidence on record while considering the issues raised in this appeal. Below is analysis of the evidence that was adduced before the trial court and the determination of the issues raised in the grounds of appeal.

Whether the prosecution proved the charges against the Appellant beyond any reasonable doubts.

21. Grounds of appeal 1,2,3,4 and 5 are dealt with under this heading.

22. The appellant was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the *Penal Code*. The appellant submitted that the charge sheet was defective for being duplex but also for showing a different date of arrest compared to what the investigating officer noted. That is, the appellant argued that the charge sheet indicates that he was arrested on the November 14, 2017whereas PW5 noted that he was arrested on the October 17, 2017. To the appellant, this contradiction made the charge sheet defective.

23. On the other hand, the state admitted that the charge sheet was duplex but submitted that the same is not fatal since no prejudice occurred to the appellant.

24. A good charge is spelt out under section 134 of the *Criminal Procedure Code* as follows:

> "Every charge of information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

25. The above provision was expounded in the case of *Sigilani vs Republic [2004]* 2KLR 480 where it held:

> "The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

26. Patrick Kiage in his book *Essentials of Criminal Procedure in Kenya, 2010*, LawAfrica at page 78 posits that any count that charges within it more than one specific offence is said to be bad for duplicity and is also said to be duplex. Accordingly, it is a fundamental mistake and not normally curable. The reason is that when a charge is duplex and an accused person goes through trial, the fairness of the process is fundamentally compromised as it is not clear to the accused what the exact charges that confront him are. As a result, he may not be able to prepare a proper defence and this is clearly prejudicial and may amount to a failure of justice.

27. In Laban Koti v Republic [1962] E.A 439, the court held that in deciding whether there is duplicity in a charge, the test is whether a failure of justice has occurred or the accused has been prejudiced.

28. In our instant case and as admitted by the respondent, the charge sheet was duplex. However, I agree with the prosecution that the same was not fatal since no prejudice occurred to the appellant. This is because the appellant knew very well the offence charged with, the same having been explained to him in a language he understood. In addition, he was able to see the witnesses testify and in fact cross-examined the said witnesses over the offence charged with. Furthermore, the particulars of the offence as described in the charge sheet are clear and unambiguous and disclose the offence of robbery with violence. It is this disclosure that allowed the appellant to be able to plead to specific having understood the same thus pleading not guilty.

29. The elements outlined in the particulars of the offence and which were read to the appellant constituted those of the offence of robbery with violence. Looking at the particulars of the offence it is clear that the same were not ambiguous in any way since the appellant duly pleaded to the charge and went ahead to cross – examine all the witnesses and finally tendered his defence. I do not see any prejudice that he suffered as a result and that if any such prejudice cropped up then the same was curable under section 382 of the Criminal Procedure Code. In this regard, I am persuaded by the decision of the Court of Appeal in the case of *Paul Katana Njuguna v Republic [2016]* eKLR where it held that as an offence of robbery with violence includes the elements of the offence of robbery, if the particulars of the charge sheet show the elements of the offence of robbery which are proved, then this is a defect that is not fatal and can be cured by the court under section 382 of the *Criminal Procedure Code*.

30. In addition, whereas the charge sheet differed with the testimony of PW5, the same is not fatal since there is no denying that the appellant was arrested by police and was put in custody until he was arraigned for the offence disclosed under the charge sheet.

31. Indeed, the trial court proceedings confirms the above and shows that the appellant took plea, fully cross-examined the witnesses and did not raise any complaint throughout the trial and went on to

tender his defence. I am therefore satisfied that there was no issue of confusion in the mind of the appellant as to the charge framed and the evidence presented against him. I have no doubt in my mind that he faced a charge of robbery with violence proper under section 296(2) of the Penal Code as the evidence tendered pointed to such a charge and not section 295 of the said Act and therefore, I find that he was not prejudiced in any way.

32. In any event if any such prejudice sufficed, then same was cured by Section 382 of the *Criminal Procedure Code* which provides as follows:

> "Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge proclamation, order, judgement or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice; provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

33. Considering that the appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*, it is instructive to reproduce the same hereunder. In particular, Section 296 (2) provides: -

> "296. Punishment of robbery
>
> (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."

34. What constitutes the offence of robbery with violence was well captured in the case of *Olouch v Republic [1985]* KLR where the Court of Appeal stated as follows: -

> "...Robbery with violence is committed in any of the following circumstances:
>
> The offender is armed with any dangerous and offensive weapon or instrument; or
>
> The offender is in company with one or more person or persons; or
>
> 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."

35. In the case of Dima Denge Dima & Others v Republic, Criminal Appeal No. 300 of 2007,it was stated that:

> "...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

36. In our instant case, PW1, the complainant/victim testified that on the October 16, 2017she was in her shop when three men, one of them armed with a gun robbed her in front of her children and worker PW2 and PW3 and PW4. At all times, all the three witnesses testified that the lights inside the shop were on and positively identified the appellant. In fact, PW1 testified that she clearly saw PW1 since

she spoke to him and the other robbers and further that the appellant at the time of the incident was standing next to her when doing the Mpesa Transaction while the others were busy robbing them.

37. PW2 Reuben Kipsigei corroborated PW1's testimony noting that they were attacked by 3 men at about 8.00pm and that the attackers came from outside. He testified that he was slapped to face the front and were pushed into the shop where the complainant was. He testified that he was tied with a rope and put to lie down where he lay until 10.00p.m. he confirmed that the lights outside were switched off but the lights inside the shop were still on. On cross examination PW2 confirmed that he saw the appellant on the day of the robbery and admitted to never having seen or met the appellant prior to the incident. He therefore confirmed the details as given by PW1 which leads credence to the fact that PW1 and PW2 positively identified the appellant as one of the attackers/robbers and that they were armed with a gun.

38. PW3, a minor also confirmed that he saw 3 attackers, confirming what PW1 and PW2 noted. He further testified that they were asking PW1 for money and directed them to lie down which they complied with. He also confirmed that they took away money, gumboots, soap and other items further corroborating PW1 and PW2's testimony. PW3 positively identified the appellant as one of the attackers carrying a torch. On cross-examination, PW3 testified that the light inside the shop was on and that the appellant had a gun made of wood partly.

39. PW4 a minor 10 years old also testified that he saw the appellant in the company of 2 other people and confirmed that they had a gun made of wood. He testified that the 3 attackers threatened to kill them if they don't give them money. He confirmed that the attackers took items from the shop including money. He confirmed that the appellant was present as one of the attackers and that he had a torch, corroborating PW3's testimony on cross-examination.

40. Taking the above into account, I am clear in my mind that the appellant was positively identified by all the witnesses as one of the robbers. It is also clear that he was in the company of two other persons and they were armed. It is also clear that they stole money, gumboots, soaps and other items from the shop before running away. It is also clear that there was sufficient light inside the shop to enable the witnesses positively identify the appellant and his accomplices. It is also clear that the appellant and his accomplices did not have any masks on to hide their identity. Finally, I am satisfied that they stayed with the witnesses long enough to enable them identify the attacker, including the appellant positively.

41. As regards therefore the issue raised by the appellant on his recognition/identification that he was not positively identified and having relied in the case of Republic v Turnbull & Others [1976] 3 ALLER 549 I find that the same has no basis since he was positively identified as one of the attackers/robbers.

42. In this regard, I am guided by the Court of Appeal's 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."

43. Again, in the case of *Maitanyi v Republic [1986]* eKLR the Court of Appeal stated that in determining the quality of identification of using light at night, it is at least essential to ascertain the nature of the light available, what sort of light available, what sort of light, its size and position from the suspect and the witnesses.

44. In our instant case and as highlighted above, I am satisfied that there was sufficient light during the incident that enabled the witnesses to positively identify the appellant. this is because being a shop, it is expected that there is sufficient lighting for operation purposes. In addition, the appellant never

disputed the issue of light and whether the same was dim or bright enough. I therefore have no reason to dispute the witnesses account as regards light.

45. I am also satisfied that the length of the time the robbers spent in the shop was enough for the witnesses to positively identify the appellant.

46. Whereas the appellant submitted that there was contradiction on the length of time, that is PW1 noting that the robbers took 1 hour, PW2 stating he lay on the ground from 8.00p.m till 10.00p.m and PW4 stating 3 minutes before they left, I am of the view that the evidence suggests that the attack must have taken between 1-2 hours. This is because the robbers took time transferring money from PW1's phone to other numbers. It is also clear that they took time ransacking the shop and PW1's house for items to rob. They also tied up PW1 and PW2 with ropes. These events could not have taken 3 minutes but the time taken was enough for the witnesses to positively identify the appellant and his accomplices.

47. In any case, I am of the view that the above contradictions as to the length of time are minor and do not point to any form of untruthfulness by the witnesses. In this regard, I must cite the case of Twehangane Alfred v Uganda (Cr.App.No.139 of 2001(2003) UGCA where the court held that it is not every contradiction that warrants rejection of evidence. The court delivered itself thus:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

48. In addition, PW4 being a minor may not have the best of recollection of the incident. In any case however, witnesses may have different recollection of the event and not all may recall the same thing the same way. Minute discrepancies must therefore be expected. This position finds support in the case of *Philip Nzaka Watu v Republic [2016]* eKLR, where the Court of Appeal held:-

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question".

49. In addition, PW7 PC Bonface Ingoci, a CID officer testified that he managed to track the appellant through mobile phone number registered in the name of the appellant's wife. He confirmed that this was the number that the complainant PW1, had been forced to transfer money to through her MpesaLine. He confirmed further that they arrested the appellant and discovered that he had registered his line using his wife's identity.

50. The above evidence strongly corroborates PW1's testimony that the appellant and his accomplices forced her to transfer money to another Mpesaline under threats that if she does not comply, she would be killed alongside her children and worker. PW4 confirmed that indeed the robbers threatened to kill them if PW1 did not give them what they wanted to rob.

51. In defence, the appellant simply stated that he is a conductor and was arrested by two police officers and denied committing the offence stating that he was forced to sign on his statement.

52. His defence however falls short considering that he was positively identified by the victims of the incident, that he was in the company of two other persons during the robbery incident, that they threatened to kill the victims if they did not cooperate with them at the time of the robbery, that they were armed with a dangerous weapon, namely a gun and stole items and money from the victim and in particular PW1.

53. In the end therefore and taking into account the totality of the prosecution evidence, I am satisfied that the ingredients of the offence of robbery with violence contrary to section 296(2) of the *Penal Code* were proved beyond all reasonable doubt by the prosecution. The conviction is therefore affirmed.

Whether the sentence was proper

54. The appellant submitted that the sentence was harsh.

55. I have looked at the provisions of Section 296(2) of the *Penal Code* that provides a mandatory sentence of death for the offence. However, the lower court sentenced him to 30 years imprisonment. I do not see the basis for this sentence taking into account that the principles espoused in Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] eKL case are inapplicable in the instant case following the directions issued by the Supreme Court that limited the application of the guidelines and decision of court to mandatory death sentence under Sections 203 and 204 of the *Penal Code*.

56. In light of the above, I find and hold that the court erred in sentencing the appellant to 30 years as there was no legal basis for the same. The same is therefore set aside and substituted with the penalty of death as per Section 296 (2) of the *Penal Code*.

57. In the end, the appeal lacks merit and is dismissed in its entirety. The conviction is therefore affirmed and sentence passed as highlighted above.

58. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH OF MAY 2022.

E. K. OGOLA

JUDGE