Wepukhulu v Republic (Criminal Appeal E027 of 2021)
[2022] KEHC 11966 (KLR) (5 August 2022) (Judgment)

Neutral citation: [2022] KEHC 11966 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E027 OF 2021

HI ONG'UDI, J

AUGUST 5, 2022

BETWEEN

JOSEPH PEPELA WEPUKHULU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the Judgment by Hon A A Odawo Senior Resident Magistrate on February 23, 2021 in Bungoma Criminal Case No 2212 of 2019)

JUDGMENT

1. Joseph Pepela Wepukhulu the appellant herein was charged and convicted of the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars were that on November 28, 2019, the appellant together with others jointly robbed Richard Okumu Wakwabubi (PW 1) of Kshs 8,600/= and in the process beat him using kicks and blows.

2. The prosecution presented three (3) witnesses in support of its case. PW 1 (Richard Okumu Wakwabubi) and PW 2 (Humphrey Sifuna Nyongesa) were eye witnesses to the incident. PW 1 was only able to identify the appellant facially but PW 2 knew him physically and by name. He flashed the torch on the three young men who were beating and demanding money from PW 1. PW 2 even described how all the attackers were dressed on the material evening. A report was made the next day at the police station by PW 1 and PW 2.

3. PW 3 – NO 55774 P C George confirmed receiving the report the next day ie November 29, 2019. Names of suspects were given and they were later arrested.

4. The appellant when placed on his defence gave a sworn statement. He explained how he was arrested on December 9, 2019 as he came from the market at 9:00 pm. He was led to the police station and later to the court. He denied any knowledge of the charges.

5. The learned trial magistrate considered all the three (3) ingredients of the offence as stated in *Oluoch v Republic* [1985] KLR and was satisfied they had been proved. The evidence on record shows that PW 1 runs a hotel and at the time of incident he was heading home from work at 7 pm. To find him with Kshs 8,600/= was therefore not a big issue. The attackers were three (3) in number. The evidence confirms they were identified by both PW1 and PW2 who had come to his rescue. The former knew the appellant by name and even where he stayed.

6. The learned trial magistrate found the prosecution case proved beyond reasonable doubt and convicted the appellant as charged and sentenced him to serve ten (10) years imprisonment.

7. The appellant filed this appeal raising the following grounds: -

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

    ii. That the trial magistrate erred in law and facts in failing to appreciate that the prosecution case lacked proper ingredients of robbery with violence contrary to section 296(2) of the *Penal Code*.

    iii. That the trial magistrate failed to appreciate that the prosecution witnesses lacked enough light to identify the assailants.

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

    v. That the trial magistrate failed to appreciate that the prosecution case had no P 3 form, exhibits and lacked witness to prove charge.

    vi. That the learned trial magistrate erred in law and fact in considering extraneous factors in the decision making.

    vii. That he wished to adduce more grounds of appeal when the same comes up for hearing.

8. When this matter came for directions on the hearing of the appeal on July 29, 2022, the appellant informed the court he was satisfied with the sentence. His only plea was for the court to consider the period he had been in remand.

9. Before considering his request, the court has to be satisfied that the conviction is sound. As was held in the cases of: -

    i. *Kiilu & another v Republic* [2005] 1 KLR 174

    ii. *Simiyu & another v Republic* [2005] 1 KLR 192

    iii. *Patrick & another v Republic [2005] 2 KLR 162*, the court on first appeal has a duty to re – evaluate and re – consider all the evidence on record and arrive at its own conclusion. It must also remember that it did not see or hear the witnesses and give an allowance for it.

10. I have re – evaluated the evidence on record against the grounds of appeal and find that it fully established the case for the prosecution. All the three (3) ingredients for establishing a charge of robbery with violence were proved to the required standard. Even if the element of injury on the complainant was not established there was evidence that the attackers were more than one (1). PW 1 said it was not yet dark and further more PW 2 who responded to PW1's screams arrived with a torch which shone brightly on the attackers and he identified them as people he knew.

11. I am therefore satisfied that the conviction is safe. I now move to the issue of sentence.

12. Infact the appellant is not seriously challenging the sentence. All he is asking is for the court to consider the period he was in remand.

13. M/s Omondi prosecution counsel in her written submissions opposes the request on the ground that the trial court considered this before sentencing the appellant. Further that the court can only interfere with the sentence if the discretion by the trial court was exercised illegally or that the court considered immaterial facts to reach its decision.

14. The sentence for robbery with violence is death under section 296(2) of the *Penal Code*. The appellant should be lucky he was sentenced to ten (10) years based on the Muruatetu I case. After the clarifications by the Supreme Court of Kenya in Muruatetu II its clear that the issue of a mandatory sentence only applies to murder cases where mitigating factors are to be taken into account.

15. Furthermore, the record shows that the period of incarceration was taken into account by the trial court. This is what the learned trial Magistrate stated: -

> " I have considered the nature of the offence. I have considered that the 3 accused have been in custody since taking plea."

16. This statement clearly confirms that the period the appellant remained in custody before conviction was taken into account. This court cannot interfere with the sentence and especially after the Muruatetu II guidelines by the Supreme Court of Kenya.

17. The upshot is that the appeal lacks merit and is dismissed.

    (ii) The conviction and sentence by the learned trial magistrate are confirmed.

Orders accordingly.

DELIVERED, VIRTUALLY, SIGNED AND DATED THIS 5TH DAY OF AUGUST 2022 IN OPEN COURT AT BUNGOMA HIGH COURT.

H I ONG'UDI

JUDGE OF THE HIGH COURT