Muthaura v Republic (Criminal Appeal E050 of 2022)
[2022] KEHC 13240 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13240 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E050 OF 2022

TW CHERERE, J

SEPTEMBER 29, 2022

BETWEEN

PETER MUTHAURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against conviction and sentence in Githongo Criminal Case No. 381 of 2020 by Hon. S.Ndegwa (SPM) on 28th July, 2021)

JUDGMENT

Background

1. Peter Muthaura(appellant) was charged with robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code* (the Act), breaking into a building and committing a felony contrary to section 306 (A) of the Act and stealing contrary to section 275 of the Act.

The prosecution's case

2. PW1 Dennis Kaimenyi stated that on the night of December 22, 2021, he was guarding Kibera Pub. That at about 02.00 am, he went out for a call of nature and was attacked by being hit on the forehead after which he was laid on the table face down. That a total of 4 people were in the pub and he recognized one that a scar on the forehead and who was their frequent customer. That the robbers took away beer and robbed him of Kes 5,000/- and escaped using M/V KAW 374A. He later reported the matter to police and was treated for the injuries he had suffered during the robbery. A P3 tendered by PW4 Severina Kaimatheri, a clinical officer revealed that PW1 suffered deep cut on occipital head with bruises and pain on forehead and left hip which were assessed as harm. PW2 and PW3 Silas Kirimi received report of the robbery from PW1. PW3 who was the owner of the pub stated that he went to the pub and found one keg pump, one keg barrel and subwoofer all valued at Kes 112,000/- missing.

PW3 PC James Njogu upon receiving PW1's complaint visited the scene and caused photographs of scene to be taken. That subsequently, appellant who was implicated in the robbery was arrested and charged.

Defence case

3. In his unsworn defence, appellant denied the offences. He stated he was at Consolata Hospital from the midnight of December 22, 2021 to about 03.00 am where he had taken a neighbour's wife who was unwell. He stated he was well known to PW1 and PW3 on the ground that he used to fetch water for the pub and was a regular of the market where the pub was located for over 15 years. He further stated that he was surprised when PW3 took him to the police station over the robbery at his pub.

4. The trial court after considering the evidence found the prosecution case on the first count proved, convicted and sentenced the appellant to suffer death.

The Appeal

5. The conviction and sentence provoked this appeal. In his petition of appeal and written submissions, appellant argues that the prosecution case was not proved beyond reasonable doubt. The state on the hand hand argues that its case was proved beyond reasonable doubt.

Analysis and Determination

6. As the first appellate court in the instant appeal, I am required and indeed duty bound to subject the evidence tendered in the lower court to thorough re-evaluation and analysis so as to reach my own conclusion as to the guilt or otherwise of the appellant. In doing so I must give allowance to the fact that I neither saw nor heard the witnesses as they testified and therefore cannot comment on their demeanour. (See *Okeno v Republic* (1972) EA 32).

7. I have considered the appeal in the light of the evidence on record, amended grounds of appeal and submissions for the appellant and the state and I have deduced the issues for determination as follows:

    1. Whether the offence of robbery with violence was proved

    2. Whether appellant's culpability was proved

    1. Whether the offence of robbery with violence was proved

8. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of *Oluoch v Republic* [1985] KLR where it was held:

> " Robbery with violence is committed in any of the following circumstances:
>
> 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 ....."

9. The evidence by PW1 discloses that the robbery was committed by four persons and that he was robbed and injured. Consequently, I find that the prosecution was able to establish that an offence of robbery with violence was committed.

Whether Appellant's culpability was proved

10. It is trite that evidence of visual identification should always be approached with great care and caution (see *Waithaka Chege v R* {1979} KLR 271). Greater care should be exercised where the conditions for favourable identification are poor. (*Gikonyo Karume & Another v R* {1900} KLR 23). Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See *Abdalla bin Wendo & Another v R*, {195} 20 EACA 166; *Wamunga v R*, {1989} KLR 42; and *Maitanyi v R*, 1986 KLR 198).

11. The Court of Appeal in the case of *Joseph Muchangi Nyaga & another v Republic* [2013] eKLR stated that before acting on evidence of visual recognition, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.

12. The difference in approach between identification and recognition was expressed thus by Madan JA in *Anjononi and Others v The Republic* [1980] KLR;

> "……This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

13. That is not to suggest of course, that cases of misrecognition cannot occur (See *Karanja & Anor v Republic* [2004] KLR 140) and courts are still duty-bound to examine such evidence with great care.

14. PW1 stated that the offence was committed at 02.00. He neither disclosed that there was lighting at the scene of the robbery nor explain how he was able to recognize appellant in the cover of darkness.

15. In the case of *Burunyi & Anor v Uganda* Cr Appeal No 1968 EA 123, Sir Udo Udoma the then CJ held:

> "It is not the duty of the court to stage-manage cases for the prosecution nor is it the duty of the court to endeavor to make a case against an accused where there is none. In a criminal case, the court cannot enter into the arena. The only duty of the court is to hold the scale to see that justice is done according to law on the evidence before it."

16. The only time PW1 mentioned lighting was in relation to him having seen M/V KAW 374A parked outside the pub where was security lighting. From the foregoing, I find that the trial magistrate therefore fell into error where she found that that was sufficient lighting at the scene of crime when no such evidence was tendered.

17. The record reveals that throughout the trial, there was no evidence linking appellant to the defilement of the complainant. It was therefore not open to the trial magistrate to import circumstantial evidence to counter a clear case absolving the appellant only for the purpose of maintaining a conviction that was not warranted.

18. From the foregoing, I find that the trial magistrate erred by unnecessarily straying into the arena of the prosecution and by attempting to make a case for the prosecution where there was none.

19. Further to the foregoing, the appellant raised the defence of alibi that he not at the scene of crime. The Supreme Court of Nigeria in the case of *Ozaki & Anor v The State* (1990) LCN/2449(SC) held as follows:

> "it is settled law that the defence of alibi raised by an accused person is to be proved on a balance of probability" and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution.

20. The Court of Appeal in the case of *Kiarie v Republic* [1984] KLR held That:

> "An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable."

21. The trial magistrate rejected appellant's defence on the ground that he did not raise it with the prosecution witness. In the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR the Court of Appeal held: -

> "Even if the appellant raised the defence of alibi for the first time during the trial, the prosecution ought to have applied to adduce further evidence in accordance with section 309 of the *Criminal Procedure Code* to rebut the appellant's defence". (Emphasis added).

22. Section 309 of the *Criminal Procedure Code* provides that: -

> "If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.

23. The prosecution did not tender any evidence to rebut the defence of alibi. The prosecution case was not so strong against the appellant as to leave only a remote possibility in his favour which can be dismissed with the sentence that it is possible that he indeed committed the robbery with violence the complainant. The defence of alibi raised by the appellant, in my considered view raised a doubt in the prosecution case and had the trial magistrate given it due consideration, she might likely have arrived at the conclusion that it ought not to have been dismissed.

24. Accordingly, and for the reasons set out hereinabove, I find that the prosecution did not prove its case against the appellant beyond any reasonable doubt. The conviction and sentence were against the weight of evidence. This appeal succeeds. The conviction is quashed and the sentence set aside. Unless otherwise lawfully held, it is ordered that the appellant be set at liberty.

DELIVERED AT MERU THIS 29 th DAY OF SEPTEMBER 2022

WAMAE. T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Accused - Present

For Appellant - Mr. Nyenyire Advocate

For the State - Ms. Mwaniki (PPC)