Obonyo v Republic (Criminal Appeal 221 of 2019)
[2022] KEHC 13223 (KLR) (Crim) (27 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13223 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 221 OF 2019

DO OGEMBO, J

SEPTEMBER 27, 2022

BETWEEN

PAUL OUMA OBONYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment, conviction and sentence arising from Kibera Chief Magistrate's court Criminal Case Number 3568 of 2017, by Hon. E. Boke Senior Principal Magistrate dated 2.9.2019)

JUDGMENT

1. The appellant, Paul Ouma Obonyo was tried before the lower court with the offence of Robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars were that on November 8, 2017 at about 2030hours at Kibera-Silanga slums in Nairobi County, jointly with another not before court, he robbed Gregory Wambua Sendi a mobile phone make Techno valued at Kshs 3,500/= and at the time of the said robbery, used actual violence on the said Gregory Wambua Sendi.

2. He faced a second count, also of robbery with violence contrary to section 296(2) of the *Penal Code*. That on November 9, 2017 at about 9:30hours, at Kibera – Lindi slums, in Nairobi County jointly with another not before court, being armed with dangerous weapons, namely, a pistol, he robbed Nelson Kithikii Kula, a mobile phone, make Techno Y35, mobile charger, ear phones and cash one thousand four hundred shillings (Kshs 1400/=) all valued at Seven Thousand two hundred shillings (7200/=) and at the time of the robbery, threatened to use actual violence to the said Nelson Kithikii Kula.

3. After full hearing, the appellant was convicted on Count 1. He was sentenced to serve 20 years imprisonment. This was on September 2, 2019. He has appealed to this court against the said

Judgment, conviction and sentence. In the memorandum of appeal filed herein on November 14, 2019, the appellant has raised the following grounds of appeal;-

1. That the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that no positive identification was made owing to difficult circumstances.

2. That the learned trial magistrate erred in law when he relied on unsatisfactory evidence that could not base or sustain a conviction.

3. That the charge was not proved to the required standards indeed in law and the same charge was fatally defective.

4. That the provision of section 169(1) of the *Criminal Procedure Code* was not complied with in relation to his defence statement.

5. That the learned magistrate erred both in law and fact when he convicted the appellant and failed to consider the appellant's plausible defence

4. The appellant has pleaded that this appeal be allowed in its entirety, the conviction be quashed and the sentence be set aside. The prosecution side (respondent), has opposed this appeal and urged that the same be dismissed for lack of merit.

5. By agreement of the parties this appeal was canvassed by way of written submissions. Both sides duly complied and filed their set of submissions.

6. From the side of the appellant, it was submitted that the appellant was not positively identified. He relied on the evidence of PW1 that it was at around 7:30pm heading to 8:00pm, and that there was no street lights along the path, and that, "I was able to recognize Paul because he was standing in the middle of the path and the light from the street light though not bright at the path was sufficient since Paul was a person well known to me. The street lights were from the street lamp and shop lamps."

7. He relied on *Wamunga v Republic* (1989)KLR 424 where the Court of Appeal held;

> it is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis for conviction."

8. He noted that the victim did not mention the name of the appellant to the police.

9. On the same point, the appellant relied on the cases of *Morris Gikundi Kamande v Republic* (2015)eKLR, and *Simiyu and another v Republic* (2005)KLR 192. Also *Republic v Turnbull* (1976)3 Aller 551, that,

> "the quality of identification evidence is critical, if the quality is good and remains good at the close of the defence case, the danger of mistaken identity is lessened, but the poorer the quality, the grater the danger."

10. The appellant also challenged the mode of his arrest. That he was arrested when he had innocently gone to the police station to inquire why his motor cycle had been seized. That the motor cycle had been at its parking place and that it was members of the public who falsely made it to be taken by the police.

11. Also, that no recovery was made from the appellant. On the issue of possession, he relied on *Joseph Kisilu Mulinge v Republic* (2014)eKLR, that;

"In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the alleged stolen property and any discredited evidence on the same cannot suffice no matter how many witnesses."

12. The appellant also submitted on alleged inconsistencies in the prosecution's case. The PW1 stated he had been attacked by 3 young men, while PW2 stated that PW1 had told him they were 2 men. Also on the evidence on whether the identification parade was at Highrise or Capital Hill Police station (PW1 and PW3). He relied on the case of *John Mutua Musyoki v Republic* (2017) Criminal Appeal No. 11 of 2016, on the effect of inconsistencies, that;

> "To our mind, these contradictions and inconsistencies are not minor as submitted by the Respondent. They were critical and go to the root of the prosecution's case and whether the complainant was credible and truthful witness. If the complainant could lie as to what had led her to report to school late, what else did she lie about?"

13. It was further submitted that the prosecution failed to call key witnesses. He relied on *Daniel Kipyegon Ng'eno v Republic* (2018)eKLR, on the inference to be made in case of failure to call a key witness. He noted the evidence of PW2 that there were many people at the scene and yet none of them recorded a statement.

14. The appellant also submitted on the fact that the court disregarded his defence. That he had found his motorcycle missing. That he then got wind of these allegations, making him go to the complainant to explain his innocence before proceedings to the police station where he was arrested. That had he committed the offence he would have run away and not go to the complainant nor to the police station. And relying on *Boniface Okeyo v Republic* (2001)eKLR, the appellant submitted that it is the burden of the prosecution to prove the guilt of an accused person beyond any reasonable doubt.

15. The Respondent, on the other hand, submitted that the issues for determination in this appeal, are proof of the ingredients of the offence, and positive identification of the assailant. It was submitted that all the elements of the offence under section 296(2) of the *Penal Code* have been proved.

16. On the issue of identification, counsel relied on the evidence of the complainant, that the appellant was well known to him and that there was sufficient security light at the scene and complainant was able to identify his attacker. That the victim knew his attacker even prior to this incident and so there was no need for an identification parade. Also, that the appellant failed to explain how his motor cycle remained abandoned at the scene of the incident. And that the appellant was arrested when he went to collect his motor cycle, after the complainant had made the report.

17. Counsel submitted on section 143 of the *Evidence Act*, that the prosecution may choose to call any number of witnesses, and that the key witness here was the victim who was the only witness to the incident. Also, that the trial court duly considered the defence of the appellant. And lastly, that on sentence, the court should enhance same to life imprisonment as the sentence awarded is illegal.

18. I have considered the above submissions of the 2 sides, and the authorities relied on. As a 1st appellant court, the jurisdiction of this court is well settled. In *David Njuguna Kariuki v Republic* (2010)eKLR, it was held;

> "the duty of the 1st appellate court is to analyse and re-evaluate the evidence which was before the trial court, and itself come to its own conclusion."

19. To determine this appeal, this court must therefore consider the wholesome evidence that was tendered before the trial court and to make its own conclusion on the same.

20. From the record of the appeal., the case of the prosecution commenced with the evidence of that of PW1 Gregory Wambua Sendi that on November 8, 2017 at about 7:30pm to 8:00pm, he was heading, home in a narrow path when he saw 3 men, one of who was standing in the middle of the path. It was the appellant standing in the middle of the path. He knew the appellant, whom stayed not far from his house. That as he bypassed the appellant, he was hit on the back of the head and he fell down semi-conscious. He was stepped on as he heard a voice, "Mzee Hauna Kitu?" he could hear the appellant say they were with him that day. He later found himself in his house being wiped off mud. He noticed that he had lost his Techno phone.

21. This witness went on that the following morning as he prepared to go to hospital, the appellant went to his house and told him, "Baba Ben pole, watu wanasema ati ni mimi nilikufanyia hivyo lakini sio mimi." He then left for hospital and later recorded his statement. He never recovered his phone. He identified his treatment notes (MFI – 1,2).

22. In further evidence, he stated that there was no streetlight along the path, but that he was able to see the appellant and recognize him because he was standing in the middle of the path and that light from the streetlight, though not bright, was sufficient. That streetlights were from the street lamp and shop lamps. He was not able to identify the ones out of the path and out of the light. That later on same day, and in company of his son, he proceeded to HighRise police station where he found the appellant and another. He had earlier mentioned the appellant to the police.

23. The appellant cross-examined the witness. He answered that it was 3 young men who robbed him. That the motor cycle of the appellant had been where he used to park it at his house, and that is members of the public who made the same be taken away by the police. He confirmed that he knew the appellant even by name and that he had recorded it was the appellant and 2 others. In the investigations diary, it was noted 3 young men and one known to the reportee.

24. PW2 was Benedict Nzioka Wambua, whose evidence was that on the material date and time, he had been in the house when he heard noise outside of people talking loudly. On reaching the scene, about 20 meters away, he found members of the public holding his father who had been robbed. He then heard a voice from a corridor, "hii simu haina memory card," which voice he recognized as that of the appellant who is well known to him. That a neighbor named Zila wiped mud off his father. And together with one John Kyalo, they proceeded to Highrise Administration police post. They were attacked again on the way back home and had to be escorted by the police. The police then went away with the motor cycle belonging to the appellant.

25. He went on that the following morning, the appellant came to their house and said sorry to his father for what had happened to him but that he was not involved. They then later identified the appellant at Capital Centre.

26. On being asked questions, he answered that many people had gathered but none recorded a statement. That one lady who sells vegetables nearby feared to record a statement. That his father told him he had been attacked by 2 boys and that appellant came to say sorry and not to ask about his motor cycle. That the appellant's motor cycle had been where he parks it waiting for people to enter into the plot before placing it inside the plot. In his view the neighbours feared to record statements for fear of victimization.

27. Sergent Elijah Leting was PW3. His evidence was that he is based at High rise Administration police post. He recalled that on November 8, 2017 at about 10:00pm, while at the post, one Nzioka came and reported that his father had been attacked and that he knew one of the attackers, and that the attackers had left a motor cycle at the scene. He proceeded to the scene and took away motor cycle KMDG

137N. That the following day 2 men came for the motor vehicles and one Nelson Identified them as the attackers. He promptly arrested the appellant. He later handed him over to Capital police station.

28. PW4 APC Samwel Baraza, previously of Highrise Administration police post, recalled hon on November 8, 2017 at about 10:42pm, a young man reported that his father had been attacked and robbed by 3 men who then ran away leaving behind a motor cycle. He proceeded to the scene where he recovered the said motor cycle. The following day, he received the report from another man of a robbery. He arrested the appellant who had allegedly come for his motor cycle. The complainant duly came and identified appellant as one he knew even by name.

29. And the last prosecution witness PW5 Corporal Philemon Rotich, produced the exhibits and had the appellant and the co-accused charged.

30. When the appellant was put to his own defence, he gave his defence on oath. That on November 9, 2017, when he woke up, he did not find his motor cycle where he keeps it only to be told that police in company of the complainant had taken it. That he then proceeded to the house of the complainant who did not respond to his greetings. He traced the same at the police station only for him to be arrested. He was then charged in court. He maintained that had he committed the offence he would not have gone either to the complainant's house or to the police station.

31. This basically is the evidence on record. The appellant faced a charge of robbery with violence contrary to section 296(2) of the *Penal Code* states;

> "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 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."

32. The above provision stipulates the elements of the offence of robbery with violence. The court of appeal, in the case of *Oluoch v Republic* (1985)KLR, at page 549, summed it, thus;

> Under section 296(2) of the Penal Code, robbery with violence is committed in any of the following circumstances;
>
> i) The offender is armed with any dangerous or offensive weapon or instrument.
>
> ii) The offender is in company 1 or more person or persons, or,
>
> iii) At or immediately before or immediately after the time of the robbery, the offender wounds, beat, strikes or uses other personal violence to any person."

33. It is worth nothing that the word "or" is used in reference to the 3 elements of the offence. In effect therefore, proof of only 1 element would suffice in proving the offence.

34. In the present case, the unchallenged evidence of PW1 was that he was attacked by 3 men, who assaulted him as a result of which he sustained body injuries. In the process, he was robbed of his Techno mobile phone. He had to be taken to hospital for treatment. In court, the relevant treatment record were produced to confirm the injuries. And his evidence was buttressed by that of PW2, PW3, PW4 and PW5, who all gave evidence on the fact that PW1 had indeed been injured during the robbery incident and had to be taken to hospital for treatment.

35. With this evidence, this court is convinced that the evidence of the prosecution proved the existence of all the 3 elements required in proving the offence of robbery with violence. I so find.

36. Having so found that the prosecution evidence duly proved the offence of robbery with violence, the next issue for determination by this court is whether the appellant was positively identified as one of the assailants. On this score, it is worth noting that this incident took place at night between 9:30pm and 10:00pm. The circumstances of the case must therefore be closely considered if this court is to decide on whether or not the prosecution proved the element of positive identification. The case of *Republic v Turnbill*, (1976)3Aller, gives useful declarations on this matter when the Lord Justices held amongst others;-

> The Judge should direct the Jury to examine closely the circumstances in which the identification by each witness come to be made ie,
>
> i. How long did the witness have the accused under observation.
>
> ii. At what distance.
>
> iii. In what light
>
> iv. Was the observation impeded in any way
>
> v. Had the witness ever seen the accused before?
>
> vi. How often?
>
> vii. If only occasionally, had he any special reason for remembering the accused?"

37. The court in the above case went on to hold that recognition may be more reliable than identification of a stranger.

38. In our case, it was the evidence of PW1 that as he walked on a path heading home, he saw 3 men standing ahead of him. One of the men, whom he identified as the appellant, stood in the middle of the path as the other 2 stood besides. That he was hit the moment he bypassed the appellant standing in the middle of the path. That he knows the appellant well even by name as they stay in the same neghbourhood. That even though the scene did not have light, it was not dark. There was light from nearby street lamps and lights from the buildings. That as he was being robbed, he heard voice of the appellant say "Mzee hauna kitu," and that they were with him that day. This witness stated that he was able to see the appellant well because he stood in the middle of the path where there was light from the street light.

39. Also relevant is the evidence of PW2, who ran to the scene to respond to the screams of PW1. While at the scene, he testified as to hearing the voice of the appellant from a nearby dark corridor say "Hii simu haina memory card." And once in the house with PW1,PW1 told him he had been attacked by 3 young men and that he knew 1 of them. PW2 proceeded to report the same statement at the nearby police post. This witness also confirmed that he knows the appellant even by name. his initial report, captured in the OB extract was read out in court and accordingly captured in the proceedings.

40. Then there is the evidence of both PW1, that early in the morning of the following day, the appellant went to the house of PW1 where he found both PW1 and PW2 and offered his apology for what they had done to PW1. This to me confirms the very important fact that PW1 and PW2 indeed knew the appellant well and that the appellant also knew the 2 witnesses well. The plausible interpretation I get in this is that the appellant must have gone to seek the forgiveness of PW1, in order that PW1 does not pursue the robbery report made at the police station, so as to enable the appellant proceed to collect his confiscated motor cycle from the police station. And indeed, the appellant was arrested at the police station as he followed up on his motor cycle.

41. It is worth noting that PW1 was candid enough to state that of the 3, he only identified the appellant, not the other 2 with him. And even in court during the trial, he had no adverse evidence against the 2nd accused. I find this witness (PW1) truthful in his testimony. Had he not been truthful, he would have falsely accused the appellants co-accused.

42. From the above analysis I am convinced that this was a case of recognition rather than visual identification. I am further convinced that the circumstances pertaining at the scene were such that it was possible and ideal for PW1 to positively recognize the appellant as one of the 3 young men who attacked and robbed him on the material night.

43. When the appellant was placed to his own defence, he denied the charges. He otherwise admitted going to the house of PW1 where he found PW1 and PW2 but that PW1 declined to respond to his greetings. In my view, it is unbelievable and inconceivable that the appellant would wake up early in the morning to go to the house, only to greet him. He must truly have gone to tender an apology to PW1 as already found above. On this, I agree with the findings of the trial magistrate that the defence of the appellant was unbelievable and lacked in any merit.

44. In the submissions of the appellant, he has raised a number of issues that need consideration in this judgment. First, on the mode of arrest, the evidence on record by prosecution witnesses, PW3, 4 and 5, was clear that he was arrested when he followed up on his motor cycle at HighRise Administration Police Post, and later transferred to Capita police station. I do not find any contradiction or absurdity in this. Secondly, I do find any material contradiction in the evidence of PW1 that he was attacked and robbed by 3 men, and the alleged 1st report made by PW2 that his father had told him he had been attacked by 2 young men. The initial investigations diary record does not confirm the position of the appellant on this score.

45. Third, on the issue that certain key witnesses were never summoned by the prosecution, both PW1 and PW2 gave a satisfactory response to this on cross examination. That none of those persons ever recorded any statements with the police out of fear.

46. In view of the above observations, I am convinced that the prosecution discharged its burden of proof and proved the charge of robbery with violence contrary to section 296(2) of the *penal code* (count I) beyond any reasonable doubt as required by the law.

47. The appellant was sentenced to serve 20 years imprisonment. I find this sentence both legal and proper and I have no reason to interfere with it.

48. I accordingly therefore, find no merit in this appeal of the appellant filed herein on November 14, 2019. I dismiss the same wholly.

D. O. OGEMBO

JUDGE

27TH SEPTEMBER 2022

Court:

Judgment read out in open court in the presence of the appellant (Kamiti) and Ms. Joy for the state

D. O. OGEMBO

JUDGE

27th SEPTEMBER 2022.