Muthee v Republic (Criminal Appeal 32 of 2019)
[2022] KEHC 13074 (KLR) (22 September 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL 32 OF 2019

HPG WAWERU, J

SEPTEMBER 22, 2022

BETWEEN

STEPHEN MUTHEE JOYCE (ALIAS MUTHEE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from original Conviction and Sentence in Nanyuki CM Criminal Case No 850 of 2017 – L Mutai, CM)

JUDGMENT

1. The appellant herein, Stephen Muthee Joyce (alias Muthee), was convicted after trial of two counts of robbery with violence contrary to sections 295 and 296(2) of the *Penal Code*. It was alleged in count I that on June 8, 2017 at Kanyoni Trading Centre in Laikipia East Sub-County within Laikipia County, being armed with a dangerous weapon, namely a knife, he robbed one Johnson Njoroge Wambui of cash KShs 900/00, and that at the time of the robbery he "used actual violence".

2. In count II it was alleged that on the same day and place, and being similarly armed, he robbed one James Ngumo Kimenyi of his mobile phone make Itel valued at KShs 1,500/00, and that after the time of the robbery he "used actual violence".

3. On August 6, 2019 the appellant was sentenced to life imprisonment on each count, sentences to run concurrently. He has appealed against both conviction and sentence.

4. In his petition of appeal filed on August 9, 2019 the appellant raised the following grounds of appeal –

    (i) That the evidence presented by the prosecution was not sufficient to found the convictions.

    (ii) That the first complainant and his wife gave contradictory and hearsay evidence.

    (iii) That there was no corroboration of the testimonies of the complainants.

(iv) That the trial court gravely erred by failing to consider that there existed previous enemity between the appellant and the complainants.

(v) That the charges were not proved beyond reasonable doubt.

5. In his hand-written amended grounds of appeal presented together with his written submissions, the appellant raised the following additional grounds of appeal –

(vi) That the charges were defective under section 137 of the *Criminal Procedure Code*.

(vii) That the ingredients of the offence of robbery with violence were not proved beyond reasonable doubt.

(viii) That the trial court failed to consider that the appellant was not arrested with anything incriminating that connected him to the offences charged.

(ix) That vital witnesses were not called to testify.

(x) That the appellant was not given "room" to present his defence.

(xi) That the complainants' medical reports were not produced by the doctor who treated them.

(xii) That there was no evidence produced to prove that the complainant in count II owned the phone allegedly stolen from him.

6. I have read and considered the appellant's written submissions. On his part learned counsel for the respondent supported both convictions. He submitted that all the ingredients of the offence were proved to the required standard. He pointed out that the robberies took place in broad daylight and that the appellant was well-known to the complainants and the witnesses to the robberies. They readily recognized him. It was not a case of positive identification of a stranger; it was recognition of a well-known person.

7. Learned counsel further submitted that the complainant in count I was seriously injured during the robbery as was verified by medical evidence (Exhibit P1). His injuries took nearly 3 months to heal. The complainant in count II was also injured in the course of the robbery.

8. Finally, learned counsel submitted that in his own defence the Appellant merely denied the offences, and that the defence was duly considered by the trial court and properly rejected.

9. Regarding the complaint that some material witnesses were not called to testify, learned counsel submitted that the prosecution brought witnesses and evidence before the trial court sufficient to prove both charges beyond reasonable doubt. He opined that the appellant was convicted upon good and sound evidence, and that both convictions are safe. As for the sentence, learned counsel submitted that the appellant should have been sentenced to death as by law provided.

10. This being a first appeal, it is my duty to evaluate the evidence placed before the trial court and arrive at my own conclusions regarding the same. I must however give due allowance for the fact that I neither saw nor heard the witnesses testify.

11. I will first deal with the issue whether the charges as laid were fatally defective. The rules for the framing of charges and informations are to be found in section 137 of the *Criminal Procedure Code* (the code).

It is a very detailed section containing ten (10) paragraphs and eleven (11) sub-paragraphs. The bottom line of these rules is to be found in section 134 of the code. It states –

> " 134. Every charge or 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."

12. In the present case the charge contained a statement of the specific offences charged. Those offences were stated to be robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. Section 295 aforesaid defines what robbery is. section 296(2) creates the offence of robbery with violence where the offender who commits robbery –

> " ...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 or property...."

13. The particulars given of the offences charged in the present case were that on the stated date and place, and –

   " ...being armed with a dangerous weapon, namely a knife..."

   the Appellant robbed the complainants of the stated items, and that -

   " ...at the time of the robbery..." (in count I),

   and

   " ...after the time of the robbery..." (in count II)

   he -

   " ...used actual violence...."

   The only thing that these particulars did not state was that the actual violence was on the complainants. That however was made abundantly clear in the evidence presented (both medical and by the complainants themselves). So, no prejudice at all could have been occasioned to the appellant.

14. I am therefore satisfied that the charges as laid met the standard set out in section 134 aforesaid of the *Criminal Procedure Code*. There was a statement of the specific offences with which the Appellant was charged, together with particulars that gave reasonable information to him as to the nature of the offences charged. The charges were thus not fatally defective in form of substance.

15. The issues before the trial court were as follows –

   (a) Were there robberies committed on the complainants (in count I Johnson Njoroge Wambui– PW1, and in count II James Ngumo Kimenyi– PW3) as defined in section 295 of the *Penal Code*? In other words, was anything stolen from these complainants, and did the thief, at or immediately before or immediately after the time of stealing, use or threaten to use actual violence to any person or property in order to obtain or retain the thing stolen, or to prevent or overcome resistance to its being stolen or retained?

(b) Was the thief armed with a dangerous weapon (a knife) as alleged?

(c) Did the thief use actual violence at the time of stealing in count I and immediately after stealing in count II?

(d) Was the thief the appellant?

16. I have carefully read and considered the testimonies of the two complainants (PW1 andPW3) as well as the testimonies of PW2, Grace Mwathatiri(who witnessed the robbery in count I) and PW4, Charles Gutengo Mugo(who witnessed the robbery in count II). I have also considered the testimonies of the appellant (who gave sworn evidence in his own defence) and his one witness. The robberies took place in broad daylight, at about 4.00 p.m (in count I) and at about 6.00 p.m (in count II). PW1 had known the appellant for about 20 years. PW2 had known him for "many" years. PW3 had known him for two months. PW4 had known him for over ten years.

17. Upon the very clear testimonies of PW1, PW2, PW3 and PW4, it was proved beyond any reasonable doubt that indeed PW1 and PW3 were robbed as they had described. It was also proved beyond any reasonable doubt that the robber was the appellant, a person who was very well known to them and whom they recognized in broad day light.

18. The four witnesses also clearly saw the appellant was armed with a knife. He used the knife to stab PW1 in the stomach, an act that was witnessed by PW2. Two hours later PW4 witnesses the appellant stab PW3 on the arm after he stole form him his mobile phone. The injuries suffered by PW1 and PW3 were verified by the medical evidence given by PW6, a clinical officer. Although PW1 and PW3 had been initially treated at a different hospital, PW6 indeed examined both of them and verified the injuries which they had suffered. He prepared and produced in evidence their medical reports.

19. PW5 (CPL Kenneth Muriithi) was one of two police officers who rescued the appellant from a mob that had badly assaulted him after he had robbed PW3. He could have been lynched by that mob if he had not been rescued. He was taken to hospital and later charged with the offences.

20. The appellant testified to previous encounters with the complainants, particularly PW1. He had cross-examined them on these alleged previous encounters, the purpose being to show that the charges were framed up. PW1 and PW3 denied those alleged previous encounters. The testimony of his witness (his mother) was that she had come upon the scene as a mob was assaulting him. She screamed and tried to call the police.

21. Upon my own analysis of the evidence, I would, just like the trial court, reject the appellant's defence in light of the overwhelming evidence produced by the prosecution, particularly the very clear testimonies of PW1, PW2, PW3 and PW4. The charges as laid were proved beyond reasonable doubt. The convictions are safe.

22. As for the sentence, following the declaration of the Supreme Court of Kenya in the now notorious case commonly referred to as the "*Muruatetu Case*", that the mandatory nature of the death sentence in murder cases is unconstitutional on account of interference with the trial court's discretion in sentencing, there is no reason why that pronouncement by the apex court cannot apply to all other statutorily mandatory sentences, including the death sentence for robbery with violence. The trial court was therefore entitlted to sentence the appellant as it did.

23. However, the sentence of imprisonment for life was manifestly harsh and excessive in the circumstances of this case. Only KShs 900/00 was stolen from PW1, and from PW3 only a mobile phone worth KShs 1,500/00. Despite the potentially mortal injury to the stomach of PW1 that the appellant had

inflicted with a knife, he himself was nearly killed by a mob as a result! A fairly long but definite term of imprisonment would have served the ends of justice.

24. The upshot is that I find no merit at all in the appeal against the convictions, and the same is hereby dismissed. I will partially allow the appeal against sentence by setting aside imprisonment for life in both counts and substituting therefor imprisonment for 15 years in each count, to run concurrently from the date of sentencing by the trial court. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 20TH DAY OF SEPTEMBER 2022.

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 22ND DAY OF SEPTEMBER 2022.