Achola v Republic (Criminal Appeal E138 of 2019)
[2022] KEHC 14122 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14122 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E138 OF 2019

LN MUTENDE, J

OCTOBER 19, 2022

BETWEEN

NELSON ACHOLA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No. 458 of 2018 at the Chief Magistrates' Court Bungoma by Hon. G. P. Omondi – SRM on 23rd August, 2019)

JUDGMENT

1. Upon arraignment, Nelson Achola, the appellant, was charged with three counts as follows:

   Count 1 – robbery with violence contrary to section 296 (2) of the *Penal Code*. Particulars of the offence being that on the March 29, 2018 at 11.30 pm at Myanga village in Bumula sub-county within Bungoma county, jointly with another not before court while armed with dangerous weapons namely an axe and a knife robbed Timothy Wabwire Masanja of his motor- cycle registration number KMEJ 160B make Boxer Bajaj valued at Kshs 93,000/-, cash Ksh 1,010/- and National Identity card, all valued at Ksh 94,010/- and, immediately after the time of such robbery threatened to use actual violence to the said Timothy Wabwire Masanja.

   Count II – robbery with violence contrary to section 296 (2) of the *Penal Code*. Particulars being that on the March 29, 2018 at 11.30 am at Myanga village in Bumula sub-county within Bungoma county jointly with another not before court while armed with dangerous weapons namely an axe and a knife robbed Boniface Wafula Wanganya Ksh 1000/-, driving license and national identity card all valued at Ksh 2,500/- and immediately after the time of such robbery threatened to use actual violence against Boniface Wafula Wanganya.

   Count III – having suspected stolen property contrary to section 323 of the *Penal Code*. Particulars being that on the March 30, 2018, at about 1.30 am at Myanga village in Bumula sub-county within

Bungoma county having been detained by No 56467 CPL Protus Ngano and No 56337 PC Charles Ongera as a result of exercise of the powers conferred by section 26 of *Criminal Procedure Code* had in his possession a motor-cycle registration number KMEF 847A make honda, one woofer radio/speakers and one suitcase reasonably suspected to have been stolen or unlawfully obtained.

2. Having been taken through full trial, he was found guilty of the offences of robbery with violence, and sentenced to serve twenty (20) years imprisonment. And, he was acquitted of the offence of having suspected stolen property.

3. Aggrieved, he appeals against the conviction and sentence on grounds that: The case was riddled with contradictions, inconsistencies, discrepancies and glaring gaps; the identification of the appellant was unprocedural; the recovery of the exhibits was questionable and incredible; the arrest was improper and the case was not proved beyond reasonable doubt.

4. That the sentence passed was in violation of article 25 (a) of the *Constitution*; the appellant was not accorded fair trial under article 50 (2) of the *Constitution*; no inventory record was produced in court as an exhibit; ownership of the recovered items was not proved; and the appellant was not arraigned in court within 24 hours; the evidence of the complainant varied from the particulars of the offence; the intensity of light did not form correct identification; the appellant was not found in possession of the items and there was no nexus between him and the persons who were in possession of the motor cycle; due to shoddy investigations carried out the court was not told which simcard the appellant allegedly used; there was no dusting of the knife and axe to ascertain the handler; the report in the occurrence book was different in the entries made in the first and second reports; and, that the court could consider section 333(2) of the *Criminal Procedure Code* (CPC).

5. The case as presented by the prosecution was that PW2 Boniface Wafula Wagenyi, the 2nd complainant, left his place of work on March 29, 2018 and reached Kimaiti at 10.00 pm. He called his brother PW1 Vincent Mapesa Ngata, the 1st complainant, who was to pick him up from Miyanga using a motor-cycle. In the meantime he walked intending to meet him along the way. As he walked along the road, he encountered two (2) individuals, a rider and a pillion passenger, on motor cycle. According to him the individuals looked like police officers, following their attire. Upon reaching him lights of the motorcycle were switched on. The individuals demanded to know where he was going. When he told them that he was going home, one of the persons who had an axe under his sleeve removed it and hit him with the butt on the right side of his face and made him to sit down. He was searched and his driving licence and phone taken. The 1st complainant, PW3 Timothy Wabwire Masanga, his brother reached them. They snatched him keys to the motorcycle and took his identity card, cash Ksh 1000/- and the phone, items they told them to collect the following day. He argued with them and one of the individuals fled with the motor-cycle registration No KMEJ 160B owned by PW1 Vincent Mapesa Ngata that he had entrusted with PW3 to operate. They raised an alarm and PW2 held the appellant herein as he attempted to get on to the other motor-cycle. They struggled and the appellant removed the axe and aimed at hitting PW2 but he blocked it with his hand; as PW3 moved to assist him. They raised an alarm, further, and people who answered their call of distress arrived and arrested the appellant and took him to Muyanga AP post where he was re-arrested by PW4 APC Bernard Namaya Barasa.

6. The appellant who was taken to the AP post with motor-cycle registration No KMEF 847 A was also in possession of an axe and a knife.

7. PW5 No 56467 Corporal Protus Ngano got a report regarding the arrest from PW4. He went to Muyanga AP post where he found the appellant and while interrogating him, he received a call. PW5 instructed him to tell the caller that he was safe and would meet him in a short while. The caller told him that the motor-cycle had run out of fuel and he was at Kholera. They moved to the area and recovered

the motor-cycle. He noted that that the jacket the appellant wore resembled that of the police. At the point of arrest the appellant had a suit case with a woofer and two (2) speakers, items they suspected to have been unlawfully obtained.

8. Upon being put on his defence, the appellant testified that on September 29, 2018 at about 9.00 pm, he closed down his business at Kimwanga market and while going home riding his motor-cycle he was stung by a bee and he collided with an oncoming motor-cycle which had three occupants. One of the persons was injured hence they demanded for Ksh 3000/- that he would use on treatment since he only had Ksh 1000/- they wanted to take his motor-cycle and a struggle ensued. The altercation continued until midnight hence he decided to go to the police station.

9. However, before he reached the police station the individuals caught up with him. They were a total of seven (7) people and they had two (2) motor-cycles. They beat him up and called him a thief. Other people joined him and hit him with an axe and he bled from the head. They took him to the police station and he was taken to Bumula hospital. When arraigned he was surprised to be charged with the offence of robbery with violence. He claimed ownership of the motor-cycle registration No KMEF 847A and the suit case that contained the woofer.

10. The trial court considered evidence tendered and opined that the identity of the appellant who was arrested at the scene after a struggle and was subsequently called by his accomplice, a fact that led to the recovery of the stolen motor-cycle, was not in question.

11. That the appellant and his accomplice stole from the 2nd complainant a driving licence, phone and identity card and from the 1st complainant the motor-cycle, wallet and identity card; and that actual violence was meted out to PW2 and PW3 by the appellant who was armed. It found evidence of the prosecution having been logical, consistent and coherent and rejected the defence put up. Hence the conviction.

12. This being a first appellate court, it has a duty to carefully analyze afresh evidence adduced at trial bearing in mind the fact of having not observed, seen or heard witnesses who testified at trial. In the case of *Okeno v Republic* [1972] EA 32 the court stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v R [1957] EA 570. 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 courts' findings and conclusions; it must make its own findings and draw its own conclusions. 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 - See Peters v Sunday Post [1958] EA 424".

13. Section 296 (2) of the *Penal Code* enacts that:

> 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.

14. As correctly submitted by the prosecution counsel, what constitutes the offence of robbery with violence was stated in the case of *Olouch v Republic* [1985] KLR where the Court of Appeal stated that:

(i) The offence is committed by more than one person or

(ii) The offender is armed with a dangerous and/or offensive weapon or

(iii) 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, the use of the word 'or' means that proof of any one of the three named ingredients will be sufficient to prove the charge.

15. 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 find an offence of robbery with violence."

16. Witnesses, PW2 and PW3 who were attacked, testified to the attackers having been armed with an axe and a knife, items adapted to be dangerous weapons that were used against the person of PW2. In his defence the appellant argues that he had an altercation with the complainants and another following a collision that they had and he could not pay the sum sought for treatment, where after they hit him with an axe on the head.

17. PW2 stated that the appellant had an axe concealed beneath the sleeve of his shirt which he removed and used to hit him on the head. On being given an opportunity to cross examine the witnesses, both PW2 and PW3 who were victims, the allegation of a collision and having been assaulted with an axe was not put to witnesses. The prosecution witness did state how they raised an alarm and members of public who answered their call of distress wanted to kill him. This was not challenged. No doubt he sustained some injuries since PW5 caused him to be taken to hospital. What came out was the fact of mob justice having been meted out upon him a fact not challenged. The trial court therefore rightfully disregarded the defence put up. This was, therefore, evidence of the fact of the appellant having been armed with dangerous weapons and having used actual violence on the person of the victim.

18. The fact of the appellant having been with another was stated by PW2 and corroborated by PW3. They urged that the person escaped with a motor-cycle registration No KMEJ 160B which PW2 held as a special owner. Evidence of how the motor-cycle was recovered was adduced by PW2 and PW3 and confirmed by PW5. The phonecall that the appellant received was what led them to Kholera where the complainant's motor-cycle was recovered. Other items had been taken from the complainants which were alleged to have been recovered at the scene.

19. The appellant faults the trial court to have not considered the fact of the time when the offence was committed as it was dark. No doubt the act was committed at night between 10.00 pm-midnight. However, it is admitted by the appellant that following the incident he did not leave the scene. He was arrested and taken to the AP post. Therefore, the question of possible mistaken identity cannot arise.

20. The state has been challenged for not availing a communication transcript to prove if indeed the appellant received any call from an accomplice. It is a fact that this evidence was lacking. But, the motor-cycle was recovered following some communication.

21. The appellant complains that he was held in custody for more than 24 hours prior to being arraigned as required by the *Constitution*. article 49 (1) (f) of the *Constitution* provides that:an arrested person has the right—

To be brought before a court as soon as reasonably possible, but not later than

i. twenty-four hours after being arrested; or

ii. if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

22. In the case of *Julius Kamau Mbugua v Republic* (2010) eKLR, The Court of Appeal held that:

> "...the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by section 72 (6) expressly compensable by damages."

23. The appellant was arrested on March 30, 2018 and arraigned on April 3, 2018. March 30, 2018 was on a Sunday. He ought to have been arraigned in court on 2nd of April, the next court day. This was wrong but, it does not lead to the person offended being released as he may have a remedy in a civil forum.

24. The prosecution is faulted for failure to produce the inventory and also dust weapons recovered. The purpose of an inventory in a criminal investigation was set out in the case of *Stephen Kunani Robe and Others v Republic* [2013] eKLR where the court stated that:

> "The purpose of an inventory is to keep record of exhibits recovered during investigations. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence."

25. PW5 listed orally items he recovered from the appellant during arrest. He added that he recovered the motor-cycle registration number belonging to the complainant. The appellant did not raise the question of existence of an inventory in cross examination hence he cannot purport to raise it at the appellate stage.

26. On the question whether the omission was fatal to the charges, in the case *Leonard Odhiambo Ouma and Another v Republic* [2011] eKLR the Court of Appeal stated that:

> "failure to compile an inventory as contended in ground 5, is in our view a procedural step which in the circumstances, did not prejudice the appellants in any way and for this reason the omission did not vitiate the trial."

27. This is a case where the items recovered were produced in evidence and the appellant was granted an opportunity to challenge the same through cross examination, therefore, he was not prejudiced. Similarly witnesses were emphatic on how the appellant handled the weapons. Failure to dust them an issue that was not brought up during trial was not prejudicial to the appellant.

28. The appellant complains that the trial court dismissed the defence put up as an afterthought. It is apparent that evidence put up by the appellant was an afterthought having not been put afore during cross examination. The trial court considered it and found the appellant was placed at the scene of crime

and there was proof beyond reasonable doubt of the fact of having committed acts that constituted the offence of robbery with violence.

29. On the legality of the sentence meted out an appellate court can only interfere with a sentence passed by the trial court if it was improper, wrong in material factor, harsh and excessive.

In the case of *Bernard Kimani v Republic* [2000] eKLR the court stated that:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle.
>
> Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist (emphasis court's)."

30. The trial court considered section 333(2) of the CPC and meted out a sentence of twenty (20) years imprisonment. The sentence was meted out in 2019 following the jurisprudence set out in the case of *Francis Karioko Muruatetu & another v Republic* [2017] Eklr.

31. However, it was erroneous for the trial court not to impose a sentence on each count as required by law. Therefore, I set aside the omnibus sentence meted out, which I substitute with a sentence of ten (10) years imprisonment on each count; sentences that will run concurrently, from the date of arrest, April 13, 2018.

32. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY

THROUGH MICROSOFT TEAMS AT NAIROBI,

THIS 19TH DAY OF OCTOBER, 2022.

L. N. MUTENDE

JUDGE