Wangui v Republic (Criminal Appeal 39 of 2018)
[2022] KEHC 15611 (KLR) (23 November 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 39 OF 2018

RM MWONGO, J

NOVEMBER 23, 2022

BETWEEN

DICKSON WACHIRA WANGUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment dated 8th June, 2018 by Hon EH Keago SPM in Baricho SPMCC No1013 of 2016)

JUDGMENT

Background

1. The appellant was charged, together with one Jobfrey Mutua Mwangi, with two counts of robbery with violence contrary to Section 296(2) of the *Penal Code*. Jobfrey Mutua Mwangi was also charged with one count of handling stolen goods contrary to section 322(2) of the *penal code*.

2. The Particulars of count 1 are that on 22nd and June 23, 2016 at Karaini Coffee at Factory at around 7.45 p.m. within Kirinyaga County jointly with others not before court while armed with dangerous weapons, namely, pangas, rungus and metal bars, he robbed the night watchmen namely Joseph Wanjohi, Erick Njuki and Josphat Mwai of Ten Thousand Six Hundred and Three (10,603) kilograms of coffee berries valued at 1,187,536 and fourteen macadamia seedlings valued 5,600 all valued at 1,192,136 and at the time of such robbery threatened to use actual violence to the said watchman Joseph Wanjohi, Erick Njuki and Josephat Mwai.

3. The particulars of count 2 are that on the same night of 22nd and June 23, 2016 at about 11.34 pm at Karaini Coffee factory within Kirinyaga County jointly with others not before court while armed with dangerous weapons namely pangas' rungus and metal bars he robbed one Erick Njuki of one motorcycle Registration number KMDR 245V make captain valued at Ksh. 103,000 (One Hundred

and Three Thousand) at the same time of robbery threatened to use actual violence to the said Erick Njuki.

4. The third count was a charge of handling stolen goods contrary to section 322(2) of the *penal code*, in that on the July 21, 2016 at Gathambi area in Kirinyaga West Sub-County within Kirinyaga County, otherwise than in the course of stealing, dishonestly was found with one Motor Cycle Registration number KMDR 245V Make Captain knowing or having reasons to believe it to be stolen.

5. At the trial in the lower court the prosecution called 7 witnesses to prove its case. Upon being called upon to defend themselves, the two accused gave sworn testimony and were cross examined.

6. The trial court convicted the appellant on the charges in Counts 1 and 2 on June 8, 2018, sentenced him to death. Aggrieved, the appellant filed this appeal on both conviction and sentence.

7. In an amended memorandum of appeal, he raised the following grounds:

    1. That the learned trial magistrate erred in both law and fact in failing to appreciate the fact that the charges as preferred were incurably defective contrary to section 214 ad 134 of the *Criminal Procedure Code*, and hence could not sustain a conviction, resulting in serious prejudice to the appellant.

    2. That the learned trial magistrate erred in law and fact in not appreciating that the doctrine of recent possession was not proved to the required standards in law hence a prejudice.

    3. That the learned trial magistrate erred in law and fact in failing to consider that, notwithstanding the provisions of section 143 of the *Evidence Act*, the prosecution failed to avail critical key witness contrary to section 150 of *CPC* and section 146 of the *Evidence Act* hence occasioning prejudice.

    4. That the learned trial magistrate erred in law and fact in not appreciating that the prosecution failed to prove its case beyond any reasonable doubt rendering the matter unproved occasioning serious dereliction of justice.

8. The parties filed written submissions as directed by the court.

9. The brief significant facts of the case are as follows.

10. On the night of June 22, 2016, the Karani Coffee factory where PW3, PW4 and PW5 were watchmen (the complainants) was broken into by robbers and the coffee produce was stolen. The robbers attacked the three watchmen. PW3 and PW4 were patrolling at the lower side of the factory when they were attacked with weapons such as rungus machetes and metal bars. PW5 who was at the upper side of the factory was also attacked, and also tied and taken to the store. All of them were threatened with violence.

11. The watchmen were tied with cloths; herded into a store and laid on the floor where wooden frames were placed on them. They later released themselves and called for help.

12. Help came in the form of the Factory Manager , PW1 and PW2 who had screamed alerting nearby neighbours who also showed up at the factory. It was discovered that the robbers had stolen 603 kgs of coffee berries worth 1,187,536/- and macadamia seedlings worth 5,600/-. The robbers also stole a red motorcycle Reg No KMDR 245V worth 103,000/-, belonging to PW3.

13. Accused 2, Jobfrey Mwangi, was later arrested riding the said motorcycle on 21/7/2016. He was charged with the offence of handling stolen property, namely the motor cycle. He alleged that he had

borrowed the motor cycle from Accused 1 to drop his customers as his own motorcycle was in the garage. He stated that Accused 1 was well known to him.

14. PW 6 stated that he was with Accused 1 when Accused 1 went looking for a motorcycle to hire. He needed to buy avocados, but Accused 2 had told him his motorcycle was in the garage. He did not mention that Accused 2 used his telephone to call Accused 1, even though Accused 1 asserted that he had used PW6s phone. PW6 did not see Accused 1 give his motorcycleto Accused 2, but he was later being ridden on it by Accused 2 whilst looking for avocados to buy when they were arrested.

15. Accused 1, the Appellant, was arrested by PW 8 on 20/9/2016 while PW1 was doing a case of robbery from Kerugoya. PW8 said Accused 1 had another case of robbery with violence in Karatina. He was given the Accused's name by Cpl Kilonzo of CID, who later came and collected the accused. When PW8 arrested Accused 1, nothing was recovered. Cpl Kilonzo had given him the Accused's name, description and alias, but no identification parade was done. PW8 said he had known Accused 1 since 2015 and had arrested him on other charges

16. PW9, the Investigating Officer, stated that he had been informed of the robbery at the factory. He visited the scene, took details, interrogated the victims and begun looking for suspects. He was then informed that some people had been arrested with the stolen motorcycle. When he interrogated them and the owner of the motor cycle, he found the number plate had been changed, and Accused 2 alleged he had borrowed the motorcycle from Accused 1.

17. According to PW9 Cpl Kilonzo, Accused 2 said Accused 1 was "Chiwa" and that he was willing to take him to Chiwa. On his part, Accused 2 in his evidence said that He knew Accused 1 as Dickson Wachira., and that:

> " I was interrogated by officers of Karatina and I still 1st Accused as the one with whom I had borrowed the motorcycle from(sic). They told me they know Dickson 'Wachira Majiwa' "

18. Later in his testimony, Accused 2 stated:

> " The person who gave me the motorcycle is 1st accused in this case. He is DickWachira Majiwa"

19. Accused 2 stated he had called Accused 1 on his phone on several occasions after he had borrowed the motorcycle but he had switched off his phone.

Analysis and determination

Defective charge sheet

20. This being a first appeal, this court is required to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. This was the holding in *Okeno v Republic* (1072) EA 32 where the Court of Appeal set out the duties of a first appellate court as follows:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (Pandya Vs Republic (1957) EA (336) and the Appellate Court own decision on the evidence. The first Appellate Court must itself weigh conflicting evidence and draw its own conclusion; (Shantilal M. Ruwala vs Republic (1957) E.A. 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 finding and conclusion: it must make

its own findings and draw its own conclusions. Only then can it be decided whether the magistrate is 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 witnesses, see Peter's vs Sundav Post (1958) EA 424."

21. On the allegation of incurably defective charge sheet the appellant submitted that it did not conform with the evidence adduced by the prosecution; further, that the charge sheet showed that all the alleged three complainants were listed in the same charge contrary to the evidence availed. He submitted that the same went contrary to provisions of section 134 and 214 of the *CPC*.

22. He submits that each of the alleged witnesses (watchmen) ought to have been indicated in a separate charge though the items were almost similar which was not done. He argues that the watchmen were not attacked and overpowered in the same place though in the same compound.

23. Section 134 of the *CPC* provides that:

> " 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. "

24. The appellant relied on the case of *Jason Akumu Yongo v Republic* M9831 eKLR, it was held as follows:

> " ln our opinion a charge is defective under Section 214(1) of the Criminal 'procedure Code where:
>
> a. It does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or
>
> b. It does not, for such reasons, accord with the evidence given at the trial; or
>
> c. It gives a mis-description of the alleged offence in its particulars."

25. The charge sheet shows the three complainants, all watchmen, are listed in the same charge sheet. Notwithstanding the fact that the three may have been assaulted in different places in the compound, there is nothing wrong with the charge sheet as drawn. The charge sheet shows that the events occurred on the night of 22nd and 23rd June at 11.30pm. I see nothing in the charge sheet on account of putting the watchmen together, that results in a mis-description of the offence.

26. At trial, the PW3 Eric Njuki testified that he was on patrol at 11.30 when they were attacked; PW4 Joseph Wanjohi stated that he was on patrol with PW3 at the dry coffee tables at 11.30 when they were attacked; and PW5 Joseph Maina stated that he was guarding the upper part and the other watchmen were guarding the lower part, when he was also attacked and tied, at 11.11.30.

27. In its decision in *Joseph Njuguna Mwaura & 2 Others v Republic* [2013] eKLR the Court of Appeal considered what should be contained in a charge sheet where an accused is to be charged with the offence of robbery with violence. It stated as follows:

> "...the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with

actual bodily harm or occasioned actual bodily harm is section 296(2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. ”

28. In this case, the ingredients of the offence are clearly stated in the charge sheet. I thus see nothing in the charge sheet that reflects a variance between the charge sheet and the evidence adduced in terms of section 214 of the *CPC*.

Recent possession

29. On this issue the appellant submitted that the trial court largely relied on the unproved doctrine of recent possession which failed in all tests for admissibility as evidence. He said that the source of that information was suspect since accused 2 was an accused person who would have done anything to ensure his release irrespective of whether he lies or not. In other words, his evidence was never tested but accepted as the gospel truth without any verification or authentication.

30. The appellant also submitted that the alleged confession was not obtained in the right way. For a confession to carry any probative weight, the same must have been obtained in the right procedure as provided by section 25A and 26 of the *Evidence Act*. Thus, the same is inadmissible unless it is made before a magistrate or a police officer not below the rank of Chief Inspector and a third party's present of the person choice.

31. Finally, he argued that the 2nd accused had not made any identification to prove that the first accused was the one who had given him the motorbike. No agreement or witnesses including the two pillions passengers were availed to confirm the same. The evidence considered in light of the pillion passengers evidence as vide Pw6 and who allegedly had lent out his phone for accused 2 to call the first accused left the allegations mired in uncertainty. No data was availed from the service provider nor even the phone number supposedly tendered in evidence.

32. In its judgment, the trial court correctly held, as stated in *Oluoch v Republic* [1985]eKLR cited by the trial court, that the ingredients of the offence of robbery with violence were: stealing; and at time of or immediately before or after stealing using or threatening to use actual violence to obtain, retain the thing stolen or prevent or overcome resistance to its being stolen or retained.

33. The trial magistrate then invoked the doctrine of recent possession to link the stolen motorcycle with Accused 1. She took the evidence of Accused 2, that he had borrowed the motorcycle from Accused 1; disregarded the alibi provided by Accused 2 as corroborated by Accused 2s wife; and applied the case of *Lawrence Chamwanda & Anor v R* [2016]eKLR and *Gedion Meitekin Koyiet v R* [2013]eKLR both of which describe the elements for proof of the doctrine of recent possession as being:

> “ a) That the property was found with the suspect
>
> b) That the property was positively identified by the complainant
>
> c) That the property was recently stolen from the complainant”

34. Clearly, the first element of the doctrine was not proved beyond reasonable doubt. The trial magistrate, in finding the doctrine applicable, made a leap in the dark of logic by connecting the alleged borrowing of the stolen motorcycle by Accused 2 from Accused 1 to find that Accused 1 had been present at the commission of the offence of robbery with violence at the factory.

35. Further, PW8, the investigating officer, arrested the accused person after being referred by PW 9. He admitted that Accused 1 was not in possession of the stolen Motor cycle at the time of the arrest.

Instead, PW 8 claimed that the accused was arrested as he was a suspect in another incident that occurred in 2015 at Karatina.

36. There were other reasons that obliged the trial magistrate to take due care before reaching the conclusion that Accused 1 was directly involved in the robbery.

37. Firstly, the alleged communication through the alleged mobile phone between the 2nd Accused and Accused 1 (the appellant) and Pw6's mobile phone number allegedly used to call the alleged owner of the motorcycle was also not provided through telephony data. This was a key component of evidence that would have connected Accused 2 with Accused 1 and the alleged borrowing of the subject motorcycle. This could only have been obtained through availing the service provider data which the Investigating Officer PW9, sought to bring but did not. PW9 in fact acknowledged the critical importance of that information at page 20 line 20 record of appeal thus:

> "...I am still investigating your phone. Your call data is very essential. I am 'still waiting for the report from Safaricom data requested. "

38. The failure to avail this data cast doubt on the veracity of the evidence of Accused 2, whom the court wholeheartedly believed.

39. Secondly, there was a subtle but critical weakness in the evidence of identification of Accused 1 as the person who the police had been looking for and referred to as alias "Chiwa"

40. The appellant submitted that it was the prosecution's case that the appellant had an alias name as per the charge sheet, namely, Dickson Wachira Wangui alias Chiwa, and thatthis was never proved. It was submitted that there could be a myriad of other aliases that allegedly were meant to mean the same. The appellant invited this court to consider the 2nd Accused's evidence that he never fronted the name alias "Chiwa" to the police nor did anyone else other than the police themselves.

41. Accused 1 pointed to the record of appeal that he was not known by any such name but rather that it was the police who fronted the name as shown at page 35 lines 12 where Accused 1 stated:

> " ...they told me they know Dickson Wachira Majiwa"

42. This clearly shows that the name emanated not from accused 2 but from the Cpl Kilonzo of the CID. Indeed, even Accused 2 who stated that he knew Accused 1 for six months did not use the name "Chiwa" until it was fronted to him by Cpl Kilonzo during interrogation. I find that Accused 2 adopted that alias upon association and suggestion by Cpl Kilonzo. This cannot amount to identification of Accused 1.

43. Thirdly, therewas the problem of identification of Accused 1. The investigating officer admitted that he did not conduct an identification parade to identify the suspect. He appears solely to have relied on his instinct concerning the alias of the Accused 1, the alleged similarity between the cases in Karatina and that in Kerugoya, and on dock identification of Accused 1 , instead of a conducting an identification parade.

44. In the case of *Waruinge v Republic* Criminal Appeal No, 20 of 1998, it was held as follows concerning identfication:

> " 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 the possibility of error before it can safely make it the basis of conviction".

45. Fourthly, the trial court dismissed the evidence of the appellant without deeper consideration of the circumstances. The appellant denied lending the motor cycle to the 2nd Accused and claimed that he did not engage in boda boda business. He said did all manner of casual jobs to support his family. He denied switching his phone or having an alias name, "Chiwa". His defence of alibi was corroborated by DW2, his wife who testified that on the material night he was at home and never left that night for any place.

46. I think that the trial court failed to address itself to these aspects of evidence and weaknesses in reaching its conclusions and conviction.

Re-sentencing

47. With regard to the appellant's request for resentencing, given the findings I have made herein, there is no necessity for discussion on this point.

Disposition

48. In light of all the aforesaid matters, the trial ultimate position is that the prosecution to prove the offence of robbery with violence as against the appellant.

49. The appeal fails only on the issue of the question of defective charge sheet. It succeeds on the issues of failure to prove the offence of robbery with violence as against the appellant beyond reasonable doubt

50. Accordingly, the appeal is allowed, and the conviction and sentence are hereby set aside.

51. In the result, the appellant is set at liberty unless otherwise lawfully held.

52. Orders accordingly.

DELIVERED AT KERUGOYA ON THIS 23RD DAY OF NOVEMBER, 2022.

.....

RICHARD MWONGO

JUDGE

In the presence of:

1. The Appellant in person

2. Mr Mamba for the state

3. Mr Murage Court Assistant