Cheboi v Republic (Criminal Appeal 174 of 2019)
[2022] KEHC 16594 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16594 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 174 OF 2019

RN NYAKUNDI, J

DECEMBER 16, 2022

BETWEEN

FREDRICK KANGOGO CHEBOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against both conviction and sentence from the judgment of Hon. H.O Barasa (SRM) in Criminal Case No. 21687 of 2018 at Eldoret dated 30th October, 2019)

JUDGMENT

1. The appellant herein was charged with two counts of the offence of robbery with violence contrary to section 296(2) of the *Penal Code* in Criminal case no 1687 of 2018. The particulars of the offence are that on the 26th day of September 2017 at Illula village within Ainabkoi sub-county in Uasin Gishu county, the accused persons with others not before court and being armed with dangerous and offensive weapons namely, AK 47 rifle and machetes, robbed Mr Benjamin Kimuge and Mrs Milka Chepchieng of 6Kgs of cooking gas cylinder valued at Kshs 4,500/=, mobile phone, make samsung 13 galaxy valued at Kshs 15,000/= and huawei mobile phone valued at Kshs 11,500/=, sony DVD decoder valued at Kshs 4,500/= and cash Kshs 4,000/- all valued at Kshs 39,500/- and immediately after the time of such robbery wounded the said Bernard Kimunge.

2. The particulars with regard to the second count were that on the same day and place, the accused persons jointly with others not before court, while armed with dangerous weapons, namely, AK 47 rifle and machetes robbed Milka Chepchieng of her mobile phone, make huawei, valued at Kshs 11,500/= and immediately after the time of such robbery wounded the said Milka Chepchieng.

3. The prosecution called 9 witnesses. PW1 was the complainant with regard to the first count. He testified that on the 25th day of September 2017 he was in his house in the company of his wife, children, house-help and brother when their home was raided by robbers. His sons and brother went out to ease

themselves but came back into the house while screaming and went straight to the bedroom to hide. He then got out of the house to find out what the matter was and that is when he came face to face with — two intruders. One of the men was tall and was armed with a panga while the other was short and was armed with a rungu. The man with the panga cut him on the head three times. There was electric light and he could therefore see his assailants properly. He then held the man who had a panga and immediately thereafter his wife came out of the house and started screaming. He held onto the man who had a panga and used him to shield himself from being hit by the man who had a rungu. Neighbours came to the scene in response to his wife's screams. As he was still struggling with the two men inside the house, he heard a gunshot. His wife and brother were outside when he heard the said gun-shot. The man with the gun then escorted them into the house He could remember how the gun the short man was armed with looked like and he duly identified it in court. The tall assailant was then commanded by the one who had a gun to go with him to the bedroom. They proceeded to the said bedroom where he retrieved his wallet and gave it to the assailant. The wallet contained Kshs. 4,000/=. The combined total value of the stolen items was approximately Kshs 40,000/= to Kshs 80,000/=. After the robbers left they all went to Mediheal hospital for treatment.

4. Upon lodging a formal complaint, he was issued with a P3 form which was duly filled by a medical officer. Police officers visited his home while he was still in hospital and recovered a spent cartridge and a pair of slippers at the point where the assailants entered his compound.

5. PW2 was the complainant with regard to the second count. She testified that on the 26th day of September 2017 at around 9.00pm she was in the house with her family. Three of her children then decided to go out for a short call but when they opened the door, they started screaming and retreated back into the house. Her husband rushed to the door to find out what the problem was. Someone however cut him with a panga. She immediately got out of the house and started screaming. The lights were on and using those lights,, he saw a short brown man who had a gun. The assailants later took their house-help who led them to all their rooms. They took their phones, a gas cylinder, shopping, DVD machine and her husband's wallet containing Kshs 4,000/=. She explained that electric lights were on when the robbers struck but after some time, the same were switched off.

6. PW3 testified that on the 26th day of September 2017 he was at his home when a neighbour called him and informed him that one of their neighbours was under attack by people who had guns. He rushed to the scene and at the gate, he saw a short brown man who had a gun. The compound was lit with electric lights. The man he saw had an AK 47 rifle and was the same height as him. The man he saw was the 1st accused.

7. PW4, who worked as a farmhand for the complainant testified that on the material date he was in the servants' quarters which was within their main compound when a man entered the house and introduced himself as his visitor. A second man who was short and was armed with a gun then followed him and ordered him to lie down. There were four more assailants outside the house. The assailants proceeded to the main house where they stole a number of items. They had warned that they would shoot him if he stood up. One hour after they left, police officers arrived at the scene. The complainant and his wife were taken to hospital. He identified one of the assailants at an identification parade which was conducted at the police station.

8. PW5, a firearms examiner working at the ballistic department, produced in evidence two reports prepared by his colleagues. The reports basically confirmed that the spent cartridge that was recovered from the scene was actually shot from the AK 47 rifle which was produced in evidence before the court and which was said to have been recovered from the accused herein.

9. PW6 testified that on the 27th day of September 2017 at around 0038 hours he was at Kapsoya Police Post when he received a phone call from one of PW1's neighbours who informed him that PW1's home had been raided by thugs. He then mobilized his fellow officers and they proceeded to the scene. The complainants had been taken to hospital since they were injured. They found a crowd at the scene and tried to look for the assailants to no avail. He sent some of his officers to visit the complainants as he continued combing the area for any exhibits. They later found one ammunition and one spent cartridge. The said exhibits were subsequently forwarded to the DCI, Eldoret West for further investigation.

10. PW7, an Inspector of Police, testified that on the 18th day of April 2018, the accused persons herein were brought to him by the investigation officer for identification parade. He then included them in an identification parade of thirteen people and they chose their solicitor, namely, Eric Kiplagat. There were three identifying witness. The 1st accused was positively identified by one of them. He told the court that he fully complied with all the requirements of the Force Standing Orders. After the exercise, they indicated that they were satisfied with how the parade was conducted. He said that one Johnson Kimuge identified the 1st accused by touching him.

11. PW8, a Senior Medical Officer based at Elgeyo Border Health Centre is the one who examined the complainants herein and filled their P3 forms which he produced in evidence before this court.

12. PW9 was the investigation officer in this case. He testified that on the 23rd day of October 2017 he was instructed to conduct investigations in a robbery with violence case which had been reported at Kapsoya Police station. He was with PC Eugene Omondi when he received the instructions. He recorded the complainants' statement and those of his witnesses. They also forwarded the recovered exhibit which had been recovered at the scene to the ballistic examination section. In early April 2018 they received information from the Sub-County Criminal Investigation officer, Keiyo South, to the effect that they were handling a case involving the 1st accused person. He had been charged with the offence of being in possession of Firearms and ammunition at Iten Law court and that they had forwarded the Firearm to the ballistic section, Nairobi. Upon examination of the said firearm, the ballistic expert found that the exhibit of spent cartridge which had been forwarded from Kapsoya Police post was fired from the firearm. They proceeded to Iten where they arrested the two suspects and booked them at Iten Police Station. On April 17, 2018, he arraigned the suspects in court, swore an affidavit and had them detained at Naiberi Police Station pending an identification parade which was conducted on April 18, 2018 by one Inspector Savimbi and on April 19, 2018, they were charged with the present offence. He also obtained a search certificate and inventory sheet with a copy of the charge sheet from the investigation officer who was handling the case against the accused persons at the DCI office, Keiyo North, Iten. He produced in evidence the charge sheet in Criminal Case No 173 of 2018 where the accused persons were charged with the offence of being in possession of a firearm contrary to section 89 (1) of the *Penal Code* and being in possession of ammunition contrary to section 89 (1) of the *Penal Code*. The 2nd accused was charged with the offence of consulting a person in possession of firearm contrary to section 89 (1) of the *Penal Code*. The inventory sheet signed by the 1st accused and adminstration officers Richard Cherotich, Joseph Kibet and PC Onesmas Kiseve was also produced in evidence. The inventory sheet showed the items that were recovered from the 1st accused. The spent cartridge that was recovered from the scene was forwarded to the ballistic expert in Nairobi and there was a firearm that was forwarded for analysis as well. The ballistic expert found that the spent cartridge was fired from the firearm which was the subject matter of the case that was pending at Iten court.

13. In his sworn statement of defence, the 1st accused told the court that on the 15th day of April 2018 he had a case before Iten Law Court. After that case was mentioned he was arrested outside the courtroom and brought to Kapsoya Police Station. From there, he was arraigned before this court but

no charges were preferred. He was taken back to Kapsoya Police Station where an identification parade was conducted. There were ten people in the identification parade. He said that he did not seek the presence of any lawyer at the parade and he therefore does not understand where there was a solicitor. He said that there was no lawyer by the name of Enock Kiplagat Tarus. He produced an advocates search from the LSK website to show that there was no such lawyer. He told the court that he was the only brown man with protruding teeth at the identification parade. He said that the witness who identified him simply pointed at him.

14. The trial court, upon considering the evidence, submissions of the parties and the defence of the accused person found him guilty and convicted him of both counts. He was sentenced to life imprisonment.

15. The appellant being dissatisfied with the decision instituted the present appeal against the conviction and sentence. He then sought leave to amend his grounds of appeal and filed the same with his submissions. The grounds of the appeal are;

    1. That, the learned trial magistrate erred in law and fact by failing to appreciate that the government's chemist n port did not provide a nexus of the commission of the offence and the appellant.

    2. That, the learned trial magistrate erred in law and fact by alluding to criminal case number 173 of 2017 at Iten Law Court to establish the guilt of the appellant in the present case, yet that case had not been determined as at that time and hence the appellant's guilt had not been established.

    3. That, the learned trial magistrate erred in law and fact by failing to appreciate that all the witnesses who signed the inventory sheet were all police officers; there was no independent witness who was a civilian.

    4. That, the sentence meted out is harsh and excessive and not informed by the unique facts and circumstances of the offence.

16. The appellant filed written submissions on the appeal. He submitted that it is clear from the evidence adduced during the trial that the appellant's identification was not positive. This fact was appreciated by the trial court as it stated on page 15-16 of the judgement where the court stated that PW3 and PW4 claimed to have seen the accused persons but PW3 was not called for identification and therefore the evidence of PW4 was found to be contradictory. Further, he stated that the trial court after failing to connect the appellant with the commission of the offence based on the botched identification relied on the evidence of the ballistic expert and that the trial court did not make an independent decision since the evidence adduced in court was in respect to criminal case No 1687 of 2018 at Eldoret. He submitted that that the trial court's refence to a matter that was pending in another court pending determination in order to draw inference of the appellant's guilt was not only erroneous but a violation of the appellant's right to a fair trial

17. What the trial court failed to put into account was that the exhibit tendered to the ballistics expert for analysis was different and the one whose report was delivered. There was a contradiction as to the lab number of the cartridge that was examined as it was not clear whether it was No 755 of 2017 or No 255 of 2017.

18. According to the appellant, the sentiments of the trial court as regards the appellant's guilt do not demonstrate the correct application of the law. The inventory sheet was signed by three police officers. There was no independent witness apart from the police officers who signed the inventory. What would have prevented the police officers from planting exhibits on the appellant and charging him with the

present offence in a matter where they are the only witness who witnessed the recovery of the alleged items? Further, it was never demonstrated to the trial court that the maker of the inventory sheet could not be procured without substantial delay. His evidence would have assured the trial court that indeed he was the one who prepared the inventory sheet. His failure to testify and the lack of explanation on his unavailability can only lead to the inference that his evidence would have been detrimental to the prosecution's case or that the inventory sheet was a forgery of PW9. This was the holding in the case of *Bukenya and Others v Uganda* (1972) EA 349.

19. The appellant contended that the magistrate imposed a severe sentence without considering that, the appellant was a first offender, he had no previous records by the time of conviction and sentence. He submitted that that sections 216 and 329 of the *Criminal Procedure Code* affords the trial courts sentencing discretion by requiring them to consider the mitigating circumstances of the offender before parsing sentence. This is meant to ensure that in exercising their exclusive functions in the administration of justice, courts are able to make fair decisions especially when the effect of such decisions is to deprive the accused persons of their fundamental right to liberty. He was of the position that mitigation should be considered in murder cases.

20. He urged that the conviction be quashed and the sentence imposed be set aside.

21. There were no submissions on record for the respondent

Analysis and Determination

22. Upon considering the petition, pleadings, record of appeal and submissions, the court has identified the following issues for determination;

    1. Whether the prosecution proved its case to the required standard

    2. Whether the sentence imposed was harsh and excessive

Whether the prosecution proved its case to the required standard

23. this being the first appellate court, it has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing and hearing the witnesses and observing their demeanour and so the first appellate court must give allowance of the same. this was well put in the well-known case of *Okeno V Republic* [1972] EA 32 where the court stated as follows:

> the first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M Ruwala V R* (1975) EA 57). 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 court's 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."

24. What constitutes the offence of robbery with violence was well captured in the case of *Oluoch vs Republic (1985)*KLR where the Court of Appeal stated as follows:-

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

> the offender is armed with any dangerous and offensive weapon or instrument; or the offender is in company with one or more person or persons; or 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 elements that the prosecution was required to establish are as follows;
The offender was armed with any dangerous and offensive weapon.The offender is in company of one or more personsAt or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

Whether the offender was armed with a dangerous weapon

25. There was a spent cartridge found at the scene of the crime. The cartridge was the subject of a ballistic report which linked the same to the gun that was recovered from the appellant on February 8, 2018 at Tairi Mbili, Iten. The report established that the cartridge had been fired from the gun he was found in possession of. The trial court indeed admitted that PW4s' evidence as to the identity of the accused was contradictory but the fact that the appellant was found in possession of the gun which was linked with the cartridge confirmed that he was one of the assailants on the material date.

26. In *Mwangi and Another v Republic* (2004) 2 KLR 32, the Court of Appeal addressed the issue of circumstantial evidence as follows:

27. In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the accused is guilty of the charge"

28. In *Ahmad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the Court of Appeal expressed itself as follows:

> However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr App R 21: -
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> "It has been said that the evidence against the applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

29. In *Musili Tulo v Republic* Cr App No 30 of 2013 the Court of Appeal proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The court stated:-

> Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr App No 32 of 1990, this court set out the conditions as follows:
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> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

i. the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;

ii. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

iii. the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.

30. It is my view that since the cartridge found at the scene was proved to have been fired from the weapon the appellant was found in possession of it is evident that he was armed on the material date and, that he was present on the crime scene. The appellant has not provided any other possible explanation to rebut the circumstantial evidence. There is no explanation as to when he came into possession of the weapon and how he came into possession of the weapon.

31. I find no fault in the evidence before another court being produced before this court with regard to the ballistic report. Further, there is no prejudice in the police signing the inventory sheet as the appellant himself filed the inventory sheet

Whether the offender was in the company of many persons

32. The appellant has been placed at the scene of the crime by cogent evidence. PW1, PW2 and PW4 all testified that there was more than one assailant who robbed them. PW2 testified that she had been assaulted by six people. It is therefore apparent that the appellant was in the company of many persons.

Whether the appellant used violence

33. PW1 and PW2's evidence is that they were assaulted by the appellant and the other assailants who were with him. PW8 produced the P3 forms that were filled by him upon conducting an examination on the complainants. He confirmed that PW1 and PW2 had sustained various injuries from a reported attack by robbers.

34. It is evident that the elements of robbery with violence were satisfied by the prosecution.

Whether the sentence was harsh/excessive

35. Section 296 of the *Penal Code* provides;

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) 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.

The trial court sentenced the appellant to life imprisonment. My understanding of this sentence denotes incarceration of the appellant in committing a capital offence of robbery. As noted by various decisions of the superior court there are guidelines on how a first appellate court can go about reviewing the sentence imposed by the trial court. In this respect I make reference to the following jurisprudential principles as illustrative in the cases of *State of MP vs Bablu Natt* {2009}2S CC

272 Para 13 that "the principle governing imposition of punishment would depend upon the facts and circumstances of each case."

Similarly, in *Alister Anthony Pareira vs State of Maharashtra*, [2012] 2 SCC 648 para 69 that:- "Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances."

36. In our own jurisdiction the court of appeal said this in *Bernard Kimani Gacheru vs Republic* [2002] eKLR restated 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 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 states is shown to exist."

37. In every case however the nature of the circumstances must convince a reasonable mind that a lesser sentence is a proper sentence and it is justified when regard is given to the aggravating and mitigating factors in the entire process of sentencing. As against this consideration I had an opportunity to receive mitigation from the appellant and subsequent rejoinder by the state on aggravating factors. Having balanced all these I concluded that the aggravating factors of the offence outweighed the mitigation offered by the appellant. The specific sentence offered by a trial court cannot be departed from lightly and for flimsy reasons not provided for in the law to guide an appeals court. In so doing I have taken account the seriousness of the offence, the manner in which it was committed, the use of a firearm and ammunitions by the appellant. It must be appreciated that during the sentencing of the appellant by the trial court key principles enunciated by the supreme court in *Muruatetu v Republic* 2017eKLR were never factored in the final verdict. In the case at bar I am minded to exercise discretion pursuant to the principles nuanced in the above case law to vary the life imprisonment imposed after the conviction of the appellant and substituting it with a term imprisonment of thirty (30) years custodial sentence with the commencement date being the April 19, 2018.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF DECEMBER, 2022.

R. NYAKUNDI

JUDGE