



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 106 OF 2019

ROBERT SITUMA MWASAMA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the conviction and sentence delivered by Hon. C. M. Wattimah, SRM, on 27/06/2019 in Criminal Case No. 428 of 2019 in the Principal Magistrate's Court at Sirisia, Republic v Robert Situma Mwasama)

JUDGEMENT

1. The appellant has appealed against his conviction and sentence of sixty (60) years imprisonment in respect of the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code (Cap 63) Laws of Kenya
2. The state has supported the conviction and has applied for enhancement of sentence.
3. The appellant has in his amended petition of appeal raised three grounds in this court.
4. In ground 1 the appellant has faulted the trial court in failing to observe the provisions of article 49 (1) (d) of the 2010 Constitution of Kenya; which guarantees to him the right not to be compelled to make a confession or admission that could be used as evidence against him. The appellant submitted that the police applied pressure upon him to admit that he committed the offence with promises that the said admission could earn him an opportunity to be acquitted. He further submitted that this was his first time to be in the hands of the police. According to him, the police took advantage of his lack of exposure and deceived him to plead guilty. He has also stated that being a serious offence of capital robbery, one would not easily plead to such an offence.
5. I have seriously considered this ground of appeal. In a serious offence such as this the court must be satisfied that the plea of guilty to the offence was voluntary and informed. One indicia of voluntariness relate to the language used in taking the plea. It is clear from the proceedings that Kiswahili was used in taking the plea of guilty. After the charge was explained to him in that language, the appellant stated that: "*kweli true.*" This was in response to the main charge of robbery with violence.
6. Thereafter the court administered a caution to the appellant in the following language: "*Accused cautioned on the severity of the sentence likely to be imposed if he pleads guilty and charges read to the accused for the second time.*" In response thereto the accused stated that: "*kweli (It is true).*" Thereafter, the court entered a plea of guilty.
7. The prosecutor then outlined the facts in support of the charge. The facts upon which the appellant was convicted were as follows. The deceased was a retired school teacher who was operating a bar and restaurant business at Lwandanyi shopping centre. The appellant and his accomplice (Lamec Jeremia Obsuru), was employed as a bar attendant by the deceased in that restaurant. The appellant and his accomplice planned on how to steal the deceased's motor vehicle registration No. KBM 098J Pro-box make and white in colour.
8. On 16/6/2019 the deceased (Timothy Omutoko Imbalika) was in his bar and restaurant. And inside his said vehicle were assorted items including alcoholic drinks (three bottles of spirit drinks and several tusker beers) a flat screen TV, a woofer and sufurias. All the stolen properties and the motor vehicle were valued Shs 670,170/-.
9. The following day on 17/6/2019, the deceased could not be traced.
10. On 17/6/2019 the accused and his accomplice, who is at large were stopped along Malaba-Eldoret road by police officers. The officers wanted to know why they had those items. The appellant escaped and later the accomplice also escaped. Later on the same day the accomplice called the appellant and told him that he had also escaped. The appellant then realized that the motor vehicle was at Matete police station. He proceeded there and asked to be given the vehicle. As a result, he was arrested.

11. The appellant was then taken to Sirisia DCIO's office where he confessed to the crime of robbery with violence on 21/6/2019. The appellant disclosed where the body of the deceased was namely that it was buried in a pit behind his bar and restaurant. The police went and dug the place and recovered the body of the deceased from that pit. The body was exhumed and taken to Bungoma referral hospital, where a post mortem was performed.

12. The findings of the post mortem were as follows. The 2nd, 3rd, 4th and 5th right ribs were fractured. The 3rd and 4th left ribs were also fractured. There were blood clots on the right thorax. The digestive system had distended intestines.

13. Furthermore, the examination of the head revealed the following. There were strangulation marks in the neck. He had an unstable skull base.

14. The doctor who performed the post-mortem concluded that the cause of death was strangulation of the 2nd degree. The report of the post-mortem was put in evidence as exhibit Pexh 2. The out of court confession before the police was also put in evidence as exhibit Pexh 3. The photographs of the exhumed body were also put in evidence as exhibit Pexh a to g.

15. The out of court confession before the police is very detailed and in substance is similar to the confession in court taken during the plea of guilty before the magisterial court. This is yet another indicium of the free and voluntariness of the plea of guilty.

16. In the light of the foregoing, I find that the submission of the appellant that the police applied pressure upon him to plead guilty is without basis. I agree with the submission of the prosecution that the plea of guilty was unequivocal. I also agree with the prosecution submission that where an accused pleads guilty, such an accused is barred from appealing against his conviction by virtue of section 348 of the Criminal Procedure Code (Cap 75) Laws of Kenya. Those provisions read as follows:

"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the legality of the sentence."

17. The foregoing provisions have been judicially approved in the case of *Olel v Republic [1989] e-KLR* in which the court held that:

"where a plea is unequivocal, an appeal does not lie. section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely."

18. The accused then was given an opportunity to respond. He did so by telling the court that: *"Ni ukweli (that is true)."*

19. Thereafter the prosecutor told the court that they did not have any previous records.

20. The appellant was then given an opportunity to mitigate. In response thereto the appellant told the court that: *"I have nothing to say."* The court then asked him how old he was. The appellant then told the court that: *"I am 19 years old."*

21. It is clear from the foregoing that the appellant was communicating with the court through Kiswahili language and that is why he responded in that language. I therefore find that the accused well understood the language of the proceedings in court on that day, which was Kiswahili.

22. The second indicium of the voluntariness is the warning to the appellant that he was liable to be sentenced to a very severe sentence if he pleaded guilty. As a result, the charge was again read to him. He still maintained his plea of guilty to capital robbery.

23. The third indicium of the voluntariness of the charge is in relation to the mitigation of the appellant. In this regard, when the appellant was given the opportunity to mitigate, he elected to say nothing.

24. The fourth indicium of voluntariness is that the proceedings must be held in open court in accordance with standard practice, which includes amongst other requirements the presence of a language interpreter. In the instant appeal, the record shows that there was such a Kiswahili/English interpreter by the name Matep.

25. I have perused the record of the proceedings in respect of taking the plea of guilty. I am satisfied that the appellant freely and voluntarily pleaded guilty and was convicted on his plea of guilty to the charge of capital robbery. It is important to point out that after the outline of the facts by the prosecutor and their acceptance by the appellant as being correct, the trial court should have entered an order of conviction. However, this was an irregularity that is curable in terms of section 382 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

26. I further find that that the right of the appellant under article 49 (1) (f) of the 2010 Constitution was not violated in that no pressure was applied upon him to plead guilty. And finally, I find that the facts that were outlined by the prosecution disclosed the offence of capital robbery. Those facts showed that the appellant and his accomplice caused the death of the deceased through strangulation. The facts further showed that the stolen goods namely the motor vehicle and the assorted items such as beer, sufurias and alcoholic spirits were recovered from the motor vehicle, which was in the joint possession of the appellant and his accomplice, who is at large. The fact that those exhibits were not produced in court does not mean that the offence of robbery was not committed. It is a curable irregularity in terms of section 382 of the Criminal Procedure Code. In other words, it is a harmless error.

27. Moreover, the fact that the appellant pleaded guilty in itself did not dispense with the production of the motor vehicle and the assorted items, as exhibits. Lack of production of these items as exhibits is not fatal to the conviction.

28. Furthermore, the appellant also submitted that his right to be taken to court within 24 hours was infringed. In this regard, the charge sheet shows that the appellant was arrested on 20/6/2019. He was taken and appeared in court on 27/6/2019. It seems he was not taken to court within 24 hours as required by article 49 (1) (f) (i) (ii) of the 2010 Constitution of Kenya. This is a matter for the inquiry of a court exercising civil jurisdiction. The alleged violation of such a right may not vitiate a conviction such as the one in the instant appeal. This submission lacks merit and is hereby dismissed.

29. I therefore find no merit in grounds 2 and 3 of the amended petition of appeal; which I hereby dismiss.

30. In the premises, I find that the plea of guilty by the appellant was unequivocal. See *Adan v Republic [1973] EA 445*. I therefore find that the appellant was not compelled to make a confession or admission as set out in article 49 (1) (d) of the 2010 Constitution of Kenya.

31. The appellant's appeal against conviction fails and is hereby dismissed.

32. In sentencing the appellant, the trial court erred in finding that the death penalty was declared unconstitutional by the Supreme Court in *Francis Muruatetu & Another [2017] e-KLR*. The court did not do so. It held that the courts were not bound to impose the death penalty, but instead it held the courts had a discretion to impose any appropriate sentence. In the circumstances, I am entitled to interfere with the sentencing discretion of the trial court.

33. After taking into account all the circumstances of the case, I find that the sentence is manifestly excessive. I therefore reduce it to thirty-five years' (35) imprisonment which sentence will run from the date of this judgement.

Judgment signed, dated and delivered at Narok this 29th day of September, 2020 through video link conference in the presence of the appellant and Ms. Nyakibia for the Respondent.

J. M. BWONWONG'A.

J U D G E

29/09/2020.