Imbwaka v Republic (Criminal Appeal 3 of 2018)
[2019] KEHC 9746 (KLR) (22 February 2019) (Judgment)

Chrisandus Amunzu Imbwaka v Republic [2019] eKLR

Neutral citation: [2019] KEHC 9746 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 3 OF 2018

SN RIECHI, J

FEBRUARY 22, 2019

BETWEEN

CHRISANDUS AMUNZU IMBWAKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Conviction and sentence in original Bungoma CM CR. 425/2017 delivered on 14.2.2018 by Hon. C.A.S. Mutai (PM))

JUDGMENT

1. The appellant Chrisandus Amunzu Imbwaka was charged in the Magistrates Court with 5 Counts but was found guilty of only three Counts which are relevant to this appeal. These are Count 1, Count 2 and Count 3 in Count 1; appellant was charged with Robbery with violence Contrary to Section 295 as Read with 296(1) of the Penal Code. Particulars of offence being; On the night of 13thand 14th August 2016 at Bukembe Market within Bungoma County, jointly with others not before court while armed with crude weapons namely axe and rungu robbed ROSE NEKESA WATITWA of three mobile phones make ITEL NOKIA TECHNO twin SIM IMEI numbers 357407052633493, 357407052635493 and cash Kenya shillings Sixteen thousand two hundred and fifty (Kshs.16,250/=) all valued at Kenya shillings Thirty one thousand two hundred and fifty (Kshs.31,250/=) and immediately before the time of such robbery used actual violence to the said ROSE NEKESA WATITWA.

   Count 2; appellant was charged with Robbery with violence contrary to Section 295 as read with 296(1) of the Penal Code. Particulars of offence being; On the night of 13th and 14th August 2016 at Bukembe Market within Bungoma County, jointly with others not before court, while armed with crude weapons namely axes and rungus robbed KASEMBELI SIMIYU of one mobile phone

make TECHNO P5, twin SIM IMEI numbers 399005055224980, 399005055224998 valued at Kshs.6,000/= (Kenya shillings Six thousand) and immediately before the time of such robbery used actual violence to the said KASEMBELI SIMIYU occasioning him actual bodily harm.

Count 3; appellant was charged with Robbery with violence contrary to Section 296(1) of the Penal Code. Particulars of offence being; On the nigh of 13th and 14th August 2016 at Bukembe within Bungoma County, jointly with others not before court while armed with crude weapon namely a metal rod robbed BENSON WAFULA SABUNI Kenya shillings two thousand (Kshs.2,000/=) and at, immediately before and immediately after the time of such robbery threatened to use actual violence to the said BENSON WAFULA SABUNI.

2. The evidence before the trial court briefly was that Rose Nekesa Watitwa the complainant in Count 1 was in her house when at 8pm. when her nephew called Mike informed her that he had seen people with torches within the compound. Shortly later Mike called again and said he had arrested a suspect. She opened the door and on stepping outside she found people who attacked and took her mobile phone. The people held her and took her to the house and demanded Kshs.200,000/=. She did not have it but they took Kshs.14,000/= in a paper bag Kshs.2,700 from a purse a solar panel, radio assorted clothes and one wanted to rape her but the others dissuaded him. She noticed that they were 5 people and were armed with pangas and axes and had torches which they were flashing. They stayed in her house for about 1½ hours. Holding her hostage, she took them to the house of Martha, Simon; Ben and to the house of Rael who runs an Mpesa Kiosk and Mama Mike where they all robbed the victims of various items subject to the other counts. They then tied them and left them. After they had left the members of Public came and matter was reported to police. Later she was called to the police station where she attended an identification parade where she picked the appellant as the person who had robbed her by voice recognition and visual identification. She was shown a Mobile phone which she identified as hers which was stolen on the material night.

3. Pw2 Rael Mukwana Munandi the complainant in count 3 testified how while asleep in her house Rose Watitwa (Pw1) called her and asked them to open the door. Her husband went to open the door. She heard a commotion and people entered the house. They demanded money from her. She gave them Kshs.300,000/= and they also took Kshs.5,000/= worth airtime cards, 5 mobile phones, transferred Kshs.17,500/= from her Mpesa phone, to the account of one Lilian Amoi and later raped her. They remained in the house for about 3 hours from mid-night at 3.00 a.m.

4. Pw3 Benson Sabuni Wafula the complainant in count 2 was also in his house he heard Rose (Pw1) call him to open the door. On opening the door people entered the house took his Kshs.2,000/= and ordered him to take them to the house of Martha Wanyonyi whom they also robbed. Pw8 Corpl. Irene Kimiyu the Investigating officer received a report of the robbery and commenced investigation. She received information that the stole mobile Imei No. 35740752433490 was being used by a person with ID. No. 11837824 in the name of Chrisandus Imbwaka son of Ernest Imbenzi. He went to trace the owner but received information that he had a case at Bungoma Law Courts. On 16.3.2017 he arrested the appellant at Bungoma Law Courts and recovered the mobile phone which was later identified by the 1st complainant as hers and which was stolen during the robbery.

5. The appellant gave sworn evidence. He testified hat he had a grudge with the DCIO over an alleged affair with appellants wife called Rebecca Mulama who was operating a hotel at Naliaya Market. The D.C.I.O. had arrested him and caused him to be charged with robbery in Eldoret. While coming out of court he was arrested by Police officers from Bungoma and later charged with the present offence. He denied being found in possession of the mobile phone. It is upon the above evidence that appellant was found guilty, convicted and sentenced to life imprisonment. The appellant filed this appeal on the following grounds;

1. That the learned trial magistrate grossly erred on law and fact by failing to observe that the identification parade which was conducted at the police station in my respect, was not at all conducted in accordance with the provisions of Chapter 46 of the police force standing orders thus rendering to the serious miscarriage of justice upon me the Appellant herein.

2. That the learned magistrate grossly erred in matters of law and fact while basing my conviction on the basis circumstantial evidence that didn't meet the required legal threshold thus rendering a prejudice.

3. That the learned magistrate erred also in both points of law and fact by failing to observe properly that the prosecution side did not at all affirmatively prove its case against me beyond all reasonable doubt. And by shifting the burden of proof to the defendant hence contrary to Sections 107(i) and 111(1) of the *evidence Act* CAP 80 Laws of Kenya thus a prejudice.

4. That the learned trial magistrate finally erred in law and fact while dismissing my defence statement, yet failure to note and consider that my same defence statement was not all displaced by the prosecution side as prescribed by the law under (section 212 as read with section 309 of the Criminal Procedure Code Cap 75 Laws of Kenya) thus rendering to the serious miscarriage of Law and Justice respectively.

6. The appellant filed written submissions in support of his grounds of appeal. He submitted that there is no dispute that the offence was committed as testified. He however, disputed the prosecution contention that he was one of the perpetrators of the crime. He submits that the charges were duplex and he would not know the exact charges against him. Appellant further submits that the evidence of identification by the witnesses and the outcome of the identification parade was not conclusive as the only identification was by voice and that the condition for voice identification were not conducive. Appellant further submitted that the identification parade was not conducted in accordance with the police forces standing orders and its probative value is therefore diminished. Appellant submits that there was no evidence that he handled the stolen property as no recovery form or other statement under inquiry was produced. Finally appellant submits that his defence was dismissed on weak reasons as his defence was not displaced. The appellant reiterated those submissions in his oral submissions in court on 10.9.2018. Mr. Akello for the state opposed the appeal contending that the conviction was supported by evidence, as the appellant was positively identified by 3 witnesses.

7. This is a first appeal. The duty of the first appellate court is to re-evaluate that evidence and arrive at its own conclusion but bearing in mind it did not hear or see the witnesses testify.

8. The appellant was charged with the offence of robbery contrary to Section 296(1) as read with 296(2) of the Penal code; 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 or the robbery, he wounds, beats, strike or uses any other personal violence to any person, he shall be sentenced to death.

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

   a. The offender is armed with any dangerous and offensive weapon or instrument; or

   b. The offender is in company with one or more person or persons; or

   c. 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 ....." [our own emphasis].

10. The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. In this case the complainant said that he was accosted by a group of six men – this fulfils ingredient (b). The complainant testified that the accused and his companions were armed with knives which were used to threaten the complainant – this fulfils ingredient (a). The fact that the complainant did not sustain any injury in the course of the robbery does not reduce the offence to simple robbery. Two ingredients of Robbery with Violence under section 296(2) have been shown to have existed and that is sufficient to prove the offence. We therefore find that the trial magistrate was correct in imposing a conviction under section 296(2). The trial magistrate did give due consideration to the appellant's defence which he found to be unworthy and subsequently dismissed. We are satisfied that the appellant was properly convicted and we do hereby dismiss his appeal against conviction.

11. There is no doubt and it is not in contention that there was a robbery on the night of 13th – 14th August 2016 at Bukembe Market, where several people including the complainants were robbed of their property and injured in the process. The main issue for determination is whether the appellant was one of the robbers.

12. The appellant in his grounds of appeal submits that he was not positively identified by the witnesses at the scene. Pw1 Rose Nekesa testified that while in her house she would not identify the people by visual means but would recognize a voice which was familiar and that of Imbwaka the appellant, whom she had known before. They went with her in her house for 1½ hours before they ordered her to take them to homes of the other complainants. On arriving at the home of Simon where there was electricity from the light she was able to see the appellant, she attended the identification parade where she picked him on the basis of voice identification.

13. Pw2 Rael Mukwana Munandi testified that when the robbers went to her house, her husband put on the electric light and he would see the robbers. He saw the appellant as the person who was being referred to as "Corporal" and that he was the one who tried to cut her husband. She also identified him at the parade from his voice and testified that even without the voice identification she had seen him properly during the incident where they stayed in the house for 3 hours. She testified that while they broke the bulb in the sitting room, the bedroom light were on and on being cross examined by appellant, she confirmed that she identified him by appearance.

14. Pw3 Benson Sabuni Wafula testified that he led them to the home of Lidin Kasembeli and was able to see the appellant with the use electric light before they blew up the bulb. He testified that he was with the robbers for about four 94) hours.

15. Pw4 Kasembeli Lidin Simiyu testified that he was able to identify the appellant in his house as the person who took tomatoes and avocados and started eating.

16. This was the evidence of the witnesses on identification. The court in evaluating the evidence of identification in robbery cases must satisfy itself that there existed conducive circumstances for visual identification. These circumstances would include the source of light, it intensity, the period of exposure, whether it is identification of a stranger or recognition of a person known and the position of the accused in respect to the identifying witnesses. In this appeal, the period within which the identifying witnesses stayed with the robbers was long, over 1 hour; there is evidence that the appellant was seen by each of the 3 witnesses on with the help of electric light in the various homes they robbed that night; the intensity of electric light was high, period of exposure long; finally all these witnesses identified the appellant at the identification parade both on voice identification and visual identification.

17. The appellant submits that the issue of possession of the stole mobile phone was not produced, as there was no evidence or recovery form filled. Recent possession of stolen property unless such possession is satisfactorily explains is a basis for a finding of guilty of the offence of robbery. The doctrine of Recent possession has been explained by locus in this county in our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version. That duty as has been said is wholly on the trial court and on the first appellate court. This court has no such duty on hearing a second appeal such as before us but if it be satisfied that that duty has not been fully discharged by the first appellate court then it will take the line that had it been done either or both courts would have arrived at a different conclusion.

18. Pw1 Rose Nekesa Watitwa the complainant in Count 1 testified that among the items stolen during the robbery was her mobile phone Make Techno. She gave the particulars of the phone to the police. Police found that the Mobile No. IMEI 35340752433490 was being used by the person who bore the particulars of the appellant. Acting on this information the appellant was arrested and the mobile phone recovered from him. This mobile phone was identified by complainant in court as hers and among the items stolen from her during the robbery. The appellant denied that the mobile phone was recovered from him but the evidence of investigating officer is clear on this. The appellant did not offer an explanation as to how he came by the mobile phone. I am satisfied that evidence of recent possession of the phone was credible and would attract the doctrine of recent possession as form of basis for a finding of guilt.

19. Upon considering the appeal, and submissions, I find no merit in this appeal which is hereby dismissed.

DATED AND SIGNED AT BUNGOMA THIS 22ND DAY OF FEBRUARY, 2019.

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S.N. RIECHI

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JUDGE.