Njenga v Republic (Criminal Appeal E031 of 2022)
[2025] KEHC 138 (KLR) (13 January 2025) (Judgment)

Neutral citation: [2025] KEHC 138 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E031 OF 2022

GL NZIOKA, J

JANUARY 13, 2025

BETWEEN

JAMES MBURU NJENGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the decision of Hon. J. Karanja Senior Principal Magistrate (SPM) delivered on; 21{{^st}} April, 2021, vide Chief Magistrate's Criminal case No. 100 of 201)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's Court at Naivasha charged vide Chief Magistrate Criminal Case No. 100 of 2015, with the offence of robbery with violence contrary to section 296(2) of the Penal Code (Cap 63) Laws of Kenya in count (1) and alternative charge of handling suspected stolen property contrary to section 322(2) of the Penal Code.

2. He was charged alongside one Antony Nganga Kiarie who was subsequently acquitted of both charges. However, the appellant pleaded not guilty to both charges and the case proceeded to full hearing.

3. The prosecution case in a nutshell is that on the 17th day of January 2015, one Joseph Macharia Karanja (herein "the deceased") was operating boda boda business using a motorcycle registration No. KMDA 177R. That he called his brother (PW2) Gabriel Mwangi Macharia and informed him that he had been arrested at Maai Mahiu while ferrying charcoal on the motor bike. That the police officers had demanded a sum of Kshs 20,000 to release him.

4. According to PW2 Gabriel the deceased did not have the money and wanted assistance from him although PW2 wondered why the deceased was working on a Saturday as he attended the Seventh Day Adventist worship on a Saturday. That after the call the deceased's phone went off and was not seen or heard off on that day.

5. PW2 Gabriel testified that the following day a search was mounted for the deceased and upon a visit to Naivasha Police Station the deceased's motorcycle was found at the station and at that point the family members learnt that the deceased had been killed.

6. That investigation revealed that the motorcycle was recovered in the compound where the suspect one Antony Nganga Kiarie who was acquitted was operating a bar. Further that the motorcycle had bloodstains on the rear wheel and footrest.

7. PW1 Laban Kariuki Kimani testified that on the material day; 18th January 2015 he heard screams and when he responded he found a motorcycle with blood stains surrounded by people. That the suspect who was acquitted had been beaten by the mob and that he named the appellant as his accomplice.

8. That when the police officers arrived at the scene, they arrested the acquitted suspect and took the motorcycle away and visited the appellant's home, which was about 500 meters away. That blood was found on the seats and floor of the house. Further two (2) phones and insurance cover of motorcycle were collected therefrom.

9. Further evidence as led by PW1 Laban and PW3, No. 67108 PC Alikanjeno Mutwiri is that bloodstains from the appellant's house spread outwards and led to a place called Kameme where sand is harvested. That upon arrival, a covered hole was discovered and was was dug up and a 90kg sack recovered. Further upon inspection thereof it was found to contain a human body with multiple injuries. That the body was of the deceased and was moved to the mortuary at Naivasha Sub-County Hospital.

10. That subsequently the scene of crime personnel visited the scene and processed it where several items were recovered and samples taken to the government chemist for analysis and at the conclusion of the investigation the appellant was charged as herein stated.

11. At the conclusion of the prosecution case the appellant was placed on his defence and in an unsworn statement he testified that on the 17th day of January 2015, he took himself to the Administration Police Post at 6.00pm to discuss the issue of bhang with (PW3) PC Akalinjeno Mutwiri who used to give him bhang exhibits to go and sell for him at a commission.

12. That on 27th of November 2014, (PW3) PC Mutwiri and one Isaac Njoroge delivered a large quantity of bhang of about 90kg valued at Kshs 350,000, which he put it in his rented house. However, the bhang was stolen on 28th November 2015 and he informed (PW3) PC Mutwiri who promised to find the culprits.

13. That on 17th January 2015, he went to the AP Police Post as usual and was accused of stealing the bhang which he denied and was placed in the cells. That at 11.00pm the investigating officer took two people badly injured to the cell and left.

14. That at 5.30am another injured person was taken to the cells and on the 18th January 2015, he was transferred to Naivasha Police Station and on 19th January 2015 he was charged alongside a person he did not know.

15. However, at the conclusion of the case the trial court vide a judgment dated 21st April 2021, found the appellant guilty on the main count and convicted him accordingly while his co-accused was acquitted of both charges. The appellant was then sentenced to suffer death as provided for under the law.

16. However, the appellant is aggrieved by the decision of the trial court and appeals against on the following grounds:

a. That the conviction of the appellant was based on presumption and circumstantial evidence not sufficient to justify any inference of guilt on the part of the appellant.

b. That the learned trial Magistrate erred in law by holding that the prosecution had discharged its legal burden and proved their case beyond reasonable doubt and thus erred in law by not considering the reasonable doubts in the case against the appellant thus denying him the benefit of those doubts.

c. That the learned Trial Magistrate erred in law and fact by convicting the appellant on evidence that was weak, contradictory and uncorroborated.

d. That the Trial Magistrate misapprehended the facts, applied wrong legal principles and drew erroneous conclusions to the prejudice of the appellant.

e. That the trial court erred in law by failing to consider the plausible defence given by the appellant.

f. That the learned Trial Magistrate erred in law and fact in advancing theories and speculations to fill glaring loopholes in the prosecution's case to justify conviction of the appellant on patently insufficient evidence.

17. However, the appeal was opposed by the respondent based on the grounds of opposition dated; 30th January 2023 which states: -

a. The appeal is misconceived and without merit.

b. The Learned Magistrate's decision was appropriate and correct given that the prosecution proved its case beyond reasonable doubt.

c. In accordance with section 215 of the Criminal Procedure Code, the Learned Magistrate finding of guilt was based on assessment of the material facts and evidence presented by the state the appellant defence as well as his mitigation thereto.

d. The Learned Magistrate gave the sentence in accordance with section 296(2) of the Penal Code.

18. The appeal was disposed of vide filing of submission. The appellant submitted that, there were a lot of discrepancies in the evidence of the prosecution case in that PW1 testified that he found two suspects being beaten and it is not clear how he came to be at the scene.

19. Further, PW3 testified that he found a mob gathered at the scene beating suspects which leads to the conclusion that, the appellant's premises had been vandalized, and ransacked and therefore it is impossible to ascertain the origin of the questioned items that were allegedly recovered from his house.

20. That furthermore there was no evidence tabled to establish how the actual theft and murder was committed and how he and the other suspect were linked to the offence, thus, there was only circumstantial evidence.

21. The appellant cited the cases of Sewe -vs Republic (2013) KLR 364 and Eric Otieno Arum -vs- Republic *CA No. 85 of 2005* (20026) eKLR where the court discussed the circumstances under which circumstantial evidence may be relied on to convict an accused person.

22. The appellant further submitted that, PW2 testified that when the deceased called last he was in the custody of the police officers at Maai Mahiu which is in close proximity to the scene and that the trial court observed that the case was poorly investigate which should have accorded him the benefit thereof.

23. Further the appellant having led evidence as to the bad relationship between him and PW3 explains why he was implicated in the offence.

24. Furthermore the doctrine recent possession does not apply as physical possession was not proved and argued that at no point did the burden of proof shift from the prosecution him. Consequently, the trial court misdirected itself on the law and therefore the appeal be allowed, the judgment of trial court be quashed, sentence set aside and he be set free.

25. However, the prosecution argued vide submissions dated 30th January 2023 that, the prosecution proved its case against beyond reasonable doubt. That PW3 the arresting and investigating officer confirmed that he collected bloodstained jembe, clothes, copy of insurance and log book of the motorcycle from the deceased house. Furthermore, the evidence of PW5 vide the post mortem report confirmed the deceased died as a result of head injuries.

26. The respondent relied on the case of Republic -vs- Tayler Weaner and Donoran (1928) Cr. Appl No. R21 and Chiragu & another -vs republic C.A No. 104 of 2018 (2012) eKLR, KECA 342 to argue that, there was adequate circumstantial evidence to support the conviction.

27. Finally the respondent submitted that, the defence advanced a mere denial and figments of his imagination. That he did not call a single witness to testify to the existence of the relationship between him and PW3 or the alleged bhang business between them. Further there is no corroborative evidence that, he took himself to the police station, and neither did he clarify as to where he was staying and neither did he call any neighbour, landlord or caretaker. Therefore he did not account for his presence in the subject house.

28. At the conclusion of the arguments advanced by the respective parties and in considering the materials before the court, I take note that the role of the 1st appellate court as stated in the case of Okeno -vs Republic (1972) EA 32 is to evaluate the evidence afresh and arrive at its own conclusion taking into account that this court did not benefit from the demenour of the witness.

29. To revert back to this matter, the appellant has been convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code. The provision thereof state as follows: -

> "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".

30. Pursuant thereof to prove the offence of murder the prosecution must prove inter alia: -

    a. Theft - that the offender stole something capable of being stolen;

    b. Violence - that the offender used or threatened to use violence to obtain or keep the stolen item, or prevent or overcome resistance;

    c. Armed - that the offender was armed with a dangerous weapon and was in the company of others.

31. In the instant matter, there is no evidence as to what transpired before the deceased's motorcycle was recovered. Consequently there is no direct evidence as to;

    a. whether the appellant robbed the deceased of the subject motorcycle or

    b. whether if he did, he was armed or

c. whether if he did, he used or threatened to use violence against the deceased and/or

d. whether if he was involved in the offence he was in the company of any other person.

32. The answers to these questions are in the negative as afore said no direct evidence was adduced to answer them. To that extent the charge of robbery with violence cannot be sustained.

33. However the appellant is charged in the alternative count with the offence of handling suspected stolen property contrary to section 322 (1) of the Penal Code. The subject provisions states that:

> "(1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.
>
> (2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.
>
> (3) For the purposes of this section—
>
> (a) goods shall be deemed to be stolen goods if they have been obtained in any way whatever under circumstances which amount to felony or misdemeanour, and "steal" means so to obtain;
>
> (b) no goods shall be regarded as having continued to be stolen goods after they have been restored to the person from whom they were stolen or to other lawful possession or custody, or after that person and any other person claiming through him have otherwise ceased as regards those goods to have any right to restitution in respect of the stealing.
>
> (4) Where a person is charged with an offence under this section—
>
> (a) it shall not be necessary to allege or prove that the person charged knew or ought to have known of the particular offence by reason of which any goods are deemed to be stolen goods;
>
> (b) at any stage of the proceedings, if evidence has been given of the person charged having or arranging to have in his possession the goods the subject of the charge, or of his undertaking or assisting in, or arranging to undertake or assist in, their retention, removal, disposal or realization, the following evidence shall, notwithstanding the provisions of any other written law, be admissible for the purpose of proving that he knew or had reason to believe that the goods were stolen goods—
>
> (i) evidence that he has had in his possession, or has undertaken or assisted in the retention, removal, disposal or realization of, stolen goods from any offence taking place not earlier than twelve months before the offence charged;

(ii) (provided that seven days' notice in writing has been given to him of the intention to prove the conviction) evidence that he has within the five years preceding the date of the offence charged been convicted of stealing or of receiving or handling stolen goods.

34. Pursuant to the aforesaid the ingredients of the offence of handling suspected stolen goods are: -

a. The goods were stolen;

b. The accused handled the goods;

c. The accused knew or believed the goods were stolen;

d. The accused was dishonest;

e. The property was found with the accused;

f. The property was stolen from the complainant;

g. The property was recently stolen from the complainant.

35. However, it suffices to note that the prosecution does not have to prove who stole the goods as long as the accused had knowledge that the goods were stolen.

36. In the instant matter, it suffices to note that the accused is charged with handling suspected stolen goods being a motorcycle registration No. KMDA 117R make Boxer 1500cc red in colour. First and foremost, PW1 Laban Kimani testified that the motorcycle was recovered in the compound of the appellant's co-accused who was acquitted. Furthermore, according to the evidence of PW3 PC Alikanjeno Mutwiri when he visited the appellant's home he recovered several items being a log book and insurance cover of the subject motorcycle. He did not testify that he recovered the motorcycle from the appellant. Pursuant to the aforesaid the appellant cannot be said to have been in possession and/or handled the subject motorcycle.

37. In my considered opinion, as it relates to the alternative charge, the appellant could only have been charged with handling suspected stolen; log book and the insurance policy thereof and not the motorcycle herein. Once again it is not possible to convict the appellant with handling of the subject motorcycle.

38. Be that as it were, there is evidence that, the deceased was last heard of on 17th January 2015 and found dead on 18th January 2015. The evidence of (PW1) Laban and (PW3) PC Alikenjeno is that when the appellant's house was visited several items were recovered therefrom including; two Nokia Mobile phones, Insurance cover of the deceased's motorcycle and the log book.

39. Furthermore, there was bloodstains on the seats, table, jembe and floor and it spread that led to the recovery of the deceased's body.

40. In my considered opinion, the appropriate charge the appellant should have been charged with is charge of murder contrary to section 203 as read with section 204 of the Penal Code. It is unfortunate that the appellant was charged with the wrong charge and how that occurred and evaded the entire DCIO and ODPP is puzzling. Pursuant, to the aforesaid the conviction of the appellant for robbery with violence was not safe.

41. Consequently I quash the conviction herein and set aside the sentence imposed upon the appellant. He shall be set free unless otherwise lawfully held.

42. It is so ordered.

DATED, DELIVERED AND SIGNED ON THIS 13TH DAY OF JANUARY 2025

GRACE L. NZIOKA

JUDGE

In the presence of:-

Mr. Wairegi for the appellant

Mr. Wanga for the respondent

The appellant present virtually

Mr. Komen: Court assistant