Otieno v Republic (Criminal Appeal E061 of 2023)
[2025] KEHC 181 (KLR) (17 January 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E061 OF 2023

DK KEMEI, J

JANUARY 17, 2025

BETWEEN

JEREMIAH OTIENO ALIAS MZEE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon T.M. Olando (Senior Resident Magistrate) in Siaya Senior Resident Magistrate's Court Criminal Case No. 513 of 2017 delivered on 9th July 2019)

JUDGMENT

1. The accused herein Jeremiah Otieno alias Mzee was charged, convicted and sentenced to 20 years' imprisonment on each of the two counts of the offence of robbery with violence contrary to section 295 as read with 296(2) of the Penal Code. The particulars on count one were that on 7th October 2017 at Murenyo Sub Location, Gem Sub County within Siaya County, jointly with others not before the court robbed Samantha Anyango Ksh 3500/- and a mobile phone make Techno all valued at Ksh 12000/-; and at the time of such robbery wounded the said Samantha Anyango. The particulars of count two were that on 7th October 2017 at Murenyo Sub Location, Gem Sub County within Siaya County, jointly with others not before the court robbed Maurice Onyango Ksh 300/-, one Nokia phone and one Techno phone all valued at Ksh 3500/-and at the time of the said robbery wounded the said Maurice Onyango.

2. Being dissatisfied with the conviction and sentence, the Appellant has appealed against both the conviction and sentence on the following grounds:

    i. That the trial magistrate erred in law and in fact by convicting him with the offence of robbery with violence contrary to section 296(2) of the Penal Code on count two when the key

ingredient of the offence hereunder namely stealing had not been proved against the Appellant to the standard required by law.

ii. That the trial magistrate failed to address himself to the issue of identification despite the fact that Pw1 the sole identifying witness was not lucid and water tight and that the identification was done under circumstances of fear and in dark conditions.

iii. That the prosecution failed totally to discharge their duty properly by failing to conduct an identification parade to ascertain and corroborate the alleged identification of the appellant by Pw1.

iv. That the prosecution's case was marred with contradictions and inconsistencies and discrepancies that go to the root of the case thereby offending the doctrine of fair trial as enshrined under Article 25 (c) of *the constitution*.

v. That the trial magistrate erred in admitting the medical evidence despite the fact that the same lacked probative value since the maker of the medical record namely P3 form did not testify on oath to prove and corroborate the evidence.

vi. The trial magistrate failed in law in failing to consider the defense and disregarding the same merely because the Appellant failed to mention where he was at 7.00 pm when the offence is alleged to have happened.

vii. That the trial magistrate erred by failing to consider the time spent by the Appellant in remand custody pursuant to section 333(2) of the Criminal Procedure Code.

3. The jurisdiction of the first Appellate Court is well settled. In the widely quoted case of Okeno –Vs. R (1972) EA 32 it was held that the duty of the first Appellate Court is to re-assess, re-evaluate and re-analyze the evidence tendered and to come to its own conclusion, of course bearing in mind that the court did not have the benefit of seeing or observing the witnesses as they testified. Therefore, this court must fairly consider the evidence on record and reach its own determination.

4. The prosecution called forth four witnesses in support of its case which was as follows:

> PW1 Samantha Anyango testified that on 07/10/2017, she went and requested Maurice Onyango to escort her to Rabuor market. On their way, she saw light behind them. They were three people who then hit Maurice twice on the head. They asked her to give them what she had which she did and gave out a phone and ksh3500/-. That one of them whom she knew before grabbed her hand and asked her to follow him to the maize plantation. It was Mzee. That when he started removing his trousers and asked her to remove her trouser too, she ran away and screamed for help. Some people rushed to her and they together went to the road and found her uncle had lost consciousness.

On cross-examination, she stated that she too was hit with a panga on the hand. She reported to Sinaga Police Post and that the appellant was arrested. That she was issued with a P3 form which she took to Yala Police Station. The P3 form was marked as PMFI 1.

5. PW2 Maurice Onyango testified that on 07/10/2017, he was going to Rabuor market in the company of Samantha (PW1) when people came from behind them and hit him. That he fell down and lost consciousness. That upon getting conscious, he found himself at Dolphine hospital. That upon returning back to his home, Samantha came and informed him that Mzee had been arrested. The following day, they went to Yala hospital and also reported to the police who issued him with a P3 form.

6. PW3 PC Michael Odhiambo, testified that he previously worked at Rabuor AP Post. That on 07/10/2017 at 9.30 pm members of the public came to the AP camp and that there was a lady called Samantha who had been assaulted by a suspect whom they had apprehended. That he took them to Sinaga Police Post for investigations. That Samantha and Maurice were taken to hospital for treatment. That the suspect they had apprehended was called Jeremiah who was the accused before the court.

   On cross examination, he stated that the complainant was Samantha. That he did not ask the complainant about time she was assaulted and that it was not true that he went to arrest the appellant at his house.

7. PW4 No. 51055 Sergeant Rodgers Murithi from Sinaga police post testified that on 07/10/2017 at about 10.00 Pm the appellant was brought by police from Rabuor Administration Police camp. That they reported that the appellant had assaulted two people namely Samantha Anyango and Maurice Onyango. That he ordered Corporal Wanyonyi to book the appellant in the OB. That they then recorded statements and issued a P3 form. That the complainants reported that as they walked along the road from home, they were stopped by two people who robbed them of their money and phones. That they had been hit with a metal bar and that Samantha screamed when they ordered her to remove her pants. That members of public came to the road and that the perpetrators ran away but the appellant was apprehended. It was his testimony that Samantha identified the appellant as the perpetrator and that the Administration Police went to the house of the appellant and recovered the iron bar -Exhibit 3. Further, he stated that the P3 form was filled at Yala hospital by Everline Odhiambo and that the injury is classified as harm for the two complainants.

   On cross examination, he testified that he is Sergeant Rodgers and that he had instructed his junior who is on transfer to conduct investigations. That he was at the station when the report was made and was among the team that conducted investigations.

8. At the close of the prosecution's case, the trial magistrate ruled that the prosecution had established a prima facie case against the appellant who was subsequently put on his defense. He opted to tender a sworn testimony and did not call witnesses.

9. DW1 Jeremiah Otieno stated that he is a welder at Ahono. He testified that on 07/10/2017 he was at home with his family at 8.30 pm when he heard a knock at the door. Upon opening, it was the police who ordered him to give them alcohol which he had taken from Samantha. That the police went to his house with PW1 and he was arrested. That he was taken to Yala police station. That it was PW3 who arrested him not the members of public.

10. The appeal was canvassed by way of written submissions. Both parties duly complied.

11. The Appellant submitted that under count two of robbery with violence, the ingredient of stealing was not proved to the required standard. That the prosecution did not produce the phones and money allegedly stolen. The Appellant likewise submitted that the issue of identification was not satisfactorily addressed as the incident happened at night. On this, he relied on the Court of Appeal decision in Wamunga Vs. R (1998) KLR 424 at page 426 and Republic Vs. Turnbull (1976) ALL ER 549 where it was held that the evidence of identification by night must be tested with greatest care and must be absolutely watertight to justify a conviction.

12. The Appellant submitted that no identification parade was conducted by the prosecution.

13. It was likewise the submissions of the Appellant that the prosecution's case was full of contradiction, inconsistencies and discrepancies which go into the root of the case thereby offending the doctrine of fair trial as enshrined under Article 25 (c) of *the Constitution*.

14. The Appellant also submitted that the medical evidence ought not to have been admitted as the same was not given under oath and thus lacked probative value. He submitted further that the medical officer did not appear in court, never testified under oath and contended that the same should be declared unlawful.

15. It was further submitted that the trial magistrate convicted him simply because he failed to explain his whereabouts at 7.00 Pm. He relied on R VS. Johnson [1961] 3 ALL ER969, where it was held that the Appellant should not be convicted on the weakness of his defense but rather on the weight of the prosecution evidence. Further, it was submitted that the trial magistrate ought to have considered the time spent by the Appellant in remand custody as per section 333(2) of the Criminal Procedure Code. He relied on the case of Ahamad Abolfathi Mohamed &another vs. R (2018) Eklr.

16. The Appellant concluded by urging this court to allows the appeal.

17. The Respondent submitted that the prosecution proved that the Appellant was in the company of others during the robbery incident and that PW1, PW2 and PW4 in their testimonies proved that at or immediately after the robbery the Appellant wounded and or struck or used violence on the complainants.

18. The Respondent submitted that the act of stealing was proved via PW1's testimony that "they told me to give them what I had. I gave them the phone and Ksh 3500/= which I had. (see page 15 of the Record of appeal).

19. On identification, the Respondent submitted that the Appellant was positively identified and placed at the scene of crime. On the grounds of appeal, the prosecution submitted that the Appellant was unable to demonstrate through cross examination that there were serious gaps in the investigations. It was thus submitted that the prosecution had proved the charge beyond reasonable doubt and urged the court to dismiss the appeal.

Analysis and determination

20. I have considered the record of appeal as well as the rival submissions made by the Appellant and those of the Counsel for the Respondent. this court has framed the following issues as set out hereunder for determination;

    i. Whether the appellant's constitutional right to be informed of his right to procure legal representation was violated despite the gravity of the offence.

    ii. Whether the Respondent proved the charge to the required threshold.

    iii. Whether the sentences imposed was appropriate in the circumstances.

21. As regards the first issue, the first port of call which comes to mind is Article 50(2)(g) &(h)of *the Constitution* on the right to fair trial. The same stipulates thus:

    (2) Every accused person has the right to a fair trial, which includes the right—

        (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

        (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

    Again, section 43 of the *Legal Aid Act* stipulate thus:

    43. Duties of the court

(1) A court before which an unrepresented accused person is presented shall—

(a) promptly inform the accused of his or her right to legal representation;

(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

(c) inform the Service to provide legal aid to the accused person.

1A) In determining whether substantial injustice referred to in paragraph (1) (b) is likely to occur, the court shall take into consideration: -

(a) the severity of the charge and sentence;

(b) the complexity of the case; and

(c) the capacity of the accused to defend themselves.

22. In the instant case, the Appellant was charged with two counts of the offence of robbery with violence contrary to section 296(2) of the Penal code which attracts the maximum sentence of death. This therefore means that the trial court ought to have applied itself to the provisions of section 43 of the *Legal Aid Act* No. 6 of 2016 as stipulated above.

In the case of Sheria Mtaani na Shadrack Wambui Vs. the office of the Chief Justice & Another; ODPP &Another [2021] EKLR the court affirmed the constitutional right provided for under Article 50(2) (g) by stating that a trial court before whom an unrepresented accused person is arraigned is under the constitutional duty to inform the accused person of the right to choose and have an advocate represent him or her. Consequently, the court stated that it is paramount for judicial officers to ensure that the right to legal representation is promptly and sufficiently explained to unrepresented accused persons and that any necessary assistance is accorded to such accused persons towards seeking the representation. The court held that a failure on the part of a judicial officer to do so, having regard to the circumstances of a particular case, may result in an unfair trial and injustice and render the trial a nullity.

23. In light of the above, i find that indeed the trial court should have insisted that the accused gets legal representation having regard to the gravity of the offences he faced. I find that the Appellant's constitutional right to fair trial was violated and thus declare the trial proceedings as null and void. On this ground the appeal succeeds.

24. As regards the second issue, the ingredients of the offence of robbery with violence were articulated in Criminal Appeal No. 116 of 2005 (Ur), Johana Ndungu V Republic where the Court of Appeal listed the ingredients of the offence of robbery with violence as follows;

i. If the offender is armed with any dangerous weapon or instrument; or

ii. If he is in the company of one or more other person or persons, or;

iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.

25. In Criminal Appeal No. 300 of 2007, Dima Denge Dima & Others Vs Republic, the Court stated that the ingredients of the offence of robbery with violence are appreciated disjunctively. It is, therefore, proper to convict an offender in instances where only one of the ingredients is proved.

The Court observed: -

> .....The elements of the offence under Section 296(2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence....

26. In the case of Oluoch -Vs- Republic {1985} KLR 549, the Court observed that proof of any one of the above ingredients is enough to sustain a conviction under Section 296(2) of the Penal Code.

27. Deriving from the foregoing, the offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the aspect of violence.

28. On the issue of identification, the incident is said to have occurred at about 7.00pm, meaning that there was darkness. PW2 Maurice Onyango testified that he was hit from behind and lost consciousness. PW1 testified that she was able to see that person very well however, she did not state what kind of lighting she used to see the perpetrator.

    In the case of visual identification, the Court of Appeal in Mwaura vs R (1987) KLR 645 held that "in case of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witness had for seeing who was doing what is alleged, the position of the accused and the quality of light." In this case, Pw1 claimed that the incident occurred at 7.00 pm in the night meaning that it happened in the darkness. PW1 further stated that the perpetrator pulled her to a maize plantation and asked her to remove her trousers, still in the dark. She does not mention what source of light she used to see the perpetrator. PW1 also stated that she ran away which implied that she did not take time to remove her trouser and thus she had very little time between being pulled into the maize plantation and attempting to remove her trouser before running away from the scene and raising alarm.

29. In Republic vs. Turnbull (1976) ALL ER 549 it was held that the evidence of identification by night must be tested with greatest care and must be watertight to justify a conviction.

30. In Wamunga vs Republic (1989) KLR 424 the Court of Appeal stated as follows regarding the evidence of identification generally:

> " It is trite law that where the only evidence against a defendant is evidence on 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 a conviction."

31. Similarly, the Court further cited its own decision in Abdala bin Wendo & Another vs Republic (1953), 20 EACA 166 where it held:

> " Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error."

32. The necessity for the trial magistrate to warn itself of the dangers of relying on the evidence of visual identification by a single witness was also dealt with by the Court of Appeal in Kisumu Criminal Appeal No. 20 of 1989, Cleophas Otieno Wamunga vs Republic where the Court observed that evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. The court stated that whenever the case against an accused person depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the accused based on the evidence of such identification.

33. It is noted that even though PW1 claimed that she had known the Appellant as Mzee and a neighbour, none of the members of the public who participated in the arrest of the Appellant came forward to give evidence to corroborate the evidence of PW1. The evidence of PW2 did not establish whether the Appellant was a neighbour as claimed by PW1 and this left PW1 as the only witness to the incident. Further, even though PW3 claimed that a metal crowbar was recovered from the appellant's house, none of the victims identified the said weapon in court. Again, the failure by the prosecution to prepare an inventory regarding the recovery of the weapon from the Appellant's house further weakened its case against the Appellant. There is therefore some doubt created as to whether the Appellant was the perpetrator of the crimes. I find that the identification of the Appellant was not sufficiently proved. The appeal on conviction therefore succeeds on this ground.

34. On the aspect of stealing, PW1 testified that "they told me to give them what I had. I gave them the phone and Ksh 3500/= which i had". (See page 15 of the Record of Appeal). Nothing was however produced at the trial as having been recovered from the Appellant upon his arrest which arrest occurred almost immediately. There was no corroboration of the said theft through exhibits i.e phones and money or even the purchase receipt of the said mobile phone. This aspect was not sufficiently proved. Ultimately, it is my finding that the charges against the Appellant were not sufficiently proved against him beyond reasonable doubt. The benefit of such doubt should be resolved in favour of the Appellant in any event.

35. In view of the finding on the foregoing issues above, i find that there is no need to analyze the issue of the sentence.

36. Ultimately, it is the finding of this court that the charges against the Appellant were not sufficiently proved beyond reasonable doubt. The benefit of the doubt should be resolved in favour of the Appellant in any event.

37. Given the foregoing observations, it is my finding that the Appellant's appeal has merit. The same is allowed. The conviction by the trial court is hereby quashed and the sentence set aside. The Appellant is hereby ordered to be set at liberty forthwith unless otherwise lawfully held.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 17TH DAY OF JANUARY, 2025.

D. KEMEI

JUDGE

In the presence of:

Jeremiah Otieno Alias Mzee....Appellant

M/s Kerubo.....for Respondent

Mboya.....Court Assistant