Cirus v Republic (Criminal Appeal E084 of 2022)
[2024] KEHC 124 (KLR) (Crim) (17 January 2024) (Judgment)

Neutral citation: [2024] KEHC 124 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E084 OF 2022

LN MUTENDE, J

JANUARY 17, 2024

BETWEEN

ROBERT KUBASU CIRUS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal arising from the original conviction and sentence in Criminal Case No. 1433 of 2019 at the Chief Magistrate's Court Kibera, by Hon. Esther Boke – SPM on 21st February, 2022)

JUDGMENT

1. Robert Cirus Kubasu, the Appellant, was charged with the offence of Robbery with Violence contrary to Section 296 (2) of the *Penal Code*. Particulars of the offence being that on the 25th day of September, 2019 at Silver Harbor in Kindaruma Road in Dagoretti-North Sub-County within Nairobi County, being armed with a dangerous weapon, namely, panga, he robbed Chen Daisheng cash Ksh. 30,000/- and at the time of such robbery he threatened to use actual violence.

2. Having been taken through full trial he was convicted and sentenced to suffer death.

3. Aggrieved, he appeals on grounds that:

   (1) That, the trial magistrate erred in law and fact by basing the appellant's conviction on the purported visual identification by recognition without considering that, no first report with descriptions was tendered into the record as the same reveals.

   (2) That, the trial magistrate further erred in law and fact by basing the appellant's conviction on evidence of PW1,PW2,PW3 and PW4 while essential witnesses were not called to testify who were at the alleged scene of crime.

(3) That, the trial court lost direction in evidence by becoming impressed with the mode of arrest without putting into consideration that the appellant was arrested while the complainant was simply called to identify him even before he was taken to the Police Station.

(4) That the trial magistrate erred in law by rejecting the appellant's defence without considering that, the same was not displaced by the prosecution as per Section 212 of the *Criminal Procedure Code* Cap 75 law.

4. Facts of the case were that PW1 Chen Daisheng, the complainant, who worked with South River Homes Ltd lived at Silver Harbor Apartments Block C 14th floor, and their offices were on the same compound.

5. On the 25th September, 2019, he left the office and while on his way to the house he decided to use the lift. The lift took long on 3rd floor hence he went over to check on what was transpiring. He pressed the elevator button and waited. Upon the elevator door opening, inside was one person, an employee of the company. He entered the lift and the individual alighted at the 11th floor. Upon reaching the 14th floor he found the same person standing in front of the lift and upon seeing him he pretended to be looking down the stairs. He walked to where the person stood and posed a question in Chinese language as to what he was looking at. He did not respond hence PW1 moved to open the door to his house No. 1402 and he noticed a person behind him. It turned out to be a person he identified as Robert who held him at the nape of his neck with one hand while the other hand held a panga. He pushed him inside the house and demanded for money by signaling with his fingers. He did not understand but the house girl, Ann, who was inside the house interpreted the gesture to him. He gave him approximately Ksh. 30,000/-. He demanded further and made a signal/gesture of person speaking on phone hence he parted with a cellphone make Huawei valued at Ksh 30,000/-. As he continued to wave the panga and demand for an additional item Cao Yuan Chinese, a manager at the company entered the house and without understanding asked the person in Chinese language what he was doing. In the process the individual ran away. They tried to stop him but he scratched the complainant on the right upper arm with the panga. They opened the door only to see the person running down the stairs and subsequently opening the gate. The matter was reported to the police who visited the scene and carried out investigations.

6. The police reviewed the CCTV footage at the apartment which they retrieved and took to the DCI Headquarters. The police having viewed the footage managed to arrest the Appellant who was subsequently charged.

7. Upon being placed on his defence the Appellant stated that having reported on duty his boss wanted to move with him to a new site but he declined and sought to be paid so as to leave. His boss told him to go but promised to call him. Twenty minutes later he called him as he was removing rubbish from the lift hence the delay, he met him at the mezzanine floor and he gave him Ksh. 9,000/- and a paper with the write up that he had been laid off. He told him that it was not his entitlement. The boss put the money back into his pocket alongside the paper. He (Appellant) alighted at the 11th floor while the boss proceeded to his house. That he continued working until evening when he left going home.

8. The trial court considered evidence on record and found that evidence adduced by the prosecution witnesses was weighty hence the case against the Appellant was sufficiently proved.

9. The appeal was canvassed through written submissions. It was urged by the Appellant that according to the CCTV footage the attacker was covering his face with a Marvin hat hence he was not positively identified. That there is no evidence that the two (2) employees of the apartment mentioned gave the police the features of the Appellant. That the house help, Ann, having not testified the alleged CCTV

footage was edited using someone elsewhere to act as the Appellant to implicate him. In this respect reliance was placed on the case of *Maitanyi v Republic* (1986)KLR 198 where the court held that:

> "There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid or to the police"

10. That the Prosecution should have called witnesses who were present to testify. That the consequence of failure to call them is as mentioned in the case of *Bukenya & Others v Uganda* (1972) EA 549 where the court held that:

> "It is well established that the Director has a discretion to decide who the material witnesses are and whom to call, but this needs to be qualified in three ways. Firstly, there is a duty on the Director to call or make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. Secondly, the court itself has not merely the right, but also the duty to call any person whose evidence appears essential to the just decision of the case. Thirdly, while the Director is not required to call a superfluity of witnesses, if he calls evidence that is inadequate and it appears that there were others witnesses who were not called, the court is entitled, under the general rule of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. If they had disappeared, the prosecution could easily have called evidence to show that reasonably exhaustive enquiries had been made to trace them without success ... "

11. The Appellant questioned the mode of arrest and urged the court to find that Article 50 (2) (h) of the the *Constitution* was not complied with. That the Prosecution failed to dislodge the defence put up by the Appellant as required by law. He relied on the case of *Victor Mwenda Mulinge v Republic* (2014) eKLR where the court held that:

> "It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution."

12. The appeal is opposed by the State/Respondent through Mr. Mutuma Mwereru Snr. Prosecution Counsel. It is submitted that the ingredients of the offence of robbery with violence as set out in the case of *Oluoch v Republic* (1985) KLR were proven while appreciating that evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the court is satisfied that it is positive and free from error as stated in the case of *Francis Kariuki Njiru & 7 Others v Republic* Criminal Appeal No. 6 of 2001. It is urged that the Appellant was well known to the complainant and the CCTV footage captured the Appellant images with a panga. And in his defence, he admitted having met the complainant.

13. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. This duty of the court on a first appeal was stated by the court in *Okeno v Republic* [1972] EA 32 as follows:

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1957] EA 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - *Shantilal M. Ruwala v R* [1957] EA 570. 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 courts' 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 - See *Peters v Sunday Post* [1958] EA 424"

14. The elements of the offence of robbery with violence are provided for in Section 296(2) of the *Penal Code* that enacts thus:

> 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.

15. Further, case law has enunciated ingredients of the same. The Court of Appeal set out the elements in the case of *Oluoch v Republic* (1985) thus:

> " 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 ... "

16. Though three (3) in number, as long as one element is proved, that is sufficient to prove the offence. In the case of *Dima Denge and Others v Republic*, Criminal Appeal No. 300 of 2007 the Court of Appeal rendered itself thus:

> " 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."

17. The Appellant is stated to have been alone in the course of the incident and was armed with a panga. A video footage recorded by the camera at the Apartment in question, Silver Harbour Apartment, was submitted to the Forensic Photographic Imaging and Acoustic Section DCI Headquarters for analysis. According to the report authored by PW3 No. 73600 Sgt. Samuel Chebii of Gazette No. 2119, upon receipt of the request to make still photos, he made sixteen (16) photos which depicted a man carrying a panga wearing a Marvin and climbing stairs. The person on arrival of the floor leans on the stair rail. A person appears in a short while he opens the door and before it closes the man who was leaning to the stair rail rushes to the door and is seen struggling to push it open. He opened and he entered. After a while, he came out climbed down stairs hurriedly.

18. He is then captured climbing down stairs on the ground floor armed with a panga in his right hand. He runs through a corridor to the other side of the building then on the pavement towards the gate still armed with the panga. Though there are three (3) watchmen at the gate, he holds the panga upright and goes straight to the gate, pushes it open and gets out of the gate and disappears. A watchman then gets out of the gate trying to follow him.

19. The testimony given by complainant is consistent with what was captured by the CCTV as to what transpired outside the house. It is however argued by the Appellant that the attacker concealed his face therefore there was no positive identification.

20. This was a case of recognition. In the case of *Anjononi & 2 Others v Republic* (1980) eKLR the Court of Appeal held that:

> " Recognition of an assailant is more satisfactory, more assuring and more reliable than identification of stranger because it depends upon the personal knowledge of the assailant in some form or other ... "

21. The Appellant herein was known to the complainant as he was in the construction management team that managed the company - South River Homes Ltd that had employed the Appellant. PW1 alluded to the Appellant having been their employee. This fact was not disputed hence the Appellant was well known to the complainant because of the close association therefore he could not be mistaken as to his identity. In any case, the CCTV captured him very well. His face was not concealed.

22. The appellant was identified as the person in the CCTV footage. by PW3. The defence put up did not comment on the averment. Similarly, he was silent on the issue of having been captured on the CCTV camera while running armed with a panga and ultimately making his way out of the compound.

23. He argues that some witnesses were not called to testify to firm up the case. Section 143 of the *Evidence Act* provides that:

> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

24. In the case of *Keter v Republic* (2007) EA 135 it was held that:

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

25. It is apparent that the police did not avail some witnesses to the fact who were stated to have witnessed what transpired. A house help, Ann, was mentioned, a certain Chinese manager Cao Yuan was mentioned and some three watchmen who were at the gate. These individuals could have confirmed what happened. The question to be posed is, however, whether failure to call them was fatal to the prosecution's case?

26. It is urged that evidence adduced by the complainant was of a single witness which called upon the court to warn itself of the danger of relying on the evidence prior to convicting. In the case of *Ogeto v Republic* (2004) KLR 19 it was stated that:

> " It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."

27. This is a case where evidence of the complainant was confirmed by the CCTV footage. The evidence was of a sufficient quality which did convince the court beyond reasonable doubt hence returning a verdict of guilty.

28. The Appellant also contends that the mode of arrest was not satisfactory since after the arrest the complainant was called to identify him physically and no identification parade was conducted. The purpose of a police identification parade is to have a witness identify a suspect who was not previously known to him. This being a case of recognition, it was not necessary.

29. On the question of non-compliance with Article 50(2) (h) of the the *Constitution* this was not a ground of appeal. In any case it should be applied progressively. The defence put up was considered by the trial court and dismissed for reasons given. In the defence put up it was not clear which boss he referred to and later met at the mezzanine floor who gave him Kshs 9000/- and a paper reading he had been sacked which he declined to accept.

30. An alibi defence means that an individual could not have committed the offence as he was elsewhere at the time the offence was committed. The Appellant did not allege where exactly he purportedly was. The Prosecution tendered evidence which disapproved the allegation that the Appellant was not at the scene of the incident.

31. The preceding analysis shows that the Appellant was positively identified as the attacker who was armed with a dangerous weapon, the panga. He threatened to use actual violence on the person of the complainant by scratching him with the same. By his action he managed to take money from the complainant without his consent and thus permanently depriving him of the same. This was robbery with violence.

32. The upshot of the above is that the appeal has no merit; accordingly, it is dismissed in its entirety.

33. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 17TH DAY OF JANUARY, 2024.

L. N. MUTENDE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

Appellant

Mr. Mongare for ODPP