Juma v Republic (Criminal Appeal E004 of 2023)
[2024] KEHC 97 (KLR) (17 January 2024) (Judgment)

Neutral citation: [2024] KEHC 97 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E004 OF 2023

AC MRIMA, J

JANUARY 17, 2024

BETWEEN

CHRIS WANJALA JUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. J. K. Ng'arng'ar, (Chief Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. 1635 of 2020 delivered on 4th January, 2023)

JUDGMENT

Introduction:

1. This appeal is related to Criminal Appeal No. E063 of 2023 Dominic Nyongesa vs. R. However, the two appeals were not consolidated and neither was Appeal No. E063 of 2023 heard. This judgment is, therefore, only in respect to Criminal Appeal No. E004 of 2023 Chris Wanjala Juma vs. R.

2. The Appellant herein, Chris Wanjala Juma, was charged alongside Dominic Nyongesa in Kitale Chief Magistrate's Court Criminal Case No. 1635 of 2020. They faced the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the offence were that on the night of 18th and 19th day of February, 2020 at Milimani area Kiminini Sub-County within Trans Nzoia County jointly while armed with crude weapons robbed Lilian Bourcat unknown amount of money and at or immediately after the time of such robbery strangled and killed Lilian Bourcat (hereinafter referred to as 'the deceased').

3. When arraigned before Court, the Accused pleaded not guilty to the offence. After a full trial, the Accused were found guilty and convicted as charged. They were both sentenced to 90 years' imprisonment.

The Appeal:

4. The Appellant herein was aggrieved by the conviction and sentence. He filed a Petition of Appeal. The Appellant challenged the conviction and sentence in alleging that his rights to a fair trial under Article 49(1)(f)(i) of *the Constitution* were infringed, that the charge sheet was defective for duplicity, that the defence was not considered and lastly that the sentence was manifestly high.

5. This Court was then urged to allow the appeal by quashing the conviction, setting aside the sentence and forthwith setting the Appellant at liberty.

6. During the hearing of the appeal, the Appellant relied on his written submissions wherein he expounded on the grounds of appeal.

7. The prosecution on its part filed its written submissions dated 16th June, 2023. The State submitted that the offence was properly proved as required in law. This Court was asked to dismiss the appeal.

Analysis:

8. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

9. Having carefully perused the record, this Court is now called upon to determine whether the offence of robbery with violence was committed, and if so, whether by the Appellant.

10. Before dealing with the said aspects of the offence, the Court will render a very brief recount of the evidence adduced at the trial. Needless to say, the trial Court summarized the evidence in its judgement quite well and this Court hereby adopts the same herein by way of reference.

11. The prosecution called 12 witnesses in a bid to establish the charge drawn against the Appellant. They were Dagala Abdi Juma, a Community Policing member who testified as PW1. He received intelligence on the planned robbery at the home of the deceased. Philomena Jepkorir, an employee of the deceased who testified as PW2. She confirmed that the Appellant had worked for the deceased. PW3 was Emmanuel Mukera. He had information on the proposed attack and robbery on the deceased from the Appellant herein and Dominic Nyongesa. The husband to the deceased testified as PW4. He was one Johanne Lemedi. There was also Lucas Wanyonyi who testified as PW5. He had been recruited by the Appellant and Dominic Nyongesa to undertake the robbery, but the first attempt flopped.

12. PW6 was employed as a Cook by the deceased. He was one Rashid Wanjala. No. 03999 NPR David Werunga, a Police Reservist in-charge of Kiminini Sub-County, testified as PW7. He was part of the investigations. He arrested the Appellant herein and recovered some Kshs. 23,000/= in cash from him. No. 46775 Cpl. Paul Cherebei then attached at the DCI Trans Nzoia West testified as PW8. He was led by the Appellant to the home of Dominic Nyongesa, but found that he had escaped only to be arrested later. Dr. Alex Barasa testified as PW9. He was a Senior Medical Officer who conducted the post mortem examination on the body of the deceased. He produced a Post Mortem Report that disclosed the cause of death as strangulation leading to loss of breath.

13. An Officer from the Scenes of Crime Department No. 88551 PC Caleb Simbiri testified as PW10. He processed photographs taken at the scene where the deceased was killed and produced them as exhibits. No. 236112 Insp, Maximilla Amwaton attached at the DCI Trans Nzoia West testified as PW11. She

was the investigation officer in the case. PW12 was Polycarp Lutta Kweyu, a Government Chemist attached at Kisumu. He confirmed that the Appellant's spermatozoa were found inside the vagina of the deceased.

14. After close of the prosecution's case, the trial Court found that each of the Accused had a case to answer and were both placed on their defenses.

15. The Appellant gave a sworn defence without calling any witness. He disclosed that he used to sell bhang which he received from Uganda and that his engagement with the witnesses was solely for that business. He further stated that the sum of Kshs. 23.000/= found on him were part of the proceeds of the sale of bhang.

16. It is on the basis of the above evidence that they Appellant was found guilty as charged, convicted and accordingly sentenced.

17. From the above factual matrix, this Court will now juxtapose it with the legal principles guiding the offence of robbery with violence.

18. A consideration of whether the offence of robbery with violence was proved now follows.

19. The offence of robbery with violence is a creation of Sections 295 and 296(2) of the Penal Code. The provisions provide as follows: -

> 295. Definition of robbery:
>
> Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.
>
> 296. Punishment of robbery:
>
> 1. .....
>
> 2. 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

20. From the foregoing provisions, 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.

21. Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft, the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto.

22. Two things must, therefore, be proved for the offence of robbery to be established. They are theft and the use of or threat to use actual violence.

23. Once the offence of robbery is proved on one hand, the offence of robbery with violence, on the other hand, is committed when robbery is proved and further if any one of the following three ingredients are also established: -

(a) The offender is armed with any dangerous or offensive weapon or instrument, or,

(b) The offender is in the company of one or more other person or persons, or

(c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

24. This Court is alive to the confusion which has lingered over time in distinguishing the offence of robbery from that of robbery with violence.

25. To this Court, the confusion is real. The description of any of the two offences leads to the other. Indeed, that was one of the findings by an expanded Bench of the High Court in Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR which called for law reform to address the ambiguity.

26. Be that as it may, for purposes of establishing the offences pending any law reform which is far too long overdue, the difference between the two offences ought to relate to the circumstances under which they are committed and the gravity of the injuries sustained. This Court will, therefore, adopt an intermediate approach. The approach is that whereas both offences connote theft and violence, for the offence of robbery with violence to be established, there must be evidence of actual use of violence on the person of the victim and not a threat to such violence.

27. Therefore, if in the course of stealing, the offender only threatens to use violence on the victim, but no more than the threat, then the offence of robbery, and not robbery with violence, may be committed. Further, in such circumstances, the offence of robbery with violence cannot stand even if it is proved that the offender was armed with any dangerous or offensive weapon or instrument and/or the offender was in the company of one or more other person or persons as long as there was no evidence of actual use of violence.

28. Having said as much, this Court joins the calling for immediate law reform to address the legal ambiguity.

29. On the basis of the above, this Court will now apply the law to the facts of the case. First is the issue of identification of the offenders.

30. The issue of identification of the Appellant is not a contested issue in this case. There is evidence that the Appellant's spermatozoa were found inside the deceased's vagina. It, therefore, means that the Appellant had sexual intercourse with the deceased immediately before the deceased was killed. That evidence alone, placed the Appellant at the scene of crime and as the perpetrator.

31. Next is the consideration as to whether the ingredients of the offence of robbery with violence were established. There is medical evidence that the deceased was raped and killed during the attack. Further, the attackers took away the deceased's money. The deceased was killed by strangulation. The Post Mortem Report shows that the deceased sustained injuries on the upper part of the body. Whatever item that was used in sustaining those injuries on the deceased including those used in subduing the deceased and the subsequent strangulation must be, and are hereby, regarded as dangerous weapons in the circumstances of this case.

32. The evidence, therefore, established all the ingredients of the offence of robbery with violence. This Court now finds and hold that the offence of robbery with violence was proved.

Other grounds raised:

33. The Appellant has raised other grounds which ought to be looked at to ascertain whether they may affect the foregoing discussion.

34. The first ground was the contention that the Appellant's rights under Article 49(1)(f)(i) of *the Constitution* were infringed. The provision relates to the right of an arrested person to be brought before a Court of law as soon as reasonably possible, but not later than 24 hours after being arrested or if the 24 hours ends outside ordinary Court hours, or on a day that is not an ordinary Court day, the end of the next Court day.

35. According to the Charge Sheet, the Appellant was arrested on 19th February 2020 and he was arraigned before Court on 11th March 2020. The record was silent on what had happened in between.

36. Since the issue is factual and it was not raised before the trial Court, then it cannot form part of the record in this appeal. The Appellant reserves the right to independently take that up through a Constitutional Petition or otherwise.

37. The second ground was that the charge sheet was defective as it suffered duplicity.

38. The Appellant vehemently contended that whereas the offence of robbery with violence is wholly provided for under Section 296(2) of the Penal Code, the charge sheet included Section 295 of the Penal Code which is a completely different charge. As such, the Appellant was charged with two separate offences in one count. Consequently, the charge was duplex making it difficult for the Appellant to understand the nature of offence he faced at the trial.

39. As a starting point, this Court will briefly look at the issue of defectivity of charges.

40. Article 50(2)(b) and (n) of *the Constitution* provides as follows: -

> (2) Every accused person has the right to a fair trial, which includes the right-
>
> (b) to be presumed innocent until the contrary is proved;
>
> (n) not to be tried convicted for an act or omission that at the time it was committed or omitted was not –
>
> i) an offence in Kenya; or
>
> ii) a crime under international law

41. Section 134 of the Criminal Procedure Code (hereinafter referred to as 'the CPC') provides as follows: -

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

42. Courts, in considering what constitutes a defective charge, have variously emphasized on the need to ensure that the accused is not prejudiced.

43. The then East Africa Court of Appeal in Yosefu and Another -vs- Uganda (1960) E.A. 236 held as follows: -

> The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act.

44. In Nyamai Musyoka v. Republic (2014) eKLR, the Court of Appeal expressed itself as follows: -

> The test for whether a charge sheet is fatally defective is a substantive one.....If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 C.P.C. to cure the defect... (emphasis added).

45. And, in Sigilani -vs- R (2004) 2 KLR 480, it was held that: -

> The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.

46. The Black's Law Dictionary defines 'defective' as follows: -

> Lacking in some particular which is essential to the completeness, legal sufficiency, or security of the object spoken of.....

47. As rightfully settled by the Court of Appeal, the test in determining whether a charge is defective is a substantive approach as opposed to being formalistic.

48. Therefore, if on examination of a charge, a Court is satisfied that the offence is stated and the particulars rendered such that the accused can understand what he/she is facing before Court and in a manner that enables him/her to adequately prepare for a defence, then such a charge cannot be faulted on defectivity. That position will not change even if a wrong section of the law has been cited on the charge.

49. The contention in this case is that the charge of robbery with violence was duplex. The Court of Appeal in Joseph Njuguna Mwaura & 2 Others v Republic [2013] eKLR dealt with the same issue and rendered why charging an accused with the offence of robbery with violence under Sections 295 and 296(2) of the Penal Code would amount to a duplex charge.

50. The said Court, while following its earlier decisions in Simon Materu Munialu vs Republic [2007] eKLR and Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR, stated as follows: -

> Indeed, as pointed out in Joseph Onyango Owuor & Cliff Ochieng Oduor v R (Supra) the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.
>
> The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that any person who steals anything, and

at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge.

51. The matter did not, however, end there. In 2016, the Court of Appeal in Paul Katana Njuguna vs Republic (2016) eKLR revisited the issue. The Court explained that the offence of robbery with violence includes the elements of the offence of robbery, and if the particulars of the charge sheet show the elements of the offence of robbery with violence which are proved, then the defect was not fatal and can be cured by this Court under Section 382 of the Criminal Procedure Code.

52. The Court of Appeal in the Paul Katana Njuguna vs Republic case (supra) appreciated the defect in charging an accused under both sections, but went further to discuss the effect of that defect. The Court held that what Courts need to consider was the larger picture as to whether or not failure of justice was occasioned by that defect.

53. The Court found that there was no confusion that arose in that case due to the duplicity since the accused in that case fully cross-examined the witnesses and raised no complaint both before the trial Court and the High Court.

54. Summing it up in Hassan Jillo Bwanamaka & another v Republic [2018] eKLR, the Learned Judge [P. Nyamweya, J (as she then was] aptly captured the legal position as follows: -

> 33. ..... So that while it would be undesirable to charge an accused person under both sections, it would not be prejudicial to that accused person if there is no risk of confusion in the mind of an accused as to the charge framed and evidence presented, in which case a charge which may be duplex will not be found to be fatally defective.

55. Applying the above to this case, when the Appellant was charged, the particulars of the offence were given. The Appellant took part in the case. He heard witnesses testify and he cross-examined them at length. When he was placed on his defence, the Appellant still defended himself in stating that he did not commit the offence and that his interaction with the witnesses solely related to his bhang business.

56. This Court finds that the Appellant fully understood the offence he was alleged to have committed. Therefore, the duplicity in the charge did not occasion any miscarriage of justice since the Appellant remained well aware of what he faced before Court and that he fully participated in the trial. This Court hereby applies Section 382 of the CPC in curing the error. This Court further finds that the application of Section 382 of the CPC in this matter does not in any way confront the protections of the right to a fair trial in Article 50(2) of *the Constitution*.

57. Having said as much, the Appellant's contention that the charge was defective on account of duplicity does not have any legal leg to stand on. It is hereby dismissed.

58. Having considered all the issues raised by the Appellant challenging the conviction, this Court finds and hold that none was sustainable.

59. As a result, the appeal on the conviction is hereby dismissed.

Sentence:

60. The Appellant was sentenced to 90 years' imprisonment.

61. The High Court in Wanjema v. Republic (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court

can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

62. In sentencing the Appellant, the Court did not call for a Pre-sentencing report.

63. This Court takes the position that even though sentencing remains discretionary on the Court and that the Court is not obliged to call for a Pre-sentence report, such a report, depending on the circumstances of a case, may greatly aid the Court in meeting the aims of sentencing. (See the Francis Karioko Muruatetu & another v Republic case (supra).

64. The *Probation of Offenders Act* as amended by Act Number 18 of 2018 defines 'pre-sentence inquiry reports' as follows: -

> Pre-sentence inquiry reports" means 'the reports on accused persons or offenders prepared by probation officers under this Act or any other law in force for purposes of criminal justice administration.

65. The significance of pre-sentence report, as can be discerned from The Probation and After Care Guidelines for Social Investigations and Pre-sentence Reports, cannot be gainsaid. It serves the following purpose;

> Pre-sentence reports provide advisory information to the Courts with a view to the court making sentencing verdicts, including decisions on alternative measures to imprisonment.
>
> The investigations are conducted with the aim of collating verifiable information and for writing various assessment reports including pre-sentence reports.
>
> In sentencing decision making, social investigations help in:
> Formulating plausible theoretical explanations of the criminal behaviour of an offenderUnderstanding the personality of the offender beyond the crime committedDeveloping a basis for intervention/rehabilitationIdentifying resources required to effect change Identify and arrange for partnership with organizations which can aid the process of eventual rehabilitationGain knowledge of the culture and resources available in the local communitiesPropose cogent measures necessary to address the identified 'needs' and forestall any risk of reoffending, including through an appropriate sentence.

66. In Consolidated Petition No. 97, 88 of 2021 and 90 of 2021 and 57 of 2021, Adan Maka Thulu -vs- Director of Public Prosecutions and, Kazungu Kalama Jojwa -vs- The Director of Public Prosecutions, the Court spoke to sentencing in the following manner:

> .... As was held in Poonoo -vs- Republic, SCA 38 of 2010, sentencing an offender is not the mechanical application of letters and numbers in a formulaic table. It is the human deliberation of what is just punishment.
>
> ...the fifth principle is that a citizen ..... has a right to put in plea on mitigation to show that the imposition of the .....sentence is not warranted in his case. If the Court in considering all the facts and circumstances of the case comes to the conclusion that indeed is the case, the court would be perfectly entitled to read down the sentence .....

67. It is on the basis of the foregoing that this Court is firmly of the considered position that this was a case where the sentencing Court ought to have called for a Pre-Sentence Report.

68. As such, and respectfully so, this Court will interfere with the sentence.

69. This Court, hence, allows the appeal against the sentence.

Disposition:

70. Flowing from the foregoing, the following final orders are hereby issued: -

    a. The appeal against the conviction is hereby dismissed.

    b. The appeal against the sentence is allowed. The sentence of 90 years' imprisonment is hereby set-aside.

    c. The Appellant will be produced before the trial Court for purposes of re-sentencing after consideration of a Pre-Sentence Report.

    d. This matter is hereby marked as closed.

    Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 17TH DAY OF JANUARY, 2024.

A. C. MRIMA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgment delivered virtually and in the presence of: -

Chris Wanjala Juma, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.

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