Nyamai v Republic (Criminal Appeal E039 of 2020)
[2024] KEHC 2166 (KLR) (24 January 2024) (Judgment)

Neutral citation: [2024] KEHC 2166 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CRIMINAL APPEAL E039 OF 2020

RK LIMO, J

JANUARY 24, 2024

BETWEEN

DAVID NYAMAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. David Nyamai, the appellant herein, was charged with the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code* vie Kitui Chief Magistrate's Court Criminal Case No. 92 'A' of 2018.

2. The particulars of charge are captured in the charge sheet were that the appellant on the 14th day of January 2018 at about 8.30pm at Ndumoni sub-location in Kitui central sub-county within Kitui County, jointly with others not before court unlawfully robbed Everline Muthui of cash Kshs 3,000/-, ID card, two mobile phones make Itel No. 1409 and 1200 valued at Kshs 8,000/-, one kg of sugar 100/- and two packets of milk 100/-, one packet sportsman cigarette valued at Kshs 200/-,, one packet maize flour 100/- two pair of slippers valued 100/-, two pieces of panga soap valued 300/- all valued at Kshs 11,900/- and immediately before such robbery wounded the said Everline Muthui using a panga.

3. The appellant was also charged with an alternative charge of handling stolen goods contrary to Section 322 (1) (2) of the *Penal Code* and the particulars are as follows; the appellant on the 15th day of January 2017 at around 9.30pm at Kalundu market beach club in Kitui Central Sub-county within Kitui county, otherwise than in the course of stealing, dishonesty received or retained one mobile phone make Itel No. 1409 knowing or having reason to believe it was stolen goods.

4. The Appellant was also charged with offence of being in possession of narcotic drugs contrary to Section 3(1) (2) (a) of the *Narcotic Drugs & Psychotropic Substances Control Act* No. 4 of 1994. The particulars as captured in the charge sheet were that the appellant on the 15th day of January 2018, at

about 10.00pm at Kitui Police Station in Kitui Central Sub-county within Kitui County was found in possession of narcotic drugs namely cannabis sativa (bhang) to with one (1) roll of street value Kshs 20/- which was not in any form of medicinal preparation.

5. The Appellant pleaded not guilty to the charges and the case proceeded to full trial before the Senior Principal Magistrate who found him guilty of the offences and sentenced him to death on Count I and two months imprisonment on Count II on 6th July 2022.

6. The summary of the evidence tendered at the trial court was as follows:-

7. Everlyne Syovinya Muthini, (PW1) the complainant told the court that that she was in her shop at around 7.30-8.00pm on the material night when she was robbed by an unknown person. She stated that she could not see the person but he ordered her to lie down and hand over her phone. That she resisted at first and the robber proceeded to cut her fingers with her finger so she handed over two phones of Itel and Techno make worth Kshs 2,000/- and Kshs 5,000/- respectively. That the robber also took one kg of sugar, 2 packets of milk, one packet of sportsman cigarette, one packet of unga and 2 pairs of slippers. She indicated that the robber was accompanied by three others persons who remained at the gate. She stated that she was treated at Tiva dispensary for her injuries and later on reported the incident at Itoleka Police Station. The appellant was also arrested at Kitui Beach Club on 15/1/2018 as he attempted to sell the complainant's phone. She explained that the appellant previously worked as a shamba boy in her neighbourhood.

   She stated she found the appellant offering her stolen phone at Kitui Beach Club to her cousin who used to work at the club.

   Gabriel Nzuki Wambua (PW2) an Assistant Chief of Ndumoni Sub-location, testified that the complainant was robbed on 14/1/2018 at her shop at around 8PM stating that she was notified by the Complainant who called her upon which she informed the Police at Itoleka Police Station. She testified that the following day the Complainant again called her and informed her that someone had been arrested by the public while trying to sell her stolen phone at Kitui Beach Club. The Chief stated that she proceeded to Kitui Beach Club and found the appellant arrested and tied with rope with stolen phone. She stated that the mob was highly charged and that she had to rescue the appellant by taking him to Kitui Police Station from where the Police from Itoleka Police Station came and collected him. The witness recalled that she found the appellant with the stolen phone tied to his leg adding that the Police later recovered bhang from him.

8. Thomas Mwaria Kithiki (PW3) a Clinical Officer from Kitui Referral Hospital testified and tendered P3 Form filled at Tiva Health Centre by one Magdalene Musyoki in respect to the Complainant. The P3 Form was tendered as P Ex.2 and it indicated that the Complainant was injured on the left index finger. He also tendered outpatient and as P ex 1. The Clinical Officer however, failed to give information as to where the author was and if he knew her.

9. Joram Gichuhi (PW4) from Itoleka Police Station told the court that the complainant reported the incident at the station on 15/1/2018. He explained that the appellant was arrested at Kitui Beach Club on 15/1/2018 as he tried to sell the complainant's phone and that he also had a one roll of bhang on him.

   The Officer tendered the stolen phone Itel as P Ex. 4 stating that what gave the appellant away was the Complainant's photo saved on the phone's screen. The Investigation Officer also tendered a roll of Cannabis found in possession of the appellant as P Ex 3.

   The witness denied the appellant suggestion that he was framing up stating that he only came to know him after he was found with the stolen phone (P Ex 4).

10. When placed on his defence, the appellant denied committing the offence stating that he was arrested on 16/1/2018 for being drunk. He insisted that he had gone to Kitui Beach Club on 14.1.2018 to take a bear. He further stated that he was arrested after he disagreed with Musee Musyoka over a woman.

11. The trial court evaluated the evidence and found that the Prosecution's Case had been proved on account of doctrine of recent possession and violence visited on the Complainant. The appellant was found guilty on both counts and convicted accordingly.

12. Being dissatisfied with the conviction and sentence meted out to him, the Appellant filed a Petition of Appeal on 19th July 2022 setting out the following grounds of appeal;

    i. That the learned trial magistrate erred in both law and in facts by finding that the prosecution had proved the case beyond reasonable doubt.

    ii. That the learned magistrate erred also in both law and facts in that she convicted the appellant against the weight of the prosecution evidence and when there was no sufficient evidence to link the appellant with the commission of the offence.

    iii. That the learned magistrate also erred in law and facts when she convicted the appellant being in possession of (phone) and same was not proved beyond reasonable doubt as required before the law.

    iv. That the learned trial magistrate erred in law and facts for conviction on inconsistent and incredible evidence of possession of stolen property (phone) without observing that the recovery was not proved beyond reasonable doubt as required by the law

    v. That the learned trial magistrate also erred in law and facts in failing to find that the offence of robbery with violence contrary to section 296/2 as read with section 296/2 of the CPC was not proved beyond reasonable doubt.

    vi. That the learned trial magistrate erred in both law and facts by ignoring plausible defence of the appellant.

    vii. That the learned trial magistrate erred in law and facts by shifting the burden of proof to the appellant by ignoring the rule of law that the burden of proving the guilty of a prisoner beyond reasonable doubt never shifts whether the defence has set up an alibi or not.

    viii. The sentence imposed upon the appellant of death is too painful and excessive.

13. In his undated written submissions, the appellant contends that the charge sheet was defective due to the duplicity of charges because of Sections 295 and Section 296(2) of *Penal Code* were cited in the charges. This however, is a new ground raised only at submissions stage without leave of this court as provided under Section 350 (2) (iv) of the *Criminal Procedure Code*.

14. He further submits that the doctrine of recent possession was not proven. He contends that he did not sign a recovery form or inventory to prove that he was found with the stolen phone.

15. He further contends that he was not positively identified submitting that dock identification was unreliable. He also faults the evidence of the Investigating Officer stating he was below the rank of an officer required to investigate serious cases like capital offences.

16. He contends that the trial court erred by relying on hearsay evidence and submits that he had no weapon when he was arrested. He submits that the ingredient of being armed with a dangerous weapon was missing from the Prosecution Case.

17. The State through the Office of the Director of Public Prosecution has opposed this appeal vide written submissions dated 8th June 2023. The State submits that the Prosecution's Case was sufficient because all the ingredients of the offence were proven and relies majorly on the doctrine of recent possession submitting that the appellant did not offer any explanation on how he came into contact with a stolen phone.

18. This court has considered this appeal. The evidence tendered during trial and the response by the State.

Thomas Mwaria Kithiki (PW3) a clinical officer from Kitui Referral Hospital produced a P3 form in filled in reference to the complainant by a doctor who referred to as Dr Magdalene. He stated that the complainant sustained a cut wound on her left index finger. The P3 form was marked as PEXH 2 and treatment notes from Tiva Health Clinic were produced as PEXH 1.

19. The Appellant has raised an issue regarding the charge sheet and contends that is was defective. Though the ground is improper as it was raised as an additional ground without leave of this court as observed above I will nevertheless consider it.

20. The appellant submitted that the charge was duplicitous for citing the two provisions of the law being Section 295 and 296(2) of the *Penal Code*. The charge sheet states as follows; Charge: Robbery with violence, contrary to Section 295 as read with Section 296 (2) of the Penal Code.

21. Section 295 of the *Penal Code* provides for definition of the offence of robbery as follows;

> 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.

22. Section 296(2) of the *Criminal Procedure Code* defines the ingredients of the offence of robbery with violence. It provides that if the offender is either armed, in the company of one or more persons or uses violence immediately before or after the offence, the penalty is death sentence.

23. In light of the above, it is evident that Section 29(2) of the *Criminal Procedure Code* is sufficient in terms of defining the offence of robbery with violence and penalty for the same.

24. The appellant contention that citation of Sections 295 and 296(2) of the *Criminal Procedure Code* was a duplex appears to hold some water but did the same prejudice by failing to disclose the nature of the charge he was required to answer/account for?

25. The Court of Appeal in the case of *Paul Katara Njuguna v Republic* [2016]eKLR dealt with that issue and made the following observations:-

"Neither Section 295 nor Section 296 refers to an offence of "robbery with violence". Indeed, the felony termed robbery as described under Section 295 of the Penal Code may involve use of actual violence or threat to use violence, while the aggravated offence of robbery as described under Section 296 (2) of the *Penal Code* may be complete with use of violence or no use of violence as long as there has been a theft and the offenders are either armed with offensive weapons or offenders are more than one. (See *Oluoch v Republic* [1985] KLR 549)...

The particulars as stated are clear and do support the offence of aggravated robbery. The defect is alleged to be in the statement of the charge in the count in which the appellant was charged with robbery with violence contrary to Section 295 as read with Section 296 (2). Is that fatal? We think not.

We have considered the law on duplicity in charges as expounded in case law and academic treatises and find an interesting trend which seems to have emerged... The Court cited with approval the case of *Cherere s/o Gakuli v R.* [1955] 622 EACA, where the predecessor of this Court reviewed the cases on the subject of the effect of a charge which is found to be duplex and concluded that "The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity"... In that case, the court held that the appellant was left in no doubt from the time when the first prosecution witness testified, as to the case which he had to meet and he could not, therefore, be said to have been prejudiced in any way.

From the Court of Appeal's decision, not every duplicity is fatal to the case. It will depend on the circumstances of every case. In this appeal, particulars of the charge of the charge were as follows;

> on the 14th day of January 2018 at about 8.30pm at Ndumoni sub-location in Kitui central sub-county within Kitui County, jointly with others not before court unlawfully robbed Everline Muthui of cash Kshs 3,000/-, ID card, two mobile phones make Itel No. 1409 and 1200 valued at Kshs 8,000/-, one kg of sugar 100/- and two packets of milk 100/-, one packet sportsman cigarette valued at Kshs 200/-,, one packet maize flour 100/- two pair of slippers valued 100/-, two pieces of panga soap valued 300/- all valued at Kshs 11,900/- and immediately before such robbery wounded the said Everline Muthui using a panga.

26. From the particulars, the appellant was informed that from the charge he was facing there was theft, there was violence accompanied by offensive weapons, and there were other offenders who had not been arrested by the time the matter went for trial. The appellant did not express that he was experiencing a difficulty in understanding what he was being charged with. The duplicity was not fatal.

27. The other issue in this appeal is whether the Prosecution's Case was proved beyond reasonable doubt.

28. From the Court of Appeal's decision, not every duplicity is fatal to the case. It will depend on the circumstances of every case. In this appeal, particulars of the charge of the charge were as follows;

"On the 14th day of January 2018 at about 8.30pm at Ndumoni sub-location in Kitui central sub-county within Kitui County, jointly with others not before court unlawfully robbed Everline Muthui of cash Kshs 3,000/-, ID card, two mobile phones make Itel No. 1409 and 1200 valued at Kshs 8,000/-, one kg of sugar 100/- and two packets of milk 100/-, one packet sportsman cigarette valued at Kshs 200/-,, one packet maize flour 100/- two pair of slippers valued 100/-, two pieces of panga soap valued 300/- all valued at Kshs 11,900/- and immediately before such robbery wounded the said Everline Muthui using a panga."

29. The ingredients of the offence of robbery with violence is clearly illustrated by Section 296(2) of the *Penal Code*. They are any of the following elements: -

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

    b. If the offender is in the company of two or more persons or accomplices or

    c. Use of violence immediately before or after the robbery.

30. As well illustrated by Court of Appeal case of *Dima Denge Dima & Others versus Republic* [2013]eKLR;

"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 enough to found a conviction."

31. The court is called upon to establish whether the prosecution was able to prove beyond reasonable doubt that;

    (i) The offenders were armed with dangerous and offensive weapon or instrument;

    (ii) the offender was in company with one or more person or persons; and

    (iii) at or immediately before or immediately after the time of the robbery the offenders wounded, beat, strike or used other personal violence them.

32. PW1 stated that one man broke into her shop on the material night armed with a panga and demanded her to hand over her phone. She stated that the man cut the lantern she was using as her source of light in the shop and the shop was engulfed in darkness. The man proceeded to take two of PW1's phone and other items from her shop being one kg of sugar, 2 packets of milk, one packet of sportsman cigarette, one packet of unga and 2 pairs of slippers.

33. On the element of use of offensive weapon, though PW1 stated that the attacker had a panga and smashed a lantern used for lighting, there was no exhibit to prove the element of violence.

34. It is true that PW1 stated that there were other people or accomplices who were outside but placing reliance on evidence of one witness in the absence of corroborative evidence is unsafe.

35. Let me turn to the other evidence tendered by Prosecution to prove the element of violence. The complainant stated that she was attacked and her finger was cut with a panga when she initially declined to give in. The medical evidence tendered to prove the injuries sustained failed to comply with the law in respect to its admissibility. This is because the prosecution for unknown reason decided to call a medical officer to produce medical documents, P3 Form and treatment card authored at Tiva Dispensary without laying basis.

36. The law gives guidelines on the production of documents whose makers cannot be availed for stated reasons. Section 33 of the *Evidence Act* states: -

    "Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the Court unreasonable, are themselves admissible in the following cases

    a. ....

    b. made in the course of business

    when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him."

37. From the record, there was no basis laid explaining the absence of the maker of the treatment notes or the P3 form to pave way for production by another medical practitioner which is ordinarily allowed. The Court of Appeal in *Sibo Makovo v Republic*, Criminal Appeal [1997] eKLR, stated as follows:

> " The P3 form was filled in by the Medical Officer, Naivasha District, was produced by PW3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person identifies the signature of the maker and in terms as laid down in section 33 of the *Evidence Act* (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is to be taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called."

38. The prosecution in this case made no attempts to lay any basis why the maker of P3 form or treatment notes could not be availed. This was an infringement of the legal requirements as stipulated under Section 33 of the *Evidence Act* which demands that basis for non-availability of the authors/makers of any opinion written or oral be laid before another expert familiar with the handwriting of the expert can be allowed to tender the evidence. The medical evidence was of little value to the prosecution.

The trial court was only left with the evidence of complainant on the element of use of violence and it failed to state if the injury to the Complainant was visible to the trial court. The Court could have noted the same in the proceedings and in the absence of the same and coupled with inadmissibility of medical evidence, the prosecution's case on the element of use of violence fell short.

39. On the element of identification, it is evident that the prosecution relied on the doctrine of recent possession given the fact that the Complainant stated that he did not identify his attacker as it was dark.

40. The trial court appears to have relied on the said doctrine but the same had some loopholes.

41. The prosecution submitted that it was able to prove the charges against the appellant and placed reliance on the doctrine of recent possession. The trial court indeed found that the appellant was found in possession of a phone which was stolen on 14/1/2018. PW1 stated that two phones of Itel and Techno make worth Kshs 2,000/- and Kshs 5,000/- respectively were stolen from her. Firstly, this was different from what was stated in the charge sheet which indicated that the appellant was charged with robbing two mobile phones make Itel No. 1409 and 1200. Secondly, PW1 was not called to identify the PEx. 4 produced by PW4, (the investigating officer) being an Itel phone. PW1 did not even identify the exhibit in her testimony in court.

42 The Prosecution should have done more by leading the Complainant to identify her phone and PW2 to point out what made him recognize the phone as the same one stolen from his cousin (the Complainant). The omission by the Prosecution left its case precariously hanging on a thin thread and cases of this kind are serious and requires prove beyond reasonable doubt because the penalty prescribed is the ultimate death penalty.

43 The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal

summarized the essential elements of the doctrine of recent possession in *Eric Otieno Arum v Republic* [2006] eKLR, as follows:

> 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 the 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."

44 In light of the above discourse, this court finds that the doctrine of recent possession could not apply given the stated/highlighted shortcomings of the Prosecution's Case.

In the end, this court finds that the Prosecution's Case fell short of the requisite threshold and it was unsafe to back a conviction on the same. This court in the premises, finds merit in this appeal. The same is allowed

The conviction is hereby set aside and the sentence is quashed. The appellant shall be set free forthwith unless lawfully held.

DATED, SIGNED AND DELIVERED AT KITUI THIS 24TH DAY OF JANUARY, 2024.

HON. JUSTICE R. LIMO-JUDGE