Pelekech v Republic (Criminal Appeal E035 of 2023)
[2024] KEHC 667 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KEHC 667 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E035 OF 2023

RN NYAKUNDI, J

FEBRUARY 2, 2024

BETWEEN

EKARU INGOLE PELEKECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. C.A. Mayamba; HSC in Kakuma law court Cr. Case No. E105 of 2022)

JUDGMENT

1. The Appellant was charged with robbery with violence contrary to Section 295 as read with section 296(2) of the *Penal Code*. Particulars stated that the Accused person on the 14th day of May 2022 at around 1430 hours along Kakuma-Pokotom Murram road in Turkana West Sub County within Turkana County, jointly with another one not before court, while armed with knives and stones robbed Bukuru Hussein of one motorcycle registration number KMFU 699Z valued at Kshs. 145,000 at the time of such robbery used actual violence to the said Bukuru Hussein. The Appellant was convicted of the charge and sentenced to 20 years imprisonment.

2. Being aggrieved by both the conviction and sentence meted out against him by the trial court, he filed the instant appeal. Both parties filed written submissions in support of their Case. This decision on appeal will take notice and appreciation of the issues canvassed by both parties for and against the memorandum of appeal.

Appellant's submissions

3. It was the appellant's submission that the question to be answered in this case is whether the evidence from the witnesses is sufficient to establish guilt of the accused person beyond reasonable doubt. He submitted that the prosecution did not prove its case to the required standards.

4. The appellant contested the element of identification and submitted that his shaving style has been a norm among the youth and as such it could not be used as a marker for identification. He submitted that his identification was done by a single identifying witness and that PW2 did not give out any descriptions of the attacker to the police upon recording his statements.

5. The appellant further submitted that there was no evidence adduced in court by the investigating officer when he failed to call NPR who helped to track the motor cycle in question. He submitted that it could have been vital to call other witnesses including the NPR who tracked the motorcycle and the neighbors who saw the accused with a motorcycle to effectively corroborate the testimony.

6. In summary, he submitted that the prosecution did not prove its case to the required standard and that he is innocent and should be acquitted and the case be dismissed.

Respondent's submission

7. The respondent submitted that the evidence adduced supported the findings. That the testimonies on pages 5-6 showed violent attacks using a weapon on a victim by more than one person, his motor cycle stolen. Injuries were confirmed. Counsel relied on the case of *Titus Wambua v. R* [2016] eKLR.

8. On identification, counsel submitted that the appellant was seen and his distinctive features described. Further that an identification parade was done and the appellant was identified. He also submitted that the ignition key to the stolen motorcycle was recovered from the appellant.

Analysis And Determination

9. This being the first appellate court, my duty is to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.The court should however bear in mind that it did not see witnesses testify and give due consideration for that.

10. Having considered the grounds of appeal, and evidence adduced before the trial court, it is my opinion that the paramount issue for determination is whether the prosecution proved it case to the required standard.

11. The offence of robbery with violence is contained in Sections 295 and 296(2) of the *Penal Code* as follows:

> " 295.
>
> 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(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."

12. Further, In *Jeremiah Oloo Odira v Republic* [2018] eKLR the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:

> "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. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.
>
> On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -
>
> i. The offender is armed with any dangerous or offensive weapon or instrument, or
>
> ii. The offender is in the company of one or more other person or persons, or
>
> iii. 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" See Olouch v Republic (1985) KLR)

13. Based on the evidence of PW1and PW2 who led evidence to what unfolded on the material night, it is clear that PW2 was assaulted and in the process robbed of his phone and money.

14. PW3 testified that the complainant was examined in the hospital and was diagnosed with tenderness on his body with no cuts and swellings. The thorax and abdomen were also tender, he had pain while breathing in and he also had a swelling and abrasion on the lower and upper limb on the left side. It was his testimony that that the complainant also had a wound on the knee with the probable weapon being a blunt and sharp.

15. PW5 stated that he was at the police station when they received a report from a Burundian male adult, who reported the loss of his motorcycle by two Turkana Adults. He had been robbed along a murram road headed to Letea. It was his testimony that the complainant had picked customers at Harsi petrol state before the customers ordered him to stop. They physically attacked him with blows and even stoned him at the back. One of them took the ignition keys with the complainant running for his dear life. They drove the motorcycle away prompting the complainant to inform the owner. It was his testimony that a passerby luckily appeared and informed him that he had recognized one of the customers, being Ingole Pelekech and promised to lead to him. He was referred the complainant for treatment. They proceeded to Pokoton area to pursue the suspect. They were led to the house of the sister to one Pelekech but he was not found. They continued the search through their informer. They managed to get an abandoned house and when they opened the door, found one motorcycle, fitting the description by the complainant.

16. On identification, the complainant stated that the accused had a mark on his neck and had also marked his face together with his shaving style, as he had shaved sideways with a lot of hair on the upside.

17. I have had the occasion to peruse the record as well as the judgment of the trial court and I wholly agree with the findings of the trial court that the elements of robbery with violence were properly established and as such the conviction is upheld in concurrence with the learned trial magistrate.

On sentence

18. In *Benard Kimani Gacheru v R* [2002]eKLR in which the court of Appeal restated as follows;

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, he appellant court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist"
>
> "295. 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(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."

19. In the "Muruatetu Case", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;

> " (a) age of the offender;
>
> (b) being a first offender;
>
> (c) whether the offender pleaded guilty;
>
> (d) character and record of the offender;
>
> (e) commission of the offence in response to gender-based violence;
>
> (f) remorsefulness of the offender;
>
> (g) the possibility of reform and social re-adaption of the offender;
>
> (h) any other factor that the Court considers relevant."

20. In my considered view, the accused mitigation and aggravating factors by the state ought to count in sentencing verdict. The objectives of sentencing should also be considered in totality as captured in the sentencing policy guidelines of 2023;

1) Retribution: to punish the offender for his/her criminal conduct in a just manner.

2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.

4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

5) Community protection: to protect the community by incapacitating the offender.

6) Denunciation: to communicate the community's condemnation of the criminal conduct.

7) Reconciliation: To mend the relationship between the offender, the victim and the community.

8) Reintegration: To facilitate the re-entry of the offender into the society.

21. On evaluation, of the custodial sentence imposed by the trial court one gets the impression that the aggravating factors of the offence were accorded more weight than mitigation to warrant the sentence of 20 years imprisonment. It follows from the observations that the sentence cannot be said to be manifestly excessive on the first limb of the totality principle and on the second limb of proportionality principle. The legitimate sense of the grievance on the part of the appellant receiving the nature and length of the sentence was influenced by the facts and circumstances of the case. What is not delved into by the learned trial magistrate is the construction and the interpretation of section 333(2) of the *criminal procedure code*. This is all about the provisions enunciated as follows;

(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

22. In the case of *Ahamad Abolfathi Mohammed & another v Republic*[2018] eKLR where the Court of Appeal held that:

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of theCriminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on June 19, 2012."

23. The words abiding in section 333(2) of the *CPC* here are significant that a conviction which follows a custodial sentence ought to incorporate and give weight to pretrial detention to ensure that the period is calculated and credit given to the convict. The emphasized portions of the judgment do not reflect

the crucial provisions in particular the proviso to section 333(2) of the code. As a consequence this court will not be acting outside it's jurisdiction in making a finding that the sentence imposed was made with a fundamental error in law. What can be done? It is to review that order on sentence and have the commencement date be effected from the 17th May, 2022.

Orders accordingly.

DATED AND SIGNED AT LODWAR THIS 2ND DAY OF FEBRUARY, 2024

.....

R. NYAKUNDI

JUDGE

And in presence of;

Yusuf for the state

Appellant present