Alembi Alias Ndugu v Republic (Criminal Appeal E063 of 2023)
[2024] KEHC 4247 (KLR) (4 April 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E063 OF 2023

RE ABURILI, J

APRIL 4, 2024

BETWEEN

JOSEPH AHINDU ALEMBI ALIAS NDUGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence by the Hon. R. Oanda on the 10th July 2023 in the Principal Magistrate's Court at Winam in Criminal Case No. 428 of 2022)

JUDGMENT

Introduction

1. The appellant Joseph Ahindu Alembi alias Ndugu was charged and convicted of the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to serve 20 years' imprisonment. The particulars of the offence were that on the 20th September 2022 at Nyalenda area in Kisumu East sub-county within Kisumu County, jointly with others not before court, the appellant robbed Hezron Otieno of his Nokia C20 valued at Kshs. 28,000, his Techno valued at Kshs. 1,300 and cash of Kshs. 5,000 and that at the time of such robbery the appellant usd actual violence on the said Hezron Otieno.

2. The prosecution called four witnesses in support of its case. Placed on his defence, the appellant testified and called 3 witnesses. The trial court found that the prosecution had proved its case against the appellant beyond reasonable doubt, found him guilty of the offence of robbery with violence as charged, convicted him and sentenced him to serve twenty (20) years imprisonment.

3. Aggrieved by the conviction and the sentence imposed, the appellant filed this appeal vide the petition of appeal dated 17th July 2023 on the 20th November 2023. The appeal appears to have been filed out of the 14 days period but as it is not clear whether he sought and obtained leave to appeal out of time, being an unrepresented person, and the appeal having been admitted to hearing thereby validating any

defect of it having been filed out of time and as no objection was raised on the same, I exercise discretion and enlarge the time for filing of the said appeal and deem it duly filed within time. The grounds of appeal are:

i. That the trial court erred in law and in fact by convicting the appellant without proving th case beyond a reasonable doubt.

ii. That the trial court erred in law and in fact in not considering the contradictions, discrepancies and inconsistencies in the case that were inconsequential to conviction.

iii. That the trial court erred in law and in fact in not appreciating the appellant's defence that overwhelmed the prosecution case.

iv. That the trial court erred in law and in fact in relying on evidence of theft of a single witness uncorroborated.

4. The appellant filed written submissions in support of his appeal whereas the respondent's counsel made oral submissions opposing the appeal.

The Appellant's Submissions

5. It was submitted that the appellant had clearly indicated how the whole incident occurred and that the evidence as adduced was not sufficient to warrant the Conviction as captured by the trial court in his judgment.

6. The appellant submitted that it was evident that the trial Court erred in law and fact in not appreciating the Appellant's Defense that overwhelmed the Prosecution Case and as such this court ought to re-evaluate the evidence and reach its own conclusion. It was submitted that there was uncertainty on the part of the witnesses as to how the whole alleged crime occurred and in essence their testimonies were contradictory and thus the prosecution's case must fail. Reliance was placed in the case of Republic V Nahashon Ngugi Gatarwa and 3 others [2007] eKLR.

7. The appellant submitted that the burden of proof strictly lay on the prosecution and that it must not be shifted upon the accused persons who are presumably innocent till proven guilty. Reliance was placed on the case of Jamleck Mwaniki Njururi V Republic [2013] eKLR and Joseph Korir V Republic [2006] eKLR where it was held that:

> "...The two issues raised above were fatal to the Prosecution case. I do agree with State and conceding the appeal was the best decision to make. The appeal is allowed and conviction quashed. The sentence is set aside. Any fine paid to be refunded."

8. It was submitted that the trial Magistrate did not take into account that the evidence adduced by the Prosecution were not beyond reasonable doubt as the evidence on record showed lack of congruence in the statements of the witnesses on record and the oral testimony by the Complainant during trial and further, the absence of the other witness to testify in court showed that the Complainant's testimony had no corroboration and thus remained imaginary assertions without cogent facts thus the prosecution had not discharged its burden of proof to the required standard. The appellant relied on the case of Philip Muirruri Ndarug v Republic High Court of, Criminal Appeal No. 76 of 2012 where the court observed that it is trite law that an accused person should only be convicted on the strength of prosecution case and not on the weakness of his defence.

9. It was submitted that the appellant challenged his conviction on the basis of failure to accord him a counsel which was in violation of his rights under Article 50(2) (h).

The Respondent's Submissions

10. It was submitted that the conviction was sound and sentence lawful as PW1 & PW4 positively recognized the appellant who was in the company of 2 others.

11. It was further submitted that the complainant was injured as shown by PW2 and that the appellant also lost his phone which was recovered.

12. The respondent urged this Court not to interfere with the conviction and sentence.

Analysis and Determination

13. This being the first appellate court, I am guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated:

> "The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

14. In a much earlier and most cited decision, the Court of Appeal similarly held in Okeno v Republic [1972] EA 32 that:

> " 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 vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. 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 court's finding and conclusion; 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 vs. Sunday Post [1958] E.A 424."

15. The prosecution bears the burden of proof. It must prove its case beyond reasonable doubt the elements of crime of robbery with violence in section 296(2) of the Penal Code. The section provides as follows: -

    (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 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.

16. The evidence before the trial court was as follow- PW1, the complainant testified that on the material day, he was headed to the market when he met the accused alongside two others, one Eddy and Orato, who stopped him and challenged him to a fight. He testified that the appellant and his friends were

armed with a panga and that the appellant hit him with the panga and he lost a tooth as Orato held him and took away his phone. The complainant testified that there was a struggle and a passerby shouted forcing the attackers to flee. He testified that the attackers robbed him of his phone and Kshs. 5,000. He testified that he knew the attackers before the incident and that he was able to see them well as they spoke before the attack and further that there was sufficient light. It was his testimony that that he bled and was rushed to Kisumu General Hospital where he was treated and he later reported the matter to Kasagam Police Station.

17. In cross-examination, PW1 testified that the appellant sent to PW1 Kshs. 1,000 in a bid to have this matter sorted out and that they also returned his phone after the matter had been reported to the Police.

18. PW2, Philip Kilimo, a Clinical Officer at Kisumu County Hospital corroborated the complainant's testimony regarding the injuries sustained following the attack having examined him on the 21st September 2022. He produced a P3 form that was filed a day after the incident occurred showing that a sharp and blunt object was used in the attack.

19. PW3, No. 73246 PC Wilson Simba testified that he took over investigations from PC Ishmael Ondigo. He testified that the other two attackers were still at large.

20. PW4, Evans Otieno testified that on the material day at 7.30pm, he was near his place of work when he was called by a lady and informed that the complainant was under attack. He testified that he rushed to the scene and found the appellant and his friends Orato and Eddy who had attacked and injured the complainant so they rushed the latter to hospital.

21. The appellant testified as DW1 denying the allegation brought against him. It was his testimony that on the material day, the complainant went to his home and informed him that a child had stolen money and that the complainant started to assault the child so he went to rescue the child. He testified that at 4pm, the complainant returned then armed and in the presence of other people threatened the said child and threatened the accused to come out of the house but the latter refused. He testified that at 7pm, the complainant whilst armed with a metal bar returned and informed the appellant that he would the appellant for denying him the opportunity to beat up the child so he, the appellant, disarmed the complainant and reported the matter to Kasagam Police Station vide OB No. 31/20/09/2022 but that two months later, he was arrested and charged with the crime herein.

22. In cross-examination, the accused testified that the prosecution witnesses lied in court and that his witnesses would confirm that he was the one who took the metal rod to the police.

23. DW2, Fredrick Otieno and DW3, Andayi Paul Ominde, corroborated the appellant's testimony. DW4, Clement Misambi similarly corroborated the appellant's testimony but stated that he did not see the appellant carry anything to the police station.

Determination

24. I have considered the evidence set out before the trial court, as adduced by the prosecution witnesses and the defence. The question is, did the prosecution prove the guilt of the appellant beyond reasonable doubt?

25. According to the complainant, he was attacked while on his way to the market and that he saw and knew the people who attacked, injured him and robbed him of his property as listed in the charge sheet. The injuries sustained are as detailed by the complainant himself and corroborated by PW3 who produced the P3 form which indicated that the injuries sustained by the complainant were likely caused by a sharp and blunt object which further corroborated the complainant's testimony that his attackers, specifically the appellant, was armed with a panga.

26. The next question is, who attacked the complainant? The complainant testified that he was attacked by the appellant and his two friends, Eddy and Otaro. He reiterated that he knew them before the incident. PW4 did not witness the attack, he was informed that the attack on the complainant was going on and when he went to the scene, the complainant reiterated the identities of his attackers to him. Both the complainant and PW4 reiterated that the scene was well lit by security lights. Therefore, only the complainant gave identifying testimonies of his attackers.

27. The appellant laments that the trial court laid too much reliance on the testimony of one witness on identification. On this subject, the Court of Appeal for Eastern Africa in Abdalla Wendo v R [1953] 20 E.A.C.A 166 held that: -

> " Subject to certain exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this 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 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."

28. See also Roria v Republic [1967]EA, 588 where the Court of Appeal for East Africa held that:

> " A conviction resting entirely on identity invariably causes a degree of uneasiness, ...
>
> That danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."

29. Be that as it may, this is a case of identification by recognition and circumstances were not difficult ones. The appellant was known to the complainant who stated that the they had spoken to one another at the scene. Also evidence show that the appellant positively identified the appellant as the person who hit him leading him to lose his tooth. Further, albeit the appellant was under no duty to testify to prove his innocence, having chosen to adduce and challenge evidence by the prosecution witnesses, from his own testimony, it is evident that the appellant knew the complainant and the complainant knew him very well.

30. In addition, the appellant's own witness contradicted the appellant by stating that the appellant did not take anything to the police station contrary to what the appellant stated that he took the metal rod which he recovered from the complainant to the police station.

31. The appellant claims that he was not at the scene where the complainant was attacked and robbed of his properties. In the case of R v Sukha Singh S/o Wazer Singh & Others {1939} 6 EACA 145 it was held that:

> " If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the internal and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped."

32. That is precisely what happened in this case. The plea of alibi by the appellant was never even part of the cross-examination issues raised at the trial by the appellant. I am not persuaded, as the trial court did that the appellant alibi defence was credible. I find that defence to be an afterthought.

33. I find no error in the finding by the trial court on the positive identification by recognition of the appellant by the complainant.

34. The appellant pleaded that there were inconsistencies and contradictions in the testimony of the prosecution witnesses. I find no such contradiction or material inconsistencies in the evidence adduced by the prosecution witnesses. To the contrary, I find that the prosecution witnesses corroborated each other. The Court of Appeal addressed itself on the issues of contradictions in the case of Richard Munene v Republic [2018] eKLR where it stated interalia that only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

35. In this case, I find no contradictions and inconsistencies sufficient to create doubt in the trial court's mind as to the appellant's guilt. Consequently, this ground fails.

36. There was also no dispute that the property alleged to be stolen from the complainant were his and or that they were stolen.

37. As to whether the appellant's right to a fair trial were compromised as he had no legal counsel, Article 50 gives the right to a fair hearing. It provides;

> " 50(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 the 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."

38. Article 50(2) (g) of *the Constitution* guarantees a fair trial to every accused person which includes the right to be represented by an advocate and to be informed of that right promptly.

39. The appellant submitted that the trial magistrate erred by failing to appoint an advocate to him to guide him in his case considering he was a student and further in contravention of Article 50 (2) (h) of *the Constitution*.

40. The criteria on legal services by the state is outlined in Section 29 (1), 30, 35 & 36 under the *Legal Aid Act* No. 6 of 2016. Section 43 of the Act lays down the duties of the court before which an unrepresented accused person is presented. The same provides as follows:

> " 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 an advocate assigned to him or her; and
>
> c) Inform the service to provide legal aid to the accused person"

41. The key words under Article 50(2) (g) and (h) of *the Constitution* and section 43 are "to be informed promptly of the right". In order to fully comply with the provisions of Article 50(2)(g) and (h) and section 43(1) of the *Legal Aid Act*, the trial court as a matter of constitutional duty and the interest of justice, ought to give the information to the accused person and/or make a preliminary inquiry at the earliest opportunity possible. A determination must be made as to whether or not the accused person would require legal representation before commencing with the hearing of the case.

42. What then is this "earliest opportunity"? In my opinion the earliest opportunity would be when the accused is first presented before court, or during plea taking, essentially before the hearing begins. In the case of Joseph Kiema Philip v Republic [2019] eKLR the High Court sitting at Kajiado stated that the trial record of proceedings must indicate or communicate that the accused was duly made aware of his rights under Article 50(2) of *the constitution* and that the process expounded above was conducted where it is relevant.

43. Examining the trial court record, I note that after taking plea on the 22.11.2022, the trial magistrate ordered as follows:

> " ORDER: Executive officer of this court to assign accused herein a counsel. Accused to get witness statements. Hearing on 1.12.2022."

44. It is evident that no counsel was assigned to the appellant but the appellant never raised any issue during the hearing and proceeded to carry on his defence well as was evident from the cross-examination of the prosecution witnesses that he undertook.

45. From the above, it is my opinion that the trial court fully complied with the provisions of Article 50(2) (g) and (h) and section 43(1) of the *Legal Aid Act*. Accordingly, this limb of the appeal also fails.

46. In the end, I find and hold that the prosecution proved their case against the appellant herein beyond reasonable doubt. I find no merit in the appeal against conviction and dismiss it.

47. On sentence, the maximum and mandatory penalty under section 296 (2) of the Penal Code upon conviction is death sentence. The appellant was given 20 years imprisonment. The offence of robbery with violence is not one that can be committed inadvertently. It is planned and executed and in most cases, life and limb is lost. the robbers often have no mercy for their victims and care le not where to hit their victims.

48. I find no reason to interfere with the discretion of the trial court in imposing twenty years imprisonment for robbery with violence considering the victim of the robbery was injured seriously and the weapon used in the robbery was lethal. The appellant was in the company of other robbers who took off.

49. I thus find no reason to interfere with the sentence imposed on the appellant, which I find was lenient, considering the maximum mandatory death penalty provided for in the statute. I dismiss the appeal against sentence too.

50. On the whole, this appeal against conviction and sentence is dismissed. The appellant to serve full sentence to take into account the period he was in custody remand prior to sentencing.

51. This file is closed.

52. I so order. File closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF APRIL, 2024

R.E. ABURILI

JUDGE