Kibe v Republic (Criminal Appeal 79 of 2023)
[2024] KEHC 3993 (KLR) (9 April 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 79 OF 2023

DR KAVEDZA, J

APRIL 9, 2024

BETWEEN

JAMES WACHIRA KIBE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. E. Boke (S.P.M) on 19th October 2022 at Kibera Chief Magistrate's Court Criminal Case no. 3606 of 2017 Republic vs James Wachira Kibe & 2 others)

JUDGMENT

1. The appellant jointly with two others not before this court was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code*, Cap 63 Laws of Kenya. After a full trial, he was sentenced to death. Being aggrieved, he filed an appeal challenging his conviction and sentence.

2. In his petition of appeal and amended grounds of appeal, he raised grounds, which have been coalized as follows: He contended that the charge sheet was defective. He challenged the totality of the prosecution's evidence against which he was convicted. He also contended that his defence was not considered by the trial court. He urged the court to quash his conviction and set aside the sentence.

3. In response, the respondent filed grounds of opposition dated 9th November 2023. The grounds are that the appeal is misconceived and unsubstantiated; the appeal is an abuse of the court process as the appellant was properly convicted before the trial court; the prosecution did discharge its burden of proof beyond reasonable doubt; the appeal lacks merit and should be dismissed.

4. The key ingredients for a robbery with violence charge are found in section 296(2) of the *Penal Code*. It provides as follows-

> "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".

5. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt leading to a proper conviction and sentence.

6. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyze the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32)

7. The prosecution called eleven (11) witnesses in support of their case.PW1, Mr. Michael Karanja, testified that he was supervising construction near Impala Club on Ngong Road when he heard gunshots. He witnessed two individuals, one in a black hoodie and the other in a beige shirt, struggling with a victim. The assailants fled on a motorbike after the victim cried for help. Though unable to identify them immediately, he later recognized the appellant and his accomplice at Thika Police Station.

8. He rushed to aid the victim, transporting him to the hospital in the victim's Prado vehicle. Police arrived, and Karanja described the incident. He identified the motorbike by its decorations at the station but couldn't recall its number plate at the scene. During cross-examination, he admitted uncertainty about certain details, including the date of the incident. Under further questioning, he clarified discrepancies in his statements regarding the timing and description of events. He initially attributed registration numbers to the motorbike after seeing it at the police station. Despite inconsistencies, Karanja maintained his identification of the appellant and his accomplice.

9. In his testimony as PW2, the complainant, a police officer attached to the Deputy Chief Justice, recounted an incident on October 24, 2017, where he was shot while picking seedlings on Ngong Road. He described being accompanied by Mr. Kiragu PW 3, to collect seedlings near Marsabit Plaza opposite Impala Club when they heard a gunshot. He felt pain and realized he had been shot in the left jaw, with his firearm, a Jericho S/NO. 44338826, stolen. The assailant was joined by another man, and they fled on a motorbike. Despite being unable to identify the motorbike's registration, he was driven to Nairobi Women's Hospital by Kiragu, where he was treated and stayed until November 13, 2017.

10. Later, he identified his recovered firearm and holster, marked with his initials "JM," at Ruiru Police Station. At Thika Police Station, he identified the appellant and his accomplice in an identification parade on November 17, 2017, confirming the 2nd accused as the shooter. During cross-examination, he clarified details, including the timing of the incident and the identification of the assailants. Despite the shock, he maintained a clear recollection and denied claims of confusion. He emphasized recognizing the 2nd accused clearly, denying any uncertainty about his identity. Additionally, he refuted claims of not identifying the 2nd accused during the lineup and reiterated that both accused were seen leaving together after the shooting.

11. PW3, Elisavan Kiragu Gathua, confirmed PW2's account of purchasing seedlings for the Deputy CJ at the Coptic area on Ngong Road, then proceeding to his seedling business opposite Impala Club, where

PW2 was a regular customer. During the incident, he took cover under a car upon hearing gunshots and later drove PW2 to Nairobi Women's Hospital in PW2's vehicle.

12. PW4, an employee of PW3, corroborated PW2, and PW3's testimony, stating they left the Coptic area opposite Impala Club. During the loading process, he heard gunshots and attempted to flee but fell, witnessing one of the assailants taking something from PW2 before fleeing on a motorbike with another person.

13. PW5, CIP Benard Wanyoike, conducted the ID parade at Thika Police Station. On November 19, 2017, he organized parades for the two accused persons, Erick and James Wachira. Erick was identified by PW1 and PW2 in separate parades, while Wachira was identified by both in their respective parades. He confirmed using 8 participants in each parade and provided the parade forms as exhibits.

14. PW6, Alex Mudindi Mwandawiro, a firearm examiner, received two expended cartridges labeled A1 and A2 from PC Joseph Gathecha on October 25, 2017. Later, on November 22, 2017, a fired bullet marked E was received from PC James Wanjohi. Mwandawiro examined the cartridges, determining they were fired from a Ceskar pistol and matched each other. Comparing them with cartridges from other shooting scenes, he concluded the same gun was used in three incidents in Githurai Kimbo in 2017.

15. He compared the cartridges with a Ceskar pistol submitted by DCI Buruburu on November 17, 2017, confirming they were fired from the same weapon. Mwandawiro also analyzed the fired bullet E, concluding it was fired from the same Ceskar pistol. He produced a report on November 30, 2017, along with exhibit memos for the cartridges and bullet, as well as exhibit memos from Githurai Kimbo and Buruburu police stations.

16. PW7, PC Richard Rotich, testified that on November 16, 2017, around 8 pm, he received information at Dandora police station that young men arrested by CID Ruiru had hidden firearms in a suspect named Kevin's house. Rotich recovered a Ceskar pistol (serial No. 8269) with 7 rounds and a Jericho pistol (serial No. 44338826) with 2 rounds from Kevin's room. Although they couldn't locate Kevin, his brother was present. They called OCS CIP Ndogo to witness. Rotich recalled seeing the 2nd accused, Erick, among the suspects but couldn't recall the others. Despite efforts, Kevin remains elusive. Rotich mentioned they were led to Kevin's house by an informer and revealed that Kevin was suspected of being a motorcycle-riding robber. The pistols were found hidden in a chicken pen near Kevin's room.

17. PW8, CIP Mathew Ngogo, testified that on November 16, 2017, he was informed by PC Richard Rotich (PW7) about the recovery of two pistols at Dandora Phase 1. He retrieved the pistols from a bag hidden under a chicken pen. Earlier, CID officers from Ruiru had led them to this discovery, mentioning suspect Erick (2nd accused). Ngogo handed the firearms to DCI Buruburu. He didn't see the appellant.

18. PW9, PC Joseph Gathecha, described processing a crime scene on October 24, 2017, finding bloodstains and recovering spent cartridges from a Toyota Prado allegedly driven by the complainant. He also photographed a motorcycle allegedly used in the robbery, clarifying discrepancies in its color during cross-examination.

19. PW10, PC Amos Mariechi, intercepted a motorcycle linked to the crime scene on October 24, 2017, and apprehended the 3rd accused, Shivaji, and a passenger, Bernard Aliuba, on November 27. They were handed over to DCI Dagoreti. PC James Wanjohi Mwangi, PW11, the lead investigator, detailed the incident report, including the recovery of firearms and the victim's hospital visits. He collected evidence, including the motorcycle, and arranged an identification parade. He confirmed

the appellant's and 2 other arrests on November 17th, 2017, their subsequent charging, and the consolidation of their files. During cross-examination, he addressed discrepancies in evidence collection and the correction of the firearm's serial number.

20. After the close of the prosecution's case, the appellant was placed on his defence. In his defence, he told the court that he resides in Umoja 3. He recounted his arrest on November 17, 2017, stating that two men took him to his home, searched it, and confiscated his belongings before taking him to the Ruiru police station. He denied involvement in the robbery and claimed he was at work during the incident. Under cross-examination, he refuted statements made during police interrogation and asserted coercion during documentation signing.

21. The 2nd accused, Erick, described his arrest on October 17, 2017, denying any knowledge of the crime and stating coercion during arrest and parade identification. The 3rd accused, a motorcycle taxi operator, testified about his arrest on October 27, 2017, denying involvement and asserting coercion during arrest and parade identification. He affirmed his presence at his usual work location during the incident. During cross-examination, he reaffirmed his ownership of the motorcycle and disputed witness claims regarding its presence at the scene.

22. The trial court found the appellant and the 2nd accused guilty and convicted them. On the other hand, the 3rd accused was acquitted.

23. The appeal was canvassed by way of written submissions which have been considered. The offence of robbery with violence under section 296(2) of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances; the offender was armed with a dangerous weapon or he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR and *Oluoch v Republic* [1985] KLR 549)

24. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt. PW1, Michael Karanja, observed the incident near Impala Club, hearing gunshots and witnessing two individuals struggling with a victim before fleeing on a motorbike. He later recognized the appellant and his accomplice at Thika Police Station, despite initial uncertainty. PW2, the complainant, recounted being shot while picking seedlings on Ngong Road, with a firearm that was stolen from him. He identified the appellant and his accomplice in an identification parade at Thika Police Station, confirming the Appellant's accomplice as the shooter. PW3, Elisavan Kiragu Gathua, confirmed PW2's account and transported him to the hospital after he was shot. PW4, an employee of PW3, corroborated the events. PW5, CIP Benard Wanyoike, conducted the ID parade, with both accused being identified by PW1 and PW2 in separate parades. The parade forms serve as exhibits to confirm the identification process. Despite some discrepancies and uncertainties highlighted during cross-examination, the witnesses maintained their identification of the appellant and his accomplice as the assailants.

25. During the ordeal that occurred in broad daylight, the assailants attacked, stole the complainant's gun, and shot him with it. From the material placed before the court, PW1, PW2 and PW3 were very clear on the facts of the incident, and their evidence was not shaken on cross-examination. It is my considered view that the appellant was properly and positively identified and apprehended after the incident. I find the testimony of the prosecution's witnesses to be reliable direct evidence of visual identification against the appellant.

26. For the consideration of whether violence was used during the incident, it was the testimony of prosecution witnesses that the assailants assaulted him, robbed him of his gun, and shot him in the

jaw. The use of violence was therefore present. This court is satisfied that the prosecution proved that the appellant and his accomplice, being armed with a gun, robbed and used actual violence against the PW2.

27. The appellant argued that the trial court failed to consider his defence. In his defence, the appellant denied committing the offences and maintained his innocence. He maintained that he was arrested while at work and was coerced to sign a statement. From the record, the trial court considered the appellant's defence and found it to be unbelievable and an afterthought. The ground therefore fails.

28. The appellant argued that the charge sheet was defective because the serial number of the recovered firearm did not match the evidence presented in court. However, the record shows that the appellant and others were charged with robbery with violence, specifying the incident on October 24, 2017, at Ngong Road. The charge detailed the robbery involving a pistol with serial number 33448826, consistent with the evidence provided by PW7. Therefore, there was no contradiction in the charge sheet. The charge sheet provided all necessary information for the appellant to understand the charge and defend himself adequately. Consequently, this argument is rejected.

29. On sentence, the appellant was sentenced to death. Section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find the sentence imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh.

30. I also take into consideration, as highlighted by the trial court, the appellant deserved a deterrent sentence considering the nature of the offence committed and the harm inflicted on the victim. However, the appellant is in need of rehabilitation and the sentence imposed shatters all hope of that.

31. Therefore, the appeal on sentence succeeds. The sentence of death is hereby vacated. I hereby resentence the appellant to 25 years imprisonment for the offence of robbery with violence. The sentence shall run from the date of conviction having already considered the time spent in remand custody.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 9TH DAY OF APRIL 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mongare for the Respondent

Appellant present on the Platform

Nelson Court Assistant