Omulai v Republic (Criminal Case E094 of 2022)
[2024] KEHC 4030 (KLR) (Crim) (22 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4030 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL CASE E094 OF 2022

LN MUTENDE, J

APRIL 22, 2024

BETWEEN

NERMAN OMULAI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal arising from the original conviction and sentence in Criminal Case No. 1324 of 2019 at the Chief Magistrates' Court Makadara, by Hon. Stephen Jalang'o (PM) on 29th April, 2020)

JUDGMENT

1. Nerman Omulai, Appellant, was charged with two counts of robbery with violence contrary to Section 296(2) of the Penal code, the particulars of the charges were that on 28th March 2019 at Blue estate Pumwani location in Kamukunji sublocation within Nairobi county jointly with others not before court while armed with a knife robbed Doris Mwende her phone make Samsung J3 make valued at ksh 7000/= and immediately before such robbery used actual violence to the said Doris Mwende.

2. On count 2, it is stated that on the 28th March 2019 at Blue estate Pumwani location in Kamukunji jointly with others not before court while armed with offensive weapons namely rungus robbed Anthony Mbuthia Muriuki of his mobile phone make Winko valued at Ksh 3500/= cash 1800/= and immediately at the time of such robbery used violence to the said Anthony Muriuki.

3. The appellant was taken through full trial, convicted and sentenced to serve fifteen (15) years imprisonment for each count.

4. Aggrieved, the appellant brings this appeal on grounds that: the court erred in denying the appellant the right to deliver defence submissions contrary to Article 50(2) of *the Constitution*; the appellant

was denied his right to legal representation contrary to Article 49(1) (c), 50 (2); the judgment was based on identification parade or recognition, but, there was no method of physical identification in the 1st report; the witness testimony was contradictory and it should benefit the appellant and that the appellant was forced to proceed with 5 witnesses in 1 day yet he was not fully supplied with vital documents.

5. Briefly, facts of the case were that on the 28th March 2019 the appellant attacked the complainants while at Blue estate area and injured the 1st complainant,then took off with her phone which he later returned. The assailant also attacked the 2nd complainant who met the appellant on the way and allegedly tried to intervene when he attacked the 1st complainant only to be attacked and robbed.

6. PW1 Doris Mwende stated that she was at her house at Pipeline area where she resided with her husband PW2 Stephen Kalaki when the appellant went to the house at about 11:00pm and broke the door. He wanted to hit her husband whom he pulled out and attacked her, then took away her phone and also injured her leg and hip. She fainted and gained consciousness while at Shauri Moyo hospital but was later taken to Kaloleni hospital where she was treated and discharged. She adduced in evidence a P3 form and treatment notes issued following the treatment and gave the value of the phone make Samsung as Ksh 7000/=

7. She identified the appellant in court as the assailant. She also stated that he was arrested at Blue estate and that he also returned the phone to the house after three (3) days. Further that she used to see the appellant prior to the incident. In cross examination she stated that the appellant forced his way to the house and it was the first time he went to the house. That neighbours came out of their houses and told him to leave her alone.

8. PW2 Stephen Kalaki testified that on 28th March 2019 he went to play pool at Blue estate area where he met the appellant who had his phone. He told him to return it but he said he would if he gave him Ksh 500/= hence he declined to give it and insulted him instead. That three days later he lost the phone. Subsequently he went to his house at night and broke in at 11:00 pm then took his wife's phone .

9. He testified to have been removed from the house but he managed to escape leaving his wife behind, and later returned with the police and found neighbours rushing his wife to hospital. Two weeks later the appellant was arrested. In cross examination he said that they worked together and the appellant used to insult him.

10. PW3 Dr Maundu of Nairobi police surgery testified that he examined PW1 who was 25 years old. She had head injury with the back of her head swollen and tender. She had tenderness on her lower back and the injury was 5 days old and was caused by a blunt object.

11. PW4 Anthony Mbuthia Muriuki stated that on 28th March 2019 at 10:30pm he was on his way home when he met the appellant in the company of four (4) men and that they were arguing over a phone. That the lady said the phone belonged to her but the appellant said that he wanted the lady's husband. That the lady ran to the house, and the appellant broke the door to the house. The husband managed to escape and the appellant attacked the lady. That the appellant and his friend then turned to him (PW4) and attacked him with rungus, they took his phone and cash worth 1800/= and in the process he sustained an injury on the head. That the appellant told the police that he (PW4) had attacked the lady hence he was arrested but later released. That he was also treated and issued with a P3. He identified the appellant in court as his neighbor.

12. During cross examination he stated that he found them arguing with Mwende over the phone that he had allegedly taken from the house.

13. PW5 No. 65340 Corporal Ali Omar the Investigating Officer took over the matter after the arrest of PW4 Anthony Mbuthia who had been placed in custody on allegations that he had assaulted PW1 Mwende. Upon interrogation he explained to him what really happened and he released him. Subsequently the appellant was arrested.

14. Upon being placed on his defence the appellant gave unsworn evidence and testified that he resided at Blue estate , that on 15th April 2019 he received a call at 8:00am and was called to the construction site. He met two men who had beckoned him, thinking they were customers only to find that they were police officers. They handcuffed him and took him to Shauri Moyo Police Station where his finger prints were taken forcefully and he was remanded until 17th April, 2019. That the Investigating Officer claimed that he looked like a thief, he also took his cash money in the sum of ksh 8760/= alleged to be an exhibit which he never saw again.

15. This being a first appeal, the primary duty of the court is to reevaluate and assess the evidence adduced at the trial and come up with independent conclusions, the court must however note that it did not see or hear the witnesses and thus must give due allowance for this. (See the case of Okeno –vs- Republic [1972] EA 32 and Pandya –vs- R[1957] EA 336).

16. Article 50(2) (h) of *the Constitution* provides that:

> Every accused person has the right to a fair trial, which includes the right...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.

17. The appellant submits that he deserved legal representation on ground that he was illiterate. The right to State sponsored legal representation is not absolute. In the case of Republic –Vs- Karisa Chengo & 2 Others [2017] eKLR , the Supreme Court held that :

> "...that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of *the Constitution*, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".

18. The phrase substantial injustice is not defined in *the constitution*. The court in Karisa chengo case(Supra) also held that it is not limited to capital offences or charges where the ultimate sentence would lead to loss of life but is a right that is available to all accused persons.

19. In this case, the appellant has argued on appeal that he was illiterate, but, from the proceedings was able to cross examine witnesses and also understand the charges .Apart from the imbalance between the prosecution which had requisite legal expertise and the appellant who was acting in person, there is no evidence that the proceedings were so complex in nature such that the appellant was prejudiced in his trial. A similar position was taken in the case of Bernard Kiprono Koech -vs-Republic [2017] eKLR by Ngugi J (as she then was).

20. Therefore, the appellant was not prevented from instructing counsel of his choice, although the court erred when it failed to advice him of his right to be represented by counsel.

21. Section 43 of the *Legal Aid Act* also imposes a duty on the trial court to inform an accused of the right, it provides as follows that:

> 43.

(1) 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 have an advocate assigned to him or her; and(c) inform the Service to provide legal aid to the accused person.

22. That omission did not affect the conviction since as stated he was able to understand the proceedings and also adduce evidence in his defence.

23. The appellant failure to file closing submissions at the end of the trial was also not fatal. *The constitution* provides for the right to defend himself. Section 215 of the Criminal Procedure Code (CPC) enacts that :

> The court having heard both the complainant and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law, or shall acquit him.

24. Therefore, failing or making closing submissions is not mandatory. The appellant closed his case and the court gave a judgment date without giving room for closing submissions. This being a first appeal court, the appellant has the opportunity to submit and cast doubt on the case. This being a criminal trial, the courts main consideration is the evidence of parties and whether the charges framed are proved. Submissions are secondary to those considerations and also act as persuasive language to sway the court the opposite direction that favours the accused at trial .

25. Lastly, the appellant contends that he was not given the occurrence book, an argument the State has not responded to in their submissions.

26. The prosecution has an obligation to provide/supply all evidence it intends to rely on at the inception and during the trial. It is a continuous duty and an accused must be given the evidence in advance so that he can challenge it.

27. From the evidence adduced the prosecution did not use the occurrence book at the trial hence the appellant was not prejudiced and there was no injustice caused by failure to supply it.

28. Further, if the appellant intended to challenge evidence or prove that the occurrence book record would cast doubt on the case, which the accused does not seem to argue in this appeal, he had an obligation to move court to summon the investigating officer to present the occurrence book record.

29. The trial court record indicate that the accused did not call for further reference from the police records either during the prosecution's case or at the defence stage. It is also apparent that he was not denied the right to call for further records.

30. The appellant also complains that he was compelled to proceed with 5 witnesses and that he had not been supplied with prosecution witness statements. The proceedings for 31st July 2019 before Honourable S.Jalango PM are instructive that the appellant had not been supplied with statements when the prosecution intended to proceed with 3 witnesses. The matter was mentioned on the same day to confirm compliance. Once supplied the case was adjourned to 23rd October, 2019 which was 3 months later.

31. The matter proceeded as scheduled and the appellant ably cross examined witnesses. He did not seek any adjournment or raise any difficulty in proceeding with the witnesses lined up. The proceedings were not prejudicial to him. For that reason, the appellant right to fair trial was not violated in any way .

32. Regarding proof of the case, In the case of Oluoch -vs- Republic [1985] KLR 353 the Court of Appeal held that::

> " Robbery with violence is committed in any of the following circumstances:-
>
> The offender is armed with any dangerous and offensive weapons or instrument; or
>
> The offender is in company of one or more person or persons; or
>
> At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

33. Proof of any of the three elements of the offence of robbery with violence would be enough to sustain a conviction under Section 296 (2) of the Penal Code.

34. In this case, PW1 stated how the appellant broke into her house and managed to steal her mobile phone, and that in the process he assaulted and occasioned upon her person actual bodily harm as found by PW3 following the examination carried out.

35. It was stated that the appellant took a cellphone that belonged to the complainant from her. The 1st complainant identified the phone in court and stated that the appellant returned the phone after 3 days, evidence which was not disputed by the appellant. The 1st complainant's evidence regarding the appellant having gone to their house was corroborated by PW2 who stated that when the appellant gained forceful access to the house he escaped but later returned with the police and found PW1 having been taken to hospital by neighbours.

36. Evidence adduced clearly show that the appellant had gone for PW2 and that he had a vendetta against him. Further evidence proved that other than assaulting the 1st complainant, the appellant also took away and retained her mobile phone thus depriving her of the same which was later returned, meaning that he had no intention of permanently depriving her of the same but he injured her in the process.

37. The appellant was known to PW2 as they used to do business deals with him and he had known him for 7 years per his testimony. What transpired on the material night and the familiarity of the parties involved called for an explanation by the prosecution which was duty bound to prove the case beyond reasonable doubt that was not forthcoming.

38. The appellant gave unsworn evidence and by this option he was not cross examined. The court considered it and found it to be a mere denial. The appellant did not raise an alibi defence as alleged in this appeal. Instead, he narrated how he was arrested by police officers on 15th April 2019, he distanced himself on the events of the night of 28th March 2019 where he had been placed at the scene by PW1 and PW2. Considering the relationship of PW2 and the appellant who worked together, the unexplained circumstances of a broken door not confirmed by the police and a phone allegedly taken and returned, it is unlikely that the offence committed was robbery.

39. Section 179 of the CPC provides that:

    1. When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but

the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

40. What is evident is the fact of the offence committed having been assault causing actual bodily harm contrary to Section 251 of the Penal Code. Therefore, I quash the conviction for the offence of robbery with violence and set aside the sentence meted out; which I substitute with a conviction for assault an offence that attracts a penalty of up to Five (5) years imprisonment which I impose, a period that the appellant has been incarcerated, hence the sentence is served.

41. As regards the 2nd complainant who testified as PW4, his evidence was contradicted and not supported. PW4 testified that he was on his way home when he met the appellant in the company of four (4) men assaulting PW1. The witness also testified that he rescued PW1 and that in the process he was assaulted and his phone stolen.

42. PW1 testified that she was attacked while at her house, this was also witnessed by PW2 who was in the house when the appellant allegedly forcibly gained entry to their house. PW1 did not testify that PW4 came to her aid, instead she was assaulted, lost consciousness and later found herself at the hospital. PW1 testified that neighbours came from their houses and told the appellant to leave her alone. The alleged neighbours who were crucial witnesses were not called to confirm what transpired.

43. Lastly, PW4 testified that he was attacked with rungus and that he suffered severe head injuries among others which he described to court. However medical records were not adduced to prove the said injuries and to connect them to the offence. Further, the trial court did not indicate that it could see evidence of the injuries.

44. PW4 also testified that he was robbed and assaulted at 10:30 pm but did not describe the source and strength of light considering that it was on the road and at night. Circumstances under which he was arrested for assaulting PW1 at the outset were also not properly explained.

45. In Twehangane Alfred vs. Uganda, Criminal Appeal No 139 of 2001, [2003] UGCA, 6, the Court of Appeal stated that:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

46. In the case of Peter Ngure Mwangi vs. Republic [2014] eKLR the Court of Appeal, when dealing with the question of alleged inconsistencies in evidence, took the position that the main consideration should be whether the inconsistencies were material enough to weaken the probative value of the prosecution evidence. The 2nd complainant's case was such a matter. The Material contradictions that were apparent could not be overlooked. This went to the root of the matter and portrayed the 2nd complainant as an untruthful individual.

47. In the upshot, the appeal on conviction on the 2nd count succeeds, the conviction is quashed and sentence set aside. The appeal on count 1 succeeds to the extent noted of variation of the charge. Consequently, the appellant shall be released forthwith unless otherwise lawfully held.

48. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 22ND DAY OF APRIL, 2024.

L. N. MUTENDE

JUDGE