Etabo & another v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 5867 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5867 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL E022 OF 2023

RN NYAKUNDI, J

MAY 22, 2024

BETWEEN

RAMSI ETABO ..... 1ST APPELLANT

LOKURUN LOWA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. C.A. Mayamba; HSC in Kakuma law court Cr. Case No. E212 of 2022)

JUDGMENT

Coram: Before Justice R. Nyakundi

Mr. Kakoi for the State.

1. The Appellants before this court were charged with robbery with violence contrary to Section 295 as read with section 296(2) of the Penal Code. Particulars stated that on 21st September, 2022 at Kakuma Refugee Camp in Turkana West Sub-County within Turkana County, jointly while armed with kitchen knife and wooden stick, robbed Emmanuelina Itangishikima Kshs. 2,020/=, South Sudanese pounds and 2 onions valued at Kshs. 20/= and at the time of such robbery threatened to use actual violence to the said Emmanuelina Itangishikima.

2. The Appellants were convicted of the charge and sentenced to 40 years in prison.

3. Being aggrieved by both the conviction and sentence, they filed the instant appeal.

4. The appellants raised the following grounds of appeal:

i. That the learned trial magistrate erred in law and in fact by failing to note that the court did not inform the appellant of his right to legal representation under Article 50(2)(g) of *the constitution* of Kenya of 2010.

ii. That the learned trial magistrate erred in law and in fact by relying on hearsay evidence by allowing the medical report of a clinical officer who did not testify.

iii. That the learned trial magistrate erred in law and in fact by not observing that no identification parade was conducted in the instant case.

iv. That the learned trial magistrate erred in law and in fact by failing to observe that no inventory from was brought forward to show the stolen items from the complainant were recovered.

v. That the learned trial magistrate erred in law and in fact by failing to observe that the accused person could not access the exhibits of the prosecution side.

vi. That the learned trial magistrate erred in law and in fact by misapprehending the evidence on record.

Appellants' submissions

5. It was the appellants' submission that their rights under Article 50 (2) (g) were violated by the trial court as the record does not indicate whether they were informed of their right to choose to be represented by an advocate. They argued that they were lay men and they ought to have been represented by an advocate.

6. The appellants submitted that they should have been informed of the right at the earliest opportunity, being the two appearances they made at the Plea taking stage. They relied on this court's decision in Joseph Kiema Phillips vs Republic [2019] eKLR.

7. The submissions by the appellants led to one conclusion, which is the fact that they were not accorded a fair hearing.

8. On whether the evidence was sufficient to convict the appellants, it was submitted in the negative. Regarding identification, the appellants submitted that an identification parade was not conducted despite being arrested by the police.

9. The appellants further submitted that PW4, a medical officer based in IRC Hospital at Kakuma Refugee Camp was allowed to testify and to produce a medical report by Dr. Patrick Ongora.

10. The appellants argued that the prosecution did not advance a cogent reason why it was convenient to call a medical officer who did not examine the complainant or author the medical records. In light thereof, the appellants submitted that the evidence adduced by the prosecution was not sufficient to convict.

11. The appellants submitted that the only logical finding consistent with circumstances of the case is to declare the trial process a nullity. That there was no justification for the trial court to conduct the trial process hurriedly and in the process infringe on the fundamental rights to a fair hearing. That if anything the appellant was staring at a minimum of 40 years in prison. The appellants urged the court to allow the appeal as prayed.

Respondent's submissions

12. In making its submissions, the Respondent argued that for the offence of robbery with violence to be proved, the prosecution needs to prove only one element of the listed grounds. The ingredients have been captured under section 296(2) of the penal code 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

13. The Respondent's counsel submitted that in this case, the complainant testified that: she was beaten with a wooded stick by the 2nd Appellant; She sustained injuries on the body; the medical officer stated that the victim had a swollen forearm at the wrist jointly on her lower limb and she had swelling and tenderness on the left Latera region.

14. It was further submitted for the Respondent that a few hours after the robbery the appellants were arrested in possession of the Complainant's stolen items. The Respondent stated all the ingredients of the offence of robbery with violence were proved to the required standard.

15. On whether their rights were violated, the respondent submitted that the 1st appellant in his defence contended that they committed the offence and blamed it on Alcohol. Similarly, the 2nd appellant confessed to have committed the offence and blamed the 1st appellant for commission.

16. It was submitted for the Respondent that the appellants were accorded fair trial as they fully understood the charge they were facing and even blamed alcohol and bad advice for the commission. That they were allowed to cross examine prosecution witnesses and they asked questions that were relevant to the charges they were facing. On this reliance was placed on the case of *Katana & another Versus Republic (Criminal Appeal 8 of 2019*).

17. The Respondent further argued that the appellants never asked to accorded a legal representation during the trial. Therefore, the assertion that they were never accorded legal representation was an afterthought and should be dismisses. On this counsel relied on the case of *William Oongo Arunda versus Republic (Criminal Appeal No. 49 of 2020*).

18. Finally, it was submitted for the Respondent that the medical officer was a qualified doctor who was familiar with the handwriting and signature of the maker of the P3 form. That the prosecution made an application to have the P3 form be produced by Dr. Suleiman and the appellants were asked whether they oppose the application and they said "No Objection".

19. On sentence, the respondent urged the court to maintain the sentence imposed of 40 years imprisonment.

Analysis And Determination

20. 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.

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

22. I will start by considering the question of legal representation, Article 50 (2) (g) of our constitution. The said provision states as follows:

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> (2) Every accused person has the right to a fair trial, which includes the right-
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> (g) to choose, and be represented by an advocate, and to be informed of this right promptly.

23. In light of the foregoing provisions, it important to consider the record. The appellants were arraigned before the trial court in Kakuma on 26th September, 2022 where they were accordingly charged. The charges were presented to them in a language that they understand and a plea of not guilty was entered. The appellants confirmed to have received the witness statements. The matter was thereafter fixed for a hearing and on the said date, PW1, PW2 and PW3 testified and the prosecution sought for another date to call two more witnesses.

24. The matter proceeded on 2nd November, 2022 where PW4 and Pw5 testified and the prosecution's case was closed.

25. The appellants were thereafter placed on their defence and the court duly complied with the provisions of section 211 of the Criminal Procedure Code. It did not come out clear whether they were informed of their right to legal representation. The Appellants elected to give sworn defence without calling any witnesses.

26. Having outlined the record, I shall now consider the said provisions. I have stated elsewhere particularly in Joseph Kiema Phillips vs Republic [2019] eKLR. That the accused person ought to be promptly informed of his right to legal representation at the earliest opportunity. One of the duties of a judicial officer in our legal justice system is to ensure that the unrepresented accused persons have fully understood their rights and without such an understanding, the court runs the risk of conducting an unfair trial.

27. This court in the case of Collins Okoth Amaga v Republic [2020] eKLR considered the effect of derogation of the right under Article 50 (2) (g), where two schools of thought were fronted. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void ab initio. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.

28. At this stage I have to state that the circumstances in the Joseph Kiema Phillips vs Republic [2019] eKLR. Case were different. In the present case, the appellants indicated at all times that they were ready to proceed and they actively participated in the trial process. In fact when they were both put on their defence, they blamed the offence on alcohol and in essence they were admitting to the said offence. For this reason alone, I am inclined to agree with the school of thought that fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal

trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.

29. 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.
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> (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."

30. 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.
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> 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: -
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> i. The offender is armed with any dangerous or offensive weapon or instrument, or
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> ii. The offender is in the company of one or more other person or persons, or
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> 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)

31. The prosecution qualified the offence of robbery with violence with the fact that the complainant was assaulted prior to the theft. According to the prosecution, at the time of robbery, the accused persons were armed with a stick and a knife. They used the same to threaten the complainant with and at the same time, hit her severally with a Turkana stick to buy her co-operation. To this end, the trial court concluded that the aspect of assault prior to robbery was established.

32. The trial court based its finding on the fact that:

i. The complainant was robbed off her personal items including money, items as well as children's clothes.

ii. The complainant was assaulted to buy her submissions

iii. The accused persons admitted robbing the complainant

iv. The defence of intoxication by the 1st accused was rejected as well as the defence of undue influence by the 2nd accused blaming the 1st accused person.

33. I have had the occasion to peruse the record as well as the comprehensive 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 was proper.

34. The upshot of this analysis is that the appeal on conviction is upheld.

On sentence

35.

"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.

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(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."

36. 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."

37. In my considered view, and as I have stated elsewhere, the accused mitigation ought to count in sentencing. The objectives of sentencing should be considered in totality.

38. Further, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

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.

It is trite that an Appeals court cannot interfere with sentence of the trial court as a matter of course and have it substituted with its own without taking into account the principles elucidated by the Court of Appeal in the cases of Shadrack Kipkoech Kogo –vs- R Eldoret Criminal Appeal No. 253 of 2003 the court of Appeal stated that: "Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (See also Sayeka –vs- (1989 KLR 306). The court of Appeal on its part, in Bernard Kimani Gacheru vs Republic (2002) vs- Republic (2002) eKLR " restated that "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, the appellate 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 materials 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 tht 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.

39. The Penal Code prescribes a death sentence for the offence of robbery with violence. I am alive to the decision in Muruatetu and it has been said time and again that it is the mandatory nature of the death sentence that was declared unconstitutional. Judicial officers have room to exercise discretion in sentencing an accused person to death, depending on the circumstances. In considering the above-mentioned factors and circumstances of the case, I will interfere with the sentence and substitute it with 10 years' imprisonment. The sentence ought to run from the date the appellants were convicted i.e. 3rd November, 2023.

40. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 22ND DAY OF MAY 2024

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R. NYAKUNDI

JUDGE