Odhiambo v Republic (Criminal Appeal 67 of 2019)
[2024] KEHC 5698 (KLR) (21 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5698 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL 67 OF 2019

RE ABURILI, J

MAY 21, 2024

BETWEEN

EVANS OCHIENG ODHIAMBO ALIAS JALANG'O ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence by the Hon. Atonga on the 13th November 2013 in the Chief Magistrate's Court in Kisumu in Criminal Case No. 598 of 2012)

JUDGMENT

Introduction

1. The appellant Evans Ochieng Odhiambo alias Jalango Awili and another were jointly charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on the night of 21st and 22nd October 2012 at Victory SDA Church in Kisumu East District within Nyanza Province jointly with others not before court and while armed with dangerous weapons to wit pangas and rungus, robbed Kenneth Obonyo of Kshs. 186,000, one 21' Sony TV, Generator, LCD Projector and a laptop make HP all valued at Kshs. 260,000 and at or immediately after the time of such robbery killed the said Kenneth Obonyo.

2. The prosecution called a total of twelve witnesses in support of their case. The appellant and his co-accused testified in their defence. The trial court after considering and weighing the evidence adduced proceeded to convict the appellant and after considering his mitigation, sentenced him to death as by law provided while acquitting the appellant's co-accused.

3. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal on the 4th December 2018. The grounds of appeal are:

i. That the trial court failed to observe that the doctrine of recent possession did not measure to the required standard.

ii. That the trial court failed to observe the provisions of section 25 (a) of the *Evidence Act*.

iii. That the trial court failed to observe that nothing linked me medically with the alleged offence.

iv. That the trial court failed to observe the provisions of Article 50 (2) (p) of the *Constitution* during sentencing.

v. That the trial court failed to consider that the mandatory nature of the sentence that I was awarded was unconstitutional.

vi. That the trial court erred in law by shifting the burden of proof on my side whereas the same lies with the prosecution.

vii. That I be served with the trial court records to enable me erect more grounds.

4. The appeal was canvassed by way of written as well as oral submissions.

The Appellant's Submissions

5. It was submitted that the evidence relied on by the prosecution was unconstitutional and several issues remained unsolved specifically that it was unreliable, untrustworthy and undependable and further that the said evidence contained contradictions. It was the appellant's submission that the trial court admitted inadmissible evidence.

6. The appellant submitted that the prosecution case was riddled with a myriad of inconsistencies that created serious doubts that ought to have been resolved in his favour. It was submitted that the prosecution failed to satisfy the appellant's guilt beyond reasonable doubt.

7. It was the appellant's submission that he was not involved in the robbery and that he asked the court to help him to reduce the sentence to a term that he could serve and return home. The appellant further submitted that he stayed in remand for two years prior to his sentence.

8. The appellant thus submitted that his appeal be allowed, conviction quashed, sentence set aside and he be set at liberty.

The Respondent's Submissions

9. It was submitted that the evidence of PW7 and PW10 linked the appellant to the offence as he had sold them the projector which had been reported stolen. It was further submitted that the evidence of PW1, PW2, PW3 and PW12 were consistent and that the doctrine of recent possession applied.

10. The respondent urged the court to uphold the conviction and sentence which was lawful.

Analysis and Determination

11. 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."

12. In a much earlier decision of *Okeno v Republic* [1972] EA 32 it was held 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 v 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 v 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."

13. 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.

14. Revisiting the evidence before the trial court, PW1, testified that he was the pastor of the Church where the robbery took place and that on the 22.10.2012 at 7am, he received a call from one of the church members telling him to rush to the church where he found a crowd already gathered as well as the area Chief and other Police Officers.

15. It was his testimony that he noticed the deceased's head covered with blood oozing, the Church opened with the key and the cash box on his table from where it had originally been kept. He confirmed that there were things missing as detailed in the charge sheet. PW1 testified that later as he was recording his statement at the police station, the appellant was brought and that he noticed that the appellant had put on the caretaker's clothes.

16. PW2 testified that he stayed in the Church compound as a caretaker. It was his testimony that on the 21.10.2012, he left the Church compound at about 4pm and went home and the following day, he returned at 6.30am and found a crowd in the compound. He testified that he saw the watchman lying down with his legs tied and head covered. It was his testimony that he went to his house which he found the door ajar with his suitcase with assorted clothes missing. He corroborated PW1's testimony on the things stolen from the pastor's office. PW2 testified that the following day, he was called and informed that someone had been arrested with his missing clothes. PW2 identified the suspect as the appellant herein.

17. PW3, PW8, PW9, PW11 and PW12 all testified corroborating PW1 and PW2's testimony on the scene of crime on the date when they discovered the Church had been broken into and the deceased killed.

PW3 and PW8 further testified on the items stolen from the scene as detailed in the charge sheet and they were able to identify the stolen projector with its bag that was recovered.

18. PW7 and PW10 both gave corroborating testimony that the appellant sold to them the stolen projector and its bag. PW7 testified that he bought the projector from the appellant for Kshs. 3,000. PW10 on his part testified that the appellant initially took the stolen projector and bag to him asking for Kshs. 3,000 in return. He testified that he took the appellant to PW7 where the deal was completed and that later PW7 called him asking him to go and record his statement with the police.

19. PW11, the scenes of crime personnel gave evidence in court on the scene of crime and produced photographs on the same. In cross-examination by the appellant he testified that the appellant took them to his house where he took some of the photos of the scene. PW12 was the investigating officer and he gave evidence tying up all the evidence adduced by the other prosecution witnesses. In cross-examination it was his testimony that other stolen items were discovered in the appellant's house.

20. Placed on his defence, the appellant denied committing the offence and stated that on the 21.10.2012, he was at his home from morning till the next day when he went for fishing and slept on the shore before going back home.

Determination

21. I have considered the evidence adduced before the trial court. 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."

22. 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: -
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> 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)

23. In this case, there was no eye witness to the robbery as the sole victim who was guarding the Church which was found broken into was found brutally lifeless. However, there was evidence of PW7 and PW10 that the appellant took to them some of the items, a projector and a bag which were found missing from the Church and which were identified by the prosecution witnesses including PW2 whose clothes the appellant was fond wearing on arrest, PW4 who saw the appellant arrive home with a black suitcase and to whose house the appellant told PW6 to take the black suitcase. PW10 was a cousin to the appellant.

24. The evidence adduced by the prosecution witnesses was corroborative and linked the appellant to the crime. PW7 and PW10 gave corroborating testimony that it was the appellant who sold them the stolen projector and its bag. PW1 and PW2 testified how the appellant was arrested having put on the clothes of PW2 which had been stolen from PW2's house in the Church compound.

25. The appellant submitted in contention that the prosecution case was riddled with contradictions and inconsistencies that could not warrant the upholding of a positive judgment. He submitted reproducing pat of the testimony of PW2 on how the latter identified the appellant. He also posed rhetoric questions about the evidence adduced by PW7 and asserted that PW7 and PW10 were prime suspects who should have been arraigned. The rest of the submissions in writing by the appellant was reiterative of the evidence of prosecution witnesses and not arguments in support of the grounds of appeal.

26. My evaluation of the evidence adduced by the prosecution in the trial court is firstly I do not see any contradictions and inconsistencies in the evidence of the prosecution witnesses and secondly, if any, the same are not sufficient to warrant the overturning of the trial court's judgement. This court agrees with the holding in *Philip Nzaka Watu v Republic* [2016] eKLR that:

> " However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing in the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.
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> In *Dickson Elai Nsamba Shapwata & Another v The Republic*, CR APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:
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> > "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

27. 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.

28. Accordingly, it is my finding that there were no contradictions and inconsistencies sufficient to create doubt in the trial court's mind as to the appellant's guilt. Consequently, it is my opinion that this ground fails.

29. On identification, the appellant was positively identified by PW7 and PW10 and further, it is evident that the evidence presented by the appellant did not in any way address the happenings of the attack but sought to create an alibi for the appellant. The question is whether the alleged alibi was credible.

30. In the case of *R v Sukha Singh S/o Wazer Singh & Others* [1939] 6 EACA 145 it was held as follows:

> " 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."

31. That is precisely what happened in this case. The plea of alibi certainly was never even part of the cross-examination issues raised at the trial by the appellant. I am not persuaded that the appellant's alibi defence addressed significant aspects of the case against him. In my view the appellant's defence was mere denial and the alibi an afterthought.

32. The appellant also raised the issue of recent possession pleading in his petition of appeal that the same was not proven to the required standard. The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarised the essential elements of the doctrine of recent possession in *Eric Otieno Arum v Republic* KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR, where the court stated as follows:

> " In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

33. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be plausible (see *Malingi v Republic* [1988] KLR 225.

34. In *Paul Mwita Robi v Republic* KSM Criminal Appeal No. 200 of 2008, the Court of Appeal observed that:

> " Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge

of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden."

35. In the instant case, the appellant never discharged the burden placed on him upon being found wearing with PW2's clothes and further, the testimonies of PW7 and PW10 that the appellant was the one who took to the two witnesses the stolen projector and bag. I therefore find that the doctrine of recent possession was proved beyond reasonable doubt. I am satisfied that all the elements of the offence of robbery with violence were proved beyond reasonable doubt and that the conviction of the appellant was sound and safe.

36. Finally, as to the constitutionality of the appellant's sentence. The mandatory nature of any sentence is now unconstitutional as per the constitutional test in the Supreme Court decision in the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR where the apex Court declared the mandatory sentence for murder under Section 204 of the *Penal Code* to be unconstitutional for the reason that it deprives trial courts of the unfettered discretion to impose a sentence other than the death sentence in an appropriate case. Secondly, that the mandatory sentence deprives the convict the right to mitigate.

37. Subsequently, the Court of Appeal in *William Okungu Kittiny v Republic* [2018] eKLR applied the *Muruatetu case* mutandis mutatis to the mandatory sentence for robbery with violence under the provisions of section 296 (2) of the *Penal Code* and declared the said section to be unconstitutional on the same reasons stated by the Supreme Court in the Muruatetu case. As follows:

> "...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the *Constitution*, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court Particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the *Penal Code*. Thus the sentence ... is a discretionary ..."

38. The emerging jurisprudence is a product of a purposive reading of Articles 27 and 28 of our *Constitution* as applied to sentencing. In interpreting these provisions, the Court of Appeal at Malindi Criminal in Appeal No. 12 of 2021, *Julius Kitsao Manyeso v Republic* (Judgement 7/7/2023) (unreported) stated as follows:

> "...we are of the view that the reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017 eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the *Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter & Others vs The United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) 120161 Ill ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including

those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

39. The Court of Appeal further stated in Criminal Appeal No. 22 of 2018 *Evans Nyamari Ayako v Republic* inter alia:

> " On our part, we are in agreement that an indeterminate life sentence falls afoul the provisions of Articles 27 and 28 of our Constitution purposively interpreted. We also find that there is an emerging consensus that the evolving standards of human decency and human rights to which Kenya has agreed to adhere to by virtue of Articles 2(5) and 2(6) of the *Constitution* that indeterminate life imprisonment is a cruel and degrading punishment which violates our constitutional values. Our conclusion is based on the consistent trend in many states towards abolition of life imprisonment or its re-definition to a term sentence."

40. The Court went on to hold that:

> " we now hold; life imprisonment translates to thirty years' imprisonment."

41. Accordingly, being bound by the decision of the Court of Appeal and in the circumstances of this case, given the objective severity of the offence committed by the appellant leading to the death of an innocent life whose only mistake was that he was guarding the Church premises when the appellant and his accomplice violently robbed and killed him, as analyzed above, I hereby allow the appeal on sentence to the extent that I set aside the death sentence imposed and substitute it with a prison term of forty (40) years to be calculated from the date of arrest on 25th October, 2012 as per the charge sheet.

42. The appeal against conviction is found to be devoid of any merit. It is dismissed. the conviction of the appellant for the offence of robbery with violence is upheld.

43. Signal to issue.

44. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF MAY, 2024

R.E. ABURILI

JUDGE