Wanjiku v Republic (Criminal Appeal E021 of 2023)
[2024] KEHC 4947 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4947 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E021 OF 2023

DKN MAGARE, J

MAY 2, 2024

BETWEEN

ALEX MACHARIA WANJIKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgment of the trial court, Hon. M. Okuche, Principal Magistrate in Nyeri CMCRC No. 545 of 2022. The Appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. The said section reads as follows: -

   (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

   (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

2. The particulars of the offence were that on 30th June, 2022, at 1040hrs in Nyeri township within Nyeri County, jointly with others not before court, while armed with an offensive weapon namely, knife, you robbed one Wyclef Maina Waruguru cash of Kshs. 3,000/= and immediately before the time of the robbery threatened to use actual violence against him.

Submissions

3. The Appellant did not file submissions. He submitted orally that he did not commit the offence. He found himself being arrested for an offence he did not know.

4. On the part of the respondent, it was submitted that the elements of the crime were well established and proved and the trial court should not be faulted in its finding. They relied on Section 196(2) of the *penal Code*.

5. It was submitted that the Appellant was positively identified and he was armed with a knife recovered from him hence his arrest. It was also submitted that the alleged contradictions in evidence were not demonstrated and supported since no submission were filed by the Appellant.

6. They urged me to dismiss the Appeal.

Evidence

7. Wycliff Maina Waruguru, testified that on 30/6/2022 at 11:00 a.m. he was heading home from school. Three young men came from the rear and snatched his bag and ran way. He chased them for 10 Metres one stopped and took out a knife. He threatened to stab the witness. The Appellant took Kshs. 3,000/ =from the witness but was nabbed by members of the public and police on patrol.

8. The police arrest arrested one of them, whom he said was the Appellant. He identified the Appellant in court. On cross examination he stated that there was no much traffic therein. The police recovered the knife from the accused. He stated that he described the clothes they were wearing to the police.

9. What did not add up was that there was no time lapse between the robbery and arrest. Why describe people who have been caught in the act. Something was not adding up in the evidence of PW1.

10. No. 117544PC-W, Lorna Mutai testified that they were on patrol on General Hospital Road offering security to students traveling home. They said they saw commotion. They saw persons removing items from the complainant's pocket. They managed to They managed to arrest some of them.

11. Cross examination she stated that the knife was recovered from the body. The Appellant was beaten. No. 49863 CPl Amos Mwangi stated that they were with PW2. And John Muriuki while on patrol. They found a young man surrounded by members of the public. They arrested. They were another in uniform chasing him. He carried out a search and found a knife in the waist. The Appellant did not have money. It is the members of the public who arrested. On cross- examinations he stated that the inventory only shows a kitchen knife but the Appellant had no money on him.

12. 23255 PC Dennis Oburu was the investigating office. He stated that that the accused signed the inventory. He stated that he never gave an inventory. He did not record the members of the public who arrested. The knife was recovered from the waits.

13. On being put on his defence, the Appellant gave evidence. He stated that at 11am on 30/6/2022 he heard alarms stating miwizi mwizi. The complainant grabbed him and said mwizi. There was no recovery, he had no knife. The knife could have injured him as he was being assaulted if it was on his waist. He was forced to sign the inventory. He was cross examined on everything else except the crime he was alleged to have committed.

Analysis

14. The duty of the first Appellate court remains as set out in the Court of Appeal for *Eastern Africa in Pandya v Republic* [1957] EA 336 is as follows: -

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and

reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

15. In the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " 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. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 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 findings and conclusions; 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 v. Sunday Post*, [1958] E. A. 424."

16. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by *Viscount Sankey L.C in the case of H.L. (E) Woolmington v DPP* [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

17. In the case of *R v Lifchus* {1997}3 SCR 320 the Suupreme court of Canada explained the standard of proof as doth: -

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient.

In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

18. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

19. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in *Re Winship* 397 US 358 {1970}, at pages 361-64 stated that: -

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

20. The court found the Appellant guilty and sentenced her to imprisonment. I was surprised that the court had no doubt on the guilt of the accused. I have never before seen evidence that is like a sieve. It has so many gaping holes that the case was irretrievably bad. No court could convict on the evidence on record.

21. Each of the prosecution witnesses gave a different story. The complainant gave three different stories. None of which is credible.

22. What was missing from the submission is the subject matter of the arrest, the money. I shall revert to this element which is decisive in character. This is in line with the elementary understanding of the concept of recent possession.

23. The doctrine of recent possession places the duty to explain possession is on the party in possession. This arises from the requirements of Section 111 of the *evidence act*. No one other than the accused is in a vantage point to explain where he got the item. Such an item must be shown to have causal link to the crime.

24. In the case of *Eric Otieno Arum v Republic* KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR, where the court of Appeal 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.

25. 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 a plausible (see *Malingi v Republic* [1988] KLR 225. 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.

26. The flip side of this doctrine is that, if a person is caught in the act, the state must explain the absence of the exhibits expected to have been in possession of the Appellant. Absence of such explanation, a negative inference must and ought to be made.

27. For example, robbery where 3,000 is involved and the Appellant is caught in the act surely the money must be one of the exhibits he recovered. If the appellant was caught with the money, he had to explain otherwise, he will be found guilty. The flipside must also hold true. If someone is caught drunk driving, the first exhibit is the vehicle itself. No one can explain absence of a vehicle which was being driven.

28. There police were said to 10-15m away in broad day light, nay in mid morning. The human traffic was said to be low. All these circumstances mean that both the police and the assailants could see each other. The police allegedly saw the whole incident.

29. However, a man who had just stolen 3,000/= did not have it on him. Noone explained why the money was not there having just been stolen. The knofe which was used was safely tacked away. The police officers did not see the same thing

30. The Appellant stated that someone started shouting mwizi and the members of the public descended on him. He had no chance to hide the money. This is because he did not have it. Further he is alleged to have brandished a knife. It was so short a span that he had no chance of hiding the knife in the waist, where it is alleged to have been recovered.

31. The complainant did not tell the police where the money was placed or where the knife was hidden. The true possibly is that it is the complainant who was pretending to be a student to rob suspecting members of the pubic [He never indicated his school or grade, despite being an adult]. The initial story was that three young men robbed him of the bags ran away leaving the appellant.

32. The appellant stopped took out a knife, threatened to stab the complainant. He robed 3,000/=. He did not indicate where the money was. He also did not say what happened to the bag. However evidence from the police indicate that a group was ransacking the complainant.

33. It is PW1 and PW2 who stated that they dropped the bag. He did not see the Appellant returning for a rematch. According to PW2. It is persons who were removing things from the complainant's pocket. The complainant thus wanted to pin the whole thing on the Appellant.

34. PW2 does not detail how the members of the public arrested the Appellant. Surprisingly PW2 stated that there were no members of the public but he same absent members beat the Appellant. I do not believe that a person could rob, 10 meters from uniformed police officers and come back for a rematch. This is a case of mistaken identity or a frame up.

35. Further, the complainant stated that his bag was snatched while PW2 stated that there was a struggle and a ransacking of pockets. PC Mwangi only heard wails. This is the same person who was a few meters away.

36. The burden of proof in criminal cases is settled. The Prosecution has to prove the case against the accused beyond reasonable doubt.

37. The duty of the first appellate court remains as set out in the Court of Appeal for *Eastern Africa in Pandya v Republic* [1957] EA 336 is as follows: -

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

38. In the case of *Mbogo and Another v Shah* [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

39. It was held by the Court of Appeal in *Moses Nato Raphael v Republic* [2015] eKLR as doth:

> "What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
>
> 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

40. The evidence tendered fell far short of the threshold required in criminal cases. None recovery of money show clearly that this is a case of mistaken identity. The complainant could be sure that truly mistaken. In the case of in *Roria v Republic* (1967) EA 583 (P584).

> " A conviction resting entirely on identity invariably causes a degree of uneasiness as Lord Gardner L.C. said recently in the House of Lords in the course of debate on S.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts.
>
> There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten - if there are as many as ten - it is in a question of identity.'"

41. In the nutshell the robbery was not proved. The identity of the perpetrator was hazy and the evidence shaky. It is evidence that no one can believe. In the end I find that the court misdirected itself by disregarding the question of identity of the perpetrator. There were many people who were present and even arrested the Appellant and b eat him senseless. They could not recover what was said to be immediately stolen.

42. The complainant was clear that it was the Appellant who stole while alone. The others had already gone. He lied about heh bag as it was available. Luckily a police officer saw it drop. In the state of confusion they arrested a young man quite on his own business. It is clear that a story of a knife was a creation by the prosecution. The man was scuffed down after being beaten. It cannot be that he had a knifed that did not harm him or that he could not use to ward of attacks from the members. A criminal with a knife will attempt to use it.

43. In the circumstances, I have come to the inevitable conclusions that the offence charged was not proved to the required standards. I therefore set aside both conviction as unsafe.

44. On sentence, the Appellant did not use actual violence according to the evidence. Head thee Appellant been guilty of the offence, a sentence of 10 years will have survived. I will have set aside 10 years imprisonment and replaced with 10 years. The court did not call for probation and pre-sentencing report.

45. The court proceed to convict without regard to the possibility of victims input. The fact that the offences is common within the jurisdiction is not enough to give a harsh sentence.

46. Nevertheless, now that I have set aside the conviction, I also set aside the sentence.

Order

47. In the circumstances I make the following orders: -

    a. The Appeal is allowed. The conviction of the charge of Robbery with violence contrary to section 296(2) of the *Penal Code* is quashed and set aside.

    b. The sentence is equally set aside.

    c. The Appellant shall be released forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 2ND DAY OF MAY, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss Lubanga for the state

Appellant in person

Court Assistant - Brian/Winnie

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