Abdi v Republic (Criminal Appeal E002 of 2023)
[2024] KEHC 7095 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7095 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E002 OF 2023

JN ONYIEGO, J

JUNE 14, 2024

BETWEEN

MOHAMED SHEIKH ABDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from Judgement in Garissa Chief Magistrate Court Criminal Case No. E550 of 2021 delivered by Hon. T L ole Tanchu SRM on 21/12/2022)

JUDGMENT

1. The appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 24.04.2021 at around 0900hrs at Windsor area in Garissa Township within Garissa County, jointly with others not before the court, robbed one Issack Bille Daud his mobile phone make Samsung Prime worth Kes. 10,000.00 and cash Kes. 8,000.00 and immediately after the time of the robbery threatened to injure the said Isaack Bille Daud.

2. He further faced an alternative charge of handling stolen property contrary to section 322(1) (2) of the Penal Code. Particulars were that on 24.04.2021 at around 0950hrs at Villa Park area in Garissa Township within Garissa County, otherwise than in the cause of stealing, dishonestly retained mobile phone make Samsung Prime knowing or having reason to believe it to be stolen.

3. Having returned a plea of not guilty, the matter proceeded to full trial. Upon conclusion of the trial, he was convicted and thereafter sentenced to serve Ten (10) years imprisonment.

4. It is this conviction and sentence which necessitated the appeal herein through the amended petition of appeal filed in court on 05.10.2023, citing three (3) grounds of appeal as follows:

    i. That the learned trial magistrate erred in law and fact by convicting the appellant without appreciating the fact that the prosecution did not prove its case to the required standards.

ii. That the learned trial magistrate erred in law and fact by failing to appreciate that the prosecution's evidence was marred with contradictions and inconsistencies.

iii. That the learned trial magistrate erred in law and fact by failing to consider the appellant's defence yet the same was cogent and believable.

5. The appeal was canvassed by way of written submissions. The appellant filed his submissions on 13th May 2023 thus submitting that there were material contradictions regarding on how he was arrested and the phone recovered. That whereas PW1 in the police report stated that he could identify the people who attacked him, on cross examination, he could not establish the identity of the other people who allegedly were in his company. He contended that the prosecution evidence was questionable and ought to be resolved in his favour.

6. On the ground that his defence was not considered, the appellant contended that the trial magistrate proceeded to find him culpable of the offence and thereafter sentenced him despite the fact that his evidence showed that there was a confrontation between the appellant and him. He stated that the same was confirmed by the PC Ndambiri when he stated that the appellant arrived at the station drunk. He faulted the court for failing to look at the evidence before him in a wholesome manner thus placing reliance inter alia on the case of Benjamin Nzioka Maragwa v Republic EACA Criminal Appeal No. [2020] eKLR to buttress the fact that the trial court ought to have weighed the evidence by the prosecution against that of the appellant. Consequently, he urged this court to quash the conviction and set aside the sentence.

7. The respondent submitted that the prosecution had proved the offence herein to the required standards as opposed to the allegations of the appellant. It was urged that from the prosecution evidence, it was proved that the appellant was part of a gang that waylaid the complainant on his way to work and thereafter robbed him money and a mobile phone. That the appellant was arrested shortly after the stolen mobile phone was recovered from him. He argued that the elements of the offence herein were proved against the appellant and as such, the appeal before the court should be dismissed.

8. I have considered the record of appeal herein, grounds of appeal and written submissions by both parties. This being the first appellate court, its duty is to subject the evidence on record to a fresh and exhaustive examination so as to arrive at an independent decision but giving due allowance to the fact that the court did not have the advantage of hearing and seeing the witnesses testify. See Okeno v Republic [1972] EA 32.

9. The issues for determination therefore are; whether the prosecution proved the elements of the offence herein to the required standard; whether the prosecution evidence was contradictory and; whether the court did consider the appellant's defence.

10. Briefly, PW1, Bille Daud the complainant herein stated that on 14.02.2022 at 9.00am, he was walking within Windsor area when three men unknown to him accosted him thus grabbing his Samsung Prime phone worth Kes. 9500.00. That he later reported to his cousin pw2 who accompanied him to the scene from where they mounted search for the suspects.

11. It was his evidence that they managed to get hold of the appellant one of the assailants while holding the stolen phone minus the sim card. That he identified the said phone from a mark inside the phone. On cross examination, he stated that he was the one who found the appellant with the said phone. It was his evidence that the appellant had the battery on one hand and the said phone on the other. That neither photos were taken during the time of the recovery nor fingerprints lifted from the phone.

12. PW2, Mohamed Siyat Shurie testified that on 14.02.2022, he received information from pw1 that he had been robbed off his Samsung Prime phone. That after mounting search for the suspects, they recovered the phone from the appellant. He denied having a dispute over a woman with the appellant. On reexamination, he stated that the appellant handed over the phone to them at the scene and thereafter, they all agreed to go to the police station. That the appellant informed them that the money had been taken by his colleagues.

13. PW3, No. 83575 P.C. Peter Odhiambo, the investigating officer testified that he took over the case from PC Ndambiri who had since been transferred. That by that time, investigations had been completed, witnesses bonded and accused person charged. He stated that on perusing the file, he found that there was a phone belonging to the complainant which had been found with the appellant herein. He produced the phone as Pex 1.

14. On his defence, DW1, Mohammed Sheikh Abdi testified that on 24.04.2021 at around 12.30 a.m., while at Town Club, he was called by a friend who was at 3D club. That upon joining the said friend, Mr. Jackson Marangu, two ladies joined them. That he knew one of the ladies as Malyun while the other one was known as Honey UK. That they later proceeded to Villa Park, which was just across 3D Club where they stayed till morning. Later on, they were joined by one Ismael Abdi Barre and that they embarked on chewing miraa and drinking alcohol.

15. It was his evidence that while in the club, one of the ladies covered her face and upon being asked, she stated that PW2 who had just entered was her uncle. It was his case that Pw2 left and after 30 minutes, he resurfaced with Pw1 who slapped lady Honey UK. That the complainant claimed that the appellant was responsible for having eloped with Honey UK for three days.

16. He stated that it was his friend Jackson who advised them to go to the police station if there was any problem. That on arrival at the station, Michael Ndambiri a police officer placed him in the cells for the reason that he was drunk and that he was in the company of Honey UK, a sister to the complainant and PW2.

17. DW2, Ismael Abdi Barre who was in company of the appellant and Jackson, reiterated the evidence of the appellant. That they were drinking in the company of Malyun, a prostitute and Honey UK who was a stranger to him. That upon someone entering the bar, Honey UK hid her face and the said man proceeded to slap her. That the appellant stood and defended the lady and the same did not go well with the man.

18. It was his testimony that as a result of pw2's action, a scuffle ensued leading to a glass being broken thus leading to them being thrown out of the club. At the advice of Jackson, they went to the police station to solve the issue. But to the contrary, the appellant was charged with the offence herein. On cross examination, he stated that he was with the appellant at Villa Park when the incident occurred but he did not accompany them to the police station.

19. I have considered carefully the record of appeal vis avis the grounds of appeal. In proving the offence herein, the prosecution was bound to prove that the elements of the offence of robbery with violence were proved to the required standards. The court in the case of Stephen Nguli Mulili v Republic [2014] eKLR held that:

> " It is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP v Woolmington, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the

prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati Murwa v R [2013] eKLR."

20. The appellant was convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code and sentenced to 10 years' imprisonment. For avoidance of doubt, I wish to reproduce Section 296(2) as follows:

> SUBPARA 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 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."

21. In Johana Ndungu v Republic [1996] eKLR, the Court stated:

> "In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
>
> 1. If the offender is armed with any dangerous or offensive weapon or instrument, or
> 2. If he is in company with one or more other person or persons, or
> 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

22. The question that this court will therefore endevour to answer is in relation to the argument by the appellant that the prosecution did not shift the burden.

23. PW1 testified that he was robbed his phone at 9.00 am., in the morning and that by about 10.00 a.m., together with PW2 who was his cousin, they managed to trace and recover the said phone from the appellant. That after finding the phone, they went to the police station together where the appellant allegedly disclosed the stolen money was with his colleagues.

24. From the evidence of pw1, he was alone when he was allegedly robbed although there were people in the nearby shops. It was his testimony that he was robbed by unknown persons. The trial court entirely relied on the evidence of pw1 and the recovery of the phone allegedly from the appellant to convict.

25. However, the court did not caution itself of the dangers of convicting based on the evidence of a single witness. See the case of Abdallah Bin Wendo v R(1953) 20 EACA 166, where it was stated that:-

> "Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but the rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification; especially when it is known that the conditions favouring a correct identification were difficult".

26. The above principle was applied with approval in Roria Vs. Republic (1967)EA 583 and Odhiambo V. Republic (2002) 1 KLR 241. The trial court was duty bound to caution itself first especially where the appellant is alleging malice and a frame up in the circumstances of the case.

27. Regarding the question of recovery of the alleged stolen phone, the circumstances leading to the alleged recovery were suspect and questionable. Where the phone was allegedly recovered, there were people in the shops around and Park villa club. No independent witness testified. The available evidence was that of pw1 and pw2 who are brothers. Pw1 said that when he was robbed, he screamed but nobody responded despite there being shops with people within the vicinity. One would expect the investigating officer to have recorded statements from such people.

28. Besides, when pw1 was robbed, he went straight home, informed pw2 his brother and together mounted search of the suspects. It is doubtful that the complainant could not report the incident to the police station which is not far from the alleged scene of the incident. How come only pw2 his brother was available and no other independent witness yet the phone was allegedly stolen and recovered during the day and within the vicinity where there were people.

29. I am persuaded to believe the appellant's submission that the elements of the offence of robbery with violence were not sufficiently proved as there was lack of corroboration due to lack of evidence from independent witnesses and failure by the trial court to caution itself on the dangers of convicting on the evidence of a single witness.

30. As regards contradictory evidence, pw1 said the phone was recovered from the appellant's hands. He again changed that it was recovered from the waist. On the other hand, pw2 stated that it was recovered from the pocket of the appellant. Who was telling the truth? If the two were together, how come their testimony is not in agreement. With this contradiction, I do not find the two credible witnesses. I am persuaded to believe the appellant's version that the case was a frame up because of the ladies he was with against PW1's wishes.

31. Concerning the failure to consider the appellant's defence, the trial court did consider the same albeit superficially without attaching much weight on it as he termed it as fictitious. From my assessment, the defence was more detailed and consistent to the extent that it is more convincing than that of the prosecution.

32. In a nut shell and for the reasons stated above, I am persuaded by the appellant that the prosecution did not prove its case beyond reasonable doubt. Accordingly, the appeal herein is upheld, the conviction quashed and sentence set a side. The appellant shall be set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF JUNE 2024.

J.N. ONYIEGO

JUDGE