Aluoch v Republic (Criminal Appeal E019 of 2023)
[2024] KEHC 6793 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6793 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E019 OF 2023

HM NYAGA, J

JUNE 6, 2024

BETWEEN

CLINTON ASEE ALUOCH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. R.Kefa (P.M) delivered on 28{{^th}} April, 2023 in Nakuru CMCR No. 1047 of 2020)

JUDGMENT

Brief facts

1. The appellant was charged with Robbery with violence contrary to section 296(2) of the *Penal Code*. It was alleged that on the 26th day of May 2020 at Naka Estate in Nakuru East Sub-County within Nakuru County he robbed Tabitha Ayen Garang of her mobile phone make IPhone 7 Plus worth Kshs 100, 000/=, a hand bag valued at Kshs 500/= and Kshs 5,000/= cash and immediately before the time of such robbery used actual violence and wounded the said Tabitha Ayen Garang.

2. The prosecution called 6 witnesses while the appellant, in his defence, gave an unsworn testimony and did not call any witness. At the close of the trial, the appellant was convicted and sentenced to death.

The Appeal

3. Being dissatisfied with the conviction and sentence, the appellant filed this appeal. Initially, he cited 8 grounds in his petition of appeal. He then filed amended grounds of appeal under Section 350(3) (v) of the *C.P.C.* They are as follows;

a. The learned trial magistrate erred in law and fact by relying on evidence of identification by PW1 and PW2 but failed to note that the circumstances were too difficult for positive identification and there was no advance report on this identification made to the police.

b. The learned trial magistrate erred in law when he convicted him to death but failed to find that the alleged possession of exhibits was not proved.

c. The trial magistrate erred in law in failing to note that the sentence of death which was later commuted to life imprisonment was harsh and excessive in the circumstances.

d. The trial magistrate erred in law in confirming the conviction and sentence of death but failed to evaluate conclusively the defense of alibi alongside the prosecution evidence.

4. The Appeal was argued through written submissions

Appellant's submissions

5. On ground one of the appeal, the Appellant submitted that identification by PW1 and PW2 was erroneous and could not support a conviction. He posited that the circumstances were not conducive for positive identification. To support his submissions, he relied on the cases of *Joseph Ngumbao Nzalo v Republic* [1991] 2 KAR 212 & *Wamunga v Republic* Cr. Appeal No. 20 of 1989 (1989) KLR page 424 where the Court of Appeal held that:

> "Where the only evidence against a Defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction

6. The Appellant further submitted that PW1 & PW2 did not give description of the attackers to the police and neither were they able to describe the clothing or even a peculiar mark on his face; they were not truthful because they did not record the description of the attackers both in the initial report and in their statements and that the witnesses could not have managed to positively identify the attacker as they were terrified. In further buttressing his case the appellant cited the cases of *Moses Munyua Mucheru v Republic* Cr. Appeal No. 63 of 1987 which held that in identification, the first report to the police should be put in the evidence so as to check whether or not a witness thinks he can identify the suspect and by what means and Lemamba v Republic which held that identification conducted after accused persons have been arrested and remanded in custody is not very useful because witnesses tend to think that the police have arrested the right person.

7. With respect to the second ground, the appellant submitted the PW1 testified that her phone and bag were not recovered while PW4 corroborated this by stating that the stolen items were not found in his possession. He argued that the prosecution failed to recover the alleged stolen items from PW1 that would have connected him to the offence.

8. In regards to the third ground, the Appellant submitted that the trial court's hands were not tied when it sentenced him. He submitted that recent judicial development have changed tides in so far as mandatory statutory sentences are concerned. To this effect he cited the cases of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR & *Dismas Wafula Kilwake v Republic* [2018] eKLR

9. The appellant thus sought a review of his sentence. In addition, he urged the court to take into consideration the period spent in custody pursuant to Section 333(2) of the *Criminal Procedure Cod*e. The appellant posited that in this matter, the amount of force/violence deployed by the attacker to

acquire the alleged phone and Kshs 5, 000/= from PW1 was minimal and did not call for a harsh sentence of death.

10. With regards to ground 4, the appellant citing the cases of *Woolmington v D.P.P* [1935] AC 462 & *Victor Mwendwa Mulinge v R*, [2014] eKLR argued that burden of proof in criminal matters lies wholly on the prosecution.

11. The appellant submitted that he was not found in possession of the alleged stolen items at the time of arrest that could link him to the offence and as such the trial magistrate was wrong in law in placing him at the scene of crime without cogent evidence.

12. He thus prayed that his conviction be quashed, his sentence set aside and he be set at liberty.

Respondent's Submission

13. The Respondent cited the case of *Jeremiah Oloo Odira v Republic* [2018] eKLR which laid down the ingredients of robbery with violence as theft and the use or threat to use violence.

14. On proof of theft, the respondent submitted that this was proved through the evidence of PW1 who stated that the Appellant accosted her and struggled to take her items and when she resisted, the appellant hit her with a stone and she fell down unconscious and woke up later in the hospital without the three items and through the evidence of PW2 who witnessed the incident.

15. With respect to use or threat to use violence, the respondent submitted that the appellant used violence by hitting PW1 with a stone which position was corroborated by PW2 who witnessed the incident and PW6 who assessed the victim's degree of injuries as harm, and as such use of violence was proved to the required standard.

16. Regarding whether violence was used to steal or to retail the thing stolen, the respondent submitted that it is apparent from PW1's testimony that violence was used after she resisted the snatching of her items.

17. With regard to identification of the perpetrator, the respondent submitted that there was no mistaken identity as the offence happened at 4pm and conditions were favorable for positive identification. The respondent submitted that PW2 spent 30 minutes talking with the Appellant and both PW1 and PW2 were able to identify the appellant based on the clothes he wore on the material date.

18. Regarding the Appellant's defence, the respondent submitted that the same was mere denial and did not challenge the prosecution's evidence. The respondent submitted that the appeal on conviction should fail.

19. On the issue of sentence, the respondent submitted that in view of Muruatetu's case the mandatory sentence imposed fettered the judicial officer's discretion to sentence. The respondent thus submitted that sentence of life imprisonment will suffice.

Analysis and Determination

20. The first appellate court is under a duty to re-evaluate the evidence presented at the trial and draw its own independent conclusions. In doing so, it must bear in mind that it neither saw nor heard the witnesses give their testimonies. Thus, matters of demeanor are best observed by the trial court. (See *Okeno v Republic* [1972] E.A 32.)

21. I have perused the lower court record, written submissions and authorities relied upon by both parties. The questions for determinations are : -

i. Whether the prosecution proved its case beyond reasonable doubt in regard to the elements of the offence of robbery with violence;

ii. Whether the appellant was identified; and

iii. Whether the sentence meted against the Appellant was harsh.

22. The elements of the offence of robbery with violence were set out by the Court of Appeal in the case of *Oluoch v Republic* [1985] KLR thus:

> " Robbery with violence is committed in any of the following circumstances:
>
> a) The offender is armed with any dangerous and offensive weapon or instrument; or
>
> b) The offender is in company with one or more person or persons; or
>
> c) 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 ....."

23. According to the case of *Dima Denge Dima & Others v Republic*,Criminal Appeal No. 300 of 2007,:

> " ...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

24. Therefore, in order to sustain a charge of robbery with violence, it is imperative that the evidence shows that in the course of a robbery, one or more of the following ingredients were present: that the offender is armed with a dangerous or offensive weapon or instrument or; the offender is in the company of one or more persons or; at, or immediately before, or immediately after the time of the robbery, the offender uses any form of violence against a person. Proof of any one of these ingredients is enough to prove the offence. See *Suleiman Kamau Nyambura v Republic* [2015] eKLR (Criminal Appeal No. 5 of 2013).

25. With the above principles in mind, I will now look at the evidence tendered in the trial.

26. PW1 was the victim herein. She testified that on 26th May, 2020 at around 4 pm, she was coming from her cousin's home. On the way she met a man who attempted to snatch her phone. She resisted and the man went behind her and picked up a stone and hit her on the head with it, whereupon she lost consciousness. She added that she regained consciousness around 7 pm and found herself at Nairobi Women Hospital, Nakuru. She noted that she was injured on the right side of the head. It was her testimony that she was carrying an iPhone 7 plus valued at Kshs 100,000/- and a clutch bag containing Kshs 5000/=.

27. She added that the person who attacked her was not previously known to her, but she was able to see him clearly. She also stated that on the next day, her neighbor, Emily, went to the hospital and informed her that the person who had robbed her had been arrested. That the appellant was brought to the hospital by police officers and she was able to positively identify him.

28. In cross examination, she stated she was able to recognize the appellant due to his facial appearance. She explained that the appellant had approached her from the front and she was able to clearly see his face. She said she had told the police officer about the appellant's appearance and the same was indicated in her statement.

29. PW2 was Emily Nasimiyu. She testified that on 26th May, 2020 at around 4 pm she was seated outside the plot at Naka when a man approached her, asked for food and Kshs 30/=. She told him she did not have them. Thereafter the man followed two men of Sudanese descent who were passing by the road. She then saw PW1 emerge from the opposite direction carrying a phone and handbag. That the man started snatching a phone from PW1 and a struggle ensued, after which the man took a stone and hit PW1 with it on the right side of the head after which she fell down and fainted. Members of the public came to the scene but the man escaped. It was her further testimony that she had conversed with the man for 30 minutes and was able to see him clearly. That on the following day, she saw the man sitting on a tree log still wearing the same clothes and shoes. She reported the incident at Hyrax Police Post and he was arrested.

30. In cross examination, she confirmed she had not seen the man prior the incident. She stated that the appellant was wearing the same clothes on 26th and 27th of May, 2020. She did not give the Appellant's descriptions to the police and did not record in her statement that she had conversed with him for 30 minutes. She said the Appellant did not have a peculiar mark on his face.

31. PW3 was Albert Michira. He confirmed that he was the one who ferried the victim to the hospital on his motor bike on the material date.

32. PW4 was PC Jackson Lengesek, the investigating officer in this matter. He testified that he recorded witness statement regarding the incident herein on 27th May, 2020. He said he discovered the Appellant was the one who injured the appellant and stole her phone and handbag. He stated that PW2 was able to positively identify the Appellant. In cross examination, he confirmed that the appellant was not found in possession of the stolen items.

33. PW5 was PC Newton Kirui. He said he was the one who arrested the appellant at about 2 p.m.

34. PW6 was Victor Kiptum, a doctor from Provincial General Hospital. He testified that the appellant was examined at their facility. That she had a swelling on the right face and tenderness on the right ear. The approximate age of injuries was 2 weeks and probable weapon used was blunt object and the degree of injury was assessed as harm. He produced the P3 form as P. Exhibit 1.

35. *PW*1 stated that her phone and her handbag were stolen and in the process the Appellant hit her on the right side of the head with a stone. This evidence was corroborated by PW2. PW6 confirmed the victim was treated in their facility and she had injuries classified as harm.

36. It is thus clear from the evidence of PW1, PW2 and PW6 that two elements of robbery were sufficiently proved, those of theft and injury to the victim in the course, before or after the said theft. The fact that the stolen items were not recovered from the appellant does not discount the fact that there was robbery on the material day. The evidence of PW1 and PW2 was very credible in that respect.

37. As stated earlier, in addition to proving that the offence of robbery with violence occurred, the evidence led by the prosecution is required to show that the accused is the one responsible for the robbery. In *Suleiman Kamau Nyambura* (*supra*) the court held that:

> " In addition [to the ingredients], and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set out ingredient of robbery with violence is the need to positively identify the assailant/s in question."

38. In the case of *Mungania & 2 others v Republic & 2 others* (Criminal Appeal 21 of 2020 & E003 & E068 of 2021 (Consolidated)) [2022] KEHC 167 (KLR), the court stated at paragraph *54*:

'To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before."

39. I have interrogated the circumstances under which identification was made. The evidence of identification was led by the complainant and corroborated by PW2. The complainant was categorical that she clearly saw the Appellant during the ordeal. PW2 similarly stated she clearly saw the appellant and that they had conversed for 30 minutes' prior the incident. These witnesses were consistent in their testimony. The incident occurred during the day and therefore the circumstances surrounding Appellant's identification were conducive for a positive identification.

40. Both PW1 and PW2 stated that they were able to identify the appellant by his facial appearance. I cannot find any element of mistake on the part of the said witnesses in the identification of the appellant as one who robbed the complainant on the material day.

41. I am thus in agreement with the trial magistrate that the appellant was positively identified and placed at the scene of the robbery.

42. The circumstances that led to the arrest of the appellant are quite straightforward. PW2 saw him on the following day. He was wearing the same clothes as he had on the day of the robbery, just a day before. Both witnesses' memories were very fresh and I do not think that there was any mistake on their part.

43. In conclusion I find that the appellant was properly identified as the person who committed the offence. The ingredients thereof have been sufficiently proven. Accordingly, the appeal on conviction fails.

44. On sentence, Section 296(2) of the *Penal Code* prescribes a death sentence for the offence of robbery with violence. The trial court imposed the sentence as provided in law.

45. I have perused the decision by the trial court and it is apparent that the trial magistrate did not take into account the Appellant's mitigation prior to sentencing him. The learned magistrate did not give any reasons as to why she opted to impose the death sentence.

46. The Applicant correctly submitted that there are recent judicial development as far as mandatory statutory sentences are concerned. There is now very well settled law that mandatory sentences are unconstitutional.

47. The constitutional test on mandatory death sentences was provided by the Supreme Court in the well-known case of *Francis Karioko Muruatetu & Another v Republic* (*supra*). The court declared that the mandatory sentence for murder under Section 204 of the Penal Code was unconstitutional on grounds that it deprives courts of the inherent discretion to impose a sentence other than the death sentence in an appropriate case.

48. 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 ..."

49. In the premises, even where an Act imposes a so-called death sentence in respect to any offence, a court can, in an appropriate case, impose a sentence other than the said death sentence.

50. In mitigation, the Applicant herein told court ;

> " I pray for leniency. I have a young family"

51. In *James Kariuki Wagana v Republic* [2018] eKLR, Prof. Ngugi J (as he then was) observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he "unnecessarily injure the Complainant during the robbery" and was not armed during the robbery. He therefore reduced the appellant's sentence of death to imprisonment for fifteen years, from the date of conviction.

52. In the case before me, the appellant used excessive force in hitting the complainant with a stone, such that she lost consciousness and found herself in the hospital. Clearly, the level of violence unleashed on the complainant is sufficiently serious to warrant long term imprisonment. However, the violence did not cause death or grievous harm. PW6 assessed the degree of injury as harm.

53. From the court record the Appellant was said to be a first time offender.

54. I think that given the circumstances of the case, the death sentence was excessive and harsh. The trial court had an option to give an alternative sentence. As I have stated if the court felt that the death sentence was justified, it ought to have given its reasons.

55. Whereas sentencing is at the discretion of the court, if the court is to find the learned magistrate did not apply the correct principles, then it has a duty to review the sentence. I am of the view that that the meting out of the death sentence, without giving reasons thereof, was premised upon the incorrect application of the law. Courts are encouraged to always give reasons to justify the imposition of a minimum or mandatory sentence.

56. In the circumstances, I will set aside the death penalty and substitute it with a term of imprisonment for fifteen (15)years.

57. The appellant was in custody throughout the trial. Therefore, in compliance with section 333(2) of the *Criminal Procedure Code*, the sentence will commence from the date of his first arraignment in court, that is on 28th May, 2020.

58. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU 6TH DAY OF JUNE, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Court Assistant Jeniffer

Nancy for state

Appellant present