Kanyi v Republic (Criminal Appeal E036 of 2023)
[2024] KEHC 6542 (KLR) (4 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6542 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E036 OF 2023

DKN MAGARE, J

JUNE 4, 2024

BETWEEN

SAMUEL NDUNGU KANYI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against both the conviction and sentence of the Hon. M. Okuche – SPM in Nyeri MC. Criminal/Misc. Case No. E846 of 2022, delivered on 26th April, 2023)

JUDGMENT

1. This is an appeal from the conviction and sentence given in Nyeri CR. E846 of 2022. The appellant was convicted for braking and committing a felony contrary to Section 306 of the *Penal Code*.

2. The particulars were that on the 13th day of October, 2022 at around 1130hours in Kahawa Ridges estate in Nyeri central sub-county within Nyeri County, jointly with another not before court, broke and entered into the stores of Eva Mwita and therein stole a wasp generator, 4 pieces of Dumuzas iron sheets 2.0 meters, a wheelbarrow, 50 pieces of electric poles stay, 2 pieces of taps, 13 pieces of conduits, a spade and a consumer unit all valued at Kshs.67,100/=.

3. The appellant filed an undated Petition of Appeal on 7th June, 2023 based on the following grounds:

    a. That the trial magistrate erred in law and fact by failing to consider that the elements of stealing were not proved beyond reasonable doubt.

    b. That the trial magistrate erred in law and fact by failing to consider that there were no exhibits recovered from the appellant.

    c. That the trial court erred in law by failing to note that the case was full of material fabrication, contradictions, inconsistencies and discrepancies that dilutes prove of case beyond benefit of doubt.

d. That the trial magistrate erred in law and facts in failing to consider the Appellant's alibi defence.

4. The appellant took plea on 17/10/2022. It is indicated he had been arrested on 13/10/2022.

5. The complainant Eva Muita testified that she stayed in Nairobi. She was called by PW2 and was told the house had been broken into. She went there and found chicken outside the house. There were pipes and cables on the outside. The store was broken. She found items which had been in the store, outside. Photographs were taken. She provided receipts but did not have one for the generator. Cross examination was only on how she learnt of the suspect to which she stated that PW2 told her.

6. PW2 testified that he was patrolling the estate where he is the Chairperson. He saw the accused carrying ½ liter plastic bottle at 9.30 am. The bottle had a liquid resembling tea. The appellant is not a residents of that estate. At 11.20 am he was called by Jaramba and told that there were people in PW1's house. The witness went there. The appellant was alone removing a metallic door.

7. The appellant was a person known to the witness. He left and came after 15 minutes and saw the appellant and removing the window to the perimeter wall. He knocked and asked the appellant open where the appellant told him to use the rear door. Such a door was not existent.

8. He moved from the gate and moved around the perimeter wall. The appellant was then by the road side. The witness inquired from the appellant whether he was a mason. He did not reply but ran into the coffee plantation.

9. The complainant came and later reported to Kahuruine Police Station. The witness was called to take the police where the appellant was staying. They took photos of items that were stolen. On cross-examination the witness stated that in 2015/2016 the witness and the appellant were neighbours. He stated that the appellant jumped over the fence.

10. PW3 testified that on 13/10/22 at 11.00 am he heard someone walking in the complainant's house. I called PW2 to accompany him. They found the appellant had removed doors and windows. He knocked at the gate. The appellant who was armed jumped over the wall. PW2 then and PW1 came. PW1 came opened the gate and found the items moved from the house. He stated on cross-examination that they photographed the appellant using a phone.

11. PW4 SSgt. Daniel Chege is a Crime Scene Officer trained in Forensic Science. He produced photographs that he processed. He also produced a certificated dated 18/1/2022.

12. PW5 PC. Alfred Kirwa of Kahuruine Police Post testified that he received intelligence that the appellant was at King'ong'o. He went and arrested the appellant.

13. PW6 Sergeant Jackson Musyoka testified that a case was referred to them about the breakup into a store. He went and found 2 witnesses who had seen the appellant in the compound. He photographed the scene. He recovered stolen items.

14. When put on his defence, he stated that he was in custody. He stated he never committed the offence. The court found the appellant guilty.

Analysis

15. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

16. This was aptly stated in the case of *Peters vs Sunday Post Limited* [1958] EA 424 where, the court of Appeal therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

17. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- 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."

18. 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."

19. 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 vs. 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."

20. In the case of *R vs. Lifchus* {1997}3 SCR 320 the Supreme 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."

21. 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."

22. 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."

23. It is not clear whether the defence was an alibi or simply it was not the kind of defence. Alibi defence should be a complete defence. However, in this matter there was no indication on the relationship of 12/10/2022 and the arrest on 13/10/2022.

24. In *S –v- Sithole* 1999 (1) SACR 585 (W) at 590 - it was posited as hereunder:

> " There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same time no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken."

25. Regarding alibi, the precedents show that it must be solid before the state is required to proof the same. In *Kiarie – v- Republic* [1984] KLR, the Court of Appeal proffered as doth:

> " An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable....."

26. The office was committed from 9.30 am to 11.00 am. The appellant was arrested the same day by PW5. If he committed a crime on 12/10/2022, he had not been arrested. An alibi defence is an absolute defence. When set up, the state has a duty to dispel the same.

27. The alibi given was thus false. The arresting officer was in court in blood and flesh but was not asked anything on arrest. How can he arrest the Appellant who was already in custody, but where? It does not make sense to state that he was in custody when the appellant was arrested. He did not say when he had been arrested before the current arrest and release. To set up on alibi it has to be solid. An alibi that does not indicate where the custody was is not an alibi. "I was in custody," this is not an alibi. He was placed in custody after event. The purported semi-alibi is dismissed.

28. The court rightly pointed out that windows and doors were removed. The crime was complete when they were removed from their place. The court used the decision of *Joseph Kariuki Vs Republic* (1985). The court finds that the offence charged was proved beyond reasonable doubt.

29. There was no appeal on sentence. In the circumstances the appeal is dismissed.

30. The appellant was sentenced to two years imprisonment. However, the court did not indicate when the two years will start running. Section 333(2) of the *CPC* provides having regard to the period in custody during pre-sentence days.

31. The appellant was sentenced to five years imprisonment. It is not indicated on when the sentence was to start running. Section 333 (2) of the *CPC* provides that regard be had to time spent in custody. Section 333(2) of the *CPC* provides as follows:-

    (1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.

(2) Subject to the provisions of section 38 of the *Penal Code* (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this *Code*. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

32. In the circumstances the term of 5 years shall run from the date of arrest, that is, 13/10/2022.

Order

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

a. The appeal is accordingly dismissed.

b. The appellant shall serve the 5 years from the date of arrest, that is, 13/10/2022.

c. The file is closed.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 4TH DAY OF JUNE, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss. Kaniu for the State

Appellant present

Court Assistant- Jedidah