



Nduati & another v Director of Public Prosecutions (Criminal Appeal E094 & E106 of 2023 (Consolidated)) [2024] KEHC 7036 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7036 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E094 & E106 OF 2023 (CONSOLIDATED)**

TW CHERERE, J

JUNE 6, 2024

BETWEEN

RUFUS MACHARIA NDUATI 1ST APPELLANT

MOSES MURAGE KIRANGA 2ND APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT

(Being an appeal against conviction and sentence in Isiolo Criminal Case No. 150 of 2017 by Hon. L.K.Mutai (CM) on 07th July 2023)

JUDGMENT

Background

1. Both Appellants together with others were charged in Isiolo Criminal Case No. 150 of 2017. Rufus Macharia Nduati was sentenced to suffer death for the offence of robbery with violence whereas Moses Murage Kiranga was fined Kes. 2,000,000/- in default to serve 7 years' imprisonment.
2. The conviction and sentences provoked these appeals. Appellants by their separate amended grounds of appeal filed on 16th November, 2023 and 30th January, 2024 respectively raised numerous grounds but mainly that:
 1. Prosecution case was not proved to the required standard
 2. Their defences were not considered
 3. The sentence were unwarranted



Prosecution case

3. Dorris Nasieku an employee of Co-operative Bank Isiolo Branch stated that she was on duty on 20th March, 2017. She recalled that about 06.00 pm, a man wearing a long coat, with his face covered and armed with a gun entered the bank and in company of her colleague Willy Mwangi commandeered them to the store. Her phone was taken away by her colleague Willy Mwangi and together with her colleagues Odindo and Daniel, their hands were tied to the back and mouths gagged with a tape and were ordered to lie facing down which they complied. After the attackers left, they discovered that money had been stolen from the bank. She stated that she of the robbers, she only identified her colleague Willy Mwangi.
4. Daniel Koilege also an employee of Co-operative Bank Isiolo Branch stated that he was on duty on 20th March, 2017 who was also at the bank during the robbery stated of the robbers, he only identified her colleague Willy Mwangi whom he saw opening the vault from where money was stolen from.
5. Isaack Kimani Kungu also an employee of Co-operative Bank Isiolo Branch equally stated that he was on duty on 20th March, 2017 stated he identified the voice of his colleague Willy Mwangi talking to the robbers.
6. Peter Bareves Galnagar who was branch manager at Co-operative Bank Isiolo Branch stated that he was on duty on 20th March, 2017 when robbers he did not identify stormed the bank and stole Kes. 24,587,312/- from the vault. He stated that immediately after the robbers left, he noticed that one of his members of staff Willy Mwangi was missing.
7. Simon Dayo who was Customer Service Officer at Co-operative Bank Isiolo Branch stated that he was on duty on 20th March, 2017 and saw his colleague Willy Mwangi disconnect the CCTV immediately the robbers got into the bank.
8. Catherine Mbutho Bernard who was Operations Manager at Co-operative Bank Isiolo Branch stated that she was on duty on 20th March, 2017 and that his colleague Willy Mwangi demanded the key to the vault from her and it was from there that money was stolen from.
9. Mwangi Muriithi recalled that on 21st March, 2017, Appellant bought a Vitz motor vehicle KBZ xxxB and gave him Kes. 450,000/- to deposit into the account of the vendor. Later on 08th April, 2017, he was arrested together with the Appellant while travelling in the said vehicle that Appellant had bought.
10. CPL David Kungu tendered as exhibits Kes. 1,181,350/- which he stated was handed over to him by his colleagues who said it was recovered from four suspects that he did not know. SGT Isaac Sang was in the team of police officers that arrested Willy Mwangi on 05th April, 2017 and from him recovered Kes. 490,000/-.
11. Moses Murage Kiranga was arrested on 22nd March, 2017 by CPL Lagat and SSP Kavoo and from him was recovered M/v KCG xxxN Toyota Noah and Kes. 575,000/- which was suspected to be stolen.
12. Photographs of M/v KCG xxxN Toyota Noah and M/v KBZ xxxB Toyota Vitz and money recovered from suspects were tendered in evidence.

Defence case

13. 1st Appellant denied giving money to Mwangi Muriithi to deposit on his behalf on 21st March, 2017. He conceded that M/v KBZ xxxB Toyota Vitz was recovered from him and explained that he bought it from proceeds of 150 bags of maize that he had sold.



14. 2nd Appellant explained that the money recovered from him was from proceeds of sale of M/v KBT xxxB and he tendered a sale agreement in support thereof.
15. 2nd Appellant in his sworn defence denied the offence and stated that he was still at a loss as to why he was arrested, charged and convicted.
16. After the trial, both Appellants were convicted of the 1st count and sentenced to serve 40 years' imprisonment. 1st Appellant was additionally convicted of the 2nd count and sentenced to serve 7 years' imprisonment.

Analysis and determination

17. This being a first appeal, the court's duty is as was stated by the Court of Appeal in *Mark Oiruri Mose v Republic* [2013] eKLR that:

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that.”

18. I have considered the appeal in the light of the grounds of appeal and submissions by the Appellants and on behalf of the DPP.
19. In *Stephen Nguli Mulili v Republic* [2014] eKLR the court emphasised the prosecution's duty in a criminal case and stated 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. From the evidence on record, the trial magistrate found as a fact that none of the witnesses saw Appellants rob Co-operative Bank Isiolo Branch on 20th March, 2017.
21. In *Neema Mwandoro Ndurya v. R* [2008] eKLR, the Court of Appeal cited with approval the case of *R vs. Taylor Weaver and Donovan* (1928) 21 Cr. App. R 20 where the court stated that:

“Circumstantial evidence is often said to be the best evidence. It is the evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial.”

22. Whereas it is appreciated that a charge may be sustained based on circumstantial evidence, the threshold to be met if a conviction is to be based thereon has been explained in a number of cases among them *Sawe -vs- Rep* [2003] KLR 364 where the Court of Appeal held that:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; Circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain



of circumstances relied on; The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused.”

23. In *R. vs. Kipkering Arap Koske & Another* [1949] 16 EACA 135, the Court of Appeal for Eastern Africa stated that:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any reasonable hypothesis of innocence is on the prosecution, and always remains with the prosecution. It is a burden which never shifts to the party accused.”

24. In yet another case of *Mwangi vs. Republic* [1983] KLR 327 the Court of Appeal held that: -

“In order to draw the inference of the accused’s guilt from circumstantial evidence, there must be no other co-existing circumstances which would weaken or destroy the inference. The circumstantial evidence in this case was unreliable. It was not of a conclusive nature or tendency and should not have been acted on to sustain the conviction and sentence of the accused.”

25. 1st Appellant admitted that he requested Mwangi Muriithi to deposit money for purchase of M/v KBZ xxxB Toyota Vitz. The trial magistrate concluded that the only reason 1st Appellant did not want to deposit the money himself was because he was suspicious and was trying to conceal his identity. With due respect, it is not uncommon for someone to send another to deposit money on their behalf. There was no evidence that 1st Appellant was suspicious and tried to conceal his identity and the trial magistrate’s finding to that effect was therefore against the weight of evidence.

26. Additionally, recovery of the driving licence for Willy Mwangi, who appeared to be the mastermind of the robbery, from 1st Appellant’s M/v no doubt proves that 1st Appellant knew the said Willy Mwangi but does not in itself justify the conclusion that 1st Accused was one of the persons that robbed the Co-operative Bank Isiolo Branch on 20th March, 2017.

27. From the foregoing, I find that the basis on which the 1st Appellant was found guilty of the offence of robbery with violence was shaky and does not justify the drawing of inference of his guilt.

28. Concerning recovery of money from Appellants, both Appellants explained how they acquired the money that was recovered from them. Recovery of Central Bank strips is itself no prove that the money was stolen. In any case, there was no evidence that the strips were the same ones that had wrapped the money that was stolen from Co-operative Bank Isiolo Branch.

29. Additionally, an accused cannot be compelled to provide evidence in proof of their innocence. The sole bearer of the burden of proof is the prosecution which has to establish the guilt of an accused beyond a shadow of doubt.

30. Whatever defence an Accused may raise to a criminal charge through sworn evidence, or unsworn statement in the dock, or through the cross examination of prosecution witnesses, is to be considered only on a balance of probabilities, and if it is found to be probably true, then the benefit of doubt raised is to be given to that Accused.



31. No evidence was led to discredit Appellant’s defences concerning how they acquired the money that was recovered from them. Their defences are probable and in my considered view discredit the Prosecution case that the money was stolen property

32. I have considered whether I would have upheld the sentence in the alternative count of handling suspected stolen property. Section 28 of the Penal Code which guides courts on imposition of fines in default sentences and subsection (2) states as follows:

“(2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the *Detention Camps Act* ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale-

Amount Maximum period

Not exceeding Sh. 50014 days

Exceeding Sh. 500 but not exceeding Sh. 2,5001 month

Exceeding Sh. 2,500 but not exceeding Sh. 15,0003 months

Exceeding Sh. 15,000 but not exceeding Sh.50,0006 months

Exceeding Sh. 50,00012 months

(3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.”

33. 2nd Appellant having been fined an amount of Kes. 2,000,000/-, the legal maximum default sentence is 12 months and the default sentence of 7 years is there illegal and would have justified an interference by the court.

34. From the foregoing analysis, both appeals succeed and it is hereby ordered:

- 1.. The conviction of both Appellants was unsafe and it is hereby quashed
2. The sentences against each Appellant are set aside
3. Unless otherwise lawfully held, it is ordered that the Appellants shall be set at liberty.

DELIVERED AT MERU THIS 06TH DAY OF JUNE 2024

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistants - Kinoti/Munene

1st Appellant - Present in person

2nd Appellant - Present in person

For DPP - Ms. Rotich (PC-1)

