Komu v Republic (Criminal Appeal E044 of 2021)
[2024] KEHC 8662 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8662 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E044 OF 2021

AC BETT, J

JULY 12, 2024

BETWEEN

PETER NJUGUNA KOMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence delivered on 25th September 2019 by Hon. P. Gichohi (SRM) in Kiambu CM's Court Criminal Case No. 1821 of 2016)

JUDGMENT

1. The appellant was charged with two counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. The particulars in respect to count one were that on the night of 22nd and 23rd June 2016 at around midnight, at Kamiti Bridge Location within Kiambu Town in Kiambu County, jointly with others not before court, while armed with crude weapons namely *pangas* and *rungus* robbed off Kenflora Limited Company, assorted chemicals worth Kshs.1.5 million and cash Kshs.115,779/= all valued at Kshs.1,615,779/= and at the time of such robbery killed one Duncan Ledidum.

2. On the second count, the particulars were that on the same date, at the same time and place, jointly with others not before the court while armed with crude weapons namely *pangas* and *rungus*, robbed off Mr. Stephen Lekara Lesumale his mobile phone make Techno T470 valued at Ksh.2,500/= and at the time of such robbery, injured the said Stephen Lekara Lesumale.

3. The trial court was satisfied with the evidence adduced by the prosecution and convicted the appellant of the two counts of robbery and sentenced the appellant to death.

4. The appellant filed a memorandum of appeal in person which he later amended. His grounds of appeal are as follows: -

(1) That the trial magistrate erred in law and in fact while finding that the circumstances at the alleged scene of robbery identification was clear conducive(sic) for PW1 and PW2 that they positively identified the appellant herein.

(2) That the trial magistrate erred in law and in fact while failing to re-evaluate properly the evidence adduced by the prosecution witnesses without considering their credibility was been(sic) left in doubt which rendered the trial court to arrive at a wrong decision.

(3) That the trial magistrate erred in law while rejecting the appellant's defence which same defence was not displaced by the prosecution as per Section 212 of the *Criminal Procedure Code* Cap 75 Laws of Kenya.

5. The appeal is against conviction and sentence.

6. It is a well settled that the duty of an appellate court on a first appeal is to scrutinize, re-examine and analyze the evidence afresh in order to arrive at an independent conclusion bearing in mind that it did not have the advantage of the trial court of seeing and hearing the witnesses as they tendered their evidence.

7. In *Okeno -vs- Republic* [1972] EA 32, the Court stated:-

> " 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 -vs- R*[1957] EA 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 conclusion (*Shatilah M. Ruwala -VS- R*[1975] EA 57). It is not the function of the first appellate court merely to scrutinize the evidence to see if there is some evidence to support the lower court's findings and 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 witnesses. See *Peters -vs- Sunday Post* [1958]EA 424."

8. The premise of the appellant's conviction was identification. The evidence before the lower court was that on the material date, PW 1 Stephen Lekara Lesumale, who was a watchman guarding the premises of Kenflora Company Limited was on duty together with the deceased Duncan Ledimum and Tom Leila who were his colleagues. At midnight, as they were patrolling the area, they were confronted by a group of thieves. The thieves who were about eleven in number surrounded them and snatched his phone, Samsung make worth Ksh.3,000/= and his knife. They also snatched his colleagues' phones. In the process, PW 1 sustained injuries to his ribs and right leg that were caused by a metal bar.

9. According to PW 1, the attackers commanded them to lie down so he never identified them save for the one who killed Duncan whom he identified because he, the witness raised his head slightly as the appellant was hitting Duncan. He said there were three security lights about 30 meters from where they lay. The light was very bright and since the attackers had not covered their faces, he could see the appellant. He described the attacker as being taller than him. PW 1 further said that the attacker stabbed Duncan on the forehead with pliers and Duncan cried out for help. The attackers ordered Duncan to stop crying for help, but he did not hear them because he had hearing difficulties, so the attackers hit him again with the same pliers. Duncan went silent.

10. After some time, the attackers tied PW 1 and his two colleagues up with ropes. They tied their hands to the back and led them to the main office where they ordered them to sit on the grass outside the office as the attackers ransacked the office and stole chemicals which they forced PW1 and Tom Liela

to carry out of the company premises. After some distance, their hands were once again tied to the back and they were ordered to lie on the ground with their faces down and ordered to raise their heads. After the attackers loaded the chemicals into a probox that had just arrived, some of the attackers left while the three attackers left behind ordered them to walk back to the company and not dare look back. On arrival, at the company around 4a.m., PW1 and his colleague found Duncan seated on a plastic chair with his legs and hands tied but dead. At around 5.50a.m, two of their colleagues who had been assigned elsewhere arrived and assisted them to call for help.

11. PW 1 further stated that on 22nd July 2016, as he was running from his house through Kiambu Institute of Science and Technology, he saw the same attackers(sic) sitting at a car wash with three other people. He recognized the attacker. He had gap, and the same shaggy uncombed hair and was dark in color. He ran to the police station and alerted the CID officers who escorted him back to the car wash where he identified the accused as one of the attackers. He pointed out the accused in court and said the accused no longer had the hair that he had at the time of the arrest. The trial court noted that the accused had a gap at the front upper teeth.

12. On cross-examination, the witness said that he raised his head slightly and sideways and saw the accused hit Duncan with the pliers. He also said that the attacker who killed Duncan with the pliers had one gap on the upper jaw and he did not see a second gap. According to PW 1, the accused was among the three attackers who forced him and Tom to carry the chemicals out of the company premises and the appellant was the group leader. PW 1 said that he had never seen the appellant before the incident and could never forget his face.

13. The prosecution called a total of sixteen witnesses whose evidence confirmed that the robbery incident did occur at the time stated by PW 1 and that one guard by the name Duncan died because of injuries inflicted by the robbers.

14. Tom Leila, who was with PW1 at the time of the robbery and who was also a victim of the robbery was not called to give evidence to corroborate his colleague's evidence. Curiously, PW14, the investigating officer confidently informed the court that Tom Leila had given evidence. PW14 told the court:-

> "We went to the scene which was Kenflora Ltd. It deals with flowers. We found two watchmen and the 3rd who had already been killed. The two watchmen have testified in this case ..... His colleague was Tom Leila and he has testified."

15. It appears from the investigating officer's testimony that Tom Leila had been earmarked as one of the witnesses. However, he did not testify. Hence on the issue of identification of the attackers, the court was left to rely on the evidence of only one witness and that is PW 1, the complainant in the second count.

16. For the court to confirm the conviction of the lower court, it must revisit the circumstances surrounding the identification of the appellant as one of the attackers and satisfy itself that the identification was proper.

17. In *Republic -vs- Turnbull and Others* [1976] ALL ER 549, Lord Widgery CJ laid down the circumstances necessary for consideration whenever an issue of identification of a perpetrator is in question namely-

> "a) How long did the witness have the accused under observation?
>
> b. What was the sufficiency of lighting?

c. Was the observation impeded in any way for example by passing traffic or group of people?

d. Had the witness seen the accused before and if so, how often?

e. Were there any special features about the accused?

f. How much time elapsed between the original observation and the subsequent identification to the police by the complainant when first seeing the actual appearance?"

18. It is quite evident that one must treat evidence concerning identification with great caution in order to avoid cases of mistaken identity. In *Cleophas Otieno Wanunga -vs- Republic* [1989]eKLR, the Court of Appeal held as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of more or mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

19. In his defence, the appellant said that on 22nd July 2016, while he was at the workplace with colleagues, the police officers came and arrested him. He was taken to the police station where he was interrogated as to what he does at the car wash, and he said he was a watchman. The police officer then took him to his house where a search yielded nothing. He was taken back to the police station and on Saturday, the officers demanded that he take them to his workplace, which he did. According to the appellant, his colleagues confirmed that he was a watchman at the car wash and also fetched water for them. The appellant's testimony was that the police officer who had taken him to the car wash summoned the complainant and told him that the appellant was not involved in the robbery although he was subsequently charged with the offence. The appellant denied being involved on the robbery and stated that Stephen recorded the statement after his arrest and that is when he described him in the further statement as in the earlier statement, he never gave a description of the attacker.

20. PW 14 who was the investigating officer had testified that after the incident, he recorded a statement from Stephen, PW 1 who told him that he struggled with the person who was trying to rob him of his phone and described the person as "tall, dark with shaggy hair and a big gap on the front upper teeth." PW 1 took about 10 minutes where there was security light. The robbery took three hours and the person still stood guard therefore PW 1 was able to see the attacker clearly.

21. The investigating officer's evidence is clearly in total contradiction with PW 1's evidence who said that he saw the attacker as they lay face down. At no point did PW 1 state in his evidence that he engaged the attacker in a struggle over his phone. This raises doubt as to the credibility of the prosecution's evidence.

22. Although the investigating officer said that PW 1 informed him that there were security lights where the incident occurred, he never informed the court whether he visited the scene to ascertain the strength of the security light. Bearing in mind the test in the Turnbull case, it was imperative that the investigating officer confirm the strength and sufficiency of the lighting in question in order to strengthen the prosecution case. The circumstances of the attack were such that there was need to rule out any

possibility of mistaken identity in light of the fact that the other eyewitness informed the Investigating Officer that he did not see any of the attackers because he complied with the orders to lie face down.

23. PW 1 and his colleagues were clearly caught up in a tense situation in the dead of the night. They were immobilized and ordered to lie face down and Duncan was attacked as they were lying down. I doubt that such circumstances would have allowed PW1 to look sideways in a manner that he could fully take note of the identifying features of an attacker whom he had never seen before. I note that other than describing the attacker's features, the witness did not describe how he was dressed. I also note that neither PW4 nor PW 5, who were PW 1's colleagues and the first responders testified that PW 1 described the attacker nor informed them that he was able to identify him.

24. I do not agree with the trial magistrate that PW1 gave a graphic description of the attacker. There was a paucity of evidence concerning identification.

25. The distinguishing features that the witness relied on to identify the accused were his light skin, a gap on the upper jaw and shaggy hair. There is nothing unique about these features per se. Had the witness also described part of the attacker's dressing, it would have persuaded this court that indeed, the witness was able to identify the attacker.

26. The trial court found that the accused was positively identified. The basis of his finding was that the identifying witness had given the same description to the investigating officer. However, the investigating officer's evidence was at variance with PW 1's with respect to how PW 1 came to identify the attacker and must therefore be treated with caution. See *Peter Gatiku Kariuki -vs- Republic* [2014]eKLR.

27. Turning to the sixth test in the *Turnbull Case*, the robbery took place on the night of 22nd and 23rd June 2016 which is the time of the initial observation of the attacker by PW 1. The witness saw the accused either on 22nd July (as per PW 1) or 25th July 2016 (as per the Investigating Officer) which is the date of subsequent encounter and identification. The date of the subsequent encounter was a month away. I consider the time lapse too long for a single identifying witness to be certain that the person he met the month before is one and the same person.

28. I find that the trial magistrate did not fully appreciate the holding in *Abdallah Bin Wendoh and Another -vs- Republic* [1953] 20 EACA 166 which he cited as follows:-

> "Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greater care the evidence of a single witness respecting identification, especially when it is known that the condition favoring the correct identification were difficult. In such circumstances what is needed is other evidence, whether circumstantial or direct pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error."

29. If the trial magistrate had carefully considered the circumstances surrounding the identification, he would have arrived at the conclusion that the circumstances were not conducive to a positive identification of the offender. In the premises, the identification needed to be treated with utmost care. The court ought to have considered the fact that there was no single corroborative evidence, direct or circumstantial, connecting the Appellant to the offence.

30. In respect to the second count, I have carefully considered the evidence tendered by all the witnesses. None of the witnesses for PW 1 were direct witnesses to the offence. Much of the evidence concerned

the aftermath of the robbery. Nevertheless, there were significant discrepancies and gaps in the overall evidence. One significant gap is the failure by the prosecution to call Tom Leila the only other eyewitness to the robbery to attend court and give evidence. This begs the question; was the failure deliberate because of the fear that Tom's evidence would contradict that of PW 1? Be that as it may, the first responder also gave evidence that raised issues of credibility of PW 1. Whereas PW 1 said that he was injured on the ribs and leg, PW 5 and PW 6, his colleagues do not refer to any injury to PW 1 at all. PW 1 also said that as the robbers left, they had tied their hands to the back. The first responders never mentioned anything concerning PW 1 and Tom being tied up. In fact, PW 5 said,

> " We walked to the office area and found Tom and Stephen. They were walking and had carried ropes which had been used to tie them."

31. PW 1 never testified that they untied the ropes. This was crucial as the robbers had tied their hands to the back hence, they must have been incapacitated. The contradiction was further compounded by PW 14, the investigating officer. According to him, when they arrived at the scene on 23/6/2016, they found the two surviving watchmen "still tied on the legs and hands as members of the public had told them not to interfere with the status until police came". Whose version between the four witnesses should be believed?

32. PW 1's testimony and that of the investigating officer also failed to pass the credibility test due to evident inconsistencies. The gaps and inconsistencies would have been resolved if there were any other witness or evidence whether direct or indirect to corroborate PW 1's evidence. Unfortunately, there was none. A search of the appellant's residence and workplace yielded nothing. By the end of the prosecution's case only the sole evidence of PW 1 remained to connect the appellant to the offence. From the above analysis, PW 1's evidence was wanting in all respects.

33. The appellant denied committing the offence. His defence was that the process of his identification was irregular. According to him, PW 1 recorded the statement that contained the description of his physical features after his arrest. Considering the fact that the Investigating Officer's evidence differed in material respects with the evidence of PW 1, PW 4 and PW 5 it was unsafe for the trial magistrate to choose to believe his evidence while disbelieving that of the appellant concerning the date PW 1 wrote his statement.

34. Although the appellant gave an unsworn statement, the prosecution's case was tenuous in totality. There was no evidence linking the accused to the offence and the court erred in convicting the appellant as the charges facing him were not proved beyond reasonable doubt.

35. For the above reasons, I allow the appeal, quash the conviction and set aside the sentence.

36. I order that the appellant be released forthwith unless otherwise lawfully held. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 12TH DAY OF JULY, 2024.

A. C. BETT

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JUDGE

In the presence of:

The Appellant

Mr. Baraka for the Respondent

Court Assistant: Polycap Mukabwa