Njuguna v Republic (Criminal Appeal E080 of 2021)
[2024] KEHC 9340 (KLR) (19 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9340 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E080 OF 2021

MA OTIENO, J

JULY 19, 2024

BETWEEN

JOSEPH MUTHIRU NJUGUNA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from original conviction and sentence (Hon. C.K. Kisiangani, SRM) dated 16th July 2021 in Criminal Case No. 886 of 2019 in the Chief Magistrate's Court at Ruiru)

JUDGMENT

Background

1. Joseph Muthiru Njuguna, the Appellant herein was charged in the Ruiru Chief Magistrate's court with three counts. The first count was the offence of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. The particulars were that on or about the 17th day of August, 2019, at around 1945 hours in Ruiru Township of Ruiru Sub County within Kiambu County, with another before court, being armed with a dangerous weapon namely Ekol Pistol S/No. ET 10121305, robbed Jane Wanjiru Kimani of her Techno mobile phone valued at Kshs. 16,000/- and immediately before that time of such robbery threatened to shoot the said Jane Wanjiru Kimani.

2. In count II, he was charged with the offence of possession of firearm contrary to section 4(2) (a) as read with section 4(3) (a) of the *Firearms Act* Cap. 114 revised edition 2015. The particulars were that on the 17th day of August 2019 at about 1945 hours in Ruiru Township of Ruiru Sub County within Kiambu County, without a firearm certificate had in his possession a firearm namely Ekol Pistol S/No. ET 10121305.

3. In count III, he was also charged with the offence of possession of ammunition contrary to section 4(2) (a) as read with section 4(3) (a) of the *Firearms Act* Cap. 114 revised edition 2015. The particulars were that on the 17th day of August 2019 at about 1945 hours in Ruiru Township of Ruiru Sub County

within Kiambu County, without a firearm certificate had in his possession one round of ammunition in calibre 8mm PAK.

4. The accused pleaded not guilty to all the counts and after trial in which the prosecution called 7 witnesses, the Appellant was convicted on all the counts. Upon conviction he was sentenced to life imprisonment in count I. Sentencing in counts II and III were held in abeyance in view of the sentence of life imprisonment under count I.

5. The Appellant was aggrieved with both conviction and sentence. He consequently filed this appeal raising the following grounds, namely:

    i. That, the trial magistrate erred in law and in fact in convicting the appellant in reliance on the purported identification by PW1 and PW2 without considering that it was left in doubt considering the actual arresters were not given the identification of the attackers.

    ii. That, the trial court lost direction in evidence after being influenced with the alleged recovery of possession of a firearm and ammunition without considering that the same rendered the charge sheet defective since the alleged pistol bared/ bore three different serial numbers as the record reveals.

    iii. That, the trial magistrate erred in law while rejecting the appellant's defence which same was not displaced by the prosecution side as per section 212 of the criminal procedure code cap. 75 Laws of Kenya.

6. The Appeal was canvassed by way of written submissions. The Appellant's submission was filed in court on 3rd July 2023 while the Respondent's submissions were filed on 20th January 2023.

7. In his submissions, the Appellant argued his appeal under three major headings. On the first ground, the appellant took up the issue of identification. According to the Appellant, due to the difficult conditions which were then obtaining, the identification by the victim could not have been free from error.

8. The second ground taken up by the appellant in the appeal was that the charge sheet was defective since the charge laid before the court was at variance with the evidence, particularly on the description of the pistol in question.

9. Finally, it was the appellant's argument that the court fell into an error of law and fact by failing to consider and accept the defence of alibi which he had validly raised at trial.

10. The prosecution on the other hand took the position that the conviction was safe and that the sentence meted was legal due to the fact that the prosecution had, by way of evidence, proved all the requisite elements of the offence of robbery with violence against the appellant.

Analysis and Determination

11. Since this is a first appeal, this court is under duty to subject the whole of the evidence tendered in the lower court to thorough reevaluation and analysis so as to reach its own conclusion as to the guilt or otherwise of the appellant. In so doing, I will bear in mind the fact that I neither saw nor heard the witnesses as they testified and therefore give due allowance. In Okeno v Republic [1972]E.A. 32) the court stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court's own decision on the

evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion".

I. Whether the Identification was free from any possibility of error

12. The first issue that the appellant took up in his appeal relates to his identification by PW1, the complainant. It was the appellant's case that due to the difficult conditions then obtaining, the identification could not have been free from any possibility of error, and is therefore unsafe to rely on.

13. According to the appellant, the testimony by the complainant indicated that the period of interaction between the complainant and her assailants was too short for the complainant to make any reliable identification, and that it was in a moment of fear and panic by the complainant, who testified as PW1. This the appellant posited, may have compromised complainant's ability to positively identify her assailants.

14. To answer the above concerns as expressed by the appellant in this appeal, I will first review the evidence adduced by the prosecution before the trial court regarding identification of the appellant.

15. The complaint, testified as PW1 and stated that on 17th August 2019 while at an MPESA shop where she worked as bank and MPESA agent, two men came in at around 7:50Pm and asked her if they could withdraw money. That instead of withdrawing the money, one of the men, while pointing a gun at her immediately ordered her to surrender to him all the money she had. That she immediately ducked down the shelf shouting, 'thief!', 'thief!'. That as she was screaming, the two men ran away, taking with them her Techno mobile phone which at the time of the incident was on the counter. That conversation between her and her attackers lasted for about 5 minutes before they fled. PW1 also testified that there was electricity at shop and that she could clearly identify her attackers, particularly the appellant herein.

16. Further, PW2 who was at the material time PW1's colleague at the MPESA shop testified that she had stepped out of the shop to answer a call of nature and on her way back to the shop, she heard PW1 scream. That she immediately saw two men running from the shop. That there were other people chasing after the two men. PW3, a police officer who was then within the vicinity testified that he is the one who apprehended the appellant. His testimony was that he saw the appellant run with members of the pubic in hot pursuit. That as the appellant passed by PW3, he tripped the appellant's foot causing him to fall. That as the appellant fell, he dropped a gun. That the appellant was immediately subdued and apprehended by PW3 with the help of members of the public.

17. Further, PW3 told court that searched the appellant and found a Techno phone in his pocket. That PW1 and PW2 caught up with them after the appellant had been subdued and apprehended. That PW1 immediately identified the appellant as one of her assailants. According to PW3, there was electricity lights at the place that he apprehended the appellant.

18. At the trial, PW3 identified the appellant as the person he had apprehended on the material day.

19. From the testimony of the complainant, it is clear that she was attacked at around 7.50pm and that at that time, she was alone in the shop. That it is only when the appellant had been apprehended that she actually caught up with him. This therefore makes the her a single witness to the incident since there were no any other eye witness at the scene. The question that therefore needs to be answered by this court is whether this was a case of mistaken identity as alleged by the appellant.

20. Section 143 of the *Evidence Act*, Cap. 80 Laws of Kenya is clear that unless otherwise by law stated, a fact may be proved by the testimony of a single witness. It states as follows; -

> " No particular number of witnesses shall, in the absence of any provision of the law to the contrary, be required for the proof of any act"

21. In Abdalla Wendo v Republic [1953] 20 EACA 166, the court held as follows in relation to the testimony of a single witness; -

> " 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 greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to 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 the possibility of error." [Emphasis added].

22. Further, if the evidence of the single witness relates to identification of an accused person, then the case of Wamunga v Republic [1989] KLR 424 becomes relevant. In this case, the court stressed the need of a trial court to carefully examine the evidence on identification so as to ensure that the same is free from any possibility of error. The court stated that:

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

23. Further, in Republic v Turnbull & others [1976] 3 ALLER 549 the court drew special attention to questions to be asked when it comes to identification of a perpetrator of the offence by a victim. It stated that:

> " The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often, if only occasionally, had he any special reason for remembering the accused? How much time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them as his actual appearance?....."

24. From the Judgment of the trial court, it is not clear whether the court cautioned itself on the dangers of relying on the evidence of a single witness in identifying the accused person. What is however apparent from the judgment of the trial magistrate is that the court delved into and analyzed the evidence of PW2 and PW3 which corroborated the testimony of PW1 on identification of the appellant.

25. Despite that the offence occurred at night, PW1 in her testimony stated that there was enough light at the shop where the incident took place. She also testified that she had the appellant under observation for around 5 minutes, had a conversation before her assailants pointed a gun at her and thereafter fled the scene, carrying with them, her techno phone.

26. In terms of the time lapse between the original observation and subsequent identification of the accused to the police, it was the complainant's testimony that she identified the appellant to the police the same day that the offence took place. Right at the outset, the complainant described that the appellant had a gun and that the accused, together with another person, had taken off with her Techno phone. The fact that the gun and the phone were later recovered from the appellant is critical on the issue of identification.

27. The complainant identified the appellant as the one who pointed a gun at her and took away with her phone. That there was close contact between them such that he could not be mistaken as to the appellant's identity.

28. The complainant's evidence was corroborated by that of her colleague, PW2 who testified that together with the members of the public she ran after the appellant immediately the two men were fleeing from the scene.

29. Further, the evidence of PW3, the police officer who apprehended the appellant also supported the complainant's evidence. He testified that he was the one tripped the appellant causing the appellant to fall, thereby dropping a gun. The complainant identified the gun as the one the appellant was pointing at her while at the shop.

30. Additionally, PW3 gave evidence that upon search on the appellant, he found a Techno mobile phone in the appellant's pockets. The complainant also identified the phone as the one that the appellant picked from her shop.

31. In the premises, this court makes a finding that the learned trial magistrate was right her judgment. This court as was the trial court, is satisfied that the identification of the appellant was positive and free from any possibility of error in terms of the Court Appeal decision in Francis Njiru & 7 Other *vs Republic CR, Appeal No. 6 of 2001* (UR) where the court stated that; -

> " The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered..... [A]mong the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all." (emphasis added).

32. Further, the doctrine of recent possession entitles a court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. This is the spirit of Section 111 of the *Evidence Act*, Cap. 80 Laws of Kenya. In Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR, the Court of Appeal summarized the essential elements of the doctrine of recent possession as follows:

> "In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

33. As I have observed above, the evidence adduced at trial by PW3 who apprehended the appellant, taken together with the evidence of the complainant – PW1 regarding the recovery of the claimant's Techno phone from the appellant immediately after the incident supports and corroborates the trial court finding that the identification was positive and free from error.

> 34. The appellant in his submissions in this appeal argued that due to the fact that there were many people around the place where he was apprehended, the phone may have been dropped by any of the persons present thereat, apart from him. I find this argument weak, especially taking into account the evidence on record.

35. This court therefore finds that contrary to the contention by the appellant, his conviction was safe because he was positively identified and that the identification was free from any possibility of error.

II. Whether the Charge was Defective

36. The second ground of appeal as per the appellant's submissions was that the charge as laid before the trial court was defective and not curable under section 382 of the Criminal Procedure Code, Cap. 75 Laws of Kenya. According to the appellant, there were contradictions regarding the type and serial number of the gun which was actually found in his position. That while PW3 referred to the gun as a "baby browning pistol serial No. ET 10121305" while the charge sheet had the description of the same gun as "EKOL pistol s/no. ET 101211305".

37. It was further the appellant's submissions that PW6l, the ballistic expert gave serial number of the gun as "ET 101211305". According to the appellant, these were three different guns.

38. The prosecution in their submissions filed on 20th January 2023 failed to respond to this ground of appeal. I will therefore proceed to determine this ground of appeal solely on the basis on the submissions filed by the appellant, taking into account the evidence adduced at trial and the applicable law.

39. It is trite that an accused person should only be charged with an offence that is known in law. A charge should specify or spell out all the relevant information in such a manner that would enable an accused person put up an appropriate defence. This principle has its basis on Section 134 of the Criminal Procedure Code which stipulates as follows:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

40. I have considered the charges as laid before the trial court and their particulars. According to the charge sheet the appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code using a dangerous weapon, being "EKOL PISTOL S/NO. ET 10121305". PW3, the police officer who apprehended the appellant in his evidence before the trial court referred to the weapon as a "baby browning pistol" "serial ET 10121305". The ballistic expert, PW6 who actually produced the ballistic report on the weapon (PExh 5) identified the gun as "Ekol pistol S/no. 10121305 serial number ET-10121305". However, in the typed proceedings, the serial number of the gun was incorrectly captured as, "101211305". I find that this was an error in the typing of the proceedings since the serial number in the handwritten proceedings, which I have verified, tallies with that in the ballistic report as well as the charge sheet.

41. In view of the above, I find that the serial number of the gun as per the charge sheet is not at variance with the evidence as alleged by the appellant. Consequently, I find this ground of appeal unmerited and therefore fails.

III. Whether the appellant's defence was considered.

42. In his submissions, the appellant claimed that his defence was not considered. I have however looked at proceedings as well as the judgment and find that contrary to his assertions, the trial court considered the appellant's defence.

43. In his sworn statement, the appellant stated that on the material day, he had gone to Bidii Supermarket in Ruiru. That when he was about 10 meters from the supermarket, PW3 held him and told him that he was a police officer. That thereafter members of the public came around. That he was immediately searched but nothing was found on him. That after about 10 minutes two police officers from Ruiru Police Station came and arrested him. That he was only booked in and charged in court after he failed to raise the Kshs. 5,000 that was being demanded by the police officers.

44. The appellant however did not tender any evidence to impeach the credibility of PW1 and PW3. This court upon careful reevaluation of the evidence at the trial court, finds that the evidence of PW1 as corroborated by the evidence of PW3 was way more credible that of the appellant.

45. The defence of alibi raised by the appellant was considered by the trial court and found to constitute mere denials which did not discredit or dislodge the prosecution's case. Upon reassessment of evidence, I have reached the same conclusion.

46. In the end this court finds that the prosecution proved its case to the required standard. The evidence tendered fully supported the charge upon which the appellant was charged and the charge sheet clearly revealed the offence of robbery with violence.

47. Due to the foregoing, I find no merit in this appeal and hereby dismiss the same.

48. The conviction is therefore upheld.

49. It is so ordered

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF JULY 2024

ADO MOSES

JUDGE

Moses – Court Assistant

Mr, Joseph Njuguna.....the Appellant.

N/A.....for the Respondent.