Omboga & another v Republic (Criminal Appeal E006 of 2022)
[2024] KEHC 9467 (KLR) (25 July 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E006 OF 2022

WA OKWANY, J

JULY 25, 2024

BETWEEN

JOSEPH OMBOGA ..... 1ST APPELLANT

DAVID ARASA MONG'ARE ..... 2ND APPELLANT

AND

REPUBLIC ..... REPUBLIC

(Being an Appeal from the Judgment and Sentence in the Chief Magistrate's Court at Nyamira, Criminal Case No. 1909 of 2019 delivered by Hon. M.C. Nyigei, Principal Magistrate on 25th January 2022)

JUDGMENT

1. The Appellants were charged, alongside two other co-accused persons, with the offence of Robbery with Violence contrary to Section 296 (2) of the *Penal Code*, Cap 63 Laws of Kenya. The particulars of the charge were that on the 18th day of November 2019, at Marindi village, Bundo Sub-Location, Bogichora Location within Nyamira county, jointly robbed Rose Kwamboka of Kshs. 3,000/= and an Itel Button phone valued at Kshs. 2,000/= all property valued at Kshs. 5,000/= and immediately before the time of such robbery, threatened to use actual violence to the said Rose Kwamboka.

2. The Appellants pleaded not guilty to the charge and a trial was conducted in which the prosecution called a total of 6 witnesses.

The Prosecution's Case

3. PW1, Rose Kwamboka, testified that she was on 18th January 2019 asleep in her house when she heard a loud knock at her neighbour's house at about 1.45 a.m. She opened her door and saw a man she recognized as the David Arasa (the 2nd Appellant) standing by her door in the company of another person whose voice she recognized as that of (1st Appellant). She also saw two other men standing at

her neighbour's door. She explained that three men entered her house and ransacked it before finding Kshs. 3,000/= which they took and that the 1st Appellant slapped her while asking for more money. They also took her red mobile phone make Itel.

4. PW1 stated that she could clearly see the 2nd Appellant because of the street lights, and that both Appellants were well known to her as her customers. She also testified that 4 other neighbours were also attacked and that they reported the matter to Nyamira Police Station. She later identified her phone at Mabundu Police Post where two suspects had been detained following their arrest.

5. PW2, Fred Momanyi Nyamato, testified that he was robbed on 18th November 2019, and that they informed the area Assistant Chief who accompanied them to the 2nd Appellant's house. PW2 testified that he knew the 2nd Appellant well and that he (2nd Appellant) did not enter into the PW1's house.

6. PW3, Peter Nyandega, the acting Area Chief, testified that he received information about a spate of robberies in 4 locations. He proceeded to the house of one of the suspects (the 2nd and 3rd Accused before the trial court) where they recovered several stolen items including PW1's phone.

7. PW4, George Morara Nyanchoka, the area Assistant Chief, testified that several shops were broken into on 18th November 2019, and that PW1 informed him that she recognized the Appellants among the people who robbed her. He stated that he arrested the Appellants and escorted them to Mabundu police station but did not recover any stolen item from their houses.

8. PW5, No. 998878 PC Winnie Namanga, was the Investigating Officer testified. She received the robbery report from PW1 who informed her that she was able to identify two robbers through the street light and voice recognition. She charged the Appellants alongside two other suspects who had been found with several stolen items including the complainant's phone. She later visited the scene near the complainant's house where she saw an electricity post with security lights. She produced PW1's mobile phone (P.Exh1).

9. PW6 No. 2236965 Police Inspector Daniel Gathuri Barnabas was the officer in charge of crimes at Nyamira Police Station who conducted the Identification Parade on 18th November 2019 where the Appellants were identified by PW1. He testified that the Appellants did not object to the manner in which the identification parade was conducted. He produced the Identification parade forms in respect to the 1st and 2nd Appellants as P.Exh2 & P.Exh3 respectively.

10. At the close of the Prosecution's case, the trial court found that the prosecution had made out a prima facie case against the Appellants who were consequently placed on their defence under Section 211 of the *Criminal Procedure Code*. They each elected to tender sworn evidence and did not call any witnesses.

The Defence/Appellant's Case

11. The 1st Appellant (DW3) testified that he was sleeping in his house on 18th November 2019 when the Assistant Chief came in the company of a big crowd and claimed that they were following up on some stolen items. He explained that the Assistant Chief searched his house but did not find any stolen item after which he took away his phone and explained that he needed it for investigations. He stated that he was arrested the following morning when he went to the Assistant Chief's office to collect his phone over an allegation that he was among the people who robbed PW1.

12. The 1st Appellant further testified that he was subjected to an identification parade where they were asked to raise their hands after which PW1 claimed that she knew them. He stated that they were asked to sign documents whose contents they did not understand.

13. The 2nd Appellant (DW4) testified that he was on 18th November 2019 at the shopping centre where the Assistant Chief asked him to report to the police station. He stated that he was later arrested and subjected to an identification parade where they were identified after they raised their hands when their names were called out. He testified that the contents of the identification parade forms were not read out or explained to them and neither were they informed if they could avail their witnesses to the ID Parade.

14. DW5, Defina Kwamboka Arasa, testified that the 2nd Appellant was her husband and that he was at home on the nights of 17th and 18th November 2019 and that he could not have participated in the robberies.

Judgment and Sentence

15. At the end of the case, the trial magistrate found that the prosecution had proved its case against the Appellants to the required standards. The Appellants were consequently convicted and sentenced to serve 20 years' imprisonment.

The Appeal

16. Aggrieved by the decision of the trial court, the Appellants filed the instant appeal in which they challenge the trial court's findings on both conviction and sentence.

17. The Appeal was canvassed by way of written submissions which I have considered.

Duty of the Court

18. In *Mark Oiruri Mose v R* (2013) eKLR the Court of Appeal held thus:-

> "This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse 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 give allowance for that."

Issues for Determination

19. I have carefully considered the record of appeal and the parties' rival submissions. I find that the main issues for determination are: -

    i. Whether the Prosecution proved the charge of robbery with violence to the required standard.

    ii. Whether the sentence was just and legal.

i. Whether the Prosecution proved the charge to the required standard.

20. Sections 295 and 296 (2) of the *Penal Code* stipulates as follows: -

    295. Definition of robbery

    Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

    296.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

21. In *Johana Ndungu v Republic* [1996] eKLR the Court of Appeal outlined the ingredients of the offence of robbery with violence and held thus: -

> "In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with S.295 of the *Penal Code*. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
>
> 1. If the offender is armed with any dangerous or offensive weapon or instrument, or
> 2. If he is in company with one or more other person or persons, or
> 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

22. Similarly, in *Dima Denge Dima & Others vs Republic*, Criminal Appeal No. 300 of 2007, the Court found that the Prosecution must establish any of the following ingredients under section 296(2) in order to succeed in its case: -

> "...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."

23. In the present case, PW1 and PW2 testified that there were a spate of robberies in the area. PW1 testified that she was robbed of her phone and money on the material night. Her testimony was corroborated by the testimony of PW3 who testified that several stolen items including the complainant's phone, were recovered from the house one Duke Oroba. I find that the Prosecution evidence proved the ingredient of robbery.

24. PW1 also testified that one the people who robbed her was armed with a panga while others were carrying a hammer. I find that the evidence presented by the Prosecution in this regard was indicative of the aspect of violence listed under the three parameters in Section 296 (2) of the *Penal Code*. I am equally satisfied that the Prosecution proved the second element of the offence beyond reasonable doubt.

25. Turning to the identification of the Appellant's as the perpetrators of the offence of in question, I am cognizant of the fact that identification is the interrelation between an accused person and a crime, that is, what connects or links a person to an unlawful act. It was clear that none of the Appellants was found in possession of any of the alleged stolen items and specifically, PW1's phone. It thus follows that the Prosecution's case against the two Appellants was primarily hinged on the aspect of identification, by a single witness, PW1 who testified that she recognized the person standing by the road and carrying

a panga as David Arasa, the 2nd Appellant. She stated that she was able to see him because of the streetlights that were nearby. She further stated that she had known the 2nd Appellant for seven years and that he would often carry her on his motorcycle.

26. It is trite that the evidence of recognition of a person who is well known to the witness is more reliable than mere identification of a stranger (see *Turnbull and others* [979] 3 AR ER 549). In the instant case, the offence was allegedly committed at night when proper identification may be difficult and this calls for a close scrutiny of the evidence of identification before arriving at a conviction. This was the caution given by the Court of Appeal in *Kiilu & Another v Republic* [2005] 1 KLR 174, where it held thus:-

> "Subject to certain well-known exceptions, it is trite law that a fact may be proved by 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 a 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 probability of error."

27. I note that the Prosecution did not lead any evidence towards determining the proximity of the streetlights from the victim's house so as to provide a clear picture of the distance between the source of light and the point of identification. I note that even though PW5 testified that she visited the scene of crime and saw the streetlights, she did not testify on the distance from the complainant's house to the street or the spot where she allegedly saw the 2nd Appellant. PW5 did not testify on the strength or intensity of the security lights and neither did she indicate if she visited the scene at night so as to confirm the complainant's ability to clearly see the person she alleged was standing by the road while armed with a panga. PW5 merely confirmed that there were security lights and I find that the evidence on the subject of lighting was wanting and insufficient to dispel any doubts on a proper identification.

28. Courts have taken the position that even where a single witness purports to recognize a person well-known to them prior to the offence, mistakes in identification may still occur.. In *Toroke v Republic*, (1987) KLR 204, it was held: -

> "It is possible for a witness to believe quite genuinely that he had been attacked by someone he knows, yet be mistaken. So, the error or mistake is still there whether it be a case of recognition or identification."

29. Regarding the identification of the 1st Appellant, PW1 testified that he was wearing a face mask and that she could not see him but was able to recognize his voice as that of Brother also known as Joseph Omboga. She testified that he was her usual customer and she had known him for seven years. The 1st Appellant, on the other hand, testified that he did not know the complainant as he was new in the area. He also stated that the victim could not know his voice as they had never had any business dealings.

30. The contrasting testimonies by the complainant and the 1st Appellant led this court to fall back to the evidence of the Identification Parade that was conducted by PW6. I make the following observations on the said parade; firstly, it is not clear to this Court why the Police Inspector chose to subject the Appellants to an Identification Parade when the victim stated that she knew them by name and recognized them on the night in question.

31. Secondly, it is noteworthy that while PW1 stated that she identified the 1st Appellant by voice recognition, the Identification Parade did not factor in this aspect as he was identified by facial

recognition. To my mind, this was a misstep by the Investigating Officer and the Police Inspector when gathering evidence of identification.

32. PW6 testified as follows: -

> " The 3rd suspect Joseph Obwoga was positively identified by the complainant after being placed between Nos. 5th and 6th by being touched on the left shoulder. On the 2nd attempt, the 3rd accused Joseph Obwoga positioned himself between the 2nd and 3rd Position and was again identified by being touched in the left shoulder. The 4th suspect – done at 6.00hrs David Arasa positioned himself between the 5th and 6th and was touched on the left shoulder. On the 2nd attempt, David stood in position 2 and 3 and the complainant touched him on right hand. The 3rd and 4th suspects had no friend/solicitor present during their parade as per their wish. After the parade, the 2 accused persons had no objection to the manner in which the parade was conducted and said they were satisfied with it...."

33. The Appellants' testimonies on the subject of the identification parade was totally different from the testimony of the PW6 not only in terms of the number of people in the parade but also the manner in which it was conducted. The 1st Appellant testified as follows: -

> " ....We were called in the evening at around 5.30 p.m. from the cells and asked to stay in a line. There were 7 of us. We had all been in the cells. I was the 3rd in line. I saw Rose standing with a Police Officer. The Officer called our names and I raised my hand. David Arasa also raised his hand when he was called. She was then asked if these were the people she knew and she answered yes. We were then given some papers to sign. The police officer never even told us that we could have witnesses. David Arasa was with me. Some of us were short others were tall. I did not know the contents of the forms I signed..."

34. The 2nd Appellant, on the other hand, testified that: -

> " ....While we were in the cells, we were called to an ID parade. The people who were lined up with us were in the cells with us. Outside our names were called. Complainant was also standing outside. Rose was able to identify us after we were called by our names and we raised our hands. I was never informed that we needed witnesses. I did not read the contents of the form that I signed. We were not all of the same height and complexion...."

35. The Appellants' testimonies raise the issue of whether the identification parade was properly conducted. The principles governing the conduct of an Identification Parade are laid out in the *Police Force Standing Orders* under The *National Police Service Act*, Act No. 11A of 2011. These rules were further outlined in *Ssentale v Uganda* (1968) E.A.L.R 365 as follows: -

a. The accused has the right to have an advocate or friend present at the parade;

b. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;

c. Witnesses should be shown the parade separately and should not discuss the parade among themselves;

d. The number of suspects in the parade should be eight (or 10 in the case of two suspects);

e. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;

f. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and

g. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.

36. Applying the above principles to the present case, I find that the Appellants were paraded alongside other suspects with whom they were sharing the cells even though the suspects were not necessarily people with similar build, height, age, complexion or appearance as the Appellants. PW6 did not also indicate if he informed the victim that there was a possibility that her assailants may or may not have been in the parade. If the evidence of the Appellants was anything to go by, then it is clear that their names were called out after which they raised their hands before the complainant identified them.

37. I have carefully considered the evidence of the 1st Appellant on cross-examination where he stated that the police officer asked the victim, "Ni hawa?" loosely translated to mean, "Are they the ones?" and her response was "Ndiyo" to mean "yes". From the 1st Appellant's testimony, it is clear that the complainant was merely asked to identify the people she knew and that she did not expressly state that they were the ones who attacked and robbed her. In other words, she identified the Appellants because they were familiar to her.

38. It was also clear that the Appellants were not accorded an opportunity to have their own witnesses during the Identification Parade. PW6 stated that the two declined to have witnesses and did not object to the manner in which the parade was conducted while the Appellants stated that they were not informed of their right to have witnesses present and that they were not aware of the contents of the documents they were signing. The question which arises is how they could decline to have witnesses when they were not informed of this right in the first place.

39. My finding is that the Police Inspector was under a duty to inform the Appellants of their rights and to explain to them how the Identification Parade was to be conducted in order to avoid any unfairness or prejudice. My finding is that the identification parade was not conducted in a satisfactory manner according guidelines provided in the *Police Force Standing Orders*. I further find that the Prosecution did not discharge the burden of proof by linking the Appellants to the crime in question beyond reasonable doubt.

40. Having regard to the findings and the observations that I have made in this judgment, I find that the instant appeal is merited and I therefore allow it. I therefore quash the conviction against the 1st and 2nd Appellant and set their sentences aside. The Appellants shall be set at liberty forthwith unless they are otherwise lawfully held.

41. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 25TH DAY OF JULY 2024.

W. A. OKWANY

JUDGE