Oduor & another v Republic (Criminal Appeal 116 of 2023)
[2024] KEHC 8003 (KLR) (2 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8003 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL 116 OF 2023

DR KAVEDZA, J

JULY 2, 2024

BETWEEN

DANIEL ONYANGO ODUOR ..... 1ST APPELLANT

BEN ONYANGO OBIERO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. M. Maroro (P.M) on 19th May 2022 at Kibera Chief Magistrate's Court Criminal Case no. 1356 of 2019 Republic vs Daniel Onyango Oduor and O of 2017 Republic vs Daniel Onyango Oduor and Ben Onyango Obiero)

JUDGMENT

1. The appellants were charged with three counts of the offence of robbery with violence contrary to section 295 as read with 296(2) of the *Penal Code*. They were convicted on two counts of robbery with violence and acquitted on the third account. They were each sentenced to serve 15 years imprisonment.

2. Being aggrieved, they filed the present appeal challenging their conviction and sentence. They challenged the totality of the prosecution's evidence against which they were convicted. They contended that the trial court failed to consider their defence. In addition, the sentence meted out was unlawful. They urged the court to quash the conviction and set aside the sentence.

3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32).

4. The prosecution called three witnesses in support of their case. PW1, Jeremiah Otieno Oginga, testified that on October 4, 2019, around 9 pm, he was in a motor vehicle with his wife (PW2). While attempting to park near Fort Jesus at Kibra, he heard a gunshot. Assailants surrounded the vehicle and demanded that he open the door. When he complied, he was forced out of the car. Two of the assailants searched him and stole his wallet, USD 800, ATM cards, and mobile phone. His wife screamed, causing the assailants to flee.

5. He testified that the area was well-lit by streetlights and lights from his in-law's house where he was parking. He identified two of the assailants at an identification parade: the 1st appellant by his long shaggy hair and the 2nd appellant by his height. He stated that the 1st appellant had the gun, while the 2nd conducted the search.

6. PW2, Diana Celestine Chao Ngali, confirmed she was with PW1 during the attack. She reiterated that her scream made the assailants flee from the scene. She told the court that she could recognise one of the assailants who was a person known to her but was not in court. She identified the 2nd appellant at the parade but not the 1st appellant. She said she could clearly see due to the lighting in the parking area.

7. PW3, Inspector James Wairia testified that he conducted an identification parade for the appellants. For the 1st appellant, there were 10 other suspects, while for the 2nd appellant, there were 9 suspects. The 1st appellant was identified by PW1 while the 2nd appellant was identified by both PW1 and PW2. The identification was done by touch, and the witnesses were different in each parade.

8. After the close of the prosecution's case, the appellants were found to have a case to answer and were put on their defence. The 1st appellant testified that on 8th October 2019, he was working at a hotel where he was employed by refugees. Police officers who usually came to take bribes arrived at around 7 am and demanded to see his employer. He told them that the employer was not available at the time and they demanded money from him which he refused. They slapped him and arrested him and later charged him. He maintained his innocence.

9. The 2nd appellant testified that he worked with the 1st appellant. He reiterated that police officers came to their place of work to extort them. When they refused to oblige, they were arrested and accordingly charged. He maintained that he had no grudge against the said officers.

10. The appeal was canvassed by way of written submissions which have been considered. The offence of robbery with violence under section 296(2) of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR and Oluoch v Republic [1985] KLR 549)

11. The issues for consideration by this court are whether the appellants were positively identified and whether the prosecution did prove its case beyond reasonable doubt. The evidence on record does prove that PW 1 while in the company of PW2 was stopped by the appellants and other assailants as he was parking his motor vehicle. He was ordered to alight as the assailants fired gunshots. The assailants ransacked him and stole cash, a mobile phone, ATM cards, and identification documents.

12. PW1 picked out two of the attackers during an identification parade overseen by PW3. He identified the first appellant as the person holding the gun while the second appellant searched him. He insisted that the area was well-lit, allowing him to see the attackers clearly. PW2, who witnessed the incident from inside the car, testified that she was frightened and raised an alarm, causing the attackers to flee.

She stated she could identify the second appellant as one of the attackers but could not identify the first appellant.

13. During their defences, the appellants claimed they were working at the time of the incident and denied committing the offense. They alleged that the police framed them for the charges they were convicted of.

14. From the material placed before the court, PW 1 and PW 2, were very clear on the facts of the incident, and their evidence was not shaken on cross-examination. It is my considered view that the appellants were properly and positively identified and apprehended after the incident. I find the testimony of the prosecution's witnesses to be reliable direct evidence of visual identification against the appellants.

15. For consideration is whether force was used to rob the victim. It was the testimony of prosecution witnesses that one of the assailants was armed with a gun. This was used to threaten the complainant and as a result of the threats, he was robbed. The threat of violence was therefore present. This court is satisfied that the prosecution proved that the appellant and his accomplices robbed and threatened to use actual violence to harm the complainant. Their conviction on count I for the offence of robbery with violence was therefore safe.

16. In count II, the appellants were found guilty of robbing PW2 Diana Celestine Chao Ngali and threatening to use violence against her. According to her testimony, her identification document was stolen, which was found in PW1's wallet. However, there was no direct evidence showing that the assailants robbed her and threatened to use actual violence against her. Therefore, the prosecution did not sufficiently prove their case for count II beyond a reasonable doubt. The appellants are acquitted accordingly on the said count.

17. On sentence, the appellants were each sentenced to serve 15 years imprisonment. In this respect, the trial court failed to specify in respect to which count the sentence of 15 years was for. That notwithstanding, section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed.

18. In that context, I note that the victim of the crime did not suffer any physical harm, indicating the absence of aggravating circumstances during the commission of the offense. It is my view that the sentence imposed was excessive.

19. I hereby set aside the sentence of 15 years imprisonment imposed by the trial court and substitute it with a sentence of ten (10) years imprisonment for each of the appellants with effect from the date of their arrest 8th October 2019.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 2ND DAY OF JULY 2024

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D. KAVEDZA

JUDGE

In the presence of:

Ngunjiri h/b for Oyugi for the Appellants

Mr. Mutuma for the Respondent

Naomi Court Assistant.