Katuu v Republic (Criminal Appeal E052 of 2021)
[2024] KEHC 13795 (KLR) (24 September 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E052 OF 2021

SN MUTUKU, J

SEPTEMBER 24, 2024

BETWEEN

SIMON MUIA KATUU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment and sentence of Hon. J.N. Nthuku, delivered on the 14th December 2021 at the Principal Magistrate's Court in Loitoktok in Criminal Case No. 62 of 2020)

JUDGMENT

Introduction

1. Simon Muia Katuu (the Appellant) was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars of the offence are that on 5th April 2020 at White House area near Kenya/Tanzania borderline in Kajiado South Sub-County, Kajiado County, jointly with others not before the court, while armed with clubs and stones robbed Benson Kamotho Thairu of his motor vehicle registration number KCC 232Y Isuzu NPR, Mobile Phone make Tecno Power 2, wrist watch make Orient, cash Kshs 2600, Equity Bank ATM Card and National Identity Card all valued at Kshs Two Million Three Hundred and Thirty Two Thousand Six Hundred (2,332,600) and at the time of the said robbery he injured Benson Kamotho Thairu.

2. The Appellant denied the charge. He was tried in the Principal Magistrate's Court at Loitoktok in Criminal Case No. 62 of 2020. He was found guilty and convicted. He was sentenced to serve life imprisonment. He has come to this court on appeal. In his amended Petition of Appeal filed on 5th October 2022, the Appellant has raised the following grounds of appeal:

    i. The trial magistrate erred in fact and in law by finding that the prosecution had established the ingredients of robbery with violence beyond reasonable doubt.

ii. The trial magistrate erred in law and in fact by failing to appreciate that the certificate under Section 106B can only be furnished by the person in control of the electronic devise alleged to have taken the photographs and therefore the electronic evidence produced by the prosecution was inadmissible evidence.

iii. The trial magistrate erred in law and in fact by finding that the identification parade was satisfactorily safe to convict the Appellant for the charge of robbery with violence.

iv. The learned magistrate misdirected herself in law and fact by allowing evidence of an identification parade where the accused person had been unrepresented and had not been informed of his rights during the identification parade.

v. The trial magistrate erred in law and fact by not appreciating the fact that injuries suffered by the complainant could not be attributed to the Appellant in the light of prosecution evidence and more so the medical evidence.

vi. The learned trial magistrate erred in law and in fact by failing to find that the prosecution evidence had glaring discrepancies and could not warrant conviction of the Appellant.

vii. The learned trial magistrate erred in law and fact in awarding the Appellant a harsh and excessive sentence by failing to consider the circumstances of the case and overlooking material facts.

3. The Appellant prays that the appeal be allowed and the conviction and sentence imposed by the trial court be set aside or varied as this Honourable Court may find fit.

4. The Appeal was canvassed through written submissions.

Appellant's Submissions

5. In his submissions dated 28th March 2024, the Appellant addressed the following issues:

Whether the charge, prosecution and conviction of the Appellant violated his constitutional right to fair trial?

6. The Appellant has submitted that the sections 295 as read with 296(2) of the Penal Code were declared unconstitutional by the court in Joseph Kaberia Kahinga & 11 others [2016] eKLR. He has submitted that his constitutional rights to fair trial have been violated for the reason that he was charged under the above provisions of the law.

Whether the Prosecution proved its case beyond reasonable doubt to warrant the conviction?

7. The Appellant submitted that in Jeremiah Oloo Odira v. Republic [2018] eKLR, the court explained the ingredients that must be proved for the offence of robbery with violence to occur, namely theft and the use of or threat to use actual violence. He submitted that there was no sufficient evidence to show the nexus between possession of the alleged stollen items by the complainant and the stealing by the Appellant.

8. He submitted that the evidence of the PW7, PC Quinto Odeke, is contradictory; that the evidence of PW7 on the Safaricom Mobile data does not locate the Appellant and the complainant on the same geographical location on 5th April 2020 when the offence is alleged to have been committed and therefore this evidence does not support the particulars of the offence and that this material discrepancy ought to be interpreted in favour of the Appellant.

9. He submitted that the photographic evidence by PW2 did not meet the legal requirements under section 106B (2) (c) of the *Evidence Act* and therefore this evidence is not authentic.

10. He submitted that the identification parade was not satisfactorily conducted. He cited Kinyanjui & 2 others v. Republic (1989) KLR where the court stated that:

> "The purpose of an identification parade is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify and for a proper record to be made of that event to remove possible later confusion".

11. He also cited Police Force Standing Orders that govern identification parades and submitted that the identification parade is meant to test the correctness of a witness's identification of a witness. He submitted that the police officer who conducted the parade did not know the rules because he did not inform the Appellant the purpose of the parade and he forced the Appellant to sign documents; that he was not allowed to have an advocate or friend present. He further submitted that the report of the identification parade does not indicate when the parade commenced and when it ended.

Whether the sentence meted out against the Appellant was harsh?

12. It was submitted that relying on the Joseph Kaberia Kahinga case cited above, the trial magistrate erred in convicting the Appellant against the principles set out in that decision and therefore breached the Appellant's constitutional rights and ought to be quashed. He submitted that there was no evidence of violence visited on the complainant or evidence of dangerous weapon recovered at the scene.

Respondent's Submissions

13. The Respondent submitted that to prove the offence of robbery with violence, the following ingredients ought to have been proved in order to sustain a conviction: whether the offender is armed with a dangerous or offensive weapon or instrument; whether the offender is in company with one or more other person or persons; whether immediately before or immediately after the time of robbery he wounds, beats, strikes or uses any other personal violence to any person.

14. It was submitted that proof of any of the ingredients is sufficient. It was submitted that the evidence shows that the attackers were more than one during the commission of the crime; that the complainant was injured during the robbery as confirmed by the evidence from the doctor.

15. It was submitted that the Appellant was positively identified; that the complainant has sufficient time to observe the Appellant as they travelled from Nairobi.

16. The Respondent urged this court to find that all the ingredients of robbery with violence were proved and dismiss the appeal.

Analysis and determination

17. I have read the entire record of the lower court. I have reminded myself that I am sitting on this appeal as the first appellate court and that I am required by the law to analyse the evidence afresh, re-consider the same and arrive at an independent conclusion, always aware that I did not observe the witnesses giving evidence and should give allowance to that.

18. I wish to state that the first issue argued by the Appellant to the effect that the charging, prosecution and conviction of the Appellant violated his constitutional rights is not one of the grounds of appeal listed by the Appellant. Be that as it may, this court, in analyzing the evidence adduced at the lower

court and coming up with its own independent conclusion is well equipped to determine whether the Appellant was accorded fair trial as demanded by our constitution and legislation.

19. According to the court records, the evidence adduced by the prosecution and the Appellant before the trial court show that the complainant, Benson Kamotho, PW1, a resident of Kasarani, Nairobi, took his lorry registration number KCC 232Y Isuzu to the usual place he normally parked to await customers to seek his services as a transporter. The date was 4th April 2020. He was approached by a broker (name not given) about a customer who wanted to transport maize from Entarara in Kajiado County. Benson was introduced to the customer. He identified the Appellant as that customer.

20. The Appellant told Benson that he wanted to transport 50-60 bags of maize. They negotiated the price and agreed at Kshs 28,000. The Appellant gave Benson Kshs 5,000 to fuel the lorry and they started the journey. At Emali/Loitoktok junction, the Appellant made a call and told the recipient of that call that he was on his way. He told the person he was calling that they should be prepared. Benson got suspicious of that call. As they progressed with the journey, the Appellant started dozing. Benson took a photo of him. They made a stop at Kimana where the Appellant said they should eat but Benson declined. The Appellant went away at around 3.00pm and returned around 5.00pm. They proceeded with the journey and arrived at Entarara after passing Illasit and Rombo.

21. At this time, it was getting late and Benson decided not to proceed to where the Appellant told him he had been directed to go, a certain transformer. It was 7.00pm and curfew time. Benson alighted and went to a certain shop and asked for directions to the nearest police station. He was directed to a Police Patrol Base. He asked police to help him with parking. He returned to bring his lorry and found the Appellant gone. Benson took the lorry to the Patrol Base and parked it there overnight.

22. The following morning, he drove to the place he had parted ways with the Appellant and waited. The Appellant arrived at 9.00am. The Appellant told Benson that it had rained making it difficult to drive and that they should wait. They waited until noon then drove to a place called White House. He found three men, one with a motorcycle. The Appellant told him that those were the people who would help him load the maize on the lorry. He carried the men, with the man on the motorcycle guiding them to a certain gate where the maize was supposed to be. At one point, the Appellant told Benson to alight to check a trench on the road. He alighted. He was attacked by the men and beaten. They pulled him to a shamba and beat him. The Appellant punched him on the ribs and took his watch and wallet. They tied him tightly using ropes and dumped him at a cassava farm and threatened to shoot him.

23. Benson was guarded by one man while the others left with his lorry. He managed to untie himself, confront the man guarding him and managed to escape. He was assisted in reaching the police station on Tanzanian side and reported the incident. He was given a letter by police on Tanzanian side to take to Illasit Police Station in Kajiado County. He was referred to hospital for treatment. The stolen lorry was recovered in Tanzania on 5th April 2020.

24. According to the evidence of SGT Humprey Osere, PW8, the Investigating Officer in this matter, he was called by the DCIO and informed of a stolen motor vehicle registration number KCC 232Y in Entarara and driven towards Tanzania. PW8 met Benson at the Illasit Police Station. He liaised with police from Tanzania who recovered the lorry at 11.00am. On 6th April 2020 PW8 went to Tanzania and the police in Tanzania handed the lorry to him. It was brought to Kenya on 9th April 2020. It was released to Benson after photographs had been taken.

25. The circumstances surrounding the arrest of the Appellant were that following the report of another robbery at Entarara reported at Illasit Police Station on 17th April 2020, the reportee gave the police the telephone number of the person who had hired the motor vehicle to Entarara. The telephone number

given was 0713742930. Through PC Quinto Odere of DCI Headquarters attached to Safaricom, this telephone number was traced to the Appellant who was the registered subscriber. The circumstances surrounding the arrest of the Appellant in this Appeal are similar to those in Criminal Appeal No. E053 of 2021.

26. Other than the claim by the Appellant that his constitutional rights were violated by the trial court and that the sentence is harsh and excessive, the rest of the grounds of appeal question the sufficiency of the evidence adduced before the trial court. I will therefore consider whether the prosecution proved the offence of robbery with violence beyond reasonable doubt.

27. The elements of the offence of Robbery with violence are clearly stated in Oluoch –Vs – Republic [1985] KLR thus:

> " Robbery with violence is committed in any of the following circumstances:
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> a) The offender is armed with any dangerous and offensive weapon or instrument; or
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> b) The offender is in company with one or more person or persons; or
>
> c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ....."

28. These ingredients are to be considered disjunctively and proof of one of the three elements is sufficient to find an accused guilty of the offence of robbery with violence. This means that if the prosecution proves beyond reasonable doubt that the offender was armed with any dangerous and offensive weapon or instrument, the offence of robbery with violence is proved. If the prosecution proves beyond reasonable doubt that the offender was in company with one or more person or persons, the offence is proved and likewise, if the prosecution proves beyond reasonable doubt that at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person, the offence of robbery with violence is proved.

29. In *Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007*, the Court stated stressed this point when it stated as follows:

> " ...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."

30. I have considered the evidence before me. The Appellant spent long hours with Benson, travelling from Nairobi to scene of the robbery. The Appellant was introduced to Benson in Nairobi. They negotiated the price of ferrying maize from Entarara in Kajiado County. They travelled together the whole day and made stop overs along the way at Kimana. Evidence shows that the Appellant was joined by three other men. Benson was attacked by the four men, beaten and tied up. He was left under the guard of one person while the rest took his belongings and the lorry and left.

31. Benson sustained injuries. The evidence of Lydia Kundate, PW5, the Clinical Officer who treated Benson testified that Benson has cut wounds at the frontal region and left parietal region of the head and strangulation marks on the neck. He had injuries on the lower limbs and scratches on the legs. The degree of injuries was classified as harm.

32. The Appellant has attacked the evidence on identification. It is true that the only evidence on identification was adduced by Benson. He is a single identifying witness. He was able to pick the Appellant from an identification parade. It is trite that a fact may be proved by the testimony of a single witness but such evidence must be scrutinized and subjected to great care to avoid miscarriage of justice. In Maitanyi Vs. Republic (1986) KLR 198 at 200 the court stated that:

> " Subject to 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 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 possibility of error".

33. In this Appeal, just like in Criminal Appeal No. E053, conditions favouring a correct identification were not difficult. As stated above in this judgment, the Appellant spent whole day with Benson. He met Benson the following day when they were joined by three other men. I am satisfied that Benson had all the time to see the Appellant to positively identify him. Even without the identification parade, the evidence of the prosecution is sufficient to prove the identity of the Appellant as the person who hired the services of Benson and travelled with him from Nairobi to Loitoktok where they were joined by three other people.

34. I have also noted that the Appellant, through his legal counsel, did not cross examine IP Abdullahi Aden about the issues he is raising in this Appeal in respect to the identification parade.

35. I have applied the relevant factors to be considered in determining whether the evidence on the identification of the perpetrator of an offence is free from error. I am guided by the decision in Katana & another v. Republic (Criminal Appeal 8 of 2019 [2019] KECA 1160 (KLR) (21 October 2022))Judgment), where the Court of Appeal had this to say about identification of a perpetrator of an offence:

> " 14 We will commence our analysis by briefly restating the law on the positive identification of a perpetrator of an offence. This court (Omolo, Bosire & O'kubasu JJ A) stated as follows in Francis Kariuki Njiru & 7 others v Republic [2001] eKLR: '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 (see R v Turnbull [1976]63 Cr App R 132). Among 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.'
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> 15. The relevant circumstances to be considered in determining whether the identification by a witness meets the positive threshold were identified in R v Turnbull (supra) and in Wamunga v Republic, [1989] KLR 424 as follows:
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> (a) The length of time the witness had the accused under observation and in what distance and light.

(b) Whether the observation by the witness was impeded in any way.

(c) Whether the witness had ever seen the accused before, and if so, how often.

(d) The length of time that elapsed between the original observation and the subsequent identification to the police.

(e) Whether there is any material discrepancy between the description given by the witness and the actual appearance of the accused.

36. I have satisfied myself that the Appellant was positively identified as the person who hired Benson from Nairobi and who, in company of three other persons robbed and beat him.

37. Overall, I am satisfied that the Appellant was with the company of other 3 persons when they beat up and robbed Benson. All the elements of the offence are present. There were more than one person and they used physical violence on him. It is therefore not true that the ingredients of the offence were not proved beyond reasonable doubt. On my own analysis and consideration, the offence of robbery with violence has been proved beyond reasonable doubt.

38. I have considered the issue of harsh sentence. The penalty under section 296(2) of the Penal Code is death. The Appellant was sentenced to life imprisonment for the offence of robbery with violence. I have no reason to disturb that sentence.

39. In conclusion, the Appellant was accorded a fair trial by the trial court. On my own, I have analyzed the evidence and satisfied myself that the evidence adduced before the trail court proves the offence of robbery with violence beyond reasonable doubt. Consequently, the appeal fails in totality and is hereby dismissed. The Appellant shall continue to serve the sentence. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 24TH SEPTEMBER 2024.

S. N. MUTUKU

JUDGE