Mwendwa v Republic (Criminal Appeal E083 of 2022)
[2024] KEHC 11047 (KLR) (Crim) (23 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11047 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E083 OF 2022

LN MUTENDE, J

SEPTEMBER 23, 2024

BETWEEN

SHADRACK MWENDWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Shadrack Mwendwa, 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. Particulars of the offence were that on 29th day of May, 2015 at Gilgil Road in Industrial Area within Nairobi County, jointly with others not before court being armed with a dangerous weapon namely pistol, robbed Vallentine Omuse off a motor cycle registration number KMDN 783J make TVS red in colour valued at Ksh 112,081/- and at the time of such robbery threatened to use actual violence to the said Vallentine Omuse.

2. In the alternative he faced the offence of handling stolen property contrary to Section 322(1) (2) of the Penal Code. Particulars being that on 29th day of May, 2015 in Mai Mahiu town, Nakuru County, otherwise than in the course of stealing, dishonestly received or retained one motorcycle make TVS red in colour registration number KMDN 783JH knowing or having reasons to believe it to be stolen.

3. Having denied the charges, he was taken through full trial, convicted on the main charge of Robbery with Violence and sentenced to life imprisonment.

4. Aggrieved, the appellant proffered an appeal per the amended grounds of Appeal that the charges were defective as the alleged recovered motorcycle, its registration number and mobile phone per PW2's evidence were left in doubt; no inventory was prepared; identification of the appellant was wanting; Article 50(2) of *the Constitution* was violated which was an irregularity; and, that the alibi defence put forth by the appellant was not considered.

5. Briefly, facts of the case were that on 29th May, 2025, PW1 Vallentine Omuse was going about his boda-boda business along Enterprise Road when a customer approached and sought to have luggage taken to South B. Shopping Centre. They haggled over payment and agreed at Kshs 300/-. The luggage was to be purportedly picked from Gilgil Road.

6. They proceeded to Gilgil road where he parked the motorcycle and waited. The purported customer went through a corridor and later retuned with two (2) men who wore leather jackets who mishandled him. When he sought to know from his customer what was happening, he slapped him. One of the men removed a pistol from the leather jacket, an act that made him co-operate. He left the key to the motorcycle on the dashboard. This customer took the motorcycle drove it away as his two (2) mates ran in different directions. He reported the matter to Industrial Area Police Station.

7. Since the motorcycle had a tracker it was tracked to Mai Mahiu. Investigations carried out involved the police accompanying the complainant to Mai Mahiu Police Station where he found the motor cycle that had been recovered. However, he was not shown the suspect. The person alleged to have been found in possession of the motorcycle was moved to Industrial Area Police Station and ultimately charged. The complainant identified the accused as the individual who hired his services and ultimately took away the motorcycle.

8. Upon being placed on his defence the appellant explained that he was at a hotel working then he went to play pool when police officers stormed the place and demanded for identification by giving out their identy documents and he complied. They were ordered to board the police vehicle and were taken round and round and on reaching the Police Station they were required to give Ksh 1000/-. Those who acted per their demand were released. He explained that he had not been paid hence a Police Officer at the police sentry released him, but, on his way out he encountered other officers who arrested him and placed him in cells. At midnight an officer went with papers and threatened him hence he signed. Thereafter he was moved to Industrial Area Police Station whereafter he was charged.

9. The court considered the case and reached a finding that the offence took place in broad daylight hence the complainant positively identified the appellant as the assailant. That the motorcycle having been found where the appellant was could not have been a coincidence.

10. The appeal was disposed through written submissions. It is urged by the appellant that the evidence was at variance with particulars of the charge which made it defective. On identification it is argued that the complainant did not give any physical description of the assailant.

11. That the appellant right to fair trial was compromised since he was in remand custody for a period of six (6) years, eleven (11) months prior to being convicted and that the alibi defence he put up was not rebutted.

12. The State/Respondent submits that ingredients of robbery with violence were established as the offender was armed with an offensive weapon, the individuals, were three, the offender slapped the victim; and, that the identification of the victim was free from error.

13. This being a first appellate court, I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. This duty of the court on a first appeal was stated by the court in Okeno -Vs- Republic (1972) EA 32 as follows:

> " 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 v. R [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting

evidence and draw its own conclusions - Shantilal M. Ruwala v. R [1957] EA 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower courts' findings and conclusions; it must make its own findings and draw its own 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 the witnesses - See Peters v. Sunday Post [1958] EA 424".

14. The appellant argues that being charged pursuant to the provisions of Section 295 as read with Section 296(2) of the Penal code, being a lay person left him not knowing what charge he actually faced. Section 295 of the Penal Code provides thus:

> 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.

15. Section 296(2) of the Penal Code provides thus:

> 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.

16. It was held in Johana Ndungu -Vs- Republic (1996) eKLR it was held that:

> "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."

17. The law on framing of charge sheets is provided in Section 134 of the Criminal Procedure Code which provides that:

> 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.

18. In the case of Sigilani -Vs- Republic (2004) 2 KLR480 it was stated that:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence"

19. This is a case where ingredients stated in the substantive law were captured in the particulars of the offence hence no defect is disclosed. The victim proved ownership of motorcycle registration number KMDN 783 J TVS HLX 125 CC a motorcycle that was traced at Mai Mahiu.

20. The complainant herein was the only witness when the act prescribed by law was committed. It was his testimony that the individuals were more than one. Two (2) of them wore leather jackets. One of them pulled out a pistol and he was slapped by another. A pistol has been classified as an instrument that is designed to be dangerous if used in a deadly manner. It was also his evidence that one of them struck him. All those were ingredients of the offence of robbery with violence.

21. The question to be grappled with is of identification, whether it was positive? According to the complainant the assailant approached him at 2.00pm while on Enterprises road. They rode the motorcycle up to Gilgil road where it was ultimately taken from him without his consent. Looking at the date of arrest, 31st May, 2015 after the offence was committed on 29th May, 2015 it was two (2) days later when the complainant saw the motorcycle again. Although the alternative count indicates that the motor-cycle was found on 29th May, 2015 which is a contradiction.

22. Subsequently the complainant went to the Police Station, Mai Mahiu and found the motorcycle at the verandah. He identified the same and allegedly told the police officer that the customer wore jeans, sports shoes, he had a skin rush on the right side of his neck, had a red cap that fell as he drove off with the motor-bike. The police declined to show him the suspect.

23. PW2 Senior Sergeant Margaret Maithya was assigned the matter with a view of investigating on 31st May, 2015. She moved to collect the accused with the exhibit from Mai Mahiu Police Station. She could not tell under what circumstances the appellant was arrested. On cross examination she said that the complainant identified and described the appellant. However, she did not say what exactly the complainant said.

24. This was a case of visual identification and the identifying witness was a single one. It is a principle of law that where evidence is of a single witness there is need for the court to caution itself. In Abdulla Bin Wendo & Another -Vs- Reg (1953) 20 EACA 166 followed in Roria -Vs- Rep (1967) EA 583, it was held 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 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 possibility of error."..

25. The question of testing evidence of a single witness is to establish whether evidence presented is credible. The trial court did rely on the case of Paul Etole and Another-Vs- Republic CA 24 of 2009(UR) at page 23 where it was held that:

> " The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raise problems relating to evidence and visual identification. Such evidence can bring about miscarriage of justice; But such miscarriage of justice occurring can be reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution before convicting the accused; Secondly it ought to examine closely the circumstances in which the identification by each witness came to be made; finally, it should remind itself of any specific weakness which had appeared in the identification evidence. It is true that recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made"

26. In reinforcing the argument that the complainant spent considerable time with the appellant. The trial court was of the view that he did describe the assailant and proceeded to Mai Mahiu to arrest him. That the appellant was found in a room playing pool and outside the pool table was the motorcycle.

27. In his defence the appellant stated that he was arrested with others while playing pool. What the court relied on was hearsay evidence as no witness was called from Mai Mahiu to confirm circumstances under which the motorcycle was recovered and appellant arrested.

28. In his testimony the complainant purported to give the description of the assailant but he did not relate as to how he looked in court.

29. In Bukenya -Vs- Uganda (1972) EA 549, the East African Court of Appeal held that:

> The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent. Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witness would have tended to be averse to the prosecution."

30. Without evidence of the owner/occupier of the place where the appellant was found playing pool and that of the arresting officer to establish circumstances in which he was arrested, there is an apparent doubt if indeed he was the assailant. The argument does not hold water.

31. Due to the doubt established the benefit goes to the appellant, therefore, the appeal succeeds. The conviction is hence quashed, and, sentence meted set aside. The appellant shall be released forthwith unless otherwise lawfully held.

32. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 23RD DAY OF SEPTEMBER, 2024.

L. N. MUTENDE

JUDGE