Githinji v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 13076 (KLR) (17 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13076 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E022 OF 2023

AK NDUNG'U, J

OCTOBER 17, 2024

BETWEEN

DUNCAN MWANGI GITHINJI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from original Conviction and Sentence in Nanyuki CM Criminal Case No.E2013 of 2021 - Hon. V.M. Masivo, SRM)

JUDGMENT

1. The Appellant, Duncan Mwangi Githinji, was convicted after trial of breaking into a building and committing a felony contrary to Section 36(a) as read with 279(b) of the Penal Code. The particulars were that on 14th day of July, 2021 at around 0200 hours at Maili Nane Area Nanyuki in Laikipia East Sub-County within Laikipia County, jointly with others not before court broke and entered a building namely Terminal 031 Lounge and committed therein a felony namely stealing and stole assorted alcoholic drinks and cigarettes all valued at Kshs.63,665=, three sets of television 55 inches make Sinotel valued at KSHS.150,000= and one HDMI Sprinter valued at Kshs.6,000= all valued at Kshs.219,665= the property of Godwin Muthuri Marete. On 31st August, 2022, the Appellant was sentenced to serve 6-years imprisonment.

2. Aggrieved by both the conviction and sentence, the Appellant has lodged this appeal and in his undated petition and has raised the following grounds;-

    i. That the learned Trial Magistrate erred in matter of law and fact by failing to note that the sentence passed to the Appellant was harsh and excessive;

    ii. That the Learned Trial Magistrate erred in matters of law and facts by appreciating that the Prosecution did not prove their case beyond reasonable doubts;

iii. That the learned Trial Magistrate erred in matter of law and facts by relying on evidence which was contradictory;

iv. That the learned Trial Magistrate erred in matters of law and facts by failing to note that the Appellant herein is a first offender.

v. That the Appellant prays to be present at the hearing of his appeal.

vi. That the grounds are laid down in absence of the Court's Judgment; trial proceedings and the same may be added or changed later.

3. In his hand-written amended grounds of appeal presented together with his written submissions, the Appellant raised the following additional grounds of appeal –

vii. That the learned Trial Magistrate erred in law and facts by convicting the Appellant on a case that was not proved against him.

viii. That the learned Trial Magistrate erred in law and in facts by convicting the Appellant by relying on a case that was fully investigated through fingerprint dusting of suspect vehicle.

ix. That the learned Trial Magistrate erred in law and facts by convicting and sentencing the Appellant while not weighing his strong defence against the Prosecution's case while adducing evidence of being kidnapped which matter was not disproved.

x. That the Trial Magistrate erred in law and in facts by applying wrong principle during sentencing and delivery of judgment by relying on extraneous and irrelevant maters contrary to section 169 of Criminal Procedure Code.

xi. That the Trial Magistrate erred in law and facts applying wrong principle by meting out a manifestly harsh and excessive sentence which did not consider that he was a first offender.

4. The appeal was canvassed by way of written submissions.

5. This is a first appeal. It is the duty of this court as the first Appellate court to re-evaluate the evidence and make its own findings on the culpability or lack thereof of the Appellant. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal laid down the duty of the Court on a first appeal:

> " 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 court's 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] E.A. 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 court's 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] E. A. 424."

6. The Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 stated: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and

reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

7. The court is not involved in finding evidence to support the conviction. It is involved in wholesome review of evidence and reaching its own conclusions.

8. In Kiilu& Another v Republic [2005]1 KLR 174, the Court of Appeal held 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 to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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 Court's findings and 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.

9. A good point to start from is to recap the evidence at the trial court. It is the prosecution's evidence that the complainants bar was broken into and items stolen. The breakage is confirmed by PW1, PW3, and 2 police officers who were alerted of the breakage and responded at the scene being PW4 and PW6. Even though none of these witnesses identified any of the persons who they found at the scene, they all saw a white car which car was driven off when the thieves saw the policemen coming to the scene.

10. It is the evidence of PW4 and PW6 that they shot at the car as it drove off.

11. The evidence of PW5 is that a person with a gunshot injury presented at Meru Jordan Hospital. The patient was reluctant to give his name only alleging he had been shot by a stray bullet in a livestock raid. The owner of the hospital alerted the police about the patient as is required of all victims of gunshot wounds. Police picked the patient.

12. James Mutungi testified that he had hired Motor Vehicle KBX 350 H to the Appelllant only for him to track it to Chumvi where he found it with bullet holes.

13. Pw10 testified that the fired bullet fragment sent to him for examination was fired in AK47 rifle serial no. 5429969. This is the rifle that PW6 had and fired on the material night.

14. PW12 confirmed to court that the Appellant blood sample matched the blood sample collected from the car in question.

15. In his unsworn defence, the Appellant states that he was hijacked. He was gagged and tied up. His face was covered. Suddenly he had a burst and thought it was a tyre burst. He woke up in hospital and saw a policeman guarding him.

16. I have re-evaluated the evidence recorded by the trial court. I take note that I neither saw nor heard the witnesses testify and I have given due allowance for that fact. I have had due regard to the submissions filed and case law cited.

17. Looking at the evidence, none of the witnesses identified the Appellant at the scene and neither was any of the stolen items recovered from him. The evidence on record is largely circumstantial.

18. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, the Court of Appeal had this to say on circumstantial evidence:

    a. "However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial. '"Further, the conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. Suffice to mention Abanga alias Onyango v. Republic CR. App NO. 32 of 1990(UR) in which this court held as follows:"It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else."And in Sawe Vs. Republic [2003] KLR 364, the Court of Appeal amplified on the above thus:"In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused."

19. Decidedly, this case turns on circumstantial evidence as none of the witnesses identified the Appellant at the scene. The vehicle that was seen by witnesses at the scene is the same vehicle that was recovered at Chumvi abandoned. The said vehicle had been shot at by pw4 and Pw6 and it transpires that the vehicle found at Chumvi had bullet holes. It is also a fact that the Appellant had hired the subject vehicle at the material time.

20. The bullet fragment sent for examination by a ballistic examiner turns out to be one shot from PW6's rifle that he had on the night. The blood on the passenger seat matched the Appellant's. The Appellant on visiting hospital was reluctant to disclose his identity.

21. All these facts put together place the Appellant at the scene of crime and in the commission of the offence. It is evidence that irresistibly points at the guilt of the Appellant and is incompatible with his innocence.

22. In countering that evidence, the Appellant testified that he was hijacked. He seems to suggest that he was shot while in the hands of hijackers. It is not explained in what circumstances that happened or even how he went to Jordan hospital. In light of the evidence on record, his narration cannot possibly be true. The chain of events tie him tightly to the commission of the offence.

23. As regards sentence, it is trite law as set out by the court of Appeal in Shadrack Kipchoge Kogo vs. Republic Criminal Appeal No. 253 of 2003 that

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into an account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

24. In Bernard Kimani Gacheru vs. Republic [2002] eKLR the Court of Appeal restated that:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

25. The trial court is faulted for taking into account irrelevant considerations and extraneous matters in order to (sic) mete out a harsh and excessive sentence of 6 years to a first offender.

26. I have considered the ruling on sentencing in the lower court. The court meticulously laid out all the considerations and matters it took into account. None was irrelevant. I have no basis upon which to interfere with the sentence.

27. With the result that the appeal herein lacks merit. It is dismissed.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF OCTOBER, 2024

A.K. NDUNGU

JUDGE