Kanjori v Republic (Criminal Appeal E047 of 2021) [2024] KEHC 16644 (KLR) (22 October 2024) (Judgment)

Neutral citation: [2024] KEHC 16644 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E047 OF 2021

JL TAMAR, J

OCTOBER 22, 2024

BETWEEN

DANIEL MERRILE KANJORI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The appellant herein was charged, convicted and sentence to life imprisonment by the lower court for the offence of Robbery with Violence Contrary to Section 296 (2) of the penal code. The particulars were that on 12th day of April 2018, at Rombo in Kajiado South within Kajiado County jointly with others not before the court being armed with dangerous weapons namely swords, robbed Timothy Timayo Katampoi of Motor Vehicle Registration No.KCM xxxJ Make Toyota Landcruiser valued at Ksh. 7.8 million, one wrist watch, one iPhone 4S, one mobile Phone X-tigi, one chain and cash ksh. 16,000 all amounting to Ksh. 7.863,500 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Timothy Timayio Katampoi.

2. Dissatisfied with the Conviction and Sentence, the appellant preferred the present petition of appeal filed on 25th October 2021on the following grounds;

   i. That the trial magistrate erred in law by convicting the appellant on a defective charge

   ii. That the trial magistrate erred in law and in fact in not properly directing her mind to the degree, standard of proof and the law relating to the standard of proof

   iii. That the trial magistrate did not properly analyse all the evidence on record and in her selective analysis failed to form the necessary balanced view and this prejudiced the appellant case.

   iv. That the learned magistrate was speculative in her analysis and findings and did not take into account all the facts, circumstances and the crucial evidence relating to the case.

v. That the learned trial magistrate failed to consider the obvious discrepancies, contradictions and inconsistencies in the prosecution case as to the identity of the appellant given the two different identification card numbers

vi. That the trial magistrate erred in law by shifting the burden of proof to the appellant

vii. That the learned trial magistrate erred in law and fact by relying on inadmissible evidence without asking the appellant whether he objected to their production or not and without proof as to whether they were legally obtained

viii. That the evidence of PW1 the complainant ought to be taken with a lot of caution and or treated with as that of an accomplice.

ix. That the learned trial magistrate erred in law and in fact in relying on the evidence of a single witness on identification.

x. That the trial magistrate erred in law and in fact in not appreciating that the case was poorly investigated and crucial witnesses and evidence was not availed

xi. That the trial magistrate erred in law and in fact by failing to properly direct her mind in considering the appellant defence especially regarding the first information report made by the complainant and or dismiss the same

xii. That the conviction was against the weight of the evidence on record

xiii. That in all circumstance s of this case, the sentence was harsh and excessive and the court should consider the same.

3. I am required as a first appellate court to revisit and re-evaluate the evidence afresh, assess the same independently and make my own conclusions bearing in mind the limitations inherent in the appellate process that I neither saw nor heard the witnesses testify, and cannot therefore comment on their demeanour an important aspect in a criminal trial. See Okeno vs Republic [1972] E.A 32. And further the Court of Appeal case of *Mark Oiruri Mose vs. Republic* (2013) eKLR

Prosecution case

4. The prosecution called seven witnesses to establish the charge against the accused person. PW1 Timothy Timayio Katampoi testified and told the court that he was tour Driver/guide and a director of Campus and Loip safaris based in Narok and Nairobi respectively. He recalled that on 9th April 2018, he received a call from one Dan Kanchori who told him that he had tourist visitors who were to be taken to Jomo Kenyatta International Airport (JKIA) from Taveta. As he operates a tour guide business, he sent him a photograph of his vehicle to establish if it is suitable for the purpose. The caller is said to have decline and requested for another vehicle. The witness called his friend Erick Ngeno PW2 who gave him motor vehicle reg no KCM xxxJ Toyota Landcruiser which Dan (appellant herein) found fit for purpose. He paid via M-pesa a deposit of Ksh. 20,000 to the witness phone number 0721xxx316 using cell phone number 0710xxx672 and the name Daniel Merille Kanchori appeared in the transaction. The witness got the vehicle from Erick Ngeno and drove to Taveta arriving at 9:00 pm and met the appellant in Green Park Hotel where they had drinks. He woke up the following day and met the appellant who told him that it had rained the previous day and that the bridge had been swept away and the visitors couldn't make it. He suggested that they travel the following day on 12th April 2018. They spent the whole day together. The appellant convinced the witness that since it had rained, they leave the following early in the morning and pick the visitors in Rombo due to inaccessibility of the road.

5. The witness and the appellant left at around 5:00 am in the morning and along the way got stuck and were helped by three young men who asked for a lift. One of the young men told the appellant and the complainant that he had seen some European on his way from Taveta and led them in that direction. The complainant, anxious that the visitors were taking long or they were not reaching where they were, asked the appellant to inquire from them where they had reached. One of the three young men who had been given lift moved to the front seat and sat next to the driver and one of the two behind placed a knife on the diver's neck from behind and asked him if he wanted to die. The complainant asked the appellant what was going on! The appellant instead got out of the vehicle as if to relieve himself and came back later and took charge of the vehicle. The complainant was ruffed up, beaten, his hands and legs tied and pushed to the back seat. He was forced to take some drink mixed with soda after which he lost consciousness. He was taken to a house and later put on a motor cycle and dumped and abandoned in a forest.

6. In cross-examination, the witness told the court that he had known the appellant before as they had tried to do business together without success. That the appellant had told him to carry some people on the road as they were known to him.

7. PW2 Erick Ngeno confirmed that the complainant had called him and requested for a Landcruiser to take some visitors from Taveta to JKIA. He went for motor vehicle reg no KCM xxxJ on 10th April 2018 and continuously kept in touch with him all the way until he lost contact on 12th April 2018 around 8:00pm. He tracked the vehicle to a place called chuthi and travelled the following to Illassit police station where they also found the appellant there who explained to him what had happened. He also visited Green Park Hotel where the appellant and complainant had spent two nights and confirmed that the reservation was made by on Dan.

8. PW3 Abraham Hassai was the witness who took the complainant to Illasit police station and also to the hospital from treatment.

9. PW4 Josphine Saiyanka a finger print assistant with National Registration Bureau Loitoktok Sub-County testified and confirmed to the court and upon request from the SCCIO Kajiado south that ID No 251xxxx92 was allocated to Merrile Daniel Ole Kanjori but could not be produced since he had already been previously issued with ID No 215xxxx74 bearing the name Saiputari Leasainyoie ole Maimai. The finger prints on the said ID Numbers are one and the same person, the appellant.

10. PW5 Theuri Kikando stated that he was the one who took the complainant to his house where he slept until the following day after he had established that he had been drugged and robbed by people he had given lift after his vehicle got stuck in mud and they helped push it out. He assisted the complainant call his relative.

11. The investigating officer, PW7 No 62xxx Sgt Julius Langat told the court that he was assigned a robbery with violence matter to investigate. He established that a report had been made at Illasit police station that the complainant had been robbed of motor vehicle reg no KCM xxxJ Toyota Landcruiser. He recorded witness statements and received information that the appellant had been arrested and detained in Taveta and recorded his statement. He took the suspect to BuruBuru police station where an identification parade was conducted and appellant positively identified although according to him the identification parade was not necessary as the complainant had known the appellant before the incident. He also did the call data analysis in respect of the appellant phone which established that he was at Taveta area on 9th April 2018 and Manzoni on 12th April 2018. The call data from Safaricom showed several call and short messages communication between the appellant and the complainant.

Defence

12. It is on the basis of the evidence tendered by the prosecution that the learned magistrate found that the appellant had a case to answer and placed on his defence. He gave sworn testimony and told the court that he names is Saiputari Lesainyoie Ole mamai. He told the court that on 22nd July 2018, he saw his photo under the name Daniel Merille circulating that he was being sought by the police and went to Hardy police station and made a report. It was after a while that he was arrested and placed in custody. On 25 July 2018 he met a CID officer from Taveta and Erick Ngeno whereupon he was transferred to Taveta police station and charged in court on 8th August 2021. He was earlier before being charged taken to Buru Buru police station and identification parade done and also charged in Makadara law court for a different offence. It was from Makadara that he was picked by officers from Illassit police station and the presented charged preferred.

13. The appeal herein was canvassed by way of written submissions by the appellant and the state. I have given due considerations to the respective parties' submissions and will bring them to bear in this judgement.

Determination and Disposition:

Issues:

1. Whether the appellant was properly identified/recognized as the attacker.
2. Broadly whether the prosecution has proved the offence with which the accused is charged beyond reasonable doubt

14. The appellant singled out the issue of identification/misidentification stating that he was mistakenly identified for the assailant against all available evidence to the contrary. The appellant contend that he is not Daniel Merrile Kanjori but Saiputari Lesainyoei ole mamai whose identity card number is 215xxx74. This issue was admirably dealt with by the trial court which found as a fact that Daniel Merrile Kanjori and Saiputari Lesanyoei ole mamai refer to one and the same person. PW4 Josephine Saiyanka an officer from the National Bureau of Registration confirmed in court that the reason why there was no physical identification Card in respect of Daniel Merrile Kanjori was because there was already in existence a physical identification card in the name of Saiputari Lesanyoei Ole Maimai and therefore there cannot be issued two identifications cards bearing the same person finger prints. The finger prints on both are for one and the same person.

15. Secondly, there is sufficient evidence from Safaricom print-out that PW1 received ksh. 20,000 from one Daniel Merille Kanjori as down payment for hiring the tour vehicle and it was the same person that PW1 met and spent two to three days with at Green Park Hotel in Taveta. The appellant faults the magistrate for questioning why the appellant had not raised the issue of his identity early during the trial. Indeed, the appellant raised this issue for the first time in his defence which he ought to have raised at the time of taking plea by simply stating that he was not the person whose names appear in the charge sheet. This notwithstanding, the prosecution sought to establish the identity of the person arrested and wrote a letter to National Registration Bureau and established that ID No. 251xxx92 was allocated to Daniel Merrile Kanjori but could not be issued to him physically as he had previously been issued with another ID No under the names Saiputari Lesainyoei Ole Maimai and that two names refer to one and the same person being the appellant herein.

16. As regards the identification parade which the appellants contend was not done in accordance with the law, I find this ground without merit. The trial court accepted that the appellant was known to the

complainant long before the robbery incident as they used to work together as tour guide. This fact was disputed by the appellant. However, assuming the witness had not known the appellant before, the period spent with the complainant was sufficient to enable a positive recognition. The complainant spent about three days with the appellant.

17. The Court of Appeal in the case of *Wamunga vs Republic* (1989) KLR 426 stated as under; -

> " It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

18. It was also held in *Nzaro vs Republic* (1991) KAR 212 and *Kiarie vs Republic* (1984) KLR 739 by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction. In *R –vs- Turnbull & Others* (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court said:

> " ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

19. I am satisfied like the court below that the appellant was well known to the complainant and also that he had spent a considerable time (3) days with the appellant as to eliminate a possibility of mistake in recognition. Therefore, the recognition of the Appellant as the attacker was not in error.

Whether the prosecution proved the offence beyond reasonable doubt:

20. The offence of robbery with violence is a creation of Sections 295 and the sentence prescribed in 296(2) of the *Penal Code* which provides;

    295. 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

21. From the foregone legal provisions, it can be seen that the offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the violence.

22. The offence termed Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. The ingredients for the offence of is, Theft and the use of or threat to use actual violence.

23. On the other hand, the offence termed robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

    (a) The offender is armed with any dangerous or offensive weapon or instrument, or

    (b) The offender is in the company of one or more other person or persons, or

    (c) The offender at or immediately before or immediately after the time of the robbery wounds, beats, strikes or uses any other personal violence to any person.

24. In the instant case there is evidence that the attackers used actual violence during the commission of the offence. They were armed with knives which fits the description of dangerous weapon in the circumstances of this case. Additionally, forcing the complainant to take a mixture of water and soda which resulted in him losing consciousness, in my view constitutes actual physical violence on the complainant as was tying of his hands and legs. There was evidence that the victim was taken to the hospital for treatment.

25. There is also uncontroverted evidence that the motor vehicle reg no KCM xxxJ was stolen and never recovered. Other items listed in the particulars of the charge sheet never recovered.

26. In the circumstances, I find the appeal by the appellant against conviction without merit and dismiss the same.

Appeal against sentence

27. The appellant submitted that the sentence imposed by the magistrate court of life imprisonment was harsh and excessive and urged the court to review and set aside the same taking into account the six (6) years already served.

28. The High Court in the case of *James Kariuki Wagana vs Republic* [2018] eKLR, Prof. Ngugi J (as he then was) observed that while the death sentence is the maximum penalty for both murder and robbery with violence, the Court has the discretion to impose any other penalty that it deems fit and just in the circumstances.

29. The Court of Appeal has had occasions to consider the mandatory nature of sentences under section 296(2) of the penal code and reduced sentences imposed on convicts for the offence of robbery with violence. For instance, in *Wycliffe Wangusi Mafura v Republic ELD CA* Criminal Appeal No. 22 of 2016 [2018] eKLR, the Court of Appeal set aside a death sentence and substituted it with a prison sentence of 20 years. In Julius Kitsao Manyeso vs Republic criminal appeal No 12of 2021, the court of appeal declared the indeterminate nature of life sentence as unconstitutional. And in *Evans Nyamari Ayako vs Republic*, Criminal appeal No 22 of 2018 the court appeal translated the sentence of life imprisonment that was imposed upon the appellant to a term sentence of 30 years

30. In the Circumstances, I am of the view that the life sentence meted out by the trial court though perfectly legal, ought to be reduced. The life sentence imposed by the trial court is therefore set-aside and substituted with a term sentence of 30 years with effect from the date of his arrest on 24th July 2018.

DATED AND DELIVERED AT KAJIADO THIS 22ND DAY OF OCTOBER 2024.

JOHN T. LOLWATAN

JUDGE