Lelehan & another v Republic (Criminal Appeal E037 of 2023)
[2024] KEHC 13017 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13017 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E037 OF 2023

JN ONYIEGO, J

OCTOBER 11, 2024

BETWEEN

BENJAMIN MUSILI LELEHAN ..... 1ST APPELLANT

DANIEL KIMWELE JOHN ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. Mbungi Stephen (C.M) in Garissa CMCC No. E696 of 2022 delivered on 15.11.2023)

JUDGMENT

1. The appellants were charged with robbery with violence contrary to Section 296(2) of the Penal Code. It was alleged that on 29.10.2022 at about 1810hrs at Samira mosque area, Madogo location Bangale sub county within Tana River County willingly and unlawfully while armed with a knife and a panga respectively jointly robbed one David Muthami Mutemi cash money amounting to Kes. 53,000/- and immediately before the time of such robbery used actual violence to the said David Muthami Mutemi.

2. The prosecution called 4 witnesses while the appellants gave unsworn testimony and did not call any witnesses. The appellants were tried for the offence and convicted on the charge of robbery with violence and subsequently sentenced to death.

3. Having been dissatisfied with the conviction and sentence they filed this appeal. In their amended petition dated 05-02-2024, the appellants cited the following grounds.

    i. That the trial court erred in law and fact by denying the appellants a fair trial process when they were not issued with advocates during the hearing process.

ii. The trial court erred in matters of law by failing to find that the charges preferred did not meet the standard of evidence on record.

iii. The trial court erred in matters of law by convicting and thereafter sentencing the appellants when the prosecution did not prove its case.

iv. The trial court erred in fact and law when it failed to consider the appellants' defence.

v. The trial court erred in law and fact by relying on section 296(2) of the Penal Code in convicting and subsequently sentencing the appellants.

vi. The trial court erred in law and fact when it acted on a fatally defective charge sheet to convict the appellants.

vii. The trial court erred in law by meting out a harsh and manifestly excessive sentence.

viii. The trial court failed to invoke section 333(2) of the Criminal Procedure Code when sentencing the appellants.

4. Ultimately, the appellants prayed that their appeal be allowed.

5. The appeal was canvassed by way of written submissions. The appellant submitted that the trial court failed to consider the impact of the contradictions in the initial report made by the complainant to the police. That the investigation diary showed that the initial report via OB No. 28/29/10/2022 involved threats made against one David Mutemi, the complainant herein and further, a report via OB No. 27/30/10/2022 the complainant made another report stating that after making the previous report, upon returning home, he found many people had entered the shop together with the 2nd appellant and some items together with an mpesa bag containing Kes. 53,000/- were stolen. It was averred that the allegation of Kes. 53,000 having been stolen was simply an afterthought and the same could not be imputed on the appellants for the reason that after the alleged incident, many people allegedly got inside the shop.

6. It was further contended that, the complainant did not give a reason why he made two different reports. That the first report formed the true picture of events and that the subsequent statements were just a mere afterthought. To that end support was drawn from the cases of Ali Bakari Masai vs republic [2019] eKLR and Titus Kathukumi Peter & 2 Others vs Republic [2019] eKLR where the importance of the first report to the police was overemphasized.

7. counsel urged that the prosecution's case was full of contradictions and inconsistencies more so in regards to the alleged amount of money that was in the shop at the alleged time of the incident. That had the trial court subjected the evidence by the prosecution to a thorough examination, it would have found that the said evidence could not support the conviction. It was urged that PW1 stated that after the incident, he left for the police while in real sense, the mpesa transaction book showed that after the incident, PW1 attended a customer by the name Hindi Yusuf Abdalla who withdrew Kes. 100/-. It was averred that PW1 and PW2 did not mention the presence of PW3 and further, it was curious that only PW3 raised alarm while PW1 and PW2 did not.

8. On the ground that the prosecution's case was not proved beyond any reasonable doubt, counsel urged while relying on the case of Anthony Mutua Nzuki vs Republic [2018] eKLR, that for the offence of robbery to be proved, there must be evidence of theft by the person charged. To that end, it was argued that the evidence adduced by the prosecution was below par as the offence of theft was not proved.

9. It was submitted that the trial court erred when it failed to consider the defence of the appellants thus shifting the burden to the appellants to prove their innocence hence completely disregarding their evidence which was persuasive. That had the trial court taken into consideration the appellants' evidence, he could have reached a different finding.

10. It was argued that the appellants were charged and convicted on a provision that had been declared a nullity. That section 296(2) was declared unconstitutional by the High Court sitting as a constitutional bench in Joseph Kaberia Kahinga & 11 others vs Attorney General [2016] eKLR. Therefore, a conviction based on a provision of law that has been declared unconstitutional cannot stand and should thus be overturned.

11. It was submitted that the appellants' rights as envisaged in Article 50(2) (g) and (h), were infringed hence the trial at the lower court was thus unfair. They relied inter alia on the case of Chacha vs Republic Criminal Appeal E027 of 2022 where the court was of the view that the accused person's right to a counsel cannot be emphasized. That the appellants were not informed or given legal representation thus the same occasioned an injustice against them. In conclusion, counsel submitted that the court ought to have weighed the conflicting evidence and reach a finding of acquittal.

12. On sentence, it was contended that the same was not only harsh but also manifestly excessive. That the same was not proportional to the offence as there were no aggravating circumstances to warrant the sentence meted out by the trial court.

13. The respondent did not file submissions.

14. As the first appellate court, I am duty bound to re-evaluate and re-consider the evidence presented before the trial court and draw my own conclusions. However, I must bear in mind that I neither saw nor heard the witnesses when they gave their testimonies. Thus, demeanor is best observed by the trial court (Okeno vs Republic [1972] E.A 32).

15. PW1, David Muthami Mutemi testified that on 29.10.2022 at about 6.00 p.m., he was at his shop when the 1st appellant sought to deposit Kes. 500/- into his mpesa line. That after loading the said amount, the name Benjamin Lenn popped up but the 1st appellant did not leave as he claimed that he had asked the witness to load a sum of Kes. 300/- only. At that point he told the 1st appellant to withdraw an amount of Kes. 200 but instead he started abusing and threatening him as he left.

16. He told the court that, after a period of about five minutes, the 2nd appellant arrived carrying a panga while the 1st appellant had a knife. That the 2nd appellant lifted the panga into a position like he was about to cut him thus prompting him to run through the rear door for safety. Upon peeping to see what was happening, he realized the appellants had left with a blue bag which contained mpesa cash money Kes. 53,000/- and several items from the shop. He thus proceeded to report the matter at the police station.

17. PW2, Ruth Kimala Kiminza, wife to PW1 recalled that on the material day, she was in the shop with PW1 when the 1st appellant, a person well known to her requested PW1 to deposit an amount of Kes. 500/- to his mepsa account. Shortly thereafter, the appellant stated that he had only wanted an amount of Kes. 300/- deposited. To meet his request, PW1 told him to withdraw an amount of Kes. 200/-. The 1st appellant murmured and thereafter left but after about five minutes, the 2nd appellant joined the 1st appellant. The 2nd appellant had with him a panga and while there, teased PW1 in a manner that he would attack him. After some few minutes, PW1 managed to free himself by running to the rear room.

18. While pw2 was busy preventing the 1st appellant by closing the door, he drew out a knife which prompted her to run away. Upon reaching safety and peeping through the window, she saw the 2nd

appellant carry away a blue bag which contained Kes. 53, 000/-.After the appellants had left, they went back to the shop and found several retail items scattered on the floor.

19. PW3, Fundi Sinema testified that on the material day at 6.00 p.m., he was at David's shop at Madogo town when two men entered into the shop. The duo positioned themselves near the door as the 2nd appellant had a panga while the 1st appellant, had a knife. That the 2nd appellant informed PW1 that they had arrived thus prompting PW1 to scamper for safety. The 2nd appellant lifted his panga as the 1st appellant tried to push him into the shop but instead, he managed to run away. It was his evidence that he saw the 2nd appellant running away while carrying a blue bag. That after sometime, PW1 told them that the thugs had stolen Kes. 53,000/- meant for mpesa. On cross examination, he stated that he saw the appellants herein carry out the said attack.

20. PW4, No. 11106 PC Barrack Mweu testified that he was the investigating officer in this case. He reiterated the evidence of PW1 and PW2 and further stated that he recorded witnesses' statements upon completion of investigations. It was his case that he visited the scene and noticed the items in the shop disturbed. That the mpesa statement showed that the 1st appellant had deposited Kes. 500/- into his mpesa account. He took photos of the shop and mpesa statement as exhibits which he produced as Pex. 1A-D. On cross examination, he stated that the appellants were armed with a panga and a knife at the time of the attack. He stated that he did not investigate a case of malicious damage but that of the offence herein.

21. In his defence, DW1, Benjamin Musili in his unsworn statement stated that he worked as a casual worker at a construction site. That on the material day, he was at work when he received a call from his wife informing him that their child was unwell. Realizing that he did not have money, someone lent him Kes. 300/- but gave him Kes.500/- to look for change. He visited an mpesa shop where after giving the attendant instructions on what he wanted, the attendant instead loaded the whole amount of Kes. 500/- stating that his brother owed them an amount of Kes. 200/-. Upon refusing to have the Kes. 200/- deducted, the same was returned to him and thereafter he left. That he was later arrested over claims he was not aware of as he denied committing the offence herein.

22. DW2, Daniel Kimwele John stated that on 01.11.2022, a lady whom he used to school with approached him and told him his wife had taken some items from her shop and that he was to pay for the said amount. He claimed that the investigating officer asked him for a bribe so as to discontinue investigating this case, a proposal he turned down. While denying the charges herein, the appellant stated that the date the offence herein allegedly occurred as per PW4's statement was different from the one stated by the complainant.

23. I have perused the lower court record, written submissions and authorities relied upon by both parties. The broad issues arising herein for determination are:

    i. Whether the prosecution proved its case beyond reasonable doubt.;

    ii. What sentence is appropriate to the offence in the circumstances?

24. Section 295 of the Penal code defines robbery as:

> 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.

25. On the other hand, Section 296 (1) stipulates that:

Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

26. On the other hand, 296(2) stipulates that:

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.

27. In this case, PW1 enumerated on how while at his shop, the appellants attacked him and further made away with Kes. 53,000/-. The appellants in rebuttal urged that in as much as the appellants visited the complainant's shop, there was no proof that the alleged offence was committed as two conflicting reports were made by the complainant.

28. It is not in dispute that indeed, the complainant made a report to the police station via O.B numbers 28/30/10/2022 and 28/29/10/2022 reporting of incidents where two people well known to him threatened him with a panga with an intention to kill him; and an incident of threatening where the appellants together with other people entered the complainant's shop after the occurrence of the incident thus leading to stores in the shop being damaged and an amount of Kes. 53,000/- stolen.

29. The appellants thus urged that there was no sufficient proof that they stole Kes. 53,000/- as the same was simply an afterthought as it was contained in the second incident report at the police station. To that end, this court was urged to free the appellants as the charge as enumerated on the charge sheet was defective.

30. It is trite that the prosecution is endowed with the authority to institute and undertake criminal proceedings against any person before the court in respect of any offence alleged to have been committed.

31. A reading of article 157 (10), stipulates that:

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this article the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

32. Having the above in my mind, the question that crops up is whether the prosecution erred in preferring the charge of robbery with violence against the appellants. My answer is no and I say so for the reason that the prosecution is bestowed with the powers and authority to charge as the onus would ordinarily remain on them to prove the elements of the offence preferred. [See Woolmington vs DPP (1935) AC 462].

33. The Court of Appeal in Criminal Appeal No. 300 of 2007, Dima Denge & Others v Republic (2013) eKLR, 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." The claim that the charges are defective does not arise as there is no ambiguity in the manner in which the charges were drafted.

34. From the above, the prosecution ought to have established that indeed, the appellants robbed the claimant and, at or immediately before or immediately after the time of stealing, used or threatened to use actual violence on the complainant.

35. The question that I therefore ask myself is whether indeed something and in this case, Kes. 53,000/- was stolen from the complainant. From the proceedings herein, PW1, PW2 and PW3 testified that they saw 2nd appellant leave the scene with a blue bag which contained Kes. 53,000/-. The foregoing notwithstanding, and having in mind that two reports were made by the complainant in two different days in regard to the incident herein, could it be authoritatively be said that indeed the appellants robbed the complainant of the said money.

36. One wonders why the complainant together with PW2 and PW3 even after seeing that the 2nd appellant left with the blue bag that had the said money, only made a report on the same on the following day and not the very day that he reported the matter to the police and/or when the incident happened. To be precise, it remains a mystery why the complainant failed to remember at the time of the making of the first report, to outrightly report that he saw the 2nd appellant carry away the bag that contained the Kes. 53,000/-, money he had worked so hard to earn.

37. The same situation was further complicated by the fact that there were some other people in the said shop and therefore, it could not authoritatively be said that it was only the appellants who could have taken the said money. In my view, the prosecution witnesses were not truthful when they stated that they saw the 2nd appellant carry away the blue bag with the money.

38. It therefore follows that the offence of robbery with violence was not established as stealing being an integral element of the offence was not proved.

39. Having regard to the fact that the first report by the complainant was to the effect that while armed, the appellants while at the said shop, threatened him, it is my view that the most appropriate charge that could have been preferred is the offence of preparation to commit felony. [See the Court of Appeal decision in the case of Rashid Mwinyi Nguisya & Another vs Republic [1979] eKLR and section 179 of the CPC].

40. Section 308 of the Penal Code states that:

    (1) Any person found armed with any dangerous or offensive weapon in circumstances that indicate that he was so armed with intent to commit any felony is guilty of a felony and is liable to imprisonment of not less than seven years and not more than fifteen years.

    (2) Any person who, when not at his place of abode, has with him any article for use in the course of or in connexion with any burglary, theft or cheating is guilty of a felony, and where any person is charged with an offence under this subsection proof that he had with him any article made or adapted for use in committing a burglary, theft or cheating shall be evidence that he had it with him for such use.

41. In P vs Murray (14 Cal. 159) it was held that:

> "Preparation consists in devising or arranging the means or measures for the commission of the offence; the attempt is the direct movement toward the commission after the preparations are made."

42. The Court must be convinced that the accused person had begun to carry out their intention to commit a robbery in a way suitable to bring about what he intended to achieve. In Criminal Appeal 55 of 2019 Suleiman Juma vs Republic [2020] eKLR the court held that:

> it is intrinsic that the prosecution shows the felonious intent on the part of the appellant or the preparation to execute felony. This can be seen through the circumstances under which the appellant was arrested.

43. The above notwithstanding, it was not denied that the appellants were in the locus quo during the material time in question. It was also not controverted that they were persons well known to PW2, the wife of PW1 and that they were armed. Therefore, the identity of the appellants was not in doubt as the appellants also conceded to the same. [See the case of Wamunga vs Republic (1989) KLR 424 at 426].

44. In as much as the appellants denied being responsible for commission of any offence at the shop, the exhibits by the investigating officer showed otherwise. The mess left in the shop could not have happened had the appellants simply carried out the business that took them there. Clearly, from the facts herein and apart from depositing the said money in the phone, the appellants had an ulterior motive which they desired to carry out. As such, the argument that their defence was not considered is not viable as the prosecution evidence looked more cogent. As such, grounds 1,2,3,4,6 and 7 are found to be without basis and are hereby dismissed.

45. As to failure to get free legal representation, the same is not mandatory but subject to the trial court's assessment on what prejudice the appellants were likely to suffer in the absence of legal representation. In any event, the appellants did not request for legal representation.

46. I therefore substitute the charge of robbery with violence with that of preparation to commit a felony and therefore set aside the death sentence and replace the same with 3 years' imprisonment.

47. From the record, I note that the appellants stayed in lawful custody upon arrest and during the hearing of this matter. They were arrested on 31.10.2022 while they were sentenced on 15.11.2023. It therefore follows that they stayed in lawful custody for a period of 1 year and 15 days. It is against the foregoing that I order that a period of 1 year and 15 days be deducted from the 3year term of imprisonment.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH OCTOBER, 2024

J. N. ONYIEGO

JUDGE