Juma & another v Republic (Criminal Appeal 102 of 2016)
[2023] KEHC 650 (KLR) (Crim) (7 February 2023) (Judgment)

Neutral citation: [2023] KEHC 650 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 102 OF 2016

DO OGEMBO, J

FEBRUARY 7, 2023

BETWEEN

MOHAMED ALI JUMA ..... 1ST APPELLANT

JAMES MACHARIA WAMBUI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being a consolated appeal (No. 102 of 2016 and 106 of 2016) arising from the original conviction and sentence in criminal case No. 822 of 2014, in the Chief Magistrates Court at Nairobi, Hon. Nyangena, PM, and Judgment delivered on 6.7.2016)

JUDGMENT

1. The 2 appellants Mohamed Ali Juma And James Macharia Wambui, were charged in the above case with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on 30.3.2014 along Kipande Road in Nairobi with others, robbed Sharon Matumbi Masariru of 1 laptop, make HP, serial Number CNV0182P10 valued at Ksh.56,000/=, 2 mobile phones, make Techno Ps Serial 3582490505783 valued at Kshs. 6,999/= and 1 Nokia phone valued at Kshs. 3,499/= 1 laptop charger valued at Kshs.4000/= 1 Barclays Bank Card valued at Kshs.1000/= and 1 cooperative Bank ATM card valued at Ksh.1,000/= and cash Kshs.1,700/= all valued at Kshs.74,198/=.

2. Upon fall trial, the 2 appellants were both convicted of the offence as charged. On 6.7.2016, both the 2 appellants were sentences to death. They have appealed to this court against the said conviction and sentence.

3. In the petition of appeal filed by the 1st appellant on 28.7.2016, the appellant raised the following grounds.

    1. That the learned trial magistrate made a crucial error in law by failing to scrutinize the entire evidence as was duty bound to as a first appellate court and as a result reached a decision which was unsatisfactory.

    2. That the learned trial magistrate made a crucial error in law by failing to re-evaluate the evidence given, not considering that the first report was not given on the effect of appellant's descriptions.

    3. That the learned trial magistrate made a crucial error in law by failing to observe that the circumstantial evidence brought by the prosecution contained some co-existing circumstances which weakens the inference of guilt.

    4. That the learned trial magistrate made an error in law by failing to observe that the provisions of section 169(1) of the Criminal Procedure Code was not adhered to in relation to the defence statement.

    5. That the learned trial magistrate erred in law by failing to observe that the identification evidence of PW1 and PW2 during the alleged crime occurred in unfavourable conditions.

    6. That the learned trial magistrate erred in law by convicting the appellant in reliance on the identification parade evidence, which was flawed.

4. The 2nd appellant in his memorandum of appeal, raised exactly the same grounds, only adding one additional ground, at No. 5, that,

    " The learned trial magistrate made an error in law by failing to observe that the stolen items mentioned were not recovered in his possession nor conduct search in his room for confirmation of the appellant's involvement in that incident."

5. This appeal was canvassed by way of written submissions by agreement of the parties. Each party duly complied and filed their set of submissions.

6. In the submissions of the 1st appellant, the 1st appellant filed an amended grounds of appeal. This was without leave of the court. Based on the same the 1st appellant submitted that based on *Okeno versus Republic* (1973)eKLR 32, this court as 1st appellant court, is to exhaustively and independently re-evaluate the evidence on record and come to adjust decision.

7. First, that the trial of 1st appellant was procedurally unfair since there was no complete disclosure of the prosecution evidence and the trial court did not inform the appellant of his right to representation. He relied on the cases of *Pett Versus Greyhound Racing Association* (1968)2 ALLER 545 and Reginald Heber Smith, *Justice and poor* (Palterson Smith Publishing, 30 Ed 1972). Also the Kenyan case of *Kenga Hisa versus Republic* (2020)eKLR, that;

    " In my view given our history, we must not lose sight that a large part of our citizenry are not endowed with knowledge of how courts work. It is for Judges and magistrates to ensure minimum rights enshrined in the *constitution* particularly to a class of defendants like the appellant who seldom might find themselves on the wrong side of law are protected and enforced."

8. The appellant, relying on *Christopher Njeru Githinji Versus Republic* (2020)eKLR, submitted that he was not provided with witness statement to assist him prepare his defence. Also *Morris Kaberia Versus Republic* (2017)eKLR and *Republic Versus Raphael Muoki Kalungu* (2015)eKLR, and *Thomas Patrick Gilbert Cholmondeley Versus Republic* (2008)eKLR. He otherwise admitted being supplied with statements of 3 witnesses out of 5.

9. The appellant also submitted that the evidence of identification was marred with irregularities, were contradictory and unsafe to sustain a conviction. That the description of the assailants given by PW1 and PW2 were not unique as to apply only to the appellants and no evidence was given as to who pointed out the appellants to the police. That evidence of the 2 witnesses prove that they did not have enough time to observe the features of the assailants. He relied on *Mohamed Elibite Hibuya & Another Versus Republic*, Criminal Appeal No. 22/96(C.A), that;

> " It is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit, and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence."

10. It was further submitted that conditions of identification were not favourable for PW1 and PW2 (*Robert Gitau Versus Republic*, (CA) Criminal Appeal 63/90 (Nakuru) i.e that evidence of identification should be treated with great care especially when it is known that the conditions favouring correct identification were difficult.

11. The appellant challenged the conduct of the identification parade and held that he had been arrested by police on patrol and not on the strength of the evidence of the witnesses in view of the discrepancies in the evidence of the witnesses when recalled as compared to their earlier testimonies. Also, that PW1 and PW2 gave conflicting accounts making the evidence of these witnesses and PW3 unreliable.

12. On sentence, it was submitted that the death sentence was manifestly harsh, inhuman and excessive. He relied on *Francis Karioko Muruatetu and Another Versus Republic* (Petition No. 15/2015). He appealed for the least punishment in the circumstances based on the mitigating factors.

13. The 2nd appellant, on the other hand relied on the case of *Sekitoliko Versus Uganda* (1967)EA 53, that the prosecution is under a duty to prove all elements of the offence beyond reasonable doubt. That on the issue of identification, the court ought to consider the circumstances during the incident, and that such evidence must be water tight (*Waithaka Chege Versus Republic* (1979)KLR 271, *Gikonyo Karume & Another Versus Republic* (1990)KLR, and *Abdalla Bin Wendo & Another versus Republic*, *Wamunga Versus Republic* (1989)KLR 42 and *Maitanyi Versus Republic* (1986)KLR 198.

14. It was noted that PW1 never gave descriptions of her assailants in the first statement, confirming that the conditions of identification were difficult. And that dock identification is worthless unless preceded by a properly conducted identification parade (*Kamau Njoroge Versus Republic* (1982-88)KLR, 1134. The appellant spelt out some of the factors that the court ought to have evaluated, and added that the court needs to take utmost care when dealing with visual identification and ensure that the identification is free from error, suggestibility or contamination.

15. It was further submitted that the appellant was not found in possession of the alleged stolen items. And that the identification parade was in violation of the parade rules since in the evidence of PW1, one of the boys was exposed to the witness in the office of the investigating officer before the parade.

And that the parade was only of 6 persons, and not at least 8. The parade officer never testified and the parade forms were also never produced.

16. The appellant questioned the made of his arrest since PW1 and PW2 never led the police to his arrest and that none of the other eye witnesses even knew the appellant. He relied on *Gidraph Thuo Ndola versus Republic*, Criminal Appeal Nos. 12 and 13 of 2000 (Nyeri), that;

> " The manner in which the accused person was arrested was not very clearly explained .... In our view, the manner in which the accused person was arrested raises some doubts as to his participation especially when his own defence is taken into account...."

17. The appellant further submitted on the contradictions and inconsistences in the prosecution's case. He gave examples of the evidence of PW3 which contradicted that of PW1 and PW2 on whether they knew the appellants names, value of the Nokia phone and even date of arrest. He relied on *John Mutua Musyoki Versus Republic* (2017), Criminal Appeal No. 11 of 2016 on the effect of material contradictions in the prosecution's case.

18. The appellant also raised the ground that certain crucial witnesses were not called by the prosecution e.g the identification parade officer and the members of the public who had apparently witnesses the incident. He relied on *Juma Ngodia versus Republic* (1982-88)KAR, that;

> " The prosecutor has a general, a discretion whether to call or not to call someone as a witness. If he does not call a vital witness without a satisfactory explanation, he runs the risk of the court presuming that his evidence which could be and is not produced would, if produced have been unfavourable to the prosecution."

19. It was summed up that the prosecution failed to prove the case against the appellant beyond any reasonable doubt.

20. In response to the submission of the appellants, the Respondent submitted that the issues for determination herein are;-

    i. Whether the ingredients of the offence of robbery with violence were established.

    ii. Whether there is sufficient evidence linking the appellant to the charges.

    iii. The defence of the appellant.

21. Replying on *Oluoch Versus Republic* (1985)KLR, it was submitted that robbery with violence is committed in any of the following circumstances;

    a. The offender is armed with any dangerous and offensive weapon or instruments, or

    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...."

22. That the authority in *Juneu Mohamed Ganzi and 3 others Versus republic*, Criminal Appeal No. 275 of 2002 is that the elements are distinct in nature and proof of only I would suffice. That the evidence proved the elements of the offence ie that the assailants were armed and were 4 in number.

23. On identification, counsel urged the court to consider the evidence of PW1 and PW2 which showed that the circumstances favoured positive identification.

24. Counsel also urged the court to dismiss the defences of the appellants as mere denials.

25. This court is seized of this matter as the 1st appellate court. As rightly submitted by the 1st appellant, Mohamed Ali Juma, the jurisdiction of the 1st appellate court is well settled in the case of *Okeno versus Republic* (1973)EA 32. It is to exhaustively and independently re-evaluate and re-analyse the evidence and to come to its own findings. This being the case, it is imperative that this court do keenly consider such evidence as it was brought up before the trial court as to come up with its own determination.

26. From the proceedings of the trial court, the case of the prosecution commenced afresh before the Hon. Nyangena, PM after the previous trial magistrate proceeded on transfer. Such directions under section 200 of the *Criminal Procedure Code* were issued on 13.7.2015.

27. PW1, Sharon Mutambi Masarim, testified that on 30.5.2014, she was heading to work at about 6:00Am she was at Kipkabus Road heading to Kipande Road, when 4 men bypassed her as they greeted her. She was with her sister Mercy Masarivu Khasowa. That on reaching the bus stop, 4 men approached them. 2 of the men approached her as 2 went to her sister. A struggle ensued as the men tried to take away their belongings. She had a laptop and a bag. They screamed for help and members of the public came to their rescue as one of the men picked up a stone threatening to hit them. Out of fear, she gave out her bag which the man picked and ran away with. In the process, she lost a laptop charger, ATM cards of Barclays, and Coop Bank, ID card, School ID for Zetech college, NSSF card, medical card, Kshs. 1700/=, 2 phones, Nokia and Techno, all approximately valued at Kshs.74,198/=.

28. Her testimony was that she saw the assailants very well and dully described them to the police. That a day later, she was able to identify Mohamed Juma, 1st appellant at an identification parade. 3 days later, she again identified the 2nd man, James Macharia, 2nd appellant.

29. On being cross examined by 1st appellant, the witness confirmed that she knew him before this incident and that she never recovered her items. She confirmed she had been seeing him when going to work and that his well shaven beards stood out. She denied first being the appellant at the office of the investigating officer. She also confirmed identifying the 2nd appellant as the one who had a cut and that she saw him at the parade.

30. This witness added that she saw the assailants well as there was street light and the brightness of the day was coming up.

31. PW2 Mercy Khasova Masavira, recalled that on 30.5.2014, she was escorting her sister to pick a matatu to work when on reaching Kipande Road, 4 men came and started snatching her bag. That on being threatened with a stone, her sister let go of the bag and when people responded to their screams, the men escaped with their items. She confirmed that one of the men had cuts on the head. He identified him as the one before court. And that there were bright street lights making it possible for identification.

32. On being cross examined she only confirmed identifying the 2nd appellant (accused 2).

33. Corporal Richard Nyakundi was PW3. His evidence was that on 30.5.2014 while at work with colleagues Samwel Nkanai and Charles Simiyu, they received a lady who reported that she had been attacked while heading to work, Sharon Mutambi Musaviru. This was at about 8:00Am and the attack had been at about 6:00Am, near globe cinema roundabout. She had lost various items in the process. That while on patrol around Fig Tree, they had information about 2 men who had hidden near Fig Tree market. That on seeing them, the young men started running away. His colleague however managed to arrest the 1st appellant. He continued with investigation and later arrested 2nd appellant at Karina A. in his testimony, he relied on the descriptions given by the complaints.

34. PW4 Dennis Simiyu, had been with PW3. His evidence was that on 30.5.2014, at about 8:00am, Sharon Musaviru reported to them about her being attacked by 4 youths armed with stones and knives and being robbed of her 2 phones and laptop. That the lady gave the descriptions of the robbers i.e one dark and heavy with a mark on the right side of the head and another with noticeable beards. That while on patrol, they received a report that the suspects had been spotted at Fi Tree market. They proceeded there and managed to arrest one of them, 1st appellant. They then later arrested 2nd appellant.

35. He confirmed that members of the public identified 1st appellant, but that they are not witnesses. And that 2nd appellant was arrested because the description given fitted him.

36. Corporal Peterson Mwania was PW5. He received 1st appellant from the cells at Central police station and on interrogating him, 1st appellant mentioned his accomplices including 2nd appellant who was then arrested. That an identification parade was done by the O.C.S central police station which the complainant picked out the 2 appellants.

37. In defence, James Macharia Wambui, 2nd appellant testified on oath that on the material date, he had been at his place of work which he closed at about 8:00pm when he was arrested and taken to central police station. He denied knowing the 1st appellant.

38. The 1st appellant, Mohamed Ali Juma, also gave a sworn defence. His defence was that he works at Fig Tree and that on 30.5.2014 he had closed. That while heading to the stage police officers arrested him and took him to central police station and later charged with someone he did not know. He denied the charges.

39. This basically is the evidence on record before the trial court. This is a case of robbery with violence. In *Oluoch Versus Republic* (1985)KLR, the Court of Appeal settled the issue of what constitutes robbery with violence when it held:

40. Robbery with violence is committed in any of the following circumstances;

    a. The offender is armed with any dangerous and offensive weapon or instrument, or

    b. The offender is in company with one or more person or persons, or

    c. At or immediately before or immediately after the times of the robbery, the offender wounds, beats strikes or uses other personal violence to any person.

41. Indeed in the above decision, the Court of Appeal has restated the provision of the law in section 296(2) of the *Penal Code*. the case of *Dima Denge Dima & others Versus Republic*, Criminal Appeal No. 300 of 2007, dealing on the subject of proof in robbery with violence cases, held;

> " .... 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."

42. The evidence of the prosecution herein was established by PW1 that as she walked to the stage while in company of her sister PW2, they were suddenly attacked by 4 men, with 2 men confronting each of them. That the men robbed them of their property including a laptop, 2 phones, laptop charger, ATM cards and cash Ksh.1,700/=, before disappearing with the same. And the evidence of this witness was corroborated in every detail with that of PW2. And both witness testified to the fact that the attackers were armed with a stone and that they forcefully took away the complainants property against her wish even as she resisted.

43. The evidence of the 2 witnesses clearly prove therefore the offence of robbery with violence as all the 3 elements of the offence were proved.

44. The issue for determination therefore is whether the 2 appellants were the ones who together with the others not before the court attacked and robbed the complaint. Regarding this issue, it is important to carefully consider the evidence on record. It was the evidence of both PW1 and PW2 that the attack was at about 6:00AM. It was nearing daybreak. There were also street lights at the scene. According to PW1, she was able to identify at least 2 of the attackers, the 2 appellants. That she had been seeing them at the vicinity while on the way to work. That when she went to report the incident to the police, she gave the descriptions of the 2 men she had identified. That one had clean shaven beards that stood out, while the other had a cut on the head. This is the same evidence that PW2 gave. That on the arrest of the 2, PW1 was called to identification parades at Central police station. She was able to identify the 2 appellants.

45. What comes out from the prosecution's case is that after the report by PW1, the arresting officers, PW3 and PW5, further acted on information from members of the public who had allegedly witnesses the incident, to proceed to Fig Tree area to first arrest the 1st appellant. That it was 1st appellant who then mentioned the 2nd appellant as his accomplice. The complainants did not therefore point out the appellants to the police. Their descriptions of the attackers, as seen above, were rather sketchy, devoid of any details. The descriptions given of, "one with clean shaven beards", and "one had a cut on the head" could well fit the descriptions of countless persons. As to the members of the public who allegedly led the police officers to the arrest of 1st appellant, their identities remain unknown. None of them testified in court to state what exactly they had witnesses.

46. The complainant further testified that she was able to identify the 2 appellants at the identification parades. Indeed the parade forms were produced in evidence as exhibits (Exh. 2 and 3). The exhibits were however, produced by PW5, Corporal Peterson Mwania, the investigating officer, not the officer who conducted the parade. No evidence was laid to confirm that the said identification parades were held and conducted in accordance with chapter 46 of force standing orders.

47. Section 67 of the *Evidence Act* states;-

> " Documents must be proved by primary evidence except in the cases hereafter mentioned."

48. The parade forms herein were produced by PW5; this witness is not the maker of these documents. I have perused the proceedings before the trial court of 3.2.2016 when the witness testified. No application was made by the prosecution and granted for this witness to produce these documents on behalf of the maker. There is no evidence on record to show that the appellants consented to this witness producing the documents on behalf of the maker. This court therefore finds that these parade form (Exh 2 and 3) were irregularly produced in evidence. By their nature therefore, these reports had no probative value and ought no to have been relied on by the trial court to sustain any conviction against the 2 appellants.

49. This court aligns itself with the finding in the case of *Michael Norman Mbachu Njoroge Versus Republic* (2016)eKLR cited by 2nd appellant, that;

> " ..... the court needs to examine evidence of identification of an accused person with the greatest care to avoid a situation where an innocent person is convicted merely because of evidence of witnesses who may be honest but are nonetheless mistaken on their identification of the accused person or persons."

50. With no doubt, PW1 and PW2, may have been honest in their testimonies. But they could as well have been mistaken on their identification of the appellants. The burgled process of identification parade only meant that the accuracy of their identification of the appellants remained untested. It is for this reason that I am not convinced that the prosecution proved beyond doubt the third element or ingredient of the offence of robbery with violence, i.e identification of the appellant/accused as the perpetrator.

51. It is the burden of the prosecution to prove the guilt of the accused person beyond any reasonable doubt and that in case of any doubt in the prosecution's case, it is the accused to benefit from the same. As observed above, there is a doubt left on whether the appellants were properly identified as the perpetrators of this crime. I accordingly give both 1st and 2nd appellants the benefit of the doubt. I allow this appeal, quash the convictions of the appellants and set aside their sentences. I order that the appellants be set free forthwith unless lawfully held. Orders accordingly.

DELIVERED ON THE 7TH FEBRUARY, 2023

HON. D. O. OGEMBO

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Court:

Judgment Read Out in Open Court (on-line) in Presence of the Appellants (kamiti Maximum) Aand Ms. Adhiambo for the State