Buyuni v Republic (Criminal Appeal 31 of 2020)
[2023] KEHC 2059 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2059 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 31 OF 2020

JWW MONG'ARE, J

MARCH 9, 2023

BETWEEN

SHADRACK WABUKE BUYUNI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. Wairimu in Eldoret CMCC No. 4956 of 2017 delivered on 24th February 2022)

JUDGMENT

1. The Appellant was charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence were that on the night of December 18, 2017 at Turbo forest, Seregeya Sub Location, Likuyani Sub County within Kakamega County, the accused being armed with dangerous weapons, namely pangas jointly robbed Hudson Nalisi of one mobile phone make Nokia, one pair of sports shoes and cash money of Kshs 500, all valued at Kshs 2500/- and at the time of the said robbery, used actual violence against the said Hudson Nalisi.

2. In the alternative, he was charged with the offence of handling stolen goods contrary to section 322(1) (2) of the *Penal Code*. The particulars of the offence were that on the December 21, 2017 at Sipande village, Mbagara sub location in Lugari Sub County within Kakamega County, otherwise than in the courts of stealing dishonestly retained one pair of shoes knowing or having reasons to believe it to be stolen property.

3. The Appellant pleaded not guilty and the matter proceeded to full hearing. Upon considering the evidence adduced in court and the testimony of the witnesses, the trial magistrate found the accused guilty of the main count and sentenced him to 20 years' imprisonment.

4. Being dissatisfied with the conviction and the sentence the Appellant instituted this appeal vide a petition premised on the following grounds;

1) That trial court erred in law and facts by failing to hold that (my) identification parade was never conducted.

2) That (I) am aggrieved that the trial court erred in law and in facts as it failed to observe that the witness evidence was uncorroborated.

3) That (I) am aggrieved that the trial magistrate erred in law and in facts as she failed to hold that the witness evidence was out of hearsay.

4) That the trial court erred in law and facts as it failed to hold that the case was not proved beyond reasonable doubt.

5) That (I) am aggrieved the trial court erred in law and facts as she failed to consider the Appellant's defence evidence.

6) That I am aggrieved that the learned trial magistrate erred in law and facts as she failed to observe that the witness evidence was coached and fabricated against the accused persons.

7) That other grounds will be adduced at hearing and determination thereof.

The parties filed submissions on the appeal.

Appellant's Case

5. The Appellant submitted that there was no identification parade at the police station and the witnesses could not identify him as there was no light when the offence took place. He urged that the evidence of the witnesses was uncorroborated and inadmissible. Further, that the trial magistrate failed to consider his defence evidence. He prayed the court allow his appeal and set aside the conviction and sentence.

Respondent's Case

6. Learned counsel for the Respondent opposed the appeal and submitted that the elements of the offence of robbery with violence as stated in *Oluoch vs Republic* (1985) KLR were satisfied. He stated that identification was by recognition and the evidence of all the witnesses was corroborated. The Appellant was found with the shoes belonging to the complainant and the evidence adduced in court was by first hand witnesses therefore it was not hearsay evidence. Counsel urged that the trial magistrate did not err in meting out the sentence but proposed that the court enhance the sentence upon considering the circumstances under which the offence was committed.

Analysis & Determination

7. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. See *Okeno v Republic* [1973] EA. 32; *Pandya v R* [1957] EA 336, *Ruwala v R* [1957] EA 570.

8. Upon considering the petition and grounds of appeal, the submissions of the parties, the following issues arise for determination;

a) Whether the prosecution proved its case to the required standard

b) Whether the sentence was harsh/excessive

Whether the prosecution proved its case to the required standard

9. The ingredients of the offence of robbery with violence were set out in the case of *Oluoch v Republic* [1985] KLR as follows;

> " 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 time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ....."

10. The complainant testified as to the attack by the Appellant using a dangerous weapon. His evidence was corroborated by the evidence of PW2 who met him when he came home and confirmed that he had a deep cut on his head. PW6 corroborated the testimony that the Appellant was armed as he was brought to Milimani Police Patrol base with a panga which was marked as exhibit 2. It follows that the element of being armed with a dangerous weapon was proved beyond reasonable doubt. Further, as he was found in possession of the complainant's shoes, it is evident that he robbed the complainant and that he used force in doing so. The ingredients of the offence need not be conjunctive; one element is all that is required to prove the offence. PW5, a clinician from Turbo Sub County Hospital produced the P3 form as evidence of the injuries sustained by the complainant in the robbery.

11. The importance of identification of an accused in a case of robbery with violence was indicated by the Court of Appeal in the case of *Suleiman Kamau Nyambura v Republic* [2015] eKLR where it stated that: -

> " In addition, and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set-out ingredients of robbery with violence is the need to positively identify the assailant/s in question."

12. In the celebrated case of *R v Turnbull and others* [1976] 3 ALLER 2549 the court gave guidelines on circumstances of identification and stated that: -

> " Secondly the Judge should direct the jury to examine closely the circumstances in which the identification by such witnesses came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" 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 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 the actual appearance"

13. The time of the attack was at 4pm therefore, there was sufficient lighting for identification of the Appellant. Further, given the length of the period within which the complainant was attacked I am convinced that he was able to remember the faces of his assailants.

14. Upon consideration of the evidence and the testimonies of the witnesses I am satisfied that the prosecution proved its case to the required standard. The circumstantial evidence corroborates the evidence of the complainant and the witnesses. The trial magistrate was correct in convicting the Appellant.

Whether the sentence was harsh/excessive

15. The offence of robbery with violence attracts a mandatory death sentence. However, in *James Kariuki Wagana v Republic* [2018] eKLR, Prof Ngugi J(as he then was) observed that;

> "while the penalty of death 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."

He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. I am also guided by the Court of Appeal decision of *Paul Ouma Otieno v Republic* [2018] eKLR where the court of appeal substituted the death sentence for a similar offence with a sentence of 20 years imprisonment.

16. Further, it is trite law that courts can exercise unfettered discretion on a case to case basis in order to determine appropriate sentences for accused persons. I have considered the circumstances of the case, the submissions of the parties and the mitigation of the Appellant and I find no reason to disturb the sentence meted out. In the circumstances therefore, I find that the Appeal before me lacks merit and is hereby dismissed. The appellant will continue to serve the sentence as set out in the judgment of the trial court in Eldoret CMCCR No 4956 of 2017 to its completion.

DATED, DELIVERED AND SIGNED ON THIS 9TH DAY OF MARCH 2023

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J.W.W.MONGARE

JUDGE

Delivered virtually In The Presence Of

1. Appellant- Absent.

2. Mr. Rop holding brief for Ms. Okok - for the Respondent

3. Brian Kimathi – Court Assistant

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J.W.W.MONGARE

JUDGE