



Mwangi & another v Republic (Criminal Appeal E007 & E008 of 2021 (Consolidated)) [2023] KEHC 1646 (KLR) (13 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1646 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL E007 & E008 OF 2021 (CONSOLIDATED)**

CM KARIUKI, J

MARCH 13, 2023

BETWEEN

SAMUEL MUTAHI MWANGI 1ST APPELLANT

BENARD MWANGI NGURU 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from Judgement of Hon S.N. Mwangi Senior Resident Magistrate- delivered on the 25/03/2021 In Nyahururu CMCC Criminal Case No. 2248 of 2018 Republic Vs Samuel Mutahi & 2 Others)

JUDGMENT

1. The Appellants were jointly charged together with another in Nyahururu Criminal Case No 2248 of 2018 where they were charged with 9 counts. Among the 9 counts, the Appellants were charged with four counts of robbery with violence contrary to Section 295 as Read with Section 296 (2) of the [Penal Code](#). They were acquitted of three counts ie, Count I to Count III due to insufficient evidence but were convicted and sentenced on one count ie, Count IV.
2. The particulars of the offence stated that on 17th day of September 2018 at Maina village in Nyahururu Sub County in Laikipia County, jointly charged with others not before court while armed with dangerous weapons Namely firearm and knives robbed Michael Macharia Gikiri of his phone make Techno Pop valued at Kshs 8,500/-, shop goods valued at Kshs 20,000/- and cash money Kshs 30,000/- all valued at Kshs 58,500/- the property of the said Michael Macharia Gikiri and before time of the robbery wounded the said Michael Macharia Gikiri.
3. They pleaded not guilty, were tried, convicted of the aforementioned charge against them and sentenced to 20 years imprisonment. Being dissatisfied with the said conviction and sentence each of



the Appellants filed individual appeals which appeals were consolidated vide a court order made on 14th June 2022 for purposes of trial and determination having each raised the following grounds of appeal:-

4. Samuel Mutahi Mwangi: 1st Appellant's Grounds of Appeal (As per Petition of Appeal filed on March 31, 2020)
5. The 1st Appellant's grounds of appeal are summarized as follows: -
 - I. That the trial magistrate erred in law and fact by cross examining the Appellant the day and time he received the prosecution statements which was heavily relied on by the prosecution side.
 - II. That the trial magistrate erred in law and fact by relying on evidence of single identification.
 - III. That the trial magistrate erred in law and fact for convicting him without any forensic or physical evidence produced to link him to the offence.
 - IV. That the trial magistrate erred in law and fact by carrying on with a defective charge sheet.
 - V. That the trial magistrate erred in law and fact by not considering that the case was not proved beyond reasonable doubt and convicting him based on contradictory evidence, discrepancies and hearsay.
 - VI. That the trial magistrate erred in law and fact by convicting him against the weight of the evidence hence passing harsh sentence under the circumstances.
6. Benard Mwangi Nguru: 2nd Appellant's Grounds of Appeal (As per Petition of Appeal filed on March 31, 2020)
7. The 2nd Appellant's grounds of appeal are summarized as follows: -
 - I. That the trial magistrate erred in law and fact by relying on evidence of single identification.
 - II. That the trial magistrate erred in law and fact for convicting him without any forensic or physical evidence produced to link him to the offence.
 - III. That the trial magistrate erred in law and fact by carrying on with a defective charge sheet.
 - IV. That the trial magistrate erred in law and fact by not considering that the case was not proved beyond reasonable doubt and convicting him based on contradictory evidence, discrepancies and hearsay.
 - V. That the trial magistrate erred in law and fact by convicting him against the weight of the evidence hence passing harsh sentence under the circumstances.

Appellants' Submissions

8. The Appellants submitted that PW5 was not a truthful witness where he alleged that he was able to identify 2 of his assailants, that he knew them by name and that he gave their description to the police in his first report. They demonstrated the discrepancies as follows: -
9. PW5 stated that he was attacked on 6/9/2018 but the particulars of the charge sheet indicted that he was attacked on 17/9/2018.
10. It was asserted that it was doubtful that PW5 gave the description of the assailants in the 1st report (OB entry). The prosecution did not produce the 1st report by PW5 to confirm that indeed he gave the description of 2 of his assailants and that he informed the police on 6/9/2018 that he knew them.



Both Appellants requested for the 1st report to be supplied and the same seems to have been supplied as ordered. The Appellants alleged that the same had been forged yet the marker of the entry one PC Rael was called to testify on the same but never appeared before court. Moreover, the investigation officer, PW6 Jacob Nyambu declined to be cross examined on someone else's statement and the objection was sustained.

11. The Appellants submitted that the only their document that shows that the said witness was able to identify 2 of his assailants is the P3 Form produced as PEXNO5 and filled by Dr. Magara but the same was issued to PW5 after the accused persons had been arrested and identified to the complainants including PW5 while at the police station as per the evidence of PW6.
12. It was contended that PW5 did not identify any of his assailants and the issue of their identification was only made up on 30/9/2018. That if at all he had identified them he could have informed the shop owners who came to his rescue after the attack noting that he claimed to have seen them around the shops for over two years and identified them by name as Sammy and Githae.
13. They asserted that PC Rael's evidence was crucial and failure to call her after the court directed that she be called was fatal to the prosecution's case. Reliance was placed on *Lugendo vs R* Case Number 13 of 2009 [2013] EA Page 174.
14. It was stated that PW5 was attacked at night at 7pm and that it was dark. The conditions for identification or even recognition were not conducive noting that he was said to have been attacked by 5 people who were armed. That no identification parade was conducted in the case and although he claimed there was light from the shop, the intensity of the light was not given. Reliance was placed on *Mateso v Republic* Case Number 11/09 [2013] page 187
15. The Appellants pointed out that PW5 alleged the offence occurred on 6/9/2018 yet the 2nd Appellant in his sworn defence gave an alibi that he had travelled to Nairobi on 5th September 2018 and only returned on the 8th and he was therefore not in Nyahururu on the 6th when the offence is said to have been committed. He produced the receipts as D. Exh. No1 and 2 as proof.
16. The trial magistrate while dismissing the defence of alibi indicated that the Appellant were convicted of a robbery which occurred on 17/9/2018 and not 6/9/2018 and therefore the Appellants were denied a fair trial as the proceeded with the trial and defended themselves for a robbery said to have been committed on 6/9/2018 only for the court to convict the robbery of 17/9/2018 as particularized in the charge sheet. The contradictions in date were therefore prejudicial.
17. In addition, the Appellants averred that the court did not properly address itself on the defence of alibi by the 2nd Appellant. Reliance was placed on the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR
18. It was argued that the Appellants were not found in custody of any of the items stolen from PW5 of the items recovered from the 3rd accused person. No evidence was tendered to prove that the 2nd accused person was known as Githae the name repeatedly mentioned in court to refer to one of the assailants. He was not charged under the name or as an alias. Suspicion alone no matter how strong cannot form a basis for conviction.
19. Moreover, the Appellants did not record a confession with the police to support the evidence of the police including the investigation officer on what the 1st Appellant is said to have informed them and which evidence was denied.



20. In conclusion, the Appellants urged the court to set aside the conviction and on sentence, the submitted that 20 years imprisonment was excessive given the mitigation by the Appellants and noting that no pre-sentence report was called for by the court before sentencing.

Analysis and Determination

21. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusions as was laid out in the case of *Okeno v R* (1972) EA 32.
22. First and foremost, I would like to dispense with the issue of defective charge sheet. Both Appellants complained that the trial magistrate erred in law and fact by carrying on with a defective charge sheet. This is because PW5 stated that he was attacked on 6/9/2018 but the particulars of the charge sheet indicted that he was attacked on 17/9/2018.
23. Further, the Appellants pointed out that PW5 alleged the offence occurred on 6/9/2018 yet the 2nd Appellant in his sworn defence gave an alibi that he had travelled to Nairobi on 5th September 2018 and only returned on the 8th and he was therefore not in Nyahururu on the 6th when the offence is said to have been committed. He produced the receipts as D. Exh. No1 and 2 as proof.
24. The trial magistrate while dismissing the defence of alibi indicated that the Appellants were convicted of a robbery which occurred on 17/9/2018 and not 6/9/2018 and therefore the Appellants were denied a fair trial as the proceeded with the trial and defended themselves for a robbery said to have been committed on 6/9/2018 only for the court to convict the robbery of 17/9/2018 as particularized in the charge sheet. The contradictions in date were therefore prejudicial.
25. I have meticulously gone through the trial court record and PW5 when giving his testimony alluded to 6/9/2018 as the material date when the incident is said to have occurred. The P3 form issued to the complainant also indicated that the date and time of the alleged offence was 6/9/2018 at 1900hours and that the same was reported on the said 6/9/2018 at 2315 hours. However, it is evident that the charge sheet specifically on the particulars of the offence stated that the offence occurred on 17th September 2018.
26. During the defence hearing, the 2nd Appellant gave sworn testimony and presented an alibi defence. He stated that on the date the complainant was said to have been attacked he was not in Nyahururu as he had received a call on 4th September 2018 informing him that his brother who was in Nairobi has been found in a river and was dead. That he on 5th he travelled to Nairobi and came back with his brother on 8th September 2018 upon realizing that he was not the one who had died.
27. The 2nd Appellant went ahead and produced return receipts of his travel on 5th and 8th marked as D exhibit 1 and 2 respectively which I had a chance to examine.
28. Upon cross examination by the prosecution, the 2nd Appellant stated that the complainant asserted that he was attacked on 6th yet he was not in Nyahururu and that he did not know of 17th September 2018 as the complainant in his statement stated that he was attacked on 6th September 2018.
29. I have assessed the trial court magistrate's judgement and notably in the last paragraph on Page 10 of her judgement while outlining the prosecution witnesses' testimony she indicated that PW5 was the complainant on Count IV and he testified on 6th September 2018 then proceeds to state what happened on that material day according to PW5'S testimony.



30. In Page 30 of the Trial Court Judgment the trial magistrate stated as follows: -

“As for the 2nd accused person, he alleged not to have been around at the time the offence was committed against PW5 but again this court finds that the same was an afterthought for he never availed any evidence or witness to counter the prosecution conclusive evidence placing him at the scene of the robbery which took place on 17th September 2018 and not between 5th and 8th September 2018 as he alleged in his defence. I therefore find that the prosecution was able to prove beyond reasonable doubt that the 1st and 2nd accused persons robbed PW5 of his mobile phone, cash and various shop items”

31. The law on drafting a charge sheet is found under Section 134 of the [Criminal Procedure Code](#) which states as follows:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

32. Further, in the case of [Isaac Omambia v Republic](#), [1995] eKLR court considered the ingredients necessary in a charge sheet and stated as follows:

“In this regard, it is pertinent to draw attention to the following provisions of S. 134 of the Criminal Procedure Code which makes particulars of a charge an integral part of the charge: Every charge or information shall contain, and shall be sufficient if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.”

33. The Court of Appeal in [Peter Ngure Mwangi v Republic](#) [2014] eKLR, quoted the Isaac Omambia case with approval and further stated that:

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archbold, Criminal Pleading, Evidence and Practice (40th Edn), page 52 paragraph 53, this Court stated in [Yongo v R](#), [198] eKLR that:

“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- i. when it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
- ii. when for such reason it does not accord with the evidence given at the trial.”



34. The Court of Appeal was further guided by the case of *Peter Sabem Leitu v R*, Cr. App No 482 of 2007 (UR) where the Court held thus:

“The question therefore is, did this defect prejudice the Appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the Appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the Appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the Appellant.”

35. Accordingly, the test of whether a charge sheet was defective or not is substantive and should ensure that no miscarriage of justice was occasioned which is prejudicial to the Appellants by the error and/or defect in the charge sheet.

36. I will rely on the Court of Appeal’s holding in the case of *Alexander Lukoye Malika v Republic* [2015] eKLR where it was stated that: -

“A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also, where upon admitted facts the Appellant could not in law have been convicted of the offence charged.”

39. That being the case, I am satisfied that in the contradiction as to the date of the offence did indeed prejudice the Appellants and occasioned a miscarriage of justice. Although the charge sheet and the particulars of the offence were read out to the Appellants and they responded and proceeded to participate in the trial process, all the evidence that was presented in the trial court referred to the September 6, 2018 as the date in which the offence occurred.

40. Perhaps one can argue that this is a typographical error that is curable and cannot make the charge sheet defective or the conviction a nullity however there is the fundamental issue of the alibi evidence that was provided by the 2nd Appellant. Notably, the same was not displaced by the prosecution and the trial court brushed it off as an afterthought stating that the offence had occurred on the 17th ignoring the fact that the evidence must support the charge. It is clear from the record that the Appellants were under the reasonable assumption that they were defending themselves against a crime that occurred on the 6th and not the 17th.

41. In *Isaac Nyoro Kimita & another vs. R* [2014] eKLR the court stated as follows:-

“In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the Appellants “jointly” defiled the complainant, made the charge fatally defective. To determine this issue, what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the Appellants. In other words, did each Appellant



appreciate the charge against him or was either of them confused by the inclusion of the term “jointly” in the particulars of the charge?

42. Consequently, I am satisfied that the defect in dates occasioned a failure of justice and thereby prejudiced the Appellants and the same must go to the benefit of the Appellants. It was ambiguous when the offence occurred. Section 382 of the *Criminal Procedure Code* would cure an error where the Appellants were not prejudiced in any way but in the present case, I find and hold that there was a material defect to the charge sheet in term of the discrepancy in the dates; capable of vitiating the Appellants’ trial for the offence of robbery with violence as charged.
43. That being the case I find that it would be inconsequential to proceed with analyzing the rest of the grounds raised in the appeal.
 - i. In the end, the Appellants’ appeal against conviction and sentence against the charge of robbery with violence succeeds. Thus, the Appellants shall be set at liberty unless they are otherwise lawfully held.

DATED, SIGNED, AND DELIVERED AT NYAHURURU THIS 13th DAY OF MARCH 2023.

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CHARLES KARIUKI

JUDGE

