Mwaleli v Republic (Criminal Appeal E099 of 2022)
[2023] KEHC 1906 (KLR) (Crim) (3 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1906 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E099 OF 2022

PM MULWA, J

MARCH 3, 2023

BETWEEN

DOMINIC MWANZIA MWALELI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant, Dominic Mwanzia Mwaleli was charged and convicted of the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*. The particulars are as per the charge sheet.

2. He took a plea of not guilty and the case proceeded to a full hearing. The prosecution called three witnesses while the appellant testified on his own and did not call any witness.

3. A summary of the evidence tendered by the prosecution was as follows. PW1 No xxxx PC Stephen Kimeu Kivinda told the court that he was on phone while driving along Tom Mboya street when the appellant approached his car window and asked for help. As the complainant was checking for coins, the appellant grabbed his phone and fled. PW1 then stated he left his vehicle to chase the appellant while screaming. He testified that the appellant continued to run while brandishing a knife which got the public scared. The complainant then shot thrice in the air but the appellant did not stop. He testified that he then shot the appellant on the elbow and after he fell down he was able to recover his phone. The appellant was then taken to the police station before he was taken to the hospital for treatment.

4. PW2 No xxxx CPL Charles Wanjau testified that as he was on patrol duties in the CBD, he received a distress call from the complainant who is also his colleague. He rushed to the scene and found a crowd gathered around a private vehicle. He found the complainant with the appellant who was bleeding. He testified that the appellant was rushed to Kenyatta Hospital where he was treated and discharged.

5. Pw3 No xxxx Dennis Ndwika was the investigating officer. He testified that he received instructions from the DCIO to prepare a prisoner who was arrested and was in custody. He stated that he took his statement after which he produced the accused in court. He then testified that on September 1, 2020, he took the appellant to Mbagathi Hospital for age assessment where he was found to be about 18 years of age.

6. After the close of the prosecution case, the trial court found that the prosecution had established a prima facie case against the appellant and put him on his defence. He denied having committed the offence and stated that he was being framed.

7. The appellant stated in his defence that on that day at around 5PM as he was going about his business of selling sugarcane, a man passed him running. While crossing the road, he got shot. He was then taken to Central Police station after which he was taken to Kenyatta National Hospital. He denied having the knife that was tendered in evidence. He told the court that the knife that is used in sugarcane business is strong yet the one before the court is not.

8. After the hearing, the Learned Trial Magistrate found the appellant guilty. He was convicted and sentenced to death.

9. He was aggrieved by the conviction and sentence hence this appeal. He initially filed an appeal to this court through a memorandum of appeal filed on June 23, 2022 but he subsequently filed amended grounds of appeal together with his written submissions on November 29, 2022 albeit without leave of the court. These grounds are as follows;

    i. That, the trial magistrate erred in law and fact while relying on the testimony of a single witness to convict, whereas the same was contradicting with dates of the alleged offence thus the charge of robbery with violence was not proved to the required standard.

    ii. That, the trial magistrate erred in law and fact by convicting the appellant in reliance with evidence of doctrine of recent possession without considering the tainted doubts which occurred in the adduced evidence by PW1, PW2 and PW3.

    iii. That, the trial court lost direction in evidence and rejected the appellant's defence which same (sic) was not challenged by the prosecution side as per section 212 of the *Criminal Procedure Code* Cap 75 Laws of Kenya.

10. At the hearing, both the appellant and the respondent chose to rely entirely on their written submissions.

11. In his submissions, the appellant submitted that the prosecution did not prove its case against him beyond reasonable doubt. He submitted that his identification was not proper from the alleged chase and arrest. To support this submission, he cited the cases of *Kiragu V R (1955) KLR* and *Ndungu Kimani V R (1979) KLR*.

12. He further submitted that the court misdirected itself by holding that the phone was recovered from him based on the doctrine of recent possession. He placed reliance on the cases of *Isaac Nganga Kahiga alias Peter Nganga Kahiga V R (2005)* and *Bukenya & others V Uganda (1972) EA*

13. He also submitted that the trial court unfairly disregarded his alibi defence.

14. The appeal is contested by the respondent. It was their submission that the prosecution had proved the case against the appellant beyond reasonable doubt, therefore he was rightly convicted.

15. The respondent further submitted that under section 143 of the *Evidence Act*, the prosecution is not obliged to call a superfluity of witnesses but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.

16. I have carefully considered the grounds of appeal, the entire evidence presented before the trial court and the written submissions filed by both the appellant and the respondent. I have also read the judgment of the learned trial magistrate. Having done so, I find that the key issue that emerges for my determination in this appeal is whether the prosecution proved its case in the trial court beyond any reasonable doubt and if so, whether the appellant was properly sentenced.

17. This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. As was held by the Court of Appeal in *Okeno vs. Republic (1972) EA 32* the Court of Appeal therein stated as follows:

> ' An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M Ruwala Vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958] EA 424.'

18. The appellant challenged his identification during the robbery. He submitted that his conviction was not safe because the trial court relied on the testimony of a single witness.

19. In *Michael Nganga Kinyanjui vs Republic [2014] eKLR* the Court of Appeal considered these cases and quoted from Cleopas Otieno Wamunga vs R that: -

> ' Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification. The way to approach the evidence was succinctly stated by Lord Widgery, CJ in the well-known case of Republic vs. Turnbull [1970] 3 ALL ER 549.'
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> '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.'

20. I have interrogated the circumstances under which the identification was made. PW1 was the victim. He narrated how the appellant approached him and snatched his phone. He further testified how he chased the appellant, shot in the air thrice to try stop the appellant and eventually shot him on the elbow which made him to fall down. PW2 testified that he got a distress call from PW1 at around 1830 hours. The appellant testified that as he was going about his business at 5PM he was shot.

21. The evidence show that there was sufficient light under which PW1 saw the appellant. I cannot find any element of mistake in the identification of the appellant as the one who robbed the complainant on the fateful day as the circumstances favour positive identification and do not exhibit any particular difficulty in the identification of the assailant. I am satisfied that the trial Magistrate correctly applied her mind on the evidence adduced by the three prosecution witnesses PW1, PW2 and PW3 and arrived at the correct finding.

22. Having come to the conclusion that the appellant was placed at the scene of the incident, the question was whether the appellant had committed the offence of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code.

23. In the case of *Oluoch Vs Republic [1985] KLR* the court of appeal stated:

> ' 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.

24. And according to the case of *Dima Denge Dima & Others vs Republic, Criminal Appeal No 300 of 2007*,

> ' 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.'

25. Therefore, to secure a conviction, the Prosecution was required to prove only one of the ingredients of the offence beyond reasonable doubt.

26. In the instant case the trial Magistrate in his judgment found and held that all the ingredients of robbery with violence were proved by the Prosecution against the Appellant and that the Accused was identified, that he was armed with a dangerous offensive weapon, that immediately before or immediately after the time of robbery he threatened the use of violence and that the accused could not explain how he came into possession of the complainant's phone, which possession was recent hence the defence by the Appellant was found to be as mere denial. The Appellant was accordingly found guilty and convicted accordingly and sentenced to suffer death.

27. Having said that, this court is satisfied upon re-evaluation of the evidence tendered that the trial court was correct to conclude that all ingredients of robbery with violence had been proved. It is my considered view that the appellant was rightfully convicted.

28. As regards sentence, the question is whether there is any lawful reason to interfere with the discretion of the trial court in passing sentence.

29. In *James Kariuki Wagana vs Republic [2018] eKLR*, Prof Ngugi, J 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. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he 'unnecessarily injure the complainant during the robbery' and was not armed during the robbery. He therefore reduced the appellant's sentence of death to imprisonment for fifteen years, from the date of conviction.

30. I have taken into account the circumstances under which the incident took place, in my view, the death sentence as pronounced by the trial court is too harsh and excessive in the circumstances and having regard the non-aggravated nature of assault on the complainant.

31. Final Orders:-

    i. The sentence of death imposed on the appellant for the offence of robbery with violence is hereby set aside. I hereby substitute the death sentence with a custodial sentence of ten (10) years imprisonment to meet the ends of justice in the case with respect to retribution, rehabilitation and deterrence.

    ii. The sentence shall, pursuant to section 333(2) of the Criminal Procedure Code, commence on the date of the appellant's arrest on August 22, 2020.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT MILIMANI

THIS 3RD DAY OF MARCH, 2023

.....

P.M. MULWA

JUDGE

In the presence of:

Kinyua: Court Assistant

For State: Ms. Chege

Accused: Present