Sidwaka v Republic (Criminal Appeal 118 of 2019)
[2023] KEHC 2887 (KLR) (Crim) (21 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2887 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 118 OF 2019

LN MUTENDE, J

MARCH 21, 2023

BETWEEN

JUSTUS OMONDI SIDWAKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No. 4011 of 2016 at the Chief Magistrates' Court Kibera by Hon. Gandani – CM on 8th April , 2019)

JUDGMENT

1. Justus Omondi Sidwaka, the appellant, was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code*. Particulars of the offence being that on the 19th day of February, 2016 at Ngila Estate in Lang'ata Sub-County in Nairobi County, jointly with another not before court while armed with dangerous weapons namely pistol and a knife robbed one Ezra Mogere Machachi of his mobile phone Neon valued at Kshs.3,000/= Cash Kshs.400/= and one pair of safari boots shoes valued at Kshs.2,500/= and immediately before the said robbery wounded the said Ezra Mogere Machachi.

2. Having been taken through full trial and found guilty, the appellant was convicted and sentenced to serve twenty (20) years imprisonment.

3. Aggrieved, he appeals on grounds, as amended, that the learned trial magistrate erred in matters of law and fact by failing: to find that there was no adverse positive first report against the appellant, neither was an identification parade conducted to corroborate his purported identification at the scene; to find that the doctrine of recent possession was inapplicable in the instant case and identification was not positive; to find that there were material contradictions and inconsistencies which went to the root of the prosecution's case; to find that essential witnesses who needed to corroborate the prosecution's

case were not called upon to give evidence; to find that the mode of arrest was unjustified; by not giving regard to the defence put up, which plausibly underpinned the doubtful circumstances circumventing the mode of arrest and identification that was in violation of the rules of natural justice.

4. Briefly, facts as presented by the prosecution were that on the 19th day of February, 2016, PW1 Ezra Mogere, the complainant, a Bodaboda rider was within Bombolulu – Kianda area when the appellant, a person known to him as his customer with another requested to be taken to Rowland through Ngina Road. When they approached Ngina Road his customers asked him to slow down and he complied. The other customer jumped off the motorcycle and the appellant who sat in the middle fell down with the motorcycle. All over a sudden he produced a knife and threatened him. He stabbed him on the left side of the head, left palm back and abdomen. The appellant pulled out a pistol and hit him once on the left eye. He pulled him to the bush and when his phone rang, he demanded for the money and everything that he was in possession of.

5. They took from him the cellphone, sahara safari boots and cash Ksh.400/= The appellant tied his hands and legs with a binding wire. Then he stashed a pair of socks into his mouth and used a knife to push it in as they threatened to kill him.

6. They went towards the road but on seeing a motorcycle passing by they ran back to the bush. The complainant however, managed to roll to the road. PW3 Justine Mullel Kotai a guard at Ngina estate was approached by Richard, a motorist who told him that he had seen a motorcycle on the ground with lights on but had not seen any rider nearby. He boarded his motor-vehicle and they went to the scene. He called Jamhuri Police Post to report the incident. PW5 No. 233964 Inspector Joseph Kituyi upon receiving the call from PW3 rushed to the scene and found PW1 injured. Since he did not have a police motor vehicle, the motorist agreed to assist. They left for Ushirika Medical Centre but along the way encountered the OCS and duty officer with the police vehicle.

7. They transferred the complainant to the vehicle and rushed him to Kenyatta National Hospital where he was admitted for a week prior to being transferred to Kikuyu Mission Hospital where the eye that was completely damaged was removed.

8. Upon being discharged, the complainant formally lodged a complaint at the Police Post. On October 12, 2016, the complainant saw the appellant and informed PW2 George Odhiambo Orodi, the chairman of Bodaboda riders. On the October 14, 2016 at about 11.00am he saw him watching a gambling game and with the help of his colleagues they arrested the appellant and took him to the Police Post where he was re-arrested by PW6 No. 2008139675 APC Vitalis Sirengo.

9. The complainant was examined by PW4 Dr. Joseph Maundu of Police Surgery on October 18, 2016. He found him having sustained a blunt injury to the left eye which caused a rapture to the eye ball causing total loss of vision to the left eye. He had a wound that had healed at the time of examination to the left parietal area of the skull. He had a scar on the left supra-orbit area of the skull. He had a scar on the left supra orbit area (above the eye) Fracture of orbital bone of the left side. The injuries were about nine (9) months old.

10. Upon being put on his defence, the appellant testified on the events of 14th day of October, 2016. That he was at a gambling kiosk when he saw a crowd. Suddenly, a man who had only one eye, a total stranger pointed at him. One of the people present grabbed him and sought to know why he had robbed the man with one eye. They beat him up and he was rescued by administration police officers. He denied having robbed the complainant.

11. The appeal was disposed through written submissions. It is contended that the charge was defective as charging the appellant under both section 295 and 296 was not correct. In this regard, he relied on the case of *Mary Waithera Kimuiru v Republic* (2016) eKLR where the High Court stated that:

> " The complaint by the Appellants was that the charge sheet set out two different sections of the *Penal Code*, sections 295 and 296 (2) of the *Penal Code*. It has been held that the correct section of law to charge the offence of robbery with violence is section 296 (2) of the *Penal Code* and that to charge under both sections 295 and 296 of the *Penal Code* is incorrect. See *Mwaura v Republic*, (2013) eKLR:
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> "The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that 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 to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge."

12. That no identification parade was conducted, a fact that made the conviction unsafe. That the incident having occurred at night and witnesses having not recalled the manner of dressing of the assailant, dock identification was worthless and the doctrine of recent possession was not established as the complainant did not tender any receipts to show that he was the owner and was in possession of items stated to have been stolen.

13. Further, that the motorist who took the complainant to Ushirika Hospital was not called to testify yet he was an essential witness. This meant that an important link in the prosecution's case was broken.

14. The appeal is opposed by Respondent/State through Mr. Kiragu, learned Prosecution Counsel. It is urged that the appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code which called upon the prosecution to prove ingredients which were:

    (a) Proof of robbery,

    (b) Use of force and

    (c) Positive identification of the assailant.

    That the fact of the appellant having been arrested several months later did not mean that items stated were not stolen from the complainant.

15. That the complainant was assaulted during the incident, he lost an eye, evidence that was supported by medical documents;that the appellant was well known to the complainant as a customer and PW2 was able to see passengers that the complainant carried on the fateful night as there was sufficient light.

16. That proof of the case was beyond reasonable doubt; corroboration of testimonies by the prosecution witnesses cured all arithmetic inconsistencies that could have arisen during trial as held in the case of *Philip Nzaka Watu v Republic*, [2016] eKLR.

17. This being a first appellate court, I have a duty to subject the evidence presented before the trial court to a fresh and exhaustive scrutiny to arrive at an independent decision on whether or not to uphold the appellant's conviction. In re-evaluating the evidence, I should remember that I neither saw nor heard

the witnesses as they testified hence I should give due allowance for that disadvantage. This duty was well captured in the case of *Kiilu & another v Republic*, [2005] 1 KLR 174 where the court stated that:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.
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> 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 findings and 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."

18. Looking at the statement of the offence, the appellant was stated to have contravened section 295 as read with section 296(2) of the *Penal Code* that provide thus:

Section 295:

> " 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."
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> Section 296 (2):
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> "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."

19. The particulars of the offence as drawn state as follows:

> " .....on the 19th day of February, 2016 at Ngila Estate in Lang'ata Sub-County in Nairobi County, jointly with another not before court while armed with dangerous weapons namely pistol and a knife robbed one Ezra Mogere Machachi of his mobile phone ncon valued at Kshs.3,000/= Cash Kshs.400/= and one pair of safari boots shoes valued at Kshs.2,500/= and immediately before the said robbery wounded the said Ezra Mogere Machachi."

20. In the case of *Paul Katana Njuguna v Republic*, [2016] eKLR the Court of Appeal observed that:

> " Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice" Can it be said with any certainty that the said defect is incurable under Section 382 of the Penal Code. We observe that the offence under Section 295 and 296 (2) were not framed in the alternative. So, following the decisions in *Cherere s/o Gakuli v R*(supra) *Laban Koti v R* (supra) and *Dickson Muchino Mahero v R* (supra), the defect in the charge herein is not necessarily fatal. (Emphasis added)."

21. From the reading of section 295 of the *Penal Code*, it is a statement explaining the meaning of the term "robbery". It is a clarification in that respect.

22. Section 296 (2) of the *Penal Code* on the other hand provides for the penalty to be imposed. The provision includes what amounts to robbery with violence. Looking at the charge as framed, it is not indicated that the appellant committed two [2] separate offences, the offence preferred is a single transaction.

23. Section 382 of the *Criminal Procedure Code* provides that:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
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> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

24. Although the formal complaint through the statement of the charge did capture both the definition and punishment section, the appellant understood what he was being accused of, denied the charge and mounted a defence to the accusation. In the circumstances, the charge was not fatally defective.

25. The ingredients of the offence of robbery with violence were stated by the Court of Appeal in the case of *Johana Ndungu v Republic*, [1996] eKLR (Criminal Appeal No 116 of 1995) as follows:

> "In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the *Penal Code*. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
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> i. If the offender is armed with any dangerous or offensive weapon or instrument, or
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> ii. If he is in company with one or more other person or persons, or
>
> iii. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

26. In the case of *Dima Denge Dima & others v Republic*, Criminal Appeal No. 300 of 2007, it was stated that:

> "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."

27. The complainant (PW1) testified to have been alone at the time of attack. He stated that one of his attackers had a knife while the other one had a pistol. A pistol is an implement/instrument that is

designed to be lethal. A knife, though not intended to be dangerous, is capable of causing serious injury or even death. Therefore, the assailants were armed with dangerous instruments/weapons.

28. The individuals were stated to have been two [2] therefore the attacker had company of one person.

29. Evidence of the complainant that the attackers used actual violence upon him in that they struck and wounded him was proved by evidence of PW2, PW3 and PW5 who saw him soon after the attack and caused him to be taken to hospital. There is proof of the complainant having been seen at Kenyatta National Hospital on 19th February, 2016 with multiple cut wounds secondary to an assault. Subsequently, he was admitted at PCEA Kikuyu Hospital Eye Unit on February 26, 2016 and he underwent an operation. Thereafter he was discharged on 29th February, 2016. This was evidence of the complainant having been wounded at the time of the act.

30. In his defence, the appellant denied having been the perpetrator. The question of identification is of a single witness. PW2 alluded to having seen the two [2] passengers the complainant carried at 8.00pm when he left the stage. That he hooted and flashed as a sign of greetings. That the complainant told him that the two (2) customers that he had carried are the ones who assaulted and robbed him.

31. Having left the stage at 8.00pm, there is no doubt the offence was committed at night. The trial court appreciated the fact of evidence of identification having been of a single witness, guided by case law namely *Kiilu & another v Republic*, [2005] 1 KLR 174. The court rightly cautioned itself of the need to test with care evidence of a single witness.

32. In the case of *Anjononi v Republic*, [1980] eKLR the court stated that:

> "…..recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic* (unreported)…."

33. This was a case of recognition. The complainant stated that the appellant was his customer as he had transported him on several occasions and had known him for several months. On cross examination he stated that although he did not know his name, he could identify him by facial appearance and the injury that he had on his hand although he did not mention it in his statement.

34. PW2 on the other hand knew the appellant very well as both of them used to live at Kibera and he saw him being carried as a pillion passenger with another by the complainant the material date at 8.00pm.

35. On the question of an identification parade having not been conducted, ordinarily an identification parade is conducted to ascertain if the victim or witness can identify the perpetrator amongst other persons who are similar to the person. This was a case where the complainant led his colleagues to arrest the appellant who was subsequently handed over to the police. Conducting an identification parade was not necessary.

36. The complainant testified to have been in possession of cash, a cell phone and safari boots that were stolen but not recovered. The doctrine of recent possession as a basis of positive proof could not be applicable because there was no recovery.

37. The complainant faults the court for failing to find that essential witnesses should have been called to corroborate evidence of witnesses who testified. In particular he questioned why the motorist who was mentioned by PW1 was not called to testify.

38. Section 143 of the *Evidence Act* provides thus:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

39. In the case of *Keter v Republic* [2007] 1 EA 135 the court held:

> "The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

40. The stated witness was also mentioned by PW2 and PW5 The witness was alleged to have taken the victim to hospital while PW1 stated that when the police vehicle arrived the victim was transferred from the vehicle of the Good Samaritan to that of the police who took him to Ushirika Medical Centre then ultimately to Kenyatta National Hospital. In the case of *Philip Nzaka Watu v Republic* [2016] eKLR, the Court of Appeal expressed itself thus;

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people can
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> perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

41. The role played by the witness was not major. There is proof that indeed the complainant was injured and taken to hospital. Therefore, failure to call the witness was not detrimental to the prosecution's case.

42. On the question of circumstances surrounding the arrest of the appellant. Members of public who reasonably suspect a person of having committed an offence may effect arrest and hand the person over to the police. Therefore, there was nothing wrong with the manner in which the appellant was arrested.

43. A defence was put up by the appellant explaining how he was arrested but he did not mention anything to do with events of the material date.

44. On sentence, the law provides for death sentence. However, as clearly pointed out by the trial court, the circumstances of the case were aggravating, but, following the decision of *Muruatetu* (2017) eKLR, when courts were exercising discretion to mete out sentences other than death as provided, the option of a definite sentence was imposed.

44. In the result, I find no merit in the appeal. Consequently, the appeal is dismissed in its entirety.

45. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 21ST DAY OF MARCH, 2023.

L. N. MUTENDE

JUDGE

In The Presence Of:

Appellant

Mr. Mutuma for the State

Court Assistants - Evance/Mutai