Wamalwa v Republic (Criminal Appeal E072 of 2022)
[2023] KEHC 3689 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3689 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E072 OF 2022

REA OUGO, J

APRIL 20, 2023

BETWEEN

PROTUS NYONGESA WAMALWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence of Hon M. Munyekenye, SPM dated 7th July 2022 in Criminal Case No. E152 of 2020 at the Magistrate's Court at Webuye)

JUDGMENT

1. The Appellant, Protus Nyongesa Wamalwa, was charged and convicted on two counts:

   Count I: Breaking into a building and committing a felony contrary to section 307 and stealing contrary to section 279 (b) of the Penal Code. Particulars being that between the nights of 14th and 15th day of November 2020, at Miendo area, Mlendo sublocation in Webuye West sib-county within Bungoma County, jointly with others not before court broke and entered church namely Miendo gospel church and committed therein a felony namely theft of the following items: Power amp mixer, 2 microphone receivers, one key board all valued at Kshs 51,500/- property of Miendo Gospel Church.

   Count 2: Stealing contrary to section 268 as read with section 275 of the Penal Code. Particulars being that between the nights of 14th and 15th day of November 2020, at Miendo area, Mlendo sub-location in Webuye West sib-county within Bungoma County, jointly with another not before court stole one tecno smart phone Kshs 16,000/- and a wallet containing 2 national id card, two cooperative bank ATM cards, one NHIF card, receipts of the stolen items and cash Kshs 3,500/- all valued at 19,500/- the property of pastor Leonard Juma Wamoto.

2. He also faced an alternative charge of handling stolen property contrary to section 322(1) (2) of the *Penal Code*.

3. The appellants pleaded not guilty to the charges before the trial court, and the primary court conducted a full trial. The prosecution called five (5) witnesses.

4. The gist of the prosecution case was that on the material day Leonard Juma Wamoto (Pw1), Protus Kilwake Khaoya (Pw2) and Fredrick Juma Wolayo (Pw3) were at Miendo Gospel Worship Center on 14th November 2020 when the appellant broke in and stole items from the church and from Pw1. Pw1 testified that on Saturdays, they would sleep in church so that they could wake up early on Sunday to worship. Pw1 explained that the door was locked but someone could easily open it. Four electrical bulbs were on but the lights outside were off.

5. Pw2 woke up at around 1:00 a.m. and saw the appellant dressed in a jungle jacket for the police. The appellant was well known to Pw2 because he lived in the neighbouring village. Pw2 further testified that he owned a barber shop and the appellant had been his customer at Miendo market. There was also another person with him but Pw2 did not see him well. Pw2 raised the alarm when he saw the appellant carrying a keyboard in his hands heading towards the door. When Pw2 raised the alarm, Pw1 and Pw3 woke up and the appellant threw the keyboard down and ran away. Pw1, Pw2 and Pw3 all ran after the appellant in an attempt to catch him but the appellant got away.

6. They went back to the church they discovered that Yamaha PSR 363, arm powered mixer 8 channels and 2 microphone receivers had been stolen. Pw1 also noted that his wallet that had Kshs 3,500/-, 2 ATM's for Cooperative Bank, 2 national identity cards (one was belonged to him while the other was his wife's), a smart phone and receipts. Pw1, Pw2 and Pw3 reported the matter to the police at Matisi police post the following day. Pw1 met with Anthony Simiyu Wanyama (Pw4) and asked him if he knew where the appellant lived. Pw4 testified that he knew that the appellant had moved from Mendo to Miange.

7. Pw1, Pw2, Pw3 and Pw4 all went back to the police post, and together with 8 police men they went to the appellant's home. The investigating officer, No. 261832 PC Baraka Otieno Odhiambo testified that they went to the appellant's home. Upon conducting a search under the appellant's bed, were a mixer and 2 microphone receivers. The mixer had abbreviations GCM (Gospel Church Miendo). They also found other items such as motor cycle, fan, solar panel, solar battery, amplifier and a speaker. The suspect was taken to Matisi police station.

8. The appellant in his submissions argues that he was not properly identified as it was not clearly stated the direction he was facing and neither did the prosecution witnesses state the direction of the light. He argues that if at all there was a person behind him as he was heading towards the door, then it would have been easier for Pw2 to identify the second person. The prosecution case was therefore not proved beyond reasonable doubt. He also questioned the manner in which the search was conducted. He submitted that Pw5 did not have a warrant of arrest, an inventory signed by the parties present showing that the items were recovered from the appellant's home and that Pw5 did not produce the O.B number or the investigations diary.

9. The respondent submits that the appellant was positively identified as the appellant was a person well known to Pw2. Pw2 was a credible witness whose version of events was consistent and there were no inconsistencies. The prosecution argue that the appellant was found in possession of items which had been stolen from church and that there were witnesses when the items were recovered.

Analysis And Determination

10. The main issue raised in the appeal is whether the prosecution proved its case beyond reasonable doubt. The respondent submitted that the appellant was properly convicted for count 1 and there are no

sufficient grounds to alter the conviction by the trial court. Having read Count 1, I note that that it has more than one particular offense. In framing charges, the prosecution ought to be guided by section 134 of the *Criminal Procedure Code* which provides 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."

11. In the case of *Hassan Jillo Bwanamaka & another v Republic* [2018] eKLR the court held as follows:

> 20. On the first issue, the rule against duplicity provides that the prosecution must not allege the commission of two or more offences in a single charge in a charge-sheet. Such a charge is sometimes said to be 'duplex' or 'duplicitous'. The rule stems from two important principles: firstly, as a matter of fairness, a person charged with a criminal offence is entitled to know the crime that they are alleged to have committed, so they can either prepare and/or present the appropriate defence.
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> 21. Secondly, the court hearing the charge must also know what is alleged so that it can determine the relevant evidence, consider any possible defences and determine the appropriate punishment in the event of a conviction.
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> ....
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> 34. The converse position therefore is that if the charge sheet reveals two independent offences where one cannot be subsumed in the other in the sense of all the ingredients of one of the offences being included in the other offence, and the evidence adduced pursuant to such a charge does not disclose any of the offences, then this is a defect that is not curable under section 382 of the Criminal Procedure Code.
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> 35. It is notable in this respect that in Reuben Nyakango Mose & Another vs Republic (supra) the charge therein that was alleged to be duplex was that of burglary and stealing contrary to sections 304 (2) and 279 (b) of the Penal Code, which offences can be subsumed in each other, and which are allowed to be charged together.....
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> 36. I am of the view that the defect in the present appeal is not one that is curable under section 382 of the Criminal Procedure Code, as there are two offences disclosed by the charge, namely unlawful possession of an explosive whose the ingredients have been enumerated in the foregoing, and possession of an explosive with a view to perpetrating an unlawful object, which offences require specific and separate ingredients to be proved, and which attract different penalties under the law. In addition, as shown above, the said offences were not supported by the particulars. Lastly, it is my opinion that there was prejudice caused to the 2nd Appellant in this regard as it would not have been clear what offence or sentence was applicable to her.

12. In this case, the appellant on the first count was charged with the offence of breaking into a building and committing a felony contrary to section 307 and stealing contrary to section 297 (b) of the *Penal Code*. Section 307 of the *Penal Code* Provides as follows:

> 307. Breaking into building with intent to commit felony
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> Any person who breaks and enters a schoolhouse, shop, warehouse, store, office, counting-house, garage, pavilion, club, factory or workshop, or any building belonging to a public body, or any building or part of a building licensed for the sale of intoxicating liquor, or a building which is adjacent to a dwelling-house and occupied with it but is not part of it, or any building used as a place of worship, with intent to commit a felony therein, is guilty of a felony and is liable to imprisonment for five years.

13. In order to prove this offence the prosecution is required to prove that the appellant broke and entered a building used as a place of worship with the intent to commit a felony. However, the same charge was lumped together with the offence of stealing from the person; stealing goods in transit, etc. contrary to 279 (b) of the *Penal Code*. Section provides as follows:

> 279. Stealing from the person; stealing goods in transit, etc.
>
> If the theft is committed under any of the circumstances following, that is to say—
>
> (b) if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house;

14. The ingredients to be proved under the two sections are very distinct as section 307 of the Penal Code relates to breaking and entering a building used as a place of worship while section 279 (b) relates to stealing of things in a dwelling house. It is not in dispute that the building in question was not a dwelling house but a place of worship. Having considered the manner in which the charge was framed, am of the view that the defect in the charge sheet is not one that is curable under section 382 of the *Criminal Procedure Code*. The two offences in count I require specific and separate ingredients to be proved, and secondly, the offences attract different penalties under the law. In my view, the duplicity of the charge in count 1 prejudiced the appellant's defence.

15. I now turn to consider whether the trial court proved its case in Count II. The appellant has submitted that he was not positively identified at the scene of crime. On the other hand the prosecution argued that the appellant was well known to Pw2 and therefore positively identified. In the case of *Wamunga v Republic* [1989]KLR 4242 at 426 the learned judge stated:

> "Where the only evidence against a dependent is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

16. Pw2 was the only witness who saw the appellant. Despite the incident having taken place at 1:00 a.m. when it was dark, Pw1, Pw2 and Pw3 who were in the church testified that 4 electric bulbs in the church were on. There was therefore a sufficient light to identify the assailants. Pw2 also gave clear evidence that the appellant was well known to him as he was a customer at his barber shop and that he

was from the neighbouring village. Pw2 testified that the appellant wore a jungle jacket for the police. The evidence of Pw1 and Pw3 also corroborates the evidence of Pw2 as Pw1 and Pw2 both testified that immediately after raising the alarm he Pw2 told Pw1 and Pw3 that he saw the appellant. The appellant was therefore positively identified in the circumstances.

17. Pw1 testified that after the appellant ran away, he discovered that his wallet had been stolen. It contained Kshs. 3,500/-, two ATM cards, 2 national identity cards and receipts. He also lost his smart phone. The prosecution therefore proved beyond reasonable doubt that the appellant was responsible for the offence in Count II.

18. In conclusion, the appeal is partly successful. Based on the reasons stated earlier in this judgment, I quash the conviction and the sentence of the trial court in regards to Count I. The conviction of the trial magistrate in regard to count II is upheld. I am constrained to agree with the submissions of the appellant that the sentence meted by the trial magistrate was excessive. The prosecution have also conceded to the fact that the sentence was excessive as the general punishment for theft under section 275 of the Penal Code is 3 years imprisonment. Accordingly, I set aside the sentence of 14 years in respect of Count II and substitute it with 30 months imprisonment.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF APRIL 2023

R.E. OUGO

JUDGE

In the presence of:

Appellant in person

Miss Omondi For the Respondent

Wilkister C/A