Ikeny v Republic (Criminal Appeal 30 of 2021)
[2023] KEHC 4078 (KLR) (2 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4078 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL APPEAL 30 OF 2021

RN NYAKUNDI, J

MAY 2, 2023

BETWEEN

EIYEN IKENY ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. C Wekesa in Lodwar law court Cr. No. 281 of 2020)

JUDGMENT

Coram: Before Hon Justice R. Nyakundi

Mr. Edward Kakoi for the State

1 The Appellant was charged with two counts. one for robbery with violence, and two for rape. The facts were that on July 15, 2020 while the complainant was going to the shop in the village he accosted her, raped and robbed her of Kshs 200/= she was going to use for shopping.

2 He was convicted on both counts and sentenced to 7 and 14 years respectively.

The Appellant did not file any written submissions.

3 The respondent on its part filed its submissions dated March 14, 2023. It was the counsel's submission that given the nature of violence meted out to the complainant, the sentence should be retained.

4 The appellant was aggrieved with both conviction and sentence and filed this appeal, raising the following grounds, namely:

1. Whether the offenses were proved beyond a reasonable doubt.
2. Whether the accused person was properly identified

5 I have considered the appeal, and submissions on record. I have also perused the trial court's record and considered the impugned judgment. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that.

6 In *Okeno v Republic* [1972] EA 32, it was held that:

7 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 the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion... 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.

8 In *Kiilu & Another v Republic* [2005]1 KLR 174, the Court also held 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. 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.

9 After considering the evidence, the trial court was satisfied that the prosecution had proved its case on the two counts of robbery with violence and rape. It convicted him prompting this appeal. I have considered this appeal and submissions by the prosecution. With regard to the counts, the trial court was satisfied that they were proven beyond reasonable doubt.

10 In line with section 295 as read with section 296 (2) of the *Penal Code* the court in *Jeremiah Oloo Odira v the Republic* (2018) eKLR stated as follows;

Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence of threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. The things must therefore be proved for the offence of robbery to be established. Theft and the use of or threat to use actual violence.

i. The offender is armed with any dangerous or offensive weapon or instrument, or

ii. The offender is in the company of one or more other person or persons, or

iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or use any other personal violence to any person. (see *Oluoch v Republic* (1985) KLR.

11 In my view the issues raised by the appellant can be dealt with firmly by the principles elucidated in the above case. I find no hesitation that the witnesses who testified before the lower court that is PW1, PW2, PW3,

12 PW4 and PW5 laid bare the ingredients of the offence against the appellant. When place on his defence the appellant failed the test of providing tactical evidence to rebut the prosecution case. in analyzing the analogy of evidence it is clear that the nature and effect of it was the findings of guilty reached by the trail magistrate. I think the appeal ignores the plain language and certain important features enshrined in section 295 as read with 296(2) of the *Penal Code* on the ultimate guidance for the trial court to establish the commission of an offence namely Robbery with Violence. Following the attack of the complainant (PW1) she was seen and treated at Lorugum Health Centre Thereafter, (PW4) a registered nurse on examination filed the P3 form which she produced as an exhibit in support of the prosecution case. In our opinion the complainant (PW1) suffered visible scars on the neck region. She further made findings that the complainant was assaulted suffering actual harm.

13 On identification the appellant was properly identified by the complainant bringing the circumstances within the scope of the case in *Hassan Abdallah Mohammed v Republic* (2017) eKLR it was stated that:

Visual identification in criminal cases can miscarriage of justice and should be carefully tested. The court in *Wamunga V Republic* (1989) KLR 424 at 426 has this to say; Where the only evidence against a defendant is evidence of identification or recognition, atrial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction."

14 The fundamental question in this appeal is whether the prosecution proved that it was the appellant who committed the offenses. The trial court agreed with the prosecution that the appellant had been identified by the complainant as the person who committed the offenses. The appellant pleaded forgiveness if the court finds him guilty.

15 On sentence, the appellant was sentenced to 7 and 14 years imprisonment on the count of robbery with violence and rape respectively. The jurisdiction on appeal to interfere with sentence of the trial court is now well settled. This is the position taken by the court of appeal in Shadrack Kipkoech Kogo v Republic Eldoret criminal Appeal No. 253 pf 2003 the court of appeal stated thus;

Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing he sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v Republic* (1989) KLR 306)."

16 That is to say that the grounds by the appellant as appertains review of sentence must demonstrate inherent factors as identified by the Kogo case. I observe that no such submissions presented are capable of reviewing or interfering with the decision on sentence as entered by the trial court. That being so, section 382 of the *Criminal Procedure Code* finds its way to this appeal.

17 In the end, having considered the appeal and submissions and reevaluated the evidence myself, I do not find merit in the appeal on both conviction and sentence. It is dismissed.

DATED AND SIGNED AT ELDORET THIS 02ND DAY OF MAY, 2023

.....

R. NYAKUNDI

JUDGE

In the presence of:

Mr. Edward Kakoi for the State

Appellant present in person