Kanjori v Republic (Criminal Appeal E040 of 2021)
[2023] KEHC 4066 (KLR) (5 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4066 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E040 OF 2021

GMA DULU, J

MAY 5, 2023

BETWEEN

MERRILY DANIEL OLE KANJORI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Originating From the conviction and sentence in Criminal Case No. 376 of 2018 by Hon. Khapoya S. Benson (PM) at Taveta Law Courts)

JUDGMENT

1. The appellant was charged in the Magistrate's Court at Taveta with two others with robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*.

2. The particulars of the offence were that on May 27, 2018 at Mata Trading Centre in Taveta Sub-County within Taita Taveta County jointly with others not before court while armed with dangerous weapons namely knives, robbed Stephen Opiyo Sandia of cash Kshs 4,500/=, motor vehicle registration number KCN 81XZ make Toyota Landcruiser, Chasis/Frame number JTELB71J50-772975 colour beige, driving licence number LXV87, Identity card number xxxxxxxx, mobile Nokia Smart Phone A35, assorted personal clothes, a bag, all valued at Kshs. 7,022,900/= (Seven million twenty two thousand nine hundred) and during the time of such robbery used personal violence to the said Stephen Opiyo Sandia.

3. The appellant and his co-accused denied the charge. The 3rd accused absconded during trial and warrant of arrest was issued against him. The 2nd accused person was acquitted of the charge. The appellant, who was the 1st accused was convicted of the offence and sentenced to suffer death as provided by the law.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, through counsel Gicheha Kamau & Company Advocates on the following grounds:-

    1. That the learned trial Magistrate erred in law by convicting him on a defective charge.

    2. The learned trial Magistrate erred in law and fact in not properly directing his mind to the degree, standard of proof and law relating to the burden of proof.

    3. The learned trial Magistrate did not properly analyse the evidence on record and in his selective analysis failed to form the necessary balanced view and this prejudiced the appellant's case.

    4. The learned trial Magistrate was speculative in his analysis and findings and did not take in to account all the facts, circumstances and crucial evidence relating to the case.

    5. The learned trial Magistrate failed to consider the obvious discrepancies, contradictions and inconsistencies in the prosecution case.

    6. The learned trial Magistrate erred in law and fact by failing to properly direct his mind in considering the appellant's defence.

    7. The learned trial Magistrate erred in law and fact by shifting the burden of proof to the accused person.

    8. The learned trial Magistrate erred in law and fact by relying on the hearsay and inadmissible evidence (of an informer and confession not properly taken).

    9. The learned trial Magistrate erred in law and fact in relying on the evidence of a single witness on identification without warning himself on the danger of relying on such kind of evidence.

    10. The learned trial Magistrate erred in law and fact in not appreciating that the case was poorly investigated and crucial witnesses and evidence was not availed.

    11. The conviction was against the evidence on record.

    12. In all the circumstances of the case, the sentence was harsh and excessive and the court should consider the same.

5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the Counsel for the appellant, as well as the submissions filed by the Director of Public Prosecutions. Each side has relied on decided court cases to support their arguments.

6. This being a first appeal, I start by reminding myself that as a first appellate court, I am duty bound to consider all the evidence on record afresh, and come to my own independent conclusions and inferences – *Okeno Versus Republic* [1972] EA 32.

7. The appellant's counsel has raised both technical and substantive grounds of appeal. The technical ground is that the charge sheet is defective.

8. In the appellant's counsel submissions, I see no arguments relating to the defective nature of the charge. No particulars of the defect were given even in the petition of appeal. I also do not see any defect on the face of the charge.

9. I take that ground of appeal to have been abandoned, and mark it as abandoned.

10. Coming to the substantive grounds of appeal, the prosecution called seven (7) witnesses to prove their case. The appellant on his part gave sworn defence testimony and did not call any additional witness.

11. From the totality of the evidence on record herein, I am of the view that the prosecution proved beyond any reasonable doubt that a robbery was committed against PW1 Stephen Opiyo Sandia as described in the charge sheet. In this regard the evidence of PW1 the complainant and the police is clear and detailed on the sequence of events, date, time and place of robbery and the items robbed. PW1 was also stabbed and drugged. The incident occurred in broad daylight.

12. Like the trial Magistrate therefore, I come to the conclusion that robbery with violence was committed on PW1 on the date stated, and the items described in the charge sheet, including the motor vehicle robbed from him.

13. This appeal by the appellant will however succeed for two reasons, all related to the identity of the culprit.

14. The first reason is that there is no evidence on record that PW1 gave any description of the appellant to anybody before the appellant's arrest. The reason why the appellant was arrested by PW5 PC Leonard Githinji at Hardy Police Station in Karen area Nairobi was also not explained in the evidence on record to be connected to this offence. The mere fact that his photograph was circulated in the media by police from Taveta, which made PW5 arrest him, alone did not mean that it related to this offence. The prosecution should have tendered evidence to show that the appellant was sought in respect of this offence which they did not do.

15. In addition, on the same point, though the prosecution alleged that the appellant was identified by PW1 in an identification parade, the evidence on record is that the identification parade was to be conducted by PW2 IP Carolyne John for the 3rd accused Leo Wangina Gerald who declined to participate in the parade, and later absconded the trial. There is no evidence from the police that they conducted an identification parade for the appellant.

16. It cannot thus be said that the appellant was positively identified as one of the robbers of PW1 in a parade. The descriptions given in court by PW1 about what the appellant did at the scene, could as well be a recital of events in the dock to support a pre-conceived narrative, because there is no evidence on record that PW1 identified him and described to anybody what the appellant did before his court appearance, to sufficiently connect the appellant to the offence.

17. The second reason why the appeal will succeed is that the appellant tendered a long sworn defence testimony denying the offence. The prosecution on their side elected not to challenge his account through cross-examination. In effect, the sworn defence testimony remained as unchallenged.

18. Based on the legal principle that the burden is always on the prosecution to prove the guilt of an accused person beyond reasonable doubt, and that an accused person has no burden to prove his or her innocence, it follows that the unchallenged sworn denial of the appellant shifted the pendulum against the prosecution and the appellant is thus entitled to its benefit and thus an acquittal. What remained of the prosecution evidence was merely suspicion. In the case of *Joan Sawe Versus Republic* (2003) eKLR the Court of Appeal held that suspicion however strong cannot be a basis for a conviction. The evidence of identification herein merely establishes strong suspicion, not positive identification of the appellant. Thus the appellant was not positively identified as the culprit.

19. This appeal will thus succeed for the above two reasons. The conviction will be quashed and sentence set aside.

20. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 5TH DAY OF MAY, 2023 AT VOI, PARTLY VIRTUAL.

GEORGE DULU

JUDGE

In the presence of: -

Mr. Otolo court assistant

Mr. Okemwa for state

Mr. Ongeri for appellant – virtual

Appellant – virtual