Ahmed v Republic (Criminal Appeal E154 of 2022)
[2023] KEHC 18883 (KLR) (Crim) (15 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18883 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E154 OF 2022

LN MUTENDE, J

JUNE 15, 2023

BETWEEN

IFTIN ABDIRIZAK AHMED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the original conviction and sentence in Criminal Case No. 1203 of 2019 at the Chief Magistrates' Court Makadara by Hon. A. Mwangi – PM on 21st July, 2022)

JUDGMENT

1. Iftin Abdirizak Ahmed, the appellant, was charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. Particulars of the offence being that on the 27th day of February, 2019 at Daniel Komboni area in Karibangi North Estate within Nairobi County, jointly with another not before court while armed with dangerous weapons namely knives robbed Benard Kariuki a mobile phone make Samsung valued at Ksh 3,500/-, cash Ksh 2,400/- and a jacket valued at 500/- all valued at Kshs 6,400/- at the time of such robbery used actual violence against the said Benard Kariuki.

2. Upon being taken through full trial he was convicted and sentenced to suffer death.

3. Aggrieved, the appellant appeals against the conviction and sentence on grounds that: the trial court relied on purported identification by recognition without considering that no first report was made of description of the assailant and the court did not warn itself of relying on single identifying witness; the trial court did not comply with Article 50(2) (c) and (h) of the *Constitution*; the court proceeded with the case without witness statements being availed; the Doctor was not called to testify and the P3 Form was produced by a Police Officer, therefore, the case was not adequately proved; and, that the appellants alibi defence that was not displaced as required by Section 212 of the *Criminal Procedure Code* was disregarded

4. Facts of the case were that on February 27, 2019, while PW1 Bernard Kariuki Njuru, the complainant was in the course of riding a motorcycle, being a Boda Boda operator, when he carried two (2) people as his pillion-passengers that he identified as Gideon and Woria (Muslim). They attacked him and took away his license, Identification Card, ATM card and jacket. The incident occurred at 4.00 am. After the act he ran to the nearby Hospital known as Selina but fell at the gate. He was picked and taken into the Hospital where he was treated and discharged. He reported the matter to Kariobangi Police Station where he was issued with a P3 Form that was subsequently filled and adduced in evidence by PW2 No 88096 PC Marcus Wameyo Male.

5. Upon being placed on his defence the appellant told the court that he was taken to the Police Station by his mother who had warned him to desist from keeping bad company. That in the result, he has reformed and is willing to help his mother.

6. The appellant called a witness, Fatuma Ado, who stated that she took him to the Police station for engaging in bad company.

7. The trial court considered evidence adduced and found the Prosecution having established ingredients of the offence of robbery with violence. It dismissed the defence put up as a mere denial and reached the conclusion to convict the appellant.

8. The appeal was canvassed through written submissions. The appellant urged that circumstances that prevailed could not have favoured correct identification and had the complainant identified the appellant properly then he could have given the description of his attackers to the police at the outset. As set out in the casé of *Maitanyi v Republic* [1986] KLR 198.

9. That Article 50(2) (c) of the *Constitution* was violated as the appellant was not supplied with witness statements during trial. The appellant also faulted the court for not appreciating that the prosecution did not call the arresting officer to testify. He questioned the medical report adduced in evidence by the Investigating Officer that he termed suspicious.

10. Further, that Section 217 of the *Criminal Procedure Code* was not complied with and the alibi defence put up was disregarded.

11. Submissions by the State were not forthcoming.

12. This being a first appellate court I must examine and analyze evidence adduced at trial afresh and reach independent conclusions bearing in mind that I had no opportunity of seeing and hearing witnesses who testified. This duty of the court on a first appeal was stated by the court in *Okeno v Republic* [1972] EA 32 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 v. R [1957] E A 336) and to the appellate courts own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions - Shantilal M. Ruwala v. 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 courts' findings and conclusions; 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 v. Sunday Post [1958] EA 424".

13. The gravamen of the appellant is the fact of the case against him having not been proved to the required standard and his rights having been contravened due to non-compliance with the requirements of the *Constitution*.

14. To prove the offence of robbery with violence the Prosecution that made allegations against the appellant was required to prove ingredients for the offence as stated in the case of *Oluoch vs. Republic* (1985) KLR where the Court of Appeal stated that:

> " Under section 296(2) of the *Penal Code*, robbery with violence is committed in any of the following circumstances;
>
> 1. The offender is armed with any dangerous or offensive weapon or instrument.
> 2. The offender is in company with 1 or more person or persons, or,
> 3. At or immediately before or immediately after the time of the robbery, the offender wounds, beat strikes or uses other personal violence to any person"

15. This is a case where evidence of what transpired was of a single witness whose evidence the court relied on in reaching the verdict. In the case of *S vs. Webber* 1971 (3) SA 574(A) the court held that:

> " A conviction is possible on the evidence of a single witness. Such witness must be credible, and the evidence should be approached with caution. Due consideration should be given to factors which affirm, and factors which detract from credibility of witness. The probative value of the evidence of a single witness should also not be equated with that of several witnesses."

16. In the case of *S v Sauls and others* [1991] 3 S.A. 172 (A) the court held that:

> " There is no rule of thumb test or formula to apply when it comes to consideration of the credibility of a single witness. The trial Judge will weigh his evidence, will consider its merits and demerit and having done so, will decide whether it is trustworthy and whether the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."

17. The learned trial court in the instant case considered evidence adduced of the complainant, a single witness and duly cautioned itself of the merits and demerits of relying on such evidence.

18. Article 50 (2) (C) and (h) of the *Constitution* provides that:

> (2) Every accused person has the right to a fair trial, which includes the right—
>
> (c) To have adequate time and facilities to prepare a defence;
>
> (h) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

19. On the May 22, 2019, prior to the case proceeding the appellant sought to be provided with witness statements and the court not only made the necessary order but also later mentioned the matter and the appellant confirmed that he had been furnished with witness statements. Subsequently the appellant

applied to be granted legal representation and the trial court directed the State to avail a probono advocate to represent him. Subsequently the appellant chose to proceed with the case following an allegation that he had suffered in remand custody.

20. According to PW2 the complainant herein was attacked after dropping of his pillion passenger. The complainant alluded to having been attacked by the person he had carried as a pillion passenger who stabbed him on the back and took away his property. The incident happened at 4.00 am but due to some security lights that were at a nearby school, he identified the accused person. This evidence was not challenged.

21. The Investigating Officer,PW2, alluded to having issued the complainant with a P3 Form as he claimed to have been stabbed. The document that was adduced in evidence by the Investigating Officer was alleged to have been filled by a Doctor who was deceased.

22. Section 33 (b) of the *Evidence Act* provides thus:

> .....Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
>
> > ...(b) when the statement was made by such person in the ordinary course of business, and in particular when it consists of an entry or memorandum made by him in books or records kept in the ordinary course of business or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him;....."

23. Section 77 of the *Evidence Act* provides thus:

> 1. In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> 2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

24. The P3 Form was adduced in evidence by an investigating officer. The question would be whether such evidence should be excluded as it was prejudicial to the appellant. If the author of the document was dead, the document would be admissible. Procedurally a witness who was conversant with the author's handwriting could have been called to testify in this regard. And an application should have been made to the court for production of such evidence so that the accused/appellant could have responded on the fact of production to enable the court rule on whether or not such evidence was admissible. This was not the case in the instant case. What transpired was prejudicial to the appellant as the background of the document was not established.

25. The appellant complains that he put up an alibi defence that was not considered. An alibi defence means that the person accused was not capable of committing the alleged offence because he was not at the scene of crime when it occurred. Looking at the defence put up, it is an explanation of how the appellant was arrested and denial of having committed the offence, it did not touch on any subject matter that would amount to an alibi defence.

26. Looking at the ingredients of the offence as charged it would be questionable if the Prosecution established elements of the offence of robbery with violence as set out in circumstances as stated in the *Oluoch* case (Supra). That notwithstanding Section 296 (1) of the *Penal Code* provides thus:

> Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

27. Section 295 of the *Penal Code* provides thus:

> 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.

28. The complainant gave evidence that was uncontroverted of an assailant who used violence on his person that took items that he did not consent to, which was his property. He lost the items permanently. The accused chose to seek an opportunity to reconcile with the complainant instead of rebutting evidence put up, hence the individual stole from the complainant. This was robbery as defined by Section 295 of the *Penal Code* as read with Section 296 (1) of the *Penal Code*.

29 In that regard I set aside the conviction meted out by the trial court which I substitute with a conviction for robbery as provided by Section 296(1) of the *Penal Code*; and set aside the sentence imposed that I substitute with a sentence of five (5) years imprisonment that shall be effective from the 27th day of February, 2019 being the date of his arrest.

30. It so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 15TH DAY OF JUNE, 2023.

L. N. MUTENDE

JUDGE

IN THE PRESENCE:

Appellant

Mr. Mutuma for State

Court Assistant- Mutai