Josphine v Republic (Criminal Appeal E042 of 2022)
[2023] KEHC 18743 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18743 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E042 OF 2022

HK CHEMITEI, J

JUNE 14, 2023

BETWEEN

KELVIN MATUNDURA JOSPHINE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal From The Judgement Of Hon. F.K. Munyi (Pm) Dated 10{{^th}} May 2022 In Nakuru Criminal Case No. CMCC 928 Of 2017)

JUDGMENT

1. The appellant was charged with 5 counts of Robbery with violence contrary tosection 296(2) of the *Penal code*. The first count was that on the night of 14th and January 15, 2017 at Kiamunyi estate in Rongai sub county within Nakuru county jointly with others not before court while armed with offensive weapon namely H K 21 rifle robbed Victor Kamau Miringu of his motor vehicle KBH 589 D make Toyota Prado valued at kshs 2 Million, laptop make HP valued at kshs,50,000, neon camera with 5 lenses valued at kshs300,000, I phone 65 valued at kshs,90,000, Gemini running watch valued at kshs,20,000 and cash kshs 13,9000 all valued at kshs 2,799,000 and immediately before and after such robbery used actual violence against Victor Kamau Miringu.

2. The other 4 counts are similar in nature and style and involves Winnie Wanjiru Ngugi, Nancy Kamau, Jackson Miringu Kamau and Lydia Wanjiru respectively.

3. The circumstances leading to the said robbery are easy to understand. The complainants had just arrived home from attending a funeral in Kitale. This was around 9pm. As they entered the house pw1 was informed by the domestic worker that there were some people at the gate. The rest of the family members had disembarked and were heading to the house as he parked the vehicle.

4. Armed with a jembe stick, pw1 and Pw 6 went to check and because it was dark they used torches. Suddenly they confronted two masked men who told them to keep silence and they were armed with

a big gun. They were then herded to the house where the other family members and the complainants in this case were.

5. Meanwhile at the said house there were other two assailants who had also herded the rest of the family members to the sitting room where they were forced to lie down. Pw1 and pw6 as well were told to lie down and not to raise any alarm.

6. The four assailants who were all masked began demanding from them their personal effects including the mobile phones and wallets. They all cooperated and they also gave them their mpesa PIN. They also surrendered their ATM bank cards and the PIN numbers.

7. The assailants spent considerable time with them between 9pm till around 4 am. Meanwhile two of the assailants took pw1 vehicle and went away to withdraw money from their banks.

8. The rest of the assailants remained guarding them and in the process cooked and ate some food which was in the fridge.

9. At around 4am and after those who had left for the bank came back they covered the complainants with blankets and left. The complainants after some time realised that they had left and they went to report the matter at Menengai police station. The officers came and began their investigations and recorded statements from them.

10. Later the appellant was arrested courtesy of another robbery incident and the complainants herein went to identify him in a parade at the police station. In the said separate robbery, a gun was recovered in which the witnesses herein were able to identify as the one used by the assailants in their case.

11. All the exhibits were thereafter produced including the said gun and the identification parade certificates as well as a search certificate for pw1 vehicle and other items he used to purchase it. It was also the respondents case that there was no recovery of the stolen items and the arrest of the other suspects.

12. When placed on his defence, the appellant denied the same in his sworn evidence. He said that he was arrested together with his employer over unrelated offence and that he had no knowledge of the recovered gun.

13. On identification parade he said that the witnesses had seen him at the DCI offices before the parade. He disputed the voice identification by the complainants.

14. When cross examined by the court he said that at the time of the arrest he was 17 years although he could not produce any evidence when the court demanded so. He generally denied the charge.

15. The appellant was then convicted in all the counts and sentence to death under count one and the rest of the counts were held in abeyance.

16. He has filed this appeal and the amended grounds of appeal which are contained in the submissions filed on December 7, 2022, where he has raised basically one ground namely identification.

17. He submitted that visual identification was not possible at the scene and therefore the witnesses were mistaken as he was not at the scene. He said that the assailants were strangers to the complainants and masked and it was therefore not possible to identify them. He relied on the famous case of *Roria v Republic* (1975) E. A .139.

18. On identification parade he reiterated the fact the same was flawed as the witnesses differed on how they described how the police conducted the same. He said that it run contrary to Rule 6 (iv), (d) of the Police Standing Orders.

19. On voice identification the appellant submitted that the same was not conclusive as the conditions obtaining at that moment was not conducive and the words spoken were changed depending on the witnesses.

20. The appellant submitted that the respondent failed to link any nexus between him and the robbery and that the court failed to take into consideration the alibi evidence he had tendered. He prayed that the appeal be allowed.

21. The learned state counsel supported the findings by the trial court. He submitted that all the ingredients of robbery with violence were proved against the appellant. He relied on the case of *Odira v Rep*. (2018) eKLR.

22. He said that the appellant was identified at the parade by the witnesses who picked him from the rest of the participants. That the voice identification was proved as the appellant spent considerable time with the family members and they had sufficient time to master his voice.

23. On his alibi defence, the respondent submitted that the appellant save from the fact that he was employed by one Josephine Waindi could not explain where he was at the night of January 14, 2017.

24. The respondent prayed that the appeal be dismissed as it lacked merit.

Analysis And Determination.

25. The court at this juncture is meant to analyse afresh the evidence so tendered by the parties and arrive at its own independent conclusion with the knowledge that it did not have the benefit of seeing the witnesses or their demeanour. (See *Okeno v Rep*. 1972 EA 32)

> " 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] EA 336) 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. (*Shantilal M Ruwala v R* [1975] EA 57). 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; 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 429."

26. Having perused the proceedings herein, it is true that the issue at stake is on visual and voice identification. It is evident that the assailant stayed with the complainants from 9pm to 4am on the fateful night. The assailants according to them were armed and masked. They relived them of their valuables including pw1 car. None of the items were ever recovered including the phones and wallets among others.

27. It is also clear from their evidence that the lights were later put off in the house except those at the sitting and dining area.

28. The thread that runs from the witnesses and or complainants in particular is that the appellant who was not among the two who went to the ATMs was around all through and at some point he lowered his mask to eat some food. At this juncture he was able to be seen properly by pw1 who said that;

> "...at some point I saw one of the thugs siting in the dining room eating food that he had taken from the fridge. The man had removed his mask thus i was able to see him clearly because the lights in the dining room were on as opposed to those of the sitting room where we were herded and ordered to lie down."

29. When cross examined by the appellants counsel he went on to say;

> "...the sitting room accommodates three sets of sofas and it's not sunken whereas the dining room is next to sitting room. I was able to view the accused face from my position in the sitting room..."

30. Pw2 as well spoke of identifying the appellant as he removed the mask up to the nose level at some point as he was inquiring about the laptop. That he kept on saying "ïkowapi laptop"

31. The sum total in my view is that considering the period the assailants took with the complainants it was very likely than not that they had sufficient time with them and thus able to pick their faces and for this matter the appellant.

32. On the issue of voice identification, i find that although there were two sentences used by the assailant namely "wapi laptop" and "kwani unaogopa", the same were sufficient to have the witnesses identify the assailant at the identification parade. The identification parade was done within the stipulated standing orders parameters and i do not agree with the appellant that he was disadvantaged in any way.

33. The court in *Choge v. Republic* (1985) KLR 1 stated on voice identification that;

> ".....There can be no doubt that the evidence of voice identification is receivable and admissible in evidence and that it can, depending on the circumstances carry as much weight as visual identification, since it would be identification by recognition rather than at first sight.

34. In *Mbelle v. Republic* (1984) KLR 626 the court said this about voice identification;

> "In relation to the identification by voice, care would obviously be necessary to ensure (a) that it was the accused person's voice (b) that the witness was familiar with it and recognized it and (c) that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it. In the instant case, we are satisfied, on our own evaluation, as we have indicated, that the reception of the evidence as to the voice identification and the dying declaration was correct and safe."

35. Consequently, and based on the above cited authorities, the witnesses identified at the parade the appellants voice despite the period they had not heard of close to a month or thereabouts and that the time they did spent with the assailants as stated above was reasonable to enable them identify him by his voice.

36. As stated above the witnesses had about 8 hours of interaction with the thugs. Even if they were shocked, they should at some point been composed enough to have mastered their voices especially where they were seeking various items including the laptop from them.

37. In view of the above findings, the evidence so presented placed the appellant at the scene. The gun recovered ostensibly used in another robbery was the same one used by them to intimidate and rob the complainants herein.

38. The appeal is not meritorious at all. All the ingredients were proved by the respondent namely, that the assailants were armed with dangerous weapons; in company of more than one and used personal violence against the complainants.

39. On sentencing, i note that the trial court gave the appellant the sufficient sentence as per law established. The same however and going by the current jurisprudence may not be efficacious and the best way in my humble view is to set a maximum definite period of the sentence.

40. Consequently, and taking the totality of the circumstances of this case, the age of the appellant and that there was no evidence that he was a repeat offender set aside the death sentence and substitute it with an imprisonment of 15 years (fifteen) on each of the 5 counts and the same is to run concurrently from March 31, 2017.

41. The appeal is otherwise dismissed.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 14TH DAY OF JUNE 2023.

H. K. CHEMITEI

JUDGE