Shikutwa v Republic (Criminal Appeal 120 of 2019)
[2023] KEHC 18308 (KLR) (2 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18308 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 120 OF 2019

WM MUSYOKA, J

JUNE 2, 2023

BETWEEN

JOSEPHAT KIPTOO SHIKUTWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgment and decree of Hon. ML Nabibya, Principal Magistrate, in Hamisi SRMCCRC No. 1092 of 2018, of 17th July 2019)

JUDGMENT

1. The appellant, Josephat Kiptoo Shikutwa, had been charged before the primary court, of 2 counts of the offence of robbery with violence, contrary to section 295, as read with 296(2), of the *Penal Code*, Cap 63, Laws of Kenya. The offences were allegedly committed at Musasa, on 2nd June 2018, where the victims were Evelyn Kimuli, Jackton Ifedha, James Shirogo and Edward Mwanzali Nandiya. He also faced a charge of possession of a firearm, contrary to section 89(1) of the *Penal Code*; and a charge of possession of ammunition, contrary to section 89(1) of the *Penal Code*. He denied the charges on August 28, 2018. 9 witnesses testified.

2. PW1, Everlyne Kimuli, did not recognize any of the assailants. PW2, Jackton Fedha, did not recognize any of the assailants. PW3, James Shiningu, did not recognize any of the robbers. PW4, Wycliffe Teda, was the clinician who attended to the victims who were injured in the assaults. PW5, No 231xxxx Alex Chirchir, Assistant Superintendent of Police, was a ballistics expert, who examined 6 spent cartridges that were collected from the scene. He later received a firearm and live bullets for examination. PW6, No 109xxx Police Constable Edwin Ombui, was in the party that arrested the appellant, at Cheptiret, Eldoret, where a rifle was recovered. It was fitted with a magazine, and had 26 bullets. Another 60 bullets were found separate from the firearm. He forwarded the firearm and the bullets to a ballistics examiner. PW7, James Makobi, was an employee of Safaricom, he testified that some of the stolen scratch cards was loaded into a line registered in the name of the appellant. PW8, Edward Mwanzani

Nandoya, was one of the victims of the violence. He did not identify or recognize any of the assailants. PW9, No 83xxx Police Constable Moses Biwott, investigated the case. He recovered the 6 spent cartridges at the scene of the robberies. He was in the party that arrested the appellant, and recovered the firearm and the live bullets. He prepared inventories for the recoveries.

3. The appellant was put on his defence, vide a ruling that was delivered on April 3, 2019. He made a sworn statement, on May 16, 2019. He denied the charges. He said that he was arrested on August 19, 2018, on his way from church.

4. In its judgment, delivered on July 17, 2019, the trial court found the appellant guilty of robbery with violence, on the basis that he was found in possession of the firearm, which had been used to discharge the 6 cartridges recovered at the scene of the robbery. He was also connected to the robbery on account of the airtime scratch cards that were fed into his mobile telephone. He was also found guilty of possession of the firearm, and the ammunition.

5. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that the charges were not proved beyond reasonable doubt; Article 50(2)(q) of the *Constitution* on sentences was not considered; the trial court relied on the testimony of only one government officer, the investigating officer; he was not found in possession of any exhibit; evidence on identification and recognition was unsound; and his defence was not considered.

6. Directions were given on June 15, 2021, for canvassing of the appeal by way of written submissions. Both sides filed written submissions. I have gone through the same and noted the arguments made.

7. I will consider the appeal based on the written submissions and the grounds of appeal.

8. The first ground turns on the constitutional right to a fair trial, specifically that relating to being afforded adequate time to prepare defence. The appellant submits that he faced 3 charges of robbery with violence in 3 different cases, being numbers 1092/18, 1100/18 and 1101/18. He submits that the same were tried in the same court and by the same magistrate, and were scheduled for hearing on the same day. He protests that he was not given enough time to prepare his defence. He submits that, in the case the subject of the instant appeal, it was alleged that he had possession of an AK47 No UG/884xxxx/UG8xxxx, which was also the subject of proceedings in another case.

9. With respect to this ground, I will start by saying that those other files are not before me, and I cannot verify the correctness of the allegations made by the appellant. In any case, there is nothing wrong with the same court or the same magistrate handling several criminal cases relating to one accused person. Judicial officers are trained in law, and they determine disputes before them based on the law and facts. The appellant has not demonstrated that he was prejudiced by the 3 cases being tried in the same court and by the same magistrate. Secondly, he has not demonstrated that the same was in violation of the *Constitution*, and he has not pinpointed the particular provisions of the *Constitution* that were allegedly violated. On not being afforded time to prepare his defence, I note, from the record, that he was represented by an Advocate, Mr Wekesa, who attended court and participated fully in the trial and proceedings. At no time did Mr Wekesa raise issue that the defence was not given time to prepare for trial. I am not persuaded that anything turns on this ground.

10. The second ground is on the ballistics evidence. The firearm referred to by the prosecution witnesses bears the same serial number, and the said witnesses were referring to the same firearm. Secondly, there would be nothing wrong with it being alleged that the same firearm was used in other incidents of robbery, the subject of other prosecutions.

11. On whether the offences of robbery with violence was established, the witnesses presented stated that the assailants were more than 1; they were armed with a rifle, which is a dangerous weapon; and they

used the same, as a result of which some of the witnesses got hurt. All those facts brought the offence within the realm of the crime defined in section 296(2) of the *Penal Code*. The other element, of course, is that a theft is committed in the process. The witnesses lost property to the assailants, money and airtime scratch cards, among other things. So robbery with violence was indeed committed. Was the appellant party to the robbery? The victims said that they did not recognize or identify any of the assailants. What brought the appellant into the picture are the airtime scratch cards that were stolen from the scene. They were fed into a telephone line registered in the name of the appellant. When police officers went to Cheptiret to arrest him, they recovered a firearm from him, with lots of ammunition. The airtime scratch cards placed him at the scene, and the evidential burden shifted to him to explain how he came to load his phone with airtime from stolen scratch cards. He did not discharge that burden. The ballistics expert produced a report, which connected the rifle, recovered from the appellant, with the 6 spent cartridges that were recovered at the scene of the robberies at Musasa. The charges of robbery with violence were established against the appellant beyond reasonable doubt.

12. Regarding the charge of being in possession of a firearm and ammunition, the testimonies of the arresting and investigating officers placed the appellant at the scene where the firearm and the ammunition were recovered. His spouse and his parents were present when the recoveries were made, and inventories were prepared, and placed on record. I am satisfied that there was proof beyond reasonable doubt on the finding of the firearm and the ammunition, and the recovery thereof, and the conviction for possession thereof was properly founded.

13. The appellant submits that the firearm was not subjected to forensics, to connect it to the robberies the subject of the charges. That was done, and reports have been placed on record. The link was through the 6 spent cartridges recovered at the scene, the report of the ballistics expert, dated September 26, 2018, item 12 .

14. He submits that the investigating officer was the only government officer who testified. The strength of a criminal case does not depend on how many government officials testify. I am not clear on what the appellant means by government officer, given that the majority of the prosecution witnesses were in fact government officials, that is to say PW4, the clinician; PW5, the ballistics expert; and PW6, one of the arresting officers. What matters is not the number of government officers giving evidence, but the quality of the evidence tendered by the witnesses, whether they are public officers or private citizens.

15. He submits that the trial court did not consider his defence. The defence statements were recited at page 6 of the judgment. That of itself is adequate evidence of consideration of the defence. The defences were also mentioned and considered at pages 8 and 9. In any case, the defence statement by the appellant was nothing more than a denial. He said he was arrested on his way from church, yet there is on record evidence from PW6 and PW9, which placed him at home, when the recovery of the firearm and ammunition was made.

16. He submits that Article 50(2)(q) of the *Constitution* was not considered at sentencing. I do not make sense of what the appellant is saying, because Article 50(2)(q) merely states the right of a convicted person to an appeal or review by a higher court. the trial court had nothing to do with Article 50(2)(q) at sentencing. The appellant has exercised the right given to him under Article 50(2)(q), by bringing this appeal, and, therefore, the issue of that provision being violated does not arise.

17. Overall, I am not persuaded that the appeal herein has merit, for the reasons given above. I accordingly disallow it, and I hereby affirm the conviction, and confirm the sentence imposed on the appellant, Josephat Kiptoo Shikutwa. Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2ND DAY OF JUNE 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Josephat Kiptoo Shikutwa, the appellant in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.