Mohammed v Republic (Criminal Appeal E050 of 2022)
[2023] KEHC 20103 (KLR) (Crim) (14 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20103 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E050 OF 2022

DR KAVEDZA, J

JULY 14, 2023

BETWEEN

LAWRENCE BARAZA MOHAMMED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction delivered by Hon. E. Kanyiri PM on 16th February 2022 in Makadara Chief Magistrate's Court Criminal case no. 1536 of 2017 Republic vs Lawrence Mohammed Baraza)

JUDGMENT

1. The appellant was charged, and after a full trial convicted for the offence of robbery with violence contrary to section 295 as read with 296 (2) of the *Penal Code* (Cap 63) Laws of Kenya. He was sentenced to serve life imprisonment. Being dissatisfied with the conviction and sentence, he filed the present appeal.

2. In his memorandum of appeal, he raised 7 grounds. He also filed supplementary grounds of appeal together with his written submissions. Those grounds have been summarised as follows: The appellant challenged the totality of the prosecution's evidence against which he was convicted. The appellant argued that his trial was unfair. He complained that charge sheet was defective for having duplex charge. The appellant further argued that the trial court failed to consider his defence. Finally, he challenged the sentence as being harsh and excessive.

3. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify. This was aptly stated in the case of *Selle & Another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was

not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.

4. The prosecution called six witnesses in support of the case. HO (name withheld) (PW 1) a child aged 11 years gave evidence after voir dire examination. He told the court that on a date he could not recall, he was in the company of his father when they were going to the chemist. On their way there, they met two men. He knew one of them as he had seen him around. The one he could identify was carrying a bottle. The other man attacked him, strangling him and pushed him into a trench. The other one hit his father with a bottle. His father fell down and they took his Alcatel phone. He started screaming and the two assailants ran away towards the dumpsite. A crowd that was quickly gathering ran after them. It was his testimony that the one who had hit his father with a bottle was arrested. He identified him as the appellant. He maintained that he recognised him and on the material day he was wearing a yellow t-shirt.

5. SOO (PW 2) testified that on 18th July 2017 while he was going to the Chemist with his son (PW 1) he met the appellant in the company of another person not before court. He was pushed into a trench and hit with a beer bottle. He lost consciousness and in the ensuing assault, his Alcatel phone was stolen. He recalled that he began to scream and neighbours chased after his assailants. He was informed that one of them had been arrested by members of the public. He was taken to hospital where he was stitched on his forehead. He was issued with a P3 form. Thereafter, he went to the police and identified his attacker. He maintained that he recalled his face, the yellow t-shirt he was wearing and that the incident occurred during the day. He denied framing the appellant as alleged.

6. Dr. Maundu (PW 3) from Police Surgery testified that he examined the complainant on 11th July 2017. He had presented a case of assault during a robbery incident. He had a stitched wound on the forehead and had a cut wound on the right hand on the back side. It concluded that the injury was caused by a sharp object and classified as harm.

7. No. 45458 (PW 4) the investigating officer told the court that he received a report from the complainant who reported that he had been attacked by a gang of two people. During the attack, the complainant had been robbed his Alcatel phone. The complainant was treated at Provide Hospital. He recorded statements and the complainant visited the station to identity his assailants. He identified the appellant as one of them. He was wearing a yellow t-shirt, brownish long trouser and a black chain. The appellant had been brought to the station by members of the public who arrested him as he fled the scene of crime.

8. He told the court that he took the appellant to Mama Lucy Kibaki Hospital where he was also treated. Blood samples were taken from him for purposes of a DNA analysis. He finished his investigations and later preferred charges against him. He told the court that the appellant was positively identified by the complainant and PW 1. Further, he did not conduct an identification parade. He produced treatment notes, the filled P3 form and a mobile phone receipt.

9. Henry Kiptoo Sang (PW 5) a government analyst at the government chemist department gave evidence that on 11th July 2017 he received a yellow t-shirt in khaki envelope marked A, blood sample marked B with name Lawrence Baraza and blood sample marked B with name SO. The samples were accompanied by a police memo form dated 8th July 2017. He was required to examine the items and state if there existed any relationship. He conducted a forensic analysis and found that the t-shirt was moderately stained with human blood from Lawrence (B). He prepared a report dated 4th June 2018 and produced it as an exhibit.

10. Dr. Ruth Kiatu (PW 6) of Mama Lucy Kibaki hospital gave evidence that on 11th July, 2017 she wrote a report regarding the appellant who had been treated for assault by persons known to him. He had sustained multiple head injuries. She was produced the treatment summary.

11. The prosecution closed their case and the trial court found that a prima facie case had been established. The appellant was put on his defence where he gave unsworn evidence. He did not call any witness. He told the court that on the material day he was walking home from work when he was attacked by a group of people wearing reflector jackets. They beat him up and he ran to the police station to seek protection. At the station he was accused of stealing a phone and was subsequently arrested. He denied committing the offence insisting that it was a case of mistaken identity.

12. The trial court found the appellant guilty and convicted him accordingly.

Analysis and determination.

13. In his appeal, the appellant submitted that the provisions of Article 50 of *the Constitution* of Kenya was not adhered to. He argued that he was not supplied with witness statements and documentary evidence relied on by the prosecution during his trial. He maintained that this was fatal to his trial.

14. Article 50 (2) (c) of *the constitution* provides for the right to a fair hearing. It reads thus:

> (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;

15. From the record of the trial court, the matter came up for hearing on 7th November 2017. The prosecution was ready to proceed with three witnesses. However, the appellant complained that he had not been issued with witness statements. The case was adjourned and the prosecution directed to serve him with witness statements. On 7th December, 2017, the case was adjourned as the appellant had still not been issued with witness statements. On 20th December 2017, the case was adjourned for a third time as the appellant sought time to go through the statements that he had been served with. On 23rd March 2018, the appellant complained that he had not been issued with documentary evidence. The same was served upon him and the case proceeded for hearing on 10th April, 2018. From the record, it is clear that appellant was issued with witness statements and documentary evidence relied upon by the prosecution. In addition, he had adequate time within which to prepare his defence. This ground of appeal therefore fails.

16. The appellant challenged the totality of the prosecution's evidence against which he was convicted. He submitted that the ingredients of the offence he was charged with were not proven beyond reasonable doubt. First, he argued that his identification as one of the assailants was not proper. He contended that the circumstances surrounding the robbery were such that the complainant was not in a position to identify the assailant. He maintained that he was arrested because he was wearing a yellow t-shirt and not because he committed the alleged offence. He asserted that PW 1, PW 2 and PW 4 were not credible witnesses and their evidence on identification was not cogent.

17. In rebuttal, the respondent submitted that both PW 1 and PW 2 knew and recognised the appellant. In addition, the appellant was arrested while fleeing the scene of crime after PW 1 raised an alarm. Further, the t-shirt worn by the appellant was tested for DNA of the blood and it was confirmed that it was his. It was therefore argued that the requirement for identification of appellant as one of the assailants was sufficiently proven.

18. Section 296 (2) of the *Penal Code* (Cap 63) Laws of Kenya provides that:

> 296. Punishment of robbery
>
> (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

19. What constitutes the offence of robbery with violence was well captured in the case of *Olouch v Republic* [1985] KLR where the Court of Appeal stated as follows: -

> " ...Robbery with violence is committed in any of the following circumstances:
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> The offender is armed with any dangerous and offensive weapon or instrument; or
>
> The offender is in the company with one or more person or persons; or
>
> At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

20. In the case of *Dima Denge Dima & Others v Republic*, Criminal Appeal no 300 of 2007,it was stated that:

> " ...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

21. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt. The evidence on record does prove that PW 2 was attacked on 8th July 2017 at around 7 am at Dandora by two male adults. PW 1 was with the complainant at the time of the attack and an eye witness. PW 1 testified that he recognised one of the attackers as he had seen him several times in the area. From the evidence of PW 1 and PW 2 who were at the scene of crime, it is established that one of the robbers was the appellant. It was the evidence of PW 1 that the appellant was the one holding the beer bottle and hit the complainant with it on his head. The other assailant was strangling the complainant.

22. The assailants attacked him stole form him an Alcatel phone. PW 1 started screaming raising an alarm. This caught the attention of passers by who chased after the assailants. They managed to stop the appellant while his accomplice was not caught. They did not recover the stolen phone. The victim who was now unconscious was taken to hospital for treatment. He came to the police station where he positively identified the appellant who had been arrested by members of the public. From the material placed before the court, PW 1 and PW 2 were very clear on the facts of the incident.

23. It is my considered view that the appellant was properly and positively identified by the PW 1 and PW2. PW 1 knew the appellant while PW 2 properly identified during the incident, at the police station and the dock. In addition, the lighting was adequate considering that the incident took place at 7 am. I find that the testimony of PW1 and PW2 to be reliable direct evidence of visual identification against the appellant.

24. On proof of ownership of the phone, the complainant produced a receipt to confirm ownership of the phone. He also identified the yellow t-shirt that was worn by the appellant during the robbery. Although the phone was not recovered, the complainant adequately proved ownership.

25. The next issue is whether force was used to rob him. It was the testimony of PW 1 and PW 2 that the appellant was armed with a beer bottle which was used as a weapon to hit him. The other assailant strangled him and pushed him into a ditch. A P3 form was filled by Dr. Maundu (PW 3) and produced by PW 4. It confirmed that the complainant had suffered injuries on the head and back side of the hand. His conclusion was that the injuries were caused by a sharp object. He classified the injuries as harm. This court is satisfied that the prosecution proved that the appellant and his accomplice robbed and assaulted the complainant.

26. The appellant also challenged the charge sheet as being defective. He argued that the charge against him was duplex. He submitted that he was charged contrary to section 295 and 296 (2) of the *Penal Code*. He argued that the two distinct provisions of the law made it impossible to make a credible defence as it was unclear which provision he was charge with. He cited the case of *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR in support of his position.

27. In the charge sheet, the appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. The particulars of the offence are that on 8th July 2017 at Dandora bridge in Njiru Sub County, within Nairobi County, jointly with another not before court armed with a dangerous weapon namely a broken beer bottle robbed SOO a mobile phone Alcatel valued at Kshs. 26,000 and at the time of such robbery used actual violence to the said SOO.

28. I have considered the charge sheet and the particulars thereof, the is no evidence that the charge sheet is defective in any way. The ground of appeal therefore fails.

29. The appellant challenged the trial court's conviction on the ground that the trial court failed to consider his defence. In his defence, the appellant denied committing the offence. He testified that he was attacked by a gang of people and ran to the police station to seek help. However, the trial court considered his defence and found it to be unbelievable. The ground therefore fails.

30. The appellant also challenged the sentence meted as being harsh and excessive. Section 296(2) of the *Penal Code* provides that:

> If the offender is armed with a dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

31. However, in light of the various judicial decisions the mandatory minimum sentence can be vacated in appropriate case. (See *Dismas Wafula Kilawake v Republic* [2019] eKLR and *Joshua Gichuki Mwangi v Republic* Criminal Appeal no 84 of 2015). Further pursuant to the provisions of section 216 and 329 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya, mitigation is part of the process under section 329 which provides that the court may before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

32. Thus, in my view, section 329 of the *Criminal Procedure Code*, gives to for the judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find life imprisonment shatters all the hopes of the appellant for rehabilitation or having another chance to start afresh.

33. Therefore, the appeal on sentence succeeds. The minimum mandatory sentence of life imprisonment is hereby vacated. I hereby resentence the appellant to 30 years imprisonment from the date of his conviction being 14th December 2021.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 14TH DAY OF JULY 2023

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mulama h/b for Ms. Akunja

Appellant present (VTC)

Joy C/A