Nyamweya v Republic (Criminal Appeal E011 of 2022)
[2023] KEHC 20733 (KLR) (20 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20733 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E011 OF 2022

HM NYAGA, J

JULY 20, 2023

BETWEEN

ABEL NYAKUNDI NYAMWEYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence arising from the judgment delivered by Principal Magistrate Y. I. Khathambi on 16th December, 2021 in Criminal Case No. 990 of 2020 at Nakuru Law Courts.)

JUDGMENT

1. Abel Nyakundi Nyamweya, the Appellant, appeals to this court against his conviction and sentence for attempted Robbery with Violence contrary to Section 297(2) of the *Penal Code*. It was alleged that on 5th May, 2020 at Mau Narok Township within Njoro Sub County within Nakuru County, the accused while armed with a dangerous weapon namely *Panga* attempted to rob George Ng'ang'a and immediately after the time of such attempted robbery assaulted the said George Ng'ang'a.

2. At the conclusion of the trial he was found guilty and sentenced to life imprisonment.

3. In the Grounds of Appeal filed on 28th January, 2022 the Appellant raised the following grounds: -

   I. That the Learned Trial Magistrate erred in law and in fact in admitting evidence of PW2 who gave false information in court.

   II. That the Learned Trial Magistrate erred in law and in fact by convicting him on insufficient medical evidence that could not sustain such conviction and sentence.

III. That the Learned Trial Magistrate erred in law and in fact by concluding that the injury was severe though it was a mere harm and no exhibit produced before the court as proof . E.g. blood stained clothes and weapon used.

IV. That the Learned Trial Magistrate erred in law and in fact by pronouncing an excessive sentence far from the weight of evidence adduced.

V. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that prosecution evidence was marred with contradiction which greatly violated the credibility of the prosecution case.

VI. That the Learned Trial Magistrate erred in law and in fact by failing to appreciate that the investigation officers' evidence was marred with contradiction by not proving its case beyond reasonable doubt.

VII. That the Learned Trial Magistrate erred in law and in fact by failing to accord the appellant a fair hearing.

VIII. That the Learned Trial Magistrate erred in law and in fact by finding that the prosecution evidence to be quiet overwhelming notwithstanding the glaring contradictions between prosecution witnesses.

4. The Appellant thus prayed for his conviction to be quashed, sentence be set aside and he be set at liberty.

5. The Appeal was opposed by the state and was canvassed by way of written submissions which may be summarized as follows;

Appellant's submissions

6. The Appellant quoted the provisions of Sections 297(1),297(2) and 298 of the *Penal Code* and submitted that the charge he faced was not only unproven but was also mischievously instigated as the prosecution chose to charge him under the said Section 297(2) instead of either section 297(1) or 298.

7. He contended that the charge against him was maliciously selected to pin him down.

8. He submitted that the evidence of the prosecution's witnesses was uncorroborated and contradictory. He asserted that PW1's testimony that he immediately left the scene after the incident and even PW2 did not find him there was contradicted by PW2 who testified that he was overwhelmed by the crowd and was arrested. He stated that this evidence was never corroborated by independent witnesses.

9. He also submitted that the investigating officer's evidence was marred with contradiction and the contention that he met him while hiding was untrue as he met him while he was heading to PW2's house to collect his debt of Ksh. 15,000/=

10. He faulted the investigating officer for not presenting the alleged blood stained clothes as exhibit before court and stated that it was impractical that he still wore the blood stained clothes 6 days later after the incident. He contended that PW3 had been in Mau Narok for 6 years and there was a possibility he aided the victim to lay a fabricated claim against him.

11. He denied committing the offence herein.

Respondent's Submissions

12. The Respondent basically submitted that all the ingredients of the charge against the Appellant were proved by the prosecution and there is no reason to interfere with the judgement of the trial court.

13. The respondent submitted that to constitute an offence of attempted robbery, the complainant must establish that he was assaulted with an intention of stealing. That by searching the complainant's pocket, the Appellant had no other intention other than to steal from him and that by assaulting the complainant using a *panga*, the appellant used actual violence to counter the resistance he was receiving from the complainant so that he could safely take away the intended thing that he wanted to steal.

14. The Respondent submitted that the *panga* used was a dangerous or offensive instrument within provisions of Section 297(2) of the *Penal Code*.

15. On identification, the Respondent submitted that there was no mistaken identification. That the street light(s) made it favorable for the victim to identify the perpetrator. It was also argued that the Appellant was a person known to the complainant by dint of being his neighbor for over 5 years and that he was not masked and he stood close to the victim when he ordered him to stop and as such the victim was able to see him clearly.

16. It was submitted that the Appellant's conduct of fleeing from the scene immediately after the incident was suspicious and consistent with having committed the offence.

17. The Respondent argued that the Appellant's defence that he was employed by PW2 and had gone to demand his dues when he was arrested was uncorroborated and an afterthought that did not shake the Prosecution's case.

18. It was further argued that the appellant was convicted under the right provision of the law as ingredients under section 297(2) were established.

19. The respondent prayed that the appeal be dismissed.

Analysis and Determination

20. This Court, as the first appellate court, is enjoined to examine, analyze and evaluate afresh the evidence adduced before the trial court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court 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. Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*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 court's finding and conclusion; 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."

21. Similarly, in *Kamau Njoroge v Republic* [1987] eKLR, the Court of Appeal stated:

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions

though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect."

22. With the above principles in mind, I will now proceed to examine the evidence adduced before the trial court.

23. PW1 was the complainant. He testified that the Appellant was his neighbor and he had known him since he was 10 years old. That on 5th May, 2020 at 7.20 p.m. he left Narok Center for his home at Mukonyongo Village. Along the way, he met the Appellant who greeted him and ordered him to stop. When he stopped and the Appellant walked towards him and pushed him to the ground then searched his pockets but did not find anything. He then removed a *panga* from his left side of the trouser and cut his left hand and left side of the head. He screamed and his mother came to the scene. He said the scene was 100 meters away from his home and that the Appellant immediately left after his mother arrived at the scene.

24. It was his further evidence that he was taken to Mau Narok Health Centre where the first aid was administered then he was referred to the Provincial Hospital. There, he was admitted and discharged after three days. He positively identified the Appellant before court and stated that he had no grudge with him.

25. In cross examination, he stated that the incident happened at 7.20 pm and he was able to see the Appellant as there were street lights. That the Appellant stood less than one meter away from him and had worn gumboots, black trouser and a jacket.

26. PW2 was Ann Wairimu Ng'ang'a, the mother to PW1. It was her testimony that on the fateful day at around 7. 30 p.m. while at home she heard someone who sounded like her son screaming. She went outside the gate and found PW1 on the ground. She said he had been cut on his head and he told her that the Appellant was responsible for the same. There was no one around and she screamed. Her screams attracted the neighbors who came to the scene. Thereafter, PW1 was taken to hospital and later she recorded her statement at Mau Police Station. It was her further testimony that the accused disappeared from the area and two weeks later she met him at the center. She informed the police officers about it and they went to the scene and arrested the accused. She stated that she had no grudge with the accused and did not owe him any money.

27. PW3 was Johstone Yeswa a clinical officer at Mau Narok. He said on the material date PW1 went to their facility. That he had a blood stained jacket and t-shirt. He injuries on his head and left hand. Upon examination, he noted a cut wound on the head and near the wrist. The head was swollen and that the injuries were estimated to be around 6 days old. He sent him for an x-ray which confirmed that cuts were not deep. He produced the P3 form dated 11th May, 2020 as exhibit No.3.

28. PW4 was Corporal Lucy Nyaboke from Mau Narok Police Station. She testified that on 6th May, 2020 the incident herein was reported at the station. She went to provincial hospital and confirmed the victim had cut wounds on the head and left hand and that he was admitted there from 5th May, 2020 to 8th May, 2020. She recorded the complainant's statement and issued him with a P3 form. She said after interjection the Appellant was arrested at Mau Narok Centre. She positively identified the Appellant before court.

29. In cross examination, she stated the complainant identified the Appellant and he was arrested on 26th May, 2020 at Mau Narok Centre. She confirmed she visited the scene and recovered nothing from there. She did not know whether there was an altercation between the Appellant and PW2 due to money owed. She confirmed she had not presented the complainant's clothes as exhibits before court.

30. PW5 was Dr. Munjerene from Nakuru Level 5 Hospital. He produced a discharge summary by Rose, a clinical officer intern, as exhibit No. 2. According to the discharge summary the complainant had sustained cut injuries on the head and left hand and was admitted at their facility from 5th May,2020 to 8th May,2020. In cross examination, he said the injuries were caused by a sharp object.

31. After the testimony of PW5 the prosecution's case was closed. Vide a ruling of 8th November, 2021, the lower court found the Appellant had a case to answer and placed him on his defence. He chose to give sworn evidence and did not call any witness.

32. It was the Appellant's testimony that on 24th April, 2020, PW2 assigned him work of harvesting potatoes and the next day he proceeded there with his colleagues and harvested the said potatoes but he was not paid. The following day in the morning he went to PW2's house to demand for his money totaling to 15,000/=and he met police officers who arrested him. He believed PW2 fixed him as she did not want to pay his dues.

Analysis & Determination

33. The key issues for determination, in my view, are: -

    a. Whether the prosecution evidence was contradictory and inconsistent;

    b. Whether the prosecution proved its case to the required standard; &

    c. Whether the sentence imposed was excessive in the circumstances of the case.

34. The Appellant argued that the testimony of PW1 and PW2 was contradictory in that PW1 stated that when PW2 arrived at the scene he had left while PW2 stated that he found him at the scene and he was overwhelmed by the crowd and arrested. I have perused the testimony of the witnesses in question. Whereas PW1 stated that the Appellant left immediately PW2 arrived at the scene PW2 testified that she only found PW1 at the scene. Nowhere did PW2 state that the appellant was found at the scene and was arrested.

35. The alleged contradiction as to when PW2 arrived at the scene is, in my view, very minor and did not materially cast doubt on the prosecution's case. It was not prejudicial to the Appellant. PW2 did not place the appellant at the scene herself but relied on what her son told her.

36. The Court of Appeal, in *Philip Nzaka Watu v. Republic* [2016] eKLR, in trying to shade light as to why there might be minor discrepancies between two witnesses testifying on the same case had this to say:

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

37. In *Dickson Elia Nsamba Shapwata & Another v The Republic*, Cr. App. No. 92 of 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows;

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter"

38. The Uganda Court of Appeal's decision in *Twehangane Alfred v Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 quoted with approval by the Court of Appeal of Kenya in *Erick Onyango Ondeng' v. Republic* [2014] eKLR held:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

39. In *Joseph Maina Mwangi v Republic* Criminal Appeal No. 73 of 1993, court held, *inter alia*, that: -

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the *criminal procedure code* viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences"

40. I am therefore of the view that the alleged discrepancies did not affect the general evidence against the appellant.

41. I will now deal with the ingredients of the offence in question. The appellant was charged with the offence of attempted robbery with violence contrary to Section 297(2) of the *Penal Code*.

The section provides as follows;

> "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 assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

42. Section 389 of the *Penal Code* provides for attempts to commit offences and states as follows: -

> "Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years."

43. In *Sammy Maina Karanja v Republic* [2003] eKLR the court explained what constitutes the offence of Attempted Robbery as follows: -

> "Section 297(1) of the *Penal Code* provides what constitutes this offence as: -
>
> (i) Assault and;

(ii) Intention to steal and;

(iii) Use or threat to use violence at or immediately before or immediately after the time of the assault in order to

(a) obtain the thing intended to be stolen or;

(b) to prevent or overcome resistance to its being stolen.

The Attempted Robbery fails under Sub-Section (2), which the Appellant was charged with, if the offender in addition to those other ingredients of the offence,

(ii) was armed with any dangerous or offensive weapon or instrument

or.

(ii) 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."

44. In the instant case the complainant told the court that on the material date he met with the Appellant on the road. That he greeted him and ordered him to stop after which he pushed him to the ground then began searching his pockets. When he did not find anything he cut him on the left hand and head using a *panga*. PW2 confirmed she visited the scene and found the Complainant lying on the ground with cut injuries on his hand and the head. It is clear therefore that the Appellant attempted to steal from the complainant when he searched his pockets and the contention by the Complainant that he sustained injuries as a result of the incident was corroborated by PW2, PW3 and PW5. It is also clear that the Appellant immediately after the time of assault, wounded and used personal violence to the Complainant.

45. The complainant also stated that the Appellant used a *panga* to inflict the aforesaid injuries on him. This position was corroborated by PW5 who told the court that the injuries were inflicted by use of a sharp object. The said *panga* was not produced in court since the assailant went away with it. Given the nature of the injuries there is no reason to doubt the evidence of the PW1. The appellant was therefore armed with a dangerous and offensive weapon.

46. The Upshot is that the Appellant was properly charged of the offence of attempted robbery contrary to Section 297 (2) of the *Penal Code*.

47. The Appellant has not challenged his identification and his defence before the lower court in my view was found to be unsatisfactory and uncorroborated. Nevertheless, I have to consider if the identification was safe.

48. The alleged offence was committed at around 7:20 p.m. The only identifying witness was PW1. The court has to determine if he correctly identified the appellant.

49. In the case *Roria v Republic* [1967] EA 583, at page 584 the Court of Appeal had this to say on identification by a single witness;

> "Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially were difficult. In such circumstance what is needed is other evidence, whether it be circumstantial or direct pointing to guilty, from which a judge or jury can reasonably conclude that the

evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".

50. Further, in *Kariuki Njiru and 7 others v. Republic* CR. Appeal No. 6 of 2001 it was held that;

> " The law on identification is well settled, ... The evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied the identification is positive and free from error. The surrounding circumstances must be considered."

51. The complainant stated that he had known the appellant for many years, since he was a lad. The accused's defence also suggests that these were parties who knew each other well. The complainant narrated how the appellant stopped him. There were security lights at the scene. The appellant then proceeded to frisk him. Given the fact that the parties knew each other, the presence of security lights and the proximity of the appellant to PW1, I have no doubt that the identification was correct and free from error.

52. The Appellant raised the issue that the alleged blood stained clothes and a *panga* were not produced in court. It is not a mandatory requirement of the law that for a criminal offence to be proved, the weapon used to commit the crime has to be produced. A criminal case may be proved by evidence other than that of production of exhibits. In the case of *Peter Kibia Mwaniki v. Republic* (2010) eKLR the court of appeal held that,

> " It would have been proper to avail the exhibits but failure to produce them was not fatal to the prosecution case".

53. Similarly, in *John Wachira Muthike v Republic* [2014] eKLR the appellant complained that exhibits were not produced in court and the court held that failure to produce exhibits in court is not necessarily fatal to a prosecution case and that each case depends on its own circumstances.

54. In the instant case I, have already stated that there was no way of producing the *panga* which was used as the assailant(appellant) did not leave it at the scene when he fled. Further, I see no prejudice by the non- production of the blood stained clothes. They were not really necessary to prove the injuries on PW1. The medical evidence was sufficient.

55. Having considered the evidence, I find that the conviction by the trial court was proper and there are no grounds to set it aside.

56. Ground no. 4 of the Appellant's Appeal is that the Learned trial magistrate erred in law and fact by pronouncing an excessive sentence far from the weight of evidence adduced. However did not advance any submissions in support of this ground. Despite this, I am enjoined to consider the ground.

57. The principles guiding interference with sentencing by the appellate Court were set out in *S v. Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court

is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

58. Similarly, in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

59. The Court of Appeal in the case of *Ogolla s/o Owuor v Republic,* [1954] EACA 270, pronounced itself on this issue as follows: -

> "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

60. The Punishment for the offence of Attempted robbery with violence under Section 297(2) of the *Penal code* is death. The trial court found it fit to sentence the Appellant to a life imprisonment.

61. The legality of the death sentence for attempted robbery has been addressed by the superior courts. I will cite two cases.

62. In *Evanson Muiruri Gichane v Republic* [2010] eKLR the Court of Appeal had this to say;

> "We have considered this ground of appeal and submissions by both Mr. Monda and Mr. Odhiambo and we are of the view that indeed, there may be a contradiction between sections 297 (2) and 389 of the *Penal Code*. The section under which the appellant was convicted provides for death sentence while section 389 provides *inter alia*:-
>
> > "…. but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years."
>
> The appellant was convicted of an offence (attempted robbery with violence) punishable by death. In terms of section 389 of the Penal Code the appellant shall not be liable to imprisonment for a term exceeding seven years. But he was sentenced to death. The apparent conflict in the law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences."

63. In *Peter Muindi & another v Director of Public Prosecutions* [2019] eKLR the court held as follows: -

> "The Petitioners were charged under Section 297 (2) of the Penal Code which provides the sentence for attempted robbery with violence as death. However, Section 389 provides the sentence for an attempted felony as being imprisonment for a term not exceeding seven years if the intended offence is punishable by death or life imprisonment.
>
> The question to ask is this: Is the offence of attempted robbery with violence a felony as per Section 389? Section 4 of the *Penal Code* defines a felony as an offence which is declared by the law to be a felony or if not declared to be a misdemeanor, is punishable, without proof of previous conviction, with death, or with imprisonment for three or more years. It is evident that attempted robbery with violence does fall within the definition of a felony.

> What punishment is offered for the offence of attempted robbery with violence? Section 297 (2) on the one hand provides the death sentence while Section 389 provides for a sentence of imprisonment for a term not exceeding seven years if the offence is punishable by death or life imprisonment. There is clearly a conflict between the two Sections as to the sentence that should be meted out for the offence of attempted robbery with violence."

64. The courts in the above cases found that there is a conflict between Sections 279(2) and 389 of the *Penal Code*. In the latter case, the court also found that the two sections violate the Petitioner's rights under Article 26, 27, 28 and 50 (2) (p) of the *Constitution* and proceeded to issue the following orders: -

    a) That an order be and is hereby made that there is a conflict between Section 297 (2) and 389 of the *Penal Code* as to the sentence for the offence of attempted robbery with violence and the conflict violates the Petitioner's rights under Article 50 (2)(p).

    b) That an order be and is hereby made that the Petitioners are entitled to benefit from the lesser sentence imposed by Section 389 of the *Penal Code*.

    c) That an order be and is hereby made that by virtue of (b) above, the Petitioners having been convicted on 24th July, 2002 and having served a sentence in excess of seven years' imprisonment, be forthwith and are hereby released from prison unless held for reasons not indicated in the Petition.

65. I am persuaded by the above decisions regarding the legality of sentence under the aforesaid section 297(2) of the *Penal code* and I do opine that the Appellant herein is similarly entitled to benefit from a lesser sentence imposed by Section 389 of the *Penal code*.

66. In the premises, I hereby set aside life imprisonment imposed against the appellant by the trial court and substitute it with a sentence of 7 years' imprisonment.

67. Under section 333(2) of the *Criminal Procedure Code*(CPC) I direct that the sentence shall run from the time the Appellant was first remanded in lawful custody by the court, that is on 27th May, 2020. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF JULY, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

C/A Jeniffer

Ms Murunga for state

Appellant present