Onsongo v Republic (Criminal Appeal E046 of 2022)
[2023] KEHC 19918 (KLR) (Crim) (12 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19918 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E046 OF 2022

DR KAVEDZA, J

JULY 12, 2023

BETWEEN

WILFRED OMBATI ONSONGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence delivered by Hon. A. Mwangi (CM) on 15th December 2021 at Kibera Chief Magistrate's Court Criminal case no. 1087 of 2016 Republic vs Wilfred Ombati Onsongo)

JUDGMENT

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

2. In his appeal, he raised 8 grounds which have been summarised as follows. He argued that the charge sheet was defective. He challenged the totality of the prosecution's evidence against which he was convicted. He contended that his rights were violated under the provisions of the *Constitution of Kenya, 2010*. He challenged the decision of the trial court to convict him maintaining that his defence was not considered. He also argued that the trial court erred in awarding the mandatory death sentence without considering his mitigation.

3. In response, the respondent filed grounds of opposition dated May 31, 2023. The grounds raised are that the appeal is misconceived and unsubstantiated. The appeal is an abuse of the court process and the appellant was properly convicted before the trial court and the prosecution discharged their burden of proof properly. The appeal lacks merit.

4. As this is the appellant's first appeal, the role of this appellate court of first instance is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of *Mark Oruri Mose vs Republic* [2013] eKLR that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

5. The prosecution called four (4) witnesses in support of their case. Lincoln Onyango Oile (PW 1) testified that he is the contractor operating a company known as Meglink Ventures Limited. He stated that the appellant was his driver and as such carried a lot of money on his behalf due to the nature of his business. On August 22, 2015, he left home in the company of the appellant while carrying Kshs 3.4 million in cash. The appellant drove him to Mountain View before they proceeded to Westlands. On reaching Mountain View, he alighted leaving the money in the car with the driver. He finished his meeting and came back to the car. There he found the appellant in the company of two individuals who were not known to him. He told the court that he did not think much about it and left with the appellant for Westlands.

6. On their way, at around Total Petrol station, the appellant stopped the motor vehicle and the two men whom he had seen with the appellant jumped into the motor vehicle. They threatened him with a gun and ordered him out of the car. He was left behind the containers and the appellant drove off with them. He reported the matter to Kabete Police Station. Police followed up the matter by trying to call the appellant but he was unreachable. They went to his house in Warogo and in his rural home but he was not there. Neigbours informed him that he had been seen leaving in a huff. The police were able to trace the appellant's wife in Eldoret. They discovered that she had purchased land and a motorcycle in the proceeding days after the incident. They also established that the appellant had built a mabati structure and a borehole. He maintained that the appellant colluded with the robbers to steal from him.

7. Nicodemus Mutunga (PW 2) testified that on August 27, 2015, he was approached to sell his piece of land by one Samson Nyakundi. During the transaction, he learnt that the property was being purchased by Rachel Nyakundi the sister to Samson. They agreed on a purchase price and Rachel Nyakundi paid Kshs 575,000 which money was deposited in his account. They drew a sale agreement which was produced in court.

8. Dennis Gacheo Nyaboga (PW 3) told the court that he is the cousin of the appellant and also a former employee of PW 1. He testified that on the material date, he was employed as a site supervisor and also a driver. On August 28, 2015, they both went to the complainant’s house for that day’s assignment. He was assigned motor vehicle registration number KBR 810N while the appellant was assigned motor vehicle registration number KBR 612L. Later in the day, he received a call from the complainant requesting the appellant's alternative phone number.

9. Thereafter, he picked up the complainant and drove him to the appellant's house in Waruku and rural home in Kisii but they did not find him. He later came to learn that the appellant had been arrested in Eldoret.

10. CPL Henry Njuguna (PW 4) the investigating officer told the court that he took over the investigations in February 2016 from PC Kibara and PC Ziro. He reiterated the evidence of PW 1 and added that after the disappearance of the appellant, he traced his wife in Eldoret. On searching their house, they recovered a sale agreement for the purchase of Eldoret Municipality Block 20 (Kabienit) 78 for Kshs 575,000. The land had a semi-permanent structure. He also told the court that the former investigators had recovered call data from Safaricom which indicated that the appellant had travelled to his house

in Waruku, Huruma then Eldoret. Thereafter, his phone was switched off. The appellant was later arrested and charged. The money stolen was never recovered.

11. The prosecution closed their case. The trial court found that the prosecution had made a prima facie case and put the appellant on his defence. In his defence, the appellant gave sworn testimony. He testified that he was employed by the complainant as a driver. On August 22, 2015, he went to the complainant's house to pick him. However, the complainant directed him to go back using a motorbike which he refused. The complainant threatened to sack him. Consequently, he left and went home. He denied committing the alleged offence. He contended that the investigation diary failed to indicate how much money was stolen from the complainant. He accused his cousin PW 3 of having a sour relationship with him. He maintained that he was framed because he had too much information about the complainant's business.

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

Analysis and Determination.

13. In his appeal, the appellant complained that the charge sheet against which he was convicted was defective. He submitted that from the charge sheet, the money allegedly stolen was Kshs 3.4 million and yet the investigation diary indicated that it was Kshs 2.56 million. The appellant submitted that the discrepancy was a defect in the substance of the charge. He cited the case of *Jason Akumu Yongo vs Republic* [1983] KLR 319 in support of his position.

14. In rebuttal, the respondent submitted that the investigation diary was not produced as evidence in the case. As such, it should not be relied upon under the provisions of the *Evidence Act* (Cap 80) Laws of Kenya.

15. From the record, there was no material variance between the charge sheet and the particulars. The charge sheet put the value of the stolen money at Kshs 3.4 million. In his testimony, PW 1 told the court that the money stolen was Kshs 3.4 million. In cross-examination, the complainant maintained that the figure was not Kshs 6 million as implied by the appellant. In my mind, these are not variations of the amount. Further, the appellant claimed that the investigation diary indicated a different amount. However, the same was not produced as evidence either by the prosecution or the defence. That notwithstanding, if there are variations of the values between the charge sheet and the evidence, they do not invalidate the charge or cause any prejudice to the appellant. It is a slip that is curable by section 382 of the *Criminal Procedure Code*. In *Joseph Maina Mwangi vs Republic* Criminal Appeal No. 73 of 1993, the Court of Appeal held:-

> " 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 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."

16. Consequently, that ground of appeal fails.

17. The appellant challenged the totality of the prosecution's evidence against which he was convicted. He argued that the prosecution failed to establish the ingredients of the offence of robbery with violence. That the prosecution failed to establish that he was armed with a dangerous weapon. That there is no evidence on record that places the appellant at the scene other than a made-up story of the complainant which was not corroborated and contradicted the evidence of PW 3. In addition, the prosecution did not prove that the complainant was wounded, or suffered injury or violence was used against him.

18. Conversely, the respondent submitted that the elements contemplated by sections 295 and 296 (2) of the *Penal Code*, did manifest themselves at different stages. That the events as narrated by the victim corroborated by other prosecution witnesses proved the commission of the offence.

19. The key ingredients for a robbery with violence charge are found in section 296(2) of the *Penal Code*. It 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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death".

20. I have re-evaluated all the evidence on record. I have found that the appellant was well known to the complainant(PW 1), PW 3. He was employed as a driver by the complainant and was a cousin of PW 3. He was therefore well known to the complainant. On the material day, the complainant testified that he left with the appellant and went to a meeting in Mountain View Estate. He had Kshs 3.4 million in his possession. After his meeting, he found the appellant in the company of two unknown individuals. It was his evidence, that due to the nature of his business, the appellant always knew when he had money in cash which they used to transport.

21. On the material day, the appellant had other ideas. He stopped near Total Petrol Station, and the two people he was with jumped into the vehicle. One of them was carrying a gun and with it, threatened the complainant. He was forced out of the car. The appellant sped off in their company. The motor vehicle was found abandoned a few metres away. The appellant's accomplices were not arrested and the gun in use was never recovered.

22. In my view, the appellant and his accomplices had an offensive or dangerous weapon namely a gun, and in the course of the robbery, they threatened to use actual violence on the complainant. Kshs 3.4 million was stolen from the complainant during the robbery. The appellant as the complainant's driver had access to the motor vehicle, clearly knew his accomplices, and was a party to the commission of the offence.

23. Although the money was never recovered by the appellant, from the evidence on record, his wife went on to purchase a piece of land and a motorcycle although she was a student not earning a living. I find that the appellant had a clear opportunity to commit the offence. What is material is that the complainant identified the appellant as one of three robbers who stole from him Kshs 3.4 million. His evidence was corroborated by PW 3, who accompanied the complainant in trying to trace the appellant after the incident.

24. The key ingredients for the offence of robbery with violence were all present. In this case the appellant was in the company of other persons not brought before the court, and threatened to use violence on the complainant. They had a gun. They robbed the complainant of money as particularized in the charge sheet. I thus find that at, during or immediately after the robbery, the appellant and his accomplices threatened to use violence against the complainants. The appellant was positively identified and arrested. All the ingredients of robbery with violence were thus present. When juxtaposed against the clear evidence of the prosecution, the defence of the appellant was feeble and unbelievable.

25. The appellant further submitted that the prosecution failed to call key witnesses. The first one was the individual he met at Mountain View who would have confirmed whether the appellant was in the company of the complainant on the material day. He contended that this left gaps in the case

of the prosecution which ought to be considered in his favour. The respondent submitted that the prosecution can call any number of witnesses to prove their case as provided under section 143 of the *Evidence Act*. In the case of *Bukenya & Others vs Uganda* [1972] EA 549 court addressed itself thus:-

> "(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.
>
> (ii) That Court has the right and the duty to call witnesses whose evidence appears essential to the just decision of the case.
>
> (iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."

26. The evidence in the instant case was adequate to prove the ingredients of the offence the appellants were charged with at the trial court. The ground of appeal therefore fails.

27. The appellant argued that he did not receive a fair trial contrary to the provisions of Article 50 (2) (a) of the *Constitution of Kenya*. He contended that he was convicted without his defence submissions being considered. In addition, his legal counsel was so ineffective that no reasonable counsel would have conducted proceedings in the manner done at his trial. He also challenged the decision of the trial court to convict him maintaining that his defence was not considered. He argued that the trial magistrate failed to properly scrutinize and analyse his defence before making a determination on his culpability. On the other hand, the respondent submitted that the appellant's defence was considered by the trial court, and the same was dismissed.

28. From the record, the trial court considered his defence and found it unbelievable. I also find that the defence put forward did not dent the otherwise strong evidence adduced by the prosecution connecting him with the offence. From the above analysis of the evidence, this court is of the view that the prosecution has established its case on the charge of robbery with violence contrary to Section 296(2) of the *Penal Code* to required standard of proof beyond any reasonable doubt. The upshot of the above reasons is that the Appellant's appeal on conviction lacks merit and is hereby dismissed.

29. On sentence, the appellant submitted that the mandatory minimum sentence of death imposed was harsh and excessive. Conversely, the respondent submitted that the death sentence is the only sentence prescribed by law. In the sentencing proceedings, the trial court noted that he had considered his mitigation but the sentence meted was mandatory. He was therefore sentenced to death.

30. However, in light of the various judicial decisions the mandatory minimum sentence can be vacated in appropriate case. (See *Dismas Wafula Kilawake vs Republic* [2019] eKLR and *Joshua Gichuki Mwangi v Republic* Criminal Appeal No 84 of 2015). Further pursuant to the provisions of sections 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 a sentence, receive such evidence as it thinks fit to inform itself as to the proper sentence to be passed.

31. Thus, in my view, section 329 of the *Criminal Procedure Code*, gives 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.

32. Therefore, the appeal on the sentence succeeds. The minimum mandatory sentence of the death sentence is hereby vacated. I hereby resentence the appellant to 20 years imprisonment from the date of his conviction being December 15, 2021.

Orders accordingly

DATED AND DELIVERED VIRTUALLY THIS 12TH DAY OF JULY 2023

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D. KAVEDZA

JUDGE

In the presence of:

C/A Habiba

Ms. Akunja for the respondent

Appellant present in person (virtually)