



**Singh v Republic (Criminal Appeal E034 of 2021)
[2023] KEHC 20506 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20506 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL E034 OF 2021
LM NJUGUNA, J
JULY 21, 2023**

BETWEEN

SANDIP SINGH APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein was charged before the trial court with the offence of abduction contrary to section 258 of the *penal code*. The charge sheet was amended vide the orders of January 28, 2021 and as per the said amended charge sheet, the appellant faced two counts. The first count was abduction contrary to section 256 as read together with section 259 of the *Penal Code*. The second count was that of the offence of robbery with violence contrary to section 295 as read together with section 296(2) of the *Penal Code*.
2. Upon hearing of the matter, the appellant was convicted of the offence of abduction and acquitted of the offence of robbery with violence. He was subsequently sentenced to serve 9 years imprisonment the court having taken into account the 11 months he had been in custody.
3. It is this conviction and sentence which necessitated the instant appeal which was instituted vide a petition of appeal dated October 19, 2021 and filed on the even date by the firm of Ms. Gori Ombongi & Company Advocates and wherein the appellant raised three grounds of appeal to wit:-
 - i. That the learned trial magistrate erred in law and in fact by convicting and sentencing the appellant relying on the evidence of PW1, PW2 and PW3 which evidence was not sufficient and or cogent enough to warrant such a conviction and sentence.
 - ii. That the Learned trial magistrate erred in law and in fact in making a finding that the prosecution had established a prima facie case for the charge of abduction



- iii. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant for the offence of abduction which conviction and sentence was in any event excessive and not supported by evidence or law thus a miscarriage of justice was occasioned.
4. The appellant as such prayed that the appeal be allowed, conviction be quashed and the sentence be set aside.
5. The appellant filed a supplementary grounds of appeal and wherein he raised three grounds of appeal. He basically challenged the conviction and on the basis that there was no direct evidence linking him to the offence but only hearsay evidence and weak circumstantial evidence; the same was not corroborative enough; the same was riddled with material discrepancies; and that the matter was not proved to the required standards.
6. Directions were given that the appeal be disposed off by way of written submissions.
7. It was submitted on behalf of the appellant that the evidence tendered was never sufficient to win a conviction as the evidence by the 3 witnesses was never corroborative and cogent. That there was no evidence which had placed the appellant at any of the indicated scenes of the offence save for PW1 and who purportedly gave two contradictory statements. That whatever he stated in court was not in his statements. That there was no witness who testified that the appellant indeed participated in any compulsion or force towards the complainant. Further that there was no evidence placing the appellant at the ATM at Standard Chartered Bank Westland branch where the complainant withdrew Kshs 95,000/- and that there was no video which was produced placing the appellant at the said scene. That PW2's evidence was that he had previously interacted with the appellant at the temple but that he had not seen him on the day of the purported incident. It was further submitted that the appellant's case was born out of grudge between Sokhi's family and the appellant. Further that the message extracts supposedly tying the appellant to the abduction were never produced and PW8 only provided the registration details of the phone numbers given to him but no details as to the phone location at the time of the offence, phone calls record or message extracts were provided neither did he establish who was subscribed to the said numbers. That there was no circumstantial evidence which would connect the appellant to the offence.
8. The appellant filed supplementary written submissions and wherein he reiterated his supplementary grounds of appeal to the effect that there was no direct evidence tendered to link him to the offence, that the evidence was hearsay evidence and that the circumstantial evidence was weak; the evidence was disjointed, uncorroborated and doubtful; the same was full of material contradictions and discrepancies; and that the case was not proved to the required standards.
9. The respondent submitted in opposition of the appeal to the effect that evidence by the prosecution was not hearsay but direct, reliable, overwhelming and strong circumstantial evidence and which displaced the appellant's defense. Further that the evidence by PW1 was well corroborated by that of PW3, PW4 and PW5 and the said evidence was sufficient to prove the case beyond any reasonable doubts. As such the appeal ought to be dismissed.
10. The duty of this court while exercising its appellate jurisdiction (1st appellate court) as was set out by the Court of Appeal in *Okeno v Republic* [1972] E.A. 32 and re-stated in *Kiilu and another v R* (2005) 1 KLR 174 is to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. The court should be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the



wrong principles (See *Gunga Baya & another v Republic* [2015] eKLR). However, it must be stated that there is no set format to which a re-evaluation of evidence by the first appellate court should conform but the evaluation should be done depending on the circumstances of each case and the style used by the first Appellate Court and while the length of the analysis may be indicative of a comprehensive evaluation of evidence, nevertheless the test of adequacy remains a question of substance. (See *Alex Nzalu Ndaka v Republic* [2019] eKLR).

11. I have considered and analyzed the evidence which was tendered in the trial court by both the appellant and the prosecution (in compliance with the duty of this court as was laid down in *Okeno v Republic* (supra) and re-stated in *Kiilu and another v R* (supra)), the amended grounds of appeal and the written submissions by the parties herein, it is my view that the issues which this court ought to determine are;-
 - i. Whether the prosecution tendered sufficient evidence to prove its case to the required standards (beyond reasonable doubts).
 - ii. Whether the sentence by the trial magistrate was excessive and unjustified in the circumstances of the case.

Whether the prosecution tendered sufficient evidence to prove its case to the required standards (beyond reasonable doubts).

12. The Appellant faced a charge of abduction contrary to section 256 as read together with section 259 of the *Penal Code* in count 1 and offence of robbery with violence contrary to section 295 as read together with Section 296(2) of the *Penal Code*. He was however acquitted for the offence of robbery with violence.

13. Section 256 provides as thus:

“ Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person. “

Section 259 on the other hand defines abduction as follows²-

“ 259. Kidnapping or abducting with intent to confine Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years.”

14. From the above section, the elements of the offence the accused was facing are that;-
 - i. The complainant was abducted that is he was compelled by force, or induced by any deceitful means to go from any place.
 - ii. That the abduction was by the accused person (appellant herein)
 - iii. The abduction was with intent to cause that person to be secretly and wrongfully confined.
15. These elements were discussed by the court in *Wright Kinyatta v Republic* [2021] eKLR where the learned Judge held as thus;-

“ 75. The ingredients of the offence include kidnapping or abducting a person with intent to cause that person to be secretly and wrongfully confined. However, my reading of Section 256 indicates in my opinion, that the key ingredient in kidnapping and abduction is the forceful compelling of an individual or



using of deceitful means to induce a person to go from any place. See, Phidesio Nthiga Kithumbu v Republic [2014] eKLR”

16. The prosecution had a duty to prove these elements. It is trite law the burden of proof rests with the prosecution and the standard of proof being that of beyond any reasonable doubts. (See *Stephen Nguli Mulili v Republic* [2014] eKLR). The question which needs to be answered is whether the above elements were proved to the required standards?
17. When the appellant was placed on his defense, he basically raised a defense that he was never involved in the abduction. As such in analysing the elements of the offence, I will start with analysing the element as to whether the appellant was the one who committed the offence. In my view, this will determine whether the other elements ought to be considered.
18. The evidence by PW1 was that on the material date, he was from the temple when he met a stranger who asked for a lift to town and that he did not know the said person. That he said that he was Gurpreet Singh and they went to the car but when he started the car and just one hundred meters or so into the journey, the said Gurpreet Singh put the hand brakes on and as PW1 was asking as to what was happening, the said stranger requested him to pull down the car window and it was at that time when said Gurpreet opened the front passengers’ door and moved to the rear left seat and ordered him to move to the rear right seat. That he pulled him and had a dagger but he was not with the same. He was told to keep his head down and another person entered the driver’s seat as he was being pulled to the back and he was of black origin. He tried to start the vehicle but the same did not start but after he pulled the handbrakes down, the vehicle rolled down the hill as there was a slope. The vehicle rolled to a dumping site and it’s where he met the accused who entered the vehicle after Gurpreet came out of the car and went to the right rear side after the accused told him to do so. That the accused was with another man of black origin and that he was able to see the accused when he was opening the door. That the car was pushed down the slope and when it started they left the area and joined the highway and they proceed up to Wambugu farm. That at that place he was told by the accused to get to another car and they left for Nairobi. What this evidence shows is that the appellant was not at the mosque when the complainant was picked but he comes to the picture at the dumping site. The evidence is clear also that the appellant engaged the complainant while enroute to Nairobi and discussing about the money he was allegedly owed by another family (Tarlochan Singh family). He also testified that he had known the appellant for over three years. In cross examination, he reiterated that he knew the appellant for three years as they had done business together. He testified that he was able to sit upright when he entered the second car at Wambugu area and he even engaged the appellant through the journey.
19. What I note is that the evidence by PW2, does not corroborate PW1’s evidence. In fact the evidence is to the effect that the complainant informed PW2 that he was hijacked by a Gurdpreet. Further the evidence by PW3 was to the effect that he saw the complainant’s car at Gatitu while he was in a moving matatu and that he was able to identify the appellant as amongst the people who were at the said Gatitu. That when the complainant came back at around 5PM, he informed PW3 that he had been hijacked. He testified that he had seen the accused once and which was about 6 years earlier. The witness did not testify as having witnessed the appellant take the complainant to alleged Nairobi.
20. PW4 testified as to how they were able to arrest the accused in Nairobi after he texted him. He produced chats or communication between him and the (allegedly) the appellant herein. However, in cross examination, he testified that he did not have evidence to prove that the number which sent the messages belonged to the appellant. In his defense, the accused testified that it was indeed true that he talked with the said witness but he didn’t ask him about a kidnapping case having been made but he talked to him to help him recover his money.



21. The evidence by PW5 was basically that he arrested the appellant in Nairobi together with PW4. PW6's evidence is not relevant in relation to the issue before this court. PW7 was the Investigating Officer and testified basically as to having investigated the matter.
22. When the appellant was placed to his defense, he denied having committed the said offence and testified that on the material date, he was in Nyeri.
23. From the analysis of the evidence herein, it is clear that there is no evidence which corroborates the evidence of the complainant as to the appellant having been in the vehicle which took him to Nairobi. Though there is evidence that the complainant withdrew money from a bank in Westlands, there is no evidence that he was in Nairobi after being taken there by the appellant. In my view, now that the prosecution's case was built on the fact that the appellant went to Nairobi with the complainant or rather took the complainant to Nairobi from Nyeri and the complainant withdrew the money from the bank and ATM, evidence ought to have been produced placing the appellant in the said bank or ATM lobby as at the time of the withdrawing the money. It is common knowledge and as the appellant submitted that there are CCTV cameras in the banking halls and ATM lobbies. Why didn't the Investigating Officer tender footages showing the accused being in the said bank or rather capturing the car which was allegedly parked at the parking lot? Why were the CCTV footages showing the alleged dark man who took the complainant to the bank and the ATM not produced? In my view and I so hold, there is indeed doubts as to whether the complainant went to Westlands alone or in company with the appellant. There is indeed doubts as to whether the appellant was in Nairobi on the said date. The mere fact that the complainant withdrew the money in Nairobi is not sufficient prove that the accused was in Nairobi on the said date. Further despite the complainant having testified as having been dropped by the appellant at Utalii Hotel area and him having been handed over to a taxi driver who took him back to Nyeri, the said driver was never called as witness. This is despite PW3 having mentioned the registration number for the said taxi. Why was it hard to call the said driver yet it was just easy to get copy of records from the NTSA and have the owner give out the names of the taxi' driver (if at all the driver was not the owner)?
24. I note that the appellant raised a defense of alibi. However even without considering the same, the evidence by the prosecution indeed raised doubts as to the appellant having abducted the complainant. It was indeed crucial to tender evidence not as to the complainant having been picked from the mosque or even Gatitu but also that he was taken to Nairobi (any other place) and by the accused. There was nothing tendered to show this.
25. In my view, there are indeed doubts as to the appellant herein having taken the complainant to Nairobi. It is indeed clear that the case was either hurried on investigations. The crucial witnesses and evidence was never tendered to prove the involvement of the appellant in the commission of the offence (if at all there was any). In fact as it stands there is no evidence that the complainant was taken to Nairobi by anyone. If at all he was taken to Nairobi, then there is no evidence that the appellant herein was involved. No evidence was tendered in that respect. There is therefore doubts as to the appellant having committed the offence. As it is trite law, an accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea (See *Elizabeth Waitibiegi Gatimu v Republic* [2015] eKLR).
26. The prosecution having failed to prove the element to the effect that the appellant committed the offence in issue, it will be in my view an academic exercise to proceed and consider the other elements of the offence. Equally it will be an academic exercise to proceed and consider the other grounds of appeal. However, I must note that during sentencing, the trial court noted that the state counsel had prayed for a "maximum sentence which is ten years'. The court proceeded to sentence the accused to 9 years



imprisonment having considered the 11 months he had been in custody. As I have already noted, the accused was charged in count 1 under section 256 as read together with section 259 of the Penal Code. The sentence provided for under section 259 is a maximum of 7 years. I thus agree with the appellant that the said sentence was indeed excessive.

27. Nonetheless having found that the evidence tendered was never sufficient to prove that the accused was indeed involved in the offence, I thus find that the trial court erred in fact and in law in finding that the prosecution proved the ingredients of the first count and in convicting the appellant for the offence.

28. As for the second count, I agree with the trial court that the elements of the said offence were never proved though the analysis was never sufficient in my view. In the second count the accused faced the charges of robbery with violence contrary to section 295 as read together with 296(2) of the Penal Code. Section 295 provides as thus;-

“ Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

29. Section 296(2) provides that;-

“ 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.”

30. From the plain reading of the above provisions, it is clear that the prosecution had a duty to prove amongst other elements that the appellant herein stole and that at the time of stealing he was either 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 robbery, he wounds, beats, strikes or uses any other personal violence to any person (complainant). (See Paul Njoroge Ndungu v Republic [2021] eKLR).

31. However, in the instant case and as I have already mentioned, there was no evidence as to the appellant having been to Nairobi. Further there was no evidence that the accused stole from the complainant. There was no CCTV footages which were produced as to the complainant giving the appellant herein money as he alleged. The fact that he withdrew the money is not prima facie evidence that the same was given to the complainant. I thus agree with the trial court’s finding in respect of that count.

32. Considering all the above, and having found that the trial court erred in convicting and sentencing the accused in count 1 and sentencing, said conviction is as thus quashed and the sentence set aside. The appellant to be released unless otherwise lawfully held.

33. It’s so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the State

