Obach & another v Republic (Criminal Appeal 83 of 2018)
[2024] KEHC 13804 (KLR) (5 November 2024) (Judgment)

Neutral citation: [2024] KEHC 13804 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 83 OF 2018

PN GICHOHI, J

NOVEMBER 5, 2024

BETWEEN

ALFRED ODUOR OBACH ..... 1ST APPELLANT

KWS ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against both conviction and sentence in Criminal Case Number 47 of 2018 at Nakuru by Hon. Y. Khatambi (SRM) delivered on the 5th day of October 2018)

JUDGMENT

1. Before this Court is Alfred Oduor Obachi (herein referred to as the 1st Appellant) and KWS (herein referred to as the 2nd Appellant).

2. They were the 1st and 2nd accused respectively when they appeared with a 3rd accused person (not in this appeal) before the trial court where they were charged with the offence of robbery with violence contrary to 296 of the Penal Code. The particulars were that on 1st day of January 2018 at Rhoda Estate in Nakuru West Sub- County within Nakuru County jointly while armed with dangerous weapons namely panga and knives robbed Alexon Mogo Mwanana of his mobile phone make Techno J8 valued at Kshs. 8,000/- and immediately before or after the time of such robbery wounded the said Alexson Mbogo Mwanana.

3. After trial, the 3rd accused was acquitted under Section 215 of the Criminal Procedure Code while the Appellants were convicted and each sentenced to life imprisonment on 5th October 2018.

4. Being dissatisfied, they have individually appealed to this Court against both conviction and sentence.

5. The 1st Appellant filed amended Grounds of Appeal on 18th October 2023 containing comprehensive submissions on the said grounds and which the Court summarises as follows: -

    1. That the learned trial Magistrate erred both in law and fact by accepting prosecution evidence on identification at night by a single prosecution witness.

    2. That the learned trial Magistrate erred in law and in fact in misconstruing the circumstances of the arrest of the Appellant in connecting him with the robbery against the Complainant.

    3. That the learned trial Magistrate erred in law and in fact when he failed to note that the ingredients of the offence of robbery with violence were not proved.

    4. That the learned trial Magistrate erred in law and in fact in shifting the burden of proof to the Appellant and failed to evaluate conclusively the Appellant's alibi defence.

5. That the learned trial Magistrate erred in law and in fact by awarding the Appellant a life sentence against the spirit of the *Constitution* and which does not serve objectives of sentencing.

6. On his part, the 2nd Appellant filed detailed submissions on 13th June 2024 also containing six (6) Grounds of Appeal which are condensed into five (5) as follows: -

    1. The learned trial Magistrate erred both in law and in fact by relying on evidence poor recognition/ identification by a single prosecution witness (PW1).

    2. The learned trial Magistrate erred in law and in fact by convicting the 2nd Appellant on the shoddy, speculative, contradictory and uncorroborated evidence adduced by the prosecution.

    3. The learned trial Magistrate erred in law and in fact by rejecting the 2nd Appellant's defence.

    4. The learned trial Magistrate erred in law and in fact by making a decision that jeopardised the 2nd Appellant who was a minor at the time of the commission of the offence.

    5. The learned trial Magistrate erred in law and in fact sentencing the 2nd Appellant to life imprisonment which was unconstitutional and inhumane.

7. Both Appellants urge this Court to allow the appeal.

8. In response to the appeal by both Appellants, the Respondent filed its submissions on 25th June 2024.

9. On proof of offence of robbery with violence, he cited the Court of Appeal decision in Oluoch v Republic [1985] eKLR on the ingredients of the said offence and submitted that proof of any of the ingredients was sufficient to establish an offence under 296 (2) of the Penal Code.

10. On identification, he submitted that the complainant was able to notice both Appellants among a crowd of fifteen (15) who accosted and attacked him. That the complainant was familiar with the 2nd Appellant (K) who he knew as they grew up together in area.

11. That it was midnight and there was light from the Checkpoint Hotel. That the incident lasted two (2) minutes. K stood next to the complainant while Alfred came and removed the phone from the complainant's pocket. It is then that a struggle ensued and a group of 15 people then proceeded to attack the complainant. He submitted that the complainant was able to see the two Appellants very well before and after the attack.

12. It was his submissions that while the complainant was struggling with 2nd Appellant (Kelvin) the 1st Appellant (Alfred) used knife and stabbed the complainant three times and this was confirmed by the P3 Form.

13. The Respondent further submitted that the complainant's brother (PW2) corroborated the evidence by the complainant. He saw the complainant had been stabbed. He tried to pursue the attackers. The complainant told him that he had been attacked by Kelvin.

14. The Respondent therefore submitted that the 1st Appellant's unsworn defence that he was arrested at the stage was in contrast with the complainant's evidence which he did not challenge. This argument is misplaced. It was not for the 1st appellant to corroborate the complainant's evidence.

15. In regard to the 2nd Appellant's defence, it was submitted that he did not state what time he was arrested. That he did not impeach PW1 and PW2 as to how he was arrested thus making his unsworn statement an afterthought. It was submitted that there were no contradictions at all.

16. On sentence, the Respondent urged the Court to grant a determinate deterrent sentence. He urged the court not to disturb the conviction.

17. This being a first appeal, this court's duty is to re-examine all the evidence before the trial court afresh, analyse it and arrive at its own conclusions bearing in mind that this court did not see or hear the witnesses testifying. – See Okeno v. R [1972] EA 32.

18. From the grounds of appeal and submissions by parties herein, the broad issues for determination are: -

    1. Whether the 2nd Appellant was a minor as at the time of the alleged offence.

    2. Whether the Respondent proved its case against the Appellants beyond any reasonable doubt in light of the alibi defence raised by the Appellants.

    3. Whether the sentence imposed on the Appellants should be interfered with.

19. Alexson Mbogo Mwanana (herein referred to as the complainant) testified that he left Holy Cross Church on the material night at around midnight while in company of his brother (PW2) and two others. He was however ahead of them and they could not see him as he had negotiated a corner.

20. He testified: - "I went to Checkpoint Hotel. I found an accident. Went to witness the scene. K and Oduor came. They are in court. I know Kelvin from several years. But Oduor on said date. There were 15 boys. I was able to identify two, the 15 attacked me. K came with a knife and stood next to me. Oduor took the phone from by pocket...I struggled with Oduor. He fell down. Kelvin stabbed me thrice at the back. They took off."

21. He went on to say: - "There were people at the scene who were also witnessing the incident. I stood down while I was attacked. The incident took 2 minutes. Other people were 50 metres away. No one was standing next to me. I know Kelvin very well."

22. The complainant went on to say: - "I was at a corner. There was security light for Check Point Hotel. I saw the faces of the 1st and 2nd accused as they walked towards me. It took a few seconds to be attacked. K came first followed by Oduor and the rest."

23. It is then that his friends found him at the scene and he reported the incident to them. He was taken to hospital and then reported the matter at Kwa Rhoda Police Station. He was issued with a P3 form.

24. Still in his evidence, he stated: - "....only two people attacked me. The other group mentioned passed."

25. He told the court that he never interacted with K. He knew him when in primary school. He did not know his home. He only knew the area.

26. When he was cross examined by the 1st Appellant, he responded: - "I have identified my assailants in court. You are the one who attacked me."

27. When cross examined by the 2nd Appellant, he told the court: - I asked you what the problem was. You did not answer me. I had seen you in the area before the incident."

28. His brother (PW2) and others found the complainant already attacked. The complainant told him that K had stabbed him and taken his phone. They ran after the attackers in vain. The complainant was taken for treatment.

29. The following day, PW2 went looking for K. The complaint had told him that it was Kelvin of Soko Mjinga who had attacked him. He did not find him. One boy told K to avail the phone but he did not avail it.

30. In company of police officers, he went to K's house and he was arrested. The complainant identified him.

31. In cross examination by the 1st Appellant, he told the court that they both attacked the complainant. That he was present when K called the 1st Appellant and was arrested.

32. Dr. Patrick Ogeto Mokaya (PW3) produced the P3 Form on behalf of Dr. Wangechi who had examined the Complainant on 2/1/2018 and confirmed the injuries on the Complainant's back. Dr. Wangechi had opined that they were caused by a sharp object. She had assessed the degree of injury as harm.

33. CPC Jirongo Lundu (PW4) received this report. The complainant was treated and P3 form filled. The case was assigned to him to investigate. He testified that the complainant identified the assailants by name and one by face.

34. He started looking for the suspects. The complainant accompanied him and showed him the house where they found 2nd Appellant and the 3rd accused. The 2nd Appellant called the 1st Appellant who was said to have the complainant's phone. This led to the arrest of the 1st Appellant but in absence of the complainant.

35. In cross examination by 2nd Appellant, he told the court that the did not recover the phone but he is the one who stated that the phone was with the 1st Appellant and led the Investigating Officer to the 1st Appellant house.

36. In his unsworn statement in defence, the 1st Appellant told the court that he got to his house at 8.00 pm on the material date and never left the house. That while at the bus stage on the 3rd day, police officers came to him in company of the complaint. The complainant identified him to the police saying he was the suspect as he was black. He was arrested and charged. He denied committing the offence or knowing the complainant.

37. The 2nd Appellant also gave an unsworn statement in defence. He told the court that on 31/12/2017, he was in his mother's house in Kiti from 4.00 pm and went back to his house in Ngambo on 2/1/2018.

38. He was arrested on 4/1/2018 and taken to Rhoda Police Station where the police pointed him out to the complainant. He was charged. He denied the offence or knowing the complainant. That he had never met him.

Whether the 2nd Appellant was a minor at the time the offence was allegedly committed on 1/1/2018,

39. The charge sheet indicates that he was an adult. The plea was taken on 5/1/2018 and he pleaded not guilty. It was on 12/1/2018 when he told the court that he was aged 17 years.

40. The trial court ordered for his age assessment and that was done on 19/1/2018 indicating that the he was 19 years old. Having confirmed that the 2nd Appellant was an adult, the trial court proceeded with the case. The Appellant's ground of appeal in regard to age is dismissed.

Whether the prosecution proved its case against the appellants beyond any reasonable doubt in light of the alibi defence raised by the Appellants.

41. In order to prove its case, the Respondent had to establish the ingredients of the offence of robbery with violence as provided for under Section 296 of the Penal Coded in the following terms: -

> " (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
>
> (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." [emphasis added]

42. The Court of Appeal in Oluoch v Republic (supra) emphasised (Obiter) that: -

> Robbery with violence is committed in any of the following circumstances:
>
> (a) The offender is armed with any dangerous and offensive weapon or instrument; or
>
> (b) The offender is in company of one or more other persons; or
>
> (c) 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.

43. It is therefore clear that the Respondent had to prove any of the above ingredients and further, bearing in mind the principle set down by the Court of Appeal in Mkendeshwa v Republic [2002] 1 KLR 461 that: -

> " In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge."

44. That leads to the alibi defence raised by both Appellants that they were not at the scene of robbery on the material night. The Court of Appeal in Erick Otieno Meda v Republic [2019] eKLR had this to say on such defence: -

> " In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt."

45. The Court then went on to say: -

> " In considering an alibi, we observe that:
>
> (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail." [Emphasis added]

46. The trial court's finding that was the defence "raised was an afterthought as the same was never raised and tested on cross examination." There is no doubt that the Appellants herein raised their alibi defence too late in the day thus giving no room for the Respondent to test it in any way hence giving the impression that the alibi was an afterthought. However, the burden first lay on the Respondent to prove their case.

47. There is no doubt from the evidence on record that the complainant was attacked on the material night and sustained injuries as confirmed by the doctor who examined him and filled the P3 Form.

48. There is also no doubt that the incident occurred at night That leads to the issue of identification. In its judgment, the trial court held on the issue of identity: -

> " I have weighed the evidence adduced by the prosecution against the defence by the 1st and 2nd accused. I am of considered view that the defence did not cast doubt on the complainant's testimony. I make this finding taking into consideration that the complainant was able to identify his attackers, the source of lighting was sufficient for the positive identification of the attackers."

49. The complainant was the only witness in regard to that identification. Regarding the 1st Appellant, the complainant told the court that he had seen him recently before the incident but he did not say when in particular though he said it was at Rhonda area. That he was sure it was Oduor.

50. In regard to the 2nd Appellant, it was the complainant's evidence that he knew him in primary school several years. He had not interacted with him. He did not know his home but he knew the area. When he asked the 2nd Appellant on the material night what was wrong, he did not respond.

51. From his testimony, it is not clear how many people attacked him for at one point, he talked of being attacked by 15 boys. He also stated that it was the two Appellants then followed by the rest. That it was only the two Appellants attacked him. It is noted that the complainant's evidence was marred with material contradictions.

52. Even though he testified that there was light at Check Point Hotel and therefore he was able to see the faces of the two Appellants, it was his evidence that the incident took a few seconds to 2 minutes.

53. The proximity and intensity of the security light was not stated and therefore those were difficult circumstances for identification. In such circumstances, the Court of Appeal in Odhiambo vs. Republic [2002] 1 KLR 241, held: -

> "Courts should receive evidence of identification with the greatest circumspection particularly: 1. where circumstances are difficult and do not favour accurate identification. 2. Where evidence of identification rests on a single identifying witness and circumstances of identification are known to be difficult, what is needed is other evidence, either direct or circumstantial, pointing to the guilt of the accused person from which, the court may reasonably conclude that identification is accurate and free from the possibility of error."

54. Nothing was recovered from the Appellants in this case. Their defence may be weak and the alibi defence uncorroborated but the Court relies on the strength of the prosecution case. The burden of prove did not shift to the Appellants the circumstances.

55. The circumstances of the Appellants identification by the complainant as his attackers on the material night were not favourable and free from possibility of error.

56. The conviction was not safe.

57. In conclusion: -

    1. The Appellants' appeals are allowed, conviction quashed and the sentence set aside.

    2. The Appellants are set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF NOVEMBER, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Alfred Odour Obachi– 1st Appellant

KWS – 2nd Appellant

Mr. Kihara for Respondent

Ruto - Court Assistant