Ahunza alias Shimotoli v Republic (Criminal Appeal 34 of 2021)
[2024] KEHC 16231 (KLR) (17 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16231 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL 34 OF 2021

JN KAMAU, J

DECEMBER 17, 2024

BETWEEN

MICHAEL AHUNZA ALIAS SHIMOTOLI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon S. O. Ongeri (SPM) delivered at Vihiga in Senior Principal Magistrate's Court in Criminal Case No 1342 of 2018 on 27th May 2020)

JUDGMENT

Introduction

1. The Appellant herein was jointly charged with two (2) others on several counts. On Count I, he was charged with the offence of robbery with violence contrary to Section 295 as read with 296 (2) of the Penal Code Cap 63 (Laws of Kenya). On Count II, he was charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2007/2006 (sic). On Count III, he was charged with the offence of assault causing bodily harm contrary to Section 251 of the Penal Code. He was also charged with an alternative charge of the offence of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*.

2. He was tried and convicted by the Learned Trial Magistrate, Hon S. O. Ongeri (SPM) on all Counts. He sentenced him to twenty-five (25) years, fifteen (15) years and two (2) years imprisonment on Count I, Count II and Count III respectively. He directed that the said sentences would run concurrently.

3. Being dissatisfied with the said Judgement, on 13th August 2020, he lodged the Appeal herein. The same was undated. He set out four (4) grounds of appeal. On 19th March 2024, he filed Supplementary Grounds of Appeal dated 7th March 2024. He set out three (3) supplementary grounds of appeal.

4. His Written Submissions were dated 12th March 2024 and filed on 19th March 2024 while those of the Respondent were dated and filed on 25th April 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. 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.

6. This was aptly stated in the case of Selle & Another vs 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 testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Petition of Appeal, his Supplementary Grounds of Appeal and parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Charge Sheet was defective warranting interference by this court;

    b. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. Charge Sheet

9. Supplementary Ground of Appeal No 2 was dealt with under this head.

10. The Respondent did not submit on this issue. The Appellant submitted that the main charge for which he was convicted was framed as a charge for robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code which was contrary to the authority in the case of Mwaura vs Republic (eKLR citation not given) which rendered it duplex as the two (2) offences under the Penal Code were different.

11. The discourse on Section 295 and 296 were set out in the case in Johana Ndungu vs Republic [1996] eKLR where the Court of Appeal stated that in order to properly appreciate what acts constituted an offence under Section 296 (2) of the Penal Code, one had to consider the same in conjunction with Section 295 of the Penal Code.

12. Section 295 was a definition section and did not deal with the degree of violence. It set out what constituted the ingredients of robbery. On the other hand, Sections 296 (1) and 296 (2) of the Penal Code dealt with the punishment of the specific degrees of the offence of robbery. The Charge Sheet against the Appellant and his Co-Accused had been framed as such.

13. In the instant appeal, the theft involved the use of crude weapons. It was clear from the particulars of the charge that they supported the offence of robbery with violence. The Appellant did not raise the issue of defective charge sheet and proceeded to cross-examine the witnesses accordingly.

14. This was a clear indication that he was aware of the charges that he was facing during trial and there was no confusion during trial. The Charge Sheet was not fatally defective as quoting both Section 295 and Section 296(2) therein did not occasion him any injustice.

15. In the premises foregoing, Supplementary Ground of Appeal No (2) was not merited and the same be and is hereby dismissed.

II. Proof Of Prosecution Case

16. Grounds of Appeal Nos (1), (2) and (4) of the Petition of Appeal and Supplementary Ground of Appeal No (1) were dealt with under this head. The court dealt with the same under the following distinct and separate heads.

A. Robbery With Violence

17. The Appellant placed reliance on the case of Ndungu Kimanyi vs Republic (1979) KLR 283 where it was held that the witness whose evidence was relied upon should not create an impression in the mind of the court that he was not a straight forward person or do something that made it unsafe for the court to accept his evidence.

18. He reproduced the evidence of Mercy Kusa (hereinafter referred to as "PW 1"), Aggrey Isaiah Ndeluu (hereinafter referred to as "PW 2"), Evans Karega (hereinafter referred to as "PW 5") and No 101022 PC Quinter Achieng (hereinafter referred to as "PW 6"). He questioned how PW 1 identified him during the incident as she had stated that during the incident, his face was fully covered. He also stated that PW 2's evidence was inconsistent as he was not clear on how many people he saw during the incident.

19. He relied on the case of Kiarie vs Republic (eKLR citation not given) where favourable circumstances for a positive identification therein were absent.

20. He further contended that although PW 1 claimed that her property was stolen, she did not adduce any documentary proof of ownership of the alleged stolen items. He argued that nothing was recovered from him and that the alleged stolen items were not produced in court. He urged the court not to rely on the evidence of exhibits that were not produced as proof of theft.

21. In this regard, he relied on the case of Samuel Kariuki Wanjiku vs Republic [2019] eKLR where the substratum of the offence of stealing in robbery with violence was not established therein. He pointed out that if the light was sufficient at the crime scene as was stated by PW 6, then there was no need of torches as evidenced.

22. On its part, the Respondent invoked Section 295 and 296(2) of the Penal Code and Section 2 and 10 of the *Sexual Offences Act* and submitted that the Trial Court termed the evidence against the Appellant herein as having been overwhelming. It pointed out that there was no merit in his defence and urged the court to dismiss his Appeal.

23. A perusal of the proceedings of the lower court showed that on 15th September 2018, at 3.00 am, PW 1 was in the bedroom sleeping when she heard people whispering. They then broke her wooden door and four (4) people entered the house. The Appellant who had a black jacket and his Co-Accused went to the bedroom where she was and told her to keep quiet.

24. The Appellant then asked her for money while the rest started picking her Tech Tablet, clothes and shoes. They hit her with a panga. She told them to pick the money from her handbag on the wall. The

Appellant took the money and fell on the bed. He pulled up her skirt and pulled down her underpants raped her. Her cousin who stayed in a house a hundred (100) metres from her house came to her rescue.

25. She pointed out that the Appellant and his Co-Accused were her neighbours. She identified them by name in court. She testified that there was lighting from the solar light that was on in her bedroom and was able to see them. Her testimony was that although the Appellant was wearing a marvin, she could see his eyes and mouth and hence recognised him. She said that the Appellant's Co-Accused was standing there (sic).

26. PW 2's evidence corroborated that of PW 1. He testified that on the material date of 15th September 2018 at 3.00 am, he was in his house, when he heard his sister screaming for help. He stated that his house was about a hundred (100) metres from PW 1's house. He woke up, took a torch and a rungu and headed to her place. He approached from behind and when he reached the front, the door was open and lights were on. He called her but one of the assailants aimed a panga at his neck. He bent down and the attacker missed him and he fell down.

27. He saw the four (4) assailants coming out of the house. One had carried a suitcase and another had a paper bag carrying shoes. He was categorical that he could identify the Appellant herein as he was the one that cut him on the head. He said that he did not know the Appellant's Co-Accused and he did not know him as they were not neighbours.

28. No 119407 PC Brian Omwenga (hereinafter referred to as "PW 3"). He testified that on the material night at 0300 hours, he was on crime standby with Corporal Theuri and Police Driver, Mahati when he was telephoned by the Officer Commanding Station (OCS) who informed him that members of the public had arrested a suspect who was being beaten up. They proceeded to Epanga and found the Appellant being assaulted by a mob. They dispersed the public and rescued him. They took him to Emuhaya Hospital. They later learned that he had raped and robbed PW 1. They booked him in the police cells.

29. PW 6 was the investigating officer. His evidence corroborated that of PW 1, PW 2 and PW 3.

30. Notably, the Appellant and PW 1 were not strangers as they hailed from the same area. The lighting from the solar light in PW 1's house was conducive to positively identify him as having been one of the attackers on that material night. PW 2 identified the Appellant herein as the person who hit him with a panga. This court was satisfied that the light was sufficient for PW 1 and PW 2 not to have been mistaken about the Appellant's face and he was positively identified as having been one of the attackers on that material night. PW 1 also identified the Appellant's Co-Accused. The Appellant's argument that the Prosecution's evidence was inconsistent therefore fell on the wayside.

31. Section 295 of the Penal Code states that:-

> " 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."

32. The elements of robbery with violence were therefore as follows:-

    a. That the offender is armed with any dangerous weapon or offensive weapon or instrument;

    b. That the offender is in the company of one or more persons;

c. That 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.

33. It was evident from the evidence of PW 1 and PW 2 that the Appellant was in the company of others during the attack. PW 1 confirmed having seen him and his accomplices armed with pangas which they slapped her with. The Appellant raped her. This was evidence of personal violence against her as was envisaged in Section 296(2) of the Penal Code. The Appellant and his Co-Accused robbed her of her money and personal items. It was immaterial that no documents were adduced in proof of the stolen items. It was punitive to expect people to keep receipts of their personal items to prove that they owned the same.

34. The Appellant categorically denied the charges that were levelled against him. He raised a defence of alibi. His testimony was that on the material night, he was at home sleeping.

35. This court had due regard to the definition of "alibi" in the Black's Law Dictionary, 10th Edition. It was defined as:-

> " A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".

36. The principle had long been accepted that an accused person who wished to rely on a defence of alibi had to raise it at the earliest opportunity to afford the prosecution an opportunity to investigate the truth or otherwise of the alibi. The East Africa Court of Appeal came to a similar conclusion in the case of Republic vs Sukha Singh S/O Wazir Singh & Others [1939] 6 EACA 145.

37. It was also trite law that once an accused person raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of Victor Mwendwa Mulinge vs Republic [2014] eKLR.

38. In this case this court noted that defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides that:-

> " If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

39. Be that as it may, weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Appellant's alibi evidence to have been watertight enough to have weakened the inference of guilt on his part.

40. The chain of events was unbroken. The Prosecution established beyond reasonable doubt, which was the required standard of proof in criminal cases, that the Appellant herein was guilty of the offence of robbery with violence.

41. The Trial Court thus proceeded correctly when it found that all the ingredients of proving the offence of robbery with violence had been satisfied as a result of which it convicted him.

B. Proof Of Gang Rape

42. The Appellant submitted that in the Post Rape Care (PRC) Form, PW 1 had indicated that she had been raped by seven (7) people but that during trial, she indicated that it was only one (1) person who raped her. He further asserted that although the PRC Form indicated that the person that had raped

her was unknown, she identified him as the person who had raped her thus raising doubts as to the credibility of her testimony.

43. He questioned why PW 6 stated that PW 1 informed her that he and his Co-Accused raped her but told the Trial Court that she was raped by only one person.

44. On its part, the Respondent invoked Section 2 and 10 of the *Sexual Offences Act* and submitted that there was enough corroboration among its witnesses who were consistent in making its case concrete.

45. PW 1's evidence of what transpired on that material night was unwavering. It was corroborated by PW 2 who went to his rescue after hearing her screams and by the scientific evidence of the Clinical Officer, Paul Muturi (hereinafter referred to as "PW 4"). Indeed, PW 4 found that she had vaginal discharge, laceration at labia majora and minora and visible vaginal laceration. He concluded that there had been penetration. He produced treatment notes, P3 Form and Post Rape Care (PRC) Form as exhibits in court.

46. As PW 1 did not consent to having sex with the Appellant, the Prosecution established beyond reasonable doubt, which was the required standard of proof in criminal cases, that he was guilty of the offence of rape. The offence of gang rape was not proven as PW 1 testified that it was only the Appellant herein who raped her and not his accomplices.

C. Proof Of Assault Causing Bodily Harm

47. Both parties did not submit on this issue with particularity. PW 2 testified that the Appellant cut him with a panga on the head. PW 5 was the Clinical Officer who examined him. He testified that PW 2 had a history of having been assaulted and had been treated at Lumunaro Health Centre. He pointed out that he had a stitched cut wound at the back of his head. The cut wound was 6cm in size. He stated that the wound was three (3) days old and that the probable weapon was a sharp object. He classified the injuries as harm. He produced the P3 Form as exhibit in this case.

48. The fundamental ingredients of the offence of assault causing actual bodily harm were spelt out in the case of Ndaa vs Republic [1984] KLR as assaulting and occasioning actual bodily harm to a victim.

49. In the foregoing premises, this court was persuaded that the Prosecution had proved beyond reasonable doubt the aforesaid ingredients in the circumstances of this case and consequently, Grounds of Appeal Nos (1), (2) and (4) of the Petition of Appeal and Supplementary Ground of Appeal No (1) were not merited and the same be and are hereby dismissed.

III. Sentencing

50. Grounds of Appeal No (3) of the Petition of Appeal and Supplementary Ground of Appeal No (3) was dealt with under this head.

51. The Respondent did not submit on the issue of sentencing. The Appellant submitted that it was not clear if he was sentenced to twenty (20) or twenty five (25) years imprisonment. He argued that he was entitled to the benefit of a least severe sentence. He urged the court to reduce his sentence to a least prescribed one and to also order that the same run from the date of his arrest pursuant to Section 333(2) of the Criminal Procedure Code and Section 38 (1) of the Penal Code.

52. This court noted that there was a typing error on the typed proceedings on the date of sentencing which read as follows:

> " The 1st and 3rd Accused are sentenced 20 25 years (sic) imprisonment..."

53. However, a perusal of the hand-written proceedings showed that the Trial Court sentenced the Appellant to twenty five (25) years imprisonment for the offence of robbery. The committal warrant was also clear that it was twenty five (25) years imprisonment. There was therefore no confusion in respect to the sentence for Count 1 as the Appellant had submitted.

54. As regards Count I relating to robbery with violence, Section 296 (1) and (2) of the Penal Code provides as follows:-

    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 court).

55. As regards Count II relating to rape, Section 3 of the *Sexual Offences Act* states as follows:-

    1. A person commits the offence termed rape if:-

        a. he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

        b. the other person does not consent to the penetration; or

        c. the consent is obtained by force or by means of threats or intimidation of any kind.

    2. In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

    3. A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life (emphasis court).

56. In respect of Count III relating to the offence of assault, Section 251 of the Penal Code further states:

> "Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years (emphasis court)."

57. The Trial Court was very lenient when it sentenced the Appellant to twenty five (25) imprisonment as it had the option of sentencing him to death for the offence of robbery with violence. It also had the discretion of imposing on him a life imprisonment for the offence of rape instead of fifteen (15) years imprisonment or to sentence him five (5) years imprisonment for the offence of assault instead of the two (2) years that was meted upon him.

58. The violence that the Appellant, his Co-Accused person and the other accomplices unleashed on PW 1 and PW 2 herein smacked of pure malice and impunity. In view of the said atrocities, this was not a case that this court was persuaded to disturb the sentences that the Trial Court imposed on the Appellant herein.

59. Having said so, this court was mandated to consider the period the Accused person spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

60. Section 333(2) of the Criminal Procedure Code provides that:-

> " Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court).

61. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.

62. Further, the Judiciary Sentencing Policy Guidelines provide that:-

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

63. The Charge Sheet indicated that the Appellant was arrested on 19th August 2018. He was sentenced on 27th May 2020. Although he was granted bond, he did not seem to have posted the same. He therefore spent one (1) year, nine (9) months and seven (6) days in custody during trial. The Trial Court did not take into account this period while sentencing him. This is a period that ought to have been taken into account at the time of sentencing unless there was a specific intention that the period would be inclusive of the years that were imposed on him.

64. In the premises, Ground of Appeal No (3) of the Petition of Appeal was not merited and the same be and is hereby dismissed while the Supplementary Ground of Appeal No (3) was merited and the same be and is hereby allowed.

Disposition

65. For the foregoing reasons, the upshot of this court's decision was that the Appellant's undated Petition of Appeal that was lodged on 13th August 2020 and Supplementary Grounds of Appeal dated 7th March 2024 and filed on 19th March 2024, were not merited save for the ground on Section 333(2) of the Criminal Procedure Code and the same be and are hereby dismissed. The Appellant's conviction and sentence be and is hereby upheld as they were both safe.

66. For the avoidance of doubt, the periods between 19th August 2018 and 26th May 2020 be and are hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

67. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 17TH DAY OF DECEMBER 2024

J. KAMAU

JUDGE

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