Amboko v Republic (Criminal Appeal E027 of 2023)
[2024] KEHC 16028 (KLR) (17 December 2024) (Judgment)

Neutral citation: [2024] KEHC 16028 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E027 OF 2023

JN KAMAU, J

DECEMBER 17, 2024

BETWEEN

CHARLES AMBOKO ..... 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 charged with two (2) others not before this court on two (2) 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). 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) who sentenced him to twenty five (25) years imprisonment on Count I for the offence of robbery with violence, fifteen (15) years on Count II for the offence of gang rape. He directed that the said sentences run concurrently.

3. Being dissatisfied with the said Judgement, on 17th August 2020, the Appellant lodged the Appeal herein. His Petition of Appeal was dated 13th July 2023. He set out six (6) grounds of appeal. On 8th April 2024, he filed Supplementary Grounds of Appeal dated 19th March 2024. He set out six (6) supplementary grounds of appeal.

4. His Written Submissions were dated 20th March 2024 and filed on 8th April 2024 while those of the Respondent were undated and filed on 15th October 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 the interference of 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 (4) was dealt with under this head.

10. 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. On its part, the Respondent also cited the case of Joseph Njuguna Mwaura & Others vs Republic [2013] eKLR where it was held that where the charge was deemed to be duplex, the test would be whether the defects occasioned any prejudice to the appellant therein. It further placed reliance on the case of Paul Katana Njuguna vs Republic [2016] eKLR where it was held that if there was no risk confusion in the mind of an accused person as to the charge framed and evidence presented, a charge which might be duplex would not be found to be fatally defective.

12. It contended that the Appellant understood the charges against him, he participated in the hearing by cross-examining the witnesses and mounted a defence at the close of the Prosecution's case. It argued that he raised no complaint before the Trial Court and in the circumstances, there was no miscarriage or failure of justice on the ground that the charge was duplex.

13. The discourse on Section 295 and 296 were set out in the Court of Appeal case in Johana Ndungu vs Republic [1996] eKLR where the court stated that in order to properly appreciate what acts constituted an offence under Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya), one had to consider the same in conjunction with Section 295 of the Penal Code.

14. 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 for the specific degrees of the offence of robbery. The Charge Sheet facing the Appellant and his Co-Accused had been framed as such.

15. 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.

16. 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.

17. In the premises foregoing, Supplementary Ground of Appeal No (4) was not merited and the same be and is hereby dismissed.

II. Proof Of Prosecution Case

18. The court dealt with the above issue under the following distinct and separate heads.

A. Robbery With Violence

19. Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) of the Petition of Appeal and Supplementary Ground of Appeal No (1) and (2) were dealt with under this head.

20. Right from the onset, this court noted that some pages were missing from the Appellant's Written Submissions. However, it proceeded with the same as they were to save the court's scarce resource of time as the gist of his arguments were sufficient to enable it pronounce itself on the issues he had raised therein.

21. He submitted that unless it was a clear case of positive identification, then it amounted to mistaken recognition and there was need for an identification parade. He pointed out that Mercy Kusa (hereinafter referred to as "PW 1") told the Trial Court that he did not steal anything from her.

22. 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 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. In this regard, he relied on the case of Samuel Kariuki Wanjiku vs Republic [2019] eKLR where it was held that the substratum of the offence of stealing in robbery with violence was not established.

23. On its part, the Respondent placed reliance on the case of Oluoch vs Republic [1985] KLR where it was held that robbery with violence was committed where the offender was armed with any dangerous and offensive weapon or instrument or the offender was in company of more than one person or at or immediately after the time of the robbery the offender wounded, beat, struck or used other personal violence against any person.

24. It reproduced the evidence of PW 1 and No 101022 PC Quinter Achieng (hereinafter referred to as "PW 6") and pointed out that the Appellant was positively identified by PW 1 on the material night as there was sufficient light. It added that upon cross-examination, PW 6 stated that PW 1 mentioned the Appellant herein when she was recording her statement.

25. In that regard, it relied on the case of R vs Turnbull (1976) 3 All ER 551 where it was held that the judge was required to direct the jury to closely examine the circumstances in which the identification by each witness came to be made. It also placed reliance on the case of Terekali & Another vs Republic [1952] EA 259 where it was held that evidence of first report by a complainant to a person in authority was important as it often provided a good test by which the truth and accuracy of subsequent statement could be gauged.

26. It pointed out that the Appellant's defence did not cast doubt on its case as PW 1 had the opportunity to properly identify him thereby rendering an identification parade superfluous. It urged this court to find that it had proven its case beyond reasonable doubt.

27. 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.

28. The Appellant's Co-Accused then asked her for money while the Appellant and the other accomplices started picking her Tech Tablet, clothes, shoes. They hit her with a panga. She told them to pick the money from her handbag on the wall. Her cousin who stayed in a house a hundred (100) metres from her came to her rescue.

29. 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 in her bedroom and was therefore able to see them. Her testimony was that although the Appellant's Co-Accused was wearing a marvin, she could see his eyes and mouth and hence recognised him. She said that the Appellant was standing there (sic).

30. When she was cross-examined, she stated that although the Appellant was in the company of his Co-Accused, he did not rape or steal from her.

31. 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 her 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, he found the door open and lights on. He called her but one of the assailants aimed a panga at his neck. He bent down and the attacker missed him and fell he down.

32. 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's Co-Accused herein as he was the one that cut him on the head. He said that he did not see the Appellant herein. He added that he did not know him and they were not neighbours.

33. No 11xxxx 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's Co-Accused 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.

34. PW 6 was the investigating officer. His evidence corroborated that of PW 1, PW 2 and PW 3. He stated that PW 1 mentioned the Appellant's Co- Accused in her statement and that the Appellant was also arrested by members of the public.

35. On his part, the Appellant testified that on the material night he was at home sleeping. He completely denied the charges.

36. 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's Co-Accused as the person who hit him with a panga. This court was satisfied that the light was sufficient for PW 1 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. His argument that it was a mistaken recognition on his part therefore fell on the wayside.

37. 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."

38. 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.

39. It was evident from the evidence of PW 1 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. They robbed her of her money and personal items. His Co-Accused raped her. This was evidence of personal violence against her as was envisaged in Section 296(2) of the Penal Code. 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.

40. 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.

41. 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".

42. 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.

43. 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.

44. 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."

45. 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.

46. 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.

47. 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.

48. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) of the Petition of Appeal and Supplementary Ground of Appeal No (1) and (2) were not merited and the same be and are hereby dismissed.

B. Proof Of Gang Rape

49. Supplementary Ground of Appeal No (3) was dealt with under this head.

50. The Appellant submitted that PW 1 stated that he did not rape her. He placed reliance on the case of Miller vs Minister of Pensions (1974) where it was held that the law would fail to protect the community if it admitted fanciful possibility in his favour which could be dismissed with a sentence.

51. He also referred this court to the case of Eunice Mukenya Andui vs Republic [2011] eKLR where it was held that the principle of common intention was based on presumptions which should not be too readily applied and where there was evidence which could displace the presumption the same had to be taken into account. It was his case that although there was evidence that he did not rape PW 1, the Trial Court misapplied the doctrine of common intention by assuming that he had committed the same by having been in company of the attackers.

52. On its part, the Respondent invoked Section 10 of the *Sexual Offences Act* and Section 21 of the Penal Code and submitted that PW 1 testified that the Appellant's Co-Accused raped her in the presence of the Appellant herein. It argued that by legitimate expectation, the Appellant had a common intention with his Co-Accused who were armed and were stealing from her. It was its case that it had proven its case beyond reasonable doubt.

53. 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.

54. Notably, the ingredients of gang rape were that the offence must have been committed in the company of others and with common intention. PW 1 was categorical that the Appellant herein did not rape her. The Prosecution therefore failed to establish its case of gang rape against him beyond reasonable doubt. In that regard, the Trial Court therefore erred both in law and in fact when it convicted him for the said offence of gang rape.

55. In the premises, Supplementary Ground of Appeal No (3) was merited. The same be and is hereby allowed.

III. Sentencing

56. Supplementary Grounds of Appeal No (5) and (6) were dealt with under this head.

57. The Appellant submitted that his sentence on robbery with violence was not clear. 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 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. He pointed out that he was arrested on 17th September 2018 and sentenced on 27th May 2020.

58. The Respondent placed reliance on the cases of Vincent Sila Jona & 8 Others vs Kenya Prison Service & 2 Others [2021]eKLR and Ahamad Abolfathi Mohammed & Another vs Republic [2018]eKLR where the common thread was that courts were obliged to take into account the period that convicts had stayed in custody before they were sentenced. It faulted the Trial Court for having not considered the same while sentencing the Appellant and urged this court to consider the same.

59. It, however, submitted that the sentence that was meted upon the Appellant herein was lawful and not excessive considering the gravity of the offence, circumstances and nature in which the offences were committed and the injuries suffered by PW 1 which were both emotional and physical. It urged the court to uphold the sentence.

60. 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..."

61. 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.

62. Notably, 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.

63. The Trial Court sentenced the Appellant to twenty five (25) years imprisonment for the offence of robbery with violence. In the mind of this court, the Trial Court was very lenient as it had the option of sentencing him to death.

64. 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.

65. Having said so, this court was mandated to consider the period that the Appellant 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).

66. 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).

67. 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(Supra).

68. 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."

69. The Charge Sheet indicated that the Appellant was arrested on 19th September 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 six (6) days in custody during trial.

70. A perusal of the proceedings showed that the Trial Court did not consider the said period while sentencing him. This period therefore ought to be taken into consideration while computing his sentence.

71. In the premises, Supplementary Ground of Appeal No (5) was merited and the same be and is hereby allowed. However, Supplementary Ground of Appeal No (6) was not merited and the same be and is hereby dismissed.

Disposition

72. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 13th July 2023 that was lodged on 17th August 2023 and Supplementary Grounds of Appeal dated 19th March 2024 and filed on 8th April 2024 was partly merited.

73. The Appellant's conviction and sentence for the offence robbery be and are hereby upheld as they were both safe. However, his conviction and sentence for the offence of gang rape be and are hereby set aside and vacated as they were both unsafe.

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

75. It is so ordered.

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

J. KAMAU

JUDGE