Mwangi v Republic (Criminal Appeal 46 of 2020)
[2021] KEHC 103 (KLR) (6 October 2021) (Judgment)

Neutral citation: [2021] KEHC 103 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL 46 OF 2020

DAS MAJANJA, J

OCTOBER 6, 2021

BETWEEN

DANCAN WACHIRA MWANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. E. Riany, SRM dated 24th September 2020 in Criminal Case No. 46 of 2020 at the Magistrate's Court at Thika)

JUDGMENT

1. Before the trial court, the Appellant was charged with the following three counts:Breaking into a building and committing a felony contrary to section 306(a) of the (Chapter 63 of the Laws of Kenya). It was alleged that on 7th June 2020 at Kivulini Garage in Thika West Sub-County within Kiambu County, jointly with others not before the court, he broke and entered in the kiosk of George Maina Waithaka and stole therein; 3 Injector Pumps, 10 Boxes of Piston Rings, 13 ball joints, 15 valves, 10 wheel cylinders all valued at Kes. 243,000.00 and Kes. 800,000.00 cash.Stealing contrary to section 268 as read with section 275 of the Penal Code. It was alleged that on 7th June 2020 at Kivulini Garage in Thika West Sub-County within Kiambu County, jointly with others not before the court, he stole 3 Injector Pumps, 10 Boxes of Piston Rings, 13 ball joints, 15 valves, 10 wheel cylinders all valued at Kes. 243,000.00 and Kes. 800,000.00 cash the property of George Maina Waithaka.Handling Stolen Goods contrary to section 322(1) and (2) of the Penal Code. It was alleged that on 7th June 2020 at Kivulini Garage in Thika West Sub-County within Kiambu County, otherwise than in the course of stealing, the Appellant, received 3 Injector Pumps, 10 Boxes of Piston Rings, 13 ball joints, 15 valves, 10 wheel cylinders all valued at Kes. 243,000.00 knowing or having reason to believe them to be stolen goods.

2. The appellant was convicted on the first and second counts. On the first he was sentenced to a fine of Kes. 700,000.00 in default four years' imprisonment and on the second count, he was fined Kes. 100,000.00 in default one-year imprisonment. Both sentences were to run consecutively.

3. The substance of the appeal contained in the Amended and Supplementary Grounds of Appeal and written submissions filed on 6th August 2021 is that the trial magistrate erred in convicting him on incurably defective charges. He contended that the charges were bad for duplicity. The Appellant also submitted that that the prosecution failed to prove its case and the reliance of the doctrine of recent possession was unjustified in the circumstances.

4. The Respondent supported the conviction and sentence. It submitted that the charges were proper in the circumstances and that the conviction was well founded.

5. Before I deal with the issues raised in this appeal, I propose to set out the facts as they emerged before the trial court noting that as this is a first appeal, I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see *Okeno v Republic* [1972] EA 32, *Kiilu and Another v Republic* [2005] 1 KLR 174).

6. George Maina Waithaka (PW 1), the complainant, testified that on the morning of 8th June 2020, he arrived at his shop and found that it had been broken into. He noticed that an injector pump, valves, wheel cylinders valued at around Kes. 200,000.00 and Kes. 800,000.00 cash missing. Stanley Munga (PW 2), a mechanic, also recalled that on the material day he found that the PW 1's garage had been broken into. Both PW 1 and PW 2 told the court that they found the Appellant, who had a lot of cash and was drunk. They went to his place with officers and recovered several items which PW 1 identified as his. They both testified that they knew the Appellant as a mechanic in the area and confirmed that he did not have any spare parts shop.

7. The Investigating Officer, PC Timothy Benedict Otieno (PW 4), told the court that on the material day, PW 1 came to report that his shop had been broken into and his items and cash stolen. He proceeded with PW 1 to the shop and found that the shop had been repaired for security purposes. The found the suspect and went to his home where they recovered spare parts which PW 1 identified as those from his shop.

8. When put on his defence, the Appellant (DW 1), in his sworn testimony, told the court that on the material morning, police officers came to his home when he was asleep, searched his house and took some items. In cross-examination, the Appellant stated that he bought spare parts recovered from his house from PW 1. He stated that he had no receipts. Jane Wanjiru Mwangi (DW 2), testified that she was the caretaker of the place the Appellant resided. She recalled that when the Appellant was arrested, only a TV, hoofer and cupboard were recovered.

9. Based on the aforesaid evidence and on the basis of the doctrine of recent possession, the Appellant was duly convicted. From the submissions, two issues fall for determination. First, whether the charges are defective and second, whether the trial court erred in law and in fact in relying on the doctrine of recent possession.

10. On the first issue, the Appellant's contention was the he could not be charged with the offence of breaking into a building and committing a felony contrary to section 306(b) of the Penal Code on one hand and on the other hand stealing contrary to section 275 of the Penal Code. The Appellant submitted that he could not face the same charge of stealing in the first and second count as he

prejudiced as it was not clear which charge he was facing. This argument flows from a reading of section 304 of the Penal Code which states as follows:

> 7. Section 304 of the Penal Code provides that:
>
> (1) Any person who -
>
> (a) breaks and enters any building, tent or vessel used as a human dwelling with intent to commit a felony therein; or
>
> (b) having entered any building, tent or vessel used as a human dwelling with intent to commit a felony therein, or having committed a felony in any such building, tent or vessel, breaks out thereof, is guilty of the felony termed housebreaking and is liable to imprisonment for seven years.

While section 279(b) of the Penal Code provides:

> if the thing is stolen in a dwelling-house, and its value exceeds one hundred shillings, or the offender at or immediately before or after the time of stealing uses or threatens to use violence to any person in the dwelling-house; the offender is liable to imprisonment for fourteen years.

11. In reference to the aforesaid provisions, the Court of Appeal in *Njoka v Republic* [2001] KLR 175 held as follows:

> Section 304(2) of the Penal Code, cap. 63, was the main section under which the appellant was charged. The section does however create two offences rather than one offence. The first offence it creates is burglary and the second offence it creates is stealing from the house. Both offences, however, are usually committed in the course of one transaction and they carry no mens rea. They are, also, usually laid as one offence in one count. The charge is then said to carry two limbs namely one for burglary and one for stealing from the house.

12. On whether the charge, comprising one limb of burglary and the other of stealing, was bad for duplicity, the Court of Appeal in *Reuben Nyakango Mose & Another vs Republic* KSM CA Criminal 606 of 2010 [2013] eKLR observed that:

> It will in any event be seen that the framing of the charge of burglary in the Criminal Procedure Code envisages that another offence may be committed in the course of burglary. That is why the relevant form is couched to include burglary and stealing in the same charge. The authorities we have visited and all relevant law envisage that because a thief who breaks into a dwelling house or a vessel will have had ulterior motives when he formed the intention to break into the house or vessel then what follows – this will ordinary but not necessarily be stealing – should be included in the burglary charge. There cannot therefore be duplicity when the offence of burglary and stealing are combined in the same charge.

13. It is clear that the provision of section 306(b) of the Penal Code, the offence prescribed has two elements, that is breaking and entering into dwelling house or building and committing a felony to wit; stealing. In this case though, the error was to charge the offence of stealing as the second count when in fact the same was an element of the first count. In this instance, I find that the charge was bad for duplicity as the second count of stealing was superfluous. But this is not the end of the matter, as

the court has to consider whether a defect in the charge was prejudicial to the Appellant and caused a miscarriage of justice as section 382 of the *Criminal Procedure Code* provides as follows;

> 382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

14. In this instance, the case against the Appellant was that he broke into PW 1's house and stole items therein. The Appellant cross-examined the witnesses and defended himself on the basis of the charges that were clear to him. Likewise, I do not think that an error in the sections quoted in the charge sheet were prejudicial to the Appellant as the particulars of the charge and substance of what was required to be proved were clear.

15. Turning to the basis of the conviction, the trial magistrate relied on the doctrine of recent possession to convict the Appellant as there was no direct evidence implicating him in the burglary and stealing. The ingredients to be established in proving a case based on the doctrine of recent possession were distilled by the Court of Appeal in *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic* }}Criminal Appeal No. 272 of 2005 as follows;

> It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

For the doctrine to stand, the evidence of recovery of the material property must be sufficient and credible. There must also be sufficient and credible evidence for positive identification of the property as belonging to the victim.

16. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. While the law is that in a criminal trial, the prosecution bears the burden of proving the case against the accused throughout the case, in a case where one is found in possession of recently stolen property like in this case, the evidential burden shifts to him to explain his possession. That explanation need only be a plausible one but he needs to put it forward for the court's consideration (see *Malingi v Republic* [1988] KLR 225. In *Paul Mwita Robi v Republic* KSM Criminal Appeal No. 200 of 2008, the Court of Appeal observed that;

> Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge

of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.

17. The testimony of PW 1, PW 2 and PW 4 confirm that PW 1's kiosk was broken into and on the next morning, when they went to the Appellant's house, they found the stolen items. The Appellant did not deny that the items belonged to PW 1. In cross-examination he stated that he bought them. The fact that he was a mechanic and not a dealer undermined his defence that items found in his possession the next day so soon after the burglary were bought and not stolen. Further, his own testimony contradicted that of his witness, DW 2, who stated that she saw other items and not PW 1's items taken from the Appellant's house. The totality of the evidence is that it is the Appellant who broke into the PW 1's kiosk and stole his items. I affirm the conviction on the first count.

18. The general principles upon which the first appellate court acts are now well settled. It has jurisdiction to interfere with sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not take into account a relevant factor or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the Court should not lose sight of the fact that in sentencing, the trial court exercises discretion and as long as the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion (see *Wanjema v Republic* [1971] EA 493).

19. As I stated, charging the Appellant on the second count was improper hence the conviction and sentence thereon is quashed. The conviction on the first count contains two limbs; burglary and stealing. The Appellant ought to be sentenced on the two limbs. In considering the sentence, the trial magistrate remarked, "Pre-sentencing report availed and it is negative. Probation officer hesitant to recommend leniency for reasons given in the report". I have looked at the Report and it states that the Appellant was adamant that he did not commit the offence. The trial magistrate did not take into account the nature of the offence and whether he was a first offender. Further, the record does not show that the Appellant was given an opportunity to mitigate before sentencing. Lastly, and assuming the sentence was proper, the trial magistrate erred imposing consecutive sentences when the incident constituted one transaction. In *Paul Gitau Ndungu v Republic* Nakuru HC Criminal Appeal No. 520 of 2003 [2005]eKLR, Kimaru J., held that, "Unless there is a compelling reason, the sentences imposed on the appellant ought to have run concurrently instead of consecutively."

20. In the circumstances, I am constrained to intervene. On limb (a) of offence, I sentence the appellant to 4 years' imprisonment while on limb(b), I sentence him to 2 years' imprisonment. The sentences shall run concurrently.

21. I allow the appeal on the following terms:

    a. The conviction on Count 2 is hereby quashed.

    b. The conviction on Count 1 is affirmed.

    c. The sentence is hereby quashed and substituted with a sentence on Count 1 as follows: 3 years' imprisonment on limb(a) and 2 years' imprisonment on limb (b) with both sentences running concurrently.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED AND DELIVERED AT KIAMBU THIS 6TH DAY OF OCTOBER 2021.

M. KASANGO

JUDGE

Appellant in person.

Mr Kasyoka instructed by the Office of the Director of Public Prosecutions for the respondent.