



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. E005 OF 2020

JOHNSTONE ODUOR.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant Jonhstone Oduor was accused in Mombasa Chief Magistrates' Court Criminal Case No. 506 of 2018 with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code.

2. The particulars are that Johnstone Oduor on the 1st day of March, 2018 at Bamburi area Likoni sub-county within Mombasa County jointly with others not before court while armed with pangas and knives, robbed Patrick Barasa of cash Ksh. 1,000/= and at the time of such robbery used actual violence against the said Patrick Barasa by stabbing him twice on his left waist joint.

3. The prosecution called 5 witnesses in support of its case that the Appellant committed the offence of robbery with violence. Upon the trial Magistrate weighing the evidence of the prosecution witnesses against the sworn statement of the Appellant, it was concluded that the Appellant was guilty and he was convicted and sentenced to life imprisonment.

4. The Appellant was aggrieved by the conviction and sentence and he preferred the Petition of Appeal on the following grounds:

i. THAT the learned trial Magistrate erred in law and fact in failing to indicate the language used in court and in failing to have the same translated into a language that the Appellant was conversant with.

ii. THAT the learned trial Magistrate erred in law and fact in proceeding with trial based on a charge that is defective and basing a conviction on a defective charge.

iii. THAT the learned trial Magistrate erred in law and in fact in failing to appreciate that considering the age of the Appellant and the charge facing him, the Appellant was entitled to legal representation as provided for by the Constitution of Kenya, 2010 and in proceeding with a trial in the manner the court did, greatly prejudiced the Appellant.

iv. THAT the learned Magistrate erred in law and fact by finding that the offence charged and all its ingredients had been proved.

v. THAT the learned trial Magistrate erred in law and fact in shifting the burden of proof onto the Appellant.

vi. THAT the sentence was manifestly excessive and was imposed without consideration of the Appellant's circumstances.

5. The Appellant prayed that the conviction be quashed and the sentence set aside.

6. The prosecution's case was that the Complainant was waiting at the gate for the to be opened at around 2140hrs when seven men who were standing by hit is leg with a metal, stabbed him on the back and stole Ksh. 1, 000/= from his pocket.

7. That when the gate was opened, he held the hand of the assailant who was holding the knife while the rest ran away. The Complainant said that the Appellant was part of the gang that attacked him.
8. PW 2 heard the Complainant knocking the gate and when he went out, he found him holding the Appellant and he was bleeding from the back. He took him to Zaru Medical Clinic where he was treated. He said he did not find the Appellant with a weapon but he found the Complainant holding him.
9. PW 3 testified that the Complainant called him to open the gate but when he got out, he noted that he was struggling with people outside. When he opened, some of the people ran away but the Complainant was holding the Appellant herein. That they called for help and neighbors-including PW 2, came. That the mob beat the Appellant and the Complainant was taken to hospital while the Appellant was taken to the Likoni Police Station.
10. PW 3 testified that the moon was full and that he is the one who took the Appellant to the police station.
11. PWN4-B Dr. Nafis Seif, produced the P3 Form prepared by Dr. Najea who found that the Complainant that the Complainant had two deep piercing wounds on the lower left back which was bleeding profusely.
12. PW 5- PC Benson Chieraa of Likoni police station investigated the offence and preferred charges against the Appellant.
13. When the Appellant was placed on the defence, he gave a sworn statement and stated that at about 7:00 pm he was heading home when he heard noise of people calling out 'thief.' He went to check and when he got to the door, he was arrested. He said he was a student at St. Gloria's in Form three and he did not participate in the crime. He said he did not accompany the thieves.
14. This appeal was canvassed by way of written submissions. The Appellant's submissions were that the charge was defective in form and substance and the authorities in **John Dalla Nyagenga v. Republic Criminal Appeal No. 84 of 1988**, **Daniel Morara Mose v. Republic Criminal Appeal No. 86 of 2000**, and **Jason Akumu Yongo v. Republic Criminal Appeal No. 1 of 1983** were relied on.
15. It was further submitted that the proceedings were conducted in a manner that was clearly prejudicial to the Appellant because the language of the court was not indicated when PW 1 testified on 19th July, 2018 and again on 21st March, 2019 when the new Magistrate was taking over the proceedings.
16. The Appellant's counsel contended that the proceedings were a nullity *ab initio*.
17. The Appellant also argued that his conviction was based on brief and scanty evidence and was therefore unsafe. That in cross-examination of PW 2 and PW 3 there is an indication that the Appellant may have been an innocent passer-by.
18. Finally, the Appellant's counsel submitted that the Appellant who was thought to be a minor and later assessed to be 19 years was facing a charge that comes with a death penalty and the trial Magistrate ought to have considered to accord him pro bono service as the manner he conducted his defence clearly shows that he was prejudiced.
19. The Respondents submitted that the charge sheet was in compliance with Section 137 of the Criminal Procedure Code and relied in the holding in **BND v. Republic (2017) eKLR** where Ngugi J. laid out the test to be followed in determining whether a charge sheet is defective.
20. On the ingredients of the offence of robbery with violence, the Respondents relied on the decision in **Joseph Njuguna Mwaura and 2 Others v. Republic (2013)** where the Court of Appeal considered what ought to be in a charge sheet.
21. The Respondents submitted that the charge in the present case was proper and the challenge to the Appellant's conviction on the basis of the charge sheet should be dismissed.
22. In regard to the conduct of proceedings, it was submitted that the Appellant was always ready to proceed. He never raised the issue to the trial court that he did not understand the language being used, that it was incumbent upon the Appellant to raise this issue from the onset and that the Court of Appeal in **Jason Akhonya Makhoha V. Republic (2014)**, considered the duty of the trial court in respect to the language used in a trial.
23. The Respondents submitted that on 23rd of March, 2018, it is indicated that the charge and all elements were explained to the Appellant in Kiswahili which he understood and responded- 'not true.'
24. It was submitted further than on 19th of July, 2018, the Appellant did not object to commencement of the trial on account of not understanding the language and he proceeded to cross-examine PW 1 and this goes to show that he understood the testimony given by PW 1. There was therefore no prejudice caused by the failure to indicate the language used and there was no miscarriage of justice. The court was asked to dismiss this ground.

25. The Respondents also submitted that they adduced sufficient evidence to prove the offence of robbery with violence and relied on the case of **Oluoch v. Republic (1985) KLR 549** in which it was held that robbery with violence is committed in any of the following circumstances:

i. The offender is armed with any dangerous and offensive weapon or instrument; or

ii. The offender is in company with one or more person or persons; or

iii. At or immediately before or immediately after the time of the robbery the offender wounds, beat, strikes or uses other personal violence to any person...'

26. The Respondents submitted that the Appellant was positively identified and placed at the scene of the crime and was therefore properly charged based on sufficient evidence on record which met the threshold required for the State to make a decision to charge.

27. On the issue of legal representation, it was the Respondent's submission that no prejudice was occasioned to the Appellant because all through the proceedings he understood the charge as well as the testimony of the witness and he cross-examined each witness. The case of **Bernard Kiprono Koech v. Republic (2017) eKLR** was cited in support of this position and the court was urged to dismiss this ground of appeal.

ANALYSIS AND DETERMINATION

28. This being the first appellate court, it is imperative that all the evidence adduced in the trial court is evaluated and analysed afresh so as to arrive at an independent conclusion on both facts and the law. This is the principle set out in *Okeno v. Republic (1972) E.A 32* where the Court of Appeal that :

“It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”

29. Having considered the records from the trial Magistrate's court, the grounds of appeal and the submissions by counsels, the issues that arise for determination are:-

i. Whether the charge was defective.

ii. Whether the language of the court was indicated.

iii. Whether the prosecution proved the ingredients of the offence of robbery with violence.

iv. Whether the conduct of the proceedings was prejudicial to the Appellant.

v. Whether substantive injustice was occasioned by the lack of legal representation to the Appellant.

Whether the charge sheet was defective

30. The Appellant argued that the failure to include the words 'dangerous or offensive' weapons was fatal to the prosecution's case and that the charge was defective. Section 295 of the Penal Code sets out the ingredients of the offence of robbery with violence and any one of the ingredients-if proved, is sufficient to warrant a conviction of the suspect. In this case, apart from failing to indicate that the weapons were dangerous and offensive, the other ingredients of 'jointly with others not before court', 'robbing Ksh. 1,000/= ' and 'using actual violence by stabbing the complainant twice' were proved.

31. The alleged defect is an omission and irregularity in the charge which under **section 382 of the Criminal Procedure Code** does not occasion a failure of justice.

Whether the language of the court was indicated

32. It is not in dispute that PW 1 testified without the court indicating the language that was being used. **Article 50 (2) (m)** of the Constitution of Kenya, 2010, provides that every accused person has the right to a fair trial which includes the right to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.

33. **Article 50 (3)** also provides that if this Article requires information to be given to a person, the information shall be given in a language that the person understands.

34. When PW 1 testified, it was not indicated that the language that the accused person understood was used and being that this is a mandatory requirement, this court finds that the Appellant's right to fair trial was thereby breached and the conviction based on such breach cannot be upheld.

Whether substantive injustice was occasioned by the lack of legal representation to the Appellant

35. Article 50 2 (g) and (h) provide that:

every accused person has the right to a fair trial which includes-the right (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

36. The Legal Aid Act, No. 6 of 2016 provides at section 43

43. Duties of the court

(1) A court before which an unrepresented accused person is presented shall—

(a) promptly inform the accused of his or her right to legal representation;

(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

(c) inform the Service to provide legal aid to the accused person.

(1A) In determining whether substantial injustice referred to in paragraph (1) (b) likely to occur, the court shall take into consideration—

(a) the severity of the charge and sentence;

(b) the complexity of the case; and

(c) the capacity of the accused to defend themselves.

37. The wording used in section 43 of the Legal Aid Act is of a mandatory nature and ought to be accorded its due regard. Contrasting this understanding with the Respondent's submission that the Appellant understood the charges all through the proceedings, this court finds fault in the latter. Precedence has also been set to the effect that any failure to comply with mandatory terms of a statutory provision leads to a nullity of the act or omission being complained of.

38. As such, this court is of the opinion that the failure to inform the Appellant of his right to legal representation amounted to non-compliance with a statutory provision of the law given that the substantial injustice risked being occasioned on the Appellant on account of the severity of the charge and sentence as provided in section 43 of the Legal Aid Act. Coupling this non-compliance with the failure to offer the Appellant an interpreter during the testimony of PW 1, no doubt is left in the court's mind that the Appellant was subjected to imminent risk of substantial injustice.

39. In conclusion, this court finds merit in this appeal. It is therefore allowed. This is the order of the court.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 5TH DAY OF NOVEMBER , 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Ms. Kambaga for Respondent

Appellant present in person

Mr. Magolo Advocate for Appellant

HON. LADY JUSTICE A. ONG'INJO

JUDGE