



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 63 OF 2018

KENNEDY ONYURO OUKO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. R.S.Kipngeno (SRM) on 31st May, 2018 at Principal Magistrate's Court at Maseno in Criminal Case No. 23 of 2018)

JUDGMENT

1. The appellant was charged with robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)* and being in possession of narcotic drugs contrary to section 3(1) as read together with sub-section 3(2) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994.
2. The particulars of Count 1 was that on 4th January, 2018 at about 21.30 hrs at Guta Beach in Kisumu West Sub-County within Kisumu County jointly with others not before the court robbed Maurice Adongo Rande of Kshs. 15,000/- and at the time of such robbery threatened to use actual violence on the said Maurice Adongo Rande.
3. The particulars of Count 2 was that on 10th January, 2018 at about 04.25 hrs at Osiri Sub-location in Kisumu West Sub-County within Kisumu County was found in possession of narcotic drugs to wit 30 gms of bhang valed at Kshs. 50/- which was not in medicinal preparation.
4. The appellant was convicted and sentenced to 20 years imprisonment on the first count of robbery with violence and to one month imprisonment in the second count.
5. The appellant now appeals against the conviction and sentence based on his petition of appeal filed on 13th June, 2018 and written submissions filed on 11th December, 2018. The state opposed the appeal based on written submissions filed on 28th February, 2018.
6. The principal issue raised by the appellant is that of identification. The Appellant contended that he was not at the scene of crime and could therefore not have been identified and that the learned magistrate failed to find that the conditions and surrounding circumstances could not allow positive identification. He also contended that he was arrested on 10th January, 2018 and charged with offences that he did not commit. He argued that the conviction and sentence was unjustified.
7. In considering the issues raised by the appellant, I am enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether I should uphold the conviction bearing in mind that I neither heard nor saw the witnesses testify (see *Okeno v Republic [1972] EA 32*). The prosecution case was as follows.
8. The prosecution case was narrated by the principal witness, Maurice Adongo (PW 1) who recalled he was walking in Kete Beach at about 9.30 pm when he met the appellant and two others who robbed him of Kshs. 15,000/- and Appellant also threatened to cut him with a panga. He stated that he knew the appellant as a villager and that he had recognized him using light from his LED torch and lighting from Olago Beach Resort. PW2, Amos Ochieng, Assistant Chief Osiri Sub-location stated that upon receipt of the complainant's report, he went to Appellant's house on 10th January, 2018 in company of 3 village elders, arrested the Appellant and recovered 30 gms of bhang from his house. PW4 Eliud Osewe stated that there was moonlight on the material night and that he had seen the Appellant who was armed with a panga and 2 others at a distance and shortly thereafter heard the complainant shout that Onyuro was robbing him. PW3 SGT Kangawalla Mkanda received the Appellant from PW2 on 10th January, 2018 and also received 30 gms of bhang allegedly recovered from Appellant's house. He sent the 30 gms of bhang to the government chemists and received a report that it was cannabis sativa. After investigations, he caused the Appellant to be charged.

9. When put on his defence, the appellant denied the offences.

10. When the Appeal came up for hearing on 13th December, 2018, the Appellant's counsel indicated that he was relying wholly on the grounds in the Petition of Appeal and Submissions filed on 10th December, 2018. The state wholly relied on submissions filed on 28th February, 2019.

Analysis

11. The appellant argues that he was not afforded legal representation at the expense of the state and was therefore denied a constitutional right. This issue first came up for interpretation before the Court of Appeal in the case of David Njoroge Macharia v Republic [2011] eKLR. The Court after reviewing the past and current law stated that as follows:-

“Article 50 of the Constitution sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence...We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”

12. The Court of Appeal was of the opinion that where the accused faced a capital offence, then the State ought to consider providing legal representation. In other instances, it would have to be through a case by case examination, such as where there are complex issues of law or fact, where the accused is unable to conduct his own defence, or where public interest requires that representation be provided.

13. In my view, this is a case that ideally, legal representation ought to have been provided at State expense. There was however no evidence that the Appellant could not afford counsel.

14. Further to the foregoing, the provisions of Article 50, part of which relate to the right to be provided with legal representation at State expense, are yet to be fully operationalized. This was indeed the basis of the decision in the case of John Swaka V DPP & 2 Others, Nairobi High Court, Constitutional Petition No. 318 OF 2011, [2013] eKLR. I am therefore not convinced that there is any violation of the Constitutional rights of the Appellant in not having been accorded legal representation at State expense given the above reasons.

15. The Court of Appeal in the case of Gabriel Njoroge vs Republic (1982 - 88) 1 KAR 1134 described the role of the first Appellate Court on an Appeal from the subordinate Court in the following terms:-

“...As this Court has constantly explained, it is the duty of the first Appellate Court to remember that the parties to the Court are entitled, as well on the question of fact as on the question of law to demand a decision of the Court of the first Appeal, and as the Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect....”

16. The offence of robbery is defined under **section 295** of the **Penal Code** as follows:

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.

17. For this robbery to qualify as a violent one under **section 296(2)** attracting a death sentence, the offender must be:-

a. armed with a dangerous or offensive weapon or

b. be in company with one or more other persons or

c. immediately before or after the time of robbery, wound, beat, strike or use any other personal violence to the victim.

18. Complainant told court that he was robbed of Kshs. 15,000/- by the Appellant and two others. He stated that after the robbery, the Appellant threatened to cut him with a panga.

19. This court is tasked to decide whether the evidence of identification at night was reliable and free from possibility of error so as to found a secure basis for the conviction of the appellant. In the case of Kiarie v Republic [1984] KLR 739, the Court of Appeal was more categorical on reliance on such evidence holding that the evidence must be ***“absolutely watertight”*** to justify conviction.

20. The robbery in the present case was committed at night and the form of lighting according to the complainant was his LED torch and lighting from a nearby resort. PW4 denied that there was electricity lighting at the scene and stated that there was full moon on that night.

21. I have considered the case of Paul Thuo Mburu & Another v Republic [2008] eKLR where the Court of Appeal dealt with the issue of identification and held '*inter-alia*' that:-

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is expected to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conclusion”.

22. The Court of Appeal stated in Roria v R [1967] EA 583 at pg. 584 that:

“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as LORD GARDNER, L.C. said recently in the House of Lords in the course of a debate on s.4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdicts:

“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten – if there are as many as ten – it is in a question of identity.”

23. From the evidence on record, the complainant did not give evidence that there was moonlight on the material date and PW4's evidence that he identified the Appellant because there was moonlight is uncorroborated and it is rejected. Whereas the complainant stated that there was electricity lighting at the scene, PW4 denied it and on that basis, I reject the complainant's evidence that there was such lighting at the scene. Complainant also told court that he had a LED torch in possession on the material night. In cross-examination by the Appellant however, complainant conceded that he did not in his statement to the police record that he had a LED torch on the material night thereby casting doubt on his evidence that there was any form of lighting at the scene. Be as it may, even if complainant had a torch, the prosecution did not lead evidence, and the trial court did not make an inquiry regarding the strength of the light, its size and its position relative to the Appellant to test the reliability of such evidence of recognition at night. (See John Muriithi v Nyagah v Republic [2014] eKLR). Consequently, I find that the trial court's decision that the Appellant was positively recognized not supported by the evidence on record and the same ought to have been rejected.

24. The only evidence regarding recovery of the cannabis sativa from the Appellant's house is that of PW2, Amos Ochieng, who stated that he was with 3 villager elders who witnessed the recovery. The 3 villager elders were not called as witnesses to corroborate PW2's evidence. Accused's defence denying that he was not found in possession of cannabis sativa ought to have been accepted for the reason the prosecution case regarding the recovery was not corroborated.

25. From the foregoing analysis, I find that the prosecution failed to discharge its burden of proof. The learned trial magistrate erred in convicting and sentencing the appellant when there was no evidence to warrant or sustain a conviction. Accordingly, I quash the conviction and set aside the sentence in both counts and unless otherwise lawfully held, order that appellant shall be released and set free forthwith.

DELIVERED AND SIGNED AT KISUMU THIS...7th DAY OF March 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Appellant - Present

For the Appellant - Mr Othong/Mr Olel

For state - Mr Gathu