Karemana v Republic (Criminal Appeal 33 of 2020)
[2025] KECA 224 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 224 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 33 OF 2020

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 7, 2025

BETWEEN

ALEX WEPUKHULU KAREMANA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (L.A. Achode, J.) dated 21st November 2018 in HCCRA No. 232 of 2016)

JUDGMENT

1. Alex Wepukhulu Karemana, the appellant herein, was tried, convicted and sentenced to death by Senior Principal Magistrate at Kimilili for the offence of robbery with violence contrary to "section 295 as read with Section 296(2)" of the *Penal Code*. It was alleged that on the evening of 16th June, 2012 at Maliki trading center in Bungoma North District within Bungoma County, jointly with others already before the court, while armed with offensive weapons namely pangas and rungus, robbed Nebert Malea of a Motorcycle registration number KMCL 630L TVS Star, a Motorola mobile phone C117 and Cash amounting to Kshs. 500/= all items being valued at Kshs.87,500/= and at, or immediately before, or immediately after the robbery used actual violence to the said Nebert Malea [Nebert].

2. He pleaded not guilty to the charge and the matter proceeded to hearing, where six (6) witnesses testified for the prosecution. On his part, the appellant gave unsworn evidence and called no witnesses. After a full trial, the appellant was found guilty of the offence, convicted, and sentenced to death.

3. Being aggrieved by the decision of the trial court, he appealed to the High Court, but his appeal was dismissed and both conviction and sentence were upheld. He is now before this Court on his second and last appeal faulting the learned judge for relying on the evidence of identification without taking into consideration the prevailing circumstances.

4. Briefly, the evidence that was presented by the prosecution at the trial and subsequently considered by the High Court on appeal, was that on 6th June, 2012 at about 7:00 to 7:30 pm, Nebert Malea, the complainant herein, who testified as PW1, was operating his boda boda business when he was approached by a passenger to take him to Maliki area. Along the way, he met the appellant with others including Joel Wanjala, and the passenger instructed him to stop. He was attacked by the passenger together with other men who took the motorcycle he was riding and his mobile phone.

5. Testifying as PW2, Hosea Matagaba, the complainant's employer and the owner of the motorcycle, upon being informed of the robbery reported the matter and, in the company of the APC John Chesebe, PW3 went to the scene. At the scene, they found the complainant unconscious. When he regained consciousness, the complainant told them that he had been attacked by Alex Wepukhulu and Joel. While at the scene, they recovered a wallet containing the appellant's voter card and passport-size photos. A similar narrative was given by PW6 Ezekiel Nandika Nazimba, a friend to PW1.

6. Dr. Godfrey Obela Okanya who testified as PW5, produced the complainant's P3 form which indicated that the complainant sustained an injury near the left eye and a fracture of the tibia. He classified the degree of injury as harm.

7. Placed on his defence, the appellant gave unsworn evidence and denied the charge, alleging that he had been framed. He testified that he was arrested at Kitale while shopping at Khetia's Supermarket, and was transferred to Kimilili Police Station where he was charged. He maintained that he was framed.

8. The trial magistrate found that:

> " From the evidence there is no dispute that the accused is well known to the complainant. There is consistent evidence that the complainant (PWI) positively identified the accused and one Joel as part of the gang that attacked and robbed him. He gave their names to those who had arrived at the scene. Further, a voter's card bearing names of the accused and his passport size photos were recovered at the scene of the robbery. There is absolutely no explanation why the accused's personal documents could have been at the scene of robbery if he was not among the assailants. His defense that he was framed is totally unconvincing. There is no plausible reason why the witnesses and more particularly PWI would want to pick on the accused and frame him. I dismiss his defence as totally unable to displace the prosecution's case. I find that the prosecution has proved all the key ingredients of the charge of robbery with violence against the accused. He is convicted of the charge robbery with violence Contrary to Section 295 as read with Section 296 (2) of the Penal code."

9. He appealed to the High court contending that, he was convicted on a charge whose particulars were fatally defective; that the evidence relied on was contradictory, leading to the trial court arriving at the wrong decision in convicting the appellant; that the charge sheet was defective as it did not meet the requirements of section 137 of the *Criminal Procedure Code*, in that it ought to have described the appellant, and not just to give the name and ought to have included the words "person unknown".

10. The learned Judge (Achode, J.) having considered the provisions of section 137 (a) of the *Criminal Procedure Code* held that the particulars in the charge sheet gave further details as to the description of the property stolen, the date, place and the manner of the alleged offence; and the appellant was fully aware that he faced a charge of robbery with violence, stating thus:

> In this case, the offence was sufficiently disclosed to the Appellant in the charge. He was fully aware that he was facing a charge of robbery with violence from the statement of the offence as well as the particulars, so much so that he was able to cross- examine the witnesses

and mount his defence. The charge was therefore not defective. In his defence, the appellant stated "I understand the charges against me'.

11. The learned judge found that from the evidence presented, the ingredients of what constitutes the offence of robbery with violence were well established as the evidence confirmed that the appellant was in the company of Joel Nanjala and two others when they attacked PW1; that one of the assailants cut PW1 in the eye with a knife, while the appellant assaulted him with a club; PW1 sustained a fracture in one leg and a cut wound of the periorbital region on the left side according to the P3 form; the injuries were in tandem with the weapons PW1 said the assailants had; and the P3 form confirmed that he suffered injuries occasioned by both sharp and blunt objects. The learned Judge also found that there was no basis to warrant arriving at the conclusion that the appellant had been framed up, as the appellant did not state who had framed him and the basis of such framing; that the evidence on identification was not contradictory, and the prosecution witnesses corroborated the appellant's evidence as to the identity of his attacker.

12. The appellant, still aggrieved, now prefers this appeal on grounds that the learned trial judge erred in points of law and fact by relying on evidence of identification without observing that the prevailing conditions were not suitable for identification.

13. In support of his appeal, it is submitted for the appellant that the identification was not proper owing to the prevailing circumstances. The incident occurred from about 7:00 pm to 7:30 pm, it was dark as such it was difficult to identify the attackers. Owing to the prevailing conditions, there was need to conduct an identification parade to enable the complainant to properly identify the assailants. In support, the appellant cited the case of Abdalla Bin Wendo and Another vs. Republic [1953] 20 EACA 166.

14. Relying on the case of Daniel Kipyegon Ngeno vs. Republic [2018] eKLR, the appellant submitted that the learned Judge failed to consider the factors stated therein. That despite the complainant stating that he identified the attackers from the lights from his motorbike, the intensity and distance from the motorbike was not mentioned, none of the stolen items were recovered and no identification parade was conducted.

15. The appeal was opposed by the respondent. However, despite the appeal being against conviction, the respondent pegged his submissions on the sentence only. The respondent contended that under Section 296(2) of the *Penal Code*, the maximum sentence for robbery with violence is a life sentence, and that maximum punishment is usually reserved for the worst of such cases.

16. Citing the Judiciary Sentencing Policy Guidelines 2016 and the decisions in S vs. Malgas 2001 (1) SACR 469 (SCA) and in Mdzomba vs. Republic (Criminal Appeal 29 of 2020) (2024) KECA 501(KLR) among others, the respondent contended the trial court considered all the mitigating factors and meted the sentence provided under the law. The respondent urged the Court to uphold the sentence and dismiss the appeal.

17. This is a second appeal, and by dint of section 361(1) of the *Criminal Procedure Code*, the court's jurisdiction is limited to dealing with matters of law only. In Karingo vs. Republic [1982] KLR 213, the Court held that:

> " A second appeal must be confined to points of law and Court of Appeal will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

18. This position was further reiterated in the case of M'Riungu vs. Republic [1983] KLR 455 as follows:

> " Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law."

19. Having carefully considered the record of appeal, the single ground of appeal presented before the Court by the appellant, the contending submissions, and the law, the main issue discerned for determination is whether the conviction of the appellant was solely based on his identification, if so, whether the identification was safe to rely upon.

20. The evidence before the trial court was fairly straightforward: Nebert was attacked by people who successfully stole his motorcycle. His evidence was clear that he was approached by a customer who requested to be taken to Maliki area. While on the way they met some men including the appellant and one Joel Wanjala, and the passenger asked him to stop. The passenger and the men attacked him and robbed him. Nebert lost consciousness and while being taken to the hospital, he regained consciousness and told [PW3] Oscar and APC Chesebe that he was attacked by persons known to him including Alex Wepukhulu the appellant herein, and Joel. At the scene, a wallet was recovered containing the appellant's voter's card and passport photos. The concurrent findings of the two lower courts were based on the evidence of Nebert, Oscar, and A.P.C Chesebe that the appellant's wallet with his documents was recovered from the scene of the robbery.

21. In his defence, the appellant denied the charge and claimed that he was framed but never gave any possible reasons why Nebert would frame him. The arrest of the appellant was not only precipitated by his identification by Nebert but was as a result of his wallet with his voter card and passport photos being recovered at the scene of the robbery. Nebert explained that he knew the appellant and on being cross-examined, he maintained that he had carried the appellant before and that he knew the appellant's home.

22. The appellant's conviction was primarily based on the prosecution evidence which placed him at the scene of the robbery, which was consistent with his wallet being recovered at the scene of the robbery which he did not explain how his wallet came to be found at the scene of the robbery. The identification by Nebert was, therefore, merely additional evidence.

23. Section 111 of the *Evidence Act* provides inter alia that:

> "(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact, especially within the knowledge of such person is upon him: Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

24. The Supreme Court in the case of Republic vs. Ahmad Abolfathi Mohammed & Another [2019] eKLR, emphasized the relevance of section 111 of the *Evidence Act* in dealing with the burden of proof, which comes into play when the prosecution has proved that the accused may have committed the offence and part of their case is that of a situation only "within the knowledge" of the accused person, so that if he does not offer an explanation, he risks conviction.

25. By virtue of section 111 of the *Evidence Act*, the burden of proof shifted to the appellant to give a reasonable explanation as to how his wallet was found at the scene of the robbery.

26. In his submissions, it was submitted for the appellant that since the incident happened between 7:00 pm and 7:30 pm, it was dark making it difficult to identify the attackers, and therefore, there was need for an identification parade.

27. The robbery happened at night and was sudden. Nebert was hit and lost consciousness. However, he was able to recognise the appellant. Apart from recognition, what linked the appellant to the crime is the presence of his wallet with his voter card and passport photos which were recovered at the scene of the robbery.

28. Regarding the prevailing circumstances during identification, first, the appellant was not a stranger to the complainant as he recognized him as a person he had interacted with and even knew his home. In Peter Musau Mwanzia vs. Republic [2008] eKLR Court of Appeal at Nairobi (Tunoi, Bosire, and Onyango Otieno JJA) expressed themselves thus on the question of recognition:

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question."

29. Given that the circumstances at the time of the incident were not ideal for identification, the test as to whether the evidence is foolproof was set out in R vs. Turnbull & Others (1976) 3 ALL ER 549 as follows:

> "..... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often, if only occasionally, had he any special reason for remembering the accused? How much time elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them as his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

30. As regards how the complainant was able to see the appellant, he stated in examination in chief:

> "...On the way, I met the accused with another person called Joel Wanjala and two others. They began beating me and even the one I had carried began beating me. I saw them well they are known to me.

> The passenger called me to stop where the people were, Alex then began beating me...The accused before the court is one of those who assaulted me."

31. It is true, that this evidence does not suggest the intensity or quality of the light and would otherwise be weak. It is, however, fortified by what the witness said in cross-examination:

> " We have never done any business. I have called before. I know your home. I identified you physically. You are the one who was beating me very much. You had a rungu. You went with it. My headlight reflected you well."

32. Instead of the cross-examination demolishing that aspect of evidence, it improved it. There lies an interrogation as to the intensity of the light: - "my headlight reflected you well". Something else strengthens the evidence that the appellant was well known to the complainant and in fact, he was the one who started beating the complainant and bit him the most. This gave the complainant an opportunity to identify the appellant, a person well-known to him. Additionally, the wallet found at the scene, absent any other explanation (and none was given), linked the appellant to the crime. Since the appellant was a person well known to the complainant, there was no need to conduct an identification parade.

33. There is no basis to depart from the concurrent findings of fact reached by the two courts below; and, indeed, by dint of section 361 of the *Criminal Procedure Code*, that this Court cannot do so unless it has been demonstrated that the findings of fact are based on no evidence or a deduction of the evidence on the basis of wrong principles of the law. The appellant has not established any. Before we conclude, we wish to briefly address the issue of the charge sheet as drawn. This was a matter which was not raised by either party both at the High Court and before us. We simply note that the appellant was charged with the offence of robbery with violence "contrary to section 295 as read with section 296(2) of the *Penal Code*." This Court has held in several cases that a charge sheet charging an accused person under both section 295 and 296(2) of the *Penal Code* is duplex. See, for example, Joseph Njuguna Mwaura & 2 Others vs. Republic [2013] eKLR. There, this Court stated:

> "The offence of robbery with violence is totally different from the offence defined under section 295 of the *Penal Code*, which provides 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 to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge." See also: *Simon Materu Munialu vs. Republic [2007] eKLR (Criminal Appeal 302 of 2005*) and in Joseph Onyango Owuor & Cliff Ochieng Oduor vs. R [2010] eKLR (Criminal Appeal No 353 of 2008).

34. However, as several court cases have subsequently found, even if duplex, such a charge sheet does not automatically cause prejudice to an accused person or an appellant unless they specifically demonstrate how it did so. For example, in Paul Katana Njuguna vs. Republic [2016] KECA 207 (KLR) the Court stated that:

> " Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the *Penal Code*. We observe that the offence under Section 295 and 296 (2) were not framed in the alternative. So, following the decision in Cherere s/o Gakuli vs. R (supra) Laban Koti vs.

R. (supra) and Dickson Muchino Mahero vs. R. (supra), the defect in the charge herein is not necessarily fatal.

35. We appreciate that Section 296 (2) of the *Penal Code* creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in Section 296 (2) of the *Penal Code*. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under Section 296 (2) were absent or were not demonstrated by the prosecution.

36. In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross- examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective."

    1. So, it is in this case. We detect no prejudice to the appellant. In any event, the appellant never raised the issue. That, obliquely, confirms that he suffered no prejudice from the technical duplicity of the charge sheet.

    2. The upshot is that the appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR