Muthanje v Republic (Criminal Appeal 115 of 2019)
[2025] KECA 1011 (KLR) (4 April 2025) (Judgment)

Neutral citation: [2025] KECA 1011 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 115 OF 2019

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

APRIL 4, 2025

BETWEEN

ALFRED MUCHIRA MUTHANJE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Embu (Khaminwa and Kasango, JJ.) dated 21st November 2007 in HCCRA No. 48 of 2007 (Original Embu SRM CR.C NO. 431 of 2005)

JUDGMENT

1. The appellant herein, Alfred Muchira Muthanje, was charged before the Senior Resident Magistrate's Court at Embu in Criminal Case No. 431 of 2005 with the offence of Robbery with Violence Contrary to section 296(2) of the *Penal Code*. The particulars were that on the 7th day of December 2004 at Gitare Sublocation in Embu District within Eastern Province, being armed with an offensive weapon namely a metal bar, he robbed Sammy Munyi Duncan Kshs.3,050/= and immediately before or after the time of robbery wounded Sammy Munyi Duncan.

2. The prosecution's case was that on 7th December 2004, the complainant was drinking with his friends, Njeru and Gitonga (PW2 and PW3) at a bar in Runyenjes when the appellant who was the complainant's client walked in. At the request of the appellant, the complainant, gave the appellant the list of spares required to repair the appellant's motor bike. Apparently, while the complainant was looking for a paper to write down the materials, the appellant noticed that the complainant had Kshs 2,050. The evidence was that Gitonga gave the complainant an additional Kshs 1,000. Although the appellant left, he returned shortly and requested the complainant to d assist him in starting the motorbike. The two then left the bar towards their respective houses, with the appellant pushing his motorbike. When they reached a forested area, the appellant asked the complainant to hold the motorbike as the appellant went to answer a call of nature. As the complainant was holding the motor

bike, the appellant approached him and hit him with a heavy object, and as a result, the complaint fell and became semi-conscious. The appellant then ran away when he noticed a motor vehicle approaching. When he returned to the bar, the complainant found PW2 and PW3 still there and narrated to them what had happened. PW2 and PW3 confirmed that when the complainant returned to the bar he was bleeding and his clothes were muddy. The two then escorted the complainant home and along the way they came across the complainant's jacket and upon checking the pocket, the complainant realised that his money in the sum of Kshs.3,050/= was missing.

3. The complainant reported the matter to the police, where PW7 received his report. According to PW7, when he went to arrest the appellant, the appellant escaped in handcuffs but was later arrested and charged with the offence. The complainant's evidence that he was assaulted was corroborated by the evidence of PW4, who examined the complainant and filled in the P3 form and who testified that the complainant had sustained injuries which he classified as harm.

4. In his unsworn statement, the appellant told the court that on the day of the offence, he was at Kianjokoma, where he was making some furniture, until 10th December 2004c when he returned home. On 11th December 2004, he was attacked by people known to him. It was his case that he was framed by police officers and that the complainant had a grudge with him because he had testified against him in Runyenjes court in a case where the complainant was jailed for 7 years. He denied owning a motorbike and called DW2, a remand mate, who supported his testimony. DW3 testified that the complainant had a grudge against him and the appellant, hence the complaint against them.

5. After hearing the evidence, the learned trial magistrate found that the prosecution proved its case beyond reasonable doubt and convicted him of the offence of robbery with violence. He was sentenced to death.

6. The appellant appealed to the High Court, and his appeal was heard by the learned two Judges of the High Court, who found that the ingredients of the offence were proved and that the appellant's evidence was untrue. The learned Judges dismissed the appellant's appeal in its entirety.

7. Dissatisfied with the decision of the first appellate court, the appellant filed the present appeal based on the following grounds:

    1. The High Court fell into error and misdirection when it heard and recorded a concession to the appeal by the state, concerning the conviction and sentence and then failing to act in favour of the appellant and thereby subjecting the appellant to grave prejudice and injustice.

    2. The High Court, as a fist appellate court, denied the appellant his legitimate right and legal entitlement to have the evidence as a whole submitted to fresh and exhaustive examination and to give the appellant the court's own decision on the evidence.

    3. The High Court as the first appellate court failed in its legal duty to itself weigh the conflicting evidence before the principal magistrate and draw its own conclusions.

    4. In flagrant breach of the law on the criminal procedural justice, the High Court confined itself to glossing over the case of the Principal Magistrate, confirming whether or not the lower court was right on the evidence and satisfying itself the conviction and sentence was sustainable in the circumstances of the lower court.

8. We heard the appeal on 27th November 2024 on the Court's virtual platform. Learned counsel, Mr Marvis Njage, appeared for the appellant, while learned prosecution counsel, Mr Naulikha, appeared for the respondent. Both counsel relied on their written submissions which we have considered.

9. In our view, the appeal is based on two grounds: whether the first appellate court erred in not considering the concession made by the prosecution; and whether the first appellate court failed in its duty as the first appellate court. As this Court restated in Okeno v Republic [1972] EA 32:

> "An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala Vs. R. (1957) EA. 570). 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 finding and conclusion; 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, see Peters vs. Sunday Post [1958] E.A 424."

10. Mativo, J (as he then was) in Sylvester Wanjau Kariuki v Republic [2016] eKLR, cited the decision of the Supreme Court of India in K. Anbazhagan v State of Karnataka and Others Criminal Appeal No. 637 of 2015 where it was held that:

> " The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

11. Although on a second appeal, this Court is only entitled to deal with matters of law, factual evaluation becomes necessary when it is alleged that the first appellate court failed to undertake its obligation of subjecting the evidence before the trial court to a fresh scrutiny. This Court therefore held in Jonas Akuno O'kubasu v Republic [2000] eKLR that:

> " It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness, but there may be other circumstances, quite apart from manner or demeanour which may show whether a statement is credible or not which may warrant the court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not

seen. On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles."

12. While appreciating the duty of the first appellate court to analyse and re-evaluate the evidence, this Court in the case of David Njuguna Wairimu v Republic [2010] eKLR appreciated that:

> "There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

13. Therefore, where the appellant puts forward a mere denial in circumstances in which he would have been expected to say more, this Court in Isaac Njogu Gichiri v Republic [2010] eKLR noted that:

> "With regard to failure by the superior court to give due consideration to the appellant's defence we wish to state that his defence was a mere denial of the charge and the sequence of events of his arrest. The trial court stated after narrating it thus: 'I find that the defence of the 5th accused is not true.' We would not have expected the trial Magistrate to say more because the appellant said nothing about the events of 8th October, 1998. On this, the superior court stated: 'The trial Magistrate was also right in rejecting the defence of the appellant in the circumstances.' We agree with this confirmation."

14. The test was laid down by the predecessor to this Court in Shantilal Maneklal Rumba v R (1957) EA 570 at 573 where Briggs, Ag. VP stated:

> "We do not take this to mean that the appellate court shall write a judgement in a form appropriate to a court of first instance. It is sufficient on questions of fact if the appellate court having itself considered and evaluated the evidence, and having tested the conclusions of the court of first instance drawn from the demeanor of the witnesses against the whole of their evidence, is satisfied that there was evidence upon which the court of first instance could properly and reasonably find as it did. If the conclusions of the appellate court are already expressed in terms such as these, that, in itself, is no indication that the appellate court has failed to make a critical evaluation of the evidence."

15. We have considered the judgement of the first appellate court.

The question before us is whether the learned Judges subjected the evidence to a fresh scrutiny in order to determine whether the ingredients of the offence of robbery with violence was proved beyond reasonable doubt.

16. Section 295 of the *Penal Code* defines the offence of robbery in the following terms:

> 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. Section 296 of the same Code provides that:

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.

18. In a charge of robbery with violence, the prosecution must prove theft because without the element of "stealing", there cannot be robbery and robbery is an essential ingredient of the offence of robbery with violence cannot stand. In this case, there was clear evidence that the appellant and the complainant left the bar together. Along the way, the complainant was assaulted by the appellant and became unconscious. After that he regained his consciousness, he went to look for help. On his way home, he came across his jacket and on checking the pockets, he discovered that his money was missing. There was no evidence at what point his money got lost since he never saw the appellant taking his money. In those circumstances, the possibility that the money could have been picked by a passer-by as the complainant went to look for help cannot be ruled out.

19. In our view, the first appellate court respectfully, failed to address its mind to the need to make a finding whether, from the evidence adduced, it was proved beyond reasonable doubt that it was the appellant who stole the money from the complainant. It may well be that the appellant saw the complainant with the money, and while it may cast strong suspicion on the appellant, that in itself does not meet the threshold of proof beyond reasonable doubt. In our view, the evidence adduced against the appellant failed to prove an essential ingredient of the offence of robbery with violence.

20. The other ground was that the first appellate court failed to consider the concession made by the prosecution as regards the appropriate offence with which the appellant ought to have been charged. It is true that during the hearing of the appeal, the learned prosecution counsel conceded that the charge ought to have been that of assault as this was what was reported in the OB and was supported by the evidence of the doctor. We appreciate that the court is not necessarily bound by concessions made by the prosecution. This Court in Lamek Omboga v. R. Kisumu Court of Appeal Criminal Appeal No. 122 of 1982 had this to say about the issue:

> "When the appeal opened before us, Mr Okoth for the appellant began submitting that as State Counsel did not support the conviction in the first appeal in the High Court, the State was in effect withdrawing the charge and the appeal should have been allowed. With respect, we do not agree. An appellate court is not in any way bound by the opinion of State Counsel as to the merits of an appeal."

21. We are however, of the view that where the prosecution makes concessions to an appeal, and the court is of a different view, the court ought to deal with the said concession and make a decision, one way or the other, on the concession. We have ourselves scrutinised the judgement of the first appellate court, and we agree that the concession was not dealt with at all.

22. Based on our finding that the ingredients of the offence of robbery with violence were not proved, we agree with the learned prosecution counsel that the prosecution evidence only proved the offence of causing grievous harm contrary to section 251 of the *Penal Code* which provides that:

> Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

23. We find merit in this appeal, which we hereby allow. We set aside the conviction and quash the sentence. Pursuant to the provisions of section 179 of the *Criminal Procedure Code*, we substitute therefor a conviction of assault causing actual bodily harm contrary to section 251 of the *Penal Code* and impose

on the appellant a sentence of 5 years imprisonment. As the appellant was sentenced on 27th March 2007, it is clear that he has served his sentence. We accordingly direct that he be set at liberty forthwith unless otherwise lawfully held.

24. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF APRIL, 2025.

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI

.....**.....**

JUDGE OF APPEAL

G. V. ODUNGA

.....**.....**

JUDGE OF APPEAL

I certify that this is the true copy of the original

signed

DEPUTY REGISTRAR