Njagi v Republic (Criminal Appeal 137 of 2018)
[2024] KECA 1070 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KECA 1070 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 137 OF 2018

W KARANJA, J MOHAMMED & LK KIMARU, JJA

FEBRUARY 2, 2024

BETWEEN

ALEX MWANIKI NJAGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Embu (Chitembwe, J.) dated 17th October, 2018 in H.C.CR. A No. 10 of 2014)

JUDGMENT

1. This is a second appeal arising from the judgment of the High Court of Kenya at Embu (Chitembwe, J.) dated 17th October, 2018 in High Court Criminal Appeal No. 10 of 2014.

2. A background of this appeal is that the appellant was charged, alongside others, before the Chief Magistrate's Court at Embu, in Criminal Case No. 924 of 2013, with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the *Penal Code*. The particulars of the charge alleged that on the night of 2nd and 3rd July, 2013, at Mithigi area within Embu County, the appellant and his co-accused, jointly with others not before court, while armed with dangerous weapons namely a pistol, robbed James Njiru Kimotho of his motor vehicle registration number KAV 504C Toyota Corolla saloon car valued at Kshs 350,000, and his mobile phone make G- TIDE Serial Number 91xxxxxxxxx80 valued at Kshs 4,500, all valued at Kshs 354,500, and at or immediately before or after the time of such robbery, killed James Njiru Kimotho.

3. The appellant denied the charges prompting the trial in which the prosecution called a total of seventeen (17) witnesses.

4. nd June, 2013. They further testified that the deceased owned a mobile phone make G-Tide, with a Safaricom line number 07xxxxxxx. PW5, Denis Njoroge, was employed by the deceased to tend to his

cattle. He told the court that on 2nd June, 2013, at about 3.00 pm, the deceased left his house aboard his motor vehicle KAV 504C. He stated that the deceased informed him that he was on his way to pick up his friends.

5 PW4, Edward Kinyua Njagi, had been employed by the deceased as a taxi driver. PW4 stated that on 2nd June, 2013, at about 6.30 p.m., he was at Runyenjes bus stop with the deceased. He stated that he was operating motor vehicle registration number KAT 709M, while the deceased was driving KAV 504C. He testified that the deceased asked him to ferry some passengers for him, as he had somewhere he had to be. When he got to Kanja Trading Centre, PW4 tried to reach the deceased through his phone but he was unable to. He stated that he went to the deceased's home that evening and waited for him in vain. The following day on 3rd June, 2013, he learnt that the deceased's lifeless body had been recovered at Manyatta area.

6. nd June, 2013, the appellant came to the garage at about 9.00 pm, whilst driving motor vehicle registration number KAV 504C, make Toyota 110, silver in colour. The appellant asked PW6 to change the tyres as well as fix the radio, and left. PW7 testified that he saw motor vehicle registration number KAV 504C at his garage on 3rd June, 2013. He was informed by PW6 that the vehicle belonged to the appellant. The appellant was his longtime customer. PW7 stated that the next day, at about 3.00 p.m., a man came to his garage and inquired who had brought the said vehicle to the garage. The man claimed that the vehicle belonged to his father. PW7 advised him to report the matter to the police. PW6 testified that he informed the appellant of the developments the following day. He stated that the appellant came by that evening and took the car away. He left behind a mobile phone make G-Tide.

7 The investigating officer, PC Peter Moses Mbevi (PW17), told the court that he obtained the deceased's phone number (07xxxxxxx) and requested for particulars from Safaricom. He stated that from his investigations, the deceased phone was at Runyenjes on the material day of 2nd June 2013, but was later tracked to Kasarani. He testified that the appellant's phone number (07xxxxxxx) was tracked to Runyenjes, and later Kasarani area on the same date, at 22.23 hours. It was his evidence that that phone number 07xxxxxxx communicated with the deceased on 2nd June, 2013, at 16.16 hours, 18.27 hours, 19.02 hours and 19.11 hours. He stated that the stolen vehicle was never recovered. PW10, CPI Sarah Waithera and PW11 PC Daniel Odhiambo and PW14, IP Nzioka Nzimbi, were part of the team that arrested the appellant and his co-accused on 16th August, 2013, in Ruiru, following a tip off by an informer.

8 On his part, the appellant in his sworn testimony, denied the charge against him. He told the court that on 2nd June, 2013, he was at home with his family. He stated that he was arrested in Ruiru on 16th August, 2013, and taken to Ruiru Police Station. He was later transferred to Embu Police Station. The appellant stated that he operated a taxi business in Roysambu, and his motor vehicles were serviced at PW7's garage in Kasarani. The appellant testified that he was framed due to a family dispute between his uncle, David Nyaga, and his father, over a succession matter with respect to his grandfather's estate. The appellant stated that he believed that David Nyaga was the informer who led the police to his arrest. He further alleged that PW6 and PW7 owed him Kshs 100,000, hence the reason why they implicated him in the offence.

9. The trial court (Biwott, SPM) upon assessing and analyzing the evidence tendered before it, found that the appellant had communicated with the deceased on the day he was found dead; that he was in possession of the deceased's motor vehicle threehours after the deceased was killed, and that the deceased's phone was recovered at the garage where he had parked the deceased's vehicle at Kasarani. The trial court found, in the absence of rebuttable evidence by the appellant, that the evidence by the prosecution pointed to the appellant as the person who killed the deceased and stole his motor vehicle.

The trial court found the appellant guilty of the offence as charged, convicted him and sentenced him to death. The appellant, aggrieved by this decision, filed an appeal before the High Court

10. In his petition of appeal, the appellant complained that the evidence adduced by the prosecution was inconsistent, uncorroborated and insufficient to sustain a conviction. He faulted the trial court for failing to find that the prosecution failed to call crucial witnesses to prove its case against him. He was aggrieved that the trial court rejected his defence. He urged the 1st appellate court to allow his appeal and quash his conviction and set aside his sentence.

11. The learned Judge (Chitembwe, J.) after re-evaluating the record of the trial court and the evidence tendered before it, saw no reason to disturb the conviction and sentence meted on the appellant by the trial court.

12. The appellant is now before this Court seeking to overturn the decision of the High Court, and has proffered six (6) grounds of appeal. In summary, the appellant is aggrieved that: the prosecution failed to discharge its burden of proof, and that his conviction was founded on insufficient and contradictory evidence; the first appellate court erred in upholding his conviction and sentence based on circumstantial evidence that alibi defence; and finally, that the superior court erred in affirming the mandatory death sentence meted by the trial court.

13 The appeal was canvassed by way of written submissions, duly filed by both parties. The firm of Gori, Ombongi & Company Advocates was on record for the appellant. The appellant's counsel submitted that none of the ingredients to establish the offence of robbery with violence were proved by the prosecution. It was his submission that the dangerous weapon, namely pistol, was not recovered from the appellant, and neither were the alleged stolen items. He stated that the deceased's mobile phone was recovered from PW8. Counsel asserted that the prosecution's evidence with respect to the recovery of the deceased's mobile phone, as well as the appellant's arrest, was inconsistent, and that the inconsistencies ought to have been resolved in the appellant's favour.

14. It was the appellant's contention that the evidence adduced by the prosecution was inconsistent with particulars of the charge. Counsel for the appellant submitted that the particulars of the charge alleged that the appellant was armed with a pistol, yet the evidence on record suggested that the deceased died of strangulation. Counsel contended that the circumstantial evidence adduced by the prosecution did not meet the requisite *Musili Tulo v Republic* [2014] eKLR. He explained that no evidence was tendered to show that mobile phone number 07xxxxxxxx was registered in the appellant's name. Counsel faulted the superior court for finding that the appellant's conviction was founded on direct evidence, yet the whole case hinged on circumstantial evidence. He urged that the appellant did not bear the burden of proving his alibi defence, which was not displaced by the prosecution's witnesses. With respect to sentence, the appellant's counsel was of the view that the death sentence was not mandatory, but rather the maximum penalty for the offence of robbery with violence. He relied on a High Court case namely, *James Kariuki v Republic* [2018] eKLR in urging the court to review his sentence in the event his appeal on conviction will be unsuccessful.

15 In rebuttal, learned Prosecuting counsel, Mr. Naulikha, submitted that the evidence by the prosecution placed the appellant at the crime scene where the deceased was robbed and murdered, and further, at the garage in Kasarani, while in possession of the deceased's motor vehicle. He explained that the evidence of PW8 established that the appellant left the deceased's mobile phone at the said garage. He reiterated that the doctrine of recent possession was properly applied in this case. He asserted that the appellant was in possession of the deceased's motor vehicle barely three hours after he was killed, and that he failed to give an explanation of how he came to be in possession of the same. Mr. Naulikha was of the view that, from the evidence on record, no other plausible conclusion could be

reached, other than that the appellant killed the deceased, before making away with his motor vehicle and mobile phone.

16. Section 143 of the *Evidence Act* provides that no specific number of witnesses are required to be called in a criminal trial for the prosecution to establish the existence of a certain fact. He asserted that the appellant's alibi defence was considered by the two courts below and dismissed upon its merit being considered. He reiterated that any inconsistencies and contradictions with regard to the evidence by the prosecution witnesses was immaterial as it did not go to the root of the case. On sentence, learned prosecuting counsel was of the view that the same was commensurate to the crime committed and the circumstances of the case. He urged that the appellant's conviction was safe, and invited us to uphold his conviction and affirm the sentence.

17 This is a second appeal. The mandate of this Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of *Kaingo v Republic* [1982] KLR 213 at page 219 this Court stated thus:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did *Reuben Karori S/O Karanja v Republic [1950 17EACA 146]*."

18. We have carefully considered the evidence on record,judgments of both the trial and first appellate court, the grounds of appeal and the rival submissions set out above, in light of this Court's mandate. The issues arising for our determination can be summed up as follows:

i. Whether the prosecution proved its case against the appellant beyond reasonable doubt;

ii. whether the superior court shifted the burden of proof to the appellant, with respect to his alibi defence; and

iii. whether the learned Judge erred in affirming the death sentence meted by the trial court.

19. As regards the first issue, we have been called upon to determine whether the prosecution's evidence met the threshold for conviction based on circumstantial evidence. This Court in the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR observed as follows with respect to circumstantial evidence:

> " However, it is altruism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence, which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form as strong a basis for proving the guilt of an accused person just like direct evidence. Way back in 1928 Lord Heward, CJ, stated as follows on circumstantial evidence in *R v Taylor, Weaver & Donovan [1928] CR. App. R. 21*: 'It has been said that the evidence against applicant is circumstantial. So it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undersigned coincidence, is capable of proving a proposition with the accuracy of Mathematics. It is no derogation from evidence to say that it is circumstantial'."

20. For circumstantial evidence to sustain a conviction in any criminal trial, certain conditions have to be met. These conditions were outlined by this Court in *Abanga alias Onyango v Republic* Cr. App. No. 32 of 1990 (UR) as follows:

> " It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
>
> (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else." See also *Sawe v Republic* [2003] KLR 364.

21. nd June, 2016, the day he was robbed and killed. This was established by the evidence of PW1, PW2, PW3, PW4 and PW5.

22 The respondent adduced circumstantial evidence linking the appellant to the offence. On the same day the respondent was killed, approximately three hours after the incident occurred, the evidence on record established that the appellant was in possession of the deceased's motor vehicle. It was PW6's testimony that on the night of 2nd June, 2016, he was asleep at PW7's garage when the appellant called him using an airtel line 07xxxxxxxx. The appellant asked PW6 to open the gate of the garage, after which he drove in motor vehicle registration number KAV 504C, silver in colour. The appellant asked him to switch the tyres and repair the radio. PW8, who was at the garage at the time corroborated PW6's testimony. Further PW7, who was the owner of the said garage, stated that on the morning of 3rd June ,2016, he saw the deceased's vehicle at the garage, and upon inquiry, was informed by PW6 that it belonged to the appellant. The appellant was known to him prior to the material day. He was not therefore a stranger to him.

23. The phone data records produced by PW16 reveal that the appellant was at Kasarani, where the garage is located, at 22.23 hours, on the material day. The appellant contended that PW16 did not produce subscriber details with respect to phone number 07xxxxxxxx. Although that was the case, the prosecution was able to establish that PW6 told the court that the appellant communicated with him through the said phone number. From the foregoing, it is clear that the appellant was in possession of the deceased's motor vehicle barely three hours after he disappeared while driving it. The doctrine of recent possession was applicable in this case. The appellant was seen by PW6 and PW8 in possession of the deceased's motor vehicle registration number KAV 504C; the said vehicle was positively identified as the property of the deceased; and the vehicle was stolen from the deceased on the same day the appellant was seen in possession of the same. The deceased was killed in the course of the said motor vehicle being robbed from him. Once the respondent established that the appellant was found in possession of the recently stolen motor vehicle, the evidential burden, in this instance, shifted to the appellant to explain how he came to be in possession of the same. This Court in Paul Mwita Robi v Republic [2010] eKLR observed thus:

> " 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 especially within the knowledge of

the accused and pursuant to the provisions of *Section 111(1) of the Evidence Act Chapter 80*, the accused has to discharge that burden."

25. alibi defence was rejected by the two courts below, and properly so, as the evidence on record was clear that he was in possession of the deceased's stolen motor vehicle shortly after the deceased was killed. There was clear and uncontroverted evidence that the appellant was using mobile phone line 07xxxxxxx on the material day. This phone number was tracked to Runyenjes at the same time the deceased was within the area. The said phone number was used to communicate severally with the deceased's mobile phone number before the deceased disappeared and was later found to have been killed. In fact, it was the last number that the deceased called before his phone went off.

26 Further, the evidence of PW6 and PW8 was to the effect that the deceased's mobile phone was left by the appellant at the garage when he went to pick the deceased's motor vehicle, on 4th June, 2016. The appellant was well known to the eye witnesses who saw him in possession of the deceased's motor vehicle as he was a regular customer at the garage. This fact was admitted by the appellant in his defence. The appellant told the court that he had known PW7 for about four years, and that he was a client at PW7's garage. He further stated that he had known PW6 for close to three years. From the foregoing, we find that the circumstantial evidence adduced by the prosecution witnesses irresistibly points to the guilt of the appellant, and no one else. The defence offered by the appellant did not dent the strong,cogent, credible and consistent evidence adduced by the prosecution witnesses.

27. *Johana Ndungu v Republic [1996]* eKLR as follows:

i. "If the offender is armed with any dangerous or offensive weapon or instrument; or

ii. if he is in company with one or more other person or persons; or

iii. if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person." (Emphasis ours)

28. From the foregoing, if any one of the above elements is established by the prosecution, it follows that an accused person is guilty of the offence of robbery with violence under Section 296 (2) of the *Penal Code*. The appellant was in the company of others, and further, the fact that the deceased was killed is proof that a means of violence was used to achieve the intent of stealing his motor vehicle. We agree with the findings of the two courts below that the offence of robbery with violence contrary Section 296(2) of the *Penal Code* was properly established to the required standard of proof beyond any reasonable doubt by the prosecution.

29. *Benjamin Mwangi & another v Republic* [1984] eKLR, observed as follows:

> " Whether a witness should be called by the prosecutor is a matter within the discretion of the prosecutor and a court will not interfere with that discretion unless, perhaps, it may be shown that, the prosecutor has been influenced by some oblique motive."

30. It is our considered view that the evidence by the prosecution's witnesses was cogent and corroborative, and that the evidence on record irresistibly pointed to the appellant as one of the robbers who robbed the deceased of his motor vehicle and in the course of the robbery killed him. In the circumstances, we are satisfied that the superior court addressed itself correctly on the law. There are no grounds for interfering with the concurrent findings of fact by the two courts below. We are satisfied that the appellant was properly convicted of the offence of robbery with violence. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion, considering the reprehensible circumstances under which the robbery was committed.

31. This appeal has no merit and is hereby dismissed.

DATED AND DELIVERED AT NYERI THIS 2ND DAY OF FEBRUARY, 2024.

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR