Esekon & another v Republic (Criminal Appeal 320 of 2018)
[2024] KECA 262 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 262 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 320 OF 2018

F SICHALE, FA OCHIENG & WK KORIR, JJA

MARCH 8, 2024

BETWEEN

EGES ESEKON ..... 1ST APPELLANT

EKADELI ERUPE ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Lodwar (S.N. Riechi, J.) delivered and dated 19th December, 2015 in HCCRA No. 17 of 2017)

JUDGMENT

1. Eges Esekon and Ekadeli Epure, the respective 1st and 2nd appellants are before us on a second appeal. The appellants were at the trial charged with 5 counts of robbery with violence contrary to section 296(2) of the Penal Code. It was alleged in the charge sheet that all the offences took place on 19th January 2013 at Kalemorok in Turkana South within Turkana County. The particulars of Count 1 stated that the appellants jointly with another not before the court while armed with AK47 rifles robbed Kelvin Ondari of his laptop make HP worth KSh. 50,000, Samsung Chart 322 mobile phone valued at KSh. 8000 and cash KSh. 2000.

2. The particulars for the rest of the charges were similar to those of Count 1 save for the names of the complainants and the stolen items. For Count 2 it was alleged that they robbed Gilbert Nyagi of a Samsung MT750 mobile phone worth KSh. 5000 and cash KSh. 1850. As for Count 3 the appellants allegedly robbed Stephen Nyerere of his mobile phone make Nokia E71 worth KSh. 25,000 and cash KSh. 2,000. In Count 4 the offence was committed against Lenson Mutuku who was robbed of an Asha 303 mobile phone valued as KSh. 13,000 and cash KSh. 1,000. Finally, in Count 5, the appellants were said to have robbed Peter Otindo of his Nokia C3 mobile phone worth KSh. 7,000 and cash KSh. 1,100.

3. The appellants pleaded not guilty to the charges but at the conclusion of the trial they were found guilty on all the five counts and sentenced to life imprisonment. The appellants were dissatisfied with the judgment of the trial court and lodged appeals before the High Court. Their appeals were dismissed for lack of merit. In dismissing the appeals, the High Court noted that the appellants were duly linked to the crime through the doctrine of recent possession and were also positively identified by the complainants.

4. The appellants are now before this Court dissatisfied with the judgment of the High Court. They raise the following grounds of appeal: that the doctrine of recent possession was not properly invoked; that the charges were not proved as the evidence was not credible; that there were material contradictions in the prosecution's evidence; that the defence evidence was not considered; and, that no identification parade was conducted to rule out mistaken identity.

5. In a nutshell, the case against the appellants was that on 19th January 2013, the complainants PW1 Kevin Ondari, PW2 Gilbert Makela Nyagi, PW3 Stephen Nyerere Tegesi, PW4 Lenson Mutuku Tivo and PW5 Peter Otindo Elijah who were employees of Broadcom Communications Network were on an assignment in Turkana County. They were aboard motor vehicle Registration No. KBD 921G which was being driven by PW3. Between Kalemorok and Kaphri junction on their way from Lodwar to Kainuk, the 1st appellant emerged from the bush while armed with a gun. He then aimed his gun at the driver forcing him to stop abruptly. Soon thereafter, the 2nd appellant and a third person also emerged from the bush and joined the 1st appellant.

6. The attackers ordered the complainants to step out of their vehicle. They then proceeded to ransack the vehicle taking away a laptop, among other items. They also searched their pockets and took cash KSh. 2,000 from PW1 and a Samsung mobile phone. From PW2 they took his mobile phone and cash amounting to KSh. 1,850. PW3 parted with his mobile phone and cash amounting to KSh. 2,000. PW4 on his part was robbed of his mobile and KSh. 1,000 in cash while PW5 lost a Nokia C3 mobile phone and KSh. 1,100 in cash.

7. Upon taking the aforementioned items, the robbers ordered the complainants to get into their vehicle and drive off. On the way they met some young men who mobilized the local people to track the robbers. The next day with the help of members of public they followed the footmarks which led them to a bush where they found the 1st appellant and arrested him. They also recovered an SFP connector from where the 1st appellant was arrested. Other items including a modem, adaptors, mouse, keys, code for modem and USB cables were also recovered. The 1st appellant was then taken to Kalemorok AP Camp where he gave out information pertaining to the 2nd appellant's whereabouts. When the 2nd appellant was arrested a memory card belonging to PW5 was recovered from him.

8. This appeal came up for hearing on the Court's virtual platform on 6th November 2023. The appellants who were virtually present they both informed the Court that they had an advocate but could not remember her name. Learned counsel Ms. Okok was present holding brief for learned counsel Mr. Kakoi for the respondent and she informed the Court that she would be relying on the respondent's written submissions dated 31st October 2023. Ms. Okok later informed the Court that she had spoken with learned counsel Ms. Orina for the appellants via telephone and Ms. Orina indicated that she had network problems but she would be relying on her written submissions dated 23rd October 2023. Both appellants consented to the matter proceeding in that manner.

9. For the appellants, Ms. Orina submitted that the learned Judge erred in law and fact by finding that the doctrine of recent possession was applicable in this case. According to counsel, the only items recovered at the scene of crime were 2 SPF connectors and those items were not recovered from any

of the appellants. Counsel also submitted that the other items were recovered at a later time or date and the place of their recovery remains unknown. Counsel urged that the Court proceeded on the erroneous assumption that the items found near the 1st appellant belonged to him yet the scene was a forest accessible to anyone.

10. Counsel submitted that the first appellate Court erred in upholding the conviction of the appellants on charges which were not proved as the evidence on record lacked credibility. Counsel urged that despite the complainants proving that they were robbed, their evidence fell short of linking the appellants to the robbery or proving the elements of the offence against the appellants. Counsel pointed out that no weapon was produced as exhibit and that the identity of the appellants was also not proved. Still on the question of the identity of the robbers, counsel submitted that the circumstances of the alleged robbery would not have permitted a firm identification of the appellants by the complainants. Counsel added that there was no initial first report on identification made to the police hence there was a possibility of mistaken identity. Counsel referred to the cases of Shaban Bin Donald v. Republic [1940] EACA and Njihia v. Republic [1986] KLR 422 to buttress this submission.

11. Counsel submitted that the prosecution failed to call key witnesses including the police reservists who arrested the 1st appellant and assisted the police in arresting the 2nd appellant.

She relied on the case of Bukenya & others v. Uganda [1972] EA 549 to urge that an adverse conclusion should be drawn from the prosecution's failure to call the said witnesses. Counsel additionally submitted that on top of the failure to call crucial witnesses to testify, the evidence on record was marred with material contradictions hence could not be relied upon to sustain the conviction of the appellants. In support of her assertion, counsel submitted that the evidence of PW3 and PW6 was contradictory concerning the arrest of the 2nd appellant. Counsel relied on Kiilu & Another v. Republic [2005] eKLR to urge that the contradictions and inconsistencies ought to be resolved in favour of the appellant. In the end, learned counsel Ms. Orina urged us to quash the conviction and set aside the sentence.

12. For the respondent, learned counsel Ms. Okok referred to the decisions in Njoroge v. Republic [1982] KLR 388 and Chemagong v. Republic [984] KLR 611 to highlight the circumscribed jurisdiction of this Court on a second appeal. Turning to the substance of the appeal, counsel submitted that the doctrine of recent possession was applicable in this case and the circumstances of the case in totality incriminated the appellants. Regarding the identity of the appellants, counsel pointed out that the robbery happened during the day and the appellants did not make any attempt to conceal their identity and that some of the stolen items were also found in their possession. Regarding the sufficiency of the evidence on record, counsel urged that all the ingredients of robbery with violence were established. Counsel referred to the case of Oluoch v. Republic [1985] eKLR as quoted in Augusti Erasmi v. Republic, Criminal Appeal No. 311 of 2012 to highlight the ingredients of the offence of robbery with violence. Rejecting the appellants' contention that there was failure on the part of the prosecution to call crucial witnesses, counsel submitted that section 143 of the *Evidence Act* permitted the respondent to decide which witnesses to call. Counsel urged that the failure to call the police reservists did not in any way water down the prosecution case. In response to the appellants' claim that the evidence used to convict them was contradictory, counsel argued that there were no contradictions in the evidence tendered by the prosecution's witnesses. Counsel added that if there were any contradictions, such contradictions were immaterial and did not affect the case for the prosecution. Counsel referred to John Mwangi Wachira v. Republic, CRA No. 35 of 2015 and John Maina Mwangi v. Republic, CRA 73 of 1993 to buttress her submission that minor contradictions that are not prejudicial to the accused person should not affect the prosecution case. In the end, learned counsel Ms. Okok urged us to dismiss the appeal in its entirety.

13. This being a second appeal, our mandate as prescribed under section 361(1) of the Criminal Procedure Code is limited to considering matters of law only. Matters of fact which includes severity of sentence are not within our purview. However, questions surrounding the legality of a sentence are deemed to be matters of law.

14. Alive to our mandate on second appeals, we have reviewed the record of appeal, the submissions and the authorities relied upon by parties. In our view, the following issues are for determination: whether the doctrine of recent possession was properly invoked; whether the identity of the appellants was proved; and, whether the prosecution failed to call certain critical witnesses and if so, whether such failure was detrimental to the prosecution case.

15. The appellants were charged with 5 counts of robbery with violence contrary to section 295 of the Penal Code as read with section 296(2) of the same Code. Section 295 defines robbery thus:

> " 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."

16. Section 296(2) then proceeds to define robbery with violence and provide its punishment as follows:

> " 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."

17. It follows that for an offence of robbery with violence to hold, an accused person must either be armed with a dangerous or offensive weapon, or be in the company of other(s), or deploy actual violence against the victim immediately before, during or after the theft. It should be recalled that these ingredients are disjunctive and the proof of any of the three ingredients is sufficient to sustain a conviction. Thus, in Dima Denge Dima & others v. Republic [2013] eKLR the Court held that:

> " The elements of the offence under Section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction."

18. In the first ground of appeal, the appellants questions the application of the doctrine of recent possession to his case by the first appellate court and the trial court. In Sakwa v. Republic [2023] KECA 732 (KLR) this Court explained the methodology for applying the doctrine of recent possession as follows:

> " The cited authorities lead us to the conclusion that whether the appellant was a thief or just a possessor of the stolen items is a matter of fact which was for determination by the trial court and subject to review by the first appellate court. To aid in determining this aspect, it was necessary for the prosecution to establish that, first, the appellant was in possession of stolen items; second that upon considering all the relevant factors, the court was satisfied that the items belonged to PW1; third, that the items were stolen from PW1 during the robbery; and fourth, that the items were recently stolen. Next, the trial court was required to consider whether the appellant put forth a plausible explanation as to how he came into possession of the items. We must however appreciate, as was done by the courts in the authorities

already cited, that such an explanation must not necessarily be satisfactory but should be reasonable. Therefore, where a reasonable explanation is put forth, then the doctrine of recent possession should not be invoked."

Also, the Court in David Mugo Kimunge v. Republic [2015] eKLR, cited with approval the decision of Canadian Supreme Court in Republic v. Kowkyk [1988] 2 SCR 59, which explained the applicability of the doctrine of recent possession thus:

> " Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply."
>
> We concur with the views expressed in the cited decisions as to how the doctrine of recent of possession is to be applied to the facts of any given case.

19. As for the present case, there is no doubt that PW1, PW2, PW3, PW4 and PW5 were robbed by three men at gun point. It is also not disputed that the 1st appellant was arrested in a nearby forest by the local police reservists who then led PW1 to the scene where 2 SPF connectors and partially burnt flash disk were recovered. For the 2nd appellant, a memory card was recovered from his pocket at the time of his arrest. The said memory card belonged to and contained pictures of PW5. In their defence, the appellants did not tender any plausible explanation as to how they came to be in possession of these items which had recently been robbed from the complainants. Instead, they chose to proffer denials. We do not find plausible the attempted explanation in the appellants' submissions that the forest where the 1st appellant was arrested was an open place freely accessible to anyone. This explanation never featured in his defence at the trial. We therefore find that both the trial court and the first appellate court correctly invoked the doctrine of recent possession to link the appellants to the offence.

20. On the question of identification, counsel for the appellants submitted that the circumstances were not favourable for the identification of his clients. Without going into the details of the evidence adduced as regards the identification of the appellants at the scene of crime, we agree with counsel that this was not a proper case upon which a conviction could ensue based on identification. From the record, the complainants and the appellants were meeting for the first time during the robbery. This was therefore a proper case for holding identification parades in order to confirm the evidence of PW1, PW2 and PW3 that they could identify their attackers. It is only from identification parades that the complainants could pick out their attackers and therefore confirm their testimony that they knew those who had robbed them. Even so, the investigating officer cannot, in the circumstances of this case, be blamed for not organising for identification parades because the record shows that the witnesses encountered the appellants immediately after their arrest and conducting identification parades would therefore not have added any value to the prosecution case. We nevertheless observe that notwithstanding the fact that identification parades were not held, there is sufficient evidence on record that connects the appellants to the robbery.

21. Another issue raised by the appellants is that there was failure to call the police reservists whom they deem as important witnesses. In this regard, we commence by appreciating that section 143 of the *Evidence Act* provides that no particular number of witnesses is required to prove the existence of

any fact. Further, we observe that the prosecution's duty is to call the witnesses who are sufficient to prove a fact and no more; and that the discretion to decide which witnesses to call remains with the prosecution. Our statement of the law aligns with the holding of the Court in Julius Kalewa Mutunga v. Republic [2006] eKLR that:

> {"As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive
>
> – see Oloro s/o Daitayi & others v R. (1950) 23 EACA 493."

22. The same message was reiterated in Omukanga v. Republic [2023] KECA 430 (KLR) thus:

> "...We further point out that a party desirous that adverse inference be made owing to the failure to call certain witnesses should, as a matter of good practice, identify the various aspects of the case that, in the view of that complaining party, the uncalled witnesses would have shed more light on. It is also important for the party to establish a link between the uncalled witnesses and the set of evidence. In our view, anything short of this, would amount to mere speculation not actionable by the courts. The alleged oblique motive should be visible from the record or the evidence by itself."

23. In this case, we do not find merit in the appellants' submission that they should walk out of the prison gates for alleged failure by the prosecution to call crucial witnesses. Firstly, the evidence adduced by the prosecution was sufficient to establish the ingredients of the charges against the appellants. And secondly, the appellants have failed to demonstrate what aspect of the evidence was marred with uncertainty that the said witnesses, if they were to be called, would have shed light on. That is to say that the appellants have failed to establish that there were areas not covered by the witnesses who testified in order for us to reach the conclusion that maybe if the uncalled witnesses had testified then the trial court would have reached a different conclusion as to the guilt of the appellants. In other words, all the aspects of the trial that the prosecution was required to cover were taken care of. To this end, the statement of the Court in Joseph Kiptum Keter v. Republic [2007] eKLR is apt:

> "Bukenya v. Uganda [1972] EA 549 clearly states that the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt."

24. The appellants also alluded to contradictions in the prosecution's case. In our view, the contradictions identified by counsel for the appellants in her submissions were trivial in nature and did not go deep into the root of the case and were therefore not fatal to the prosecution case at all. It must be recalled that sometime witnesses testify long after the incident. Discrepancies are bound to occur as witnesses will always have distinct recollection of any occurrence. Some people are blessed with elephantine memory and can easily recollect events that happened ages ago as if those events happened yesterday. Others suffer from fragile memories and their recollection of events can only be equated to the legendary forgetfulness of a warthog. A combination of the evidence of persons with diverse abilities of recollection can easily give the impression of inconsistency but even in such circumstances, the Court must still consider that which is of relevance to the fact in issue while disregarding those trivial discrepancies that alter not the foundation of the case. In the appeal before us, we find no fundamental inconsistencies which can make us give the benefit of doubt to the appellants. As such, this particular ground of appeal also fails.

25. Having considered all the grounds raised by the appellants against their conviction, we find that the appeal against conviction lacks merit and is for dismissal.

26. Although the appellants' counsel did not give keen attention to the sentence imposed upon the appellants, we observe that in one of the grounds of appeal the sentence is criticized for being inappropriate. Considering that the appellants were sentenced on 17th February 2014 and in view of the emerging jurisprudence on life sentence, we find that an issue of law concerning the appellants' sentences. For the latest jurisprudence on the life sentence, reference is made to the decisions in Julius Kitsao Munyeso v. Republic, CR Appeal No. 12 of 2021 (Mombasa) and Evans Nyamira Ayako v. Republic, CR Appeal No. 22 of 2018 (Kisumu).

27. We appreciate that in our statute books, the death sentence is the punishment provided for the offence of robbery with violence under section 296(2) of the Penal Code. In this case, the appellants were imprisoned for life. Whether a death sentence or a life sentence is imposed, the court is required to take into consideration of the circumstances of each case in order to impose a sentence appropriate to those circumstances. In the appeal before us we are cognizant of the fact that the appellants were armed with a rifle during the robbery and also visited violence upon the victims. However, life imprisonment is too harsh considering that the appellants were first offenders. We are therefore inclined to pass a sentence of 30 years in respect of each of the five counts in lieu of the life sentences meted upon the appellants. The appellants having committed the offences in a single transaction, the sentences will run concurrently. See Peter Mbugua Kabui v. Republic [2016] eKLR and John Waweru Njoka v. Republic [2001] eKLR.

28. The upshot of the foregoing is that the appeal against conviction is hereby dismissed for lack of merit. The appeal against sentence partially succeeds and the sentence of life imprisonment is hereby set aside. Each appellant is instead sentenced to serve 30 years' imprisonment on each of the five counts. The sentences will run concurrently. Further, as the record shows that appellants were held in custody from 21st January 2013 when they were first presented to the trial court, their sentences, shall, in accordance with the proviso to section 333(2) of the Criminal Procedure Code, run from that date.

29. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 8TH DAY OF MARCH, 2024

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR