Lekisima v Republic (Criminal Appeal 47 of 2017)
[2024] KECA 604 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 604 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 47 OF 2017

F TUIYOTT, FA OCHIENG & WK KORIR, JJA

MAY 24, 2024

BETWEEN

YOSUF HAMISI LEKISIMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from a Judgment of the High Court of Kenya at Nakuru (Maureen A. Odero, J.) delivered on 10th February, 2017inH.C.CR.A. No. 182 of 2015)

JUDGMENT

1. Before the Principal Magistrate's Court, Maralal, 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*.

2. The prosecution asserted that on 25th December 2014, at about 8:00 am at Loporos Village in Maralal Town in Samburu Central Sub-County, the appellant, being armed with an offensive weapon, namely a knife, robbed Lizz Narumo of one mobile phone, make Nokia 107 valued at Kshs 2,500/=, and at or immediately before or immediately after the time of such robbery threatened to use personal violence to the said Lizz Narumo.

3. Following a plea of "Not Guilty", the prosecution led evidence through 3 witnesses, in an effort to prove that the appellant was guilty.

4. PW1 was the complainant, Lizz Narumo. She testified that the incident took place at about 8:00 am. Whilst walking near the ACK Church, a person grabbed her from behind, by her shoulders. The person pinned a knife to the complainant's stomach, and he ordered her to give him her phone, which she was holding in her left hand.

5. When PW1 turned around, she saw that it was the appellant who had grabbed her. PW1 released the phone, but she requested the assailant to give her, the line which was in her phone. The appellant obliged, by removing the line from the phone, and he threw it towards PW1.

6. PW1 picked up the line and then went to the house of her friend, Consolata, whom she told about what had transpired.

7. Four days, later, PW1 was with Consolata (PW2), at her house. They left the house heading to Alamano. Whilst on the way, they met their pastor, and the 3 of them got talking. Whilst PW1 and PW2 were still talking to the pastor, PW1 saw the appellant passing by. She grabbed the appellant and told her pastor that it was the appellant who had stolen her phone.

8. At that point, the appellant gave PW1 the phone that he was holding. The appellant then promised that he would later bring to PW1 her own phone.

9. Both PW1 and PW2 gave to the appellant their respective phone numbers, and they agreed that the appellant could phone either of them when he was ready to return PW1's phone.

10. Meanwhile, PW1 was suspicious that the phone that the appellant had given to her was also stolen. Therefore, PW1 reported to the Police, who instructed her to inform them if she saw the appellant. As luck would have it, PW1 met the appellant at Alamano, and she asked him for her phone.

11. PW1 testified that the appellant led her to the person to whom the appellant had sold her phone. When that person said that he did not have her phone, PW1 went with the appellant to the Chief's Office. The police were called to the Chief's Office, and they left there in the company of the appellant, PW1, PW2, and the person who bought the phone from the appellant.

12. At the police station, the appellant was placed in the cells by the police. Later, the police phoned PW1 and informed her that her phone had been recovered.

13. During cross-examination by the appellant, the complainant told the court that her phone was recovered from the person to whom the appellant had sold it.

14. PW2 corroborated the testimony of PW1 in all material particulars.

15. During cross-examination, PW2 said that she and PW1 had given their respective numbers to the appellant so that he could reach them if he was ready to return PW1's phone.

16. PW3, P.C Paul Njenga, was a Police Officer attached to the Maralal Police Station, Crime Branch. He was the Investigating Officer. After PW1 reported the incident, PW3 gave her his phone number and requested her to phone him if she spotted the appellant.

17. PW3 went to the Chief's Office after PW1 phoned to inform him that the appellant was with her, at that office. PW3 arrested the appellant.

18. PW3 testified that whilst the appellant was at the police station, the appellant communicated with one of his friends, who delivered PW1's phone to the police station.

19. When he was put to his defence, the appellant said that he did not know PW1 and that he did not meet her on the date when he was alleged to have robbed her.

20. In his judgment, the learned trial Magistrate held that the appellant had been positively identified by PW1 at the time of the robbery.

21. He also noted that on a subsequent date, the appellant offered to return the stolen phone to PW1. Although the appellant did not immediately return the phone, he did so after being arrested. On the strength of the said evidence, the trial court convicted the appellant.

22. When given an opportunity for mitigation, the appellant said that he had nothing to say.

23. Thereafter, the trial court sentenced the appellant to suffer death in the manner authorized by the law.

24. Following the conviction, the appellant moved to the High Court, on an appeal, through which he challenged both the conviction and the sentence.

25. On 10th February 2017, the High Court dismissed the appeal in its entirety. It is that decision which gave rise to this appeal.

26. As this is a second appeal, the law enjoins this Court to only determine issues of law.

27. Both the appellant and the respondent filed their respective written submissions.

28. When the appeal came up for hearing on 27th February 2024, Ms. Ekesa advocate represented the appellant, whilst Mr. Omutelema, SADPP, represented the respondent.

29. Both counsel placed reliance upon their respective written submissions. Secondly, they also made oral submissions.

30. Ms. Ekesa informed the court that her emphasis was on the issue of the sentence. Counsel noted that the phone which was stolen from PW1 was worth Kshs. 2,500/=, and that the said phone was eventually returned to PW1. Furthermore, PW1 did not sustain any injuries during the robbery.

31. In the said circumstances, the appellant reasoned that the death sentence was harsh and excessive.

32. The appellant drew our attention to the case of Anthony Mwanzia Mbizi, Criminal Appeal No. 6 of 2017, in which the Court of Appeal substituted the death sentence with a sentence of 15 years' imprisonment. When substituting the sentence, the Court noted that the stolen phone was recovered immediately; the appellant pleaded for leniency when mitigating; he was a first offender; and the complainant was not injured during the robbery. In that case, the stolen phone was an Alcatel, which was worth Kshs. 3,000/=.

33. Meanwhile, as regards the conviction, the appellant submitted that there was no evidence that connected him to the return of the phone. He pointed out that the phone was returned by someone else, whilst he (the appellant) was in police custody. He faulted the prosecution for failure to call, as a witness, the person who returned the phone.

34. The appellant also asserted that he was not accorded a fair hearing as the prosecution did not provide him with witness statements prior to the commencement of the trial.

35. However, when the court sought to know how it could ascertain the alleged violation, the appellant conceded that the record of proceedings did not contain any such information as would enable the court to verify that witness statements were not provided to the appellant.

36. We have taken into consideration all the submissions by both parties and note that three issues fall for determination:

    a. Did the trial court and the first appellate court fail to note that the evidence of the single identifying witness was not free from error?

b. Was there a failure by the trial court to caution itself that the evidence of a single-identifying witness must be accorded careful consideration before determining if the court could place reliance on it?

c. Was the death sentence unduly harsh and excessive, in the circumstances?

37. On the issue of identification, it is common ground the appellant was unknown to PW1 prior to the time when the offence was committed. It is also not in dispute that the incident took place in broad daylight, at 8:00 am. The assailant grabbed the PW1, suddenly, and pinned a knife to her stomach, whilst demanding that she surrender her phone.

38. Although the attack was sudden and unexpected, the complainant turned around, handed over her phone, and then requested the assailant to let her have her line.

39. In the case of *R v Turnbull* [1976] 3 All ER 551, Lord Widgery CJ observed that:

> " the quality of identification evidence is critical; if the quality is good and remains good at the close of the defence case, the danger of mistaken identification is lessened, but the poorer the quality, the greater the danger."

40. It is trite the trial court ought to carefully scrutinize the evidence of a single identifying witness and only convict if satisfied that it was free from the possibility of an error or mistake. In *Wamunga v Republic* [1989] KLR 424, the court stated thus:

> "It is trite law that where the only evidence against a defendant is evidence on identification or recognition, a trial court is enjoined 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 a conviction."

41. However, it is also well settled that the evidence of a single identifying witness can still prove a fact in a criminal trial, and lead to a conviction. In *Ogeto v Republic* [2004] KLR 19, the court stated that:

> " It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken."

42. In this instance, it had been four days after PW1 had been robbed of her phone. She was talking to PW2 and her pastor when she spotted the appellant and immediately recognized him as her assailant. The appellant did not deny these assertions.

43. When PW1 engaged the appellant in conversation asking for her phone, the appellant did not deny knowledge of the PW1's phone. Instead, the appellant gave PW1 another phone, which we deem to be in the nature of an assurance that he would return her phone later.

44. We also find that the learned trial Magistrate made an express finding that there was no possibility of mistaken identity, in the circumstances. Therefore, there is no merit in the appellant's contention that the court failed to caution itself about the evidence of a single identifying witness.

45. Before arriving at the said finding, the trial court made a detailed analysis of the evidence on the question of identification. Therefore, his finding on that issue was properly rooted in actual evidence.

46. In the circumstances, we find that PW1 properly identified the appellant as her assailant.

47. It is well settled that the doctrine of recent possession allows the court to infer guilt when the accused is found in possession of recently stolen property under unexplained circumstances. In the case of *Eric Otieno Arum v Republic* [2006] eKLR, the court stated as follows:

> "In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

48. The elements of the doctrine of recent possession were laid out in the case of *Isaac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic*, Cr App. No. 272 of 2005 (UR) where this court held thus:

> " It is trite that before a court of law can rely on the Doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof;
>
> i. that the property was found with the suspect;
>
> ii. that the property is positively the property of the complainant;
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> iii. that the property was stolen from the complainant;
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> iv. that the property was recently stolen from the complainant.
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> The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other".

49. During his conversation with PW1 and PW2, the appellant exchanged phone numbers with both of them so that he could call either of them when he was ready to return PW1's phone.

50. From his conduct, the appellant confirmed that he knew how he would retrieve the phone which PW1 had lost to the robber.

51. It was therefore not surprising that soon after his arrest, the appellant contacted his friend, who then delivered PW1's phone to the police station.

52. In the circumstances, we find that the court was right to have invoked the doctrine of recent possession, as the appellant demonstrated by getting his friend to bring the phone to the police station.

53. Section 296(2) of the *Penal Code* and the case of *Oluoch v Republic* [1985] KLR outline three circumstances that need to be proven to sustain a conviction for an offence of robbery with violence. The prosecution need only prove one. The circumstances are that:

> " a). The offender is armed with any dangerous or offensive weapon or instrument;
>
> b. The offender is in the company of one or more person or persons; or
>
> c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

54. From the evidence on record, we are satisfied that two elements of robbery with violence were proved beyond any reasonable doubt. The appellant was armed with a dangerous weapon, a knife. He also threatened to use violence on PW1 when he attacked her from behind and held the knife to her stomach.

55. In the circumstances, we find that the prosecution's case against the appellant was overwhelmingly credible.

56. Finally, on the issue of the sentence, the respondent made a concession and invited us to substitute the death sentence with one of imprisonment.

57. We are satisfied that the concession was proper in the circumstances. Our conclusion is informed by the decision in the case of *Anthony Mwanzia Mbizi v Republic*, (*supra*).

58. In the result, the appeal against conviction is dismissed.

However, the appeal against the sentence is allowed; and we

hereby set aside the death sentence, and we substitute it with a sentence of 15 years imprisonment.

59. As the appellant was in custody during the trial, we order, (pursuant to Section 333(2) of the *Criminal Procedure Code*) that the sentence shall be computed from the date when the appellant took the plea.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF MAY, 2024.

F. TUIYOTT

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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