Omera v Republic (Criminal Appeal E066 of 2022)
[2024] KECA 720 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 720 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E066 OF 2022

FA OCHIENG, LA ACHODE & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

NICHOLAS ODHIAMBO OMERA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Judgment of the High Court of Kenya at Eldoret (H. A. Omondi, J.) dated 9th May 2019 in HC.CR.A. No. 103 of 2018))

JUDGMENT

1. The appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that; on 5th August 2016 at Kapsabet township, KCB area within Nandi County, the appellant, jointly with another not before the court, robbed Giddy Ondari of a red motorcycle registration Number KMDV 282, make Honda, engine No. SDH, 52FM1-363-21360, chassis No. BF-OJA 3094FS401357, valued at Kshs. 100,000 and at or immediately after the time of such robbery used actual violence on the said Giddy Ondari, by cutting him on the head with a panga.

2. The appellant denied the charges and soon thereafter a trial ensued. After the trial, the appellant was found guilty of the offence of robbery with violence. He was accordingly convicted and sentenced to death.

3. According to the complainant who was a boda boda rider employed by PW2, on the material day at about 10:30 pm, he was at the stage opposite Sasa petrol station waiting for a client, when he was approached by two youthful men. They requested him to take them to KCB. While leaving the stage, PW3 tried to stop him but the two men did not want him to stop.

4. When they arrived, while he was waiting for payment, one of them attacked him with an axe, which cut his head, and he lost consciousness. He woke up two weeks later at the Moi Teaching and Referral

Hospital. He did not know the two men he had carried. He told the court that it was at night and he did not know who he was carrying. However, PW3 told him that he knew Omera, the appellant, and that he was one of the two men he had carried that night. That night, he was robbed of the motorcycle which was never recovered.

5. According to PW2, he was the owner of the stolen motorcycle and he had employed the complainant to operate a boda boda business. When he received information that the complainant had been robbed and hospitalized, he searched for the motorcycle but could not find it. PW3 informed him that he had seen the complainant carrying the appellant, and shortly thereafter he heard that the complainant was injured. A search was mounted for the appellant, who upon seeing PW2 ran to the police station where he was arrested. PW2 produced receipts for the motorcycle, a logbook, and inspection report as exhibits.

6. PW3 told the court that he had just locked up his shop on the material night at around 10:30 pm and was passing through Sasa Petrol Station and Choma when he saw the complainant carrying two passengers. He knew the appellant as Omera, and he had a reputation as a bad boy. The other passenger was Glade. He tried to stop him but the passengers beckoned the complainant to ride on. He then went to Destiny where he took a motorcycle and went home. 15 minutes later, he received a call from PW2 who informed him of what had happened.

7. On cross-examination and re-examination, PW3 maintained that he knew the motorcycle the complainant was riding as KMDV XXXX and that he had seen the appellant on the said motorcycle at Naivas with the help of security lights.

8. PW4 was the appellant's ex-girlfriend. She testified that she was outside Club Destiny at about 10:30 pm and she had seen the appellant board a motorcycle with another person from Club Destiny going towards the mosque. She told the court that she recognized the appellant because he had called her and there was electricity light.

9. On 15th August 2016, the appellant was lured to his arrest when he called PW4 but her husband received the call and told her to go to Kichinjio. On cross-examination, PW4 told the court that the appellant came close to her and showed her a panga.

10. PW5 examined the complainant at Kapsabet County Hospital. He noted that the complainant had a deep-cut wound on the left side of the head with massive bleeding. The complainant also had left-sided weakness and associated numbness. He confirmed that the complainant had lost consciousness after the attack and that the possible weapon used to attack him was a sharp object. The degree of the injury was assessed as harm.

11. PW6 received a report about the incident and he later rearrested the appellant.

12. Put to his defence, the appellant in his unsworn statement informed the court that he was selling groundnuts at the stage on 15th August 2016 when he was apprehended by three motorcycle operators who forced him to go to the police station with them. He told the court that he had a grudge against PW2 and PW3 over PW4 who had vowed that he would regret it one day.

13. The trial court held that the evidence sufficiently proved that the complainant had been robbed of the motorcycle in the course of which he had sustained injuries. The defence was rejected for being weak and lacking elaboration.

14. Aggrieved, the appellant appealed to the High Court on the grounds that the prosecution case had not been proved beyond a reasonable doubt; the evidence was falsified and skewed; and his defence was rejected unfairly.

15. The learned Judge held that the contradictions in the dress description were not fatal enough to warrant interfering with the trial court's finding because it was clear that the appellant was well known to PW3, PW3 was able to see all three people on the motorcycle with the aid of security lights, and PW3 identified the appellant not by how he was dressed but by physical appearance.

16. The learned Judge held that the evidence proved that: the complainant was attacked by the appellant who was in the company of another; before being robbed there was violence meted on him; he was robbed of the motorcycle; identification was free from error; and consequently, the conviction was safe.

17. The learned Judge took into consideration the value of the property, the nature of the violence meted; and the residual effects of the violence on the complainant, who remained unconscious for two weeks and who was discharged with partial paralysis in holding that the spirit of Muruatetu & Another v Republic could attempt to curtsy at the appellant. The sentence against the appellant was, therefore, upheld.

18. Dissatisfied with the judgment on both conviction and sentence, the appellant lodged this appeal in which he raised five (5) grounds of appeal to wit that;

    a. The appellate court erred in failing to hold that the trial court based its conviction on contradictory and uncorroborated evidence.

    b. The appellate court erred in failing to hold that the trial court shifted the burden of proof to the appellant.

    c. The appellate court erred in failing to evaluate the appellant's defence.

    d. The appellate court erred in failing to consider that the trial court misconstrued the circumstances of the arrest of the appellant.

    e. The appellate court erred in failing to note that the prosecution did not prove their case beyond reasonable doubt.

19. When the appeal came up for hearing on 6th March 2024, Mr. Githaiga, learned counsel appeared for the appellant whereas Ms. Oduor learned Senior Principal Prosecution Counsel appeared for the respondent. Counsel relied on their respective written submissions.

20. The appellant submitted that it was unlawful for the court to record unsworn evidence from an accused person when the accused wishes to give sworn evidence. He pointed out that his rights under Article 50(2)(k) of the *Constitution* on the right to a fair hearing were violated, as the appellant opted to give sworn testimony. Still, the trial court recorded an unsworn testimony.

21. While relying on the *Amber May v Republic [*1979] eKLR case, the appellant submitted that the trial court should have explained the consequences of giving a sworn or unsworn testimony. The appellant pointed out that he was prejudiced when the court recorded an unsworn testimony because the prosecution did not get the chance to cross-examine him, and his defence was not considered by the trial court in arriving at its conclusion.

22. The appellant submitted that the lapses and the contradictions that formed part of the prosecution's case were notable and they go to the root of the matter. He faulted the appellate court for failing to re-evaluate the said contradictions, thereby occasioning an injustice. He pointed out that the witnesses gave different accounts of the weapon used in the incident, and the number of persons involved.

23. The appellant relied on the case of *Moses Nato Raphael v Republic* [2015] eKLR in submitting that the prosecution case was not proved beyond reasonable doubt and that the burden of proof was shifted.

24. The appellant argued that none of the elements set out in the case of *Oluoch v Republic* [1985] eKLR were proved as the certainty of the weapon used, the company of persons, and the identity of the person responsible were not proved. In any event, the prosecution failed to produce the weapon before the court as evidence of force used.

25. While relying on the *Francis Muruatetu & Another v Republic* [2017] eKLR case, the appellant submitted that the trial court failed to consider his mitigation; that he was a first offender, while passing his sentence. He was of the view that the death sentence meted out was not appropriate in the circumstances and prayed for an alternative sentence.

26. Opposing the appeal, the respondent relied on the provisions of Section 296(2) of the Penal Code in submitting that the prosecution had proved the case against the appellant, as all the ingredients of the offence of robbery with violence were met; the complainant was attacked by two young men who posed as pillion passengers, they used a sharp weapon and injured the complainant on the head before they took off with the motorcycle.

27. The respondent pointed out that although the complainant did not identify his assailants, PW3 categorically stated that he saw the complainant carrying two pillion passengers whom he was able to identify. He identified the appellant as Omera and said that he wore a white jacket. 15 minutes later, he was informed of the robbery and injuries of the complainant.

28. This evidence was corroborated by that of PW4 who stated that she saw the appellant board a motorcycle going towards the mosque. She was able to recognize the appellant as he was her ex-boyfriend, and also because the appellant had called out her name. She also testified that the appellant had a panga on his belt when he boarded the motorcycle.

29. The respondent submitted that both PW3 and PW4 stated that they were able to recognize the appellant because he was a person known to them, and that there were security lights in the buildings and in the streets which enabled them to clearly see the appellant.

30. The respondent pointed out that although the complainant stated that he was attacked using an axe and PW4 stated that the appellant had a panga, the complainant did not see his assailants' attack as he was ambushed. However, it was not in doubt that a sharp object was used to inflict injuries on the complainant.

31. The respondent submitted that the appellant when put to his defence, he chose to narrate how he was arrested. He did not controvert the evidence of the prosecution witnesses. In any event, the prosecution linked him to the offence.

32. We have carefully considered the record of appeal, the submissions, the authorities cited, and the law. The issues for determination are whether or not the contradictions in the prosecution case went to the root of the case; whether the appellant was accorded a fair trial; whether or not the case against the appellant was proved beyond a reasonable doubt; and whether or not the sentence meted against the appellant was lawful.

33. position was reiterated in the case of This being a second appeal, we are legally constrained to consider only issues of law raised in the appeal and not to consider matters of fact that had been determined by the trial court and the appellate court on the first appeal. This is by dint of Section 361(1)(a) of the *Criminal Procedure Code*. This *M'Riungu v Republic* [1983] KLR 455 where the court stated thus:

> " 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."

34. The appellant pointed out the inconsistencies that marred the prosecution case. To determine the issue of contradictory evidence, we are being called upon to revisit the record and proceedings before the trial court to verify whether or not they were substantive in the evidence tendered by the prosecution. As a second appellate court, we are minded to determine matters of law only.

35. However, it is trite that in any criminal trial, where several witnesses testify, there are bound to be contradictions or some inconsistencies. Such inconsistencies or contradictions may be ignored if they do not go to the root of the prosecution case, otherwise, they should be resolved in favour of the accused person. In the case of *Richard Munene v Republic* [2018] eKLR, the court stated thus:

> "Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved, they must be resolved in favour of the accused.
>
> It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

36. From the record we note that there were no significant contradictions that would persuade this Court to overturn the trial court's decision. The witnesses recounted what happened. The trial court, which had the opportunity to see and hear the witnesses; and the first appellate court, which re-evaluated the evidence from the trial court, both found the prosecution witnesses to be credible.

37. It is common ground that the record shows that the appellant stated that he would give sworn testimony. However, on the date of the defence hearing, the trial court recorded unsworn testimony. We have looked at the appellant's defence, he narrated how he was arrested by persons whom he had a grudge against. He did not inform the court of anything about the charges leveled against him, save that he was charged with the offence of robbery with violence, and he pleaded not guilty. It follows, therefore, that the appellant cannot be seen to say that he was not given a fair trial as guaranteed by Article 50 of the *Constitution* when his defence could not come to his aid, sworn or unsworn.

38. It is common ground that although the complainant saw and spoke to his assailants when they spoke to him requesting to be taken to KCB, he did not know them. The motorcycle that was stolen was also never recovered. However, the men were known to PW3 who identified them as Omera and Glade. The appellant was also known to PW4 as they had been in a relationship. The appellant contended that the inconsistencies in the witness description of him, were indicative of the lack of a positive identification.

39. In the case of *Sawe v Republic* [2003] KLR 364, this Court held that:

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other

reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the party accused."

40. In the case of *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, the court stated thus:

> "However, it is a truism 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 a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -
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> "It has been said that the evidence against the Applicant is circumstantial. So, it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

41. The appellant and his companion were the last people to be seen with the complainant immediately before he was injured and the motorcycle stolen. According to PW3, it was only about 15 minutes after he had seen the complainant ferrying the appellant and another, that he was called by PW2 and informed that the complainant had been injured and the motorcycle stolen.

42. It follows, therefore, that the appellant being the last person to have been seen with the complainant before the robbery, had the onus under Section 111 (1) of the *Evidence Act* to explain how and where he parted company with the complainant. Section 111(1) provides that:

"111

(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."

43. Section 119 of the *Evidence Act* provides that:

> " The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

44. It is our considered view that the evidence tendered by the prosecution was watertight. The appellant's defence did not cast any shadow of doubt on the said evidence. We find that the circumstances

surrounding the incident are such that they point to the guilt of the appellant and there are no other co-existing circumstances that could weaken or destroy this inference of guilt. It follows, therefore, that the circumstances in this instance taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellant and none else.

45. The offence of robbery with violence is provided for under Section 296(2) of the Penal Code 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."

46. The ingredients of this offence were aptly discussed in the case of *Oluoch v Republic*, (*supra*), where this Court stated that robbery with violence is committed in any of the following circumstances:

> "(i) The offender is armed with any dangerous and offensive weapon or instrument; or
>
> ii. The offender is in company with one or more other person or persons; or
>
> iii. At or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

47. In the case of *Dima Denge & Others v Republic* [2013] eKLR, this Court stated as follows:

> "The elements of the offence under Section

48. From the evidence on record, we are satisfied that all the elements of robbery with violence were proved beyond any reasonable doubt. The appellant was armed with a sharp weapon. According to PW4, it was a panga. The complainant felt it was an axe as he lost consciousness before he could come to terms with the attack. The appellant was in the company of another person. The complainant was approached by two young men who asked to be taken to KCB. According to PW4, the appellant showed her a panga before he boarded the motorcycle. Lastly, the appellant used actual violence on the complainant which resulted in his hospitalization and partial paralysis.

49. This evidence was not controverted by the appellant. In his defence, he chose to narrate the circumstances surrounding his arrest and did not rebut the testimonies of the prosecution witnesses. In the circumstances, we find that the prosecution's case against the appellant was overwhelmingly credible, it was proved beyond any reasonable doubt.

50. We now move on to consider the appeal against the sentence.

The Supreme Court in the case of *Francis Muruatetu & Another v Republic*, (*supra*), held that:

> "Consequently, we find that Section 204 of the penal code is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

51. Section 296(2) of the *Penal Code* provides that the offender convicted for robbery with violence in circumstances stipulated therein; "shall be sentenced to death."

52. In the case of *William Okungu Kittiny v Republic* (*supra*), this court held that:

> "From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies Mutatis Mutandis to section 296 (2) and 297 (2) of the *penal code*. Thus, the sentence of death under section 296 (2) and 297(2) of the penal code is a discretionary maximum punishment."

53. In our view, what renders a sentence unconstitutional is the fact that the prescribed mandatory sentence completely precludes the court from exercising any discretion, regardless of whether or not the circumstances so require.

54. The current jurisprudence on the issue of mandatory sentences is that it is unconstitutional, as it deprives the court of the mandate to exercise its discretion in such a manner as to do justice in a way that imposes a sentence that is appropriate to the circumstances of the particular case which is at hand.

55. In the light of the current jurisprudence on sentencing, and after giving due consideration to the circumstances in which the offence was committed, we note that the complainant, an innocent man just performing his duties, was condemned to partial paralysis for the rest of his life as a result of the injuries that were inflicted on him. This was a serious aggravating factor. We find that the sentence meted against the appellant was lawful. We also find that the appellant has not demonstrated that the trial court had acted upon wrong principles, overlooked some material factors, considered irrelevant factors, or that the sentence was illegal or was so inordinately excessive to be an error of principle. (See: *Wilson Waitegei v Republic* [2021] eKLR)

56. Accordingly, we uphold the conviction and sentence of the appellant. The appeal is dismissed in its entirety.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.