Akanga v Republic (Criminal Appeal 15 of 2018)
[2024] KECA 1457 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KECA 1457 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 15 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

OCTOBER 18, 2024

BETWEEN

BONIFACE AKANGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega (Majanja, J.) dated 15th November 2017)inHCCRA No. 76 of 2015consolidated with HCCRA 68 & 69 of 2016)

JUDGMENT

1. Boniface Akanga, the appellant, was convicted for the offence of robbery with violence contrary to section 296(2) of the Penal Code and sentenced to death by the Senior Resident Magistrate's Court at Hamisi. Aggrieved by that decision, the appellant moved to the High Court at Kakamega, vide, Criminal Appeal No. 76 of 2016. In a judgment dated and rendered on 15th November,2017, the High Court dismissed the appeal for lack of merit, hence upholding the appellants' conviction and sentence.

2. The appellant was jointly charged with three others, in the Senior Resident Magistrate's Court at Hamisi, with two counts of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of Count 1 were that on the night of 30th March 2014 at Serem market, Shamakhokho Location of Hamisi District within Vihiga County, the appellant and his co-accused while armed with pangas and iron bars, jointly robbed Daniel Kipkosho Masisa of his mobile phone Nokia 1200, a torch and two whistles all valued at Kshs.2,200/= and immediately before the time of such robbery used actual violence on the complainant.

3. The 2nd count stated that on the same date at the same place, while armed with pangas and iron bars, they jointly robbed Habiba Hussein of a Samsung mobile phone valued at Kshs.4,000/= and at time of said robbery struck the complainant with the side of a panga.

4. The particulars of the 3rd count were that on the same night and place, under similar circumstances, they jointly robbed Nasra Hussein of Kshs.200,000/= and a mobile phone Ideos valued at Kshs.8,000/= and during the time of such robbery threatened to use actual violence on the complainant by putting a panga to her neck.

5. The particulars of count 1V were that on the same night and place, under similar circumstances, they jointly attempted to rob Nimo Ahmed of cash and mobile phone; and during the said attempted robbery wounded the complainant on her left leg by cutting her with a panga.

6. They all denied the charges and trial ensued. The trial court, after carefully considering the evidence before it, was satisfied that the prosecution had proved its case beyond reasonable doubt, taking into consideration the time span between the robbery, their arrest; recovery of some of the items stolen during the robbery soon after the incident and positively identified as belonging to the victims, and which they could not adequately explain how they got to be in possession of, thus linking them to the crime. The trial magistrate held that the evidence proved that a violent robbery took place; applied the doctrine of recent possession with regard to recoveries of the stolen properties which linked the persons charged to the crime; and each one of them was found guilty of the 4 counts of robbery with violence; and sentenced to death.

7. The appellant then appealed to the High Court on grounds that the trial magistrate failed to appreciate that there was no independent evidence adduced by the prosecution to link him to the offence; that the evidence was fabricated, speculative, full of conjecture, discredited, unreliable and also lacked probative value; and his alibi defence was erroneously rejected.

8. The High Court having reconsidered and re-evaluated the evidence on record, found that without the witnesses identifying the exhibits and affirmatively confirming that the items recovered were theirs, the court was denied the chance to assess the evidence and make a finding that the items belonged to them; and the appellants were denied the opportunity to cross-examine the witness on the identity and ownership of the items recovered. The learned judge, thus, held that the key element of positive identification the property of the complainant, was not proved on Count I and Ill, and allowed the appeal on those counts; likewise on Count IV which was in respect of attempted robbery of PW3, since nothing was stolen from her, the doctrine of recent possession could not be applied in the circumstances and the learned judge held that the charge was therefore not proved.

9. However, as regards Count II, the learned judge found that PW2 positively identified the phone which was recovered from the appellant as hers; and he failed to give a satisfactory explanation on how he got to possess it. In regard to this charge, the judge upheld the conviction and sentence against the appellant, saying it was based on sound evidence.

10. Being aggrieved by the outcome in the High Court, the appellant has now filed this appeal before us, citing the following grounds:

    a. the first appellate court erred in law by affirming the decision of the trial magistrate despite the fact that there was no evidence on record that the trial in lower court was conducted in a language the appellant understood contrary to the provisions of section 198 of the criminal procedure code;

    b. both lower courts erred in law by failing to consider that his fundamental and constitutional rights under article 50(2)(c) and (j) were violated thus rendering a serious miscarriage of justice.

    c. both courts erred in law by failing to comply with section 169(2) and (3) of the criminal procedure code (chapter 75 laws of Kenya)

d. Both lower courts acted on wrong principle of law based on a misapprehension of the evidence on record.

e. Both lower courts erred in law when they applied the doctrine of recent possession without carefully considering the law governing the same in totality.

f. the High Court erred in law in failing to take into consideration the appellants alibi defence.

g. the High court erred in law in confirming the appellant's conviction which was based on uncorroborated evidence of witnesses.

11. This being a second appeal, we are mindful that we must only be confined to points of law; and this Court will not interfere with concurrent findings of the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See Karingo & 2 Others v Republic [1982] eKLR.

12. The evidence presented was that PW2, Habiba Hussein, a petroleum dealer at Serem, was at home with her children and grandchildren, when at around 1.30am, she was woken up by 4(four) people armed with pangas. They threatened her, while demanding for money. Nasra Hassan PW1, Neema Hasan PW5, and Amram Sala PW6, who were also in the house all testified that several assailants armed with pangas and iron bars broke into the house and demanded money and phones while ransacking the house. PW1 testified that she gave the assailants 200,000/= while PW2 testified that one of the assailants took her Samsung Duo mobile phone. PW5 testified that one of the assailants attacked her and cut her leg. The injury was confirmed by Erick Koskey, PW4, a Clinical Officer at Serem Health Centre who produced the P3 form. Daniel Kipkosho, PW3, the watchman also described how he was attacked by the assailants who took away his Nokia mobile phone – he eventually identified his phone and whistles at the police station. None of the witnesses were able to identify the assailants.

13. The incident was reported to Serem Police Station. Inspector John Oyugi, PW8, who was the Investigating Officer, and PC Francis Shishani, PW7 and other officers went to the scene. After viewing the scene, they proceeded to lay an ambush at Musasa, where they intercepted a passenger vehicle and arrested some of the occupants, while others escaped; after searching the said car found assorted items including phones and a whistle. PW8 who was present at the search confirmed that among the items recovered were PW2's Samsung Duo phone, PW3's Nokia phone and two whistles.

14. The appellant denied involvement in the robbery and testified that he had boarded a vehicle which was stopped by the police who took Kshs.14,000/= from him and he did not know why he was charged.

15. The learned judge noted that the trial magistrate held that while a robbery took place none of the assailants were identified and as such their complicity was established by the doctrine of recent possession, which led to the appellant contending before the High Court that there was no evidence connecting them to the offence.

16. The court, in its judgment, found that proof of any one of the ingredients of robbery with violence was sufficient to establish the offence under section 296(2) of the Penal Code. The High Court was satisfied that a robbery did take place as corroborated by the evidence of the prosecution witnesses. The High Court also noted that since none of the witnesses identified the appellant, the doctrine of recent possession applied to determine the innocence or otherwise of the appellant. In line with the evidence tendered before the trial court, count 1 was in relation to PW3's Nokia phone and whistles, and the court noted that PW3 only identified the items at the Police Station and the recovered items were never identified in his evidence.

17. With regard to Count III which concerned PW1, the recovered items were not also identified in her evidence in chief and as a result the court found that Counts I & III were not proved. However, with relation to Count 2, the court noted that PW2 identified her phone and that PW8 recovered the said phone from the appellant. The appellant was not able to explain how he came into possession of PW2' phone or lay claim to it and that the said phone was recovered a few hours after the robbery. This is what the learned judge stated:

> "...the 2nd appellant did not explain how he came into possession of PW2's phone nor lay claim to it. The phone was recovered within a period of 5 hours after the robbery had taken place hence the irresistible evidence is that he was involved in the robbery. Whether the other accused are implicated depends on whether the 1st and 3rd appellants can be said to be in possession of PW2's mobile phone which was found in actual possession of the 2nd appellant ... in their respective defences, the appellants stated that they had boarded the vehicle on their own and although they were found with assorted goods, including mobile phones, the prosecution did not prove these items belonged to the witnesses. The prosecution did not also prove that the appellants knew each other independently of being found in the same car. I give the 1st and 3rd appellants the benefit of doubt and hold that they were not in possession of PW2's mobile phone."

18. With regard to the provisions of section 198 of the Criminal Procedure Code, the appellant argues that his fundamental and constitutional rights under article 50(2)(c) and (j) were violated, as the trial did not indicate the language used by all the witnesses during trial; that as a result, most of the witnesses were never cross-examined. The appellant further submits that the trial proceeded despite the indication that he was not ready to proceed as he had not yet received witness statements thus denying him enough time and facilities to prepare for defence. The respondent did not address this ground, and we also take note that it was never raised at the first appeal – we thus have no basis upon which to address it.

19. The appellant also laments that the two courts below, failed to comply with section 169(2) and (3) of the Criminal Procedure Code, pointing out that the learned judge in his judgement at page 7 in his findings held that:

> "I therefore find that the failure to comply with section 169(2) of the criminal procedure code was not fatal to the prosecution case and did not occasion any justice."

20. In support of this submission, reference is made to the case of *Gerald Macharia Githuku vs. Republic, HCCR No.119 of 2004*. The appellant also submits that the findings of the courts below were based on a misapprehension of evidence on record regarding who had the recovered phone belonging to PW2; and that both lower courts put into account extraneous matters that were neither in evidence nor proved.

21. In opposing this ground, the respondent submits that the ingredients of the offence, namely that the offender was armed with a dangerous weapon or instrument; he was in the company of more than one person; and that at the time of the robbery, he used violence to the victim, as was set out by this Court in the case of Johana Ndungu v Republic [1996], Eklr were proved.

22. In relation to the application of the doctrine of recent possession, it is submitted that there were co-existing circumstances which pointed to other persons as having been in possession of the alleged items; that this was further compounded by the contradiction as to the number of persons who were found inside the motor vehicle; and that no inventory forms were prepared during recovery and signed by the purported suspects to clear doubts.

23. The respondent, while acknowledging that none of the witnesses identified the assailants during the incident, nonetheless, points out that upon the arrest of the appellant, part of the stolen items were recovered from him, within hours after the robbery; and since he was found in possession of very recently stolen property, section 111 of the *Evidence Act* shifted the burden of proof to the appellant to offer a plausible reason; and he failed to offer a reasonable explanation when granted the opportunity. That the doctrine of recent possession was aptly invoked and all the 4 essential ingredients espoused in the case of Eric Otieno Arum v Republic [2006] eKLR were satisfied in terms of the possession being positively proved, as the property was found with the appellant; the property was positively identified by the complainant as the one that was recently stolen from her; thus, the trial and the High Court were justified in invoking the doctrine of recent possession.

24. It is the appellant's contention that both lower courts neither analysed his defence nor considered the law regarding the alibi defence; and we are urged to consider the decision in Karanja v Republic [1983] eKLR 5001. The appellant complains that the trial court never requested the prosecution to avail the appellant's named employer to confirm where he was; It is further submitted that in any event, the appellant was not positively identified by the prosecution witness.

25. As regards the issue of sentencing, the appellant submits that the death sentence was manifestly excessive and that the courts below ought to have exercised discretion in sentencing and considered the circumstances of the appellant. On this ground, the respondent submits that the circumstances where an appellate court can interfere with the sentence of the trial court were well cited in Nillson v Republic [1970] E.A 599 following the reasoning of the court in Ogalo s/o Owuora v Republic [1954] 21EACA 270 as follows:

> " The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in James v Rex [1950], 18 EACA 147, it is evident that the judge has acted upon some wrong principle or overlooked some material. The offence of robbery with violence is contained in sections 295 and 296(2) which provides for the sentence as death. The respondent argues that judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity [1912] C.CA 28 T.LR 364."

26. In supporting the findings on sentence, the respondent's counsel points out that section 296(2) of the Penal Code prescribes the death penalty as the sentence for the offence of robbery with violence; that, the death penalty is lawful and is still applicable as per the directions in *Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015*) [2021] KESC 31 (KLR) (6 July 2021) (Directions)., and we are thus urged to uphold the sentence.

27. The elements of the crime of robbery with violence were set out by the court of appeal in the Case of Oluoch v Republic [1958] KLR, and elaborated in the case of Dima Denge Dima & Others v Republic Criminal Appeal No. 300 of 2007 thus:

> " The elements of the offence under section 296(2) are three and they are not be read conjunctively, but disjunctively. One element is sufficient to find an offence of robbery with violence."

28. Looking at the testimony of PW1, 2, 3, 4, 5 and 6 we concur with the findings of the judge that the robbery did indeed take place on the night of 30th March 2014. This Court notes that it is not in dispute that none of the prosecution witnesses identified the appellant. Indeed, we can safely conclude that the conviction of the appellant was not based on identification but on the doctrine of recent possession which the appellant addresses in his supplementary submissions dated 4th October 2023. Taking into consideration that the High Court found that none of the prosecution witnesses identified the appellant, we must now determine whether the High Court erred in upholding the conviction on the basis of the doctrine of recent possession.

29. This Court (constituted by a different bench) has summarized the essential elements on the doctrine of recent possession in Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR:

> " Before a court of law can rely on the doctrine of recent possession as a basis for conviction, the possession must be positively proved. There must be proof that first the property was found with the suspect, secondly that the property is positively the property of the complainant, and thirdly the property was stolen from the complainant..."

30. Once the primary facts are established, the appellant bears the evidential burden to provide a reasonable and/or plausible explanation for the possession. (See *Paul Mwita Robi vs. Republic Ksm Criminal Appeal No. 200 of 2008*). We concur with the trial judge that the prosecution did establish the primary facts as set out in the Arum Case(supra); further that the appellant did not have a reason and/or plausible explanation as to why PW2's phone which was so recently stolen, infact, within hours after the event, was found in his possession.

31. On the issue of sentence, this Court having found that the elements of robbery with violence had been proved beyond reasonable doubt by the prosecution, the lawful sentence prescribed under the Penal Code for the offence of robbery with violence, is death. A live issue that is raised in this appeal, is whether the sentence is harsh, illegal and/or inappropriate, despite the prescription under section 296(2) of the Penal Code.

    It is the appellant's contention that the sentence meted out was manifestly excessive; and that the Magistrate's and High Courts ought to have used discretion during sentencing, to give a sentence other than the mandatory prescription. We note from the High Court's record, and the grounds of appeal at the High Court that the issue of sentence was never raised in the High Court. This being a 2nd appeal the appellant cannot now turn around and ask this Court to make a finding on sentencing when it was never raised in the High Court.

32. The question left for this Court to now answer is whether there is any lawful reason to interfere with the sentencing of the High Court. In this case the ingredients of robbery with violence have been met. The appellant robbed the complainant, and in the course of the robbery was armed with a dangerous weapon which he used to injure the complainant; further, the appellant was also found with PW2's phone with no plausible reason and or explanation as to how and why he was in possession thereof.

33. There has been a lot of debate regarding the constitutionality of the death sentence, but we are cognizant that the Penal Code prescribes the death sentence for the offence of robbery with violence and that sentence is still legal. This is fortified by the Supreme Court's decision in Muruatetu II (supra) and we decline to interfere with the sentence.

34. Consequently, we find that this appeal lacks merit; we uphold the judgment of the High Court and affirm the death sentence. The appeal is thus dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 18TH DAY OF OCTOBER, 2024.

HANNAH OKWENGU

JUDGE OF APPEAL

.....

H. A. OMONDI

JUDGE OF APPEAL

.....

JOEL NGUGI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR