Shitombole v Republic (Criminal Appeal 20 of 2019)
[2024] KECA 1857 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1857 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 20 OF 2019

MA WARSAME, JM MATIVO & WK KORIR, JJA

DECEMBER 20, 2024

BETWEEN

GEORGE SHITAKA SHITOMBOLE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Naivasha (Mwongo, J.) dated 18th October, 2018 in H.C.CR.C No. 159 of 2015)

JUDGMENT

1. George Shitaka Shitombole (the appellant) and Joel Muguku Wachira were jointly charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars were that on 12th October, 2013 with others not before court at Kikopey Area while armed with offensive weapons namely, pangas and rungus, they jointly robbed Willy Kinuthia Mbugua of motor vehicle registration Number KBB 355D make Mitsubishi canter, one mobile phone make Nokia Asha, one driving licence, one national identity card and cash Kshs.840/- all totaling to Kshs.1,240,000/- and robbed Joel Njoroge of one mobile phone make MK 4N,a pair of shoes, one driving licence, one national identity card and cash Kshs.700/- all totaling to Kshs.5,500/- and during the time of such robbery used actual violence on the said Willy Kinuthia and Joel Njoroge.

2. After trial, they were convicted and sentenced to death. Their convictions and sentences were confirmed by the High Court (Mwongo, J.) sitting as the first appellate court.

3. The concurrent findings of fact by the lower courts were that Willy Kinuthia (PW1), who was a canter driver, received a call on 3rd October 2013 from an individual who identified himself as Njihia, claiming he required transportation services for manure from Gilgil to Memo. Njihia sent a deposit of Kshs.2000 for fuel and they agreed they would meet on 6th October 2013 to transport the manure together.

4. When the day arrived, Njihia was a no-show. He called PW1 claiming that he had been arrested by CID while repairing a tyre puncture on his vehicle. This was affirmed by an alleged CID officer who called PW1 to confirm the arrest. Njihia however promised to call again.

5. On 10th October 2013, Njihia called PW1 alleging that he had a new customer-a priest, and required the services of PW1 to transport the manure. The cost of transportation was agreed at Kshs.12,000/-.

6. On 12th October 2013, PW1 and his turnboy, Joel Njuguna (PW4), embarked on the journey at 4 a.m. Again, Njihia did not turn up, but instructed PW1 to pick up the appellant at Naivasha junction along Nakuru Nairobi Highway. Njihia then instructed them to proceed to

   a place called Nyama Choma where they would find an individual who would direct them. They picked up the individual, and as they proceeded on the journey he asked PW1 to stop the vehicle so he could talk to two men who were walking along the road. He obliged and while waiting, he and PW4 were forcibly removed from the vehicle by a man wielding maasai sword and the man they had just picked up who was now carrying a panga. To their surprise the appellant also joined the assailants. They were then beaten, robbed of their phones, wallets and cash; tied up and given a bitter liquid to drink and fell unconscious.

7. They eventually woke up and managed to untie each other. They realised that their vehicle had also been stolen and walked to Nyama choma and alerted police officers at Kikopey Police Station. They were taken to Gilgil hospital where they were treated and discharged.

8. The investigating officer, Nzioka Singi (PW5) used Safaricom data to trace PW1's phone which was active and being used by someone at Kinamba- one Joseph Karanja Njau who ran a radio repair shop. Upon arrest Joseph, informed the police that he had purchased the mobile phone from the appellant, who was well known to him for Kshs.1,700/- and even lured the appellant to his shop where he was also arrested.

9. The appellant told PW5, that he had gotten the phone from Njihia who was a shylock and led the police to him. Upon arrest, the individual identified himself as Joel Muguku Wachira.

10. Subsequently, an identification parade was conducted by pw6- Inspector John Owuoth. PW1 and PW4 identified the appellant as one of the assailants who robbed them after spending more than an hour with him after picking him up at Naivasha Junction.

11. It is on the basis of the foregoing identification that the prosecution charged the appellant and Joel Muguku with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. At the close of the prosecution's case the appellant was placed on his defence while his co-accused was acquitted for lack of evidence.

12. In his sworn evidence, the appellant denied committing any of the offences and maintained he had been framed by the police. He stated that on 8th October, 2013 at around 7 p.m. he was at destiny's bar when two policemen walked in and hand cuffed him. He was told that if he did not give them money he would face serious charges including theft of a motor vehicle. Since he had no money, he was booked, interrogated and tortured. He was taken to an identification parade where two people came up to him and touched him and was later charged with the offences in question.

13. The trial court addressed its mind on the evidence on record and was convinced that the identification evidence was not only positive and free from error but also placed the appellant at the scene of the crime as one of the perpetrators, and the person who sold PW1's stolen phone to PW4 thus linking him to the crime. As such, the appellant was convicted on both counts of robbery with violence and sentenced to death. Aggrieved with that decision the appellant

preferred an appeal in the High Court (Mwongo, J.) which equally concurred with the trial court's findings and vide a judgment dated 18th October, 2013 upheld his conviction and confirmed the sentence meted out to him.

14. This second appeal is premised on three grounds outlined in the Memorandum of appeal. That learned Judge erred in law by-

    a. Upholding the appellant's conviction and sentence on faulty identification evidence

    b. Convicting the appellant on the basis of an identification parade which did not meet the required legal standards.

    c. Shifting the burden of proof to the appellant

15. Miss Cherono, learned counsel for the appellant however failed to submit on the grounds pleaded and instead posited through written submissions that the appellant was greatly prejudiced in his defence due to the states' failure to accord him free legal representation in the trial court as articulated in Article 50(2) of *the Constitution*. Citing the case of Douglas Kinyua vs Republic [2015] eKLR she emphasised that "under the current Constitution an accused person is entitled to legal representation at the state's expense during trial where substantial injustice would otherwise arise in the absence of such legal representation."

16. Secondly, she submitted that the sentence imposed was harsh and manifestly excessive. Relying on the Supreme Court Case of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR she

    submitted that mandatory sentences dehumanised offenders by failing to give credence to mitigation and taking away the discretion of the court. She faulted the trial court for failing to consider the appellant's mitigation and emphasised that the Court should take into consideration mitigating and aggravating factors as listed in the Judiciary's Sentencing Policy Guidelines. She urged that a substitution of 20 years would be appropriate.

17. Opposing the appeal, Mr. Omutelema who appeared for the State, asserted that the identification of the appellant was safe and justified his conviction. He added that the incident occurred in broad daylight and the complainants had interacted with the appellant for a considerable period of time negating the possibility of mistaken identity. In any event, the complainants also identified the appellant in an identification parade which was conducted by the book. It was further submitted that the appellant was in recent possession of the stolen phone as was evident from the fact that he sold it to PW2 only two days after the robbery. He urged us to dismiss the appeal which he considered unmeritorious.

18. This being a second appeal and by dint of Section 361 of the Criminal Procedure Code, this Court is restricted to addressing itself on matters of law only. Under that section, severity of sentence is a matter of fact and is therefore not open to this Court for consideration as urged by the appellant. Again, the severity of the sentence was not in issue before the first appellate court and as such we cannot make any pronouncement on the issue.

19. In addition, having gone through the record we note that the issue of the appellant's representation was also never raised in the first appellate court and what's more, it is not a ground of appeal in the memorandum of appeal filed by the appellant in this Court. We also cannot help but note that it was raised for the first time in the appellant's submissions and as per Rule 74(a) of the Court of Appeal Rules such submissions should not have been made without leave of the Court.

20. Consequently, we are of the view that the sole issue for our determination is whether the appellant was correctly identified as an assailant in the robbery.

21. This court has in a myriad of cases stated that evidence of visual identification is of great importance in criminal cases but if not properly evaluated and tested can cause a miscarriage of justice to an accused person. In the case of R vs. Turnbull and others (1976)

3 All ER 549, Lord Widgery C.J. had this to say on the issue identification of an accused person:-

> " First, wherever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the Judge should warn the jury of the special need for caution before convicting the accused in reliance to the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a
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> convincing one and that a number of such witnesses can all be mistaken. Secondly, the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?"

22. Were the circumstances in this case favourable for the positive identification of the assailant? We have gone through the evidence on record. It is evident that both PW1 and PW4 testified that they spent more than one and a half hours with the appellant after picking him up at Naivasha Junction and prior to the robbery. It was daytime and he sat between them as they conversed freely during the journey. PW1 even stated that he bought milk as a refreshment for his companions as he had no reason to suspect him.

23. Again, there was the identification parade, conducted by PW6 which was in accordance with the law as outlined in Section 6 of the Force Standing Orders where the appellant was the only one identified by the complainants as the assailant.

24. PW6 who conducted the identification parade gave a detailed account of what transpired during the parade. He stated that he conducted the parade consisting of nine individuals in the cells while the witnesses were kept in his office thus the witnesses could not see members of the parade until they participated. The appellant also confirmed that he signed the parade form upon its conclusion. We find that the veracity of the identification of the appellant was successfully tested through an identification parade which was properly conducted and that the appellant was identified as one of the assailants.

25. Lastly there was evidence to the effect that the recovered mobile phone was traced to Joseph Karanja Njau who disclosed that he had purchased the same from the appellant a few days after the robbery and led the police to his arrest.

26. The doctrine of recent possession applies where there is unexplained possession of recently stolen goods which raises an adverse inference that the possessor is guilty of their theft.PW1 identified the recovered phone as the one which was stolen during the robbery and PW5, CI Nzioka Singi was able

to obtain Mpesa printouts which showed that Joseph Karanja was using the stolen phone and that the appellant was using the phone prior to selling it to him.

27. At trial, the appellant did not address whether or not he knew Njau or whether or not he sold him the phone, nor did he provide any xplanation as to how the stolen phone came to be in his possession (if at all) within a short span after the robbery. He avoided the matter entirely. We therefore find that there is no basis to disturb the trial Court's and High Court's findings on the application of the doctrine of recent possession, and the subsequent conviction of the appellant for the offence of robbery with violence based on the application of the doctrine.

28. In the end, we agree with the Courts below that the identification of the appellant was proper and safe to sustain his conviction for the two counts of robbery with violence. We think we have said enough to demonstrate that this appeal is devoid of merit and is hereby dismissed.

DATED AT NAKURU THIS 20TH DAY OF DECEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR