Isoe v Republic (Criminal Appeal 104 of 2019)
[2023] KECA 27 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KECA 27 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 104 OF 2019

FA OCHIENG, LA ACHODE & WK KORIR, JJA

JANUARY 26, 2023

BETWEEN

PHILIP NJOKA ISOE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (D. Kemei, J.) delivered and dated 22nd November, 2018 in HC CR. A. No. 35 of 2017)

JUDGMENT

1. We have been called upon to render ourselves on a second appeal lodged by Philip Njoka Isoe, the appellant herein. The appellant was charged and convicted for the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. He also faced an alternative charge of handling stolen property contrary to section 322(1) of the *Penal Code*. The offence is alleged to have been committed against Daniel Lang'at with respect to motorcycle registration number KMDU 768C of TVS star model at showground village in Kapsabet within Nandi county. The appellant was found guilty and sentenced to life imprisonment.

2. The appellant being dissatisfied with the judgment of the trial court lodged an appeal before the High Court (the first appellate court). The High Court in its judgment dismissed the appeal in its entirety. The appellant is now before us on a second appeal.

3. In summary, the case against the appellant was that the complainant (PW1) was a bodaboda rider and on June 9, 2016 he was instructed by the appellant to ferry him to Dr Cleophas. He had, on the previous day, ferried the appellant to Wanja's place. While on the way to Dr Cleaphas' place, the appellant asked the complainant for his helmet claiming that he had an allergy. The complainant obliged and upon arriving at the gate, the appellant told him that he had passed the gate. The appellant then jumped off and alighted, after which he proceeded to attack the complainant. Following the attack, the

complainant lost consciousness. On regaining consciousness, the complainant saw a motorbike rider, whom he informed that he had been hit and robbed of his motorbike.

4. The complainant went to Kapsabet County Referral Hospital where an x-ray was done and he was found to have sustained a fracture near his right eye. He was stitched and after two days he was taken to Mediheal Hospital Eldoret for CT-Scan. He later reported to the police and recorded a statement. His fellow riders asked for his motor cycle registration number which he cited as being KMDU 768C make TVS. He also informed them of the person who took it. Later on, he received information from the riders that they had arrested someone. He went to the police where he identified the appellant.

5. Simon Kipketes (PW2) gave evidence that he was the chairperson of bodaboda group Nandi Hills and that he and other bodaboda riders left Nandi Hills for Kisii looking for PW1's motor cycle. On their way back, they made a stop where upon they were informed that there was someone taking tea and had a folded motor bike. The person said his name is Philip and he was headed to Nairobi from Kapsabet. In the process he saw a crowd gather. He called CID Nandi Hills and he was escorted to Kimwah. The motor cycle KMDU 768C was taken and driven away; and when they reached Chebarus primary the appellant fell on the tarmac and injured himself. The appellant was arrested and the motor cycle was recovered.

6. Police Constable Samuel Maka (PW3) stated that on June 12, 2016 alongside PC Omondi they went to Nandi Hills police station and met the arresting officer PC Mutindwa who assisted him in tracing the chairman of the motor cycle association Nandi Hills (PW2) whose statement he recorded.

   He visited the scene and later collected the motor cycle which he took to Kapsabet. His evidence corroborated that of PW1 and PW2. Danson Githenji (PW4) confirmed that PW1 was admitted at the hospital where he worked. PW1 had history of head trauma and had blood stained clothes. He stated that PW1 had cracked lower incisor teeth and a skull CT-Scan revealed that he had a minimally depressed fracture of the right temporal bone with underlying bleeding under the skull that was clotted. That there was a right fracture zygomatic part but not displaced and the approximate age was 2 days. He stated that the probable weapon was sharp. That the wound which was 5 cm, long was stitched.

7. Police Constable Mutinda (PW5) who was the arresting officer, stated that he was on mobile patrol when he was called by the OCS chief inspector John Kiarie who alerted him that there was a suspect who had a motor cycle that was suspected to have been stolen and was being assaulted by members of the public. He and his colleague Sila went to Chebarus area and found that bodaboda operators had already arrested the appellant. That the appellant had been arrested after he had jumped off the motor cycle and got injured. That the appellant lost his teeth and was bleeding.

8. Placed on his defence, the appellant denied comprehension of the charges he faced. He asserted that he was in Nairobi when he received a call from his father informing him that his brother was in hospital and had been operated on. He alighted to get direction and that is when he was subjected to mob justice. He was laid on the tarmac and he surrendered when he was overwhelmed.

9. From his memorandum of appeal and the supplementary grounds of appeal, we discern that the appellant raises 4 grounds of appeal which can be summarised as follows; first, the appellant challenges the decision of the first appellate court on grounds that the court failed to note that the charge sheet was defective. The second ground is that the offence was not proved to the required standards as the evidence on record was marred with contradictions and lack of corroboration. Third, that his defence was not considered by the two courts below. And finally, the appellant challenges the sentence on grounds of illegality.

10. This matter was mainly canvassed by way of written submissions. First, the appellant submitted that the charge sheet was not only defective but was also duplex and therefore his conviction should be quashed. He pointed out that the date and time of the alleged robbery and recovery of the motor cycle are contradictory and ambiguous and cannot therefore sustain the conviction.

11. On duplicity, he submits that he ought to have been charged under section 296(2) as opposed to being charged under section 295 as read with 296(2) of the *Penal Code* as was in the charge sheet. He argues that the charge sheet as framed contained two offences rendering the charge sheet duplex. He places reliance on the decisions in *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR and *Ibrahim Mathenge v Republic*, CR App No 222 of 2014 to buttress his arguments on this point. He further submitted that the defect of duplicity is not curable under section 382 of the *Criminal Procedure Code*.

12. Thirdly, the appellant submitted that the prosecution's case fell short of proving the offence of robbery with violence against him. He argues that the evidence tendered in this respect did not establish all the elements of the offence, to the required standards. He contends that his identity as well as that of the weapon used against the complainant remains a mystery. He also contends that the evidence on record reveals that the assailant was acting alone.

13. On this submission, he relies on the cases of *Mwaura v Republic*[1987] eKLR and *Wamunga v Republic* [1989] KLR 242 to challenge the evidence on record in relation to his identity as the assailant. The appellant also submitted that the doctrine of recent of recent possession was not proved against him as he cannot be said to have been found with the stolen motorcycle. To buttress this submission, the appellant sought to rely on the decision in *Peter Ng'ang'a Kahiga v Republic*, CR Appeal No 272 of 2005.

14. Further, it is also the appellant's submission that his defence was not taken into consideration by the two courts below thereby occasioning him an injustice. He also contends that the two lower courts did not properly analyse the evidence on record, thereby reaching to an unfounded factual conclusion.

15. Finally, on sentence, the appellant prayed for a determinate sentence so as to afford him a second chance in the society and one which, according to him, would envision the spirit of the Supreme Court decision in the Muruatetu case.

16. The respondents in their submissions started off by submitting that the charge facing the appellant was not duplicitous. Counsel reiterated that the rule against duplicity was meant to ensure that no two offences were brought forth against an accused person in one charge. He submitted that in the present case, the two sections as framed, only revealed one offence, and which was robbery with violence.

17. Counsel relied on the cases of *Joseph Onyango Owuor & Another v Republic* [2010] eKLR and *Paul Katana Njuguna v Republic* [2016] eKLR to submit that the offence of robbery with violence contained the elements of the offence of robbery hence there was no harm charging the appellant under the two sections. It was also counsel's submissions that even if we find the charge to have been duplicitous, the same was not prejudicial to the appellant since there was no risk of confusion in the appellant's mind as to which offence he faced.

18. Further, it was also submitted on behalf of the respondent that the case against the appellant was proved beyond reasonable doubt. Counsel urged us to consider the elements of the offence of robbery with violence as established in the cases of *Oluoch v Republic* [1985] KLR and *Dima Denge Diana & Others v Republic*, CR Appeal No 300 of 2007 where the court held that the three elements of the offence of robbery with violence must be read disjunctively and that proof of a single element was sufficient to establish the offence of robbery with violence.

19. On the applicability of the doctrine of recent possession, counsel urged us to adopt the pronouncement of the court in *Erick Otieno Arum v Republic* [2006] eKLR where the court concluded that the doctrine of recent possession could be relied upon to convict an accused person as long as possession is positively proved. Counsel submitted that the evidence on record satisfied all the elements required prior to invoking the doctrine of recent possession.

20. It was also submitted by counsel that both the trial court and the first appellate court duly considered, analyzed and dismissed the appellant's defence.

21. On sentence, it was counsel's submission that the sentence meted out was harsh and excessive in the circumstances and was not in line with the objectives of sentencing. It was finally submitted that this court should uphold the conviction while the appeal against sentence was conceded.

22. This being a second appeal, our mandate under section 362(1)(a) of the *Criminal Procedure Code* is limited to consideration of issues of law only. This position has been reiterated by this court in many of its decisions including in *Adan Muraguri Mungara v Republic* [2010] eKLR where the court stated that:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

23. Upon our independent review and consideration of the record of appeal, submissions and list of authorities by both parties, we will address all the 4 grounds of appeal which we paraphrased earlier in this judgment.

24. We set off by considering the appellant's assertion that the charge sheet was defective. The appellant has submitted before us that the defective nature of the charge sheet arises out of duplicity. To him, the offence of robbery with violence ought to be charged under section 296(2) as opposed to being charged under section 295 as read with 296(2) of the *Penal Code*, as was in the charge sheet herein. He also contends that such a defect goes to the root of the case and cannot be cured under section 382 of the *Criminal Procedure Code*.

25. In opposing this view adopted by the appellant, the respondent contends that charging the appellant under section 295 as read with 296(2) of the *Penal Code* occasioned no duplicity and that the offence of robbery with violence contained elements of the offence of robbery and therefore there was no confusion whatsoever on the mind of the appellant on what charges he faced. The respondent further submitted that even if the charge is found to be defective, the defect is of such a minor magnitude that it can be cured under section 382 of the *Criminal Procedure Code*.

26. A duplex charge is one which charges more than one offence in the same count. The provisions of section 134 of the *Penal Code* sets out the particulars which ought to be incorporated into a charge. It stipulates thus;

> "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

27. Meanwhile, section 135(2) of the *Criminal Procedure Code* provides as follows:

> " Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count."

In effect, one charge ought not to contain more than one offence in any single count.

28. To understand the import of the rule against duplicity, we refer to the decision of this court in *Reuben Nyakango Mose & Another v Republic* [2013] eKLR where the court pointed out that:

> " The court in the Mahero (supra) case considered the English case of Ministry of Agriculture Fisheries & Food v Nunn Comm & Coal (1987) Limited [1990] L R 268 where it was emphasized that the question of duplicity is one of fact and degree and that the purpose of the rule is to enable the accused to know the case he has to meet.
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> In the case of Amos v DPP [1988] RTR 198 it was held that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed and to counter a true risk that there may be confusion in the presenting and meeting of charges which are mixed up and uncertain. (Emphasis ours)"

29. It then follows that in assessing whether a charge is fatally defective on account of duplicity, the court must address its mind to two issues, namely, whether the charge as framed enabled the accused person to know the case against him and which he needed to defend; and also whether the charge as framed occasioned a mix up or uncertainty on what defense an accused ought to mount against the charge.

30. The issue of a duplex charge was never raised before the trial court or the first appellate court. Therefore, the first appellate court did not render itself to this issue. Accordingly, the appellant cannot purport to be appealing against an issue which had not been determined, or a decision that had not been rendered.

31. The appellant participated in the trial, responded to the charge and even cross-examined witnesses. Before the first appellate court, we note that the appellant in his submissions challenged the charge on grounds that the evidence on record did not establish the offence as charged. It cannot be said then that he did not have a proper comprehension of the elements of the offence which he faced. He must have been aware of the offence and the elements thereof, to reason that the elements of the said offence were not established by the evidence which the prosecution adduced. Consequently, we find that the charge, as drawn, did not occasion any prejudice to the appellant and is therefore a defect which is curable under section 382 of the *Criminal Procedure Code*.

32. The second ground of appeal was that the offence was not proved to the required standards as the evidence on record was marred with contradictions and lack of corroboration. This is a second appeal and we note that the trial court and the first appellate court have both rendered themselves concurrently as to the sufficiency of the evidence on record in proving the charge. As regards this ground of appeal, we will limit ourselves to considering whether there were discrepancies and contradictions which went to the root of the case. That is an issue of law which falls within our jurisdiction.

33. Trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. If the inconsistencies or contradictions are substantial and fundamental to the main issues in question, then

an accused person will be entitled to benefit from doubts arising from such contradictions. In *Erick Onyango Ondeng' v Republic* [2014] eKLR this court stated that:

> " The hearing before the trial court invariably entails consideration of often contradictory, inconsistent and hotly contested facts. The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time- honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (see Okeno v Republic (1972) EA 32).
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> It is in the above context that this court has said time and again that it will defer to and respect findings of fact by the trial court as affirmed by the first appellate court after due re-evaluation and analysis, because the second appellate court operates from the distinct disadvantage of not having seen or heard the witnesses."

34. In the present case, the appellant's contention revolves around the time and dates of the offence, recovery and arrest. In our view, such contradictions are trivial as they do not erode the evidence relating to and proving the various elements of the offence of robbery with violence. It must be understood that dates and hours of events may sometimes skip the minds of witnesses. Such an eventuality may be accommodated, save in the instances when the court finds that the discrepancy is so material as to cast doubts on the whole evidence of a witness. In this case we find that there were no material inconsistencies or contradictions which could vitiate the conviction.

35. The third ground of appeal was the contention that the defence was not considered by the two courts below. We disagree with the appellant on this issue. Even as we do so, we find it prudent to point out that there is no standard test that courts ought to comply with in assessing the evidence for the defence. All a court must do is to consider the cumulative evidence in a case, find that which is believable, and measure it against the ingredients of the offence as set out in the charge. As an appellate court, we are the called upon to conduct a simulation of the trial court's process and consider whether the conclusions reached by the trial court is founded on the evidence on record. We have conducted that exercise and noted that the learned trial magistrate gave due consideration to the defence. We find that the trial court cannot be faulted for finding that the appellant's defence did not shake the cogent evidence that had been tendered by the prosecution.

36. The appellant challenges the sentence as meted by the court and upheld by the first appellate court, on grounds of illegality. The appellant was sentenced to life imprisonment. We have reviewed the analysis of the first appellate court in as far the issue of sentence is concerned. We are in agreement with the High Court on its analysis of the sentence imposed by the trial court. We are also cognizant of our mandate which is limited to addressing ourselves to the issue of sentence only when the sentence passed is illegal or one which the court did not have jurisdiction to pass.

37. In principle, the trial court and the High Court cannot be faulted for handing down the sentence of life imprisonment. It was a lawful sentence. Nonetheless we live in a dynamic world, and we do appreciate the recent developments of jurisprudence, especially with regard to sentences which are of a mandatory nature.

38. It is now settled that the imposition of mandatory sentences, by the legislature, takes away from the courts the discretion to impose sentences which are deemed to be appropriate to a particular case.

39. A mandatory sentence serves to put on an equal footing a first offender and a serial offender. A mandatory sentence compels the court to disregard either aggravating factors or mitigating factors which may be at play in a particular case. It serves to reduce the court to a conveyor belt, rather than a dispenser of justice which is dictated by the particular factors and circumstances of each individual case.

40. To the extent that the imposition of the sentence herein was driven by the perceived mandatory nature thereof, we hold the considered view that we have jurisdiction to intervene, as it is a matter of law.

41. The appellant was a first offender. He is a young person. Whilst that does not excuse his actions, we hold the view that he deserves an opportunity to know that after he has been adequately punished, he would be given a second chance.

42. Life imprisonment is indeterminate, in terms of duration, as it only comes to an end when the convicted person dies.

43. In an appropriate case, a convict may still be sentenced to life imprisonment. For instance, when the offence was committed in an extremely heinous manner, or in a manner that was very degrading to the victim, the court would be entitled to hand down a life sentence, so as to send out a clear message of how the society abhorred the actions of the convict.

44. The act of robbing motorcycle riders, who provide affordable transport to the majority of our people, must be discouraged. One way of doing so, is by imposing stiff sentences.

45. All said and done, we find that in this case the life sentence was over the top. We therefore set it aside, and substitute it with a sentence of 25 years imprisonment. The said sentence will run from the date when the trial court handed down the original sentence.

46. Furthermore, we direct that if the appellant was in custody whilst he was on trial, the period when he was in custody shall be taken as part of the sentence already served. This final order is made pursuant to the provisions of section 333(2) of the *Criminal Procedure Code*.

47. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JANUARY, 2023.

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

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

Signed

DEPUTY REGISTRAR

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JUDGE OF APPEAL