Ngwiri v Republic (Criminal Appeal 15 of 2022)
[2023] KECA 952 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 952 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 15 OF 2022

MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA

JULY 28, 2023

BETWEEN

JOHN KUMURU NGWIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Ngenye, J.) dated 29th April, 2020 in HC. CR. A. No. 240 of 2018)

JUDGMENT

1. John Kumuru Ngwiri, the appellant herein comes before us by way of a second appeal, the first appeal having been dismissed by the High Court (Ngenye J, as she then was) on April 29, 2020. The appellant was originally charged before Kibera Law Courts, Nairobi, with three counts of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the first count were that, on May 2, 2012 at Dam II Estate in Langata within Nairobi County, jointly with another not before the court and while armed with dangerous weapons namely pistols, robbed Peter Ochieng Okongo off one TV set make LCD 40 inches valued at Kshs 119,000/-, one TV make LG valued at Kshs 7,000/, one DVD player valued at Kshs 12,000/-, a mobile phone make Nokia E72 valued at Kshs 30,000/-, blackberry phone valued at Kshs 30,000/- and a Motor Vehicle registration number xxxx Toyota wish, valued at Kshs 1,200,000/- all totaling to Kshs 1,344,000/- and immediately before or after the time of such robbery threatened to use actual violence against the said Peter Ochieng Okongo.

2. The particulars of the second count were that on the same date and place and in similar manner, robbed Nancy Laura Khisa of a blackberry phone serial number xxxx valued at Kshs 42,000/-, one mobile phone make Nokia Asha 200 valued at Kshs. 6,500/-, 2 gold necklaces valued at Kshs 50,000/-, a wedding ring valued at Kshs 14,000/-, earrings valued at Kshs 2,500/-, three flash discs valued at Kshs 4,000/- and cash Kshs 30,000/- all totaling to Kshs 148,300/- and immediately before or after the time of such robbery threatened to use actual violence against the said Nancy Laura Khisa.

3. The particulars of the third count were that again on the same date and place and in a similar version, robbed Charlene Becky Khisa of a Samsung phone serial number xxxx valued at Kshs 2,000/- and immediately before or after the time of such robbery threatened to use actual violence against the said Charlene Becky Khisa.

4. The alternative charge against the appellant was handling stolen goods contrary to section 322(1) as read with section 322(2) of the Penal Code. The particulars were that on May 15, 2012 at Ruiru town within Kiambu county, otherwise in the course of stealing, he dishonestly received or retained a Samsung mobile phone, serial number xxxx valued at Kshs 2,000/- the property of Charlene Becky Khisa, having reasons to believe it to be stolen property.

5. This being a second appeal, Section 361(1)(a) of the *Criminal Procedure Code* limits our jurisdiction to consideration of matters of law only. This is now a well-trodden legal path that has received judicial interpretation in numerous decisions of this Court. In *Kaingo vs Republic [1982) KLR 213* this Court stated as follows:

> ' A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless it is 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 (REUBEN KARASI s/o KARANJA V R [1956] 17 EACA 146).'

6. The facts of the case according to the complainant (PW1), Peter Ochieng Okengo were that on 2nd May 2 he returned home from buying medicine for his child who was unwell. He parked his car and got into the house and found his wife with a friend. His wife then left the house, to escort the friend and left him in the kitchen putting the medicine in the refrigerator. As he walked out of the kitchen, 8 men entered the house brandishing pistols. The men ordered him to lie down, with one of them pointing the pistol at his head and asking for the car keys. One of them took his wallet and his phone, a Nokia E72. He told the men that he had Kshs 50,000/- which he had just withdrawn. They asked for Pin Number to his m-pesa account and his ATM cards for Barclays and CBA banks. They also removed the wedding ring from his finger. At that point, his wife walked in and she was also ordered to lie down. The men called the house help from the kitchen and ordered her to lie down. They tied and blindfolded PW1. His niece, Becky Khisa walked in and was ordered to lie down and they also tied her. They began loading household items in his car including two gas cylinders, cutlery, sufurias, wine glasses, and carpet. They later took off with his car and the stolen items, but two of them remained in the house and kept communicating with the rest about how far they had gone.

7. PW2, Nancy Lora Nekesa Khisa, was the wife of PW1. She stated that she was on maternity leave at that time. On May 2, 2012 at about 2 pm she had a friend who had come to see the baby. She saw the friend off and on coming back, she found the gate open so she just pushed it. She also found the burglar-proof door open and she proceeded to enter the house. She found a man standing by the door whom she quickly recognized. She had seen him with another man, standing not far from the house as she escorted her friend out. Another man emerged from the kitchen and ordered her to lie down. The 2nd man whom she had seen outside earlier, asked her what she was wearing and proceeded to take her watch, gold earrings, and wedding ring. PW1 and the house girl were lying down in the sitting room. The men then increased the volume of the television as another asked for the car keys. The other men were busy ransacking the house, moving upstairs and downstairs picking whatever they could carry. They asked for the gate keys and moved the car into the compound and loaded the car with household goods. They also took her ATM card for Equity bank. When the men left, she took a knife, cut the

ropes, and unbound herself, then freed her husband and the maid and reported the incident to Lang'ata police station.

8. She further testified that later she was called for an identification parade at the police station and she was able to identify the appellant. She testified that she had seen the appellant and another man, standing about 20 metres from her house when she escorted her friend on the fateful day and that he was also part of the gang that was in the house.

9. PW3 Becky Shirleen Khisa, a niece to PW1 narrated that on May 2, 2012, she was from church. On reaching home, she entered and 3 men grabbed her, some grabbed her bag and ordered her to lie down next to PW1 and PW2. They tied her hands. She heard them asking PW1 for his pin number. They took many household items from both upstairs and downstairs to PW1's car. When the rest left, two of the gang members remained behind and told them not to move. Minutes later, the two men also left, and PW2, who had only been tied on the legs, as she was breastfeeding the baby, untied herself and the rest.

10. PW4, Cpl Gabriel Ndungu Wainaina stated that on May 3, 2012, he received instructions from the DCIO to conduct investigations into the case of robbery which had happened at Dam II estate that had been reported by PW1. They were assisted by personnel of Safaricom, a telecommunications company to trace and arrest the suspects.

11. PW5, CI Margaret Abayi stated that on May 17, 2012 he was requested by PW4 to conduct an identification parade on the appellant. He asked the appellant whether he had any objections and he answered in the negative. The appellant was informed of his right to have a lawyer or a representative present during the parade but he declined and signed the identification parade form. The appellant was positively identified by PW2.

12. When put to his defence, the appellant in a sworn statement denied committing the offence and testified that on May 2, 2012 while in a matatu heading to Nairobi, he found a phone that had fallen under a chair and took it. On May 15, 2012, he went to meet his mother at Ranga hotel. The mother came with 3 men and 2 of his aunties. One of the officers asked him which phone he was using, and he showed them the Samsung phone he had allegedly picked up in the matatu on May 2, 2012 and his mobile phone, Nokia 3310. They asked the appellant where he got the Samsung phone and he told them he had picked it in a matatu. They asked him to accompany them to Githurai police station. He was taken to Pangani police station and later transferred to Nairobi area, then to Lang'ata police station.

13. In support of his defence the appellant called two witnesses, DW3, Ruth Wanjiku and DW4, Lucy Wacheke, DW3 stated that she was called by the CID and told that she was colluding with robbers. She was tasked with showing the officers, the appellant's residence. She called the appellant's mother who promised to call the appellant. She later led the officers, to the shop of DW4.

14. DW4, the appellant's mother stated that on May 2, 2012 she received a call from her sister–in–law, DW2 who asked her not to close her shop as she was accompanied by some police officers who wanted to see her. The sister-in-law and the officers went to her shop and she confirmed that the appellant was her son. They told her that the appellant had a stolen phone. She took them to the appellant who was then arrested.

15. The trial Magistrate, in a judgment dated September 21, 2018, found the charges proved beyond reasonable doubt and convicted the appellant, as charged in counts I, II, and III. The appellant was sentenced to 20 years on each charge and the sentences were ordered to run concurrently.

16. Aggrieved by the conviction and sentence, the appellant lodged a first appeal in the High Court, which was heard by Ngenye, J (as she then was). In the judgment dated April 29, 2020, the trial Judge upheld both the conviction and sentence, thus precipitating this second appeal.

17. The memorandum of appeal dated June 16, 2022 contains 3 grounds, which are: that the trial Judge erred in law in failing to analyze and scrutinize the evidence before the lower court on findings of fact; in failing to make a finding on the contradictions in the ownership and proof of exhibits; and in failing to find that the appellant was not properly identified in the parade.

18. When the appeal was called out for hearing on the online platform, Mr Gitari holding brief for Mr Kanyi, learned counsel appeared for the appellant whereas M/s Margaret Matiru, Senior Deputy Director of Public Prosecutions, appeared for the State.

19. Mr Gitari, relied on the written submissions dated March 13, 2023 which he highlighted as follows: that the trial court did not adequately re-evaluate the evidence adduced before the trial court; that the appellant was linked to the counts after the recovery of the phone yet he was not found in possession of any of the items mentioned in the charge sheet; that the identification of the appellant was not watertight as the robbery took place during the day, yet the witnesses did not describe the special features or marks, that would have made them identify the appellant; that the prosecution's evidence was contradictory and inconsistent because the charge sheet stated that the appellant had stolen a Samsung phone S/No xxxx and in the alternative charge, was stated to have handled a Samsung mobile phone S/No xxxx.

20. M/s Matiru highlighted her written submissions dated March 26, 2023 that the findings of fact by the trial court sufficiently supported the conviction of the appellant as he was in the company of others, while armed and they robbed various household items including mobile phones. On the doctrine of recent possession, she submitted that the appellant was connected directly to the Samsung phone which belonged to PW3, Becky Charlene Khisa, whose serial no was marked as S/NO xxxx. She further submitted that PW2 was able to produce a piece of the box in which the phone had been bought and in which the serial number tallied with the number on the phone. It was also submitted that the appellant was arrested while using the stolen Samsung phone, which was produced in court as exhibit 2 and he was not able to explain how he ended up with the phone.

21. On identification of the appellant, M/s Matiru submitted that the appellant was positively identified by PW2' in the police identification parade conducted by PW5, Regarding the appellant's defence that he got the phone under the chair of a Matatu that he had boarded, she stated that was simply a mere denial and that his witnesses did not corroborate his explanation of having picked the phone from the floor of a Githurai/ Nairobi Matatu.

22. We have revisited the record and considered it in light of the rival arguments set out in the submissions by the appellant and the State. In our opinion, two issues arise for our consideration:

    i. Whether the offence was proved to the required standard;

    ii. Whether the 1st appellate court re-evaluated and re- analyzed the evidence as statutorily required.

    iii. Whether the prosecution's evidence was riddled with contradictions and inconsistencies.

23. As to whether the offence of robbery with violence was proved to the required standard, the case of Johana Ndungu vs Republic Criminal Appeal No 116 of 1995 (1996] eKLR) sets out the requirements thus:

> ' Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub- section.
>
> PARA 1.
>
> If the offender is armed with any dangerous or offensive weapon or instrument, or
>
> SUBPARA 2.
>
> If he is in company with one or more other person or persons, or
>
> PARA 3.
>
> If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.'

24. The Court is not required to look for the presence of all three ingredients, as proof of one of the ingredients would suffice to secure a conviction. (See. *Dima Denge Dima & Others vs Republic, Criminal Appeal [2013] eKLR*. We note that the trial magistrate found the offence of robbery with violence proved and held:

> ' From the aforesaid evidence, it is clear PW1, PW2 and PW3 were robbed of their property on May 2, 2012 by more than 6 people two of whom were armed with pistols. Their hands and legs were tied before the incident. I therefore find the ingredients for the offence of robbery with violence were proved.'

25. On the question of identification, the trial magistrate held as follows:

> ' From the aforesaid evidence, I find the conditions were favourable for a positive identification of the assailants by PW2. The incident happened in broad daylight therefore, she was able to clearly see them. She even confirmed that she had seen the 1st accused near her house as she escorted her friend and when she returned to the house, she met him at the door.'

26. The appellant submits that he was not positively identified, as PW2 did not give any special features or marks that she had recognized. It is instructive to reiterate that it is not necessary for the identifying witness to point out special features of an accused person. The threshold to be met is narrower than that. It all boils down to the strength of the evidence of the identifying witness. In the case of *Roria vs R (1967) EA 583* it was stated:

> ' A conviction resting entirely on identity invariably causes a degree of uneasiness. The danger is of course greater when the only evidence against the accused person is identification by one witness and a conviction based on such identification should never be upheld, it is the duty of this court to satisfy itself in all circumstances, that it is safe to act on such identification.'

27. In this appeal, the fact that PW2 was the only witness who identified the appellant does not make her evidence any less valuable to uphold a conviction. What is important is whether the evidence was tested in terms of the prevailing circumstances and whether PW2 had the opportunity to see and later

identify the appellant. We note that PW2 testified that while escorting a friend who had been at her home, she noticed the appellant outside her gate, and upon returning to the house, she found him in the company of others, who asked her to lie down, but later was asked to wake up and breastfeed the baby who had started crying. It is discernible that, she must have been able to have a good look at the appellant, as the robbery occurred in broad daylight, in the afternoon at about 2pm.

28. PW5 testified that she conducted an identification parade. From the identification parade, PW2 was able to positively identify the appellant from a lineup containing 8 members of similar height and complexion. An identification parade form dated May 17, 2012 was produced in court and marked as PEX No 4. As a result, we are satisfied just like the two courts below that the appellant was positively identified by PW2 and there was no danger in the trial court relying on the evidence of a single witness because the first time PW2 saw the appellant was in the daytime outside her house, later at her house and finally, in the police identification parade.

29. In the case of *Nzaro –vs- Republic [1991] 2KAR 212*, this Court said the following on the issue of identification:

> ' A careful direction regarding the conditions prevailing at the time of the identification and the length of time for which the witness had the accused person under observation, together with the need to exclude the possibility of error was essential.'

30. Concomitantly, looking at the circumstantial evidence aspect, it was well covered by the trial magistrate when she held as follows:

> 'Besides the direct identification of the 1st accused by PW2, I find the aforesaid circumstantial evidence which revolved around the recovery and possession of PW3's phone pointed to the guilt of the 1st accused than to his innocence. I find his defence that he collected the said phone from a bus not plausible as what was expected of him if at all he had collected the said phone which clearly did not belong to him was to either hand it over to the bus crew or Sacco or even take it to a police station so that the owner can be traced. Instead he decided to keep it and even started using it. He confirmed the same was on when he collected it and also had a password and that he threw the sim card away. His conduct is that of a person who had the intention to keep a phone which was not his, hence stole it.'

31. We note that there is ample evidence on the identification of the appellant, as other than direct evidence, here was also, circumstantial evidence. PW2 saw the appellant outside their house when she was escorting the visitor. She vividly recounted how the appellant entered the house with others. It was daytime and the ordeal they went through took a long time and she recognized the appellant as the same man she had seen outside their house. In addition, PW2 positively identified the appellant in the identification parade that was conducted later. We are satisfied by the concurrent finding on the identification of the appellant by the trial court and the first appellate court.

32. The second issue is about the re-evaluation and re-analysis of the evidence tendered in the trial court. It is alleged that the appellate court did not properly analyze and scrutinize the lower court's evidence and findings of fact and law and erred as a result. The learned Judge combed through the evidence and found that the evidence on record established the offence of robbery with violence. Further he interrogated the prevailing circumstances at the time the incident

occurred and found that the circumstances prevailing at the time of the robbery negated any possibility of a mistaken identity of the appellant by PW2.

33. Also, as regards the doctrine of recent possession, the appellant before the appellate court, was of the view that the trial court wrongfully invoked the doctrine of recent possession and disregarded the appellant's explanation of how he came into possession of the recovered mobile phone. According to the appellant, the appellant's possession of the phone was not recent enough, since the robbery happened on May 2, 2015 and recovered on May 15, 2015 and it was possible that the mobile phone may have changed hands during the two weeks period before the appellant was arrested. The appellate court re – evaluated the evidence and held that applying the rebuttable presumption of the doctrine of recent possession, the appellant was expected to explain how he came into possession of the phone, in rebuttal and failure to do so would draw and inference that he either stole it or was a guilty receiver. The learned Judge held that the trial court correctly invoked the doctrine, and the doctrine was merely corroborative of the positive identification of the appellant.

34. After re-assessing, re-evaluating and re-analyzing the evidence before him, he proceeded to make findings on the appellant's grievances. With regard to the identification parade, he found that the appellant conceded in the parade form and as testified by PW5, that the appellant had no objection with the manner the parade was conducted. He was satisfied that the appellant was positively identified as having taken part in the robbery. We have no quarrel with that finding.

35. The third issue is about the contradictions and inconsistencies in the evidence adduced by the prosecution. The appellant submits that the prosecution's evidence is riddled with inconsistencies and contradictions. He specifically flags the charge sheet and submits that it stated that the appellant had stolen through robbery, a Samsung phone S/No xxxx and in the alternative charge, was stated to have handled a Samsung mobile phone S/No xxxx.

36. Whereas we appreciate that there can be minor discrepancies in a case, whether or not discrepancies in the evidence have the effect of discrediting that evidence would depend upon the nature of the discrepancies, that is to say, whether or not the discrepancies are significant as to affect the culpability of an accused person. The Court should only consider the discrepancies if they are of such a nature that would create doubt as to the guilt of the accused. The difference in 3 digits of the serial number seems to be a typographical error and cannot possibly oust the culpability of the appellant as found by both the lower courts. (See *Willis Ochieng Odero vs Republi[2006] eKLR*.) In any case this is a matter of fact that we are barred from entertaining on second appeal.

37. The appellant did not deny that he was arrested with the stolen phone and his only defence was that he found it under a seat in a matatu. That phone is the one that led to his arrest and he was later positively identified by PW2, as part of the gang that attacked and robbed them. We are satisfied by the concurrent findings of the trial court and the first appellate court on the culpability of the appellant.

38. We note that the learned Judge considered in great detail every complaint the appellant raised on appeal before her. We find no fault in the approach taken by the learned Judge. We are in agreement that both courts below arrived at the correct conclusion as to the appellant's culpability and that the appellant's conviction is safe.

39. The upshot of the foregoing is that the appeal has no merit and we hereby dismiss it in its entirety.

Dated and Delivered at Nairobi this 28th day of July, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR