Musyimi v Republic (Criminal Appeal 48 of 2021)
[2023] KECA 1156 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1156 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 48 OF 2021

MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA

OCTOBER 6, 2023

BETWEEN

JOSPHAT MULI MUSYIMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Machakos (Nyamweya, J.) dated 18th January 2016 in HCCRA No. 2 of 2014)

JUDGMENT

1. This is a second appeal against the appellant's conviction and sentence for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. As such, we are alive to the fact that by dint of section 361 (1) (a) of the *Criminal Procedure Code*, our jurisdiction is confined to consideration of matters of law only. Furthermore, we remind ourselves that we need not interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the two courts below are shown demonstrably, to have acted on wrong principles in reaching their findings. This much was restated by this Court in the case of *Alvan Gitonga Mwosa vs Republic* [2015] eKLR.

2. With the above in mind, a brief background of the case as presented before the trial and first appellate courts will suffice. As already stated, the appellant was charged with one count of robbery with violence contrary to section 296 (2) of the *Penal Code*. He also faced one count of rape contrary to section 3 (1) (a) (b) (c) and (3) of the *Sexual Offences Act*, with an alternative count of indecent act with an adult contrary to section 11A of the *Sexual Offence Act*. The particulars of the first count were that; on 9th day of March 2012 at Mlolongo township within Machakos County, jointly with others not before the court, while armed with a dangerous weapon namely, a kitchen knife, robbed EKN of Ksh 127,121, Safaricom Limited scratch cards worth Ksh 5,600 all totaling to Ksh 132,721, and immediately after the time of such robbery injured the said EKN. On the second count, the particulars were that on the

same day and place, he intentionally and unlawfully inserted his male genital organ namely, the penis into the female genital organ namely, the vagina of EKN without her consent. On the alternative, it was stated that on the same day and place, he intentionally and unlawfully committed an indecent act by making his male genital organ namely, the penis to come into contact with the female genital organ namely, the vagina of EKN.

3. The prosecution in a bid to prove its case against the appellant called a total of 4 witnesses. PW1, EKN testified that she was on the March 9, 2012 at about 7.30pm walking home from work carrying monies from the M-pesa shop belonging to PW2 where she was an employee in the sum of Kshs 119,880 in cash, Kshs 3,200 for card replacement and Safaricom Limited scratch cards worth Kshs 5,600 and Kshs 4,041 church funds. She also had the business Mobile phone Nokia 1100 with a float of Kshs 5,000, which she carried in her handbag. As she trudged along, she was abducted by two men in a white Nissan vehicle and ordered to sit between them with her head between her legs. The vehicle was driven by a third person towards Kitengela. The attackers took her mobile phone and handbag which had the money and on reaching a bus stop next to Mlolongo Primary School they demanded that she transfers the money in the business Nokia phone to a particular Mobile Phone Mpesa account number. When she resisted, one of her attackers stabbed her with a knife on her upper left arm. She then did as ordered and when satisfied that she had no more money left, the kidnappers stopped the vehicle, pulled her out and pushed her into a trench and ordered her to remove her clothes. When she refused one of the attackers kicked her and having subdued her, he raped her.

4. After the ordeal the kidnappers drove off. She was assisted by good samaritans to get to a clinic at Mlolongo where she was treated and thereafter referred to Nairobi Women's Hospital for further treatment. Later, her P3 form was filled by police surgeon, Dr. Zephania Kamau, PW4. She was subsequently informed that a suspect Josphat Musyimi, the appellant had been arrested because investigations had showed him to be the registered owner of a mobile phone Mpesa money transfer account, to which mobile money account the kidnappers had during the robbery, forced PW1 to transfer the Kshs 5,100 held in the Mpesa agency's phone account.

5. PW2, Julius Mwangangi Kiilu, was the employer of PW1, in his Mpesa shop. He was called by a good samaritan who informed him that he had picked EKN who had been robbed and was taking her to the clinic. He reported the incident to the Mlolongo Police Station, proceeded to the clinic and later took her to Nairobi Women's Hospital for further treatment. He helped the police with investigations by obtaining a Safaricom Limited printout of transactions at his Mpesa shop which led to the arrest of the appellant. He confirmed that he had lost money in cash, scratch cards and card replacement, the business mobile phone with its line and Mpesa float.

6. PW3 on the other hand was Police Corporal Allan Adolo, the investigations Officer. He investigated the case and with the Mpesa statement and Mpesa record book from the PW2's Mpesa shop revealed that the mobile number belonged to the appellant and was used to wire the money robbed from EKN. He approached National Registration Bureau to get the print out of the said identity card number which led to the arrest the appellant.

7. Lastly PW4, Dr Zephania Kamau, a police surgeon testified that he had on April 4, 2012 examined PW1 on a complaint of assault and rape. He confirmed that she had stitched scar wounds on the outer part of her left hand and the outer part of the left thigh that were about 26 days old. No injuries were noted on the external genitalia and vulva.

8. Upon closure of the prosecution's case, the appellant was found to have a case to answer and when put on his defence, the appellant in his unsworn statement denied the charges. He claimed that he had lost

his identity card which was used by a stranger to register and operate an Mpesa account in which some of the proceeds of the robbery were transferred and deposited.

9. After considering the evidence, the trial magistrate was satisfied that the prosecution had proved its case against the appellant in respect of count one, convicted and sentenced him to life imprisonment but acquitted him of the second and alternative count. Being dissatisfied with the decision of the trial court, the appellant appealed to the High Court. Upon hearing the appeal, Nyamweya, J. (as she then was) dismissed it in its entirety.

10. The appellant is now before us in an attempt to overturn the decisions of the two courts below on four grounds to the effect that the two courts erred in law; when they did not find that the case was poorly investigated, wrongly invoked the doctrine of recent possession; wrongly applied circumstantial evidence that did not meet the threshold; and lastly, that they failed to observe and appreciate that there existed a weak link connecting the appellant with the alleged offence.

11. The appeal was heard by way of written submissions with limited oral highlighting. When the appeal came up for hearing on July 18, 2023, the appellant was represented by Mr Bansali, learned counsel whereas the respondent was represented by Miss Vitsengwa, learned prosecution counsel. Mr Bansali submitted that there was no direct evidence that implicated the appellant to the offence and that the only evidence was purely circumstantial to the extent that the courts only considered the fact that the appellant's identity card was used to register an M-pesa account in which some of the proceeds of the robbery were transferred and deposited. That this circumstantial evidence required intense scrutiny before being used to place the appellant at the scene of the crime. That the appellant had offered an explanation as to the loss of his identity card and that the only mistake was not reporting the loss to the police but this did not mean that he had participated in the crime. Further, the appellant was never found with the purported stolen property. Both the Safaricom Limited sim card and the handset that had been used were easily traceable but there was no record of history of the usage or movement of the sim card and the handset, yet the said evidence would have been easily retrieved and tendered in the trial court by an expert in that technology. Failure to call such an expert meant that the courts relied on the evidence of EKN and PW2, who were not experts in mobile technology.

12. The appellant while relying on the case of *Isaac Ng'ang'a Kahiga & Another vs Republic* [2006] eKLR submitted that the ingredients of the doctrine of recent possession were not proved by the respondent. He therefore prayed for the appeal to be allowed in its entirety.

13. The appeal was opposed by the respondent. That the documents from Safaricom Limited were properly adduced by the investigating officer having been legally obtained from the said company by PW2. That in any case, the appellant did not object to the production of the same during the hearing.

14. As regards the doctrine of recent possession, the respondent submitted that the ingredients of the same were proved as the money that had been stolen from EKN's mobile phone was sent to the appellant's M-pesa account. That the appellant's connection with the offence was the Mpesa records that tied him to the offence as he was the registered owner of the number that received part of the stolen money. The ingredients of the doctrine of recent possession were all satisfied as it was established that the mobile number in question was owned by the appellant, the Safaricom Limited M-pesa agent print out and the appellants identification card details were produced in evidence unchallenged. The respondent therefore called for the dismissal of the appeal in its entirety.

15. The first issue of law which we discern for our determination is whether the tenets of the doctrine of recent possession were proved to the required standard. We are well aware that where a suspect is found with recently stolen property which is identified by the complainant to be his/hers and there is

evidence that the property was recently stolen from the complainant, this can be a basis of a conviction for robbery with violence.

16. We note that the doctrine entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. This Court summarized the essential elements of the doctrine of recent possession in *Eric Otieno Arum vs Republic* [2006] eKLR, thus:

> "In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be plausible. See *Malingi vs Republic* [1988] KLR 225.

17. From the evidence on record, the appellant was alleged to have been a beneficiary of the proceeds of the robbery about an hour after the incident and thus he must have been involved in the robbery. The respondent's case in the trial court was that he had lost his identity card which was used to open an M-pesa account to which part of the proceeds of the robbery were deposited. This explanation given by the appellant was rejected on the flimsy ground that he had failed to report to the police the loss of his national identity card and get an abstract. In our view, this was a simplistic approach to the plausible defence proffered by the appellant.

18. Further, the appellant has faulted the reliance on the statements from Safaricom Limited. He submitted that the lines used and the handset were easily traceable but there was no record of history of the usage or movement of the sim card and the handset which evidence would have easily been retrieved and brought before the court by an expert in the technology field if it ever existed. The respondent however submitted that the evidence on recent possession was proven when the Mpesa statement and identity details were produced as exhibits without any objection by the appellant.

19. From the record, it is clear that the court relied on the M-pesa statements and the records from the Registrar of Persons to find that the appellant must have been among those who had committed the crime. However, no expert witness from Safaricom Limited was called to authenticate the fact that the phone that was used to send the money at the time and the line thereon belonged to the appellant and that the same was within the vicinity of the scene of crime at the time it was used. Prudence would have required that an expert from Safaricom Limited be called to shed light on the M-pesa transaction as well as the whereabouts of the mobile phone used at the time and the area where the sim card was at the time.

20. To us, without this evidence, the fact that the money had been sent to the appellant's phone does not place the appellant at the scene of crime. We are thus unable to connect the appellant to the offence given that the trial court used the fact of sending the money and the presence of the identity card to pin him to the offence. When we place the evidence on record vis-a-vis the authorities we have cited on the aspect of recent possession, we are satisfied that this case did not meet the threshold at all. The appellant in a nutshell was not found in possession of recently stolen property belonging to EKN.

21. The second issue for our determination is whether the circumstantial evidence relied on was sufficient to warrant a conviction. The prosecution evidence was mostly circumstantial as to what actually transpired immediately before, during and after the incident. Circumstantial evidence must be examined carefully before it can be a basis of conviction.

22. In the case of *Sylvester Mwacharo Mwakeduo & another vs Republic* [2019] eKLR this Court observed:

> " Over the years, courts have set the threshold which has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this Court in a myriad of cases for instance in the case of *Judith Achieng' Ochieng' vs Republic*, Criminal Appeal 128 of 2006, this Court stated the law as follows:-
>
> It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy four tests:-
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> i. The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established;
>
> ii. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
>
> iii. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else;
>
> iv. In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there are no co-existent facts that are capable of explanation upon any reasonable hypothesis other than that of the accused's guilt."

The High Court while dealing with the issue stated thus:

> " Although the complainant PW1 could not identify any of her attackers or the person who deposited the Ksh 100/- to the mobile phone Mpesa account to which the attackers later in the robbery forced her to transfer the monies float in the business mobile phone, the circumstantial evidence raised reasonable inference that the owner of the Mpesa account and Identity Card under which it was registered participated in the robbery as the beneficiary of the transfer of the money, and that the deposit of the paltry Ksh 100/- was a ruse to allow a reconnaissance mission before the planned attack."

23. Considering the principles set out in the cases above and the record before us, we do not agree with the above conclusions by the High Court given our holding on the first issue above. Having failed to connect the appellant to the offence by not conducting proper investigations of the Mpesa transactions, the mobile phone that was used raises doubts as to whether the offence was proved against the appellant. We may go further and state categorically that none of the above ingredients of circumstantial evidence were met. We are aware that for a reasonable doubt to be raised in a criminal trial it must be one that is reasonably probable not one that is whimsical and fanciful. While it is tenable in the realm of possibilities, we do not agree that the probability that the appellant's National Identity

Card was lost and found by a person who used it to acquire a mobile phone line and register an Mpesa mobile money transfer account in the appellant's name and subsequently uses it to receive money robbed from EKN, is too remote to sway the case to the prosecutions side. Given the foregoing, can it be said that there were no other co-existing factors that could poke holes in the chain of events as to make irresistible inference that it was the appellant and nobody else who committed the offence?

24. The last issue which we wish to address is whether the offence of robbery with violence was proved beyond reasonable doubt. The offence of robbery with violence is contained in sections 295 and 296(2) of the *Penal Code* as follows:

> " 295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.
>
> 296
>
> (2). 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

25. What constitutes the offence of robbery with violence was well captured in the case of *Olouch vs Republic* (1985)KLR where this Court stated as follows:-

> " ...Robbery with violence is committed in any of the following circumstances:
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> The offender is armed with any dangerous and offensive weapon or instrument; or
>
> The offender is in company with one or more person or persons; or
>
> At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

26. In the case of *Dima Denge Dima & others vs Republic*, Criminal Appeal No 300 of 2007, it was stated that:

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

27. From the analysis above, it is clear that there was no nexus established between the appellant and the crime that was committed. The doctrine of recent possession invoked, fell flat on its face as none of the ingredients were proved. Similarly, circumstantial evidence relied on failed to establish that indeed it was the appellant who had committed the offence. EKN testified that she did not recognize any person at the scene of the crime. The ingredients of the offence were not proved at all even with the application of circumstantial evidence which failed to meet the threshold.

28. Given the above, we are of the view that the offence was not proved to the required standards and therefore the conviction and sentence was not safe.

29. In the premises, we allow the appeal, quash the conviction and set aside the sentence imposed. The appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 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