Lenaibor v Republic (Criminal Appeal 8B of 2014)
[2022] KECA 932 (KLR) (19 August 2022) (Judgment)

Neutral citation: [2022] KECA 932 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 8B OF 2014

HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA

AUGUST 19, 2022

BETWEEN

PHILEMON LENAIBOR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nakuru (Omondi. and Emukule, JJ.) dated 4th March 2014 In Nakuru HCCR A No. 143 of 2012)

JUDGMENT

1. The appellant was charged before the Principal Magistrate's Court at Maralal with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. The particulars were that on 4th March 2012 at Samburu Game Reserve in Samburu County, the appellant, with others not before the court, being armed with a dangerous weapon, namely a Carbine rifle, robbed Joel Kaleli of one mobile phone make Ideos, one binoculars make Bushwell and cash Kshs. 4,000, all valued at 18,000 and, at or immediately before or immediately after the time of such robbery, threatened to use actual violence to the said Joel Kaleli. The appellant was also charged with possession of a firearm contrary to Section 89(1) of the Penal Code. The particulars were that on 4th March 2012 at Ngarentare village in Isiolo County, he was found in possession of a firearm, namely Carbine S/No. M10299 in circumstances which raised reasonable suspicion that the said firearm was intended to be used in a manner prejudicial to public order.

2. The appellant pleaded not guilty to the charges, and the matter proceeded to trial. The prosecution case was that, on the material day at around 10:30 am, the complainant (PW1), who was a tourist van driver, was in Samburu National Reserve driving 3 tourists in a van. Two men emerged in front of the van and pointed a rifle at PW1, and two other men emerged shortly thereafter. Shouting "money, money, pesa, pesa," the men ordered him to switch off the engine and come out holding his money. PW1 complied. The appellant was one of the men. The appellant took PW1's money, wallet and a pair of binoculars

while the other 3 men robbed the tourists of their cash and valuables. The whole incident took about 10 minutes. PW1 was then ordered to drive off leaving the robbers at the scene. They reported the incident to the park rangers at Intrepid Hotel, who rushed to the scene. PW1 recorded a statement with the police. He told the officers that he could identify the face of the person who robbed him.

3. The next day, PW1 was informed that one person was arrested and held at Archers Police Station. He was informed that a camera, a binoculars and cash belonging to the tourists had been recovered. He then went to the police station. At the police station, PW1 participated in an identification parade and picked out the appellant from a group of 8 people.

4. PW2 Robert Leleiyo, a ranger at Samburu National Reserve, got a report from Intrepid Hotel of the robbery on the material day and rushed to the scene of the robbery with his colleagues PW3 Charles Lekirgoto, PW4 David Leitiktik and PW5 Gabriel Lepariyo. They found their colleagues from Intrepid Hotel. They followed the footsteps of 4 people to a place called Garadare and found 4 Samburu morans with guns. The appellant was one of them, and he had a Carbine rifle. A gunfight ensued and the appellant surrendered. They found the appellant with a camera, 300 US Dollars, Kshs. 3,800 and a binoculars. They passed by Intrepid for the tourists to identify the recovered items. They took the appellant to Archers Post Police Station and gave the gun to the police. The accounts of PW3, PW4 and PW5 tallied with that of PW2.

5. PW6 Corporal Fredrick Mutua of Archers Post Police Station, received the appellant after his arrest by the rangers at around 8:00pm on the material day. They had earlier received a report of the robbery earlier in the day. The appellant was brought with a pair of binoculars, a camera, memory cards, cash and a Carbine rifle. PW6 booked the appellant and recovered the items. The recovered items were identified by the tourists who were in transit. They gave the tourists their items after taking photos of the same. PW6 sent the firearm to the firearm examiner.

6. PW7 Chief Inspector Charles Koilel of CID Headquarters produced a ballistics report prepared by Mr Mwongela. The report was to the effect that the rifle S/No. M10299 was a Siminov rifle in Carbine 7.62mm designed to chamber ammunition calibre 7.62mm by 39mm. The rifle was in poor condition. Its trigger mechanism was missing, its butt stock was broken and was incapable of firing ammunition in its current condition. Mr Mwongela's opinion was that the exhibit was a firearm as defined under the *Firearms Act*.

7. On 5th April, 2012 PW8, Chief Inspector Mwangi Gitau, based at CID Headquarters Scenes of Crime section, received the photographic films related to the robbery with violence charge against the appellant. He supervised the development of the films, and 4 photographs were generated.

8. PW9 Chief Inspector Naibei, OCS of Archers Police Station, was asked to conduct an identification parade on 5th March 2012 at around 10:30am. The suspect was the appellant. He told the appellant about the parade and informed him that he could agree or decline. The appellant consented to the parade and thumb printed the form. The witness identifying the suspect, PW1, was placed in PW9's office and could not be seen by the witnesses. The parade comprised seven men who were members of the public from Archers Post shopping centre and the appellant. The appellant chose to be placed between No. 6 and 7. The witness identified the appellant by touching his shoulder. The accused was satisfied and signified his satisfaction by affixing his thumb print.

9. In his defence, the appellant made an unsworn statement. He stated that, on the material day, he was arrested by game rangers who found him looking after cattle. They asked whether he had seen anybody pass by and he replied that he had not. He was arrested and taken to a waiting vehicle and taken to Intrepid Hotel. People were called to come and see him. It was alleged that he had stolen from tourists.

He reached the police station at around 10:00pm. A parade was conducted at around 10:00 am the next day. PW1 picked him out. PW1 had seen him the previous night at Intrepid Hotel.

10. In his judgment, the trial magistrate noted that he listened to the complainant and observed his demeanour, and that the complainant looked truthful. The magistrate believed his testimony that he was robbed of his money and binoculars at gunpoint. The magistrate was also satisfied with the evidence relating to the identification of the appellant by the complainant and found that it was unshaken. The magistrate held that PW9 and the game rangers positively linked the appellant to the robbery which occurred on 4th March 2012. The magistrate did not believe the appellant's statement that he was arrested while innocently herding his cattle. He held that the appellant was found in possession of a rifle he had no permit for, and that the prosecution had proved its case. The magistrate therefore convicted the appellant as charged. At sentencing, the magistrate noted the mitigation of the appellant and held that the penalty for the first count is a mandatory death sentence. He accordingly sentenced the appellant to death while the sentence on the second count was held in abeyance.

11. The appellant appealed against the conviction and sentence in Nakuru High Court Criminal Appeal No. 143 of 2012. The grounds for the appeal were that:

    i. PW1 alleged that the appellant stopped the vehicle armed with a G3 rifle yet the exhibit brought before the court was not a G3 rifle but a damaged carbine rifle.

    ii. The recovered items belonging to the tourists were not brought to court and nothing proved that recovered dollars were the same as the ones stolen during the robbery. That the appellant was not found with the items PW1 alleged were stolen from him.

    iii. There was a contradiction in the evidence of the prosecution witness PW3 who stated that the incident took place on 4/3 /2011 while the rest claimed it was on 4/8/2012.

    iv. The appellant being taken to Intrepid Hotel was a calculated move to tell the driver to pinpoint the appellant. That after the identification the appellant was called by the OCS to sign a form whose contents he did not know.

12. The appellant later filed additional grounds of appeal that the trial magistrate erred in law and in fact with regard to the following issues:

    v. The manner of plea taking where the option of pleading guilty subject to a plea agreement was not mentioned.

    vi. The appellant was not afforded the right to seek legal representation.

    vii. That there was no interpretation of the evidence contrary to Section 198(1) of the CPC.

    viii. That the appellant was not asked whether he wished to cross-examine PW9.

    ix. That the visual identification of the appellant was not sufficient.

    x. That possession of the recovered items was not proved.

    xi. That the appellant was never sentenced pursuant to his conviction in Count 2.

13. In their judgment, the learned judges re-evaluated and analysed the evidence, and also considered the arguments tendered on appeal. With regard to the issue of identification, the judges found that, although this was based on evidence of one witness, the incident took place in broad daylight and lasted about 10 minutes during which time PW1 had an opportunity to see the appellant as he and his colleagues approached the vehicle while armed, ordered PW1 to lie down and surrender his valuables,

and finally ordered PW1 to get back to the car and drive away; and that there was adequate opportunity for positive identification which is why PW1 was able to pick the appellant out at the identification parade. The learned judges also found that the identification parade was properly conducted.

14. The learned judges noted that the typed record of proceedings of the trial court appeared to indicate that the appellant did not cross-examine PW9, but upon checking the handwritten record, they confirmed that the appellant was indeed given an opportunity to cross-examine PW9 and the record indicated that the accused stated that he had no questions for the witness.

15. The learned judges also noted that the record does not show the language used by PW1 or the court. On whether this was prejudicial to the extent of allowing the appeal, the learned judges noted that the appellant's cross-examination of PW1 related to what the witness said in his evidence in chief; and that it was apparent that the appellant understood the language being used by the witness. The learned judges were therefore persuaded that the omission to indicate the language used was neither fatal to the prosecution case nor prejudicial to the appellant.

16. Regarding the issue of the recovered items, the learned judges observed that the appellant did not claim ownership over them, and had no explanation as to how he came to have them; and that the items were photographed and identified by PW1 which made the conviction sound and secure. As for the appellant's possession of the firearm, the learned judges found that all the rangers were consistent with regard to their encounter with the appellant, how he surrendered and the recovery of the firearm, and that the issue was not whether the firearm was functional, but whether the appellant had a permit authorising him to possess the firearm. The learned judges concluded that the evidence was watertight, and that the trial magistrate reached a proper conclusion in finding the appellant guilty and convicting him. They dismissed the appeal thereby upholding the conviction and confirming the sentence meted out.

17. Dissatisfied with the decision, the appellant filed the present appeal on the grounds that the learned judges erred in law when they:

    i. Failed to note that the reading of the charges to the appellant were conducted outside the provisions of Section 198 of the Criminal Procedure Code (CPC) and Article 50(2) (m) of *the Constitution*.

    ii. Failed to find that the visual identification was not free from error or mistake.

    iii. Failed to note that the circumstances surrounding the scene of crime were not conducive for a positive identification.

    iv. Failed to note that the trial court failed to warn itself on the dangers of reliance upon evidence of identification from a single identifying witness.

    v. Failed to find that the rules spelt in Chapter 46 of the Force Standing Orders were not observed.

    vi. Failed to note that in the absence of a valid identification parade, the evidence of identification amounted to dock identification.

    vii. Failed to find that the provisions of Section 154 of the CPC were not duly complied with.

    viii. Failed to note that PW1 was not truthful in his statement hence it discredited the entirety of his evidence.

ix. Failed to note that the evidence linking the appellant to the recovery of the items was not backed by any evidence given that the provisions of Section 177 of the CPC were violated and nothing that was stolen from PW1 was recovered with the appellant.

x. Failed to find that the evidence adduced was unsatisfactory and could not have supported a safe conviction.

xi. Failed to find that the appellant was not reminded of the charge as provided for under Section 211 of the CPC before advancing his defence.

xii. Failed to find that the stipulations of Section 137 (f) of the CPC were not duly complied with.

18. When this appeal came before us for hearing, Mr. Maragia appeared for the appellant on a pauper brief, while there was no appearance for the respondent. Mr. Maragia informed the court that he had filed submissions, which he fully adopted in addition to some brief oral highlighting. In his written submissions, Counsel for the appellant reduced his grounds into 5 major issues, being: issues of the credibility of the witnesses, positive identification and the identification parade; non-compliance with Section 211 of the *CPC*; the conduct of the trial contrary to the provisions of Section 198 of the CPC and Article 50(2) of *the Constitution*; and the alleged recovery of the items from the appellant.

19. On the first major set of issues, Counsel submitted that there was no description given by PW1 to the police to enable them arrest a suspect. If PW1 had indeed seen the appellant's face, nothing could have been easier than describing his face or the physical outlook of the suspect. The rangers did not tell the court whether they had been given a description of the person they were pursuing. It was also mysterious how the rangers knew the exact location of the incident. Counsel also pointed out that the tourists were never interrogated or asked to record statements when the suspect had been taken to the station; that the arrest of the appellant in a gun fire exchange was not corroborated by the report of the Firearms Examiner; and that the trial court did not warn itself of the dangers of relying on the evidence of a single identifying witness.

20. Regarding the identification parade, it was the appellant's submission that the regulations were not followed because the number of persons were 7 instead of 8, and that the appellant was the only one with unique features, namely a bandage on his head, and the head covered with Samburu traditional red ochre, and that this greatly disadvantaged the appellant.

21. Counsel submitted that the trial court failed to comply with Section 211 of the *CPC* in that there is no indication that the substance of the charge was read again to the appellant at the close of the prosecution case; and that the court merely invited the appellant to weigh the options of giving evidence, but did not invite the appellant to tender submissions at the close of the case; that the court did not indicate the language used by the court. and that This was contrary to Section 198 of the CPC, and fatal to the prosecution's case.

22. Regarding the issue of the recovered items, Counsel submitted that the said recovery was not authenticated as there was no inventory duly signed by the appellant that the items were recovered from him; and that proof of ownership of the items by the tourists was not done. Counsel reiterated that the appellant never admitted being in possession of the recovered items in the first place, hence the learned judges were wrong in finding that the appellant did not demonstrate ownership of the items.

23. The duty of this Court as a second appellate court was set out in *Chris Kasamba Karani vs. Republic* [2010] eKLR:

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law.

24. The issues of non-compliance with Sections 211 and 137F of the *CPC* were introduced for the first time in this second appeal. These issues were not placed before any of the courts below to consider and cannot therefore be entertained at this stage. In *John Kariuki Gikonyo vs. Republic* [2019] eKLR, this Court, when faced with similar circumstances, held that:

> " The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her? This Court when faced with a similar issue in Alfayo Gombe Okello vs. Republic [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows:
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> "... the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, as we now do, that it was not raised at the earliest opportunity, although it could and should have been."
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> (18) In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal."

25. On the issue as to whether the omission of the language used by the court was prejudicial to the appellant, the learned judges' analysis of the proceedings and the appellant's cross-examination of the witnesses was flawless. It was apparent from the appellant's cross-examination of PW1 and other witnesses that he understood the language used by the witnesses. His cross-examination related directly to the witnesses' testimonies. Whether the appellant required interpretation pursuant to Section 198 of the *CPC* is therefore a non-issue. The learned judges also diligently verified from the hand-written record that the appellant was afforded an opportunity to cross-examine PW9, but declined to do so.

Whether the identification by PW1 was sufficient and whether the identification parade was properly conducted

26. It is trite law that great care ought to be exercised by a court before convicting on the basis of the evidence of a single identifying witness. The predecessor of this *Court in Abdalla bin Wendo & Another vs. Republic [1953] 20 EACA 166* observed that:

> " Subject to well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but that does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring a correct identification were difficult."

27. Even though the trial magistrate did not caution himself regarding reliance upon the evidence of PW1 as a single identifying witness, his analysis of the evidence made it clear that the conditions for identifying the appellant as one of the robbers were ideal. The robbery took place in broad daylight at around 10:30 am. PW1's testimony was that it was the appellant who issued orders to him and robbed him of his property and money. The appellant must have been facing PW1 when addressing him. There is no suggestion the appellant disguised himself in any way. The identification of the appellant during the identification parade was viewed by the courts below as further corroboration of PW1's visual identification of the appellant at the scene.

28. The appellant however contends that, the manner in which the identification parade was carried out did not comply with the regulations, particularly with regards to the number of persons in the parade and the unique physical features of the appellant. Standing Order 6 (iv) of the Force Standing Orders provide that:

> "6. (iv) Whenever it is necessary that a witness be asked to identify an accused/suspected person, the following procedure must be followed in detail: -
>
> ....
>
> (d) The accused/suspected person will be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as himself. Should the accused/suspected person be suffering from a disfigurement, steps should be taken to ensure that it is not especially apparent;
>
> ....
>
> (n) The parade must be conducted with scrupulous fairness, otherwise the value of the identification as evidence will be lessened or nullified;"

29. In the present case, no evidence emerged regarding the general appearance of the other members of the identification parade, making it impossible to evaluate how much the appellant stood out from the rest. The evidence of PW9 and the Identification Parade Report that, the appellant was placed among seven persons thereby making him the eighth member of the parade. He was therefore "among at least eight persons" as prescribed by the Standing Orders cited above. The learned judge's finding that the identification parade was properly conducted cannot be faulted.

30. The positive identification at the parade reinforced the identification at the scene of the robbery, which was aided by the conducive atmosphere then present. This included unhindered weather conditions, the proximity of the appellant vis a vis P.W.1 and the length it took to execute the robbery. We entertain no doubt whatsoever that all this evidence placed the appellant at the scene.

31. The subsequent recovery from the appellant of property stolen during the robbery sealed his fate. In the circumstances the offence of robbery with violence was proved beyond any reasonable doubt.

32. With respect to the charge of possession of a firearm contrary to Section 89 (1) of the *Penal Code*, the evidence of the rangers was clear and consistent. The appellant was arrested in possession of a carbine rifle after a gunfight between the rangers and the appellant together with three others. The rifle was confirmed by the Firearms Examiner to be a firearm as defined under the *Firearms Act* Cap. 114.

The appellant did not have a permit authorising him to possess the said firearm. The prosecution proved its case beyond reasonable doubt, and the conviction by the trial magistrate was safe.

33. Our assessment of the evidence adduced before the trial magistrate and confirmed by the High Court is that the offences were proved beyond any reasonable doubt, and the two courts cannot be faulted either on conviction or sentences imposed. The appeal has no merit and, therefore, the same is hereby dismissed.

Dated and Delivered at Nairobi this 19th Day of August, 2022

HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR