Khakali v Republic (Criminal Appeal 66 of 2016)
[2022] KECA 1423 (KLR) (16 December 2022) (Judgment)

Neutral citation: [2022] KECA 1423 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 66 OF 2016

PO KIAGE, M NGUGI & F TUIYOTT, JJA

DECEMBER 16, 2022

BETWEEN

SEBANA KHAKALI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega (R. N. Sitati & Njoki M. Mwangi, JJ.) dated 3rd March 2016inHCCRA No. 149 of 2013)

JUDGMENT

1. On the night of December 18, 2011, the complainant, John Mabongo (PW1) was on his way home after a day's labour as a carpenter. He was walking to his home which was near the home of one George Amwatete, whose fence he had been repairing. He was hit on the head and fell down. He lost three teeth as a result of the attack, and his assailant's left him for dead. He lost his phone, make Alcatel, money and the trousers and shirt that he had been wearing. He had been left at the scene of the attack, naked and unconscious. The appellant's green cap had been found at the scene of the attack, and the complainant's clothes were found in the appellant's house.

2. As a result, the appellant, Sebana Khakali, was charged and convicted of the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence were that on the night of December 18, 2011 at Mahanga in Vihiga County within the Western province jointly with others not before court while armed with pangas robbed John Mangabo his mobile phone make Alcatel, a shirt and trouser all valued at Kshs 7,000 and at or immediately before or immediately after the time of such robbery used actual violence to the said John Mangabo.

3. The appellant faced an alternative count of handling stolen goods contrary to section 322 (2) of the *Penal Code*. The particulars were that on the 19th day of December, 2011 at Mahanga in Vihiga county

within the Western province otherwise than in the course of stealing, retained a shirt and a trouser known or having reasons to believe them to be stolen.

4. The appellant pleaded not guilty and after a trial, he was found guilty on the main count of robbery with violence and was sentenced to death as prescribed under section 296(2) of the *Penal code*.

5. Aggrieved by the decision of the trial court, the appellant appealed to the High Court. Upon considering his appeal, however, the High Court agreed with the decision of the trial court and dismissed his appeal, upholding both the appellant's conviction and sentence.

6. The appellant then filed the present appeal in which he raises six grounds of appeal. He argues that the first appellate court erred in law in convicting him when: his plea was not proper; he was not given a right to a fair hearing in its entirety; the evidence was insufficient to sustain his conviction and was marred with contradictions and inconsistencies; it wrongly applied the doctrine of recent possession in finding that the complainant's clothes were found in the appellant's house; he had not been given the right to choose and be represented by an advocate at state expense or informed promptly of the right to be represented by counsel when faced with a capital offence on appeal.

7. This is a second appeal. Accordingly, our jurisdiction is confined within the limits set by section 361 of the Criminal Procedure Code. As was stated in *Karani v R* [2010] 1 KLR 73:

> " 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."

8. Briefly, the evidence before the trial court was that the complainant, PW1, had gone to work at the home of George Amwatete on the material day. He finished his work at 6.00 pm and waited for Mr Amwatete, who arrived home at 10.00 pm and paid him Kshs 2,800 for the work done. PW1 left and started walking towards his home which was nearby. On the way, he was hit on the side of the head and fell down. His attacker pricked him using sharp objects. He lost 3 teeth and was left for dead by the roadside. He was rescued by some people who took him to hospital. His mobile phone make Alcatel, a saw, pliers and planes and money were stolen. He was stripped of the clothes he was wearing, a brown shirt and brown trousers, which were also stolen. He did not identify his attackers. He regained conscious at the Nyanza Kisumu hospital.

9. PW1 testified that the appellant was his neighbour but he did not see him on the material day. After being discharged from hospital, he identified his shirt and trousers, brown in colour, which he had been wearing on the night of the attack, at the police station.

10. PC Ambrose Mathenge (PW2) attached to Vihiga police station was the investigating officer. He had been sent by the Officer Commanding Station (OCS) to Mahanga bus stage to look into a report of a person who had been

    found naked and injured. On arrival at the scene, he was informed that the person had been taken to hospital, and he found him at the Vihiga district hospital. The victim of the attack had a wound on his head and could not speak.

11. PW2 was then sent to Mahanga shopping centre where he found that a suspect, the appellant, had been arrested in connection with the injured person. A crowd had gathered and wanted to burn him.

He was saved by police officers from Mahanga who took him to Emuhaya and later handed him over to PW2 who took him to Vihiga police station. The appellant was found in possession of PW1's clothes, which PW2 produced in evidence.

12. The evidence of PW2 was corroborated by that of PW3, APC Michael Onyiego Achar attached to Mahanga AP Camp. His testimony was that on December 19, 2011, members of the public reported that a man had been assaulted and lay along the Majengo Luanda route. When he and two other administration police officers proceeded to the scene, they found PW1 who was naked and had several injuries all over the head, and blood was oozing out of the injuries. PW1's friend made arrangements and took him to hospital. Members of the public gave the name of the appellant as a suspect. PW3 and others proceeded to the appellant's house and woke him up. They searched his house and recovered a brown shirt and a brown trouser in a basin of water. The appellant told them that he did not know the owner of the clothes, but admitted that a green cap which was found at the scene was his.

13. The complainant had been examined by PW4 Sammy Chelule, a senior clinical officer working at Vihiga District hospital on December 19, 2011. The complainant had multiple injuries on the head, face and he could not talk. He had a deep cut wound on the temporal region, 12 centimetres long, running deep into the skull. There was another deep cut on the front of the

    head extending to the cheek and nasal bone and to the base of the lips. The wounds were stitched to arrest bleeding. Two lower teeth had been removed. He was referred to New Nyanza hospital due to his state of unconsciousness, and was unconscious for 3 weeks.

14. When placed on his defence, the appellant gave a sworn statement in which he denied committing the offence. He stated that he was asleep on December 19, 2011 when he heard a knock at his door. He opened it and found administration police officers who started attacking him. He was arrested and taken to Ebwali administration police camp. Thereafter he was taken to Emuhaya where the officer-in-charge directed that he be taken to Vihiga police station. He was then charged with the current offence which he did not commit.

15. The appellant filed written submissions dated March 10, 2022 which his learned counsel, Mr Mshindi, indicated he would rely on and briefly highlighted. The appellant submits that his plea was not proper contrary to section 207 of the *Criminal Procedure Act* as the record indicates that his words were never recorded. He submits, further, that he was not accorded a fair hearing as the trial was not conducted expeditiously. His plea was taken on December 22, 2011 but hearing commenced on March 8, 2013. According to the appellant, there were forty adjournments and six last adjournments, a clear manifestation of lack of a fair trial. He further contends that he was never granted bail or supplied with the documents that the prosecution relied on. It is his submission further that despite facing a capital offence, he was not accorded an advocate to represent him and he was also not given a chance to submit on a case to answer.

16. The appellant further faults the first appellate court for upholding his conviction when all the ingredients of the offence he was charged with were

    never proved, reliance for this submission being placed on the case of *Charles Maina Wamai v Republic* [2003] KLR 1 EA 353.

17. It is the appellant's submission further that the trial court based his conviction on the doctrine of recent possession yet there was contradictory evidence on who recovered the stolen clothes and who signed the inventory in respect thereto. Support for this submission is sought in the case of *Erick Otieno Arum v Republic* (2006) eKLR.

18. The respondent opposed the appeal and filed submissions dated July 1, 2022 which were highlighted by Mr Okango, learned prosecution counsel. It is submitted that the appellant's complaint that the words and the language used in taking his plea were never recorded, hence rendering the trial unfair, was never raised before the trial or first appellate court. That contrary to the appellant's assertion, the plea was taken in the Kiswahili language, which the appellant informed the trial court that he understood, and he spoke in Kiswahili throughout the proceedings.

19. Regarding the claim that there was a breach of the appellant's right to fair hearing and legal representation, the respondent submits that these issues are improperly being raised for the first time before this court sitting as the second appellate court. It is further submitted that the appellant was given adequate time to prepare his defence and supplied with witness statements.

20. With regard to the claim that the appellant was not accorded legal representation, the respondent submits that there was no enabling legislation, such legislation having been later enacted vide the *Legal Aid Act* No 6 of 2016.

21. Regarding the evidence relied on to convict the appellant, the respondent submits that the trial court and the first appellate court properly found that there was sufficient evidence to hold that the offence of robbery with violence had been proved beyond reasonable doubt. The evidence showed that the complainant was robbed and seriously injured, that it linked the appellant with the commission of the offence; and that the trial court had found, in basing its decision on the doctrine of recent possession, that the complainant's clothes, which were produced in evidence, were recovered from the appellant's house and he had not given a reasonable explanation on how he came to be in possession of the stolen items.

22. In his petition of appeal to the High Court dated July 22, 2013, the appellant raised five grounds of appeal which, reproduced verbatim were that:

    i. The trial magistrate erred in law and facts when failed to summon the prosecution to avail the first report the credibility or identifying witnesses.

    ii. The trial magistrate erred in law and facts by relying on the evidence of PW2 and PW3 who alleged that they got information from the members of public but no one was summoned.

    iii. That the learned trial magistrate misdirected himself in both law and facts when he failed to see the contradictions and discrepancies consisted by the prosecution side.

    iv. That the trial magistrate gradually erred himself in both law and in facts by shifting the burden of proof to the appellant without knowing that it is always on the prosecution party to proof their case as charged.

    v. The trial magistrate erred in law and facts when he failed to comply with the provisions of section 324 as read 329 *CPC*.

23. We observe that the appellant has raised several grounds in the present appeal that he did not raise before the High Court. He did not challenge his conviction on the basis that the plea he took was not proper; or that he was not given a fair hearing; that he was not permitted to make submissions on a case to answer; nor did he challenge his conviction on the basis that he had not been given the right to legal representation at state expense. In line with the decision in *Alex Wambani Joseph v Republic* [2020]

eKLR cited with approval in *Alfayo Gombe Okello v Republic* [2010] eKLR we shall not consider these grounds which have been raised for the first time in this second appeal.

24. The sole issue of law before us is to be found in the appellant's third ground of appeal, namely, whether the prosecution proved the offence of robbery with violence and, as a corollary, whether the doctrine of recent possession was properly applied by the trial and first appellate court to lead to the conviction of the appellant. In its decision in *Johana Ndungu v Republic* [1996] eKLR the court considered the ingredients of the offence of robbery with violence and observed as follows:

> "In order to appreciate properly as to what acts constitute an offence under section 296 (2) of one must consider the subsection in conjunction with section 295 of the PC. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore described ingredients constituting robbery are presupposed in the 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 subsection:
>
> 1. If the offender is armed with any dangerous or offensive weapon or instrument; or
> 2. If he is in company with one or more other person or persons; or
> 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."

25. We have set out above the evidence of the complainant (PW1), as well as that of PW2, PW3, and PW4. The evidence shows that the complainant was attacked savagely on his way home on the material night, grievously injured and left for dead by the roadside. He was robbed of his phone, money, tools and, most curiously and incomprehensibly, of his clothes: a brown shirt and a brown trouser were stolen together with his phone, money and the tools he had used to carry out his work, and he was left for dead by the roadside. PW1 was rescued by some people who took him to hospital.

26. The evidence of PW2 and PW3 related to the arrest of the appellant, and the recovery of the complainant's clothes from the appellant's house. The appellant had stated that he did not know the owner of the clothes. He admitted that a green cap found at the scene of the assault on the complainant was his. Evidence with regard to the injuries sustained by the complainant was given by PW4.

27. The evidence showed that the complainant was robbed and injured on December 18, 2011. The clothes that he was wearing on the night of the attack, a brown shirt and brown trousers, were recovered from the appellant's house the following day, December 19, 2011. There is no dispute that the two items belonged to the complainant, and the appellant offered no explanation of how he came to be in possession of them.

28. In our view, the doctrine of recent possession was properly invoked by the trial court, and upheld by the first appellate court. In *Peter Kariuki Kibue v Republic* [2001] eKLR the appellant was found in possession of recently stolen items and the court held:

> "The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. This is a rebuttable presumption of law based on the provisions of section 119 of the Evidence Act."

29. In its decision in *Eric Otieno Arum v Republic* [2006] eKLR this court stated as follows:

> "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."

30. The complainant's clothes were found in the appellant's house the day after the robbery, soaked in a basin of water. The appellant did not give a reasonable explanation as to how the clothes came to be in his house and it is not a strange coincidence that the appellant's cap was found at the scene of the assault and robbery. The irresistible conclusion that the trial court came to, which was upheld by the first appellate court, was that the appellant was the person who committed the robbery against the complainant. The ingredients of the offence of robbery with violence were established against the appellant.

31. In the result, we find no merit in this appeal, and it is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER, 2022

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR