Shinavula v Republic (Criminal Appeal E015 of 2023)
[2025] KEHC 7104 (KLR) (27 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7104 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E015 OF 2023

JN KAMAU, J

MAY 27, 2025

BETWEEN

HILARY LITIOLI SHINAVULA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon M.L. Nabibya (PM) delivered at Hamisi in Principal Magistrate's Court in Criminal Case No 1092 of 2018 on 17th July 2019)

JUDGMENT

Introduction

1. The Appellant herein was jointly charged with others two (2) Counts of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* Cap 63 (Laws of Kenya).

2. The Learned Trial Magistrate, Hon S. Otieno (PM) convicted him and one Co-Accused on both Counts and sentenced him to fifty (50) years imprisonment on each Count.

3. Being dissatisfied with the said Judgement, he lodged an appeal herein. His Petition of Appeal was dated 19th January 2023 and filed on 20th June 2023. He set out eight (8) grounds of appeal.

4. His Written Submissions were dated 29th April 2024 and filed on 4th May 2024 while those of the Respondent were dated 15th October 2024 and filed on 17th October 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify, and thus make due allowance in that respect.

7. Having looked at the Appellant's Grounds of Appeal and the parties' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were:-

    a. Whether or the Trial Court erred when it found that the Prosecution had proved its case beyond reasonable court;

    b. Whether or not in the circumstances of this case, the sentence that was meted out to him by the Trial Court was lawful and/or warranted.

8. The said issues were dealt with under the following separate and distinct heads.

I. Proof of The Prosecution's Case

9. The Appellant submitted that the Trial Court convicted him based on circumstantial evidence yet the duty of the Prosecution was to prove its case beyond reasonable doubt as was held in the United State (sic) Supreme Court decision in Rewinship 379 US 388 (1970) at pp 361-64 (sic).

10. He added that the Prosecution also had the duty to explain his possession after proving that the item had been stolen, that the item had been stolen a short period prior to the possession and that there were no other co-existing circumstances that pointed to another person as having been in possession of the stolen item. In this regard, he relied on the case of Republic vs Hassan s/o Mohammed (1948) 23 EACA 121.

11. It was his submission that the doctrine of recent possession was not applicable in the case herein because he was not found in possession with the weapon that was used during the robbery. He added that the recovery of the phone that he topped up airtime did not form a strong chain to criminalise him. He was emphatic that a single circumstantial evidence could not stand on its own without support.

12. He further submitted that the Trial Court applied the doctrine of common intention without considering his participation in the crime that was committed.

13. He also discredited the search warrant as the power to search could only be exercised between sunrise and sunset but in his case the same was done at 11.00pm and thus violated Article 50(4) of the *Constitution* of Kenya, 2010 despite the number of witnesses who testified against him. He relied on the case of Erick Otieno vs Republic [2006] eKLR to buttress his argument.

14. On its part, the Respondent submitted that the Prosecution established the ingredients of the offence of robbery with violence which were set out in Section 296(2) of the *Penal Code*. In this regard, it placed reliance on the cases of Oluoch vs Republic [1985] KLR and *Dima Denge Dima vs Republic Criminal Appeal No 300 of 2007* (eKLR citation not given) which reiterated the said ingredients.

15. It pointed out that the Appellant did not provide an alibi and that the evidence that the Prosecution adduced showed that he was in the company of others who were armed with an AK- 47 when the said offence was committed and violence was also meted out to the complainant. It further argued that he did not explain how the stolen airtime came to his possession when he topped up his phone which was a day after the robbery.

16. This court analysed the evidence of Everlyne Kimuli and Jackton Fedha (hereinafter referred to as "PW1" and "PW 2") respectively and noted how they were robbed money and airtime by a group of four (4) armed men. Evidence was adduced to show that James Shiningu (hereinafter referred to as "PW 3") was shot as the robbers fled from the scene. Wycliffe Teda, a Clinical Officer at Serem Health Centre (hereinafter referred to as "PW 5") confirmed the injuries that PW 3 sustained and adduced a P3 Form and treatment notes.

17. No 2317102310 ASP Alex Chirchir (hereinafter referred to as "PW 5") testified that the AK-47 that was recovered from the Appellant's Co-Accused house had committed several robberies in Eldoret and Vihiga County. The Appellant's Co-Accused was arrested in his home by No 109503 PC Edwin Ombui (hereinafter referred to as "PW 6") who had tracked his number. When the Appellant's Co-Accused was interrogated, he directed the police officers to the Appellant's house.

18. James Makobi (hereinafter referred to as "PW 7") testified that airtime that had been stolen from PW 1 was loaded in the Appellant's and his Co-Accused person's phones. He worked at the Law Enforcement Office, Safaricom Kisumu.

19. No 82212 PC Moses K. Biwott (hereinafter referred to as "PW 9") was the Investigating Officer. He explained how they laid a trap for the Appellant's Co-Accused persons in the pretext that there was a robbery to be committed whereupon they were all arrested.

20. In his sworn evidence, the Appellant herein told the Trial Court that he could not tell where he was on the material date but he was arrested by three (3) police officers who had posed as clients. He admitted having known only one of his Co-Accused persons.

21. In ascertaining whether the Appellant's defence of alibi had value, this court had due regard to the definition of "alibi" in the Black's Law Dictionary, 10th Edition. It was defined as:-

> " A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time".

22. It was also trite law that once a respondent raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of Victor Mwendwa Mulinge vs Republic [2014] eKLR.

23. In this case, the defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) that provides that:-

> " If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it."

24. Be that as it may, weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Appellant's alibi evidence to have been watertight enough to have weakened the inference of guilt on his part. This is because the Prosecution had demonstrated the elements of the offence of robbery with violence as was set out in the case of Oluoch vs Republic (Supra).

25. In that case, the Court of Appeal set out the elements of robbery with violence as being that at the time the offence was committed, the offender must have been armed with a dangerous and offensive weapon or instrument or he must have been in the company with one or more person or persons or

at or immediately before or after the time of the robbery, the offender wounded, beat, struck or used other personal violence to any person.

26. Notably, Section 295 of the *Penal Code* stipulates that the elements of robbery with violence are :-

    a. That the offender is armed with any dangerous weapon or offensive weapon or instrument;

    b. That the offender is in the company of one or more persons;

    c. That or if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person.

27. PW 1 and PW 2 confirmed having been robbed by four (4) people who were armed with an AK-47 Rifle. The airtime which was stolen from PW 1 was loaded into the phones of the Appellant's phone and his Co-Accused person. They never explained where they got the airtime yet its source was a major focus of the Prosecution's case. The doctrine of recent possession was therefore applicable in the circumstances of this case.

28. It was clear that the Appellant was in the company of more than one (1) person at the time of the robbery. They were armed and the Appellant and his Co-Accused persons injured PW 3 with the AK-47 Rifle immediately after the robbery, injuries which were confirmed by PW 5. The bullets that were discharged from the Rifle matched the AK-47 Rifle that was recovered from the Appellant's Co-Accused person's home.

29. Assuming that the Appellant herein was an innocent purchaser of airtime, he could not escape because he confirmed knowing his Co-Accused person whose phone was also loaded with stolen airtime and from whose house, the AK-47 Rifle was recovered.

30. As the chain of events was unbroken, this court was satisfied that the Prosecution established its case of robbery with violence against the Appellant herein beyond reasonable doubt. The Trial Court thus proceeded correctly when it found that all the ingredients constituting the offence of robbery with violence were present in this case and convicted him accordingly.

31. In the premises foregoing, Grounds of Appeal Nos (1), (2), (4), (5), (6), (7) and (8) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

II. SENTENCE

32. The Appellant submitted that the sentence that was meted out to him was excessive. He referred this court to Section 26(2) of the *Penal Code* that stipulates that one can be given a shorter sentence and Paragraph 4.5.3 of the Sentencing Policy Guidelines, 2023 that provide that where an offence was committed by more than one (1) offender, the court was required to ascertain the culpability of each offender and mete out sentence that was commensurate with the offence each offender had committed. He sought that he be given the least prescribed sentence pursuant to Article 25(c), 50(2)(p)(sic).

33. He also urged this court to consider Section 333(2) of the *Criminal Procedure Code* and Paragraphs 5.1.22. 1.3.18 and 2.3.20 of the Sentencing Policy Guidelines. He asked this court to order that his sentence run from 19th August 2018 noting that he was convicted on 31st July 2019.

34. On its part, the Respondent submitted that the sentence that was meted out to him was not discriminatory or excessive. It asked this court not to interfere with the same. It, however, did not object to this court granting him the period that he had spent in custody while awaiting trial as was set out in the case of Ahamad Abolfathi Mohammed & Another vs Republic [2018]eKLR.

35. Notably, the Appellant was found guilty of the offence of robbery with violence and gang rape.

36. Section 295 of the *Penal Code* states that:-

> " 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."

37. Further, Section 296 (1) and (2) of the *Penal Code* provides as follows:-

    1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

    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 before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

38. The Trial Court could not therefore have been faulted for having sentenced him to fifty (50) years imprisonment for each Count as the same was lawful.

39. Having said so, it was the view of this court that fifty (50) years for each Count was too excessive as the total number of years exceeded the Appellant's life time. He was aged (31) years at the time he was convicted and sentence. If the sentence was to be left as it was, it meant that the Appellant would serve the sentence until he was one hundred and thirty one (131) years when we do not expect human beings to be alive by any stretch of imagination.

40. It was the view of this court that twenty five (25) years imprisonment for each Count was adequate, the same to run consecutively as the Counts related to two (2) separate offences but on the same night.

41. Notably, as per the charge sheet, the Appellant herein was arrested on 19th August 2018. Although he was granted bond, he did not appear to have posted the same. He was convicted and sentenced on 31st July 2019.

42. A perusal of the lower court proceedings indicated that the Trial Court did not take into consideration the said period while sentencing him. This was a period that therefore ought to be taken into consideration while computing his sentence.

Disposition

43. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated 19th January 2023 and filed on 20th June 2024 was not merited save for the grounds on Section 333(2) of the *Criminal Procedure Code* and the reduction of the sentence to twenty five (25) years for each Count. The Appellant's conviction be and is hereby upheld as the same was safe.

44. For the avoidance of doubt, it is hereby directed that the period between 19th August 2018 and 30th July 2019 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

45. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 27TH DAY OF MAY 2025

J. KAMAU

JUDGE