Kipsang v Republic (Criminal Appeal E008 of 2023)
[2024] KEHC 249 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 249 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E008 OF 2023

AC MRIMA, J

JANUARY 25, 2024

BETWEEN

GILBERT KIPSANG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. S. K. Mutai, (Senior Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. E3273 of 2021 delivered on 28th July, 2022)

JUDGMENT

Introduction:

1. The Appellant herein, Gilbert Kipsang, was charged in Kitale Chief Magistrate's Court Criminal Case No. E3273 of 2021. He faced two main counts with an alternative count. The main counts were Robbery with violence and Having suspected stolen Property. The alternative count to the charge of robbery of violence was Handling stolen goods.

2. The particulars of the offences were as follows: -

Count I:

Robbery with violence contrary to Section 296(2) of the Penal Code.

On the 11th day of July, 2021 at Leltangat in Trans Nzoia East Sub-County within Trans Nzoia County with others not before Court, while armed with crude weapons robbed Margaret Rutto Kshs. 1,505/= and one mobile phone namely Tecno T372 of IMEI 359319724245442/3593197242424467 valued at Kshs. 1,700/= all valued at Kshs. 3,205/= the property of Margaret Rutto and

unknown amount of money and immediately after the time of such robbery threatened to use actual violence to the said Margaret Rutto.

Alternative Charge to Count I

Handling stolen goods contrary to section 322(1) as read with section 322(2) of the penal code.

On the 12th day of July 2021 at Motosiet in Trans Nzoia East Sub County in Trans Nzoia County, otherwise than in the course of stealing you dishonestly retained one mobile phone namely TECNO T372 of IMEI 3593197242425442/3593197242425459/3593197242425467 valued Kshs.1,700/- the property of MARGARET RUTTO knowing that it was a stolen good.

Count II:

Handling suspected stolen property contrary to section 323 of the penal code.

On the 12th day of July 2021 at Motosiet Police Post in Trans Nzoia East Sub County in Trans Nzoia County, having being detained by No.79753 Corporal Daniel Misita as a result of the powers conferred by section 26 of the Criminal Procedure Code, had in your possession one cock which was reasonably suspected to have been stolen or unlawfully obtained.

3. When arraigned before Court, the Accused pleaded not guilty to the offences. After a full trial, the Accused was found guilty and convicted as charged in all offences. He was subsequently sentenced to 10 years' imprisonment on the main charge of robbery with violence.

The Appeal

4. The Appellant herein was aggrieved by the conviction and sentence. He filed a Petition of Appeal. The Appellant challenged the conviction and sentence in alleging that identification was not proper since no identification parade was conducted, that possession was not proved, his rights to a fair trial were infringed and that the defence was not considered.

5. This Court was then urged to allow the appeal by quashing the conviction, setting aside the sentence and forthwith setting the Appellant at liberty.

6. During the hearing of the appeal, the Appellant relied on his written submissions wherein he expounded on the grounds of appeal. He also referred to various decisions.

7. The prosecution on its part relied on the record.

Analysis

8. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

9. Having carefully perused the record, this Court is now called upon to determine whether the offence of robbery with violence was committed, and if so, whether by the Appellant.

10. Before dealing with the said aspects of the offence, the Court will render a very brief recount of the evidence adduced at the trial. Needless to say, the trial Court summarized the evidence in its judgement quite well and this Court hereby adopts the same herein by way of reference.

11. The prosecution called 10 witnesses in a bid to establish the charges drawn against the Appellant. They were Margaret Rutto, who was the complainant. She testified as PW1. She testified on how the Appellant invaded her while asleep in her kitchen in the night in issue and robbed her properties while threatening to kill her. A son to PW1, one Alex Kiprono Rutto testified as PW2. He confirmed hearing PW1 scream at around 2:00am and rushed to where she was. He searched for the robbers in vain. He then called PW1's phone and it was received by someone who introduced himself as a police officer at Motosiet Police Post. He asked PW1 to proceed to the police. He also identified the phone in Court.

12. PW3 was the husband to PW1. He was one Josephat Rutto. He also confirmed hearing PW1 scream at around 2:00am and rushed to where she was. He searched for the robbers with PW2 in vain. PW4 was a boda boda operator. He was John Wekesa. He recalled in the morning of 12th July 2021 finding the Appellant, who was the Watchman at Reynold Primary School, selling a cock. The Appellant also had a phone. He, and others, suspected that the cock was stolen. They surrounded the Appellant and started interrogating him. Suddenly the came rang and it was picked by one of those people who were interrogating him. The caller said that the phone had been stolen. The people escorted the Appellant to the police, but he escaped on the way only to be arrested later. PW4 identified the Appellant, the phone and a photograph of the cock in Court. PW5, Elvis Kipyego Lesan and PW8, Anthony Mukhwana, were among the people who interrogated the Appellant. They also confirmed that the Appellant escaped, but was later arrested and taken to the police.

13. PW6, Patrick Mitei, was one of those in the search party for the Appellant. They followed footprints and found the Appellant in a maize plantation. They took him to Motosiet Police Post and handed him over to the police. He identified the person as the Appellant before Court. Andrew Kipkorir Yegon, PW7, was also one of those who gave chase to the Appellant and arrested him.

14. An Officer from the Scenes of Crime Department No. 88551 PC Caleb Simbiri testified as PW9. He processed 2 photographs for the Appellant and the cock and produced them as exhibits. No. 237082 Insp. Felix Otieno attached at the DCI Trans Nzoia East Sub-County testified as PW10. He was the investigation officer in the case.

15. After close of the prosecution's case, the trial Court found that the Accused had a case to answer and he was placed on his defense.

16. The Appellant gave a sworn defence without calling any witness. He denied omitting any of the offences. He stated that he had been given the chicken by his grandmother to sell. That, as he was attempting to sell it, he was confronted by boda boda riders and taken to Motosiet Police Post. He decried that PW1 did not prove ownership of the phone.

17. It is on the basis of the above evidence that they Appellant was found guilty as charged, convicted and accordingly sentenced.

18. From the above factual matrix, this Court will now juxtapose it with the legal principles guiding the offence of robbery with violence.

19. A consideration of whether the offence of robbery with violence was proved now follows.

20. The offence of robbery with violence is a creation of Sections 295 and 296(2) of the Penal Code. The provisions provide as follows: -

> 295. Definition of robbery:
>
> > 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. Punishment of robbery:
>
> 1. .....
>
> > 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.

21. From the foregoing provisions, the offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the aspect of violence.

22. Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft, the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto.

23. Two things must, therefore, be proved for the offence of robbery to be established. They are theft and the use of or threat to use actual violence.

24. Once the offence of robbery is proved on one hand, the offence of robbery with violence, on the other hand, is committed when robbery is proved and further if any one of the following three ingredients are also established: -

(a) The offender is armed with any dangerous or offensive weapon or instrument, or,

(b) The offender is in the company of one or more other person or persons, or

(c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

25. This Court is alive to the confusion which has lingered over time in distinguishing the offence of robbery from that of robbery with violence.

26. To this Court, the confusion is real. The description of any of the two offences leads to the other. Indeed, that was one of the findings by an expanded Bench of the High Court in Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR which called for law reform to address the ambiguity.

27. Be that as it may, for purposes of establishing the offences pending any law reform which is far too long overdue, the difference between the two offences ought to relate to the circumstances under which they are committed and the gravity of the injuries sustained. This Court will, therefore, adopt an intermediate approach. The approach is that whereas both offences connote theft and violence, for the offence of robbery with violence to be established, there must be evidence of actual use of violence on the person of the victim and not a threat to such violence.

28. Therefore, if in the course of stealing, the offender only threatens to use violence on the victim, but no more than the threat, then the offence of robbery, and not robbery with violence, may be committed. Further, in such circumstances, the offence of robbery with violence cannot stand even if it is proved that the offender was armed with any dangerous or offensive weapon or instrument and/or the offender was in the company of one or more other person or persons as long as there was no evidence of actual use of violence.

29. Having said as much, this Court joins the calling for immediate law reform to address the legal ambiguity.

30. On the basis of the above, this Court will now apply the law to the facts of the case. First is the issue of identification of the offender.

31. The issue of identification of the Appellant was hotly contested in this appeal. The Appellant contended that no identification parade was conducted, hence, the issue was not properly settled.

32. This is a case in which the identification of the Assailant arose in two ways. The first way was through eye-witness account and the other way was through the inference of recent possession. The Court will deal with the two ways in seriatim.

Direct identification

33. PW1 was the only witness who testified to have seen the Appellant invading his house, threatening her and eventually robbing her phone and money. Since the evidence was that of a single identifying witness, there is need to look at the guiding law in that arena.

34. The Court of Appeal in Peter Mwangi Wanjiku v Republic [2020] eKLR addressed the aspect of single identifying witness as follows: -

> 13. Section 143 of the Evidence Act provides that a court can convict on the evidence of a single witness. The said section reads, "No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact." Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in Mailanyi vs Republic [1986] KLR 198:
>
> 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.
>
> 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions

and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. The issue is whether this was actually done. In Mailanyi v Republic (supra), the Court emphasized that:

> What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. ....
>
> There is a second line of enquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police.

35. In R -vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated thus: -

> ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

36. In Wamunga vs Republic (1989) KLR 426 the Court of Appeal stated as under: -

> "…. It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction."

37. In Anil Phukan v State of Assam (1993) AIR 1462 the Court held as follows: -

> A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.

38. Applying the foregoing to this case, PW1 was invaded at around 2:00am. She was sleeping in the kitchen having been rained on. She was suddenly woken up by a knock on the door and two people entered. They both had bright torches. They demanded for money and phones. PW1 spotted three other people waiting outside the kitchen. After getting the money and the phone, they left. PW1 then raised alarm and her husband and son readily responded. A search did not yield any positive results.

39. PW1 did not state whether she knew the Appellant before the attack. She was suddenly woken up from slumber amid being shone unto bright torches. She was also under threat of actual violence. There was no other lighting in the kitchen. PW1 did not indicate how she identified the attackers or any of them.

40. On a review of the evidence, this Court is of the considered position that the prevailing circumstances as at the time when the attack took place were not favourable for proper identification of any of the attackers by PW1 and without error. As such, PW1 did not recognize the attackers.

The Inference of Recent Possession

41. The doctrine of recent possession was discussed at length by the Court of Appeal at Nyeri Criminal Appeal No. 4 of 2014 David Mugo Kimunge vs. Republic (2015) eKLR. The Learned Judges greatly rendered themselves as follows: -

> 16. The doctrine of recent possession has been applied in numerous decisions of this Court and the High Court properly cited the Kahiga case (supra) as one for the elements necessary for proof. We may reproduce the elements from that case: -
>
> > It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof
> >
> > i) that the property was found with the suspect;
> >
> > ii) that the property is positively the property of the complainant;
> >
> > iii) that the property was stolen from the complainant;
> >
> > iv) 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."
>
> 17. .....

18. In the end, the majority of that Supreme Court accepted the following summary of the doctrine: -

> Upon proof of the unexplained possession of recently stolen property, the trier of fact may - but not must- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decided which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatorily, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.

42. On the acceptable threshold of the explanation offered by an accused on his/her possession, the Learned Judges stated as follows: -

> 19. ..... Applying that learning to the case before us, we are of the view that the inference arising from the unexplained possession of stolen goods is one of fact. The trier of fact in this case was the Principal Magistrate's court which had the advantage of seeing and hearing the witnesses testify before it. As always, the first appellate and the second appellate courts must of necessity give allowance for this advantage and be slow to interfere unless there was no evidence to support the findings or the findings were perverse. It is also clear from the decisions that the truth of the explanation alluded to in the doctrine is not the standard applicable. Nor is it acceptable that any fanciful or concocted explanation will suffice. The explanation must pass the muster of reasonableness and plausibility. Did it do so in the case before us?

43. This Court will now apply the above four principles in this matter.Recovery of the phone and the Cock:

44. The phone was recovered from the Appellant by some of the witnesses. That was when members of public had gathered around the Appellant asking him on where the cock he was trying to sell was from. The phone which was in his pocket rang and the members forced him to receive the call. He was resistant and one of the people received it. The caller told the one who had answered the call that the phone was stolen.

45. It was during that time when members of public recovered the phone and cock and led the Appellant to the police only for the Appellant to escape, but to be re-arrested.

46. The phone and the Cock were, hence, found with the Appellant.Whether the phone belonged to PW1:

47. The Appellant contended that since PW1 did not produce any ownership documents, the phone did not belong to her.

48. PW1 testified that the phone was hers and that it was stolen from her possession. PW2 and PW3 identified the phone as belonging to PW1.

49. The Merriam-Webster Dictionary defines an 'owner' as follows: -

> person who owns something: one who has the legal or rightful title to something: one to whom property belongs....

50. The Black's Law Dictionary, 9th Edition defines a 'beneficial owner' as one who enjoys, uses and manages property as of right and can convey it to others; an equitable ownership.

51. In Nancy Ayemba Ngaira –vs- Abdi Ali [2010] eKLR the Court had the following to say on ownership: -

> "..... In judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration."

52. The evidence of PW2 and PW3 corroborated that of PW1 and affirmed the position that the phone belonged to PW1 and that she used it. PW2 and PW3 had PW1's phone number and even made calls that number.

53. In some instances, the law does not mandatorily require documentary evidence of ownership of property. Whereas PW1 did not avail ownership documents of the phone, there was ample evidence of actual and possessory ownership by PW1. Further, no one else laid claim over the ownership of the phone. Legally, it was, therefore, proved that the phone belonged to PW1.Whether the phone was stolen from PW1:

54. There is ample evidence to show that the phone was stolen from PW1. PW1, PW2 and PW3 attested to that.Whether the phone was recently stolen from PW1:

55. The theft was at 2:00am on 11th July, 2021. At day break, the phone was recovered from the Appellant as he was trying to sell a Cock.

56. Given that the phone was recovered just a few hours after it was stolen, suffice to find that the phone had been recently stolen.

57. In sum, therefore, the inference of recent possession aptly applies in this case. Without any shred of doubt, and in view of the above discussion, there is an indefeasible inference that the Appellant had just stolen the phone from PW1 before he was found with it.

58. Having found that the Appellant stole the phone from PW1, and having discussed the intermediate approach in this judgment in a bid to distinguish the offence of robbery from that of robbery with violence, this Court settles that the offence of robbery, and not that of robbery with violence, was committed by the Appellant. The reason being that PW1 was only, but threatened to be killed if she raised alarm. She was neither injured nor molested in any other way.

59. Section 296 of the Penal Code provides the penalty for one found culpable of robbery to be a sentence of up to 14 years imprisonment. The sentence for one convicted of robbery with violence goes up to a death sentence. As such, the offence of robbery is a lesser offence to that of robbery with violence. Robbery is a cognate offence to robbery with violence.

60. This Court, hence, finds the Appellant guilty of robbery.

Sentence

61. The Appellant was sentenced to 10 years' imprisonment.

62. The High Court in Wanjema v. Republic (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

63. In sentencing the Appellant, the Court did not call for a Pre-sentencing report. The Appellant had nothing to say in mitigations.

64. This Court takes the position that even though sentencing remains discretionary on the Court and that the Court is not obliged to call for a Pre-sentence report, such a report, depending on the circumstances of a case, may greatly aid the Court in meeting the aims of sentencing. (See the Francis Karioko Muruatetu & another v Republic case (supra).

65. The Probation of Offenders Act as amended by Act Number 18 of 2018 defines 'pre-sentence inquiry reports' as follows: -

> Pre-sentence inquiry reports" means 'the reports on accused persons or offenders prepared by probation officers under this Act or any other law in force for purposes of criminal justice administration.

66. The significance of pre-sentence report, as can be discerned from The Probation and After Care Guidelines for Social Investigations and Pre-sentence Reports, cannot be gainsaid. It serves the following purpose;

Pre-sentence reports provide advisory information to the Courts with a view to the court making sentencing verdicts, including decisions on alternative measures to imprisonment.

The investigations are conducted with the aim of collating verifiable information and for writing various assessment reports including pre-sentence reports.

In sentencing decision making, social investigations help in:

- Formulating plausible theoretical explanations of the criminal behaviour of an offender
- Understanding the personality of the offender beyond the crime committed
- Developing a basis for intervention/rehabilitation
- Identifying resources required to effect change Identify and arrange for partnership with organizations which can aid the process of eventual rehabilitation
- Gain knowledge of the culture and resources available in the local communities
- Propose cogent measures necessary to address the identified 'needs' and forestall any risk of reoffending, including through an appropriate sentence.

67. In Consolidated Petition No. 97, 88 of 2021 and 90 of 2021 and 57 of 2021, Adan Maka Thulu -vs- Director of Public Prosecutions and, Kazungu Kalama Jojwa -vs- The Director of Public Prosecutions, the Court spoke to sentencing in the following manner:

> .... As was held in Poonoo -vs- Republic, SCA 38 of 2010, sentencing an offender is not the mechanical application of letters and numbers in a formulaic table. It is the human deliberation of what is just punishment.
>
> ...the fifth principle is that a citizen ..... has a right to put in plea on mitigation to show that the imposition of the .....sentence is not warranted in his case. If the Court in considering all the facts and circumstances of the case comes to the conclusion that indeed is the case, the court would be perfectly entitled to read down the sentence .....

68. It is on the basis of the foregoing that this Court is firmly of the considered position that this was a case where the sentencing Court ought to have called for a Pre-Sentence Report more so since the Appellant did tender any mitigations.

69. As such, and respectfully so, this Court will call for a Probation Report to be able to render itself on whether it ought to interfere with the sentence or not.

Disposition:

70. Flowing from the foregoing, the following final orders are hereby issued: -

    a. The Appeal against the conviction on the offence of robbery with violence only succeeds to the extent that the Appellant is instead found to be guilty of the offence of robbery and not robbery with violence.

    b. For avoidance of doubt, the Appellant be and is hereby found guilty of and is hereby convicted of the offence of robbery.

    c. The Appeal against the conviction on the offence of Having suspected stolen property is hereby dismissed.

    d. The determination on the appeal against the sentence shall await a Probation Report to be availed on a date to issue.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 25TH DAY OF JANUARY, 2024.

A. C. MRIMA

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Judgment delivered virtually and in the presence of: -

Gilbert Kipsang, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.