Wangui v Republic (Criminal Appeal E051 of 2021)
[2024] KEHC 3071 (KLR) (21 March 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E051 OF 2021

A MSHILA, J

MARCH 21, 2024

BETWEEN

KELVIN NDUNG'U WANGUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal originating from the conviction and sentence by Hon. C.N. Mugo (SRM) in Limuru Criminal Case No.905 of 2018 dated 23rd July, 2020)

JUDGMENT

1. The Appellant, Kelvin Ndung'u Wangui, was charged before the Senior Principal Magistrate's Court at Limuru in Criminal Case No. 905 of 2018 for the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars were that on the 21st day of November, 2018 at around 2300hrs at Kwambira in Limuru Sub-County within Kiambu County jointly with others not before court robbed Jane Nyambura Kanja three mobile phones Samsung s3 mini, sony xperia, itel s2 all valued at Kshs. 80,500/=, cash of 6,000/= and 200 US dollars and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Jane Nyambura Kanja.

2. Upon being found guilty, the trial court convicted the Appellant and sentenced him to serve twenty three years (23) in prison. Being aggrieved by the said conviction and sentence the Appellant has lodged this appeal based on the following amended grounds of appeal;-

    a. That the Learned Trial Magistrate erred in law and fact by convicting the Appellant on identification that was riddled with errors that goes to the core root of the case since it was not proved beyond reasonable doubt as required by the law.

    b. That the Learned Trial Magistrate erred in fact and law by applying the wrong yardstick on the application of the identification parade which she used to convict the Appellant.

c. That the testimonies tendered to establish the Appellant's mode of arrest was riddled with doubts and was not enough to sustain a conviction.

d. That the trial Magistrate erred in law by failing to note the peculiar circumstances of the case facing the Appellant and instead ignored his mitigation and sentenced him to harsh and severe sentence hence violated his right to mitigation as provided for under Section 216 and 326 of the Criminal Procedure Code and also right to fair trial under Article 50(2) (p) of *the Constitution*.

3. The prosecution called four witnesses in support of their case. Jane Nyambura Kanja (PW1) testified that she is a businesswoman residing in Ndeiya. On 21/11/2018 at 11 pm she had come from work and proceeded to pick their car where it had been parked by her husband. Another car was parked too close to theirs that she was unable to access their car using the driver's door as such she opted to use the co-driver's side. She testified that as she was going around it she saw three men approaching and when the men came too close she started screaming. A scuffle ensued and the men accessed the driver door where they took her handbag and ran away. She testified that she identified the Appellant as the area is well lit as there was a big light next to the hotel. In her handbag she had three phones being Sony experia worth between Kshs. 60,000-65,000/=, a Samsung for Kshs. 12,800 and Itel worth Kshs. 8,500/=. She testified that she proceeded to Mutarakwa Police Station where she recorded a statement. She was informed after a week that there were people who had been arrested at Kwambira as such she was directed to go to Tigoni Police Station for identification. During the identification, she identified the Appellant as he had a scar which she had seen on him during the robbery incident.

4. Nelson Kanja Mungai (PW2) testified that on 21/11/2018 he had left his car at Kwambira for his wife to use as she used to come late from work. At 11 pm he received a call from his wife who informed him that she was at Mutarakwa Police Station as she had been robbed. Later the complainant got home and informed him what had happened. The complainant had bruises on the fingers and knee and her clothes were dusty as she had been thrown on the ground. The following day they went to Mutarakwa Police Station where he recorded a statement. He also accompanied his wife to the police station where she identified the Appellant in an identification parade.

5. NO. 236000 Inspector David Kibet Ruto (PW3) from Tigoni Police Station testified in respect of the identification parade he conducted involving the Appellant. The parade was conducted on 2/12/2018 where he removed eight people from the cells to join the parade and he asked the Appellant to also join and he stood between number 5 and 6 on the lineup. That the complainant identified the Appellant by touching him. He also confirmed that the Appellant was satisfied with the parade and he signed the identification parade form.

6. NO. 77632 Corporal George Wambua (PW4) the from Tigoni Police Station was the Investigating Officer herein, he testified that on 21/11/2018 he was based at Mutarakwa Police Post where he was performing general duties, when Jane Nyambura made a complaint that she had been attacked at Kwambira Trading Centre and that her three phones had been stolen. A Samsung s mini, sony xperia, itel s2, Kshs. 6,000/= and 200 USD. He indicated that the complainant stated that she had been attacked by three people as she was going to collect her motor vehicle which had been left by her husband at Kwambira Trading Centre at around 11 p.m. that she could identify two of her attackers. The officer indicated that on 29/11/2018 the suspects were arrested at Kwambira and they were taken to Tigoni Police Station where the Appellant had been charged with another offence of being in possession of bhang and he was remanded at Kiambu Remand. On 2/12/2018 the Appellant was produced again as there was an identification parade that was to be conducted at Tigoni Police Station where the Appellant was one of the suspects in a case of robbery with violence. The identification parade was conducted by Inspector Ruto. Eight people were presented and the Appellant joined them

and the complainant was then called out to identify her attackers. She identified the Appellant by touching him as she could identify his face as well as a mark that the Appellant had on his hand. The Appellant later signed the identification report to show that he was satisfied with it.

7. The prosecution closed its case and the Appellant was put on his defence where he opted to give a sworn statement and did not call any witnesses. In his defence, the Appellant herein stated that on 28/11/2015 he was at work as a conductor and that the lorry got spoilt as they were coming from Mai Mahiu as such he was forced to sleep there. On 29/11/2015 he had another Case No. 47 of 2018 at Limuru where he found his case had already been called out and he was given another date. As he left the court premises, he was arrested by three police officers who took him to the nearest AP camp. While there he was photographed then taken to Tigoni Police Station. On 30/11/2018 he was charged with possession of bhang in Case No. 904 of 2018 and on 3/12/2018 he was charged with the offence of robbery with violence.

8. The trial court was satisfied that the prosecution had proved beyond reasonable doubt that the Appellant had attacked and robbed the complainant of her valuables and in the process some form of violence was used and that the Appellant had been positively identified at the identification parade. In the end, the Appellant was convicted of the offence of robbery with violence and sentenced to serve 23 years imprisonment.

9. The parties were directed to canvass the appeal by filing and exchanging written submissions. Hereunder is a summary of the parties respective submissions;

Appellants Submissions

10. The Appellant in his written submissions submitted that his identification was not proved beyond reasonable doubt. The court must be satisfied by the evidence produced that the identification is positive and free from the possibility of error by describing the attacker at the earliest time possible. Reliance was placed in the case of Francis Kariuki Njiru & 7 others vs Republic (2001) eKLR. He submitted that there was not enough light for the complainant to identify the 3 assailants. It is also submitted that the complainant did not describe the Appellant at the earliest time possible. He stated that the Police Force Standing Orders provide that the Investigating officer should not take part in the identification parade and that the reason for identification should be noted. Failure to describe the assailant by the complainant rendered the identification parade worthless. Reliance was placed in the case of Charles Matu Mburu vs Republic (2014) eKLR. The Appellant further submitted that the mode of arrest was marred with doubts as such it was not enough to sustain a conviction. The prosecution was said to have failed to prove the cause of arrest and the connection to the crime herein. Failure to avail the arresting officer was said to be fatal and the benefit of doubt should shift to the Appellant and warrant an acquittal. With regard to the sentence, the same was said to be harsh as the Appellant's mitigation was not considered. The court was urged to mete a lesser offence if it was inclined to find the Appellant guilty.

Respondents Submissions

11. The Respondent submitted that it established all the requisite elements of the offence of robbery with violence against the Appellant. It was established that the Appellant was in the company of several people though unarmed, some form of violence was meted. The identification, was said to be proper as the place was well lit to enable clear vision and identification as such the same was said to be safe and the sentence meted legal.

Issues

a. Whether the identification parade as conducted was proper.

b. Whether the arrest was properly executed

c. Whether the sentence was legal

Analysis

12. This being a first appeal, the court is clothed with the jurisdiction to re-evaluate and re-analyze the evidence of the trial court and arrive at its own independent conclusion as was cited in the case of David Njuguna Wairimu V – Republic (2010) eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions." See also the case of Okeno v R (1972) EA 32.

Whether the identification parade as conducted was proper.

13. The Appellant herein faults the identification parade as there was no description of him at the earliest time possible and that the mode of arrest was not clearly explained as such it raises doubt of the Appellant's participation in the crime. The Appellant submitted that the alleged robbery occurred at night as such visibility was poor and the evidence by PW1 that she was shaken during the robbery meant that she could not have seen the attackers very well as to be able to identify any of them.

14. This court notes that the Appellant herein was convicted through the evidence of identification which should be treated with caution. The court cannot convict an accused person based only on the evidence of identification unless the court is sure that the identification of the appellant as the person who committed the robbery is proved beyond any reasonable doubt. Refer to the case of Maitanyi v Republic (1986) KLR 198 where the Court of Appeal had this to say in respect of evidence of identification, especially in regard to the evidence of identification by a single witness:-

> " In this case there is no other evidence, circumstantial or direct. The decision must turn on the need for testing with the greatest care the evidence of this single witness. Is that what the courts below really did? It must be 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 the light improves to greater brightness, so the chances of a true impression being received improves. 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. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes

> the great burden of senior magistrates trying cases of capital robbery to make these inquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness? There is a second line of inquiry 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. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the other hand the witness says that he or she could not identify or recognize the person, then a later identification or recognition must be suspect unless explained. It is for the magistrate to inquire into these matters."

15. The complainant herein testified that on 21/11/2018 she was robbed of her belongings at Kwambira as she was proceeding to drive her husband's car which was parked outside Hollywood Hotel. She contended that the place was well lit as there was light around the hotel as such she was able to identify the Appellant who had roughed her up during the incident. She also indicated that when she reported to the police she informed them that she could identify the Appellant if she saw him as he had a scar on his arm.

16. The Investigating Officer (PW4) also testified that the complainant in her report had stated that she would be able to identify two of her attackers if she saw them. The complainant was able to identify the Appellant during the identification parade by his face and a mark that the Appellant had on his arm.

17. The identification parade in this case was conducted on 2/12/2018. The complainant testified that during the identification parade she had requested the police to have the suspects show their arms so that she could confirm the scar/mark she had seen during the incident as the attacker was wearing a short sleeved. The complainant then went ahead and identified the Appellant as one of the persons who had attacked her. She testified that she did so as she still had a photographic memory of the Appellant as she had seen him well as he came so close to her during the attack as well as the mark that she saw on the accused's arm bearing in mind the place was well lit with the "mulika mwizi" light.

18. In the circumstances, therefore, it is this court is satisfied that the prosecution did indeed establish to the required standard of proof beyond reasonable doubt that indeed the Appellant had been identified as being one of the persons who robbed the complainant on the material night of the robbery. The prosecution established that indeed the circumstances under which the complainant is said to have identified the appellant were conducive to positive identification and therefore raise no reasonable doubt that the Appellant was in actual fact identified as one of the robbers in the robbery incident. In any event the complainant had indicated to the police that she wanted the suspects to show their arms so that she could look out for the mark that she had seen during the attack.

19. Secondly, this court is satisfied that the Appellant was properly identified by the complainant during the identification parade carried out by Inspector Ruto which the Appellant signed and stated that he was satisfied with the outcome. This court finds no reason to interfere with the trial court's judgment delivered on 21st November, 2018, and its finding that the complainant was robbed of her valuables and some form of violence was used by the Appellant who was positively identified during the identification parade which was free from error as all the proper procedures were followed.

20. This ground of appeal is found to be without merit and it is disallowed.

Whether the arrest was properly executed

21. The Investigating Officer testified that the Appellant had been arrested for other charges of being in possession of bhang and that he was also suspected of being involved in a spate of robberies as

such he was subjected to the identification parade when he was identified by the complainant. This court having found that the identification parade was properly conducted and that the Appellant was properly identified by the complainant, and being that the circumstances under which the Appellant was arrested are well explained by the Investigating Officer, being that the Appellant was suspected of being involved in robberies, as such he was subjected to the identification parade, this court is satisfied that the arrest was not biased and unlawfully targeted towards the Appellant.

22. This ground of appeal is disallowed as it is found to be devoid of merit.

Whether the sentence was legal

23. Lastly, the Appellant faults the trial court for imposing a sentence that was too harsh bearing in mind his mitigation which he contends was not considered.

24. On whether the sentence was proper, this Court is guided by the principles in the Court of Appeal case of Bernard Kimani Gacheru vs. Republic (2002) eKLR where it was stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

18. From the above principles a trial court must take into consideration all the facts of a case as well as the mitigation by the Appellant. He was invited to mitigate, which he did and the trial court proceeded to sentence him to 23 years imprisonment.

19. The sentence for robbery with violence carries a death penalty and or a life sentence. In this instance the trial court gave neither of the above and in exercising its discretion gave the Appellant a definite sentence of 23 years and also took into consideration the time spent in remand.

20. The Appellant has not demonstrated to this court that the sentence is manifestly excessive in the circumstances of the case, nor that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle.

21. This court finds no sufficient grounds for interfering with the discretion of the trial court on sentence; this ground of appeal is found to be lacking in merit and is disallowed.

Findings And Determination

18. For the forgoing reasons this court finds the appeal to be devoid of merit in its entirety; the appeal is hereby dismissed and the conviction and sentence upheld.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 21ST DAY OF MARCH, 2024

A. MSHILA

JUDGE

In the presence of;

Mourice – Court Assistant

Kelvin -the Appellant present in person

Ndeda – for the State