Wanjiku v Republic (Criminal Appeal E039 of 2021)
[2024] KEHC 4399 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4399 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E039 OF 2021

GL NZIOKA, J

APRIL 30, 2024

BETWEEN

GIDEON KIBOGO WANJIKU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal against the decision of Hon Y. M. Barasa, Senior Resident Magistrate SRM delivered on 9th November 2021 vide Chief Magistrate's criminal case No. 30 of 2020 at Naivasha)

JUDGMENT

1. The appellant was charged vide Chief Magistrate's Criminal Case No. 30 of 2020 at Naivasha with the offences of robbery with violence contrary to section 296(2) of the *Penal Code* in two counts and the offence of being in possession of Narcotics drugs contrary to section 3(1)(2)(a) of the *Narcotics and Psychotropic substances Act* No. 4 of 1994. The particulars of each count are as per the charge sheet

2. The charges were read to the appellant and he pleaded not guilty to all the charges. The case proceeded to full hearing, however before any witness was called, the appellant changed on his plea on the 3rd count, pleaded guilty, was convicted on his own plea of guilty and was then sentenced to serve six (6) months in prison.

3. The case was heard on the 1t and 2nd count. The prosecution case is that, the complainants PW1 Mary Wamaitha Muigai and PW2 Laban Njoroge who operate a P.S.V matatu as conductor and driver respectively were reporting off duty on 31st December 2019, when they were attacked by two men armed with pangas and rungus.

4. That, the attackers ordered the complainants to give them money arguing that, they knew the complainants were from work and therefore they had money. The complainants hesitated and were

physically assaulted and robbed. PW1 Wamaitha was robbed of Kshs. 5,000 which were the daily collections, while PW2 Laban was robbed of his phone, Itel, valued at Kshs. 7,000 and Kshs. 700 in cash. That the robbers injured the complainants in the course of the robbery.

5. As a result of the incident, the complainant's reported the matter to the police station and were issued with P3 forms and referred for treatment. In the meantime, the robbers had run away. However, the following day, PW1 Wamaitha saw the appellant, who was alleged to be one of the robbers, and alerted the police officers. The appellant was arrested, subjected to an identification parade, identified by both complainants and charged accordingly.

6. At the close of the prosecution case, the accused was placed on his defence. He testified that, he was arrested on 9th January, 2020 over offences of robbery with violence and possession of bhang. That, he used to sell bhang and so he admitted that offence. However, he denied the offence of robbery with violence as he has been framed. That the robber who committed the offence was released and he was charged. He tore into the prosecution, arguing that he was not properly identified and that, the witnesses gave contradictory evidence on how he was allegedly dressed, and identification.

7. At the close of the entire case, the trial court delivered its judgment on 9th November 2021, found the appellant guilty on both counts and sentenced him to life imprisonment on each count. The court ordered the sentence to run concurrently.

8. However, the appellant's aggrieved by the decision of the court and has appealed against it based on the following grounds: -

    a. That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were not conclusively proved.

    b. That, the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defence was cogent and believable.

    c. That, the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that prosecution did not discharge the burden of proof.

    d. That, the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the identification of the appellant was not positively proved.

    e. That, I pray to be supplied with a copy of the original trial court's proceedings and its judgement.

    f. That, further grounds shall be adduced at the hearing or this appeal.

9. The appeal was opposed vide respondent's grounds of opposition dated 21st November 2022 wherein the respondent states: -

    a. That the offence of robbery with violence was proved to the required standards.

    b. That the trial court considered the appellant defence and subsequently dismissed it.

    c. That in the judgment the trial court noted that the complainant evidence was cogent and gave conscience account of the events of the fateful day.

    d. That the trial court found that the prosecution case was proved beyond reasonable doubt and subsequently convicted him in line with section 215 of the criminal procedure code.

e. That the sentence imposed by the trial court was proper and in line with the section 296(2) of the penal code. Further, that the court considered mitigation and circumstances of the offence and used discretion in sentencing the appellant to life imprisonment.

f. That I pray that the honourable court be pleased to dismiss the appeal and uphold both the conviction and the sentence.

10. The appeal was disposed of vide filing of submissions. The appellant in submission filed on 13th March, 2023 argued that, he was not properly identified. That, the offence occurred at 8:30pm when the conditions were not favourable for making positive identification. Further, the complainants did not explain the source of light, its intensity, and the distance between the source of light and where the offence occurred and relied on the case of *Paul Etole & another vs Republic* CR. APP No. 24 of 2000.

11. The appellant submitted that, the trial Magistrate erred in holding that identification was by way of recognition, despite the fact that, the complainants did not know his name and referred to him as "saa ngapi". That, the complainants did not give any description, physical features, or the name of their assailants in their first report to the police and thus the identification was an afterthought. He relied on the case of *Tekerali s/o Kirongozi & 4 others vs Republic* [1952] 19 EACA 259 and *Republic vs Shaban Bin Donaldi* [1940] 7 EACA 70 on the importance of giving a description of a suspect in the first report.

12. Further, the failure by the complaints to give the appellant's description beforehand meant that the identification parade was flawed. That, in the case of *Ajode vs Republic* (2004) 2 KLR the Court of Appeal stated that, before an identification parade is conducted, a witness should give a description of the person sought to be identified.

13. Furthermore, the identification parade was marred by irregularities as PW4 inspector Ali Ibrahim Dalal, failed to comply with several rules of conducting the identification parade. Firstly, he was not informed of the right to have a friend or advocate present during the identification parade in accordance to Rule 6 (iv) (a). Secondly, he was not give a chance to choose where to stand during the parade contrary to Rule 6 (iv) (e).

14. Thirdly, the complainants were standing in front of the office when he was brought from the cells before the identification parade in breach of Rule 6c. Moreover, that PW2 Laban saw him while at the Police Station one day before the identification parade was conducted breaching Rule 6(iv) (n).

15. The appellant relied on the cases of; *Simon Lihanya Kairu & Another vs Republic*, *Samuel Kilonzo Musau vs Republic*; *Kinyanjui & 2 others vs Republic* (1989) KLR 60; and *David Mwita Wanja & others vs Republic* where the courts laid out the procedure of conducting an identification parade and stated the failure to adhere to the procedure depreciated the value of such a parade.

16. However, the respondent in submissions dated 21st November, 2022 argued that, the prosecution proved its case beyond reasonable doubt. That, in the case of; *Oluoch v Republic* (1985) KLR the court laid out the ingredients of the offence of robbery with violence being that; the offender is armed with a dangerous an offensive weapon, or is in the company of one or more persons, or at or immediately before or after the time of robbery wounds, beats, strikes or uses personal violence to any person.

17. It was submitted that, the appellant was armed with a panga and was in the company of another man, who was armed with a dangerous weapon. Further, before robbing the complainants, the appellant and his co-assailant used the weapons and inflicted injuries on their victims, which was proved by the production of the P3 form.

18. The respondent submitted, there was enough light at the scene that enabled the complainants to see and identify the appellant. Further, the complainant had seen the appellant the day before the offence and was therefore able recognised him. Furthermore, the appellant was identified in an identification parade and the identification parade form produced in the trial court.

19. Finally, the respondent submitted that, the trial court considered the appellant's defence and found it to be a mere denial. That, the evidence before it was clear on who robbed the complainant. The respondent urged the court to uphold the sentence and dismiss the appeal. Reliance was placed on the case of *Mohammed Ali vs Republic* (2013) eKLR wherein the appellate court upheld the sentence whereby the facts were similar to the instant case.

20. I have considered the appeal in the light of the materials placed before the court and noting that the role of the 1st appellant court as held by the Court of Appeal in the case of; *Okeno vs. Republic* (1972) EA 32, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.

21. In that matter, the court stated as follows: -

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*Pandya V R* 1975) E.A. 336 and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala V. R* [1957] E.A. 570. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that, the trial court has had the advantage of hearing and seeing the witnesses"

22. In the instant matter the offence of robbery with violence which the appellant was charged with is provided for under section 296(2) of the *penal code* which states: -

> " 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 use any other personal violence to any person, he shall be sentenced to death."

23. Pursuant to the aforesaid, the ingredients of the offence are there must be evidence of; the theft, number of assailants, whether the appellant was armed with a dangerous weapon, and whether the appellant injured or threatened the complainant.

24. In convicting the appellant, the trial court held that, the prosecution had proved all the ingredients of the offence as stated by the corroborative evidence of PW1 and PW2 and the results of the identification parade

25. I have considered the evidence afresh and I find that, both PW1 Wamaitha and PW2 Laban gave evidence that they were attacked by two men. Therefore the 2nd element that, the offender was in the company of one or more person was proved.

26. PW1 Wamaitha and PW2 Laban also testified that the perpetrators were armed with pangas and rungus. For all intent and purpose a panga is an offensive and dangerous weapon. This the 1st ingredient above was established and/or proved.

27. The further element require proof that, the victims were injured before or during the robbery. The prosecution called PW6- Benjamin Kuria who produced P3 forms in respect of the complainants which showed that PW1 Wamaitha sustained the following injuries: multiple laceration marks on the left laceral neck 1 – 3 cm long; mild tenderness on movement of the left wrist. The injuries were classified as harm.

28. On his part PW2 Njoroge was injured as follows: mild tenderness on left occipital region, broken 1st left incisor, mild tenderness on right scepule region. The injuries were classified as grievous harm. The evidence of the witnesses confirm that, the complainants were injured.

29. However, the very questions are whether, the prosecution proved that a robbery took since and that it is the appellant who committed the offences. As regards robbery section 295 of the *Penal Code* defines the same as follows:

> " 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."

30. In the instant matter I note that, although PW1 Wamaitha testified that, she was robbed of Kshs 5000/- which was not recovered, no evidence was led to prove that, the money existed before it was stolen. She testified that the Kshs 5,000/- was her daily collections but no evidence was led that she worked as a conductor, employer, the motor vehicle or any other form of evidence. Therefore it was not established how much money she had and how much was stolen. In the same vein PW2 Laban did not produce any evidence to prove existence and/or ownership of the stolen phone or money. Therefore the element of robbery was not proved.

31. The last question is whether the appellant was involved in the incident, in that regard I find that both complainants and the investigating officer confirmed that, there was light at the scene. That the attacker had a rusty tooth. That he was known to PW1 Wamaitha prior to the incident, and had met PW2 Njoroge 3 days prior to the offence. He was identified on the parade. Consequently in my considered opinion was positively identified.

32. I note that, he gave unsworn statement in defence. He therefore denied the prosecution an opportunity to test the veracity of his defence. It did not even address the events of the day in question. He took on a summary of submissions tearing into the prosecution case, thus losing out of rebuttal of the prosecution case. I therefore find it did not displace the prosecution evidence on his involvement in the offence.

33. Finally, as regards the sentence meted out of the life imprisonment, in my considered opinion it was unlawful as the sentence provided for under the law for robbery with violence is death. Consequently I set aside that sentence.

34. In conclusion I find that the evidence adduced as regards the accused can only sustain a charge of assault contrary to section 251 of the Penal Code and a charge of causing grievous harm contrary to section 234 of Penal Code in relation to count 2.

35. The provisions of section of 179 *Criminal Procedure Code* allows the court to convict an accused person of a lesser offence if the evidence proves the same though he was not charged with that offence. Therefore, I set aside the conviction of the appellant of the charge of robbery with violence contrary to section 296(2) of the *Penal Code* and substitute with the aforesaid offence under section 251 and 234 respectively.

36. The life imprisonment sentence is also set aside and substituted with a sentence of two (2) years imprisonment in respect to count 1 and seven (7) years imprisonment in respect of count 2. The period meted out has already taken into account the period of one (1) year and ten (10) months that the appellant was in custody. Consequently, the sentence meted out will be served consecutively giving a total of nine (9)years and takes effect from the date of judgment in the trial court on 19th November 2021, and subject to remission where applicable.

37. It is so ordered

DATED, DELIVERED AND SIGNED THIS 30TH DAY OF APRIL 2024

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Abwajo for the respondent

Ms. Ogutu: Court Assistant