Langat v Republic (Criminal Appeal E026 of 2023) [2024] KEHC 6396 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6396 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E026 OF 2023

RL KORIR, J

MAY 30, 2024

BETWEEN

GILBERT KIPKIRUI LANGAT .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the Conviction and Sentence in Criminal Case Number E886 of 2022 by Hon. L. Kiniale in the Principal Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant alongside others not brought before the trial court was charged with three counts of the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars of the first count were that on 9th September 2022 at Kipngeno Village, Silibwet Sub Location within Bomet County, jointly with others not before court, robbed Edward Thuku Mugo of one jacket valued at Kshs 900/=, one mobile phone make Infinix valued at Kshs 16,000/= and cash valued at Kshs 2,500/= all valued at Kshs 19,400= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Edward Thuku Mugo.

2. The particulars of the second count were that on 9th September 2022 at Kipngeno Village, Silibwet Sub Location within Bomet County, jointly with others not before court, robbed Vincent Kibet Cheruiyot of one mobile phone make Tecno valued at Kshs 10,000/=, one pair of slippers valued at Kshs 100/= and one National Identity Card valued at Kshs 300/= all valued at Kshs 10,400/= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Vincent Kibet Cheruiyot.

3. The particulars of the third count were that on 9th September 2022 at Kipngeno Village, Silibwet Sub Location within Bomet County, jointly with others not before court, robbed Abraham Ndirangu Kahumbu of one power bank valued at Kshs 3,000/=, one mobile phone make Tecno valued at Kshs

10,000/=, one pair of slippers valued at Kshs 100/= and cash valued at Kshs 3000/= all valued at Kshs 16,000/= and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Abraham Ndirangu Kahumbu.

4. The Appellant pleaded not guilty to the counts before the trial court and a full hearing was conducted. The prosecution called five (5) witnesses in support of its case.

5. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

6. At the conclusion of the trial, the Appellant was convicted of the offence of robbery with violence and sentenced to serve 20 years in prison.

7. Being dissatisfied with the Judgment dated 11th May 2023, the Appellant appealed to this court on the following grounds reproduced verbatim:-

    i. That the learned trial Magistrate erred in law and fact by overlooking that there was no identification parade conducted.

    ii. That the learned trial Magistrate erred in law and fact by holding that the Prosecution had proved its case beyond reasonable doubt without supporting evidence and in view of the unresolved contradictions in the Prosecution case.

    iii. That the learned trial Magistrate erred in law and fact by meting out an excessive sentence whereas the circumstances do not stand.

8. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh and come to my own conclusion. See Kiilu & Another vs Republic (2005)1 KLR 174.

The Prosecution's Case.

9. It was the Prosecution's case that on the night of 9th September 2022 at 1 a.m., the Appellant with others not before the trial court robbed Edward Thuku Mugo (PW5), Vincent Kibet Cheruiyot (PW1) and Abraham Ndirangu Kahumbu (PW2) when their vehicle registration number KAP 343W developed mechanical problems. That as PW5, PW1 and PW2 waited for assistance, the Appellant and his accomplices attacked them while armed with pangas and rungus and robbed them off mobile phones, cash, a power bank, a National Identity Card, a jacket and a pair of slippers.

The Appellant's Case.

10. It was the Appellant's case that on the material day, he was staking firewood in a lorry during the day and thereafter went to watch a football match in Silibwet town during the night. While on his way to watch the football, he was arrested by about 9 people who took him to Silibwet Police Station. It was the Appellant further case that he was told that he had committed an offence on the material day at around 1 a.m. That he was never taken to the crime scene.

11. On 2nd November 2023, I directed that the Appeal be dispensed off by way of written submissions.

Appellant's Submissions.

12. The Appellant submitted that he was not sufficiently identified as one of the attackers. That the complainants were shocked and had a lot of anxiety and because they were attacked swiftly, they did not have time to properly identify their attackers.

13. It was the Appellant's submission that the Prosecution ought to have conducted an identification parade. That the fact that Vincent Kibet Cheruiyot and Edward Thuku Mugo knew him before could not be used to link him to the offence. It was the Appellant's further submission that Vincent Kibet Cheruiyot and Edward Thuku Mugo used his reputation to fit with their expectations and pre-existing beliefs that he was a culprit.

14. The Appellant submitted that he did not commit the offence and the yellow jumper that was produced as an exhibit was forcefully taken from him.

15. It was the Appellant's submission that the sentence passed by the trial court was harsh and excessive. That this court had the discretion of reducing the sentence. It was his further submission that he was remorseful for what had happened to the complainants and promised to live peacefully with people. That he had a family reliant on him and they had been suffering for the period he had been in custody.

The Respondents'/Prosecution's Submissions.

16. It was the Prosecution's submission that the Appellant was properly identified and placed at the scene. That PW1 and PW5 knew him prior to the incident and that they also recognized him through a scar on his lips and a gap between his teeth. It was their further submission that although the offence was committed at night, the scene was lit by the headlights of the passing motorists and also from the light inside their motor vehicle. That he was arrested wearing the same yellow jumper that he wore during the commission of the offence.

17. The Prosecution submitted that they sufficiently proved the offence of robbery with violence. That from the witnesses testimonies, the Appellant was in the company of eight other people when they attacked the complainants. They further submitted that they were armed with rungus and pangas and that they slapped PW1 and robbed him of his mobile phone. That they also robbed PW2 and PW5.

18. It was the Prosecution's submission that the Appellant merely denied committing the offence. That he however admitted to being found with a yellow jumper at the time of his arrest, the same jumper that he had on during the commission of the offence. They urged this court to reject the Appellant's defence and dismiss the Appeal.

19. I have gone through and given due consideration to the trial court's proceedings, the Memorandum of Appeal, the Appellant's written submissions filed on 29th November 2023 and the Respondent's written submissions dated 4th December 2023. The following issues arise for my determination:-

    I. Whether the Prosecution proved its case beyond reasonable doubt.

    II. Whether the Defence casts doubt on the Prosecution case.

    III. Whether the Sentence was harsh and excessive.

I. Whether the Prosecution proved its case beyond reasonable doubt.

20. The Appellant was charged and convicted for the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. Section 295 of the Penal Code defines robbery as:-

> 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.

21. Section 296 of the Penal Code states 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. (Emphasis mine)

22. The Court of Appeal in the case of Johana Ndungu Vs Republic (1996) eKLR, set down the ingredients of robbery with violence by stating thus:-

> " In order to appreciate properly as to what acts constitutes an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. 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 before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
>
> 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."

23. More recently, Mrima J. in Jeremiah Oloo Odira vs Republic (2018) eKLR elaborated on the offence of robbery with violence as follows:-

> " 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. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.
>
> On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -
>
> i. The offender is armed with any dangerous or offensive weapon or instrument, or
>
> ii. The offender is in the company of one or more other person or persons, or
>
> iii. 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"

24. The elements of robbery with violence are disjunctive and not conjunctive. This was explained by the Court of Appeal in Dima Denge & Others vs. Republic (2013) eKLR, where it held:-

> " ....the elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence......." (Emphasis mine)

25. Vincent Kibet Cheruiyot (PW1) testified that on the material night, he was attacked by the Appellant and his other accomplices who totalled 8 in number and they slapped him. That he was robbed off a pair of slippers, his National Identity Card jacket and a Tecno mobile phone. Joan Cherono (PW3) testified that she had sold the said Tecno mobile phone to Vincent Kibet Cheruiyot (PW1).

26. Abraham Ndirangu Kahumbu (PW2) testified that on the material night, he was attacked by a group of 8 people who included the Appellant and who were armed with rungus and pangas. That the attackers slapped Kibet (PW1). PW2 further testified that he was robbed off his power bank, Kshs 3,000/= in cash and a Tecno mobile phone.

27. Edward Thuku Mugo (PW5) testified that on the material night, he was attacked by a group of 8 people which included the Appellant and who were armed with rungus and pangas. That the attackers slapped one of them (PW1). PW5 further testified that he was robbed off his jacket, Kshs 2,500/= in cash and an Infinix mobile phone.

28. No. 83367 PC Paul Awayo (PW4) who was the Investigating Officer testified that on the material night, the complainants (PW1, PW2 and PW5) were transporting avocados from Merigi when their motor vehicle broke down. That they were then attacked by around 8 men who were in boda bodas and robbed the complainants off their mobile phones and personal effects.

29. PW4 produced the receipts of the mobile phones being and P. Exh 1, a receipt which that showed that the Tecno mobile phone purchased by Joan Cherono (PW3) and sold to PW1 belonged to PW1, P.Exh 3 which showed that the Tecno C8 mobile phone belonged to Andrew Ndirangu Kahumbu (PW2) and P.Exh 5 which showed that the Infinix mobile phone belonged to Edward Thuku Mugo (PW5). The Appellant neither challenged the production or veracity of the receipts above nor did he challenge or cross examine the complainants (PW1, PW2 and PW5) on the ownership of the said mobile phones.

30. I have looked at the receipts indicated above and it indicates that the mobile phones (Tecno, Tecno 8 and Infinix) belonged to the complainants. I am satisfied by this evidence and it is my finding that the Prosecution proved ownership of the said mobile phones.

31. In this Appeal, the Appellant has faulted the identifying evidence. He stated that he was not properly identified. Needless to state, the positive identification of a perpetrator of any offence was crucial in proving a charge and proper caution must be taken to ensure that an innocent person was not convicted on the basis of mistaken identification.

32. The Court of Appeal in the case of Cleophas Wamunga Vs Republic(1989)eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn

itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

33. The English case of R Vs Turnbull (1977) QB 224 gives further guidance as follows:-

> “ If the quality (of identification evidence) is good and remains good at the close of the accused’s case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution”.

34. In the present case, the offence was committed at around 1 a.m. on the material night. It is important for the Court to assess such evidence thoroughly to satisfy itself that the source of light was sufficient to enable the victims to properly see their attackers. As stated in the case of Hassan Abdallah Mohammed vs. Republic (2017) eKLR:

> “ Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested.”

35. Similarly the Court of Appeal in the case of Shadrack Shuatani Omwaka Vs Republic [2020] eKLR, held as follows:-

> “ ....Apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time the victim had to observe and even the opportunity to hear the assailant are factors to look out for.”....

36. In this case Vincent Kibet Cheruiyot (PW1) testified that he identified the Appellant as one of the attackers as he had a scar on his lips and a gap between his teeth. PW1 further testified that the Appellant had worn a yellow jumper and he knew his voice. PW1 further testified that there were motor vehicles which passed by while they were under attack and the headlights from the motor vehicles enabled him to identify the Appellant. When PW1 was cross examined, he reiterated that the Appellant had worn a yellow jumper.

37. Abraham Ndirangu Kahumbu (PW2) testified that he was able to see one of the attackers who had a scar and a yellow jumper. That the headlights from the passing motor vehicles enabled him to identify the Appellant. When PW2 was cross examined, he reiterated that the Appellant who had a scar had a yellow jumper and a panga.

38. Edward Thuku Mugo (PW5) testified that he knew the Accused as he had seen him before in Silibwet. That he saw the Appellant on that material night with the assistance of headlights from the passing motor vehicles. When PW5 was cross examined, he stated that the Appellant had some marks on his head and had worn a yellow jumper.

39. No. 83367 PC Paul Awayo the Investigating Officer testified that the Appellant had a yellow jumper when he was arrested and brought to the Police Station. He produced the jumper as P. Exh 2.

40. The Appellant in his defence admitted that he was arrested while wearing the yellow jumper and it was forcibly taken from him and produced in court as an exhibit.

41. When I consider all this evidence in totality, there is no doubt that the Appellant was placed at the scene of crime by the complainants. He was identified by the scar on his lips and the yellow jumper which all the complainants saw and testified to. PW1 and PW5 were able to recognise him as they had seen him before in Silibwet town. Further, the complainants were attacked for a while and were in close proximity with the attacker. I am satisfied therefore that they were able to recognise the Appellant. The Court of Appeal in Peter Musau Mwanzia vs Republic (2008) eKLR, the Court of Appeal expressed itself as follows:-

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.........."

42. It was a ground of appeal that the Prosecution failed to conduct an identification parade to properly identify the Appellant as one of the attackers. The Court of Appeal in the case of Samuel Kilonzo Musau Vs Republic (2014) eKLR explained the purpose of an identification parade thus:-

> "The purpose of an identification parade, as explained in KINYANJUI & 2 OTHERS VS REPUBLIC (1989) KLR 60, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion..................."

43. Similarly, in John Mwangi Kamau vs Republic (2014) eKLR, the Court of Appeal held:-

> "Identification parades are meant to test the correctness of a witness's identification of a suspect........."

44. In the present case, an analysis of the identifying evidence shows that the victims had no hesitation in identifying the accused. They clearly identified the appellant by describing him as having a scar on his lips. That he had a yellow jumper on during the commission of the crime, the same jumper he had on when he was arrested. Even though the offence was committed in the night, the Appellant was identified by the three complainants with the help of the headlights from the passing motor vehicles. Further and as I have stated earlier, the Appellant was placed at the scene. The complainant had seen him earlier and when he attacked them, they clearly recognized him. It is my conclusion therefore that the lack of an identification parade was not fatal. In fact it was not even necessary as the complainants PW1, PW 2 and PW5 would simply have picked him out. I therefore dismiss this ground of appeal.

45. Flowing from the above, I am satisfied that the Prosecution sufficiently proved the elements of the offence of robbery with violence as contained in section 296 (2) of the Penal Code. They were able to prove that the attack was carried out by 8 people, that the attackers were armed with pangas and rungus and used violence by assaulting PW1 when robbing them off their mobile phones and personal effects. It is my finding therefore that the Prosecution having satisfied the ingredients necessary to sustain the charge of robbery, proved its case against the Appellant beyond reasonable doubt.

II. Whether the Defence casts doubt on the prosecution case.

46. I have already set out the defence of the Appellant earlier in this Judgment. I have considered the defence carefully and I have noted that the Appellant's defence was a mere denial. The Appellant simply stated that he had been arrested on the material night on his way to watch a football match. In my view, the Appellant's defence was shallow, weak and did not hold any value. The Appellant's defence did not shake the Prosecution's case at all.

III. Whether the sentence was harsh and excessive

47. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. In Bernard Kimani Gacheru vs Republic (2002) eKLR, the Court of Appeal stated that:-

> "It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the 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 the wrong material, or acted on the 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 states is shown to exist".

48. The penal section for this offence is found in Section 296 (2) of the Penal Code which provides:-

> 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.

49. Having considered the circumstances of this case, it is my view, the sentence of 20 years given by the trial court was reasonable considering that the Appellant could have faced the death sentence. The Appellant benefitted from the mercy of the trial court and I do not see any reason as to why I would interfere with the sentence.

50. In the final analysis, having considered the Appellant's Memorandum of Appeal, and also having carefully reviewed the evidence on record, there was nothing to suggest that the learned magistrate erred in convicting and sentencing the Appellant, which I uphold.

51. It is my finding that the Appeal lacks merit and it is consequently dismissed.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 30TH DAY OF MAY, 2024.

....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant acting in person, Mr Njeru for the State and Siele(Court Assistant)