

KENYA / JUDGMENT

James Lebite v Republic

[2017] KEHC 2351 (KLR)

[2017] KEHC 2351 (KLR)**COURT**

High Court

BEFORE

MM Kasango

CASE / FILE NUMBER

Criminal Appeal 31 of 2017

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL APPEAL NO. 31 OF 2017

JAMES LEBITE..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Maralal Principal Magistrate's Court Criminal Case No. 2 of 2009 by Hon. A. K. ITHUKU Senior Resident Magistrate on 24th December 2009)

JUDGMENT

1. JAMES LEBITE was charged before the Principal Magistrate's Court at Maralal with the offence of robbery with violence contrary to section 296(2) of the Penal Code. He was convicted as charged and was sentenced to suffer death as provided under the law. He has filed this appeal against that conviction and sentence.
2. This court being the first appellate court has a duty as was stated in the case NYANDO MUKUTA MWAMBANGA V REPUBLIC (2008) eKLR where it was held:-

"This court as the first appellate court has a duty to re-appraise the evidence and come to its independent finding. In doing so we have to appreciate that we do not have the advantage enjoyed by the trial court of seeing and hearing the witnesses and have to make due allowance for that –SOKI V REPUBLIC (2004) 2 KLR 21; KIMEU V REPUBLIC (2002) 1 KLR 756. Moreover, we are guided by the principle that the first appellate court should not interfere with the findings of the trial court which were based on the credibility of witnesses unless no reasonable tribunal could make such findings, or it

was shown that the findings of the trial court are erroneous in law (REPUBLIC V OYIER (1985) 2 KLR 353; BURN V REPUBLIC (2005) 2 KLR 533)."

3. The prosecution case was that Catherine Kitheka (PW 1) on 27th November 2008 closed her shop at Maralal town at 6. 30 p.m. She was in company of her husband Kenneth Kitheka (PW 3). As they walked home together PW 3 received a phone call from the house help informing him that there was no electricity at their home. PW 3 turned back towards the town to get an electrician. It was then when PW 1 was walking alone that she met two boys, one of them being the appellant. The two boys beat her, cut her and stole from her KShs.10,000 and a Samsung 480 mobile phone. PW 1 screamed and her screams attracted PW 3. PW 3 returned back to rescue her and after reporting the matter to the police took her to hospital for treatment.
4. On 15th December 2008, Mathew Stellu Lelesit (PW 2) took a Samsung mobile phone to have it charged to a shop next to PW 1 shop. PW 1 identified that phone as the one which was stolen from her. On being questioned PW 2 said that he had exchanged his phone with the appellant who gave him the Samsung phone.
5. PW 2 in his evidence stated that he went to collect his phone from a shop where he had left it being charged. He stated that when he collected it he was questioned about its ownership. He explained that he had gotten from the appellant. PW 2 stated that he was persuaded by PW 1 and the police officer who had been summoned to call the appellant on phone and to arrange a meeting with him. When the appellant honoured the invitation to meet he was arrested and charged with the offence of robbery with violence.
6. Lodeke (PW 5) was at the Maralal District Hospital when PW 1 reported there for treatment. On examining her he found that she had bruises on her leg and neck and that she had deep cut on her upper limb. He states that she was admitted at the hospital for treatment.
7. The appellant in his unsworn defence did not testify of his whereabouts on 27th November 2008. Rather he testified how on 16th December 2008 he was arrested while at Maralal. He said that on being arrested he was beaten and later taken to Maralal hospital. He denied knowledge of the phone the subject of the robbery.
8. The appellant in his first ground of appeal faulted his conviction submitting that he was identified under difficult circumstances.
9. The robbery incident occurred at 6. 30 p.m. PW 1 specifically stated in answer to a cross examination that it was not dark when the robbery occurred. She even stated that she identified the appellant at the scene of robbery. This is what PW 1 said about the appellant:-

"You (appellant) are the one who had the knife on that day. I identified you when you were beating me. I saw your appearance."
10. PW 3 also when responding to PW 1's screams said that he met with the men who attacked PW 1. He said the following in respect to his identification of the appellant:-

“I recognised you when I met you running you were holding the knife. You were wearing the Samburu scarf. You worked near omega.”

11. It follows from the above evidence of PW 1 and PW 2 which evidence was not contradicted by the appellant that the appellant was at the scene of the robbery. That evidence also shows that the appellant was actively involved in the robbery. It also seems that PW 3 knowledge of the appellant was not fleeting. PW 3 knew where the appellant worked. It is as a consequence of the above finding that this court makes a finding that the first ground of appeal has no merit.
12. On the second ground of appeal the appellant argued that the mobile phone was not proved to belong to PW 1. This he said was because the serial number was not given of that phone.
14. PW 1 identified the recovered Samsung phone as the one that was stolen from her. PW 3 was able to show to the court a marking on that phone of the name ‘Julius’ which marking the court noted. There is therefore no basis of the second ground of appeal. It is rejected.
15. On the 3rd and 4th ground the appellant argued that his constitutional rights as prescribed in the constitution were violated. The rights he alluded to were the right not to be held for a prolonged period before being presented to court and the right to have an advocate assigned to him.
16. The first thing that I need to dissuade the appellant of is that any violation he may have suffered, if at all, fell under the former constitution which was operative up to the 26th of August 2010. The new constitution popularly referred to as the 2010 constitution was promulgated on 27th August 2010. The appellant submission therefore will only be considered under the provision of the former constitution.
17. Under section 72(3) of the former constitution the appellant should have been presented to court within 14 days of his arrest. The appellant according to the charge sheet was arrested on 16th December 2008. He was arraigned before court on 6th January 2009. That means that the appellant was detained before being presented to court for 7 more days than was prescribed under that section.
18. What is the consequence of the appellant detention for 7 more days than was provided in the former constitution? The courts have held that when such allegation is proved it does not entitle one to be acquitted of the charges they face. Rather such a person should seek compensation for such a violation. This was stated in two cases;

- (1) REPUBLIC v MUTABARI MITHIKA KOOME [2011] eKLR where it was stated:-

The court will not act against the law nor will it go against public policy. A rapacious rapist and a serial killer will not be allowed to go scot-free because either deliberately or inadvertently, the prosecution authority has not deemed it fit to have him brought before a court within 24 hours or as a case may be within 14 days.”

(2) MUSEMBI KULI V REPUBLIC [2013] EKLR where it was held:-

We reiterate what this Court stated in JAMES KABWARO NYASANI Vs. R Nakuru Cr. Appeal NO. 54 OF 2011 (Unreported);

“The appellant’s complaint that the original trial was a nullity by reason of alleged violation of his constitutional rights under Section 72(3) of the former Constitution cannot, with respect, succeed. We note that the appellant never raised this issue before the trial court...We view his attempt to raise the said questions here an afterthought ...

We also agree with Mr. Chirchir, the learned Senior Prosecution Counsel for the respondent, that even if there had been such violation, which there is not, the appellant’s recourse would have been in damages.”

19. In respect to the appellant’s submissions that he was not assigned counsel to represent him at the trial it is important to state that the former constitution did not recognise such a right. That right is now recognised under Article 50 of the 2010 Constitution.
20. On the last ground of appeal the appellant faulted the trial court for what he stated as rejection of his defence.
21. As stated before the appellant by his defence did not deny that he was at the scene of the robbery. His unsworn defence revolved around the day of his arrest that is, 16th December 2008. The trial court found that not only was the appellant identified during the robbery but he had possession of the mobile phone which linked him to the robbery. The learned trial magistrate in his considered judgment found the evidence of PW 2 to be particularly convincing. On the contrary the trial magistrate was unconvinced by the denial of the appellant in his defence because of overwhelming evidence that the trial court found had been adduced by the prosecution and which evidence proved a case against the appellant.
22. In my view the learned trial magistrate was correct in his assessment of the evidence before him. The prosecution’s evidence was sound and proved the charge against the appellant. I would also add that the prosecution proved the ingredients of robbery with violence as was discussed in the case of SAMSON NYANDIKA ORWERWE V REPUBLIC [2014] eKLR as follows:

“In Oluoch V Republic [1985] KLR 549 this court set out the ingredients of robbery with violence. The court rendered itself in the following manner:-

“the ingredients of the offence of robbery under section 296(1) of the Penal Code are:-

- a. Stealing anything and
- b. At or immediately before or immediately after the time of stealing, in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained.”

22. This has been reaffirmed by this court on several occasions, such as in Daniel Muthomi M'Arimi v Republic [2013] eKLR where the court stated that proof of any one of the three elements of the offence of robbery with violence would be enough to sustain a conviction under section 296(2) of the Penal Code.”

Those ingredients were proved in the case of the appellant in that the prosecution proved theft of the phone, proved that the appellant was with others during the robbery and also proved that they used actual violence in order to obtain the phone from PW 1.

23. It is this court's view that the prosecution proved the case against the appellant and accordingly this court finds that there is no merit in the appellant's appeal. The appeal against conviction and sentence is therefore dismissed. The appellant's conviction by the trial court is upheld and the sentence is hereby confirmed.

DATED and DELIVERED at NANYUKI this 8th day of NOVEMBER 2017

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue/Mariastella

Appellant: James Lebite

For the State:

Language:

COURT

Judgment delivered in open court.

MARY KASANGO

JUDGE

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