David Njuguna Wairimu v Republic (Criminal Appeal 28 of 2009) [2010] KECA 495 (KLR) (18 June 2010) (Judgment)

David Njuguna Wairimu v Republic [2010] eKLR

Neutral citation: [2010] KECA 495 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 28 OF 2009

SEO BOSIRE, PN WAKI & DKS.AGANYANYA, JJA

JUNE 18, 2010

BETWEEN

DAVID NJUGUNA WAIRIMU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. Following the dismissal of his appeal to the Superior Court against his conviction and sentence for the offence of robbery with violence contrary to section 296(2) of the Penal Code, David Njuguna Wairimu, the appellant, has come before us on a second appeal. In such an appeal, by dint of the provisions of section 361(1) of the Criminal Procedure Code (CPC) only issues of law may be raised. Several issues of law have been raised by the appellant in both his home-made memorandum of appeal, and a supplementary memorandum of appeal which his advocate filed. It should, however, be noted that Mr Menezes abandoned all grounds, except ground 6 of the memorandum of appeal and also grounds 2(a)6 and 8 of the supplementary memorandum of appeal. In his submissions before us, Mr Menezes canvassed the following grounds:-

   (1) The robbery charge as worded is duplex

   (2) The appellant's constitutional rights were violated as:

      (a) He was presented to the trial court after the expiry of the period stipulated under section 72 (3) of *the Constitution*

      (b) At the appellant's trial the trial Magistrate did not indicate the language the proceedings were interpreted to the appellant, in breach of the provisions of section 77 of the Constitution.

(3) The Superior Court, on first appeal did not analyse and re-evaluate the evidence as it was obliged to do.

(4) The Superior Court, also, failed to consider the appellant's written submissions before coming to a decision.

2. The particulars of the robbery with violence charge read as follows:- "David Njuguna Wairimu, on the 10th day of July 2004, at Nyamaharaga township in Kuria District within the Nyanza Province, jointly with others not before court while armed with pangas and a pistol robbed Biltha Bochere of her two radios make Sony and Rising all worth Kshs 13,700/- and cash money Kshs 20,000/- and immediately before or immediately after the time of such robbery wounded Samuel Marwa Kerario."

3. It was Mr Menezes submission, firstly, that the particulars have omitted two essential terms, namely "dangerous" and "offensive", to describe the weapons the robbers were armed with. Secondly, Mr Menezes submitted that the addition of the particulars relating to the wounding of Samuel Marwa Kerario, made the charge duplex. In learned counsel's view, these two aspects were fatal to the charge.

4. Section 296 (2) of the Penal Code, as material, provides as follows: "If the offender is armed with any dangerous or offensive weapon or instrument or if, at or immediately before or immediately after the time of the robbery wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death." (Emphasis supplied).

5. We agree with Mr Menezes, that the words "dangerous or offensive" should have been included to describe the type of weapons the robbers were armed with. However, it is quite clear that the prosecution was not relying on the type of weapons the robbers were armed with, but the fact that the robbers wounded one Samuel Marwa Kerario, which is one of the alternative elements of a robbery with violence charge, the other ones being the following:-

(a) If the offender is armed with a dangerous or offensive weapon (b) If the offender is in the company of one or more persons.

6. The inclusion in one count of one or more of the alternative modes of bringing a robbery charge within the ambit of section 296 does not ipso facto make the charge duplex. It is our view, therefore, that the robbery charge as framed is not duplex.

7. Before we consider the remaining grounds of appeal we consider it appropriate to set out, in resume form only, the background facts of this case.

8. At 8.00 pm on 10th July, 2004, Frida (Biltha) Bochere (PW1) then a "changaa" dealer, was at her residence within Isebania town. With her, in that house were Samuel Marwa Kerario (PW2), Thomas and Gati, and also PW1's daughter Nema Mukwa (PW3). A hurricane lamp was on. Suddenly 4 men stormed into the house armed with pangas and a firearm. They ordered all occupants to lie down. As the lamp was on PW1, 2 and 3, said they were able to recognize one of their attackers as being the appellant. PW1, and two of her guests complied and lay down. However, PW2 did not comply. He called the appellant in the following manner, "Munene what is the problem?" Thereupon the appellant cut PW2 on the head and he fell down.

9. The raiders confronted PW1 and demanded from her some money. She surrendered to them Kshs 20,000/- which was in a cupboard. The men also seized two radios; Sony and another one of a different type which was in the kitchen. The men then escaped.

10. PW1, PW2 and PW3 all testified that they were able to identify the appellant, because he is a person they knew very well. PW1 testified that she knew the appellant by the name Munene and that he was a

hawker. It was her evidence that she used to meet the appellant almost daily before the robbery incident and she was therefore not mistaken as to the person she saw on the night of the robbery.

11. Samuel Marwa Kerario, (PW2), likewise testified that he knew the appellant very well before the robbery incident. He had known the appellant for over two years, he had worked with him and that he was therefore, not mistaken as to the person he saw in PW1's house on the night of the robbery.

12. Nema Mukwa (PW3), a 10 year old girl, in standard 4, also witnessed the robbery. She was in the kitchen, but she testified that she was able to identify the appellant as one of the robbers. It was her evidence that the appellant was armed with a panga and she saw him take a radio from the kitchen which was in the possession of one Hellen. A hurricane lamp was on and so with its aid she was able to recognize the appellant.

13. Thomas, who was one of PW1's visitors allegedly made the first report to the police. PW1 and PW2 later did the same . They all mentioned the name of the appellant to the police. It was following that report that the appellant was arrested. PC Njeru (PW4) testified that the appellant was pointed out to him by PW1 for purposes of arrest. The appellant was arrested on 11th July, 2004, but he was not presented to court until 30th July, 2004, which was about 19 days after his arrest. Section 72 (3) (b) of *the Constitution* provides that a person arrested for a capital offence should be presented to the court upon arrest within 14 days of such arrest or within a reasonable time as is practicable. The duty of showing that such a suspect has been presented before the court "as soon as is reasonably practicable" rests upon any person so alleging.

14. Mr Menezes submitted before us that the aforesaid provision was violated and for that reason he urged us to quash the appellant's conviction, set aside the sentence of death which was imposed on him and set him at liberty.

15. The appellant did not raise that issue both at his trial and in his first appeal. Mr Menezes, did not however, think that the appellant was precluded from raising a constitutional issue at any stage of the proceedings. The period of 14 days is not absolute. The prosecution may have had a good reason for not bringing the appellant to court within the stipulated 14 days. However, the duty to explain the delay lay upon it. They could only be called upon to account for the delay if the issue was raised either at his trial or on first appeal. The appellant did not raise it both during the trial and on first appeal. He has raised it before us, when it was not practicable for the prosecution to explain the delay. Besides, as rightly pointed out by Miss Oundo, Principal State Counsel, the appellant is not without a remedy. *The Constitution* (section 72 (6)) does make provision for compensation. In the above circumstances, it cannot be said that the delay which was in any case, for a short time, vitiated the charges against the appellant. Besides, by the appellant not raising the issue at the earliest possible opportunity, he thus created the mistaken belief that he had waived his right to raise it.

16. The next point Mr Menezes raised related to language. Section 77 (2) (b) of *the Constitution* provides thus:-

(77)(2) Every person who is charged with a criminal offence -

> (a)shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence with which he is charged;"

17. Looking at the record, this provision was complied with when the appellant first appeared in court. The court record shows that an interpreter was provided to interpret both the charge and the proceedings from English to Luo, Kikuyu and Kiswahili and vice versa. The appellant's complaint is, however, that in the course of the trial, the court record is not clear whether proceedings were interpreted to the appellant into a language which he could understand . Mr Menezes made reference to the names of

the persons noted as court clerks in the respective dates the appellant's case came for hearing or for orders. In his view in absence of a note that the respective clerks could interpret proceedings into a language the appellant could follow, a doubt is created whether or not the appellant was able to fully understand the proceedings.

18. With due respect to learned counsel, the submission he has put forward on this issue is clearly a red herring. The record clearly reflects that the appellant fully participated in the proceedings, asked questions in crossexamination, himself gave evidence in his defence, and in any case he did not raise the issue in his written submissions on first appeal. This ground is without merit.

19. The last ground Mr Menezes raised was with regard to the alleged failure by the Superior Court to analyse and re-evaluate the evidence. On this ground learned counsel raised several issues, which in our view should have formed part of the substantive grounds of appeal. We will deal with those issues seriatim. The first issue relates to two or three people who were arrested with the appellant but were later released. Miss Oundo speculated that those people might have been arrested because they were changaa drinkers, but that is neither here nor there. PW1 testified that PW2 and two other people, whose names we gave earlier, were in her house when the robbery took place. Mr Menezes did not submit on how, the failure by the first appellate court to deal with their case does prejudice the appellant. They were arrested, not as robbers, but for reasons other than the robbery. It is noteworthy that one of them is said to have made the report of the robbery to the police. Mr Menezes was surmising that the assault on PW2 could have arisen from a disagreement during a drinking spree. That clearly is speculative and in any case that was not the appellant's defence. The appellant's defence was that he was a customer of the complainant who was a seller of "changaa". This issue does not avail the appellant anything.

20. The next issue Mr Menezes raises which is related to the one above, is that Thomas and Gati should have been called as witnesses. He invited us to raise an adverse inference that had they been called their evidence would have been adverse to the prosecution case. Miss Oundo, in answer, submitted that in her view the evidence against the appellant was sufficient to sustain his conviction, and the same could not, properly, be said to be barely sufficient. She was re-echoing part of the holding in Bukenya & Another v Uganda [1972] EA 549 without citing the case. We agree with Miss Oundo that the evidence on record against the appellant is sufficient to sustain his conviction for the robbery charge. We earlier set out the evidence of eye witnesses. The appellant is a person they knew well. A lantern was on when the robbery took place. The appellant's stay in the complainant's house was not momentary. Besides, the witnesses gave his name to the police. The evidence is clearly overwhelming and the testimony of Thomas and Gati would simply have been superfluous.

21. Mr Menezes, next submitted on the way the Superior Court handled the defence case. In his view the superior court, merely reproduced the defence case without analyzing and considering it against the case of the prosecution. Besides, he said the superior court merely adopted the reasoning of the trial court without subjecting the case to an analytical process.

22. In Okeno v R [1972] EA 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyse and reevaluate 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 appellate 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 decision. In Okeno v R (supra) the Court said:-

> " 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."

23. The Superior Court, in the matter before us, went through the evidence, considered whether or not the charge of robbery with violence is duplex and came to the conclusion that it was not. On the evidence, the court concluded thus:-

> " We have carefully considered the evidence that was tendered before the trial court. The offence was committed at about 8.00 pm There were two hurricane lamps in the rooms. PW1, PW2 and PW3 knew the appellant very well. PW1 used to brew changaa in her house and the appellant was one of her customers. The appellant was a hawker at Isebania and was well known by many people including children like PW3."

24. The Court then made reference to the fact that during the robbery PW2 called the appellant by name and that when PW1 made the report of the robbery to the police she gave the name of the appellant. From the foregoing, it is quite clear that the 1st appellate court was conscious of its duty of re-evaluating the evidence and also the important elements of the charge which the prosecution was duty bound to prove beyond any reasonable doubt, more so the main issue whether the appellant was positively identified as having been one of the robbers. We are satisfied the superior court satisfactorily re-evaluated the evidence as was expected of it. To say otherwise is to unfairly criticize that court.

25. The appellant's conviction on the robbery charge was based on sound and acceptable evidence and we have no basis for interfering with his conviction on that charge. We, however, observe in passing that the first appellate court's failure to specifically refer to and deal with the appellant's written submissions was a serious omission. However, no prejudice was occasioned to the appellant as the court somehow dealt with the important aspects raised in those submissions, though in an indirect manner.

26. It is also important to note that the appellant faced a second count of assault causing actual bodily harm contrary to section 251 of the Penal Code. The charge related to the assault of Samuel Marwa Kerario (PW2). We earlier dealt with the propriety or otherwise of including his wounding in the robbery with violence charge. We came to the conclusion that it was proper to include that aspect in that charge. That being so, PW2's wounding was improperly made the subject matter of a separate charge of assault. It formed part of the particulars of the robbery with violence charge. The Superior Court did not deal with this aspect of the appellant's case and we think it fell into error. All it did was to order the sentence which the trial magistrate imposed thereon to be held in abeyance. We quash the appellant's conviction on that count and set aside the sentence of 12 months imprisonment imposed thereon.

27. In the result except to the limited extent regarding the assault charge, the appellant's appeal fails, and accordingly it is dismissed. Order accordindingly.

DATED AND DELIVERED AT KISUMU THIS 18TH JUNE, 2010

S.E.O BOSIRE

COURT OF APPEAL

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P.N WAKI

COURT OF APPEAL

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D.K.S AGANYANYA

COURT OF APPEAL.

I certify this is a true copy of the original

DEPUTY REGISTRAR.