



**Mutwiri v Republic (Criminal Appeal E002 of 2022)
[2024] KEHC 10737 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10737 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E002 OF 2022
LW GITARI, J
AUGUST 20, 2024**

BETWEEN

KENNETH MUTWIRI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Background:

1. The appeal arises from the proceedings in the Chief Magistrate’s court at Isiolo Criminal Case No.659/2016 where the appellant was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the charge are that on the 11/12/2016 at Checheles area in Isiolo North Sub-County within Isiolo County in Eastern Region jointly with others not before court while armed with dangerous weapon namely a knife robbed of Kaka Junior a motorcycle Registration number KMDY 988 F make Danyun black in colour valued at Ksh.98,000/- and immediately before or immediately after the time of such robbery used actual violence to the said Kaka Junior.
2. The appellant pleaded not guilty to the charge but after a full trial he was found guilty, convicted and sentenced to death.
3. The Appeal:
The appellant was dissatisfied with the conviction and sentence. He filed this appeal based on the following grounds:-
 1. That the learned trial magistrate erred in both matters of law and facts by failing to Notethat the identification parade conducted is worthless since the witness said he know the appellant before.



2. That the learned trial magistrate erred in both matters of law and facts by failing to Note that the appellant was represented according to article 50(2) (g) (h) of *the Constitution*.
3. That the sentence meted to the appellant is harsh and excessive in the circumstances of this case.
4. That the learned trial magistrate erred in both matters of law and facts by failing to Note that there was no enough light to identify the appellant herein at the scene of crime.
5. That the trial court erred in both matters of law and facts by failing to note that there was grudge between the appellant and PW1.
6. That the trial court erred in both matters of law and facts by failing to note that the appellant was not found with any stolen property of the complainant
7. That the learned trial magistrate erred in both matters of law and facts by failing to note that the key witnesses were not called.
8. That the learned trial magistrate erred in matters of law and facts by failing to take into consideration the alibi defence adduced by the appellant.

The appellant prays that the appeal be allowed, the conviction be quashed, the sentence be set aside and he be set at liberty.

4. The respondent opposed the appeal and prays that it be dismissed.

5. The Prosecution's Case:

The facts of the case are that Takayo Muchina (PW1) was the owner of the motor cycle registration number KMDY 988F make Dayuni and had employed Kaka Junior (deceased) the victim of this crime as a rider of the motor cycle. It was on the night of 11.12.2016 at 8.00pm when PW1 met the deceased and gave him Kshs.100 to fuel the said motor cycle. He went and fueled the motor cycle then went to where the PW1 was accompanied by Harun and the appellant. The deceased informed PW1 that the appellant wanted hire to be taken to Kirwanyani but PW1 told him it was far and that it was at night. Kennedy (appellant said he would go with Kaka and they went towards a place called Genesis. PW1 met Kennedy and his wife but did not find Kaka at Genesis Ndogo. PW1 started looking for Kaka but did not trace him. The following morning he was informed that a rider's body had been found. He went and confirmed that it was Kaka. The same night at around 8.00 pm Yuko Yuman PW2 was at Isiolo barrier waiting for a motor vehicle to take him to Ngarimara. The motor cycle which the deceased was riding approached and he flagged him down. The deceased was carrying two pillion passengers. PW2 told the deceased to come for him after dropping the passengers. The two pillion passengers were Ken, the appellant and Kevo who were known to him. The deceased was taking them to Checheles. Ken told the deceased to leave. There were street lights at the scene which enable PW2 to see the rider and his pillion passengers. PW2 then stopped another motor cycle to take him to Ngaremarara. On the way the deceased was ahead of him and he branched towards Checheles whereby PW2 suddenly heard a person screaming. The following day he heard that Kaka was killed and his body was left at Checheles. He decided to go and report to the police that he had seen Kaka carrying two pillion going towards the scene where his body was found. Later PW2 was called for an identification parade and he identified the appellant. The body of deceased was removed from the scene and a postmortem was conducted by Doctor Mohamed (PW4) who observed that the body had five wounds on the head and a stab wound on the chest anterior chest wall, the lungs were stabbed and there was a massive wound and massive bleeding cell over the chest/rib cage. The doctor formed the opinion that the cause of death was cardio pulmonary arrest due to Haemothorax following fatal penetrating chest injuries leading to blood loss. He produced postmortem as exhibit. In the course of investigations police went to the house



of the appellant and recovered a shirt and a T-Shirt which were bloodstained. They were analysed by a Kipngetich Bernard a government analyst who found that the shirt had bloodstains from unknown male person while the T-shirt did not generate any D.N.A. The investigating officer Shadrack Mambo (PW6) after completing his investigations concluded that the appellant was the last person to be seen with the deceased and robbed him the motor cycle and used actual violence which resulted in his death. The appellant was then charged.

6. Defence Case:

The appellant gave unsworn defence and stated that he was arrested from his house on 12/12/2016 by a person who alleged that he had stolen his motor cycle. No motor cycle was not recovered from his house. He was then escorted to the police station and charged. He alleged grudge with PW1 over a debt of Ksh.2000/-. He also stated that the prosecution failed to call various witnesses who would have shed light as to what transpired on that material day.

7. The learned trial magistrate after analyzing the evidence held that the prosecution has proved the charge against the appellant beyond any reasonable doubts and convicted him.

Analysis and Determination

I have considered the proceedings before the lower court and the submissions. The issues which arise for determination are:

- i. Whether the parade had any probative value
 - ii. Whether the appellant was properly identified
 - iii. Whether the trial magistrate erred by failing to note that the appellant was not represented by an advocate in contravention of Article 50(2) (g) (h) of *the Constitution*.
 - iv. Whether the prosecution failed to call crucial witnesses.
 - v. Whether the defence of the appellant was considered.
 - vi. Whether the sentence was harsh and excessive.
8. This is a 1st appeal and this court has a duty to re-evaluate and analyse the evidence tendered before the trial court and come up with its own independent finding. The court to bear in mind that it did not see the witnesses when they testified and leave room for that. See *Okeno-v- Republic* (1972) E.A 32 and *Erick Otieno Arum-v- Republic* (2006) eKLR.
- i. Whether the identification had any probative value:

The prosecution called PW2 who testified that he saw the appellant as one of the people who was carried by the deceased on that fateful night as a pillion passenger. PW2 testified that he was able to see and recognize the appellant at the barrier as there were security lights. The courts have stated that evidence of identification must be treated with caution. In *Republic-v- Turnbull & 2 Others* (1976) 3 All E.R 549 ‘the Judge Widgery CJ, stated that court should direct the jury to examine the circumstances in which the identification by each witness came to be made. Such as how long did the witness have the accused under observation, at what distance and in what light.’

It is clear from the testimony that the PW2 stopped the motor cycle, talked with the deceased, saw the appellant and the appellant talked and told the deceased to proceed on. The fact that the appellant was known to the deceased is not denied.



I find that the prevailing circumstances and the light which was at the barrier was conducive for PW2 to see and recognize a person who he knew.

9. On identification parade it is trite that they are conducted in respect of strangers who the witness see and claim that if they see them again they can identify them. I note that PW2 testified that he knew the appellant and decided to report that he had seen the deceased carrying the appellant on the fateful night. What we have in this case is the evidence of recognition in circumstances which favoured a positive identification and recognition. In the circumstances I find that since the appellant and PW2 were not strangers, the identification parade was of no probative value. PW2 was not involved in the arrest of the appellant the police must have gone overboard to have the appellant conform that the person they arrested was the one PW2 was referring to. However since PW2 had reported to the police and had given them the name of the appellant, the conduct of the identification parade was a futile exercise.

10.

(ii) Whether the appellant was properly identified:

The evidence of PW2 was key in the identification of the appellant as the person who was with the deceased on that fateful night. It was corroborated by the testimony of PW1 that indeed the appellant was carried on the motor bike by the deceased. The prosecution adduced weighty evidence which proves that the appellant and another were the last persons to be seen with the deceased before his lifeless body was found on the road. PW2 trailed the deceased after he got a motor bike to carry him. He heard screams coming from the path where the deceased turned. He could not go there as it was a night. The next day the body of deceased was found at the scene where the deceased turned with fatal injuries and motor bike he was riding was nowhere. The testimony of PW2 is direct and to some extent circumstantial. It is trite law that the circumstantial evidence can prove the guilt of an accused person with the accuracy of mathematics. See the Court of Appeal in the case of *Abanga alias Onyango -v- Republic* Criminal Appeal No.32/1990 (UR) where the court stated that circumstantial evidence must satisfy three tests which are-

- i. “ the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established.
- ii. those circumstances should be of a definite tendency unerring pointing to the guilt of the accused.
- iii. the circumstances taken cumulatively must form a chain so complete that within all human probability the crime was committed by the accused and no one else.”

The Court of Appeal in *Sawe -v- Republic* (2003) KLR 364 stated that-

“In order to justify on circumstantial evidence the inference of guilt, the inculpatory factory must be incompatible with the innocence of the accused and incapable of any other explanation upon any other reasonable hypothesis than that of his guilt.’

In the case of *Abamad Abolfathi Muhammed and Another -v- Republic* [2018] eKLR, this court had this to say on circumstantial evidence: “However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial



evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstantial or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an accused person just as direct evidence. *Abanga alias Onyanggo –v-Republic* Criminal Appeal No.32 of 1990 (UR) in which this court held as follows:-

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests;

- i. the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established.
- ii. those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.
- iii. the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else,” And in *Sawe –v- Republic* [2003] KLR364, the Court of Appeal amplified on the above thus: “In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to be exclusion of any other reasonable hypothesis of innocence remain the prosecution. It is a burden which never shift to the party accused.”

In this case the only circumstantial evidence was tendered by PW1 & 2 who testified the appellant was the last person seen with the deceased carried as a pillion passenger and that of PW1 who saw the appellants on deceased’s motor cycle, soon thereafter heard screams and deceased body found at the scene where PW2 heard screams. The deceased branched off to that scene while carrying the appellant. As submitted by the respondent the doctrine of “last seen with” applies and leads to the inference of guilt of the appellant who must have had a hand in his death.

11.

- (iii) Whether the trial magistrate complied with Article 50(2)(g)(h) of *the Constitution*.

The Article provides:

“Every accused person has the right to a fair trial which includes the right-

- (g) to choose, and be represented by an advocate, and to be informed of that right promptly.



- (h) to have an advocate assigned to the accused person by the State and at State expense if substantial injustice would result and to be informed of this right promptly.”

In *K.O -v- Republic* (2023) KEH.C 18310 (KLR) it was held that, “Failure by a trial court to inform a minor that faced charges that carried a lengthy stence of their right to legal representation is a violation of the minor’s right for legal representation is a violation of the minor’s right to fair trial.”

The court further held that there was none compliance with the constitutional requirements regarding fair trial, the trial was unfair and was rendered a nullity. The court held that the Director of Public Prosecutions was to decide whether to prosecute the appellant a fresh.

12. The Article 50(2) (g)(h) of *the Constitution* is about the right to legal representation by an advocate of one’s choice or at State expense in case of being indigent and if substantial injustice would otherwise result. It is the right of an accused person to be informed of the right and where he cannot afford an advocate to have one assigned to him. The provision places a duty on the trial court, before the trial commences to ensure that the accused person is informed of the right.

In determining whether substantial injustice would otherwise arise, such considerations as seriousness of the charge, for example murder and robbery with violence and the severity of the sentence or mental incapacity of the accused, where the person charged is a minor are son of the factors to be considered.

In this case was charged with robbery with violence which attracted a mandatory sentence of death. The record shows that on 21/12/2016 when the appellant was arraigned in court he was duly informed of the right to legal representation and he confirmed that he understands. He did not apply to be assigned a legal counsel at State expense nor did he engage an advocate of his own choice. This is a court of record and fully relies on the record of the trial court as a reflection of what transpired. I find that from the record of the trial court, there was compliance with article 50(2)(g) (h) of *the Constitution*.

13.

- (iv) Whether the prosecution failed to call crucial witnesses.

The appellant raised this issued under ground eight of his appeal. No submissions were advanced on this ground. Be that as it may, Section 143 of the *Evidence Act* (Cap 80 Laws of Kenya) provides:-

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”

In this case, the respondent called witnesses who adduced evidence in support of their case. The respondent is faulted where he fails to call witnesses and adduces evidence which is barely enough or fails to call witnesses for some alterior motive or reasons. These were not alleged. The ground must fail.

14.

- (v) Whether the defence was considered:

The appellant submits that the learned trial magistrate failed to note that the appellant had a grudge with the PW1 over some money he took from him. The appellant did not cross-examined the PW1 on the issue of the grudge. The appellant brought up the issue that PW1 owed him 2000 when giving his defence. The learned



trial magistrate in her judgment considered the defence and was satisfied that PW1 denied the allegation that he had taken money from the appellant and also held that PW2 was an independent witness who was not part of the alleged grudge. The defence was considered and therefore the ground must fail.

15.

(vi) Whether the sentence was harsh and excessive. Section 295 & 296 of the *Penal Code* provides:

295. 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.

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(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.”

The maximum sentence for robbery with violence is death. It is well settled that an appellate court will not normally interfere with exercise of discretion of the trial court in sentencing unless it is shown that the learned magistrate considered irrelevant factors or failed to consider relevant factors or short of that the sentence is manifestly harsh and excessive. Sentencing is a matter of exercise or discretion which the court will not interfere with unless it is shown that the discretion was not exercised judiciously, see *Wanjema -v- Republic (Court of Appeal)* 1971 E.A 493.

At the time the learned magistrate passed the sentence, the death sentence was the maximum sentence for robbery with violence. The appellant was given an opportunity to mitigate but he kept silent.

The court considered that the appellant was a 1st offender, he was not remorseful, that the offence resulted in the death of an innocent boda boda rider who was just eking a living. She then passed the death penalty. I find that the trial magistrate considered relevant factors and exercised her discretion judicially in the circumstance. I find no reason to interfere with the sentence.

Conclusion:

I find that the prosecution tendered sufficient evidence before the trial court which proved the charge against the appellant beyond any reasonable doubts. I hold that the appeal is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA (THROUGH TEAMS) THIS 20TH DAY OF AUGUST 2024.

L.W. GITARI

JUDGE

