



**Muchiri v Republic (Criminal Appeal 29 of 2017)
[2024] KEHC 13932 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 13932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL 29 OF 2017
BK NJOROGE, J
SEPTEMBER 26, 2024**

BETWEEN

MARTIN MUSAU MUCHIRI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. This Appeal arises from the Judgement of Honourable E. Michieka (SRM) dated 28th October, 2015. It arose from SRM Criminal Case No. 16 of 2012 at Kikuyu Law Courts.
2. The Appellant was charged with 5 counts whose penalties are as follows;
 - i. Robbery with violence contrary to Section 296(2) of the Penal Code. Martin Musau Muchiri on the nights of 11th and 12th October, 2012 at Muthure Village Kikuyu district within Kiambu County, jointly and others not before the Court while armed with dangerous or offensive weapons namely pangas, axes and rungus, robbed Duncan Rigii Kinuthia of a DVD Player make Sony, three mobile phones makes G-tide, a Nokia 1110 Nokia C-101 three pairs of shoes DVD player with screen (DC Voltage) Sony Camera (digital) and Cash kshs.5,600/-, all valued at Kshs.38,100/- and at or immediately after the time of such robbery threatened to use actual violence on the said Duncan Rigii Kinuthia.
 - ii. Robbery with violence contrary to Section 295(2) of the Penal Code. Martin Musau Muchiri on the nights of 11th and 12th October, 2012 at Muthure Village Kikuyu District within Kiambu County, jointly with others not before the Court while armed with dangerous or offensive weapons namely pangas, axes and rungus, robbed Evelyne Khakali of mobile phone make Nokia 110 and Cash Kshs.1,800/-, all valued at Kshs.3,800 and at or immediately before or immediately after the time of such robbery threatened to use actual violence on the said Evelyne Khakali



- iii. Robbery with violence contrary to Section 296(2) of the Penal Code. Martin Musau Muchiri on the nights of 11th and 12th October, 2012 at Muthure Village, Kikuyu District within Kiambu County jointly with others not before Court while armed with dangerous or offensive weapons namely pangas, axes and rungun, robbed Grace Wacheke of cash Kshs.1,000/- and at immediately before or immediately after the time of such robbery threatened to use actual violence on the said Grace Wacheke.
 - iv. Robbery with violence contrary to Section 296(2) of the Penal Code. Martin Musau Muchiri on the nights of 11th and 12th October, 2012 at Muthure Village, Kikuyu District within Kiambu County jointly with others not before this Court while armed with dangerous or offensive weapons namely pangas, axes and rungun, robbed Sammy Muroki Mbira of three mobile phones, make Motorola C113, Nokia 2100, Samsung E220, an electronic tooth brush, hand bag, ATM card Equity Bank Card, National ID Card, interim driving license, a pair of safari boots shoes, a bible, two remote controls for LG DVD and LG TV a trouser belt and cash kshs.4,000/- all valued at Kshs.14,880/- and at immediately before or immediately after the time of such robbery threatened to use actual violence on the said SAMUEL MUROKI MBIRA.
 - v. Being in possession of Cannabis Sativa (Bhang) contrary to Section 3(2) (A) of the Drugs and Psychotropic Substances Control Act No. 4 of 1994. Martin Musau Muchiri on the 12th day of October, 2012 at Gituamba Market in Kiambu District within Kiambu County was found in possession of a narcotic drug namely Cannabis Sativa (bhang) weighing 500 grams which was not in medical preparation form with a street value of Kshs.500/-.
3. The Trial Court found that the prosecution had discharged its burden of proof in respect to all the 5 counts on the charge sheet. It proceeded to convict him accordingly, under Section 215 of the Criminal Procedure Code.
 4. The Appellant had a previous record though presumably not related to the charges before the trial Court. He offered no mitigation. The Court sentenced him to death under Section 296(2) of the Penal Code. The right of appeal was explained to him.
 5. Aggrieved by both the conviction and the sentence, the Appellant has preferred this Appeal.
 6. The Appeal filed raises the following key issues, as can be summarized by the Court.
 - i. Whether the identification of the Appellant was free from any errors.
 - ii. Whether the doctrine of recent possession was correctly applied to this case?
 - iii. Whether the conviction was arrived at properly?
 - iv. Whether the prosecution summoned sufficient witnesses to prove its case.
 - v. Whether the Trial Magistrate considered the Appellant's defence?
 7. In the amended grounds of Appeal, the Appellant raises the following other issues.
 - i. Whether the mandatory sentence of death passed was lawful considering the decision of the Supreme Court in Muruatetu's case.
 - ii. Whether the Trial Court could convict and put a sentence on a non-existent provision of the Law.



8. There are yet other Supplementary Grounds of Appeal which were filed without any leave and after the prosecution had already represented its closing submissions. The prosecution therefore had no right for response. The Court proceeds to disregard the fresh grounds filed on 27/3/2023. This is because there should be no trial by ambush in litigation.
9. This matter was flagged for the Rapid Results Initiative (RRI) for the month of June, 2024. The Appellant filed his submissions on 19/11/2020. The Respondent filed its written submissions dated 4th September, 2020 and 19th January 2023. The Appellant filed a response on 27/5/2023. The Court has perused all the submissions and considered the same.

Issues for determination

10. For the sake of brevity and clarity the Court summarises the issues arising from the grounds of Appeal filed by the Appellant, as follows;
 - a. Whether the identification of the Appellant was free from any errors?
 - b. Whether the doctrine of recent possession was correctly applied in this case?
 - c. Whether the Trial Magistrate considered the Appellant's defence?
 - d. Whether the conviction was arrived at properly?
 - e. Whether the mandatory sentence of death passed was lawful considering the decision of the Supreme Court in the Muruatetu's case/
 - f. Whether the Trial Court could convict and pass a sentence on a non-existent provision of the Law.
 - g. What orders lie in this Appeal?
11. This is a first Appeal. The Court reminds itself of the duty of the first Appellate Court. The Court is expected to submit the entire evidence to a fresh evaluation. The Court is to re-evaluate the evidence and reach a conclusion of its own. All the while, the Court has to warn itself that it did not have the advantage of hearing and seeing the witnesses. That advantage accrued to the trial Court only. See Okeno -vs- Republic [1972] E.A 32.

Analysis

12. The Appellant challenges the identification by the complaints. He argues that the Identification parade was not carried out in accordance with the law. He challenges the application of the doctrine of recent possession to the facts of this case. He also challenges the conviction as well as the sentence passed.
13. The Respondent argues that though the identification was at night, it would be safe to convict based on the same. Further that the Identity parade was conducted in a proper manner. The goods were recovered from the person of the Appellant and hence the doctrine was applied properly. Lastly that the case was properly proved, the conviction arrived at properly and the sentence was in accordance with the law.
14. This Court proceeds to analyse the issues framed in seriatim as follows;



a. Whether the identification of the Appellant was free from any errors?

15. The robbery is said to have happened at night at about 1.30a.m. None of the prosecution witnesses testified to having knowledge of the gangsters that broke into their houses. The gang was said to be of about 6 people.
16. PW1 Grace Waceke testified that the lights were on. That the assailants had caps on their heads, but only one did not have a cap on. Presumably, she could not identify the assailants who had caps on. She was able to identify the Appellant at the identification parade. She said he did not have a cap on. That he is the one who took the camera.
17. The Court is intrigued at the manner in which PW1 Grace Waceke was able to identify the Appellant as the person who broke into her home.
18. In her testimony she did not give any description as to his physical features, his height, hair, facial features, skin colour or even clothes. There is no evidence as to how long the robbery took place. It is curious as to how PW1 was able to pick the Appellant at the identification parade done on 15/10/2012. There is no evidence before the Court of the 1st report or description of the robbers given to the police.
19. Identification even in ordinary circumstances is always a dicey issue. People remember persons they ordinarily associate or spend time with. Fleeting encounters with persons even during the day may not register much in our minds. An example is the stranger that one sits next to during a matatu ride to work. Though the commute may last an hour, one may not even remember the clothes or height of the passenger. When you add the trauma of a robbery, especially a robbery with violence at night, remembering the assailants may not always be easy.
20. The Court is left seeking the answer to the question, how could PW1 positively identify the Appellant as the person who robbed her? Sadly, looking at her evidence, the Court does not find that positive assurance. She did not know him from before.
21. PW2 Duncan Kinuthia and PW3 Samuel Muroki all identified the Appellant at the dock. They were clear that they had not seen him prior to the incidence. It is not clear why PW2 and PW3 did not take part in the identification parade. If they could identify the assailants, they should have participated in the identification parade that PW1 took part in.
22. That said and done the identification by the Appellant by PW2 and PW3 remains dock identification. In *Gabriel Kamau Njoroge -vs- Republic* [1987 – 1988] 1 KAR 1134, the Court of Appeal stated that generally dock identifications are worthless unless preceded by a properly conducted identification parade. In absence of an identification parade, the dock identification by PW2 and PW3 remains worthless. The Court will not place reliance on it.
23. That leaves the identification by a single witness being PW1. Guided by the Court of Appeal decision of *Peter Mwangi Mungai -vs- Republic* [2002] eKLR, the Court finds that the identification was not free from error. From what this Court has observed earlier, no evidence was led by PW1 to show how she was able to relate the Appellant at the identification parade, with the person who robbed her. The case of *Maitanyi -vs- Republic* [1986] eKLR is also applicable. There was no prior description of the robber or a descriptive 1st Report.
24. On the issue of identification, the Court gives the benefit of doubt to the Appellant.



b. Whether the doctrine of recent possession was correctly applied in this case?

25. The position at law is that once an accused person is found in possession of recently stolen goods, facts of how he came into possession of the recently stolen goods is especially within his own knowledge. It is now up to the accused person to discharge that burden. See Paul Mwita Robi -vs- Republic [2010] eKLR.
26. The starting point on the application of the doctrine of recent possession is to be found in the decision of Eric Otieno Arum -vs- Republic [2006] eKLR.
- “before a Court can rely on the doctrine of recent possession as a basis of conviction in a Criminal Case, the possession must be positively proved. In other words, there must be positive proof first that the property was found with the suspect. Secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complaint, and lastly, that the property was recently stolen from the complaint. The proof as to time, as has been stated over and over again will depend on the casualness with which the stolen property can more from one person to the other.”
27. The Police witnesses PW5 PC. Corporal Geoffrey Kaigathe; PW 7 PC Peter Kimilu and PW8 PC Julius Kaimenyi testified as to the arrest of the Appellant. The Police had received a tip off from a police informant that there was a drug peddler at Gituamba. The police went and arrested the Appellant. Upon searching him they recovered some 500 grammes of dry plant material. This was suspected to be Cannabis Sativa. They also received a phone and a camera.
28. They went to the Appellant’s house and recovered a tooth-brush and a Motorola phone. They also found sweets.
29. The evidence of PW12 Corporal Joseph Kaunda shows that he sought to produce the exhibits being the goods recovered. The record does not indicate whether the items marked as MFI 1 to 8 were produced and marked as exhibits. The Court has looked at the original Lower Court file. The list of Exhibits Form indicates 5 exhibits were produced and enumerated as follows;
- Sony camera (digital) – 1
1 pair brown shoes – 2
6 sweets assorted – 3
Nokia mobile phone – 4
Parade (identification) - 5
30. PW1 Grace Waceke identified the Digital Camera exhibit no. 1 (then marked as MFI -1) as follows;
- “Another went to the wardrobe and pulled out my digital camera. This is the camera. Camera ... MFI – 1”
31. She identified the exhibit 3 (then marked as MFI – 3 as follow;
- “... some sweets that I sell at the shop and my husband’s shoes... MFI 2.
4 packets of sweets – MFI – 3.”



32. PW2 Duncan Kinuthia identified the Nokia phone, camera, sweets and shoes being exhibit 4, 3 and 2 (then marked as MFI – 4, 1, 3 and 2) as follows;

“some items were later recovered the following day. They were;

Nokia phone MFI – 4

Camera MFI – 1

Sweets MFI – 3

Shoes MFI – 2

The Police told me they had arrested a suspect with the goods.”

33. This is the same narrative by PW3 Samuel Muroki. He identified the electric tooth brush MFI – 6 and the phone MFI – 7. The electric tooth brush and the Motorola phone are not listed on the List of Exhibits Form which runs upto Item 5. The record does not reflect whether these exhibits were admitted into Court as exhibits.
34. The Appellant denies the goods were recovered from him.
35. The narrative of the Police visit to the Appellant’s house was given by PW8 only. The other police officers did not allude to this.
36. In any event the identification of the recovered goods by the complainants leaves a lot to be desired. All they said was that the properties were theirs. They did not lay any basis or narrative as to why the Court should believe that the goods belonged to the complainants. They did not produce any receipts or proof of ownership of say the phone or camera. They did not demonstrate or identify any special identification marks of say the shoes or the tooth brush. The Court would expect the complainants to give some historical narrative of how they came to own the goods. Explain to the Court why they believe the goods are theirs and how they can identify them. They had a duty to establish their possession of the goods. The prosecution did not establish these crucial facts of positive identification of the goods as the complainants.
37. Without proof that the goods recovered belonged to the complainants, the prosecution could not establish that the goods were stolen from PW1, 2 and 3 by the Appellant. The duty to prove the facts of the case all along remained with the prosecution. The Court is persuaded by the decision of Justice Musyoka in *Wycliff Mugando -vs- Republic* [2021].
38. The Court holds that the doctrine of recent prosecution was misapplied in this case.

c. Whether the Trial Magistrate considered the Appellant’s defence?

39. The Court notes that in its Judgment, the Trial Court did reproduce the defence laid out by the Appellant. The Court was cognisant that the Appellant had pleaded not guilty. Due consideration was given to the defence raised.

d. Whether the conviction was arrived at properly?

40. In view of what this Court has stated above, Counts I, II, III and IV all relating to robbery with violence were not properly proved. The conviction on these counts was improper.



41. On Count V relating to possession of Cannabis Sativa, the Court has evaluated the evidence. The police were acting on a tip off. They arrested the Appellant on suspicion of being a drug dealer. They searched him upon arrest and recovered some dried plant material.
42. The material was tested and found to be Cannabis Sativa. A Government Analyst Report dated 13/02/2013 was produced by PW6 Geoffrey Nyagaka a government analyst.
43. The Appellant was properly convicted of this charge, though the trial Court did not pass any sentence.

e. Whether the mandatory sentence of death passed was lawful considering the decision of the Supreme Court in the Muruatetu's case?

44. As the Court is minded to overturn the conviction and sentence of death, nothing turns on this issue. However, the Court is alive to the decision of the Supreme Court in Republic -vs- Joshua Gichuki Mwangi No. E018 of 2023. Death sentence remain valid sentence within the Kenya Legal System, unless and until otherwise stated.

f. Whether the trial Court could convict and pass a sentence on a non-existent provision of the law?

45. The Appellant's complaint is that he was sentenced to death, under Section 296(3) of the Penal Code. The Court has perused the original transcripts which states that the section passed was under Section 296(2) of the Penal Code. However, in view of the final orders to be made, nothing much turns on this.

g. What orders lie in this Appeal?

46. The Court finds that the Appellant was wrongly convicted on the charges of Robbery with violence. However, he was properly convicted on the charge of possessing Cannabis Sativa.
47. Pursuant to Section 354 of the Criminal Procedure Code the Court has the necessary jurisdiction to pass a sentence even on an Appeal. In exercise of such powers, the Court sentences the Appellant to serve a prison term of one year. The Court is minded of the fact that the Appellant has been in custody and the sentence imposed has already been eclipsed by the time spent in custody as well as the prison term spent.

Final determination

48. The conviction against the Appellant in relation to Counts I, II, III and IV are hereby quashed and set aside the sentence of death imposed set aside.
49. On Count V relating to possession of cannabis sativa, the Court finds that the Appellant was properly convicted and proceeds to sentence him to serve a prison term of one (1) year.
50. The Appellant is therefore only partially successful.
51. As the Appellant has already served this prison term, he is to be released forthwith and set at liberty, unless he is otherwise lawfully held.
52. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF SEPTEMBER, 2024.

NJOROGE BENJAMIN. K

JUDGE

In the presence of: -



..... for the Appellant

..... for the Respondent

Court Assistant:

