



**Musumba & another v Republic (Criminal Appeal 83 of 2023)
[2024] KEHC 16044 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 83 OF 2023
DR KAVEDZA, J
DECEMBER 20, 2024**

BETWEEN

SAMUEL OJAJU MUSUMBA 1ST APPELLANT

FELIX MUHANJI LUGHALU 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. Boko (SPM) on 23rd February 2023 at Kibera Chief Magistrate's Court Criminal Case no. 340 of 2020 Republic vs Samuel Ojaju Musumba and Felix Lughalu Mubhanji)

JUDGMENT

1. The appellants were charged, convicted, and sentenced as follows for various offences: The 1st appellant was convicted in count III (robbery with violence) contrary to section 296(2) of the *Penal Code* – death sentence; Count VI (handling suspected stolen property) contrary to section 323 of the *Penal Code* - two (2) years; and Count VII (preparation to commit a felony) under section 308(1) of the *Penal Code* – ten (10) years.
2. The second appellant was convicted and sentenced as follows: Counts I (robbery) contrary to section 295 of the *Penal Code* – ten (10) years imprisonment; alternative to count II (handling stolen goods) contrary to section 322(1) and 322(2) – two (2) years, count III (robbery with violence) contrary to section 296(2) of the *Penal Code* - death and count VII (preparation to commit a felony) contrary to section 308(1) – ten (10) years. The trial court held the other sentences in abeyance due to the death sentence.
3. Being aggrieved, they filed the present appeal, challenging the totality of the prosecution's case against which they were convicted. They also complained that the sentence imposed was harsh and excessive. They urged the court to quash their convictions and set aside the sentence imposed.



4. Their appeals were canvassed by way of written submissions which have been considered and there is no need to rehash them.
5. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32).
6. The prosecution called five (5) witnesses in support of their case. On 13th March 2020, PW1, PC Charles Macharia, stationed at Dagoretti Division, received information about a group of young men terrorising the public with firearms. Acting on a tip-off, he and his colleagues proceeded to a hide-out at 11:00 pm, where they found four individuals. Three fled, and the second appellant attempted to escape on an unregistered motorcycle but was apprehended. Upon searching him, the police recovered two mobile phones and a homemade pistol. The motorcycle, however, was excluded from the inventory.
7. PW2, PC Kihiko Mwangi, corroborated PW1's account, confirming their involvement in the arrest.
8. PW3, Grace Wangu, a complainant, testified that on 13th March 2020, three men, including the second appellant, forcibly entered her house, threatened her with a pistol, and stole money and electronics. She later identified her stolen phone during an identification parade.
9. PW4, CIP Ann Kamama, conducted the identification parade, where complainants Isaac Njenga, Grace Wangu, and Henry Otieno identified the appellants and their stolen property. PW5, PC Willie Bungei, the investigating officer, detailed the recovery of stolen items, including mobile phones and a red motorcycle. Through tracking, the motorcycle was traced to a third party, Margaret Muhanji. The investigating officer presented all evidence, including Mpesa statements and the homemade pistol, leading to the appellants' charges.
10. In their respective defences, the first appellant testified that on 13th March 2020, after finishing work at 10:00 pm, he was forcibly abducted by men in civilian clothes, taken to the police station, and assaulted. One officer pointed a gun at him while another hit his head with a rungu, rendering him unconscious. During cross-examination, he stated that although he had business permits at home, he was not found with any items during his arrest.
11. The second appellant testified that on the same date, after a fight at BoraBora pub, he went to the washroom. Upon returning, he was arrested by police officers called by the other man involved in the altercation. He claimed he was handcuffed and found DW1 in the vehicle. DW2 refused to sign the inventory form and maintained that the complainants could not identify him or the phones. He also insisted the motorcycle he was found with had a number plate.
12. The trial court found them culpable and convicted them accordingly.
13. For the offence of robbery with violence, the key ingredients are found in section 296(2) of the [*Penal Code*](#). It provides as follows-

“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”.
14. The evidence of robbery with violence contrary to section 296(2) of the [*Penal Code*](#) is firmly established. PW1 and PW2, who arrested the appellants in a well-lit area, ensured that proper



identification procedures were followed. PW4 conducted an identification parade, during which the appellants were positively identified by the complainants, including PW3, who signed the identification forms, which were presented in court. PW5, the investigating officer, was present at the parade, confirming the identification process.

15. Additionally, PW3 and the other complainants testified that the appellants threatened them with a pistol, demanding valuables such as money and mobile phones. Upon arrest, the appellants were found in possession of the stolen mobile phones and the same pistol used to intimidate the victims. This establishes that force was used to rob the victims, meeting the legal requirements for robbery with violence under section 296(2) of the *Penal Code*.
16. In relation to the offences of having suspected stolen property and having stolen property, the 1st appellant was found in possession of mobile phones that were reasonably suspected to have been unlawfully obtained. In addition, they were both found in possession of what was determined to be stolen property. PW3, a complainant, testified that she identified two of the recovered phones as belonging to her and her mother, which were confirmed during the identification process at the police station. Other complainants also proved ownership of their phones by providing serial numbers, which matched those of the recovered phones. When the appellants were given an opportunity to explain their possession of the phones, they failed to provide a credible or satisfactory explanation. The failure of the appellants to account for the possession of the phones, coupled with the direct identification by the complainants, satisfies the necessary elements for the offences under sections 322 and 323 of the *Penal Code* for possessing stolen or suspected stolen property.
17. The offence of preparation to commit a felony is provided under section 308 of the *Penal Code*. The offence involves any act that demonstrates an intent to commit a criminal act. In this case, the appellants were found in possession of a homemade pistol, classified as a dangerous and offensive weapon under the Penal Code. The possession of such a weapon is a clear indication of preparation for a violent crime, as it is commonly used to facilitate robberies or other felonies.
18. Moreover, the appellants were apprehended shortly after the police had received reports of a group of young men walking around armed and forcibly demanding property from the public. This situational context, coupled with the appellants' actions, supports the inference that they were preparing to commit a robbery or other similar offence.
19. Additionally, the appellants had broken into the home of PW3 and had accosted Isaac Njenga and Henry Otieno, brandishing the homemade pistol at them. These actions demonstrate not only that the appellants had the means (a weapon) but also that they had initiated the commission of a felony, namely robbery. Their conduct indicates a clear intent to commit an unlawful act, satisfying the requirements of section 308 of the *Penal Code* regarding preparation to commit a felony.
20. Having considered the totality of the prosecution's evidence and the appellants' defence, it is my finding that the trial court rightly convicted the appellants. Their respective convictions are therefore affirmed.
21. On sentence, the appellants were sentenced as provided in paragraph 1 of this judgement. From the record, I note that the appellants were sentenced to death for the offence of robbery with violence, and the other sentences were held in abeyance.
22. In 2016, the judiciary developed the Sentencing Guidelines as a response to the challenges experienced by judges and judicial officers. The Guidelines were developed pursuant to section 35(2) of the *Judicial Service Act* 2011. The guidelines collated the principles of law that should guide courts in the



exercise of their discretion so that sentences for analogous circumstances are delivered transparently and consistently.

23. Since the formulation of the SPGs of 2016, the criminal justice landscape around sentencing has evolved significantly, prompting NCAJ to review (The [Sentencing Policy Guidelines](#) 2023) the Guidelines to align with the emerging jurisprudence and make them more responsive to the justice needs of Kenyans. The revised SPGs provide guidance in sentencing where the mandatory minimum and maximum sentences are concerned, as well as sentencing hearings.
24. Consequently, the evolution of law and jurisprudence should grow in tandem with the Constitution while acknowledging the judiciary guidelines on sentencing.
25. Flowing from above, it is equally my view that a sentence imposed on a convict has to meet the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection, and denunciation. Therefore, it is no longer necessary or desirable to hold a convict for an indeterminate amount of time as this does not meet the objectives of the sentencing policy guidelines.
26. In this case, it appears that in determining the sentence, the learned trial magistrate's decision was primarily influenced by the mandatory nature of the applicable law. This jurisprudence has since shifted after the promulgation of the [Constitution](#) of Kenya, 2010 (See: [Manyeso v Republic](#) Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) and ([Evans Nyamari Ayako v Republic](#) Criminal Appeal No.22 of 2022 Kisumu Court of Appeal)
27. I hereby set aside the death sentence imposed for the offence of robbery with violence and substitute it with a sentence of thirty (30) years imprisonment.
28. Consequently, the sentences against the appellants shall be as follows:

Samuel Musumba Ojaju (First Appellant)

- i. The death sentence imposed in count III is substituted with a sentence of thirty (30) years imprisonment.
- ii. The sentence of two (2) years imprisonment imposed in Count VI is upheld.
- iii. The sentence of ten (10) years imprisonment imposed in Count VII is upheld.
- iv. The sentences shall run concurrently from 13th March 2022 the date of the first appellant's arrest pursuant to section 333(2) of the [Penal Code](#).

Felix Muhanji Lughalu (second appellant)

- i. The sentence of ten (10) years imprisonment in Count I is upheld.
- ii. The sentence of two (2) years imprisonment in the alternative to count II is upheld.
- iii. The death sentence imposed in count III is substituted with a sentence of thirty (30) years imprisonment.
- iv. The sentence of ten (10) years imprisonment imposed in Count VII is upheld.
- v. The sentences shall run concurrently from 13th March 2022 the date of the second appellant's arrest pursuant to section 333(2) of the [Penal Code](#).

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER 2024



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D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mburugu for the Respondent

Achode Court Assistant

