



REPUBLIC OF KENYA



**Jonah v Republic (Criminal Appeal E013 of 2022)
[2023] KEHC 3051 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E013 OF 2022**

**A. ONG'INJO, J
MARCH 30, 2023**

BETWEEN

ZACHARIA NGWATU JONAH APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the decision by Hon. Khapoya S. Benson (PM)
on 31st January 2020 in Taveta Criminal Case No. 28 of 2019, Republic
v Zacharia Ngwatu Jonah & Geoffrey Haggar Samuel alias Micah)*

JUDGMENT

Background

1. The Appellant Zacharia Ngwatu Jonah was charged in Taveta PMC Criminal Case No. 28 of 2019 with the offence of robbery with violence contrary to Section 296 (1) of the [Penal Code](#) jointly with another before court.
2. Particulars are that on 22nd December 2018 at around 0900 hrs at Taveta Township in Taveta sub-county within Taita Taveta County, they jointly robbed Christine Zena Mbamba of Kshs. 90,000, one mobile phone make Infinix valued at Kshs. 20,000, one mobile phone make Huawei valued at Kshs. 15,000 and immediately before the time of such robbery threatened to use actual violence against the said Christine Zena Mbamba.
3. Upon taking the evidence of 3 prosecution witnesses and accused persons' sworn statements, the trial magistrate found the appellant and his co-accused guilty and they were convicted and sentenced to serve jail terms for a period of 14 years each.
4. The appellant was aggrieved by the conviction and sentence and he filed the appeal herein on the following grounds: -



1. That the learned trial court magistrate erred in law and fact by convicting him on an unsworn testimony of the complainant without clear corroborative evidence.
 2. That the learned trial court magistrate erred in law and fact by failing to consider the inconsistencies in the prosecution evidence.
 3. That the learned trial magistrate erred in both law and fact by holding that the prosecution had proved its case against the appellant beyond a reasonable doubt whereas the evidence on record did not support such a finding.
 4. That the learned magistrate erred in both law and fact in finding the appellant guilty of the offence whereas there was no direct evidence pointing to the appellant.
 5. That the learned magistrate erred in both law and fact by failing to consider the appellant's defence of alibi.
 6. That the learned magistrate erred in both law and fact in convicting the appellant on trumped-up charges.
 7. That the sentence meted out against the appellant is harsh and excessive in the circumstances of the case.
5. The appellant prayed that the appeal be allowed and trial court's judgment, order and conviction be quashed and consequently set aside sentence imposed therewith and set the appellant at liberty forthwith.

Prosecution Case

6. The prosecution case was that PW1 – Christine Zena Mbamba was in her Mpesa shop opposite Taveta G.K. prisons along Taveta – Voi Road on 22nd December 2018 at 9.00 hrs when 2 men walked into her place of work and demanded for all the money she had. That when she told them she did not have any money, one of them drew a pistol and pointed at her as the other walked into the counter where she keeps money. She identified A2 as the one who entered the counter. That when A2 shouted “*Ni mjeuri ana pesa*” the appellant who initially wore a mask took it off and threatened to kill her as he demanded to know if she knew him. That when she put for them money on the counter, A2 pushed it away with his elbow and the appellant herein collected it and also took her phones make Infinix Note 4 and Huawei. That after picking the money and phones, they walked out and boarded a motorbike they had packed close by and sped off.
7. PW1 said she identified the appellant when he took off the mask then threatened to kill her. PW1 realised that A1 was unable to pick money because he did not have hands and that is why he pushed it for the appellant to pick. That when the suspects sped off, she raised alarm and members of the public responded and tried to pursue the robbers who rode towards Njoro area but did not find them. PW1 reported the matter at Taveta Police Station. According to PW1, on 14.1.2019, she was leaving home on a motorbike when they met two men riding a motorcycle and she had eye contact with A1 and identified the two as the ones who had robbed her. She directed the rider to follow them. They followed up to the suspects' gate. When the suspects had entered the gate, PW1 raised alarm and with help of members of the public, suspects were pursued to the nearby murrum quarry and they were apprehended and taken to Taveta Police Station.
8. PW1 identified exhibits to show her deposits, withdrawals and unregistered entries for Mpesa transactions. PW1 testified that she had enough time to identify the suspects during robbery as appellant even removed his mask from his face. She said that a motorcycle rider waited for the appellant



and his co-accused on the road nearby and they rode towards Njoro area. PW2 Sergeant Benson Lwangu testified that he took over investigations from cpl Gitahi. He said a report of robbery was made by the complainant on 22.12.2018 at around 09.24 hrs. He reiterated what PW1 said in her evidence as to how robbery took place. PW2 also testified on how the complainant was able to meet the suspects on a motorbike and she pursued them to their home where she raised alarm and members of the public assisted to arrest them and they were escorted to the police station.

9. PW2 testified that there was no need for identification parade as the complainant knew A1 the appellant herein. PW3 PC Anthony Kagwamba testified that on 14th January 2019, he was at the police station when members of the public escorted the appellant and his co-accused for robbing PW1. PW3 testified that the 2 suspects had been beaten.

Defence Case

10. The appellant on his defence gave sworn statement and said that on 14th January 2019 at 7.45 hrs, he had taken his client a teacher to school and on his way back he met A2 who requested to be driven back home. He said that along the way at a corner, they collided with another motorcycle carrying a woman and that the rider rose and started beating him and when he went to the police station, he was not assisted. That at the police station, the complainant who was carried on the motorbike claimed he had robbed her. The appellant denied having robbed the complainant. Marita Wanjala Mbashu, the appellant's mother testified on 22.12.2018 that the appellant spent his day working for her carrying bananas at the market and that she was surprised when on 14th January 2019 she learnt that he had been arrested. The 2nd accused also testified and denied having robbed the complainant.
11. This appeal was canvassed by way of written submissions.

Appellant's Submissions

12. The appellant in submitting stated that the trial magistrate erred in law and facts by holding that the appellant was properly identified. He stated that during the reporting time at the police station on 22.12.2018, PW1 never gave any descriptions or the names of the perpetrators and that the police did not interrogate her on the identification or recognition of the alleged robbers for purposes of pursuance of the same. That upon reporting the incident, the police believed the police believed PW1's report and booked the same without visiting the scene to confirm the truth of the alleged offence. The appellant in submitting cited the case of *R v Turnbull* where the trial court wholly or substantially relied on identification of the accused person. Additionally, the appellant cited the case of *Hassan Abdalla Mohammed v Republic* (2017) eKLR where it was held that visual identification in criminal cases can cause a miscarriage of justice and should be properly tested. He also made reference to *Wamunga v Republic* (1989) KLR 4242 where it was held that where the only evidence against a dependent is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that circumstances of identification were favourable and free from possibility of error before it can safely make it basis of conviction.
13. The appellant submitted on defective charge sheet that the initial charges that the appellant was charged with was robbery with violence contrary to Section 296 (1) of the *Penal Code* but the evidence adduced in court clearly suggested that the offence committed was robbery with violence contrary to section 292 (2). The appellant states that the prosecution chose not to make any changes to the charge sheet and the court made a determination on the same which prejudiced the appellant.
14. In submitting on poor and unreliable investigations, the appellant stated that when it came to the attention of the police that one cpl David Gitahi who used to move around armed with a CESKA



pistol and associated with crimes that were happening within Taveta township and was later, shortly after the alleged date of the incident herein arrested for shooting dead one person in Taveta township under unclear circumstances and charged. That after the police officers knew the behavior of their colleague with chances of him being associated with several robberies that had been occurring within Taveta township concealed the same and diverted the attention of the public and coaching of PW1 for the appellant to carry the blame.

15. The appellant submitted that PW3 never made any attempt to secure his phone to track it and any communication or transactions made on 22.12.2018 for clearance of doubt or for proof on commission of the alleged offence. He states that PW1's stall was robbed on 22.12.2018 at around 0900hrs and she was not able to work since everything had been taken. That however, from Exb.3, (Safaricom transaction report of PW1), it shows that one Florah Mnene transacted Kshs. 5000 on 22.12.2018 at 1036hrs as well as another transaction of Kshs. 2000 by one Alice Musili on 22.12.2018 at 1231hrs. That upon cross examination, PW1 stated that the transaction was done after her phone had been stolen and that the transaction was reversed. The appellant submitted that Exb.3 does not show reversal of the alleged transactions and the two individuals who initiated the transactions were never called as witnesses. Further, the appellant states that the exhibit omitted transactions on 23.12.2018 and there is therefore no proof that indeed business was closed on 22.12.2018 at around 0900 hrs as a result of the robbery.
16. The appellant in support of his submissions further cited the case of *Charles O. Maitanyi v Republic* (1986) KLR 198 where it was held that although it is trite law that a fact may be proved by testimony of a single witness, this does not lessen the need for testing the greatest care the evidence of a single witness respecting identification. In the case of *Margaret Wamuyu Warioko v Republic*, Criminal Appeal No. 35/2005 it was held that circumstantial evidence is very often the best evidence. However, in the case of *Republic v Kipkering Arap Koske and Another* (1949) 16 EACH 135 it was held that in order to justify the inference of guilt, the inculpatory facts must be compatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis. He also made reference to *Abanga alias Onyango v Republic*, Criminal Case No. 32 of 1990 on the issue of circumstantial evidence, and the case of *Suleiman Juma alias Tom v Republic*, Criminal Appeal No. 181 of 2002, Mombasa where it held that where life of an individual is at stake, the prosecution must extremely be careful not to bring evidence that is less than watertight.

Respondent's Submissions

17. The Respondent in submitting cited Section 295 of the *Penal Code* which defines robbery and sets out the elements of the offence of robbery as the act of stealing, and use of or threat to use actual violence to any person or property immediately before or immediately after stealing intended to obtain or retain the stolen item or prevent or overcome resistance to the stealing. The Respondent further cited Section 296 (1) of the *Penal Code* by submitting that it denotes a case of simple robbery and that it is important to ensure that the ingredients of the offence are supported by the facts and circumstances of the case.
18. The Respondent submitted that the first element was proved whereby the appellant and his stole Kshs. 90,000 and the complainant's 2 phones and that the line of evidence was uncontroverted. It was further submitted by the Respondent that the second element was proved and that the complainant testified that the appellant herein was armed with a firearm. The Respondent stated that he threatened to harm the complainant if she did not comply with their demands. That both elements were proved beyond reasonable doubt.
19. In submitting on identification, the Respondent stated that PW1 testified that the appellant removed the mask and helmet he was wearing. That he asked PW1 whether she knew him thrice. The



Respondent submitted that on 14th January 2019, PW1 recognized the appellant and his accomplice when they were on board a motorcycle and that she sounded out an alarm for people to help her apprehend them which was done with the help of members of the public. The Respondent stated that during cross examination PW1 reiterated that she did not know the appellant by name but recognized his face. She stated that she had seen him previously before the day of the incident and confirmed to court that the appellant herein was one of the people who robbed her. The Respondent stated that there was enough light at her shop for her to have a good look at the appellant and positively identify him.

20. The Respondent cited the case of *Hassan Abdalla Mohammed v R* (2017) eKLR, with regard to visual identification in criminal cases which should be carefully tested as the same can cause miscarriage of justice. The said case further cited the cases of *Wamunga v Republic* (1989) KLR 424 at 426 and *Nzaro v Republic* (1991) KAR 212, and that the court is therefore duty bound to interrogate whether or not the circumstances in the case at hand were favourable for positive identification.

Analysis and Determination

21. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held:

“The duty of the first appellate court is to analyze and re-evaluate 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 decisions.”

22. After considering the prosecution evidence on record, the judgment of the trial court, and the submissions by the parties, the issues for determination are as follows: -
- a. Whether the appellant was convicted on the complainant’s unsworn testimony without clear corroborative evidence
 - b. Whether the trial court considered inconsistencies in the prosecution evidence
 - c. Whether the prosecution proved its case beyond reasonable doubt
 - d. Whether the appellant’s defence was considered
 - e. Whether the appellant was convicted on trumped-up charges
 - f. Whether the sentence is harsh and excessive

Whether the appellant was convicted on the complainant’s unsworn testimony without clear corroborative evidence

23. This court has perused typed proceedings and established that on page 7, the complainant gave sworn statement, contrary to the appellant’s allegation of an unsworn statement.



Whether the trial court considered inconsistencies in the prosecution evidence

24. In *Erick Onyango Ondeng v Republic* [2014] eKLR the court stated as follows with regards to the duty of a court when considering contradictory evidence: -

“The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured device for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See *Okeno v Republic* (1972) EA 32).”

25. In *Peter Ngure Mwangi v Republic* [2014] eKLR, the Court of Appeal, when dealing with the question of alleged inconsistencies in evidence held: -

“We, therefore find that on the totality of the evidence before us, any difference there may have been in the evidence adduced by the prosecution consisted of minor discrepancies and inconsistencies. We find that these were not material and did not weaken the probative value of the evidence tendered by the prosecution in support of their case.”

26. This court has perused the records of the trial court and found no inconsistent evidence on the part of the prosecution’s case and the appellants in their submissions have not pointed out any inconsistencies which this court can base its finding on.

Whether the prosecution proved its case beyond reasonable doubt

27. The offence of robbery with violence is provided for under Sections 295 and 296(2) of the *Penal Code* as follows: -

“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.

296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

28. In *Jeremiah Oloo Odira v Republic* [2018] eKLR the Learned Judge while interpreting the aforementioned sections of the Penal Code defined robbery with violence as follows: -

“Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be



proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

- i. The offender is armed with any dangerous or offensive weapon or instrument, or
- ii. The offender is in the company of one or more other person or persons, or
- iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person”

29. The evidence of the complainant was that she was attacked at 0900 hrs by two men who entered her shop and demanded for money. She said that one of the two was armed with a firearm and she identified the same as the 1st accused who was also wearing a mask but which he later removed. She testified that the appellant threatened to shoot her if she did not comply with their demands and that they stole Kshs. 90,000 and two phones before escaping on a motorbike. The offence took place in the morning at 9.00 am and there was therefore sufficient light to enable the complainant properly identify the suspects. On 14th January 2019, the complainant came across the appellant and his accomplice on a motorcycle and she followed them and raised alarm and they were arrested by members of the public as the people who robbed her. There was therefore proper identification of the appellant as the perpetrator of robbery with violence and the charge was proved beyond reasonable doubt.

Whether the appellant’s defence was considered

30. The trial magistrate, Hon. Khapoya S. Benson (PM), in the judgment stated: -

“In defence, the accused person’s merely talked of how they were arrested. They alleged there was a traffic accident. None was reported. A1 alleged to have been assaulted by the complainant’s rider. No such report was made at the station. DW2 alleges that she was with her son on the material date. A1, her son did not mention anything to do with the day of the incident. He did not tell the court where he was or what he was doing. This testimony is obviously made up and false. Similarly, A2 did not tender any evidence to rebut the prosecutor’s case as regards the date of the incident.”

31. The Appellant in his submissions has not pointed out what aspect of his defence was not considered by the trial magistrate and this ground therefore fails.

Whether the appellant was convicted on trumped-up charges

32. There was no evidence to point out any reason why the complainant would fabricate the appellant with the serious robbery under section 296 (1). PW1 gave evidence that she was robbed and on a later date she came across the robbers, raised alarm and members of the public assisted her to apprehend the robbers and they were charged.



Whether the sentence is harsh and excessive

33. Section 296 (1) of the Penal Code provides: -

“Any person who commits the felony of robbery is liable to imprisonment for fourteen years.”

34. *Shadrack Kipkoech Kogo v R*, Eldoret Criminal Appeal No. 253 of 2003 the Court of Appeal stated: -

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R*. (1989 KLR 306)”

35. In *Bernard Kimani Gacheru v Republic* [2002] eKLR, the Court of Appeal restated that: -

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

36. In this case, the trial magistrate gave the maximum possible penalty of 14 years by merely saying that it was a felony. Although the appellant was armed with a firearm, he did not harm the complainant and the years should have been discounted on that account. This court is of the view that in consideration of the value of the subject matter, 10 years should be sufficient punishment.

37. The appeal fails on conviction but the sentence is substituted from 14 years to 10 years to take effect from 31st January 2020 when the appellant was sentenced.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,
THIS 30TH DAY OF MARCH 2023.**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Sirima for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

