



**Wanjiru & another v Republic (Criminal Appeal E026 of 2021 & E019 of 2022
(Consolidated)) [2023] KEHC 2976 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2976 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E026 OF 2021 & E019 OF 2022 (CONSOLIDATED)
SC CHIRCHIR, J
MARCH 29, 2023**

BETWEEN

DENNIS KAMAU WANJIRU 1ST APPELLANT

NELSON MBIRA MUTHUITA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Original Conviction and Sentence
in robbery with violence in PM'S criminal case No. 367 of 2021
delivered on 19th October, 2021 by Hon. M. Wangui Kinyanjui PM)*

JUDGMENT

1. The appellants were charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars are that on 18th May 2020 at Ngarani area in Gataya sub-county within Murangá County jointly, while armed with dangerous weapon namely knife, robbed Onesmus Musembi a motorcycle registration number KMFB887 Honda red in colour valued at kshs, 113,480 and cash of Kshs.2000 all valued at Kshs. 115,480 and at the time of such robbery stabbed the said Onesmus Musembi on the shoulder.
2. The 1st appellant faced an alternative charge of handling stolen goods contrary to section 322(1)(2) of the *Penal Code*. They were convicted of the main charge and sentenced to death.
3. They were dissatisfied with the finding of the lower court and consequently filed this appeal. The appeal is against the conviction and sentence.

Grounds of Appeal

4. The appellants have each filed grounds of appeal which I have considered and summarized as follows.



1. That the police standing order identification parade were violated
2. That the prosecution's witness's testimony case were doubtful incredible, inconsistent, contradicting and that there was no corroboration
3. That there were defects in the charge sheet
4. That there was no positive identification of the 2nd Appellant
5. That the prosecution's case was not proved beyond reasonable doubt.
6. That the trial court erred in rejecting the evidence of the 2nd Appellant
7. Whether the sentence imposed was excessive.

1st Appellant Submissions

5. The 1st appellant submits that the complainant (PW1) did not indicate the time spent with the appellants, so as to allow ample time for identification. He further submits that from PW1's narrative, the time was probably short.
6. That the rules on identification during the identification parade were violated. Specifically, he states that his right to legal representation or presence of a friend was not explained to him; that the complainant had seen him prior to the identification parade; that the identification parade had 8 instead of 10 people; and finally that the people he was paraded with failed the test of similar built height and appearance.
7. It is further submitted that the description of the assailant was not given to the police by the complainant. That it is unsafe to base a conviction on a contested identification evidence. The Appellant has relied on the following past decisions to buttress his submission
 - i. [Kariuki Njiru & 7 others vs. Republic](#)
 - ii. [Simon Kibanga Kairi & Another vs. Republic](#)
 - iii. [David Mwita Wanga & others vs. Republic](#)
 - iv. [Ajode vs. Republic](#)
 - v. [John Mwangi Kamau – vs. Republic](#)
 Neither the citation nor copies of the said decisions were supplied to the court.
8. On failure to call crucial witnesses the 1st appellant urges the court to draw negative interference on the prosecution's failure to summon the lady he was found with at the time of arrest, one Nasimiyu.
9. The 1st Appellant further submits that the doctrine of recent possession was not established. He submits that the motorbike was found in a plot where he resides with others but not with him. That the extract of the tracking device was not produced to show that the motorbike was traced from the crime scene to his house.
10. The appellant has further submitted that his rights to fair trial were violated. In particular, he points out that he was not informed of his right to legal representation.
11. The appellant further submits that there was no connection between him and the offence and that there was no description of him given to the police at the time of reporting the offence.



12. Finally, the appellant submits that the offence was not proved beyond reasonable doubt. He has relied on the case of *Woollington vs. DPP* (1935) 462 and *Elija Waitbeige Gatimu* (2015) eKLR to buttress his submission in this regard.
13. On sentencing the appellant has contended that the trial court misapplied the Muruatetu case when imposing the sentence.
14. The 2nd Appellant did not file any submissions.

Respondent's Submissions

15. On identification, the Respondent submits that the Complainant gave the description of the Appellant to the police at the time of reporting. Prosecution relied on the case of *Francis Kariuki Njiru & 7 others vs. Republic* (2001) eKLR and *Mohammed E. Hibiya vs. R. Cr. Appeal No. 22 of 1996* (unreported) in this regard
16. On whether the correct procedure was followed during identification parade, the prosecution submits that the parade was properly conducted as two separate parades were conducted, one for each suspect and the parade forms were produced as Exhibits
17. That the appellant agreed to proceed with the parade without representation and that in any event the issue of non-compliance with the procedure on identification was not raised during cross examination.
18. On the allegation that PW1 must have seen the photo of the 1st Appellant prior to the identification parade, it is the respondent's submission that there was no contact between PW7 and the complainant as PW7 had only contacted the owner of the Motorbike, one Simon Wambua and not complainant who was a Rider.
19. That the number of people in the parade met the requirements of the law.
20. On whether the right to fair trial was violated, the Respondent submits that contrary to the Appellant assertion that he was not given the statements, the statements were supplied, and the Appellants were able to cross-examine the witnesses on the basis of these statements.
21. On failure to call what the Appellant has called a crucial witness, the Respondent submits that the prosecution only summoned witnesses who were instrumental and adequate in proving its case. They relied on the case of *Kihara vs. Republic* (1986) KLR 473 and *Keter vs. Republic* (2009)EA 13).
22. On the doctrine of recent possession, the Respondent also submitted that the motorbike was tracked and found in the possession of the 1st Appellant on the same day. On the documentary evidence of the tracking device it was submitted that the same not necessary as tracking was not the only evidence that the investigators were relying on to trace the motorbike. It is further submitted that there was uncontested evidence that the complainant had the motorbike first before it was forcefully taken away from him.
23. On whether the appellant's right to legal representation was violated the Respondent submits that there was no prejudice occasioned as the Appellant actively took part in the proceedings. The prosecution has relied on the case of *Owour vs. Republic* cited with approval in the case of *David Njoroge vs. Republic* (2011)eKLR.
24. On whether there was a nexus between the Appellant and the crime it is the prosecution submission that the description by the complaint, the identification parade and the tracking of the motorbike to the 1st Appellant's house established the nexus.



25. On sentencing the respondent concedes that the sentence may be reconsidered in the light of the recent jurisprudential developments on Mandatory or minimum sentences.

Determination

26. This is the first Appellate court and its mandate is to relook at the evidence, re-evaluate and arrive at its own finding as set out in *Onoko vs. Republic (1972)EA*. This court must however warned itself that unlike the trial court it does not have the benefit of having seen or heard the witnesses first hand.
27. I have considered the grounds of appeal, evidence on record and the rival submissions plus the accompanying authorities. In my view the following issues need to be determined:
- a. Whether the Appellants were positively identified
 - b. Whether the Appellant's right to fair trial was violated.
 - c. Whether failure to call certain witness was fatal to the prosecution's case.
 - d. Whether the doctrine of recent possession was established.
 - e. Whether the appellant was linked to the offence
 - f. Whether the case was proved beyond reasonable doubt
 - g. Whether the sentence should be reviewed.

Whether the appellants were positively identified

28. PW1 the complainant told the court that he was stopped by the Appellants near Kiungu River Bridge and the Appellants requested to be given a ride to Branson Estate. They went to the Estate and on the way back the first Appellant pretended to have dropped a wallet and the 2nd Appellant asked him to stop. The 1st Appellant then disembarked. Instead of re-boarding the motorbike, the 1st Appellant told the complainant to surrender the motorbike or else he would be killed. At the same time the 1st Appellant stabbed him on the shoulder. He fell down, and the 2nd Appellant stabbed him on the ribs. The complainant managed to get up and ran. The complainant told the court that the time was about 4.20PM, he could see the assailants clearly.
29. At cross examination, the complainant indicated that he gave the description to the police as follows "I said one was dark skinned and another was light"....the light one had dreads, that the first accused had yellow t-shirt". Cross examined by the 2nd Appellant he responded "you had dreadlocks".
30. On re-examination, he told the court that "he was able to see the appellants as it was daylight" that he could see the two in court.
31. In the case of *R -Vs- Turnbull & others* 91976) 3 All RE 549 which has been consistently and extensively cited by the courts including in the case of *George Mbaya Githinji vs. Republic*, the court sets out the following factors where identification is by a single witness like in the present case:

"...How long did the witness have with the accused under observation? At what distance? Was the observation impeded in any way?..... had the witness seen the accused before, how often?.... How long had lapsed between the time of observation and subsequent identification by the police...."was there material description given....."



32. Taking into consideration the above guidelines, I am satisfied that the complainant properly identified the appellants. The incident took place during daylight between 4 to 4.30 pm. There was enough light to see the surroundings. Moreover, this was not a sudden attack where the complainant could be said to have had no chance to check who was attacking him. First the appellants gave the complainant a shout requesting for a ride, he stopped. He must have seen his passengers approach. They rode for a distance, which was not indicated. PW1 told the court that he stopped at the alleged destination and the 1st Appellant disembarked and went towards a coffee Estate. A lady came out of the plantation and conversed with the 1st Appellant. The appellant ran back to where the complainant and 2nd Appellant was. The complainant must have had a chance to see who was calling him when he got to the signal to stop; he must have also had ample time to see the 1st Appellant, as he ran towards the “lady from the coffee plantation” and finally, had the chance to see the assailant as he ran back towards the motorbike.
33. This was not “a hit and ran” attack. I am satisfied that there was ample interaction between the complainant and his would be attackers prior to the attack to allow for proper identification.
34. The manner in which the identification parade was conducted has also been brought up. In his submissions, the 1st Appellant has submitted that, following procedural aspects were breached:
1. He did not have an advocate or a friend during the parade
 2. That the complainant had seen him prior to the parade.
 3. That the required number of people in the line-up was not met
 4. That the people in the parade was not as similar height build age and appearance.
35. PW8 is the officer who conducted the parade and he narrated to the court how the parade was conducted. He told the court that the 1st Appellant agreed to proceed without a friend or an advocate. The 1st Appellant was identified by the complainant in a line of eight (8) other people. The 1st Appellant shared his satisfaction by signing the parade form
36. The next parade was in respect of the 2nd Appellant. He indicated he had no friend or advocate. He was identified by the complainant and the 2nd Appellant indicated satisfaction by signing a form.
37. On cross examination by the 1st Appellant, he indicated that he selected people of the same height and weight as that of the Appellants’. Further on cross examination by the 2nd Appellant, the witness stated that the 2nd Appellant did not object to the identification exercise.
38. On the issue of representation during the parade, it is instructive that the Appellant did not cross examine PW8 on this issue. If indeed they were not informed of their rights, cross examination gave them the chance to take PW8 to task, but none of them did. It would appear to me that this was merely an afterthought on the part of the Appellants.
39. On whether the complainant had seen the 1st Appellant prior to the parade, the 1st Appellant refers the court to the testimony of PW7, who told the court that he took a photograph of the 1st Appellant. This Appellant believes this photograph must have been shared with the complainant, as PW7 and the complainant were allegedly in a business relationship. PW7 told the court he worked with Wetu Credit who had sold the motorbike to one Simon Wambua on credit. He was called by Mr. Wambua and informed about the robbery and PW7 was instructed to track the motorbike using a tracking device. The 1st Appellants speculates that the photograph must have reached the rider (the complainant). This however remains just that: speculation. There was no evidence that there was a direct contact between PW7 and the Rider (the complainant).



40. On the number of people in the parade, the testimony of PW8 shows that two separate parades were carried out, each consisting of 8 people. This portion of PW8's testimony was not challenged in cross examination. It is also being brought up for the first time in Appeal. I do find that the Appellant's complain in this regard is not genuine.
41. On whether the other persons in the parade were of the same height and weight, PW8 responded in the affirmative. In the case of Kariuki Njiru & 7 others vs. Republic, The court held "the law on identification is well explained and this court has from time to time said that the evidence relating to identification must be scrutinized. And should only be accepted and acted upon if the court is satisfied, that the identification is positive and free of the possibility of errors"
42. I am satisfied that the identification parade was properly conducted. In any case, the identification parade was not the only evidence linking the appellants to the crime. The motorbike was found outside the house where the 1st appellant was, and the key and helmet were found in his house.
43. This brings me to the next issue: The doctrine of recent possession. The doctrine of recent possession entitles a court to draw inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The essential elements of the doctrine were summarized in the case of Eric Otieno Arum vs. Republic (2006) EKLK where the Court of Appeal stated as follows; - "in our view, before a court of law 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 complainant and lastly that the property was recently stolen from the complainant. The proof as to time as has been stated over and over again will depend on the business with which the stolen property can properly can move from one person to another."
44. Once the accused is found with the property the onus is on him to explain how he came into his possession. This is the sequence of the events in the present appeal: PW1 told the court that he was robbed of the motorbike at about 4.30pm; he made a report to the police and at the same time the company that had sold the motorbike; then PW7 was given the duty of tracking it; the tracking device located the motorbike in Ruiru area; PW5, accompanied by police officer from Ruiru police station (PW5) finally traced the motorbike outside the 1st Appellants house. The key found in his house ignited the motor bike. The fact that the motorbike was initially in the possession of the complainant was not contested neither was there any contest on the fact that the motorbike had been stolen at about 4.20 and traced a number of hours in the night , of the same day. The motor bike was stolen at Gatanga and traced at Ruiru. Being a motorized Machine it is not odd that it was at Ruiru at a numbers of hours later.

The first Appellant gave unsworn statement, and alleged that the motorbike was not found outside his house, but on the plot where other people also reside He never called any of his neighbours or any other witness to back up his claims. He never discharged his duty of explaining the "why" or "how" he was in possession of a recently stolen item.

I find that all the elements of recent possession have been established.

Whether failure to summon certain witnesses substantially affected the prosecution's case.

45. The 1st appellant took issue with the prosecution's failure to summon one Nasimiyu who was allegedly with the Appellant at the time of arrest. On this regard, I agree with the Respondent that they are not required to call a particular number of witnesses except where the law specifies. In my view



the case against the Appellants centered on: the identification by the complainant at the scene, the identification parade and the tracing of the motorbike to the 1st Appellant. The prosecution had adequate number of witnesses to cover these grounds.

Whether a nexus was established between the Appellants and the offence.

46. The testimony of PW1 was key. He identified the assailants at the crime scene. The assailants went with the motorbike, which was traced to the house where the 1st Appellant was IN. The 1st Appellant informed the police that he 2nd Appellant was his partner in crime and with his assistance the police traced the 2nd Appellant. Both Appellants were picked in the parade, by the complainant. I find that the nexus was established.

Whether the appellant's right to fair trial were violated.

47. The 1st Appellant has raised two issues in this regard namely, access to witness statements and failure of the Trial court to inform him of his right to legal representation.
48. Article 50(2) give an accused person a right to know the charges that he would be faced with and to have a reasonable access to the evidence in question. The record shows that on 12.1.2021 and 26.1.2021 and 6.4.2021 1st Appellant informed the court that he did not have statements and on 6.4.2021 the court directed that he be supplied with them. The issue never rose against and on 4.5.2021 when the hearing began the Appellants participated in the proceedings without any further complain about the missing statements. I also notice that both appellants substantially cross examined that witnesses. If indeed the 1st Appellant was not supplied with statements he should have alerted the court. Also the fact that Appellants cross examined the witnesses very well, shows that they were not prejudiced in anyway.
49. The other issue raised under Article 50 is the issue of legal representation. It is the 1st appellant's complain that he was not informed of his right to legal representation by the court and this he submits, is fatal to the prosecution's case. Ongoing through the record, I find that indeed the Appellants were not informed of this right. But did it cause any prejudice? Again, like in the issue of statement this was not raised. The Court of Appeal in *Duncan Owma Owuor vs. Republic* (2022) KECA 18(KLR) stated that for the accused to benefit from the omission of the trial court, he needed to demonstrate that he raised his concern of his inability to afford legal representation. The court took issue with the fact that the issue of lack of information on representation was only being raised on appeal.
50. In the Owour's case (*supra*) the court of appeal further found that the accused did not suffer any prejudice as he was able to follow the proceedings keenly and managed to extensively cross examined the witnesses.

This is what happened in the present case. The accused persons never raised this issue during trial. It is being brought up for the first time or on appeal. The record also shows that they cross examined the witnesses without any difficulty. They did not suffer ay prejudice. This complain is without merit, and I dismiss it.

Was the case proved beyond reasonable doubt?

51. In the case of *Oloucho vs. Republic* (1985) KLR cited by the Respondent to constitute the offence of the robbery with violence the prosecution need to demonstrate that any of the following acts took place:
- (i). The offender needs to be armed with a weapon or dangerous instrument or ;
 - (ii). The offender is in the company with one or more persons or;



- (iii). At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses violence or any persons”
52. The prosecution is required to proof only one of the above circumstances.
- The Appellants were armed with knives. The assailants were the two Appellants. The complainant was attacked, and there is evidence that he sustained injuries. I have addressed myself to the identification about which I find no fault in it. I have also find that doctrine of recent possession was established.
- In a nutshell, I am left with no doubt that the case was proved beyond reasonable doubt.
53. I have no reason to fault the trial court on the conviction of the Appellants and their appeal on conviction is hereby dismissed.
54. On sentencing, the record shows while sentencing the Appellants trial court clearly indicated that its hands were tied in view of the mandatory or minimum sentence prescribed for the charge of robbery with violence.
- The mandatory minimum sentences has come into sharp focus following the decision of the supreme court in Muruatetu case (*Francis K. Muruatetu and Another vs. Republic* (2017) eKLR and whereas I am alive to the fact that the clarification issued by the supreme court to the effect that the decision was applicable to section 204 of the *Penal Code*, I am of the view that the issues leading to the finding in the case can be applied to all cases where mandatory minimum sentences are applicable. In my view the finding in Muruatetu case was that minimum or mandatory sentences take away the exercise of the court’s discretion when sentencing Accused persons. And considering that sentencing is part of trial, then it takes away an accused’s right to fair trial. If that be the case, then there is no reason as to why similar argument cannot apply to all offences for which Minimum or mandatory sentences are prescribed. I find support in the case *John Kubai & Another vs. Republic* (2019)eKLR. In this regard where the high court borrowed the argument in Muruatetu case while vacating a mandatory sentence.
55. In sentencing, the court is required to consider both the mitigating and aggravating factors. On mitigation, I note that the 1st Appellant stated that he was a first offender and he was a student. He pleaded for leniency.
56. The 2nd Appellant also said he was a first offender and his parents left him 6 years earlier. The court having stated that is hands were tied did not understandably consider any aggravating or mitigating factors. There was no indication from the prosecution on the criminal record of the Appellants. I have perused the pre-sentencing report. The report on the first Appellant is negative with a listing of one past criminal record. There was no negative report in respect of the 2nd Appellant.
57. I have taken into consideration the ages of the Appellants. I notice that they are young Adults aged 26 and 21 at the time of trial. I am of the view that the sentencing in this case should focus more on rehabilitation and eventually restoration back to society. Am therefore inclined to interfere with the sentence given. I hereby vacate the sentence of Death and substitute with 20 years’ imprisonment.
58. Though the appellants have granted bail the bond shows that they remained in custody during trial. Pursuant to the provisions of section 333(2) of the *Criminal Procedure Code*, the above sentence will run from the day 18th May 2020 being the day they were arrested.
59. In conclusion I make the following orders:
- a. The appeal on conviction is hereby dismissed
 - b. The sentence of death is hereby set aside



- c. The Appellants are hereby sentenced to 20 years in prison and the sentence will run from May 18, 2020

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 29TH DAY OF MARCH, 2023.

S. CHIRCHIR

JUDGE

In the presence of ;

Court Assistant;- Susan

Appellants – present

Ms. Muriu for the Respondent.

