



REPUBLIC OF KENYA



**Abonyo v Republic (Criminal Appeal E50 of 2022)
[2023] KEHC 3774 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3774 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E50 OF 2022**

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

CHARLES ODHIAMBO ABONYO APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from conviction and sentence of Hon. JR Ndururi, Principal Magistrate,
PM, in Kakamega CMCCRC No. 712 of 2019, of 21st December 2021)*

JUDGMENT

1. The appellant, Charles Odhiambo Abonyo, had been charged before the primary court, of the offence of robbery with violence, contrary to section 295, as read with 296(2) of the *Penal Code*, cap 63, Laws of Kenya, and an alternative charge of handling stolen goods, contrary to section 322(1)(2) of the *Penal Code*. The particulars of the charge were that on February 19, 2019, at Embwambwa area in Kakamega Central Sub-County, within Kakamega County, jointly with others not before court, while armed with crude weapons, namely, pangas and metal bars, he robbed Evelyne Lusanji Simiyu of an assortment of items listed in the charge, and immediately before or after such time of robbery used actual violence against the said complainant. The appellant denied the charges, on March 18, 2018, and a trial ensued, where 3 witnesses testified.
2. PW1, Everlyne Lusanji Simiyu Khaila, the complainant. She testified how on February 19, 2019, at 2.00 AM, how a group of men broke into her bar-cum-residence, and hit both her and her husband. They took mobile phone handsets, a flat TV screen and a gas cooker. Some items were subsequently recovered. She said that she was not able to identify any of her assailants. PW2, No. 80914 Police Corporal Samwel Namiti, was among the police officers who responded to the distress call by PW1. They went to the home of PW1, and she narrated to them about what had happened. They use a locator to track the telephone of PW1 through its SIM card, which led them to the appellant, at Webuye. The phone was recovered from his pocket. PW3, No. 74556 Police Constable Clement Kiprono, was



- together with PW2, when they responded to the distress call by PW1. They used a signal on the mobile phone of PW1, which led them to Webuye. They traced or tracked the appellant to a house at Webuye, where they arrested him, and recovered some items from him, before he fled with handcuffs.
3. The appellant was put on his defence, vide a ruling that was delivered on December 7, 2021. He made a sworn statement, on the same date. He denied the charges. He testified largely on how he was arrested.
 4. In its judgment, the trial court found the appellant guilty of robbery with violence, on the basis that he was found in possession of some of the items stolen, and he was arrested within hours of the commission of the offence.
 5. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that he was not identified at an identification parade by PW1; the husband of PW1 was a crucial witness who was not produced to give evidence; no inventory was produced to prove that the Infinix phone was found on him; the receipt produced by PW1 was improvised; conviction was based on the wrong provisions of the law; the evidence was contradictory; and section 107 of the *Evidence Act*, cap 80, Laws of Kenya, was contravened.
 6. Only the appellant filed written submissions. He submitted on identification, failure to call critical witnesses, evidence on recovery, the provision on which he was convicted, contradictions and inconsistencies, among others.
 7. On identification, he submits that he was not positively identified by PW1. It is true, PW1 testified that she did not identify any of her attackers, and no identification parade was mounted for her to identify her assailants. Identification and recognition are the most preferable modes of connecting persons to a crime. However, they are not the only ways of linking a suspect to a crime. There are other ways, which are indirect, and which the appellant has mentioned in his written submissions. They include being found in possession of items recently stolen from the complainant. The mere fact that PW1 did not identify the appellant was not necessarily fatal to the prosecution case, so long as there was other evidence linking the appellant to the crime.
 8. The appellant submits that there were other individuals alleged to have been at the house at the time of the commission of the offence, who were not called as witnesses. Let me start by saying that the prosecution is not required to call any number of witnesses to prove its case. Put differently, the prosecution is under no obligation to call every person who was within the vicinity when the events the subject of the prosecution happened. The only obligation is to call such number of witnesses as would be adequate to prove its case. If the individuals that the appellant talks about would not have added value to the prosecution, for example, if they were not able to identify the assailants, it would serve no purpose to call them, and they ought not be called for the sake of it.
 9. The case against the appellant was built around the recovery of the items allegedly stolen from PW1. Indeed, it is the only link between the appellant and the crime, for the victim of the crime was not able to identify any of the assailants. The appellant argues that that recovery evidence was shaky, as an inventory of the recovery was prepared, yet the same was not signed by him, nor by any of his neighbours. PW2 explained that the appellant escaped after his arrest, in handcuffs, hence he was unavailable to sign the inventory. That was corroborated by PW3. He also testified that the appellant's neighbours, including the woman they found in his house, fled after the chaos that arose from the appellant's flight, especially after the gunshot. There was, therefore, no one who could sign the inventory, except the officers themselves. The items were recovered from him, according to PW2 and PW3, and PW1 identified them as belonging to her, and to have been lost on the material night. The mobile phone recovered from him, belonged to PW1, it was its signal that led the police to the appellant. The trial court had occasion to see and hear both PW2, PW3 and the appellant, and it



believed PW2 and PW3 on what transpired. I find nothing to fault with how the trial court handled the evidence. The items were found on the appellant shortly after the theft, indeed almost within the hour, the principle of recent possession was appropriately applied, to have the appellant convicted of the robbery, as he had no explanation for the possession.

10. The argument about the receipt is that it was improvised. The appellant had occasion to cross-examine PW1, when she testified, and produced the receipt. He was obliged to bring out any suspicious features on that receipt, during the cross-examination, which the trial court could pick out to rule that the receipt was dubious. The trial court was persuaded that the receipt was genuine, and I find no basis to find and hold otherwise.
11. On the trial court convicting on the basis of the wrong provisions of the law, I do note, from the judgment, that the court convicted under section 211 of the *Criminal Procedure Code*, cap 75, Laws of Kenya. Section 211 deals with how a magistrate's court, handling a criminal case, should handle the accused, after finding that he has a case to answer. The proper provision is section 215 of the *Criminal Procedure Code*, which provides for acquittal, conviction and sentence. I agree with the appellant, there was an error, but the same was not fatal. The trial court had power to convict, based on the evidence, and that was the power it exercised when it convicted the appellant in this case. That power comes from section 215, and the mere slip of referring to section 211, rather than section 215, cannot vitiate the conviction.
12. On contradictions and inconsistencies, I will start by stating that they are to be expected, for it is not uncommon for human beings to err. The contradictions and inconsistencies could be attributed to forgetfulness, due to passage of time, state of mind, differences in perception of events, among others.. They may also be a reflection of mistakes in the recording of the evidence or transcription by the court of what the witnesses said. They only affect the outcome, if they are substantial, and go to the core of the matter. They will not, where they are minor, and do not affect the overall picture. What emerged from the recorded evidence is that PW1 was attacked at night, at her residence, by a group of men, who harassed her and her household, and eventually left with goods or items belonging to her, including a mobile phone. After the intruders left, a distress call was made, which was responded to by PW2 and PW3, who tracked the signal for the mobile phone taken from PW1, to the residence of the appellant, who they arrested and handcuffed, but he fled. That is the simple reconstruct of the events, as narrated by the witnesses. If any contradictions and inconsistencies exist in the narratives, they do not take away from that overall picture. I did not find any substantial contradictions and inconsistencies, that went to the core of the matter.
13. Section 107 of the *Evidence Act* is about burden of proof. In criminal cases, the legal burden always lies with the prosecution, and never shifts to the accused, except for the evidential burden in certain respects. The appellant claims that the legal burden was shifted to him by the trial court. He has, however, not demonstrated the manner in which that happened. I have closely perused the record, and I have not come across any case where the trial court shifted the burden of proof to the accused person. Regarding the evidential burden, the same shifted to him, with regard to possession of the goods that were found on him. He was under a burden or duty, thereafter, to explain himself or account for that possession. If that is what he is referring to, then he should understand that that is legal.
14. Overall, it is my finding, and holding, that the appeal herein has no merit, for the reasons given above. I accordingly disallow it, and affirm the conviction. Regarding sentence, I note that he was sentenced to death, on grounds that that was what is provided for in law. The sentence is mandatory. The Supreme Court pronounced mandatory sentences of death to be unconstitutional, in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala,



Njoki & Lenaola SCJJ). Consequently, I shall set aside the sentence imposed on the appellant, for that reason.

15. The principle stated, in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola SCJJ), would give me some discretion to interfere with the sentence. He mitigated. He was not remorseful. He said he was an orphan, and that he had a 6-year-old child. The penalty for simple robbery is a maximum of 14 years in jail, according to section 296(1) of the *Penal Code*. The punishment for aggravated robbery ought to be anything above that, taking into account the circumstances, in terms of the level of violence used, the number assailants involved, the type of weapons involved, the value of the property stolen, among others. In this case, the level of violence was fairly low, the weapons involved were dangerous but were not used to cause injury, there were many assailants. Taking everything into account, I hereby substitute the death sentence with imprisonment for 20 years. The time spent in remand custody shall be reckoned.
16. The appeal is disposed of in those terms.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
28TH DAY OF APRIL 2023**

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Appearances

Charles Odhiambo Abonyo, the appellant in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

