



REPUBLIC OF KENYA



KENYA LAW
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**Kimutai & another v Republic (Criminal Appeal 29 of 2020)
[2023] KEHC 3542 (KLR) (26 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3542 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CRIMINAL APPEAL 29 OF 2020
JR KARANJA, J
APRIL 26, 2023**

BETWEEN

FREDRICK KIMUTAI 1ST APPELLANT

PATRICK RONO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellants, Fredrick Kimutai and Patrick Rono, appeared before the chief magistrate Kericho facing a charge of robbery with violence, contrary to section 295 as read with section 296 (2) of the penal code, in that as the 30th November, 2019 at around 9:30am at Chepsir village in Londiani within Kericho County, jointly being armed with a dangerous weapon namely a knife robbed Nelson Kimaru Bett a 62 inch T.V make Samsung S/No.02R33KHDA 000072 and an umbrella all valued at Kshs.125,600/= and immediately before the time of such robbery threatened to stab the said Nelson Kimaru Bett.
2. Both Appellants pleaded not guilty and were tried, convicted and sentenced to life imprisonment each. Being dissatisfied with the conviction and sentence, they filed separate appeals on the basis of the grounds contained in their respective petitions of appeal filed herein on 2nd July 2020 by the first Appellant (Fredrick) and on 21st September 2021 by the second appellant (Patrick). Both Appeals were consolidated and heard together by way of written submissions which were filed herein by the appellants through the second appellant and by the state/respondent through learned Senior Assistant Director of Public Prosecutions, Timothy Musyoki, in opposition to the appeals.



3. Whereas the appellants urged this court to allow the appeal, the respondent agitated for the dismissal of the appeal and enhancement of the sentence from life imprisonment to mandatory death sentence in terms of section 296 (2) of the penal code.

After due consideration of the appeal on the basis of the supporting ground and those in opposition thereto in the rival submissions, the duty of this court was to reconsider the evidence adduced at the trial and arrive at its own conclusions bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

4. In that regard, the prosecution's case was briefly that on the material date the complainant Nelson Kimaru (PW 1), a chef at Wima Resort Hotel, was in the hotels kitchen when he was confronted and threatened with a knife by a person he recognized as the first appellant. (Second accused) who proceeded to remove and take away a television set together with an umbrella before escaping on a motorcycle under the control of an accomplice.
5. The complainant alerted his colleagues including Jennifer Langat (PW2) who saw the main culprit escaping through a fence wearing a black jacket and his face partly covered. Her colleagues, Moses Kipngetchi Jumba (PW3) and Thomas Keter (PW 4) pursued the suspects towards the Brooke Kipchimchim direction where they were apprehended by members of the public in possession of the stolen items and handed over to the police through Cpl. Stephen Nguru (PW 5) of Ainamoi police post. The two suspects/appellants were taken to Chepseon police station where the relevant report had been received by P C Sammy Nzau (PW 6) who was informed that the complainant had been attacked and robbed of the recovered T.V and umbrella.
6. After the necessary police investigations, the appellants were charged with the present offence. Their respective defence was a denial of any involvement with the offence. The second appellant (first accused) indicated that he was attacked by strangers on the way to Kapcheptoror factory before being arrested and taken to Ainamoi police post by police officers. The first appellant (second accused) on his part indicated that he was riding a motor cycle when he came across a passenger at a place called Brooke. The passenger wished to be taken to Kipchimchim with his luggage but a group of people surrounded and suspected them to be thieves. They were then arrested.
7. Having considered the evidence in its totality the trial court concluded that the charge against the two appellants had been proved beyond any reasonable doubt. In so doing, the trial court found that the necessary ingredients of the charge under section 296 (2) of the penal code were duly established and that the two appellants were arrested while being in recent possession of the stolen T.V and umbrella.
8. In this court's opinion, the evidence raised two major issues for determination viz whether the offence of robbery with violence was committed against the complainant and if so, whether the appellants were positively identified as the offenders.

Basically there was sufficient and credible evidence establishing the fact of robbery against the complainant. This was somehow corroborated by the complainant's colleagues (PW2, PW3 and PW4). However, the complainant indicated that he was confronted and threatened with a knife by the first appellant (Fredrick) who was the second accused in the trial and who ended up robbing him of the T.V set and umbrella.

9. Under section 296 (2) of the penal code, the offence of robbery with violence is complete by the mere fact that an offender or offenders is or are armed with a dangerous or offensive weapon or instrument (see Johana Ndungu vs Republic (1996)eKLR). herein, it was established that the dangerous or offensive weapon was the knife in possession of the first appellant which he threatened the complainant with.



10. In that regard, this court agrees with the trial court that the necessary ingredients of section 296 (2) of the *penal code* were duly established by evidence from the prosecution. It was also established the first appellant was in the company of an accomplice to facilitate his escape from the scene after the fact. Indeed, he was apprehended alongside the accomplice who was identified as the second appellant and was the first accused in the trial.

11. Although it was only the first appellant who was directly identified the scene of the offence by the complainant, the identification of the second appellant was more or less circumstantial anchored on the doctrine of recent possession as the two of them were found in possession of the stolen items a few minutes after they had been stolen and failed to give a reasonable and credible account of such possession. Even in their respective defence they never attempted to give such explanation other than denying the charge and anything to do with it.

12. Indeed, the defence raised by the appellants was discredited by the evidence adduced against them such that it was rendered unworthy of belief and an afterthought.

In sum, the appellants were positively identified as the offenders in the criminal transaction of robbery with violence against the complainant (PW 1). Their conviction by the trial court was safe and sound and is hereby upheld and affirmed to the extent that this appeal in that regard is devoid of merit.

13. With regard to the sentence of life imprisonment, it is lawful regard being given to the fact that in the famous case *Muruatetu & Another vs. Republic* the Supreme Court of Kenya other than outlawing the mandatory nature of the death sentence did not outlaw the death sentence.

Although the respondent has called for enhancement of the sentence imposed upon the appellants to a death sentence, this court is of the view that the life imprisonment sentence imposed upon the appellants was rather excessive in the circumstances as the complainant beside being threatened with the knife was not stabbed or injured with it. Further, both appellants were first offenders and all they required was a reasonable term of imprisonment for purpose of deterrence.

14. In that regard, the sentence imposed by the trial court against both appellants is hereby set aside and substituted for a sentence of fifteen (15) years imprisonment on each of the appellants.

Other than the alteration in the sentence, the appeal is considered dismissed for want of merit.

Ordered accordingly.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 26TH DAY OF APRIL, 2023.

J. R KARANJAH

JUDGE

