



**Kiprono v Republic (Criminal Appeal E041 of 2021)
[2023] KEHC 20148 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 20148 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CRIMINAL APPEAL E041 OF 2021**

**RL KORIR, J
JUNE 29, 2023**

BETWEEN

FRANKLINE KIPRONO APPELLANT

AND

REPUBLIC RESPONDENT

*(From the Conviction and Sentence in Criminal Case Number 2057 of
2019 by Hon. L. Kiniale in the Principal Magistrate's Court at Bomet)*

JUDGMENT

1. The Appellant was convicted by Hon L Kiniale Principal Magistrate for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the charge were that on September 20, 2018 at Masare village within Bomet County jointly with another not before court robbed Joseph Cheruiyot Koech of Kshs 8,000/= cash and immediately before or immediately after the time of such robbery wounded the said Joseph Cheruiyot Koech.
2. The Appellant pleaded not guilty to the charge before the trial court and a full hearing was conducted. The prosecution called eight (8) witnesses in support of its case.
3. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Accused and he was put on his defence.
4. At the conclusion of the trial, the Appellant was convicted of the offence of robbery with violence and sentenced to serve 20 years in prison.
5. Being dissatisfied with the Judgment dated October 29, 2020, the Appellant appealed to this court on grounds reproduced verbatim as follows:-
 - i. That the court erred in law and fact by failing to note that the Prosecution had failed to prove their case to the required standard of proof which is beyond reasonable doubt.



- ii. That the court erred in law and fact by basing its conviction on bare circumstantial evidence which was not sufficient to sustain the conviction.
 - iii. That the court erred in law and fact by failing to note that the entire prosecution evidence was inconsistent and contradicted.
 - iv. That important witnesses were not called by the prosecution to testify in this matter which was prejudicial to the Appellant.
 - v. That the conviction of the Appellant did not comply with the provisions of section 162(2) of the Criminal Procedure Code
 - vi. That I wish to be present during the hearing and determination of this Appeal.
 - vii. That the imposed sentence is excessively harsh and unjust considering that the Appellant was a first offender.
6. This being the first appellate court, I have a duty to re-evaluate the evidence on record. This duty was clearly stated by the Court of Appeal in the case of *Kiilu & Another vs Republic (2005)1 KLR 174*, thus:-

' An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.'

The Prosecution's Case.

- 7. It was the Prosecution's case that Joseph Cheruiyot Koech (PW1) was assaulted and robbed of Kshs 8,000/= cash, a Samsung mobile phone and a coat by the Accused and Patrick Kiprotich Ng'eno. That he was assaulted by the Accused and Patrick Kiprotich Ng'eno who used a piece of wood and a knife.
- 8. Dr Eric Kiprono Tonui (PW7), the doctor who examined PW1 testified that PW1 he had multiple lacerations on the scalp, 5 cut wounds, a cut on the eyes, a corneal laceration and his chest had multiple bruises and lacerations. That PW1 had multiple deep cut lacerations on the thigh and it was his opinion that they were caused by a sharp object. He classified the nature of the injuries as major.
- 9. No xxxx Sgt Osman Mohammed (PW8) who was the investigating officer testified that he received 2 pieces of wood and the knife that were used to assault PW1 from John Kipkorir Koech (PW6). He produced the long stick, short stick and knife as exhibits in the trial court.

The Accused/Appellant's Case.

- 10. It was the Appellant's case that on the material day, he worked at a kinyozi from morning till 8 pm then he went to Hellen Mutai's (DW5) house and spent the night there. That he opened the kinyozi the following morning and he was informed that PW1 had been injured that night. It was the Appellant's further case that after about 2 months, he went to stay with his cousin where he stayed and worked for a cumulative period of 10 months and when he returned home, he was arrested.



11. On July 29, 2022, I directed that the Appeal be canvassed off by way of written submissions.

Appellant's Submissions.

12. The Appellant submitted that since no one lost a life, a lesser sentence would have been appropriate. He relied on the Judiciary Sentencing Policy Guidelines whose objectives in sentencing included that the court should consider the gravity of the offence, the threat of violence against the victim and the nature and type of weapon used by the assailant to inflict the harm. That the knife used against PW1 did not cause grievous harm.
13. It was the Appellant's submission that he condemned and regretted the actions he took and was remorseful. That he had asked for forgiveness from God and the complainant and promised never to repeat such a crime.
14. The Appellant submitted that before his conviction and sentence, he used to support his family. That while in custody, he had embraced rehabilitative work and he believed that he was fully rehabilitated and was ready to be productive in nation building. He relied on [*Douglas Muthaura Ntobiri vs Republic \(2018\) eKLR*](#), [*Francis Opondo vs Republic \(2017\) eKLR*](#) and [*Daniel Gichimu & another vs Republic \(2018\) eKLR*](#) and
15. It was the Appellant's submission that the court should consider the period spent in custody i.e August 13, 2019 being the date of arrest. He relied on section 333(2) of the [*Criminal Procedure Code*](#) and [*Abamad Abolfathi Mohammed & another vs Republic \(2018\) eKLR*](#).
16. The Appellant prayed that this court finds him fully reformed and either grant him an acquittal, a reduced sentence or a community service order. He relied on [*Jackson Solomon Saitoti v Republic \[2019\] eKLR*](#).

The Respondents/Prosecution's Submissions.

17. In their written submissions dated October 18, 2022, the Prosecution submitted that PW1 was robbed off his coat, a Samsung phone and Kshs 8,000/=. That no doubt was raised regarding the ownership of the stolen items and that they were never recovered. It was the Prosecution's further submission that according to PW1's testimony he was robbed by the Appellant and two other persons.
18. The Prosecution submitted that PW7 produced a P3 Form which showed that the victim suffered multiple cut wounds as a result of the robbery and the injuries sustained were classified as grievous harm. That PW6 recovered from the scene the weapons that were used in the commission of the offence being a knife and wooden stick. The Prosecution further submitted that the elements of robbery with violence were established by the Prosecution.
19. It was the Prosecution's submission that PW1 and PW5 identified the Appellant as their neighbour and that on the material night, PW1 had met the Appellant who was accompanied by another person before they demanded money and attacked him. That during the commission of the offence, PW1 stated that there was enough moonlight so he could identify the Appellant. It was the Prosecution's further submission that this was a case of recognition and not identification. That the Appellant spoke to PW1 during the attack and that indicated familiarity.
20. The Prosecution submitted that it emerged during trial that the Appellant had approached the victim seeking reconciliation.
21. It was the Prosecution's submission that the Appellant raised the defence of alibi and that it was trite that such a defence ought to be raised at the earliest opportunity to enable the Prosecution time to



evaluate the veracity of the defence. That it was an afterthought as the Appellant only raised it at the time of his defence. It was the Prosecution's further submission that Hellen Mutai (DW5) who was supposed to provide the Appellant's Alibi testified that the Appellant was not at her home on the material night.

22. I have gone through and given due consideration to the trial court's proceedings, the Memorandum of Appeal filed on November 25, 2021, the Amended Grounds of Appeal and Appellant's Written Submissions filed on March 7, 2023 and the Respondent's Written Submissions dated October 18, 2022 and the following issues arise for my determination: -
- I. Whether the Prosecution proved its case beyond reasonable doubt.
 - II. Whether the Defence places doubt on the Prosecution case.
 - III. Whether the Sentence was harsh and excessive.

I. Whether the Prosecution proved its case beyond reasonable doubt.

23. The Appellant was charged and convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code. Section 295 of the Penal Code defines robbery as:-

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.

24. Section 296 of the Penal Code states as follows: -

- (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
- (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 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.

25. The Court of Appeal in the case of *Johana Ndungu v Republic [1996] eKLR*, set down the ingredients of robbery with violence by stating thus: -

' In order to appreciate properly as to what acts constitutes an offence under section 296 (2) one must consider the sub-section in conjunction with s 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument,
or
2. If he is in company with one or more other person or persons, or
3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.'



26. More recently, Mrima J in *Jeremiah Oloo Odira v Republic [2018] eKLR* elaborated on the offence of 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'

27. Joseph Cheruiyot Koech (PW1) testified that on September 20, 2018 at around 9 pm, he was robbed of Kshs 8,000/=, a Samsung phone and a coat. He testified that those items were never recovered. It was his testimony that he reported the theft to Bomet Police Station. The Appellant did not question the theft or ownership of the Kshs 8,000/=, a Samsung phone and a coat during cross examination and he did not dispute the same during his defense. It is my finding that PW1's evidence on the theft stood unopposed and it is my further finding that the Prosecution proved the theft of the aforementioned items.

28. Regarding identification of the Appellant, the Court of Appeal in the case of *Cleophas Wamunga v Republic [1989] eKLR* expressed itself as follows: -

' Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant wholly depends or to a great extent on the correctness of more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.'

29. The English case of *R v Turnbull [1977] QB 224* gives further guidance as follows: -

' If the quality (of identification evidence) is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however that an adequate warning has been given about the special need for caution'.



30. With the above caution in mind, I have re-looked the evidence of identification. PW1, the victim testified that the Appellant was the one who stabbed him with a knife on the back of his hip joint, below his neck and on his left eye. That they were neighbours and that there was a bright moonlight which assisted him identify the Appellant. When he was cross examined by the Appellant, PW1 stated that they struggled in close proximity with the Appellant.
31. I note that the offence was committed at around 9 pm. An abundance of caution should be applied by the court when dealing with a single witness in regards to identification of an assailant. In the case of *Kiarie v Republic [1984] KLR 739*, the Court of Appeal held that:-
- ' Evidence of identification/recognition at night must be absolutely watertight to justify conviction.
32. Similarly the Court of Appeal in the case of *Shadrack Shuatani Omwaka v Republic [2020] eKLR*, held as follows: -
- ' Apart from light during the incident, and familiarity of the assailant to the victim, other factors, such as distance between them, the length of time the victim had to observe and even the opportunity to hear the assailant are factors to look out for.'
33. With regard to recognition, the Court of Appeal in *Peter Musau Mwanzia v Republic [2008] eKLR*, the Court of Appeal expressed itself as follows:-
- ' We do agree that for evidence of recognition to be relied upon, the witness claiming to recognise a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for sometime, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident. It is not clear whether that is what Mr. Mutuku refers to as basis for recognition.'
34. There is no doubt in my mind that the Appellant was positively identified as the perpetrator of the offence. The evidence of recognition buttressed the evidence of identification. PW1 testified that there was sufficient moonlight to identify the Appellant. The Appellant was his neighbour and he knew him well. PW1 also stated that they struggled with the Appellant who was armed with a knife at close proximity and therefore he was able to recognise him. PW1 further testified upon cross examination they he had met the Accused and Patrick Ng'eno during the day as they were herding cows. I find the evidence of recognition of the Appellant overwhelming.
35. On whether the Appellant was armed with an offensive weapon which he used to harm PW1, Joseph Cheruiyot Koech (PW1) testified that on the material night, he was confronted along a narrow road by the Accused and Patrick Ng'eno. That Patrick demanded for money and when he told them that he did not have any money on him, Patrick hit him on the head with a piece of wood. PW1 further testified that the Appellant then stabbed him with a knife on the back of the hip joint. That when he fell down, the Appellant stabbed him again below his neck and on his left eye and afterwards lost consciousness. It was PW1's testimony that when he came to it, he discovered he had been robbed.



36. John Kipkorir Koech (PW6) stated that on the material night, he was woken up at around 1 am and was told that PW1 had been stabbed. That he proceeded to the scene and found a knife and a stick on the ground. It was PW6's testimony that he took the stick and knife to the police the following morning. No xxxx Sgt Osman Mohammed's PW8 testimony corroborated PW6's evidence. He stated that he received the exhibits from PW6 and he produced the long stick, short stick and knife in court as P Exh 2, 3 and 4 respectively as the weapons that were used in the commission of the offence.
37. Dr Eric Kiprono Tonui (PW7) testified that he examined PW1 and found that he had multiple lacerations on the scalp, 5 cut wounds, a cut on the eyes, a corneal laceration and his chest had multiple bruises and lacerations. That PW1 had multiple deep cut lacerations on the thigh and it was his opinion that they were caused by a sharp object. He classified the nature of the injuries as major. He produced a P3 form that was marked as P Exh 1 whose findings supported PW7's medical evidence.
38. The only witness to the assault was the victim himself. All the other witnesses either found the victim already stabbed or in hospital. PW1 was very clear that he was attacked by two people who used two different weapons. That Patrick Kiprotich Ng'eno (who was the 1st Accused in the trial court) struck him on his head with a piece of wood and that the Appellant stabbed him using a knife. When the Appellant cross examined him, PW1 confirmed that it was the Accused who stabbed him and at some point, struggled over the knife that he had. Before the knife could be produced in court as an exhibit, PW1 was recalled to identify the exhibits. He positively identified the knife as the one which the Appellant used to stab him.
39. Following my analysis the above, it is my conclusion that the Appellant was armed with a knife (P Exh 4) and used the knife in assaulting and harming PW1.
40. On whether the Appellant was accompanied by another person in the commission of the offence, it has been proved that the people who robbed and wounded PW1 were the Appellant and his co-accused in the trial court Patrick Kiprotich Ng'eno.
41. Before I conclude analysing the Prosecution's evidence, the Appellant stated that the trial was prejudicial to him as important witnesses were not called by the Prosecution. However, he did not state which witnesses these were and how their absence prejudiced him.
42. It is trite that Prosecution has the discretion on the number of witnesses to call and this court cannot dictate or compel the Prosecution on the number of witnesses it should avail. Section 143 of the *Evidence Act* provides as follows: -
- No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.
43. In *Julius Kalewa Mutunga v Republic Criminal Appeal No 31 of 2005* the Court of Appeal held as follows: -
- ' As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.'



44. I am also persuaded by Kariuki J in [Edward Wanyonyi Makokha v Republic \[2020\] eKLR](#), where the court held that: -

' The court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.'

45. It is my finding that the Prosecution evidence was sufficient as they were able to demonstrate the ingredients necessary to sustain the charge of robbery with violence. It is also my finding that there was neither improper conduct by the Prosecution nor were they influenced by some oblique motive.

46. In the final analysis, it is my finding that the Prosecution proved its case against the Appellant beyond reasonable doubt. I affirm the conviction.

II. Whether the Defence places doubt on the prosecution case.

47. I have already set out the defence of the Appellant earlier in this Judgment. I have considered the defence carefully and I have noted that he raised an alibi when he stated that he was at home of Hellen Mutai (DW5) on the material night. That he ate dinner with DW5's children and spent the night there. In the case of *R v Sukha Sign S/O Wazir Singh & 7 Others [1939] 6 EACA 145*, the former Court of Appeal for Eastern Africa held that:-

' If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the interval, secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into the alibi and if they are satisfied as to its genuineness, proceedings will be stopped'.

48. It is trite that once the Appellant raised an alibi defence, the onus was on the Prosecution to displace the defence of alibi after the defence raises it at the trial. This was held in the Court of Appeal case of [Victor Mwendwa Mulinge v Republic \[2014\] eKLR](#) as:-

' It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution'.

49. The Court of Appeal in the case of [Wangombe v Republic \[1980\] KLR 149](#) held as follows: -

' In *Ssentale v Uganda [1968] EA 365, 368* (Sir Udo Udoma CJ) said that a prisoner who puts forward an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout the prosecution. We agree, we have ourselves said so on more than one occasion. The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible'.

50. Following the principles set out above, I find that the Appellant's defence of alibi was raised at the defence hearing and not at the beginning of the trial thus denying the Prosecution an opportunity to verify the said alibi. I have also noted that the issue of the alibi was not put across to the Prosecution



witnesses during cross examination. It is my view therefore that the alibi defence was an afterthought by the Appellant.

51. Interestingly, the witness who was supposed to prove the alibi, one Hellen Mutai (DW5) did not mention anywhere in her testimony that the Appellant spent the night at her home on the material night. DW5's children whom the Appellant claimed to have shared dinner with on the material night were also not called as witnesses to corroborate the Appellant's version of events.
52. It is my finding therefore that the Appellant's defence in total did not hold any value and it did not shake the Prosecution's case at all.

III. Whether the sentence was harsh and excessive

53. In *Bernard Kimani Gacheru vs Republic [2002] eKLR*, the Court of Appeal stated that: -

' It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the 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 the wrong material, or acted on the 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 stated is shown to exist'.

54. In this case the Appellant was charged with robbery with violence contrary to Section 296 (2) of the Penal Code. The section provides: -

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.

55. The Criminal Procedure Bench Book at page 116 provides that:

The sentences imposed should be geared towards achieving the following objectives set out in the sentencing policy guidelines (paragraph 4.1):

- i) Retribution.
- ii) Deterrence.
- iii) Rehabilitation.
- iv) Restorative justice.
- v) Incapacitating the offender.
- vi) Denouncing the offence, on behalf of the community.

56. In my view, the sentence of 20 years given by the trial court was lenient considering that the Penal Section provides for a mandatory death sentence. The Appellant benefitted from the mercy of the trial court and I do not see any reason as to why I would interfere with the sentence. It is therefore my finding that the trial magistrate did not overlook some material factor, or took into account the wrong material, or acted on the wrong principle.



57. In the final analysis, having considered the Appellant's Memorandum of Appeal, and also having carefully reviewed the evidence on record, there was nothing to suggest that the learned magistrate erred in convicting and sentencing the Appellant.

58. In the end, the Appellant's conviction and sentence are upheld. The Sentence shall run from October 29, 2020 being the date of his conviction.

Judgment delivered, dated and signed at Bomet this 29th day of June, 2023.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant acting in person, Mr. Njeru for the Respondent and Siele(Court Assistant)

