



REPUBLIC OF KENYA



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**Ngorapough v Republic (Criminal Appeal E005 of 2022)
[2023] KEHC 20924 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20924 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL E005 OF 2022
RB NGETICH, J
JULY 27, 2023**

BETWEEN

KIYECH NGORAPOUGH APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against both the conviction and sentence by Hon. N.M
Idagwa Senior Resident Magistrate at Kabarnet in Criminal case No. 799 of
2019 delivered on 12 th January, 2022 and 27 th January, 2022 respectively)*

JUDGMENT

1. The Appellant was charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence being that the Appellant on the 14th day of November, 2018 at unknown time at Ngaratuko village, Loruk sub-location, Sibilo Location in Baringo North Sub-county within Baringo county jointly with others not before court, while armed with dangerous weapons namely AK 47 rifles they robbed Kabelel Arabal of 22 head of cattle valued at Kshs.500, 000/= and the time of such robbery shot dead the said Kabelel Arabal.
2. The alternative charge is the offence of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars of the charge being that the accused on the 16th day of November, 2018 at 0500hrs at Tuwo village, Tuwo sub-location in Tiaty East Sub- County within Baringo County the accused dishonestly handled 2 heads of cattle valued at Kshs.50,000/= the property of Karalel Arabal knowing or having reasons to believe them to be stolen.
3. The Appellant pleaded not guilty to the main and alternative charge. The prosecution availed 5 witnesses to prove the charge against the accused. The appellant was found guilty, convicted and sentenced to 50 years imprisonment.



4. The Appellant being aggrieved and dissatisfied with the above with conviction and sentence filed this appeal on the following grounds:-

- i. That the learned trial magistrate erred in law and fact in convicting the appellant when there was no sufficient evidence to warrant conviction.
- ii. The learned trial magistrate erred in both law and fact by disregarding the appellant's defence thereby arriving at a manifestly unjust conclusion that the Appellant was guilty of the offence.
- iii. The learned trial magistrate erred in both law and fact in finding that the appellant was found in possession of the two cows when there was evidence to the contrary that the cows if any were in the compound of the appellant's father and/or were in company of the appellant's father's cows.
- iv. The learned trial magistrate erred in both law and fact in convicting the appellant in the face of glaring contradictions in the prosecution's case which contradiction afforded the appellant the benefit of doubt.
- v. The learned trial magistrate erred in both law and fact in finding that the appellant was armed with dangerous weapons namely AK 47 when there was no evidence to that extend and ballistic report to corroborate the said assertion.
- vi. The learned trial magistrate erred in both law and fact in shifting the burden of proof to the Appellant.
- vii. The learned trial magistrate erred in both law and fact by convicting the appellant on the uncorroborated evidence of the complainant whose evidence fell far short of the threshold in case of robbery with violence under Section 296(2) of the Penal Code.
- viii. The learned trial magistrate erred in both law and fact by importing extraneous evidence and making wrong assumptions thereby arriving at a manifestly wrong conclusion that the appellant was guilty.
- ix. The learned trial magistrate erred in both law and fact in failing to find that the purported complainant did not make a report to the police station that the appellant had robbed him and only did so after the arrest of the appellant one year after the event.
- x. The learned trial magistrate erred in both law in sentencing the appellant to serve 50 years imprisonment in complete contravention of the law.

5. The Appellant prays that this Appeal be allowed, conviction and sentence be set aside and the Appellant set at liberty.

6. The appeal proceeded by way of written submissions. The appellant filed submissions through counsel Mr. Chebii; the state counsel Mr. Mongare also filed written submissions.

Appellant's submissions

7. The Appellant submits that the offence of robbery was not proved and argue that Pw 1 contradicted himself by stating that on 21st November, 2018, they received a call telling them to go and identify some cows, which is a clear indication that no cows had been traced before 21st November, 2018.



8. Counsel further submits that from the evidence of Pw 1 cows were not found hence the allegation that the cows were found a day after the attack is unfounded. On allegation of handling stolen goods, counsel submits that from evidence adduced, cows were allegedly found on 26th November, 2018 in the appellant's fathers compound hence the 2nd count is defective and Pw1 failed to explain how the cows were recovered and/or how they were handed over to police as they did not produce any inventory and/or photographs showing cows and/or their handing over.
9. Counsel further submits that on the 26th November, 2018, the appellant was summoned to Nginyang where they found two cows despite having been informed earlier that there were three cows hence the process of handing over the alleged cows was bungled as it was not carried out at a police station.
10. Further that the photographs of the two cows were taken in the bush and not at Nginyang police station as claimed and submit that it is the appellant's contention that the cows were not recovered from the appellant's home as alleged and that the police simply took photographs of cows grazing in the field and purported that they were the cows recovered from the appellant.
11. Counsel further submits that Pw 1's failure to make a report regarding the appellant's involvement in the robbery is a clear indication that he was not aware that the appellant was involved in the robbery and the allegations against him was an afterthought; that the offence occurred in the year in 2018 but no report was made and/or statement written until after the arrest of the accused in 2019, one year after the alleged offence. He referred to the case of Swahibu Simbuini Simiyu Vs Republic and submitted that failure to report raises doubt on identity of the suspect and was unsafe to convict the appellant; further there was need to call the appellant's father to explain how the cows ended up in his compound.
12. Counsel submits that Pw 1's evidence is basically hearsay as he did not see the assailant who killed Kabelel yet he alleges they were five and Pw 2 did not state where the cows were recovered from and in whose possession and he said he signed a document which was not produced by the prosecution to prove that fact.
13. He submits that prosecution evidence is contradictory in respect to ownership (as between pw2, mike and deceased) of the cows which raises doubt on credibility of the witnesses and the veracity of their evidence.
14. Further that Pw 2 stated that he reported that his cows were stolen and was booked in the OB at Loruk police station, however no investigations diary and/or OB was produced to confirm this allegation and pw2's evidence that the cows were found in Appellant's home is therefore inconsistent and unreliable to warrant a conviction. and the county commissioner was not availed before court to prove allegations that the appellant admitted being in possession of the cows.
15. That there was no explanation in respect to the recovery of the third cow bearing in mind that the elders and NPRS recovered 2 cows; and though Pw 3 admitted knowing the appellant it took one year for the Appellant to be arrested which show the witnesses did not know who committed the robbery.
16. In respect to photographs produced in court, counsel submitted that they were taken by unqualified person and there was no visit to the scene to take photographs as alleged and referred to the case of John Kibii Lang'at vs Rep Criminal Appeal No. 159 of 2004 Nakuru in support of admission of photographs taken by unqualified persons.
17. Counsel further submit that the complainants had not given prior description of their cows and it has not been established how Pw 1 and Pw 2 were able to identify their cows yet the photographed cows do not bear any ear marks safe for descriptions which can be gleaned from the photographs by anybody.



18. Counsel further submit that the evidence adduced by complainant was uncorroborated evidence and fail threshold to prove a case of robbery with violence under section 296(2) of the Penal Code as there was no positive identification of the appellant.
19. In conclusion counsel submit that the alternative charge of handling stolen goods was not proved beyond reasonable doubt since at the time of the arrest of the appellant, he was not in possession of any goods as alleged. He urged court to analyze evidence on record and find that it is contradictory and prosecution did not prove its case beyond reasonable doubt.

Respondent's submissions

20. On whether sufficient evidence was adduced to warrant a conviction, the respondent submit that on 21st November,2018 pw1 and others were called to Nginyang where they identified three cows using the ear marks and colour.
21. The state counsel submitted that trial magistrate considered the appellant's defence and applied doctrine of recent possession as stated in the case of Kahiga (Supra) and in the case of Republic versus Graham; two cows having been found in possession of the appellant who did not offer any explanation on how the said cows were in his homestead and photographs were taken in the presence of pw4 CPL Karanja who was in charge of investigations.
22. The state counsel submits that there were no material contradictions in the evidence of the prosecution witnesses. That it was also corroborative in so far as the facts tallied with each other's version of evidence and if there were any contradictions which fact is denied, the same were minor and did not go to the core of the prosecution's case.
23. On whether the appellant was armed with AK47 Rifle the state counsel submits that the undisputed medical evidence on record confirm that the cause of the death was single gunshot wound to the chest and the issue of non-recovery of the gun is not fatal to the prosecution case.
24. The state counsel submit that the general principle and rule is that the burden of proof always lies with the prosecution, however there is exception to this rule under the *evidence Act* cap 80 laws of Kenya where the accused person puts up a defence and alleges or alludes to something that is especially within his knowledge, then the burden of proof lies in him; and submits that all the ingredients of robbery with violence were proved.
25. In respect to sentence, the Respondent's submits that the trial magistrate did not err in sentencing the appellant to 50 years imprisonment as the offence under section 296(2) of the Penal Code provides for a sentence of death but instead the magistrate imposed a lenient sentence of 50 years and the sentence imposed was proper and lawful.

Analysis and determination

26. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court t fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of Okeno Vs Republic [1972] EA 32 where it was stated as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) 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; it must make its own findings and draw its own



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, (See *Peters v. Sunday Post*, [1958] EA 424.)”

27. In view of the above, I have perused and considered the proceedings before the trial court and submissions herein together with authorities cited and wish to consider the following issues:-
- i. Whether the main charge and the alternative charge were proved beyond reasonable doubt
 - ii. Whether there were inconsistencies in prosecution evidence and its effect if any
 - iii. Whether the charge was defective and its impact on findings by trial court
 - iv. Whether the sentence imposed by the trial court was harsh and excessive.

Whether the main charge and the alternative charge were proved beyond reasonable doubt

28. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of *Oluoch –vs – Republic* [1985] KLR where it was held:

“Robbery with violence is committed in any of the following circumstances:

The offender is armed with any dangerous and offensive weapon or instrument; or

The offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person

29. The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code.

30. In the case of *Dima Denge Dima & Others vs Republic*, Criminal Appeal No. 300 of 2007, it was stated that:

“...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”

31. In the instant case, it is the prosecution evidence that the victim died of a gunshot wound. I note that postmortem was conducted on the body of the victim Kabelel Arabal on the 30.11.2018. postmortem report was produced in court as Exhibit 2 . It indicates cause death as a single gunshot wound to the chest which confirm that dangerous weapon was used against the deceased.

32. In respect to the second ingredient of the robber being in company of more or more persons, this was not fully established; however, proof of any one of the above ingredients is sufficient to establish an offence under section 296(2).

33. On the issue of identification of the assailant, Pw 2, Pw 3 and Pw 4 testified that the deceased Kabelel Arabal was found dead the following day. The cows he was grazing were missing and investigations led to recovery of 2 cows in the home of the appellant. The Appellant fled on seeing investigation team; the cows were positively identified by Pw 1 and Pw 2 since they had the family mark on the ears.



34. In the case of *Roba Gama Wario vs Republic* (2015) eKLR where the Appellant ran away after the incident, the Court was of the view that the conduct of the Appellant was indicative of the fact that he was conscious of what he was doing and what he had done was wrong.
35. The two cows were found in possession of the appellant on 26th November 2018 about 2 weeks after the incident. The appellant never gave an explanation as to how he came to be in possession of the 2 cows. There is therefore clear connection between the appellant, the stolen cows and the deceased. There is no doubt that that the Appellant was part of the people who shot the victim and stolen the said cows. From the foregoing, ingredients for the offence of robbery with violence were sufficiently proved.

Whether there were inconsistencies in prosecution evidence and its effect if any

36. On whether there were any material inconsistencies/contradictions in the prosecution's case I refer to the case of *Philip Nzaka Watu v. Republic* [2016] e KLR, the Court of Appeal stated as follows: -

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses.

Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question”.

37. From the foregoing, minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. Its only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court to the extent of raising doubt in the mind of the trial court that the accused ought to benefit from the doubt. In my view the inconsistencies alleged by the appellant in respect to complainant's evidence are not substantial to affect evidence adduced by the prosecution. That ground therefore fail.

Whether the charge was defective and its impact on findings by trial court

38. The Appellant contends that the charge sheet was defective as the charge of handling stolen goods refers to 16th November, 2018 as the date the appellant was alleged to have been found with the two cows, however it is clear from the evidence presented that the cows were allegedly found on 26th November, 2018 in the appellant's fathers compound hence the 2nd count is defective.
39. In *Brian Kipkemoi Koech vs. Republic* [2013] eKLR the court held that:

“What constitutes a defective charge sheet was spelt out in the case of *Yosefu And Another - vs- Uganda* (1960) E.A., 236. The East Africa Court of Appeal held: -

“The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc., in contravention of the Act.”



40. And in *Sigilani -vs- Republic* (2004) 2 KLR, 480, it was held that:-
- “The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”
41. In respect to defective charge sheet section 134 of the criminal procedure code provide as follows:-
- “Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”
42. In the case of *Obedi Kilonzo Kevevo vs. Republic* [2015] the Court of Appeal stated as follows: -
- “The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants’ conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant.
43. Further in the case of *JMA v. Republic* (2009) KLR 671, the court stated as follows: -
- “It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.”
44. I note that the error referred to in this case is in respect to date and in my view despite the error on date, the appellant understood the charges he was facing and he responded to when read to him and also when he was given opportunity to cross examine witness and when he defended himself. In my view, the error did not prejudice the appellant.
45. Further the error is curable under Section 382 of the Criminal Procedure Code which provides as follows: -
- “Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”
46. Further Section 214(2) of CPC which provides that:
- “...variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be



amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.”

47. From the foregoing, the discrepancy on the dates as contained in the charge sheet and as contained in the facts read out to the appellant did not occasion a miscarriage of justice; did not prejudice the appellant.
48. In conclusion I find that ingredients of Robbery with Violence under section 296(2) of the penal code were proved beyond reasonable doubt.

Whether sentence imposed was harsh and excessive.

49. The accused was sentenced to 50 years imprisonment. I take note of the fact that section 296(2) provides for mandatory death sentence. From probation officer’s report, the appellant was 25 years at the time of the sentencing. I also take judicial notice of the fact that life expectancy is about 70 years. If appellant was aged- 25 years at time of sentencing, then he is expected to complete his sentence when over 75 years. This my view amount to life sentence.
50. In the case of Malindi Court Of Appeal Criminal Appeal No. 12 Of 2021, Julius Kitsad Manyeso Versus Republic, the court of appeal declared life sentence unconstitutional. Having found that sentence of 50 years in respect to the appellant herein will result to life sentence in view of life expectancy in Kenya, I find sentence imposed unconstitutional, harsh and excessive. I am inclined to set aside sentence of 50 years and impose sentence of 30 years imprisonment.
51. Final Orders: -
 1. Appeal on conviction is dismissed
 2. Appeal on sentence is allowed and sentence of 50 years imposed by trial court set aside
 3. I hereby sentence appellant to 30 years imprisonment
 4. Sentence to run from the date appellant was arrested

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 27TH DAY OF JULY 2023.

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RACHEL NGETICH
JUDGE

