



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Kubania & 4 others v Republic (Criminal Appeal E013, E015, E016, E017 & E021 of 2022 (Consolidated)) [2023] KEHC 21867 (KLR) (10 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E013, E015, E016, E017 & E021 OF 2022 (CONSOLIDATED)
MS SHARIFF, J
AUGUST 10, 2023**

BETWEEN

**JOHN KAILIKIA KUBANIA 1ST APPELLANT
BENARD KAMENJU MUTUNGA 2ND APPELLANT
JOHN MUTIGA M'IKIAO 3RD APPELLANT
GEORGE RIUNGU MBIJIWE 4TH APPELLANT
JOSEPH MBAYA RAMARE 5TH APPELLANT**

AND

REPUBLIC RESPONDENT

(An appeal from the conviction and sentence by Hon P.M.Wechuli (SRM) in original Tigania PMC Criminal Case No. 1570 of 2012 delivered on 21/1/2022)

JUDGMENT

1. The appellants were charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars were that on the 26th October, 2012 at Mumui Location in Tigania West District within Meru County jointly with others not before the court robbed Daniel ngunju John of his shirt, trouser, cap, leather shoes, Nokia mobile phone all valued at Kshs 13,000/- and Kshs 10,000/- in cash and uring the time of such robbery used actual violence to the said Daniel Ngunju John.
2. The second count was grievous harm contrary to section 234 of the *Penal Code*. The particulars were that on 26/10/2012 at Mumui Location in Tigania West District within Meru County jointly with others not before court unlawfully did grievous harm to Dorothy Mukiri.
3. Upon arraignment, the appellant pleaded not guilty and the matter proceeded to hearing.



4. PW-1 Daniel Nkunja testified that he was at his house on 26/10/2012 when the accused came to his house at about 7.30 pm. When he opened the door, he was held by the throat and made to sit down as he was being asked about a gun he had no idea about. That the appellants took him to the forest and beat him. They took all his clothes and money. They came back in the morning and continued beating him. At the time, all the assailants had runguns and one who had not been arrested had a gun. His wife, Dorothy Mukiri was also assaulted in the incident.
5. PW-2 Dorothy Mukiri, PW-1's wife stated that the assailants came to their home and called her husband and left with him. That they beat him up while asking him to produce a gun which he had no knowledge of. This witness stated that the appellants had sticks except the 4th one who had a panga and the one who ran away had a gun. She further stated that the 5th appellant injured her leg. She stated that she identified the appellants as there was moonlight.
6. PW-3 Daudi Dabaso a clinical officer from Isiolo County hospital produced a P 3 filled by his colleague. It was his evidence that according to the observations made by his colleague, the victim had sustained chest pains and fracture of the tibia with an open wound. The clinical officer who examined the victim and opined that the object used to inflict the injury was a blunt one. This witness also produced a P3 of PW-2 which revealed that she had sustained injuries on her right lower leg with haematoma.
7. PW-4 Mary Kihito stated that while she was at home, seven people came; John Kailikia, Mbaya, Kuru, Mburugu, George Kamenchu and Ngolua. They forcefully demand for the production of a gun and money from her father and when her father said that he had none, they pulled him out of the house while beating him. When her mother followed the victim outside and tried to intervene, she was also assaulted. The appellants carried her father and left with him, only for him to resurface the next day while injured.
8. PW-5 Kenneth Muchui, the complainant's son testified that the assailants/appellants went to their home and summoned his father. They pulled him out and started beating him up. When his mother tried to intervene she was also assaulted. This witness stated that he identified the 1st appellant as he was Kenya Police Reservist. It was his evidence that his father came back the following day while injured.
9. PW-6 Silas Kinyua, a Senior Chief of Mumui location testified that he received a call from one Monica informing him of the loss of her relative at night. He also received a similar call from the Officer Commanding Station. He found the complainant injured at a Njuri Ncheke shrine. The complainant identified those who had assaulted him.
10. PW-7 was PC Ngeno, the investigating officer.
11. PW-8 Mworio Kikiomo stated that he had presided over land dispute between the complainant and John and it had been resolved that the complainant moves out of the land at 2 pm. Later that night he heard screams from the complainant's home. The following morning, they found the complainant had been injured.
12. The appellants were all put on their defence and elected to give unsworn statement.
13. DW-1 John Kailikia stated that on the material day, he had attended a land dispute hearing between the complainant and George Riungu Mbijiwe. After the dispute hearing, he went home.
14. DW-2 Joseph Mbaya stated that he had also attended the land dispute hearing. He stated that the complainant had sold 2 acres of land belonging to Patrick who was an in-law to him. He stated that he was arrested because the complainant had previously threatened him.



15. DW-3 George Riungu stated that the complainant had sprayed his maize with a herbicide. He reported him to the elders and the complainant was ordered to re-plant the maize crop. This appellant further stated that the complainant had also attempted to take another parcel of land from his wife and that it is the complainant who caused him to be arrested.
16. DW-4 John Mutinga stated he had attended the land dispute hearing. The following day as he was going to a construction site, he met the chief who informed him of the assault of the complainant. He maintained that he was arrested because he had presided over the hearing of the land dispute.
17. DW-5 Silas Kamenchu stated that on the day of the dispute, he had been in his farm with his son. The following day, the chief found him and asked him to accompany him to a place where he found George, the victim handcuffed. He was also arrested. He denied committing the assault.
18. DW-6 Charity Kananu, Joseph Mbaya's wife stated that on the material day, her husband had attended a Njuri Ncheke sitting and came back home and started to fence his compound and later went to sleep. He was arrested the next day.
19. DW-7 Catherine Njiru, wife to George stated that the complainant had attempted to take their land. The elders summoned them. The complainant admitted being on the wrong. The hearing ended at about 2 pm and she did not see the complainant again.
20. DW-8 Jesse Muriuki, George's son stated that on the material day, his father had attended the hearing of a land dispute while he had been herding goats. At about 4 pm, his father came and took over. His testimony was that he had been with his father all through that day.
21. DW-9 Daniel Kimathi, Benard Kamenchu's son stated that on the material day, he had been ploughing with his father until the plough broke. The following day, his father went to weld the panga but he did not return home as he had been arrested in the course of the day.
22. The trial considered the evidence tendered before it and convicted the appellants and sentenced each of them on count 1 to suffer death and on count 2, the 5th appellant was sentenced to 1 year imprisonment. The appellants being aggrieved moved this court on appeal raising the following grounds;
 - a. The trial magistrate erred in by failing to note the incident took place at night, the light used to identify the appellants was not conducive for proper identification of the appellants.
 - b. The magistrate erred by failing to note that the appellants were not represented by a lawyer according to article 50(2)(h) of *the Constitution*.
 - c. The learned trial magistrate erred by failing to note there no independent witness called by the prosecution to support the evidence of the complainant and his family.
 - d. The learned trial magistrate erred by failing to note that there was grudge between the 3rd appellant and the complainant.
 - e. The learned trial magistrate erred by failing to note the ingredients of robbery were not proved beyond reasonable doubt.
 - f. The learned trial magistrate erred by failing to consider the appellant's defence.
23. All the convicts were aggrieved by the judgment of the trial court and they each preferred an appeal.
24. The appeal was disposed of by way of written submissions. All parties complied and their respective submissions have been taken into consideration.



Analysis and determination

25. This being a first appeal, I am guided by the sentiments expressed in *Kiilu & another vs. Republic* [2005]1 KLR 174, where the duty of a first appellate court was enunciated 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.”
26. In a charge of robbery with violence the ingredients espoused in *Oluoch -Vs - Republic* [1985] KLR must be established beyond reasonable doubt. The ingredients are;
- a. The offender is armed with any dangerous and offensive weapon or instrument; or
 - b. The offender is in company with one or more person or persons; or
 - c. 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” .
27. In this case, the evidence tendered before the trial court was that the assailants were armed with rungu, one had a panga and one had a gun. The extent of violence meted on the complainant is evident from the P3 from produced in this matter.
28. Clearly, the motive behind the attack is the alleged land dispute pitting the complainant against the 4th appellant, George Riungu. The attack was carried by the appellants jointly and even came back early the following morning to check on the complainant. Clearly, the assailants were in a group.
29. Premised on the above set of facts, I am satisfied that the elements constituting the offence of robbery with violence were established.
30. The next issue that emerges for determination is whether the appellants were properly identified given that the offence is said to have been committed at night.
31. In his evidence, the complainant gave an account of how he was accosted in his house by the appellants who demanded for production of a gun and money. He stated that the appellants went to his house, dragged him out into the bush while demanding to know the whereabouts of a gun. He stated that at the time of making his first report, he mentioned their names. He stated that there was moonlight. This element of identity was corroborated by PW-2, PW-4, PW-5. The information was also given to the area chief (PW-6) and PW-8 by the complainant. Although it was dark except the moonlight, the witnesses were able to identify the assailants as the attackers that night.



32. Given the set of facts, I find guidance in *Felix Kinyanya Marako v Republic* [2016] eKLR where the court while considering the issue of identity where the names of the assailants had been given held;
-The best way to identify someone by recognition is by giving the name at the earliest possible opportunity. That was expected to be done immediately the witnesses went to the police at the first instance or to at least put it down in their statements.
33. I find that the disclosure of the names of the appellants by the complainant in his first report to the authorities is corroborative of the fact that it is indeed the appellants who had robbed the complainant.
34. The next issue is the lack of representation by counsel. The appellants contend that their rights under article 50 of *the Constitution* were violated due to the failure by the state to appoint pro bono defence advocates. The article provides;
- (2) Every accused person has the right to a fair trial, which includes the right—
- (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
35. There has been several discussion on the issue of this right. I have considered the decisional authority in *Joseph Kiema Philip vs. Republic* (2019) eKLR where Nyakundi J observed;
- There are two schools of thought on the issue. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void ab initio. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.
- In answering the question, I will consider the wording of the article 50(2)(g) and (h) of *the Constitution*. From the wording of article 50(2)(h) the right therein is not absolute as the court must first satisfy itself that substantial injustice may result before it enforces the right.
36. The above authority is persuasive in nature though I take cognizance of the fact in all circumstances, the court ought to weigh whether there was substantial injustice resulted from the failure to appoint pro bono advocates for the appellants during the trial in the subordinate court.
37. Looking at the record, this matter was a retrial on orders of the High Court. I do not however have the benefit of the order referring the matter for retrial. In the circumstances, I am persuaded that from the manner in which the proceedings were conducted, no prejudice has been shown to have been meted on the appellants.
38. The record shows that the appellants were given the opportunity to fully participate in the proceedings by cross examining the witnesses. I thus find no merit in this ground of appeal.
39. One other issue is the alleged failure by the trial court to consider the appellants defences. DW-1 stated he was at home on the said date, DW-2 stated that he was arrested because the complainant had threatened him over the land dispute, DW-3 stated he was arrested because the complainant had caused his wife to be arrested over a land dispute, DW-4 stated he was at his home on the day of the offence and finally DW-5 stated he was at his farm ploughing and was arrested the following day.



40. The appellants also called into their defence 4 other witnesses who testified the appellants were in other places other than the scene of crime.
41. It is trite law that when the defence of alibi is raised, the same ought to be raised early enough so the prosecution can challenge and or put the defence to test by cross-examination.
42. In *R. v. Sukha Singh s/o Wazir Singh & Others* (1939) 6 EACA 145, the former Court of Appeal for Eastern Africa stated:
- “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, and secondly, if he brings it forward at the earliest possible moment it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped”.
43. In *Kiarie v Republic* (1984) KLR, it was held that:
- An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.....
44. In the instant appeal, the appellants have introduced the issue of alibi late in the retrial, when the prosecution had closed its case and had no chance to subject the veracity of the alibi defence to test.
45. In any event, the defence witnesses did not deny the fact the appellants attended the Njuri Ncheke meeting. Neither was the pre- existing land dispute between the complainant and the 3rd appellant denied.
46. In the end, I find the defence tendered by the appellants as after thoughts and I hereby reject the same.
47. In the end, I find no merit in the appeal which is hereby dismissed. The conviction is upheld.
48. In light of the decision in *Francis Kariuki Muruatetu & Anor Vs Republic* which declared death sentence unconstitutional, and having taken into account their pretrial period spent in custody, I do hereby set aside the accused persons’ death sentences and I hereby commute their sentences to definite terms of 35 years each.
49. It is noteworthy that the 5th appellant has already served the sentence on count 2 wherefore that is spent. It is ordered accordingly.

DATED, DELIVERED AND SIGNED AT MERU THIS 10TH DAY OF AUGUST 2023

MWANAISHA. S. SHARIFF

JUDGE

In the presence of:

Ms Njeru for the respondent.

Appellants present.

