**Abaloni 'alias' Masection v Republic (Criminal Appeal E002 of 2021)**
**[2023] KEHC 23623 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23623 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT GARISSA**

**CRIMINAL APPEAL E002 OF 2021**

**JN ONYIEGO, J**

**SEPTEMBER 29, 2023**

**BETWEEN**

**ABDULLAHI AHMED ABALONI 'ALIAS' MASECTION ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the sentence and conviction by Hon. Maundu in CM's Court in Garissa Criminal Case No.111 of 2019 delivered on 06.01.2021)***

## JUDGMENT

1. The appellant herein filed an undated petition of appeal on 27.07.2022 wherein he challenged the conviction and sentence the subject of this appeal. The trial court convicted the appellant of the offence of robbery with violence contrary to section 296 (2) of the Penal Code.

2. The particulars of the offence were that on the 16th and 17th day of January 2019 at Madogo area, Tana – North sub County within Tana – River County jointly with others not before court while armed with a panga robbed Abdia Edin Mohamed of dozen of wheat flour, 50 kg of beans, 20 litres of cooking oil, 2 dozens maize flour, 2 sacks of sugar 50kgs each, mobile phone make itel, a set of blender, a set of water jugs, a set of cups, one TV make LG, remote control, 2 sets of curtains, a service matchet of KDF, assorted cloth, jackpin, keys and cash 5000/= all worth Kes. 100,000/= and immediately after the time of such robbery threatened to use actual violence to the said Abdia Edin Mohamed.

3. The appellant denied the charge consequences whereof he was tried and thereafter convicted of the said offence and sentenced to serve 20 years imprisonment.

4. It is that conviction and sentence that necessitated the instant appeal wherein the appellant raised the grounds of appeal as summarized here below:

i. The learned magistrate erred in both points of law and fact by convicting the appellant and yet the case was not proven to the required standard.

ii. That the trial magistrate erred in law and fact by relying on the prosecution's evidence which was riddled with contradictions and discrepancies to convict the appellant.

iii. That the learned trial magistrate erred both in law and in fact by totally disregarding and dismissing the appellant's defence.

iv. That the learned magistrate erred in law and fact by imposing harsh, unfair and excessive punishment to the appellant.

5. When the matter came up for directions, the court with the consent of all parties directed that parties file their written submissions in disposition of the appeal herein. Consequently, the appellant filed his submissions thus contending that prosecution did not prove its case to the required standards. That the charges herein were not in consonance with the particulars enumerated thereon and therefore the conviction by the trial court could not be considered safe as the authenticity of the weapon used in committing the robbery was not ascertained.

6. The appellant submitted that he was not accorded a fair hearing as he was not accorded the services of an advocate yet the charges against him were very serious. He placed reliance on the case of Evans Wanjala Silibi v R in Criminal appeal No. 314 of 2018 whereby the conviction and sentence of the appellant were quashed for the reason that he was not accorded the services of an advocate.

7. It was his contention that he was not properly identified as the trial court relied on the evidence of a single witness to convict him. To support this position, the appellant relied on the case of Kariuki Njiru & 7 Others v R, Criminal Appeal No. 6 of 2001 where the court held that it was necessary to test with the greatest care the evidence of a single witness regarding identification. In the same breadth, the appellant contended that the trial magistrate relied on prosecution's evidence which was marred with contradictions and inconsistencies to convict him. He opined that the burden of proof was shifted to him in proving the charges herein contrary to the well-established principle and law that the burden of proof always lies with the prosecution.

8. Mr. Kihara representing the respondent submitted that all the ingredients of the offence were proved beyond any reasonable doubt and sought to rely on the case of Oluoch v Republic [1985] eKLR to support his proposition that the ingredients of the offence herein were met and therefore the conviction should be upheld. In the same breadth, the respondent submitted that conviction having been proper, the appeal herein lacks merit hence the legal sentence imposed should equally be upheld.

9. Having considered submissions by both parties, and further having analyzed the evidence before the trial court, I find that the issue for determination is whether the appellant has made a case for this court to interfere with the conviction and sentence imposed by the trial court in line with the duty of this court while exercising its 1st appellate jurisdiction. [See Okeno v Republic [1972] E.A. 32].

10. Brief facts of the case were that, PW1, Abdia Aden Mohamed was on 16.01.2019 at about 3.00 am sleeping outside her house together with her children due to the excessive heat on that day. She stated that she had locked her shop, her house and the gate with padlocks and thereafter placed the keys inside her handbag and then placed the same under her pillow. That at about 3.00 a.m., she heard a sound of someone jumping over her wall and upon checking, she saw it was the appellant. She contended that she managed to see him well due to the fact that her house is surrounded by security lights.

11. That the appellant placed a knife on her neck while threatening to chop off her head. She stated that the appellant pulled the bag beneath the pillow and took the keys which he threw to his colleagues who used them to open the house and carried assorted household goods away.

12. She stated that her assailants had two motor bikes parked outside the compound and when they were done, they cycled away. It was her evidence that after two weeks after reporting the incident, she was called by the police to identify a TV set that had been recovered. That she identified the said TV to be hers since her husband had previously scratched the names 'Adan Ibrahim' at the rear of the TV set. She stated that one of the robbers was the appellant herein as she previously knew him very well.

13. PW2, Ahmed Abaloni testified that before the night of 16th and 17th of January, 2019, police officers had severally called him telling him that they wanted the appellant herein who is also his son. That upon the appellant coming back home, he phoned the police officers who arrested him. It was his evidence that the complainant had informed him that the appellant was among the people who had robbed her and so she requested him to assist in the arrest of the appellant.

14. PW3, Suleiman Hassan testified that on 27.01.2019 at around 8.00 p.m., he was at the trading Centre when he received information that there was a stolen TV which was spotted in a dry river and so, he proceeded to the scene. It was his evidence at the scene he found a TV LG make of 32 inches inside a sack. He proceeded to state that inside the sack, a remote control and cables were found.

15. PW4, John Ng'eno testified that he was the investigating officer in the matter herein. He reiterated the evidence of the complainant and thereafter stated that he preferred the charges herein against the appellant.

16. PW5, Ali Isaack Karime testified that he was a remandee having been charged with the offence of being in possession of bhang. That on 19.01.2019, he was at Bulla Amani in Madogo sleeping in his house when police officers arrested him. He denied ever seeing nor knowing the appellant

17. At the close of the Prosecution's case, the Court considered the evidence tendered by the prosecution and placed the appellant on his defence.

18. DW1, Abdullahi Ahmed Abaloni denied the charges herein stating that the complainant had previously requested him together with two other individuals to go help in doing some work at her place. That upon finishing, the complainant wanted sexual favours from him but on turning down such move, he was instead condemned and charged with the offence herein.

19. It is trite law that in criminal proceedings, the burden of proof lies always with the prosecution. This position is fortified by Section 107(1) of the *Evidence Act*, which provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists. It then goes without say that the burden of proof is placed on the prosecution to establish every element in a criminal charge beyond reasonable doubt. This position was well buttressed in the cases of Woolmington v DPP 1935 AC 462 and Miller v Minister of Pensions 2 ALL 372-273.

20. The offence of robbery with violence is provided under Sections 295 and 296(2) of the Penal Code as follows:

> " 295. Any person who steals anything, and, at or immediately before or I mmediately 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.

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(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

21. The question which needs to be answered is whether the salient elements of the offence were proved to the required standard. In Jeremiah Oloo Odira v Republic [2018] eKLR the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:

.21 "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".

22. "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: -

(a) The offender is armed with any dangerous or offensive weapon or instrument, or

(b). The offender is in the company of one or more other person or persons, or

(c) 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"

[Also See Olouch v Republic (1985) KLR].

22. PW1 gave a distinct recollection of what unfolded on the material night. The complainant stated how while sleeping, she heard a sound of someone jumping over her wall and upon checking out, she saw the appellant. She contended that she saw the appellant well due to the fact that her house is surrounded by security lights. That the appellant proceeded to place a knife on her neck while threatening to chop off her head. Additionally, she stated that the appellant pulled the bag beneath the pillow and took the keys, threw the same to his colleagues upon which they opened the house and carried the goods in question away.

23. Besides the testimony of the complainant, a TV which was among the stolen items stolen was recovered from a dry river while covered in a sack. The TV was later identified by the mark at the rear of it being the scrapped name of the complainant's husband. With this evidence, I have no doubt that the complainant was attacked on the material night by more than one person who were armed with a knife which is a dangerous weapon and that force was applied while house hold goods were stolen. To that extent the elements of robbery with violence were met.

24. The key question however is whether, there was positive identification of the assailant. Considering the explanation given by the complainant, identification was by way of recognition given that she knew the appellant before. Equally, the appellant admitted that he knew the complainant and that she was not a

stranger to him. In the case of Anjononi and others Vs. Republic 1976-1980) KLR 1566 the question of identification was discussed as follows: -

> " ...When it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or the other."

25. Besides the complainant's evidence, pw2 the father to the appellant confirmed that pw1 had reported to him that his son (the appellant) was among those people who attacked her on the material night. The arrest of the appellant was based on the report made by the complainant. It is my finding that the appellant was positively identified as the perpetrator of the offence using sufficient security light fixed round the compound. I do not buy the defendant's claim that he was framed for refusing to have sex with the complainant. This is a crafted story to escape liability. It is my considered view that, conviction by the trial magistrate although based on the evidence of a single witness was thus safe and free from any error and that the court was satisfied that the complainant was a honest witness hence sufficient caution.

26. On the ground that the appellant's defence was not considered, it is clear that the trial court considered the evidence before him cumulatively before reaching the determination being appealed against. It was his view that the prosecution had proved its case against the appellant beyond reasonable doubt. I do not find the assertion herein that the court did not consider his defence tenable.

27. On the ground that the prosecution's evidence was marred with contradictions and discrepancies, the appellant did not submit on the same but that notwithstanding, having read the record herein, it is my view that the appellant contests the fact that the charge sheet in reference to the instrument that was allegedly used in perpetrating the offence herein read as panga while the complainant stated that the appellant had a knife.

28. The law as regards the issues of contradictions and discrepancies is crystal clear. It is trite law that inconsistencies unless satisfactorily explained would usually but not necessarily result in the evidence of a witness being rejected. The court will ignore minor contradictions unless it thinks that they point to deliberate untruthfulness or they do affect the main substance of the prosecution case. [See Uganda v Rutaro {1976} HCB; Uganda vs George W. Yiga {1979} HCB 217].

29. As to lack of legal representation, it was his duty to engage a lawyer of his choice. As of now, there is no legal framework guiding on propono legal services for people charged with robbery with violence.

30. In view of the above testimonies and the case law cited above, I have perused the said allegations by the appellant and I find the same did not affect the root of the charge herein and consequently the same ground is hereby dismissed.

31. On sentence, the Penal Code prescribes a death sentence for the offence of robbery with violence. The trial court exercised its discretion by sentencing the appellant to 20 years imprisonment.

32. In as much as the appellant did not submit on the sentence, the same formed his prayers that this court set aside the sentence by the trial court. The question is whether there is any lawful reason to interfere with the discretion of the trial court in passing sentence.

33. In James Kariuki Wagana v Republic [2018] eKLR, Prof. Ngugi J (as he then was) observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not

be said that the appellant used excessive force, nor did he "unnecessarily injure the Complainant during the robbery" and was not armed during the robbery. He therefore reduced the appellant's sentence of death to imprisonment for fifteen years, from the date of conviction.

34. In the instant case, all the ingredients of robbery with violence were met. The appellant, who was in the company of others, robbed the complainant, and in the course of the robbery, the appellant not only used force, but was armed with a dangerous weapon with which he threatened to use to chop off the head of the complainant. However, the appellant did not execute the threat hence the offence was not so aggravated to call for the most punitive penalty.

35. In the circumstances, and considering that the appellant was a first offender, I am inclined to interfere with sentence as it was somehow excessive. Accordingly, the 20-year sentence is hereby substituted with ten years imprisonment. The same shall start running from the date of arrest.

ROA 14 days

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF SEPTEMBER 2023.**

**.....**

**J. N. ONYIEGO**

**JUDGE**