



REPUBLIC OF KENYA



**Sigei v Republic (Criminal Appeal 33 of 2019)
[2023] KEHC 22594 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22594 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL 33 OF 2019
F GIKONYO, J
SEPTEMBER 28, 2023**

BETWEEN

EZRA KIMUTAI SIGEI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. W. Juma
(CM) in Narok CMCR No. 1004 of 2017 delivered on 19/07/2019)*

JUDGMENT

Robbery with violence

1. The appellant was charged with Robbery with violence contrary to section 296(2) of the [Penal Code](#).
2. It is alleged that on August 7, 2017 at Nkaron village, Sogoo location in Narok sub-county, being armed with dangerous weapon namely pen knife, robbed Wesley Sigilai of cash Kshs. 41,800/= and immediately before such robbery used actual violence against the said Wesley Sigilai.
3. The prosecution called 7 witnesses while the defense gave unsworn testimony and did not call any witnesses.
4. The appellant was found guilty, convicted and sentenced to serve 28 years imprisonment.
5. Having been dissatisfied with the conviction and sentence he filed this appeal.
6. The appellant cited 5 grounds in his amended grounds of appeal;
 - i. That the charge sheet is fatally defective.
 1. That the prosecution did not prove the case beyond a shadow of doubt the court relied on contradicted and fabricated evidence.



2. That the prosecution evidence is marred with glaring and grave contradictions that could have resolved in the benefit of the accused person.
3. That the prosecution failed to call the wife of the victim who is adversely mentioned throughout the trial.
4. That the prosecution admitted inadmissible evidence in the form of exhibits allegedly found at the scene of the crime.

Directions of the court

7. The appeal was canvassed by way of written submissions.

The appellant's submissions.

8. The appellant submitted that the prosecution applied to substitute the charge sheet on March 22, 2018 which was allowed but there is no recording of the charges and substance thereof. The appellant relied on section 214, and 134 of the *Criminal Procedure Code* and *Sigilani vs Republic* (2004) 2KLR, 480.
9. The appellant submitted that the court cannot work on presumptive evidence as to the weapon used. That the victim's evidence was that he was stabbed with a weapon which may seem to have been a knife. Therefore, it is not clear what weapon was used against the victim. The appellant relied on section 296 of the *Penal Code*, the cases of *Oluoch v R*, *Sawe v Rep* [2003] KLR364, *Mary Wanjiku Gichira v Republic*, Criminal Appeal No. 17 of 1998, R vs Ally (Criminal Appeal No. 73 of 2002) [2006] TZCA 71.
10. The appellant submitted that the P3 form is improperly and inadmissible in court. That the p3 form is indicated that it was issued at Melelo. That the victim asserted that he reported the case between 10 and 12 whereas the records indicate that a report was made on 16.08.2017. That PW3, a clinical officer cannot be said if he had the required expertise of filling a P3 form. That PW3 did not tell the court how long he had worked and his experience. He also did not treat the victim. That the victim gave evidence on 15.01.2019 and the patient card from Longisa was filled on 12.03.2019. That the victim stated that he lost memory and not able to give recollection of events but nowhere is it noted that he had lost recollection of events when he was giving evidence in chief. The appellant relied on the cases of Francis Mugambi N'chuke V R [2009] eKLR, Joseph Ndungu Kimanyi V Republic [1979] eKLR, H.L.(E) Woolmington Vs DPP [1935] A.C 462 Pp 481, Halsbury's Laws Of England, 4th Edition, Volume 17 Paras 13 And 14, In The United States Supreme Court Decision In Re Winship 397 US 358 {1970} At Pages 361-64, The Supreme Court Of Canada In R V Lifchus {1997} 3 SCR 320, JOO Vs Republic [2015] eKLR, Miller Vs Ministry Of Pensions, [1947] 2 ALL ER 372, Ann Ekimat V Republic [2014] eKLR.
11. The appellant submitted that the prosecution failed to call the wife of the victim who is said to have played the key role in arresting and seeking for services of PW7 of filling the P3 form. The appellant relied on section 143 of the *Evidence Act* and Julius Kalewa Mutunga Vs Republic Criminal Appeal No. 31 Of 2005, Alex Lichodo Vs Republic Criminal Appeal No. 11 Of 2005.
12. The appellant submitted that the prosecution admitted inadmissible evidence in the form of exhibits allegedly found at the scene of crime. That PW6 told the court that he visited the scene of crime on 16.08.2017 where he recovered one torch, a shoe(sandal) and a jacket with blood stains. That that was 9 days after the incident. That the incident occurred on 07.08.2017. Further that there was no dusting to ascertain finger prints on the items and link them to the accused. That PW2 told the court that he did



not know where the appellant got the money. The appellant relied on the case of Elizabeth Waitiengi Gatimu Vs Republic [2015] eKLR.

13. The appellant submitted that there is a lot of doubt as to whether the appellant robbed the victim. Therefore, the sentence is too harsh in the circumstances. The appellant relied on the high court of Malawi in the case of Chauya And Another V the Republic, Criminal Appeal No. 9 of 2007.

The respondent's submissions

14. The prosecution submitted that three elements of robbery with violence were proved beyond reasonable doubt. That PW1, the victim stated that on 07.08.2017 at around 2300hrs was headed home when he noticed the appellant herein was trailing him. That he was first behind him then passed him before pulling back again. That he kept on trailing him before disappearing into a bush when the complainant met other villagers along the way. He then emerged from the bushes after the villagers had passed by and knocked down the complainant before he stated that he had been looking for him. He pushed him down and using a pen knife stabbed the complainant on both sides of his face near ears and left upper eye. He further hit him on the upper side of the chest and gripped his throat. The appellant then proceeded to remove money from the inner left pocket leaving the complainant unconscious. PW7 clinician at Longisa hospital produced a p3 form in court as PExh2 which ascertained that PW1 had stab wounds. The respondent relied on the cases of Mombasa Criminal Appeal No. 13 of 2017 Mohammed Ali Vs the Republic [2013] eKLR, Dima Denge Dima & Others Vs Republic, Criminal Appeal No. 300 of 2007.
15. The respondent submitted that there was sufficient light at the scene and PW1 was able to clearly see the appellants. That this was a clear case of recognition and not identification. PW1 encountered the appellant first hand and at a close range for a reasonable amount of time. That PW1 stated that though the incident took place around 11. 00p.m, his assailant had followed him for a duration of time as he walked back home through the same path that he followed. That he had seen the appellant clearly since there was moonlight. The incidence took place for quite a while and the complainant was in the hands of his assailant for a reasonable amount of time making it further favorable to know appellant as his assailant. PW5 also stated that he had seen the appellant following PW1 with a lit torch which he had described to have been light blue with a yellow head (PEx3). That few minutes later he heard screams and found PW1 having been assaulted. At the scene he found the said torch and sandack shoe (P Exh4) which he believed belonged to the appellant. The respondent relied on the cases of Peter Musau Mwanzia Vs Republic [2008] eKLR, R Vs Turnbull [1976]3 All ER 549
16. The respondent submitted that the trial magistrate took into consideration the appellant's mitigating factors, nature and circumstances of the offence prior to passing a lenient sentence of 28 years imprisonment.
17. In the end the prosecution urged this court to dismiss the appeal in its entirety and uphold the conviction and sentence as it is within the law.

Analysis and Determination

Court's Duty

18. The duty of the first appellate court is to re-evaluate the evidence presented at trial and draw its own conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses firsthand. Thus, demeanor is best observed by the trial court (Okeno vs. Republic [1972] E.A 32).



Issues

19. From the appeal, the written submissions, and authorities relied upon by both parties, the broad issues arising herein are: -
 - i. Whether the prosecution proved its case beyond reasonable doubt.; and
 - ii. Whether the sentence imposed herein is harsh and excessive in the circumstances?

Elements of robbery with violence

20. According to the Court of Appeal in the case of *Oluoch vs. Republic* [1985] KLR: -

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

”
21. The three elements of the offence of robbery with violence under section 296(2) of the Penal Code are, however, to be read disjunctively and not conjunctively. Therefore, proof of one or more of the elements beyond reasonable doubt founds a conviction for the offence of robbery with violence (*Dima Denge Dima & Others vs Republic*, Criminal Appeal No. 300 of 2007)
22. In this case PW1 stated on 07.08.2017, he was walking home from Sachora. He noticed the presence of the appellant who at times walked behind him, overtook him and again pulled back. The complainant met fellow villagers, with whom he talked. Upon realizing the presence of the villagers, the appellant walked ahead and entered into a forest. PW1 parted with the villagers and then the appellant emerged from the bush saying he had been looking for him. PW1 did not recognize the voice of the appellant but stated that he knew it was the appellant because he had been walking together along that path. The appellant then knocked down PW1 and stabbed him on both sides of the face near the ears and the lower and upper left eye. The appellant then hit PW1 on the chest and gripped his throat tightly. PW1 suspected that the object used was a knife. He saw the appellant as there was moonlight. The appellant removed PW1’s money from the inner left pocket. PW1 was rescued by persons who escorted him home. He regained consciousness at Longisa hospital.
23. PW5-Isaiah Cheruiyot Koros, testified that on the material date at around 10:30 p.m. he saw PW1 as he wanted to close the door to the cow shed. He later met the appellant who had a torch and was carrying open shoes. A short while later he had people screaming from the road. He rushed to the scene. He found PW1 lying down and was bleeding from the right ear, forehead and head. Together with others, they assisted PW1 to his home. They also escorted the complainant to hospital. PW5 identified the torch (P Exh3) he also identified the open shoe (P Exh4). According to PW5, he had just seen the appellant with the two items before finding them at the scene of the attack.
24. On cross examination, PW5 stated that he did not know the appellant before the incident. He stated that the sandal is something that can ordinarily be found in the market. He also could not identify the torch by any mark.
25. PW3, a clinical officer testified that he examined PW1 for purposes of filling a P3 form. He acknowledges that he did not refer to treatment notes because PW1 did not bring them along. He relied on the history that PW1 had been treated at Tenwek and Longisa. He saw that PW1 had 5 stitched wounds on the head and a cut wound on the right periorbital area near the eye which was stitched and



- the right eye was red. He also noted that PW1 complained of pain on the right chest. He stated that the injuries were about 9 days old.
26. PW2 Kiprono Mutai testified that the appellant woke him up at 3.00 a.m on 07.08.2017 inviting him to go they spend the elections money. They left to go drinking. He noticed that the appellant had no shoes on his feet. They walked together to Chombek then they waited to board a vehicle. The appellant pulled out ward of notes. PW2 was suspicious fearing that it was stolen money. PW2 noted that the appellant was willing to spend money on a taxi and showed him that he had a lot of money. The following day he learnt that someone had been robbed. He therefore suspected the appellant. He had seen the appellant with blood on his fingers.
 27. PW4 AP CPL Richard Kipyegon Ngeno testified that on 18.08.2017 he received a warrant of arrest against the appellant for alleged robbery. That the reportee was the wife of PW1. She led the police to arrest the appellant. They however did not recover any exhibits from the appellant.
 28. PW6 PC Patrick Mugo of Melelo police station testified that on 16/08/2017 PW1 made a report of robbery against the appellant. They were led to the scene of the alleged robbery by a witness. They recovered a torch, sandal and jacket at the scene. The jacket had a torn pocket and some blood stains. PW1 identified the jacket as his.
 29. PW7, a clinical officer Leah Chelole of Longisa hospital testified that she reconstructed the treatment notes for PW1. She stated that she used the history given to her by the wife of PW1 and the information on the treatment notes. She also stated that the lady did not give her name.
 30. In his defence the appellant stated that on 16.08.2017, a lady called him whom he noticed was his ex-wife. He opened the door for her and she was in a company of four men. They wanted to know the whereabouts of his new wife. He was then arrested. The defence was mere afterthought and make-up.
 31. The court has keenly paid attention to the subtleties of the evidence adduced, and the grace the said evidence gives to the elements of the crime of robbery with violence.
 32. The incident occurred during the night. Care should be taken to ensure the appellant was positively identified as the perpetrator of the offence. The court in *Wamunga v. Republic* (1989) KL 424 at 426 stated that:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”
 33. The court has carefully interrogated the circumstances in which identification was done.
 34. PW1 testified that there was moonlight and he had enough encounter with the appellant as to have properly identified him. PW5 gave a testimony which corroborated the evidence by PW1 in material respects. On the material day at around 10:30 p.m. he saw PW1 as he wanted to close the door to the cow shed. He later met the appellant who had a torch and was carrying open shoes. A short while later he had people screaming from the road. He rushed to the scene. He found PW1 lying down and was bleeding from the right ear, forehead and head. Together with others, they assisted PW1 to his home. At the scene he saw the items the appellant was carrying on the material day. The evidence by the prosecution squarely placed the appellant at the scene of crime.



35. Evidence by PW1 and other witnesses including the medical evidence confirmed the injuries the complainant suffered during the robbery. These pieces of evidence prove the weapon used was dangerous and that violence was applied upon PW1 during the robbery.
36. Accordingly, the prosecution proved beyond reasonable doubt that; (i) the offenders were armed with dangerous and offensive weapon or instrument; and (ii) at or immediately before or immediately after the time of the robbery the offender wounded, beat, struck or used other personal violence on the victim. The offence of robbery with violence was proved beyond reasonable doubt.
37. On the basis of the evidence adduced, the appeal on conviction lacks merit and fails.

Sentence

38. The appellant robbed the complainant, and in the course of the robbery, he was armed with a dangerous weapon which he used with brutal force thereby causing serious injuries to the complainant, and he also left with his valuables; money.
39. The level of violence unleashed on the complainant is sufficiently serious to warrant a death sentence or long period of imprisonment.
40. The Penal Code prescribes a death sentence for the offence of robbery with violence. Accordingly, the court finds no reason to interfere with the sentence meted upon the Appellant by the trial court.

Of section 333(2) of the CPC

41. The trial court was guided by the Muruatetu decision on discretion of mandatory sentences. The trial court weighed the degree of the offence and noted that the appellant had been in custody a few days shy of two years at the time of sentencing. Accordingly, the trial court was alive of time spent in custody. Section 333(2) of the CPC was considered in light of the sentence imposed.
42. In the upshot, the appeal on conviction and sentence is dismissed.
43. Orders accordingly.
44. Right of appeal explained.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS 28TH DAY OF SEPTEMBER, 2023.

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F. GIKONYO M.

JUDGE

In the presence of:

1. Appellant
2. Mr. Torosi for Respondent
3. Mr. Muraguri C/A .

