



REPUBLIC OF KENYA



KENYA LAW
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**Luvai v Republic (Criminal Appeal 42 of 2021)
[2023] KEHC 24397 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL 42 OF 2021
JN KAMAU, J
OCTOBER 26, 2023**

BETWEEN

JOHN ORINDO LUVAI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon J. A. Owiti (PM) delivered at Vihiga in Principal Magistrate's Court in Criminal Case No 8 of 2016 on 23rd February 2017)

JUDGMENT

Introduction

1. The Appellant herein was charged with three (3) Counts of the offence of robbery with violence and causing grievous harm jointly with another contrary to Section 296 (2) and Section 234 respectively of the [Penal Code](#) Cap 63 (Laws of Kenya). He was also charged with an alternative count of handling stolen property contrary to Section 322(2) of the [Penal Code](#).
2. He was tried and convicted on Count I and Count II by the Learned Trial Magistrate, Hon J.A. Owiti, Principal Magistrate who sentenced him to death. She further directed that he serves (5) years suspended sentence while awaiting execution of the death sentence. She made no finding on the alternative charge.
3. Being dissatisfied with the said Judgment, on 29th February 2020, the Appellant lodged the Appeal herein. The same was undated. He set out two (2) grounds of appeal.
4. His Written Submissions were dated and filed on 22nd June 2023 while those of the Respondent were dated and filed on 20th February 2023. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/or warranted.
8. The court dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution's Case

9. Ground of Appeal No (2) of the Petition of Appeal was dealt with under this head under the following headings.
10. The Appellant submitted that he was not properly identified and that the Trial Court erred in having found that the doctrine of recent possession was applicable in the circumstances herein. He was emphatic that he was not identified.
11. He relied on the case of *Jethwa & Another vs Republic* (1969) EA 459 where it was held that before the said doctrine could be invoked, the prosecution was required to demonstrate that the accused person knew or had reason to believe that the goods the accused person was found with were stolen.
12. He asserted that the makers of the evidence relied on by various airtime companies were not called to attest and verify the truth. He asserted that the authenticity of the receipts and airtime was questionable and ought to be rejected. In this regard, he placed reliance on the case of CRA No 15 of 2022 *Makokha Ogutu vs Republic* where the court found that there was no sufficient justification to justify another person other than the maker to produce the evidence as was provided in Section 77 of the [Evidence Act](#).
13. On its part, the Respondent submitted that the Appellant herein was positively identified both at the scene and in the identification parade and that the witnesses were unshaken in this regard even on cross-examination. It pointed out that there was proper lighting from the security lights and that one (1) witness confirmed that he purchased airtime from the Appellant who he knew previously, on the same night.
14. According to Section 295 of the [Penal Code](#), the elements of robbery with violence are :-
 - a. That the offender is armed with any dangerous weapon or offensive weapon or instrument;
 - b. That the offender is in the company of one or more persons;



- c. That 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.
15. A perusal of the proceedings of the lower court showed that on 6th January 2016, Asnet Oside Musera (hereinafter referred to as “PW 1”) was standing by the road side waiting for a motor bike to go home when two (2) people grabbed her bag which contained Airtel, Safaricom and U Cards and ran away. They also injured her with a sharp object. She identified the Appellant’s co-Accused, Riziki, as one of the perpetrators at the time as there were security lights on the road and she knew him previously.
 16. Joseph Omongo (hereinafter referred to as “PW 2”) was also standing along the road waiting for a motor bike to take him home when three (3) men robbed him of his driving licence and a cell phone. His evidence corroborated that of PW 1. He was emphatic that he saw Riziki very well because there was a security light. Eisha Barara Ngeri (hereinafter referred to as “PW 3”) also confirmed that he was attacked by some people who also robbed him and beat him, leaving him unconscious. He also identified Riziki as one of this attackers on the material night.
 17. Stephen S. Agade (hereinafter referred to as “PW 4”) told the Trial Court that on the material date at 9.20 pm, the Appellant who he knew as Orindo, approached him and sold him an Orange line for Kshs 50/=. At the time, the Appellant had several lines. He stated that a plastic container with assorted airtime cards was recovered from the Appellant’s house when he was arrested.
 18. No 233493 Chief Inspector Harrison Matheka (hereinafter referred to as “PW 5”) testified that PW 2 identified the Appellant in an identification parade by touching him on his shoulder. He was categorical that the process of identification was untainted.
 19. Loyi Agwona (hereinafter referred to as “PW 6”) was a Clinical Officer at Vihiga District Hospital. He confirmed having filled the P3 Form in respect of PW 3 and confirmed the injuries that he sustained on the material night. He classified his injuries as grievous harm.
 20. Amena Cyrus (hereinafter referred to as “PW 7”) was a Clinical Officer working at Boyani Health Clinic. He confirmed that he treated PW 1 for cut wounds that she sustained on the material date. He tendered in evidence the P3 Form as evidence in the matter.
 21. PC Edwin Nyongesa (hereinafter referred to as “PW 8”) was the Investigating Officer. He reiterated the evidence of all the Prosecution witnesses. He testified that it was the Appellant who led them to a plastic container where cards were hidden.
 22. It was therefore clear from the evidence that was adduced by the Prosecution that the Appellant was positively identified as having been an offender on the material night as the lighting conditions were conducive for positive identification, that he was in the company of his co-Accused, that they were armed with a sharp object and that during, immediately before and after the offence they wounded PW 1 and PW 3. The Appellant herein was also found in possession of a plastic container that contained assorted airtime cards at his house and that he even sold an airtime card to PW 4 on the same material night.
 23. The Trial Court was therefore correct to have invoked the doctrine of recent possession as the Appellant was positively identified as having been at the scene of the crime, he sold items that were stolen at the scene on the material night and that in fact the stolen items were subsequently recovered at his home the following day on 7th January 2016. The chain of events was unbroken.



24. The Trial Court also proceeded correctly when it found that all the ingredients of proving the offence of robbery with violence had been satisfied and hence convicted him accordingly. The Appellant's assertions that the case against him was not proved as was envisaged in the case of *Erick Amwata Onono vs Republic* [2016] eKLR thus fell by the wayside.
25. In the premises foregoing, Ground of Appeal No (2) of the Petition of Appeal was not merited and the same be and is hereby dismissed.

II. Sentence

26. Ground of Appeal No (1) of the Petition of Appeal was dealt with under this head.
27. The Appellant asserted that the sentence was manifestly excessive in circumstances. He submitted that he was entitled to the least severe punishment as provided in Section 179 of the *Penal Code* thus curtailing his rights under Article 24(1)(e) and Article 50(2)(9) of the *Constitution of Kenya*.
28. He also faulted the Trial Court for having meted on him two (2) sentences, the death sentence and a suspended sentence of five (5) years.
29. On its part, the Respondent submitted that the sentence was lawful as it was prescribed in Section 296(2) of the *Penal Code*.
30. Section 295 of the *Penal Code* states that:-

“ 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.”
31. Further, Section 296 (1) and (2) of the *Penal Code* provides 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.
32. Notably, on 6th July 2021, the Supreme Court of Kenya gave guidelines in the case of *Francis Karioko Muruatetu & Another vs Republic* (Supra) to the effect that the said decision only applied in respect to sentences of murder under Sections 203 and 204 of the *Penal Code* and that it was not applicable to capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the *Penal Code*.
33. The holding in the case of *Francis Karioko Muruatetu & Another vs Republic* (Supra) was inapplicable herein as the Applicant had been charged and convicted of the offence of robbery with violence and not murder as was emphasised by the Supreme Court in its aforesaid guidelines. Until such time that further directions were given in respect of sentences in robbery with violence cases, the hands of this court were tied and could only mete out the punishment that was presented by law, which was death. It could only mete out the punishment that was prescribed by the law, which was death.



34. In view of the fact that the Trial Court sentenced the Appellant to death, this court was unable to comprehend how the suspended sentence of five (5) years imprisonment was to be implemented as the same was to suspended awaiting execution of the death penalty or why it was being suspended. Indeed, the Appellant could not have served the five (5) years imprisonment after he had been executed. It was also not clear why the same was being suspended. There was a possibility of the death sentence being carried out immediately rendering a prison sentence unenforceable.
35. This court took the view that the Trial Court ought to have pronounced herself on the death sentence only and not imposed another sentence on the Appellant in the nature of imprisonment. The Trial Court had already determined that the only sentence that she could mete out upon him was death. Having convicted him on two (2) Counts, it could only have sentenced him to death once as he could not die twice.
36. A suspended sentence of five (5) years imprisonment was superfluous where the accused person had been sentenced to death. However, such a sentence would be suitable where such an accused person had been sentenced to more than one (1) term of imprisonment.
37. Having said so, this court did not find that the Appellant herein had been prejudiced merely because the Trial Court sentenced him to a suspended sentence of five (5) years' imprisonment alongside the death sentence as he had a more severe sentence awaiting him.
38. In the premises foregoing, Ground of Appeal No (1) of the Petition of Appeal was not merited and the same be and is hereby dismissed.

Disposition

39. For the foregoing reasons, the upshot of this court's decision was that the Appellant's undated Petition of Appeal that was lodged on 29th February 2020 was not merited and the same be and is hereby dismissed. The Appellant's conviction and death sentence be and are hereby upheld as they were both safe. However, the suspended sentence of five (5) years' imprisonment be and is hereby set aside and/or vacated as it would present challenges in the enforcement of the same.
40. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF OCTOBER 2023

J. KAMAU

JUDGE

