



REPUBLIC OF KENYA



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**Gatutha v Republic (Criminal Appeal E007 of 2022)  
[2023] KEHC 26168 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26168 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL E007 OF 2022  
DK KEMEL, J  
NOVEMBER 30, 2023**

**BETWEEN**

**GEOFFREY MUGO GATUTHA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Original Conviction and Sentence in Nanyuki  
CM Criminal Case No. 1168 of 2019 by Hon L. Mutai, CM)*

**JUDGMENT**

1. The Appellant in this appeal, Geoffrey Mugo Gatutha was convicted after trial for an offence of robbery with violence contrary to section 296(2) of the Penal Code wherein he was convicted and sentenced to twenty (20) years' imprisonment. The particulars were that on the 13/09/2019 at Meeting Point area Walazo Jet sub-location, Kieni East Sub-County within Nyeri County, while armed with a knife, robbed James Wanjohi Kingori Kshs.10,000/- and one jacket and immediately before the time of such robbery, used actual violence to the said James Wanjohi Kingori.
2. The Appellant has appealed against both the conviction and sentence. He filed a petition of appeal on 25/01/2022 but later amended the same by filing 'supplementary amended grounds of appeal' attached to his submissions. The grounds of appeal are as follows;
  - i. The learned magistrate erred by failing to appreciate that the prosecution did not connect the Appellant to the offence of robbery with violence.
  - ii. The learned magistrate erred by failing to note that the assault weapon was not produced to prove the alleged offence.
  - iii. That the entire prosecution's evidence was full of material contradiction, inconsistencies and was uncorroborated.



- iv. That the prosecution relied on single witness evidence.
  - v. The learned magistrate erred in failing to note that receipts for referral and admission of the complainant to Nyeri hospital were not produced.
  - vi. The learned magistrate failed to note that what was reported vide OB No. 06/14/09/2019 was at variance with the particulars in the charge sheet.
  - vii. The learned magistrate erred in failing to note that the Appellant was a layman and a pauper and could not represent himself adequately hence he was supposed to be given a counsel at State expense.
3. The appeal was canvassed by way of written submissions. In his submissions, the Appellant faulted the trial court for relying on a single witness evidence and pointed out that the complainant contradicted himself when he stated that he was from a shop when he got robbed, while on cross examination, he stated that he was from the shopping centre. That if the complainant sustained injuries, the same was as a result of the fight between the complainant and the Appellant at the bar. That the trial court failed to see the contradictions when the complainant testified that he did not scream or did not see the weapon and could not remember the clothes the Appellant was wearing during the attack despite the complainant testifying that security lights assisted him to see the Appellant.
  4. He submitted that the investigating officer failed to investigate the matter as he failed to interrogate anyone who was at the scene of crime; he did not visit the scene of crime; he did not recover anything from the Appellant and he failed to record the statement of the people he claimed had escorted the Appellant to the police station. He submitted that the charge of robbery was an afterthought as the investigating officer testified that the initial report was that of assault and that the complainant did not state that he lost any item during the assault. He argued that hospital documents were not produced apart from the P3 form and that he could not have attacked the complainant and then go looking for him the following day for reconciliation.
  5. He further submitted that he was not given a counsel despite his request to the trial court hence, there was breach of his fundamental right under Article 50(1)(h) of *the Constitution*. He submitted that his defence was dismissed without cogent reasons.
  6. The Respondent opposed the appeal. The Respondent's counsel submitted that the prosecution proved the ingredients of robbery with violence since it was in evidence that the complainant was robbed of his possessions and that the Appellant had a knife which was used to inflict injuries on the complainant and which injuries were confirmed by PW4. On identity, the counsel submitted that there was no error on recognition as the complainant used to see the Appellant at the meeting point area and that the Appellant did not deny that he was familiar with the complainant.
  7. The counsel submitted that the allegation that the Appellant was framed due to a fight that ensued at the bar was an afterthought as the same was only raised by the Appellant in his submissions. He did not cross examine the complainant on that issue therefore, his defence was properly rejected. As to inconsistencies, the counsel submitted that the inconsistencies noted by the Appellant did not erode the fact that the complainant was robbed and injured.
  8. On the issue of being denied a counsel at state expense, the counsel submitted that the same is not a violation of a right as legal representation at state expense is not a preserve for all. Reliance was placed in the case of *Karisa Chengo & 2 Others vs R* (2015) eKLR. Furthermore, the Appellant participated in the trial by cross examining all the witnesses hence he did not suffer any prejudice. On the sentence, the



counsel submitted that the sentence of 20 years was lenient considering the fact that the complainant was seriously injured.

9. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
10. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court in order to evaluate all the evidence tendered before it and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.
11. In order to prove their case, the prosecution called four witnesses. PW1 James Wanjohi was the complainant. He testified that on the material day at 10:00 p.m. he met Mugo, the Appellant at the meeting area while he was coming from the shop. He saw him well as there were security lights. The Appellant took his Kshs.10,000/- and his black jacket. He stabbed him with a sharp object on the left chest and on the left upper hand. He was taken to hospital by good Samaritans and by that time, the Appellant had disappeared. He reported the matter to the police and was issued with a P3 form which he identified in court. He testified that he was admitted in hospital for five days. He testified that the Appellant was arrested after two days by members of the public. He stated that he knew the Appellant as he used to see him at the meeting area. He testified that he had not differed with the Appellant.
12. On cross examination, he denied differing with the Appellant and he stated that he was not drunk and could not tell if the Appellant was waiting for him at the meeting area and that he did not talk to him before attacking him. He testified that he was alone when the Appellant attacked him and repeated that the Appellant took his Kshs.10,000/- and a track jacket. He stated that he did not see the weapon and did not scream and could not remember what the Appellant was wearing. He testified on re-examination that he saw the Appellant well.
13. PW2 Simon Ndungu stated that he received a call and was informed that his uncle, the complainant had been stabbed at the meeting point area. He met the complainant at the Munyu hospital but they were referred to Nyeri Hospital. He testified that the Appellant was recognised by the complainant and that the Appellant was arrested when he requested for reconciliation through him but he told him that he could not act for the complainant in the matter. He stated that there are security lights at the scene of crime. He testified on cross examination that the Appellant was not arrested with anything relevant to the case.
14. PW3 was the investigating officer. He testified that he was at the police station when members of public escorted in an injured person who had stab wounds on the chest. He referred him to hospital. On a later date, the members of public escorted the Appellant to the police station. He rearrested him and recorded the witness statements. He testified that the complainant reported that he was at the meeting point where he met the Appellant who attacked him before taking his jacket which had Kshs.10,000/- He stated that he did not recover anything from the Appellant.
15. On cross examination, he testified that the OB of 6/14/9/2019 indicated assault but by then he had not talked to the complainant. He stated that the weapon was not recovered and that the charge of robbery was not an afterthought. He testified that when the complainant was taken to the police station, he could not talk. On re-examination, he testified that the initial report was that of assault but that the investigations led to the offence of robbery with violence.
16. PW4 was the clinical officer who filled the P3 form. He stated that the complainant had a stab wound on the chest and that the probable weapon was a sharp object. He produced the P3 form as exhibit 1.



17. The Appellant was placed on his defence whereupon he tendered a sworn testimony and called one witness. He testified that he comes from Walazo Jet and that he is a boda boda rider. He stated that on the material night, he entered into a club and that the complainant approached him and asked about whereabouts his (complainant's) wife. That the complainant's wife was his customer and that he had no idea that she was the complainant's wife. That a fight ensued and that he was injured on the right shoulder and on the left small finger which prompted him to leave the club. He was arrested the next day by the complainant's relatives while he was on his way to hospital. He was taken to the police station where he was accused of the incident. He stated that he was asked to compensate the complainant but he refused.
18. On cross examination, he testified that he fought with the complainant but did not report since he was not given an opportunity to do so.
19. DW2 Peter Njuguna was the Appellant's nephew. He testified that he was present when the Appellant and the complainant fought. He stated that he was informed about the fight since he was seated in another section from where the Appellant sat. He stated that the Appellant and the complainant sustained injuries. The Appellant left with his motorbike while the complainant was chased away by the bar owner. On cross examination, he testified that the fight occurred in his absence.
20. That was the totality of evidence before the trial court. The Appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code hence it was the duty of the prosecution to prove that the Appellant was either armed with dangerous or offensive weapons or that he was in company of one or more person or that he wounded, beat or used personal violence to the complainant. What the prosecution need is to prove is either of the above elements. Proof of one element is sufficient to establish the offence of robbery with violence. See *Oluoch -vs - Republic* [1985] KLR.
21. In the instant case, the evidence reveals that the complainant was robbed of his jacket and his money amounting to Kshs.10,000/-. In the process of robbery, he was stabbed with a sharp object and was taken to hospital. The P3 form produced as Pexhibit1 shows that he had a stab wound on the anterior chest and that the probable type of weapon used was a sharp object. Therefore, the prosecution proved two ingredients of robbery with violence.
22. As to identification of the assailant, the Appellant did not fault the fact that he was familiar with the complainant. He actually stated that he had a fight with the complainant at the club on the material night. The complainant testified that on the material night, he met the Appellant at the meeting area. With the aid of security lights at the meeting area, he was able to see the Appellant properly. He testified that he knew the Appellant previously. It therefore follows that identification was by way of recognition.
23. It has been held in numerous cases that recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other, See *Anjononi & 2 Others v Republic* [1980] eKLR. However, this is not to suggest of course, that cases of misrecognition cannot occur and courts are still duty-bound to examine such evidence with great care
24. The Court of Appeal in the case of *Joseph Muchangi Nyaga & another v Republic* [2013] eKLR stated that before acting on evidence of visual recognition, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the suspect and time taken by the witness to observe the suspect so as to be able to identify him subsequently.



25. The evidence before the trial court was that it was around 10:00p.m. when the complainant was attacked. The complainant testified that at the meeting area where he was attacked, there were security lights which aided him to see the Appellant. He did not state the proximity the Appellant was, the intensity of the light and how much time it took him to recognise the Appellant. It therefore follows that the court has to scrutinize the above to see whether the Appellant was properly recognised by the complainant.
26. The evidence of the complainant was quite consistent regarding his encounter with the appellant. He had been seeing him in the area and that the appellant and his witness confirmed having fought with him on the date in question. Further, the complainant's uncle (Pw2) testified that the appellant later approached him and requested him to intervene and convince the complainant to agree to a reconciliation over the incident. I am satisfied complainant that the appellant was squarely placed at the scene of crime and that the presence of security lights left no doubt that the recognition of the appellant by the complainant was free from error.
27. The Appellant faulted the trial court and submitted that he was convicted on single witness evidence; that there were contradictions; investigation was not carried out; that he was not given a counsel during trial despite his request to be accorded one and that his defence was not considered.
28. It is trite law that evidence of a single identifying witness can still prove a fact in a criminal trial thus leading to a conviction. In *Robert Onchiri Ogeto v Republic* [2004] KLR 19, the Court of Appeal stated:
- “It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”
29. See also *Roria v Republic* [1967] EA 583, where the court warned on the dangers of convicting on the evidence of a single identifying witness, stating:
- “A conviction resting entirely on identity invariably causes a degree of uneasiness... That danger is, of course, greater when the only evidence against an accused person is identification by one witness and though no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”
30. The trial magistrate in her judgment clearly cautioned herself and found that though the evidence was that of sole identifying witness, the complainant's evidence remained unchallenged by the defence. The trial court also further held that the evidence of PW2 that the Appellant approached him seeking reconciliation with the complainant was also not challenged by the defence. Furthermore, the complainant was cross examined by the Appellant and his evidence was not shaken and remained consistent.
31. As to contradictions, the Appellant stated that the complainant contradicted himself when he stated that he was coming from the shops in examination in chief while on cross examination, he stated that he was coming from the shopping centre.
32. This leads to nothing as this does not negate the fact that the complainant was attacked and robbed on the material night. Also, not every contradiction warrants rejection of evidence. The court will ignore the minor contradictions if they do not affect the main substance of the prosecution's case.



33. The Appellant claimed that investigations were not carried out in that the investigating officer failed to interrogate people who were at the scene; that he did not visit the scene of crime; that he did not recover anything from the Appellant and that the investigating officer failed to record the statements of people who escorted the complainant to the police station. He also argued that the charge of robbery with violence was an afterthought as the initial OB revealed that a report of assault had been made.
34. PW3 was the investigating officer and he testified that he visited the scene of crime. He confirmed that nothing was recovered from the Appellant. He testified that the complainant was taken to the station by people but did not state whether he recorded the statements of those people or not.
35. The complainant did not state in his testimony that there were people at the scene of crime when the Appellant attacked him. He testified that he was taken to hospital by good Samaritan and this happened after the Appellant had left. Therefore, there was no one at the scene whom the investigating officer could have recorded statement from. As for failure to record the statement of the people who escorted the complainant to police station, this does not affect the prosecution's case in any way as the witnesses who testified before the court were sufficient to prove the case of robbery with violence. In any case, there is no hard and fast rule that the prosecution must call a multitude of witnesses to prove a fact if the few called could do so. Hence, the failure to call other members of public to testify did not weaken the prosecution's case in any way.
36. As to the charge of robbery with violence being an afterthought, PW3 clearly answered this question when he stated that the initial OB indicated that the case was that of assault. He however stated that when the complainant was taken to the station, he could not talk but after investigations and examination of the complainant by the doctors, the charge of robbery with violence was preferred. The appellant's contention in this regard is misplaced since the initial charge had been preferred as a holding charge pending the proper charges upon the examination of the complainant's injuries by the doctor. Indeed, the evidence tendered by the prosecution supported the charge of robbery with violence as preferred against the appellant.
37. The Appellant claimed in his submissions that his defence was not considered by the trial court. This is not true since the trial court rightly considered his defence and termed it as an afterthought. The trial court also considered the testimony of DW2 and found it to be incredible since DW2 did not witness what may have unfolded between the complainant and the Appellant.
38. I have also considered the said defence and it is my view that the same was a sham. It was raised too late in the day and was not put to the witnesses when they testified. Such a defence ought to be put to the witnesses so that they can have an opportunity to give their side. Failure to raise it when cross-examining the witnesses leads to the inevitable conclusion that it is an afterthought which cannot possibly be true.
39. As to the fact that he was denied a counsel at State expense, the record shows that when the Appellant made an application to be given a counsel, the file was forwarded to the chairman of the probono committee who considered the Appellant's right as enshrined under Article 50(1)(h) of *the Constitution*. The chairman rejected the Appellant's application on account of budget constraints and on the ground that the Appellant had not advanced a good reason in support of his application. In doing so, the chairman was guided by the decisions in *Karisa Chengo & 2 others vs R* (2015) eKLR and *S v Halgryn* 2022(2) 211 SCA where it was held inter alia that a right to representation is not an absolute right and is subject to reasonable limitation. Indeed, the appellant participated fully in the trial and cross-examined the witnesses at length and even tendered his defence. I find that he was not prejudiced in any way whatsoever.



40. As to the sentence, it is trite law that sentencing is a discretion of the trial court and that an appellate court will not easily interfere with the discretion of the trial court on sentence unless it is shown that in exercising its discretion, the court acted on a wrong principle; failed to take into account relevant matters; took into account irrelevant considerations; imposed an illegal sentence; acted capriciously or that the sentence imposed was harsh and excessive. (*Ogolla S/o Owuor v R* {1954} EACA 270).
41. The Appellant was sentenced to twenty (20) years' imprisonment. The charge of robbery carries a death sentence. The Appellant in his submissions did not fault the sentence that was meted upon him. It is my view that the sentence was lenient considering the circumstances of the case.
42. In the result, it is my finding that the appeal is devoid of any merit. The same is dismissed.

Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA (VIRTUALLY) THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**D.KEMEI**

**JUDGE**

**In the presence of :**

Geoffrey Mugo Gatutha Appellan

Miss Kimani for Respondent

Savuni Court Assistant

