



REPUBLIC OF KENYA



**Kihonge v Republic (Criminal Appeal 30 of 2020)
[2023] KEHC 26127 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 26127 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 30 OF 2020
CW GITHUA, J
NOVEMBER 28, 2023**

BETWEEN

RURU KIHONGE APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal against the conviction of Hon. M. Kinyanjui, PM, dated the 13th day of January, 2020, in the Principal Magistrate's Court at Kandara in Criminal Case no. 73 of 2018)

JUDGMENT

1. The appellant herein, Ruru Kihonge was tried and convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code.
2. The particulars of the offence alleged that on 29th December 2017 at around 0300 hours at Kaburugi village within Murang'a County, being armed with a dangerous weapon, namely a sword, the appellant robbed David Kiarie Karanja of one mobile phone make Techno N25 IMEI No. 3581100754xxx valued at Kshs 15,000/= ,Afrigas 13 kg Cylinder valued at Kshs 8,500, a CCTV machine (Hard drive) valued at Kshs 17,000/= and cash Kshs 7,000 and immediately before or after such robbery, he wounded David Kiarie Karanja.
3. Upon conviction, the appellant was sentenced to serve 4 years imprisonment. He was aggrieved by his conviction and sentence hence this appeal.
4. In his petition of appeal dated 23rd October, 2020 filed by his then Advocate Ms. Njuki Kariuki & Co Advocates, the appellant relied on nine grounds of appeal which were for the most part a duplication of each other. The grounds read as a whole reveal that the appellant's main complaints were that the learned trial magistrate erred in law and fact by : convicting him on evidence which did not prove the charge preferred against him beyond any reasonable doubt; shifting the burden of proof from the



prosecution to him; and; failing to appreciate that his constitutional rights to a fair trial were violated during the trial.

5. The brief facts of the prosecution case is that on the night of 29th December 2017 at around 2 a.m, PW1 David Kiarie Karanja and his wife Carrie Wambui (PW2) were asleep in their house.

They were an elderly couple who were living in the house alone.

According to PW1, at the material time, he opened his eyes and saw that lights in the bedroom and nearby corridor were on although they had switched them off before they slept. As he was going to switch off the bedroom lights, he found someone standing in the bedroom. His face was covered with a “shuka”(bedsheet). The person started beating him up and extended the assault to PW2 when she started screaming. He then ordered her to go to an adjoining room and remain there which she did.

6. PW1 further recalled that the intruder asked him to lead him to the shamba where he was going to kill him.

He was led out of the bedroom and on reaching the corridor, the intruder ordered him to lie down so that he could cut his neck. He complied and lay on his back. As he was bending down pinning PW1’s head to the floor, the shuka fell off and as the lights in the corridor were still on, PW1 was able to see and recognise his assailant as the appellant herein who he had known since he was a child given that he was their next door neighbour. Their two homes shared a boundary and they were only about 50 meters apart.

7. The other reason PW1 gave for recognizing the appellant as his assailant is that when the shuka fell, the appellant did not bother to put it back. He instead ordered PW1 to accompany him to the garage where he ordered him to drive his Datsun 121.

Before going to the garage, on the appellant’s instructions, he loaded his gas cylinder into the vehicle. The appellant sat at the vehicle’s rear left side and ordered him to drive the vehicle out of the compound which he did. PW1 stated that though his vehicle’s headlights were off, he was able to drive the vehicle because there was a full moon.

8. It was PW1’s further testimony that on getting to the main road, he deliberately drove the vehicle into a ditch near the appellant’s home to avoid being killed far from home. He was not injured and when he got out of the vehicle, the appellant directed him to remove the gas cylinder which he did and he placed it at the gate of the appellant’s home before going back to his home. On arrival, he discovered that Kshs 7,000 he had kept in a coat in his bedroom together with a techno phone and a CCTV recorder had been stolen.

9. PW2 on her part recalled that on the material date and time, she turned in her sleep and realised that she was in bed alone. On looking around, she saw PW1 lying on the floor and before she could speak, a person addressed her asking her for money. She said she had no money and started screaming. The stranger ordered her to stop screaming. She watched as PW1 was led out of their bedroom. According to PW2, she was able to identify the intruder through his voice which she recognised as that of “Ruru”, the appellant who was their immediate neighbour.

She claimed that she had heard and knew his voice previously because the appellant was her children’s agemate and they had been raised together. Though she was certain that some items were stolen from their house, she could not tell the specific items that were stolen.

10. On the same day of the incident at around 6 P.M, both PW1 and PW2 reported the robbery to PW4, Sgt. Munene Watia at Kandara Police Station. PW4 recalled that PW1 and PW2 reported that they knew who the culprit was and gave him his name but they declined to include it in their statement



apparently because they feared for their security. He later visited the scene and discovered that entry into the couple's house was gained through a window. He recalled that when he visited the scene, he found PW1's vehicle in a ditch. Appellant was later arrested by the area O.C.S and was charged with the offence for which he was convicted. When questioned in cross-examination, PW4 testified that when making his report, PW1 told him that he had known the appellant since he was young.

11. When placed on his defence, the appellant chose to give an unsworn statement and called his wife as a witness.

He denied having committed the offence as alleged claiming that it was a fabrication by PW1 who wanted to reclaim the money he had paid him as compensation for damage caused to his toilet and wall after PW1's trees fell on them. He confirmed that he enjoyed a cordial relationship with PW1 and his family.

His wife also confirmed having heard screams from PW1's house on the night of 29th December 2017 but claimed that the appellant did not leave their house that night.

12. When the appeal came up for hearing, both the appellant and the respondent chose to prosecute it by way of written submissions.

The appellant filed his submissions on 30th January 2023 through his advocates, Ms. Kirubi, Mwangi Ben & Company Advocates while those of the respondent were filed on 17th January 2023 by learned prosecution counsel Ms. Winnie Otieno.

13. This being a first appeal to the High Court, I am conscious of my duty as the first appellate court which is to subject the evidence adduced before the trial court to a fresh and exhaustive analysis to arrive at my own independent conclusions bearing in mind that I did not have an opportunity to hear or see the witnesses.

See: Mwangi V Republic [2014] KLR 28; Simiyu V. Republic [2005] 1 KLR 192.

14. With the above duty in mind, I have considered the grounds of appeal, both parties rival written submissions together with the authorities cited. I have also read the evidence on record and the Judgement of the trial court.

Having done so, I find that the only issue arising for my determination is whether the prosecution proved its case against the appellant beyond any reasonable doubt as required by the law.

15. A reading of Section 296(2) of the Penal Code reveals that for the offence of robbery with violence to be established, the prosecution must prove beyond reasonable doubt the following essential ingredients of the offence. These are;

- i. That the accused was armed with a dangerous or offensive weapon or instrument; or
- ii. That he was in the company of one or more persons; or
- iii. At or immediately before or after time of the robbery, the accused wounded, beat, struck or used any other violence on any person.

16. It is now settled that it is not necessary for the prosecution to prove all the above ingredients together in order to sustain a conviction for the offence. Proof of any one of them is sufficient to prove the offence. See; Johana Ndungu V. Republic [1995] KLR 387; Jairus Mokulwe Ochieng V. Republic [2013] eKLR.

17. In this case, there is evidence from PW1 and PW2 that an armed intruder broke into their house, assaulted them and stole the items stated in the charge sheet. It is clear from the evidence on record



that the prosecution's case was based solely on identification evidence since the stolen items were not recovered.

18. The law is that where the prosecution case rests entirely on evidence of identification or recognition, the trial court is enjoined to thoroughly and cautiously interrogate such evidence to ensure that it did not leave any room for doubt regarding the identity of the perpetrator. The evidence must be watertight and should not create any impression on the mind of the court that a possibility existed for mistaken identity.
19. The court of Appeal in *Wamunga V Republic* [198..] KLR 424 emphasized this legal position and stated as follows:

“It is trite law 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.”
20. In *Kiarie V. Republic* [1984] KLR 739 , the same court gave the rationale for need to carefully weigh the evidence of the alleged identification or recognition before making it the basis of a conviction. The court expressed itself thus;

“it is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction”
21. In *R V Turnbull* [1976] 63 Cr. App R. 132 and in *Wamunga V. Republic* (Supra), the factors that a trial court should consider when determining whether the circumstances of the alleged identification were conducive for a reliable and positive identification or recognition of the culprit were enumerated as follows;
 - i. The length of time the witness had the accused under observation and in what distance and light.
 - ii. Whether observation of the witness was impeded in any way.
 - iii. Whether the witness had seen the accused before, and if so, how often.
 - iv. The length of time that elapsed between the original observation and the subsequent identification to the police.
 - v. Whether there is any material discrepancy between the description given by the witness and the actual appearance of the accused.
22. In convicting the appellant, the learned trial magistrate stated, interalia, as follows:

“.....PW1 stated that he had known the accused all his life and was accused's father's agemate. Accused confirmed he lived next to PW1.PW1 and PW2 had no reason to frame the accused. These are elderly people and I so no such motive. Accused said PW1 framed him because they had a grudge once over trees that damaged his property but he confirmed PW1 compensated him and he now thinks PW1 is revenging (sic) which I find absurd.”



23. The learned trial magistrate continued to state as follows on the issue of identification;

“...Though none of the stolen items were recovered, I am convinced by PW1’s evidence that he saw his attacker who is the accused. He said he even drove with the accused in the car and I believe he had enough time to identify the accused. Further he knows the accused since he was a young boy and see no reason for PW1, an 83 years old man to frame the accused... I am convinced he is the one who violently robbed the complainant. He was armed and assaulted PW1 which was corroborated by the doctor’s evidence and I do find the prosecution has proved its case to the required standard and I proceed to convict the accused as herein charged under section 251 of the CPC.”

24. I have deliberately reproduced the judgement of the trial court at length to demonstrate that in arriving at her decision, the learned trial magistrate carefully evaluated the evidence placed before her including the appellant’s defence and appreciated the essential elements of the offence which the prosecution was required to prove beyond reasonable doubt in order to secure a conviction. The learned trial magistrate considered the circumstances under which the appellant was identified as the culprit and concluded that he was properly and positively identified; that his was a case of recognition since it was not disputed that PW1 and the appellant’s family had been neighbours since the appellant was a child and they therefore knew each other very well. The learned trial magistrate after considering the appellant’s defence dismissed it finding it to be implausible when compared with the evidence of PW1 and PW2 whose evidence she believed and accepted finding that they were reliable and truthful witnesses. On my part, I find no reason to fault the learned trial magistrate’s finding on PW1 and PW2’s credibility since she is the one who had seen the witnesses as they testified.

25. On my own independent appraisal of the evidence, I find, just like the learned trial magistrate, that it was not disputed that the appellant and PW1 were immediate neighbours and PW1 had known the appellant since his childhood. PW1 was clear and straightforward in his evidence that he saw and recognised the appellant as the robber when the shuka he had used to cover his face fell off when he was bending over him as he lay on his back on the corridor. He saw his face through electricity lights. As he was facing upwards given that he had been lying on his back, I find that in this position, he was in a position to see his assailant’s face at a very close range and given the many times PW1 must have seen the appellant as he grew up in his immediate neighbourhood, I find that his recognition of the appellant as the person who robbed him that fateful night was both reliable and most satisfactory. Having seen his face at close quarters and having interacted with him as he drove him in his vehicle in the moonlight, I find that though the offence was committed at night, the circumstances in this case were conducive to a correct and positive identification/ recognition of the appellant as the perpetrator of the offence. There was no room for any possibility of error.

26. Although PW2 had testified that she had also identified the appellant through his voice when he addressed her before leading PW1 out of their bedroom, the learned trial magistrate based her conviction of the appellant more on the visual recognition of the appellant by PW1.

27. Lastly, the appellant’s argument that his identification by PW1 was not positive or reliable because no identification parade was conducted after he was arrested is misconceived since this was a case of recognition not identification of a stranger and conducting an identification parade in such a case was not necessary. I am fortified in this finding by the recent decision of the Court of Appeal in *Katana & Another V. Republic* [2022] KEC 1160 (KRL) where the court held that:

“... it is also notable that an identification parade is not necessary where the witness is positively confident at the time of commission of the crime as to the identity of the



perpetrator of the offence and will only become necessary where the victim of the crime did not know the accused before his acquaintance with him during the commission of the offence, or identification was made under difficult circumstances such that the witness may have made a mistake.....”

I am also unable to find on record any evidence that any of the appellant constitutional rights were violated during the trial as claimed by the appellant.

28. For all the foregoing reasons, I have come to the conclusion that the learned trial magistrate was right in her finding that the appellant was positively identified as the person who robbed PW1 at the material time while armed with a dangerous weapon, namely, a sword and that at the time of the robbery, he assaulted PW1 and PW2 as shown by the evidence of PW3. I am thus satisfied that the prosecution proved its case against the appellant beyond any reasonable doubt and that the appellant was properly convicted.
29. On sentence, though the appellant did not strictly speaking appeal against his sentence, he requested this court to set it aside. The prosecution urged me to uphold the sentence arguing that it was very lenient given that the offence attracted the death penalty.

Although I agree with the prosecution that the law provided for a mandatory death sentence for persons convicted of the offence of robbery with violence and in this case the appellant was sentenced to four years imprisonment, I am not persuaded to either set aside or enhance the sentence given that in imposing the sentence, the learned trial magistrate appears to have been guided by the principle enunciated by the Supreme Court in Francis Karioko Muruatetu & 5 others V. Republic [2017] KLR (Muruatetu one) which courts were at that time applying to all cases for which the law prescribed mandatory sentences including cases of robbery with violence. This was before the Supreme Court clarified its position that what it had declared to be unconstitutional was the minimum mandatory death sentence provided for by the law for the offence of murder and not minimum mandatory sentences prescribed for other offences. In any event, the prosecution did not file a cross appeal challenging the said sentence.

30. In the result, the sentence imposed by the trial court is confirmed. The court record shows that the appellant has been out on bond pending appeal and now that his appeal has been concluded, the said bond is hereby cancelled. The appellant shall continue serving the sentence imposed by the trial court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 28TH DAY OF NOVEMBER 2023.

C.W GITHUA

JUDGE

In the presence of:

The Appellant

Ms. Muriu Prosecution Counsel

Mr. Kirubi holding brief for Mr. Mwangi Ben for the Appellant

Mr. Quinteen Court Assistant.

