



REPUBLIC OF KENYA



**Kilemi v Republic (Criminal Appeal E126 of 2022)  
[2023] KEHC 25789 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25789 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CRIMINAL APPEAL E126 OF 2022  
EM MURIITHI, J  
NOVEMBER 28, 2023**

**BETWEEN**

**SAMSON KILEMI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. F.K  
Munyi PM in Tigania criminal case No. 28 of 2019 delivered on 8/9/2022)*

**JUDGMENT**

1. The appellant herein was charged with robbery with violence contrary to section 296 (2) as read with section 295 of the *Penal Code*. It was alleged that on the 9<sup>th</sup> day of June 2019 at K.K Kengechia village in Tigania West Sub-county within Meru County, being armed with dangerous weapons namely panga and a walking stick robbed Jacob Kithure of his Ksh. 1000/= and at, immediately before or, immediately after such robbery used actual violence thereby occasioning him actual bodily harm.
2. He denied the charges but upon full trial, he was convicted and sentenced to death.

**The Appeal**

3. On appeal, the appellant raised 10 grounds of appeal as follows:
  1. The learned trial magistrate erred in law and fact by failing to note that the exhibit adduced before court was not found in possession of the appellant.
  2. The learned trial magistrate erred in law and fact by failing to note that the complainant in his first report indicated that the charge was assault not robbery.
  3. The learned trial magistrate erred in law and fact by failing to note that the appellant was fighting with his uncle, thus this charges are the dispute of family members



4. The learned trial magistrate erred in law and fact by failing to note the appellant was framed because of a land dispute.
5. The learned trial magistrate erred in law and fact by failing to note that the prosecution failed to prove the offence of robbery with violence to the required standard of beyond reasonable doubt.
6. The learned trial magistrate erred in law and fact in convicting the appellant based on inconsistent and contradictory evidence.
7. The learned trial magistrate was selective in her analysis of her evidence and left out crucial evidence which had she considered she would not have convicted the appellant.
8. The learned trial magistrate failed to properly caution herself before relying on the evidence of a single witness to convict.
9. The sentence meted out on the accused was harsh and excessive.
10. The learned trial magistrate erred in law and fact in failing to take into account the appellant's defence.

### **Duty of Appellate Court**

4. The duty of this court as the first appellate court is to re-evaluate the evidence on record and draw its own independent conclusions, bearing in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. (See *Okeno v R* (1972) EA 32).

### **Evidence**

5. PW1 Jacob Kithure and the complainant herein aged 62 years testified on oath that,

“On 9<sup>th</sup> June, 2019 I recall that it was around 2.00 p.m. I was with my late wife Stella Kabiritho heading to Mwangaza area to buy children wire. I was ahead of my wife by a few metres and I met Samson Kilemi who was armed with a Somali sword. Samson demanded to know why my son had addressed him in English and I responded that I was not present when that was happening. Samson then hit me with a club he was holding on the head and I fell down. As he swung another blow I fended it off with my left hand which got hit and broke. Samson then hit me again with the club on the left leg. He then raised the Somali sword and demanded that I surrender cash. I yielded and told Samson that he could remove the cash from the trouser pocket. He removed Ksh.1,000/= from my trouser pocket and left. I rose up and wiped blood from my head. I followed Samson so as to warn my wife of danger because he was headed in her direction. When Samson met my wife he hit her with the club on the neck and I saw her fall. Samson then shoved the stick in my late wife's vagina. My wife had Kshs. 800/= secured in a knot in her wrap around and I saw Samson take away the cloth. Charles Meme who was herding goats nearby witnessed the incident. Charles my wife and I screamed and that is when James M'Mwitari arrived. James assisted my wife and I to Isiolo police station where we reported the incident. We were referred to Ngundune police station. I was treated at Isiolo hospital where my hand was bandaged. I returned to Ngundune police station where I was issued with a P3 form which was filled in hospital. The document is before court. P3 form PMFI 1. My wife developed complications over her vaginal injuries and succumbed to them. Samson has a case at the High Court over my



wife's death. Samson is seated there (pointing at Accused). I know him quite well being my nephew. He is a son of my brother.”

6. On cross examination, he stated that,

“You never inquired from me as to why my son Martin had damaged your fence. You were armed with a Somali sword and not a machete. It is not true that when you struck me with the stick the first time I fainted. I was all conscious and that is why I fended off the subsequent blows that you lashed out at me. I had walked for about 800 metres before meeting the accused. I was ahead of my late wife by about 70 metres when I met the accused who is my nephew. I was all alone when I met the accused but there was an old man herding goats besides the road who I know as Charles Meme. Charles is the one who screamed when he saw me being assaulted by the accused. The accused is the son of my late brother, Joel Mwamba. I was left as trustee of family land when Joel died. I am the one who took the accused from where his mother had abandoned him when he was a small boy. I allocated the accused 6 acres to cultivate. The accused and I have no other cases before our elders or before court. I am not out to usurp the accused's land. I have not chased his wife out of the land after he was charged before court. The accused has never asked me for cash. I am not out to fix the accused in order to take his land because I am the one who gave him that land in the first place. The other person who arrived when I was being beaten by the accused was James Mwitari who emerged from the Isiolo direction. He stood afar fearful of the accused who was armed. A lot of people showed up at the scene drawn by the commotion. I do not recall when I reported the incident to the police. I did not have the blood stained clothes when I had the P3 form completed at Miathene hospital. ”

7. PW2 James Mwitari, a resident of Isiolo and a mason gave sworn testimony that,

“On 9<sup>th</sup> June 2019 at around 2.00 p.m I was headed to the home of Jacob Kithure from Isiolo. As I walked to Jacob's home I found him being beaten at KK area near a dam. I saw this from a distance of 70 metres. Jacob was with some herdsmen. He was lying down and the assailant who was armed with a stick fled. The assailant met Kithure's wife Stella and began whipping her with the stick until she fell down. I ran to where Stella was and I saw Jacob insert the stick in Stella's private parts. I saw this from a distance of 20 metres. The assailant was someone I did not know. I do not know his name. I do not see hi, before court today. After that I proceeded on my way. I left other people to take the injured Jacob and Stella to hospital. Stella has since passed away.”

8. On cross examination, he stated that,

“I had not reached Jacob's home when I encountered the incident. Jacob's homestead was a kilometer away from the scene. I saw over 10 people at the scene out of whom I knew 3 or 4 of them. I saw Kamwilu, Meme and Kamwilu's 3 children whom I recognized at the scene out of the over 10 people. I saw Kamwilu and Meme lived nearby in the neighbourhood. I met Jacob having already been assaulted and the assailant having already fled. I am not aware of what occasioned the violence. I approached the assailant when I saw him attack Stella. It is the crowd of people I met who told me that the person attacking Stella was the same one who had assaulted Jacob. Stella was behind Jacob and both were headed towards Isiolo side from the direction of their home. I heard Stella cry out that her money had just gone. She did not announce the amount and I did not see the money being stolen. I cannot tell



whether the money was in the bag or her wrap around. The assailant is not before court today and I do not see him.”

9. On re-examination, he stated that,

“I have told the court what I saw and not what I was told.”

10. PW3 Charles Meme, a resident of Isiolo and a herdsman gave sworn testimony that,

“On 9<sup>th</sup> June 2019 at around 1.00 p.m I recall that I was herding livestock at Nguainthethia area of Isiolo when I saw a fight involving 3 people at a nearby road. Out of the 3 people was a woman. I identified 2 of them as Stella and Kithure. I went to remove my livestock from a nearby farm where they had strayed and when I returned I saw Kithure and Stella had already been beaten. I saw all this from a distance of 30 metres. The assailant was armed with a stick. I did not go to the rescue of the victims. It is true that I recorded a statement with the police. I did not identify the assailant. I know that Stella died soon thereafter.”

11. On cross examination, he stated that,

“I was in the bush herding cattle. Kithure was walking ahead of his wife by a short distance when the incident took place. I could not hear what Kithure and Stella were saying. I did not know the assailant’s name.”

12. PW4 Dr. Mbaabu Adams of Miathene sub county hospital produced the complainant’s P3 form filled on 18/8/2019 by Dr. Muthomi. On examination, the patient had cut wound on the head 2 4 cm, swelling and tenderness on the left hand, swelling and tenderness on the left leg and an x-ray revealed a fracture of the radial-ulna. Both blunt and sharp objects were used to inflict the injuries and the degree of injury was harm.

13. PW5 Cpl Joseph Mburugu of DCI Tigania West testified on oath that,

“On 17<sup>th</sup> October 2019 a report was made at our station to the effect that Stella Kabiritho had died. The matter was handed over to us by the OCS who had first investigated the case and charged the suspect Samson Kilemi with the offence of assault. After going over the investigations I established that Stella and her husband, Jacob Kithure were walking towards Isiolo from KK village a few places apart when they met Samson with whom they got into a confrontation. Samson demanded to know why the couples son had broken his fence and when Jacob answered that he did not know Samson hit him with a stick on the forehead sending him sprawling on the ground. That was when Samson demanded cash from Jacob and relieved him of Ksh. 1,000/= . Several witnesses saw the incident 2 of them who recorded statement that after assaulting Jacob Samson turned to Stella whom he confronted and hit her on the neck with a stick sending her to the ground. Samson then demanded and stole Kshs. 800/= from Stella. Both victims were assisted to the local police station by good Samaritans. After reviewing investigations I decided to enhance the charges against Samson to Robbery with Violence and Sexual assault in relation to the victims Jacob and Stella respectively. After the demise of the deceased Samson was charged with a homicide. The suspect was arrested on 19<sup>th</sup> September, 2019 by PC Abuga but nothing significant was recovered from him. I had the suspect record a statement under caution in which he denied the offence. The suspect was related to both victims. Samson is seated there (pointing at



accused) he was unknown to me prior to this case. A P3 form issued to Jacob and duly completed in hospital is before court.”

14. On cross examination, he stated that,

“I do not know the place of your arrest as at the time of taking over investigations you were already in custody. It is true that I visited the scene but found nothing of value because it had been tampered with my visit having been made long after the offence. Jacob is the one who led me back to the scene. The first report made at Isiolo police station was one of assault of the victims and upon completion of investigations I preferred the substituted charges.”

15. When put on his defence, the appellant, Samson Kilemi gave sworn testimony that,

“I live at K.K Kengechia. I am a farmer. I was charged in court by Jacob Kithure who alleged that I had beaten him (charges read to the accused) its not correct. My uncle is my neighbour. He always sees faults with me. My mother got married elsewhere and left me. The assistant chief called me and requested me to go to Ndundune. I wasn't aware that my uncle had complained about me. Jacob Kithure is my uncle. His wife came and identified me. I exhausted everything because of this case. In October, 2019 he chased away my wife alleging that I am not one of them. He came with a tractors and chased her with the children. I was in custody. On 17<sup>th</sup> October, 2019 his wife died. He complained about me. I was taken to Meru. Later he alleged that I had burnt his house. He did it. I was arrested with my wife. I was released on bond. Once I was released from custody on 2.8.21 I wrote a letter to the ODPP and it was realized that I was not to blame. This is the letter (DMFI 1) (Dexh 1). I got a response. In 2014 my uncle realized his livestock to my parcel of land and crops were destroyed. I reported the matter to the police OB NO. 36/13/10/14. An agricultural officer carried assessment of damage Dmfi 2 (Dexh.2). He defames me. I respect myself. I have a family and I am respected in the community. I was a police reservist. I was guarding my community from the chief (DMFI. 3) produced as exhibit Dexh.3. He also put a caution on my parcel of land and so I cant do anything. He was summoned but he failed to appear. I have copies of summons (MF1 49a) & (b) Dexh. 4). I urge the court to consider the matter. He accused me falsely and has caused me to suffer. His son can come to testify. I am suffering.”

16. On cross examination, he stated that,

“Jacob Kithure is about 62 years. He is an elderly person. He is a brother to my father (deceased) we live in the same place. There has been ill feeling between my uncle and I since 2014. He released his livestock to my parcel of land. I used to be a police reservist. I left in 2019. This is because the government took away our guns. I am a law abiding citizen. Grudges arose because I used to try to bring illegality to an end. We came to court. We never approached the elders. We reconciled in 2014. He complained about me even though I had forgiven him. I have been charged in court in many cases. I have been charged in court for murder. Stella Kabirithu died while I was in custody. On 9.6.2019 I was at K.K where Kithure was. I did not beat him or kill his wife. God knows. Last year I was brought to court by my neighbours. They had carried me. Njuri Ncheke members bit me. I complained about 6 people, including Jacob Kithure. I was tied on top of a tree. They were from Isiolo County. I was being oppressed because I am an orphan. If I do not live well I could not have obtained a surety. His wife died while I was in custody. One witness said I had a stick, another said I had a stone. I wonder how I used them. I could not have made it to move from there.”



## Submissions

17. The appellant urged that the complainant's evidence was riddled with inconsistencies and contradictions such that no reasonable tribunal would convict. He faulted the trial court for failing to test the evidence of the complainant, who was the single identifying witness with care before relying on it to convict, and cited *Abdulla Bin Wendo v R* (1953) 20 EACA 166. He further faulted the trial court for failing to take into consideration the evidence of the appellant especially that there was a land dispute between them which led to him being framed.
18. The respondent urged that it had proved beyond reasonable doubt all the elements of the offence as set out in *Oluoch v R* (1985) eKLR and *Dima Denge Dima v Republic* (2013) eKLR. It submitted that this case was one of recognition rather than identification of strangers which lessened the chances of mistaken identity, and cited *R v Turnbull & Others* (1976) 3 ALL ER 549. It cited *Ekai v Republic* (1981) eKLR and *Karani v Republic* (2010) 1 KLR 73 where it was held that failure to produce dangerous weapon as exhibit is not fatal to a conviction. It urged that the appellant's defence was duly considered by the trial court, and the same did not cast doubt on the prosecution's case. It urged that the death sentence meted out to the appellant was legal, as the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR did not declare all mandatory or minimum sentences unconstitutional.

## Analysis and Determination

19. From the grounds of appeal as framed, the issues for determination are whether the evidence led by the prosecution witnesses was devoid of any contradictions to prove the offence beyond reasonable doubt, whether the appellant's defence of being framed up due to a land dispute was considered and whether the sentence was harsh and excessive.

## Proof of the offence

20. Robbery is defined under section 295 of the *Penal Code* as follows,

“ 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.”
21. The elements of robbery with violence, which the prosecution needed to prove beyond reasonable doubt are stipulated under section 296 (2) of the *Penal Code* as follows: -

“(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.”
22. The complainant testified that on the material day around 2.00 p.m, he and his late wife Stella, though a few metres apart, were both heading to Mwangaza area to buy children wire when he met the appellant, who was armed with a Somali sword. He went on to state that,

“ ... Samson then hit me with a club he was holding on the head and I fell down. As he swung another blow I fended it off with my left hand which got hit and broke. Samson then hit



me again with the club on the left leg. He then raised the Somali sword and demanded that I surrender cash. I yielded and told Samson that he could remove the cash from the trouser pocket. He removed Ksh.1,000/= from my trouser pocket and left. I rose up and wiped blood from my head.”

23. PW2 was on his way to PW1’s home on the material day, when he saw him being beaten. His testimony in part was that,

“.... I saw this from a distance of 70 metres. Jacob was with some herdsmen. He was lying down and the assailant who was armed with a stick fled.” On cross examination however, he clarified that by the time he was arriving at the scene, the assault and the robbery had already taken place.”
24. PW3, an eye witness testified that he witnessed the incident take place 30 meters away from where he was herding his cattle. He affirmed that the assailant, whose name he did not know was armed with a stick.
25. Medical evidence of PW4 corroborated the evidence of the complainant that he had been assaulted. When PW4 examined the complainant, he had cut wound on the head 2 × 4 cm, swelling and tenderness on the left hand, swelling and tenderness on the left leg and an x-ray revealed a fracture of the radial-ulna.
26. Although PW5 had visited the scene, he was categorical that nothing of value was recovered therefrom because the scene had been tampered with.
27. In his sworn defence, the appellant vehemently denied any involvement in the alleged assault and the subsequent robbery.
28. It is this court’s finding that the corroborative and consistent evidence led by the prosecution witnesses had placed the appellant at the scene of the crime.

### **Identification of the appellant**

29. There can be no doubt that it was the appellant who violently robbed the complainant on the material day. PW1 recognized the appellant, who was his nephew as the offence took place in broad day light. He stated that,

“Samson is seated there (pointing at Accused). I know him quite well being my nephew. He is a son of my brother.”
30. The appellant admitted on cross examination that,

“Jacob Kithure is about 62 years. He is an elderly person. He is a brother to my father (deceased) we live in the same place.”

### **Consideration of the appellant’s defence**

31. The appellant’s defence of being framed up was analyzed by the trial court when it observed that,

“The accused informed the court that there exist serious issues in their family arising the fact that his father is deceased so PW1 would wish him to be out of the way so that he can take his parcel of land. He explained that he was once a police reservist entrusted with the security of his community. However, there is overwhelming evidence that the accused wounded, but



PW1 and then took away KShs. 1,000/= from his while armed with a Somali sworn and a club both of which are dangerous weapons.”

32. When PW1 was cross examined on the issue of whether he had framed the appellant due to a land dispute, he stated that,

“ .... I am the one who took the accused from where his mother had abandoned him when he was a small boy. I allocated the accused 6 acres to cultivate..I am not out to fix the accused in order to take his land because I am the one who gave him that land in the first place.”

The Court does not believe the defence of frame up set up by the Appellant in view fo the consistent evidence of the prosecution.

33. This court does not condone the use of violence in the guise of protection of property and, if such were his pursuit, the appellant ought to have employed other mechanisms to protect it instead of resorting to violence.

### **Sentence**

34. The sentence prescribed for the offence of robbery with violence under section 296 (2) of the [Penal Code](#) is death.

35. The record shows that although the appellant had other matters pending before other courts, the same had not been concluded, and therefore he was treated as a first offender. Even after the court had considered the appellant’s mitigation and the fact that he was a first offender, it still handed him the prescribed mandatory sentence of death. In the wording of *Arissol (Josphine) v. R* (1957) EA 447, 449,

“ it is unusual to impose the maximum sentence on a first offender.”

36. The trial court did not, therefore, properly exercise its discretion in sentencing the appellant to the maximum penalty of death because he was a first offender.

### **Orders**

37. Accordingly, for the reasons set out above, the court finds that the appellant’s appeal from conviction has no merit and it is dismissed.

38. The appeal from the sentence is allowed and the death sentence is set aside and substituted with a sentence of imprisonment for 15 years from the date of sentence in the trial court.

Order accordingly.

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Masila for DPP

