



**Juma v Republic (Criminal Appeal 119 of 2019)
[2023] KEHC 27098 (KLR) (19 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27098 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL 119 OF 2019
DK KEMEL, J
DECEMBER 19, 2023**

BETWEEN

CHRISPINUS JUMA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising from the original conviction on 18th July 2017
and sentence on 4th August 2017 in Criminal Case No. 4097 of 2015
at Chief Magistrate's Court Bungoma by Hon. E. N. Mwenda-SRM)*

JUDGMENT

1. The Appellant was charged and convicted on two (2) accounts: the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code and assault contrary to section 251 of the Penal Code. Particulars of the offence are that the Appellant on the 26th December 2015, at Mfutu Village in Bungoma Township within Bungoma County jointly with others not before Court while armed with an offensive weapon namely stones robbed Wycliffe Sambaya of a mobile phone make ITEL valued at Kshs. 1,500/= and at the time of such robbery used actual violence on the said Wycliffe Sambaya wounding him in the process.
2. The particulars of the second count are that the appellant unlawfully and intentionally assaulted one Albert Mulama on 26th December 2015, at Mfutu Village in Bungoma Township within Bungoma County thereby occasioning him actual bodily harm.
3. The Appellant was convicted and sentenced to death on count one and 2 ½ years imprisonment on Count two, which was to be held in abeyance. Being aggrieved by both the conviction and sentences meted out against him by the trial Court, he filed the instant appeal against the sentence of death penalty and the 2 ½ years' imprisonment on grounds that: -



- i. That his fundamental and constitutional rights to a fair trial under Article 25 (c) and Article 50 (2) (h) of *the Constitution* of Kenya were violated by the trial Court when it failed to accord him legal representation at the State's expense.
 - ii. That the trial magistrate erred in law and fact without considering that there was no proof of ownership of the purported stolen mobile phone.
 - iii. That the trial magistrate erred in law by convicting him on evidence marred with a lot of contradiction and inconsistencies.
 - iv. That the trial magistrate erred in law and facts without noting that the Prosecution failed to avail essential witness named during trial like the number of people on the road.
 - v. That the trial magistrate erred in law when he did not consider that both PW1 and PW2 never gave the description of the purported assailant.
 - vi. That the trial magistrate erred in law when he was not accorded the services of an interpreter as PW3 and PW4 testified in English a language he did not understand.
 - vii. That the trial magistrate erred in law and facts when he relied on the alleged stones used in the robbery but which were not produced as exhibits in Court.
 - viii. That the trial magistrate erred in law when he did not give him a chance to respond to the Probation report.
 - ix. That the trial magistrate acted on a wrong principle by passing a death sentence penalty against him as the same is unconstitutional subject to the case of Muruatetu.
 - x. That the trial magistrate erred in law by convicting him on a defective charge sheet contrary to section. 137 of the Criminal Procedure Code.
 - xi. That the trial magistrate erred in law when he failed to consider his sworn alibi defence which he raised pursuant to section 309 of the Criminal Procedure Code.
4. Reasons wherefore the Appellant prayed that the appeal be allowed and the conviction and sentence in Bungoma Chief Magistrate's Court Criminal Case No. 4097 of 2015 be set aside.
 5. Briefly, the evidence before the trial Court is as follows:
 6. PW1 Wycliffe Sambaya Tom, the Complainant under Count one testified that at 5.30 p.m. on 26th December 2015 while on his way home along the road near the mosque in Mfutu Village, the Appellant in the company of two other youths accosted him. He testified that the Appellant searched his pockets and removed his mobile phone handing it over to his two accomplices who ran away. According to him, he got hold of the Appellant who was strangling him and they struggled. The Appellant who was armed with a brick struck him on the head, fingers and his knees as he screamed for help. This attracted the attention of the rescuer and the Police who were on patrol with their land cruiser. The Appellant was promptly arrested.
 7. PW2 No. 208177322 Albert Mulama, told the Court that at 5.30 p.m. on 26th December 2015 while on his way from work at Mfutu area near the Mosque, he heard someone screaming and on rushing to the source of the commotion he saw the Appellant herein in the company of two other boys assaulting the complainant. They had already pinned him on the ground with the Appellant choking his neck. He testified that he saw the Appellant toss a phone to his accomplice who later took off. He told the Court that he was able to pick the complainant from the ground but the two other accomplices of the



Appellant ran off with PW1 's phone. According to him, he tried to separate the Appellant from PW1 as he was hitting PW1 with a brick. He told the Court that the Appellant injured him on his fingers with the brick before the same disintegrated. He added that during th incident the Police came to their rescue and apprehended the appellant.

8. PW3 Johnston Weremba told the Court that he is a clinician at Sirisia Sub-County Hospital and that he wished to produce a P3 form of PW1 filled on 28th December 2015. According to him, PW1 sustained several tissue injuries on the knees bilaterally, had bruises on his upper arms, the condition of his head and neck was fair. He classified the injuries observed as harm and proceeded to produce the P3 form as PEXH. 2. He also produced in Court the treatment notes of PW1 as PEXH. 1. Further, he produced the P3 form for PW2 which was filled on 28th December 2015. According to him, he observed PW2 was generally in fair condition but noted that he had a swollen right hand with a bruise on the upper side of right hand. He noted that the injury was as a result of blunt trauma and classified his injuries as harm. He produced the treatment card for PW2 as PEXH.4 and his treatment notes as PEXH.3.
9. PW4 No. 35465 P.C Ezekiel Abe told the Court that he is the current investigating officer in this matter and that the initial investigating officer had been transferred. He took over the matter on 10th August 2016 and that after perusing the file he established the Appellant was arrested by PW2 while in a robbery with violence incident.
10. At the close of the prosecution's case, the Appellant was put on his defence.
11. DW1 Chrispinus Juma in his sworn statement told the Court that he knows PW1 and that on 26th December 2015 he had an altercation with him over a phone he had allegedly left in PW1's car. He testified that on 25th December 2015 he had washed PW1's car as instructed by PW1 and that the next day PW1 alleged that he had left his phone in the car and that it was now missing. The Appellant denied knowledge of the same and an altercation ensued. He testified that it was only the involvement of the crowd that the matter was referred to the police. He testified that the charge of robbery with violence was as a result of a past grudge as he had washed PW1's car without permission and that he demanded payment. He noted that it was the gathered crowd that forced the Appellant to pay him for washing his car. He finally testified that PW1 had vowed to deal with him hence this case.

Analysis and Determination

12. 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.
13. Having considered the grounds of appeal, submissions thereon and evidence adduced before the trial Court, it is my opinion that the paramount issue for determination is whether the prosecution proved the offence of robbery with violence and causing bodily harm against the Appellant beyond any reasonable doubt.
14. Inevitably, this Court in determining this appeal ought to satisfy itself that the ingredients of the offence of robbery with violence were proved and as so required in law; beyond any reasonable doubt.
15. The offence of robbery with violence is contained in sections 295 and 296(2) of the Penal Code as follows:

“

“295. 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.

296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

16. Further, In *Jeremiah Oloo Odira v Republic* [2018] eKLR the court encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:

“Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

- i. The offender is armed with any dangerous or offensive weapon or instrument, or
- ii. The offender is in the company of one or more other person or persons, or
- iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person” (See *Olouch v Republic* (1985) KLR).

17. Based on the evidence of PW1 and PW2 who distinctly gave a recollection of what unfolded on the material evening, it is clear that PW1 was attacked leading to him sustaining injuries and in the process robbed of his phone and money.
18. PW1 and PW2 testified that the Appellant together with two others not before the court jointly participated in attacking PW1. According to PW2, while on his way he heard screams that prompted him to follow up to investigate the reason for the commotion. On arriving at the scene of incident, he found the Appellant overpowering PW1 and saw him throw a phone towards two young men who fled the scene. He further observed the Appellant had a brick on his hand which he used to attack PW1. He promptly sprung into action by trying to separate the Appellant from PW1 which led to him getting attacked by the Appellant with the same brick. The police that were on patrol on the same road spotted them and quickly ran to their rescue and apprehended the Appellant. The evidence of PW3 did show that both PW1 and PW2 bore blunt trauma injuries that he classified as harm and he further produced their treatment notes and P3 forms respectively.
19. It is my considered view that the Appellant was properly and positively identified by PW1 and PW2. PW1 and Appellant had a history as per his testimony during further cross examination. He told the Court that the Appellant also attacked him in the past. This is clearly an incident of recognition. It is my considered view that the Appellant was properly and positively identified by PW1 and PW2. I find that the testimony of PW1, and PW2 to be reliable direct evidence of visual identification of the Appellant. It is imperative to note that the incident occurred while there was sunlight therefore, they



- were able to see the Appellant. I find that the testimony of PW1 and PW2 to be reliable direct evidence of visual identification against the Appellant. The Appellant also admitted that he knew PW1.
20. It is my reasoned view that the Appellant in his defense tried to mislead the Court by stating that he was not involved in the attack and robbing of the Complainant but that he was merely asking for payment from the Complainant for the work he had done on 25th December 2015. The Appellant alleged that he summoned the crowd to try and convince the Complainant to pay him his money but he ended up being accused out of malice for robbery with violence. Besides there is overwhelming evidence against the Appellant to prove that he was indeed part of the attackers and that he took a phone and money from the complainant's pocket. I believe the eye witness (PW2) evidence to be credible as he was all consistent in his testimony and as the trial Court noted the inconsistencies were too minor thus immaterial. I concur with the holding of the lower Court that PW1 and PW2's evidence did corroborate each other.
21. In *Hassan Abdallah Mohammed v Republic* [2017] eKLR, it was stated that:
- “Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in *Wamunga v Republic* (1989) KLR 424 at 426 had this to say:
- “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 favorable and free from possibility of error before it can safely make it the basis of a conviction.”
22. In *Anjononi v The Republic* (1976-1980) KLR 1566, Madan JA (as he then was) stated as follows:
- “The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in the possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other.”
23. I am satisfied that the Appellant was recognized by the prosecution witness who knew him well. The area where the incident took place was well lit by the evening sunlight and therefore, I am unable to find any loophole in the manner in which the Appellant was identified. I am satisfied that the prosecution proved its case against the Appellant beyond any reasonable doubt. In any event, the appellant was arrested at the scene of crime and in the act of robbing the complainant and that Pw2 intervened and managed to wrestle him down before police officers on patrol arrived and took him to the police station. The said Pw2 suffered injuries inflicted on him by the appellant. The appellant having been placed at the scene of crime, then the conviction arrived at by the trial court was sound.
24. On the aspect of the Court proceedings being conducted in English language which he did not understand, it is my humble view that upon perusal of the Court record it is clear that on 22nd September 2016 while he was taking plea on an amended charge sheet, the appellant he made it clear to the Court that he understands Kiswahili. Further, when the Appellant chose to recall PW1 and PW2 for cross-examination, the trial Court record indicates that the language of the Court used was Kiswahili. This was also the case when PW3 and PW4 testified. Hence, I find that no prejudice occurred as a result since the language used by the court in recording the proceedings was in English while the interpretation was in Kiswahili language which was understood by the Appellant.



25. On the ground of a defective charge sheet, it is clear that the charge sheet was amended and that the Appellant took a plea again under the amended charge sheet. Hence, this ground of appeal must fail.
26. On the ground of not being accorded legal representation, it was very clear that the Appellant had an understanding of what was happening in Court and proceeded to cross-examine the prosecution witnesses and even mounted a defence. He also went as far as making an application for the case to start afresh as soon as it was placed before a different magistrate. It is worth noting that at no point did he bring it to the attention of the Court that he required legal representation. I find this ground must fail. In any case, it is my opinion that any irregularity did not occasion a failure of justice thus the proviso in section 382 of the Criminal Procedure Code cures the same.
27. Accordingly, the appeal on conviction on Count one fails.
28. The essential elements of the offence of assault causing actual bodily harm are;
 - i. Assaulted the complainant or victim, which;
 - ii. Occasioned actual bodily harm. (See the case of Ndaa vs Republic[4]).
29. An assault is any act by which a person intentionally or recklessly causes another to suffer or apprehend immediate unlawful violence. The term is often used to include a battery- an intentional or reckless application of unlawful force to another person (DPP v Little [1992] QB 645).
30. Of actual bodily harm, or hurt or injury, in Rex vs Donovan[5], Swift J, stated:-

“For this purpose, we think that "bodily harm" has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the complainant. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.”
31. The facts of this appeal indicate that PW1 testified that the Appellant who was strangling him and while armed with a brick struck him on the head, fingers and his knees as he screamed for help. PW2 on the other hand testified that he heard someone screaming and on rushing to the source of the commotion, he saw the Appellant herein in the company of two other boys assaulting PW1. They had PW1 pinned on the ground with the Appellant choking his neck. According to him, he tried to separate the Appellant from PW1 who was being hit with a brick. He told the Court that the Appellant injured him on his fingers with the brick before the same disintegrated. PW3 corroborated the testimony of PW1 and PW2 by producing a P3 form of PW1 filled on 28th December 2015. According to him, PW1 sustained several tissue injuries on the knees bilaterally, had bruises on his upper arms, the condition of his head and neck was fair. He classified the injuries observed as harm and proceeded to produce in Court the P3 form as PEXH. 2. He also produced the treatment notes of PW1 as PEXH. 1. Further, he produced the P3 form for PW2 which was filled on 28th December 2015. According to him, he observed PW2 was generally in fair condition but noted he had a swollen right hand with a bruise on the upper side of right hand. He noted that the injury was as a result of blunt trauma and classified his injuries as harm. He produced the treatment card for PW2 as PEXH.4 and his treatment notes as PEXH.3.
32. In this appeal, there is uncontroverted evidence that the Appellant while trying to retain the stolen phone and money hit PW1 while overpowering him and holding him down on the ground. PW2 was also a casualty when he tried to separate the Appellant and PW1 he was also given his fair share of clobbering with the brick the Appellant had on hand till it disintegrated.



33. These facts, therefore, disclose an offence and supported the charges of assault causing actual bodily harm contrary to section 251 of the Penal Code.
34. Accordingly, I find that the appeal on conviction on Count two fails.
35. The Penal Code prescribes a death sentence for the offence of robbery with violence. I have perused the decision by the trial Court and it is apparent that the death penalty was imposed because it was the only sentence prescribed in law at the time.
36. It was argued for the Appellant that the death sentence was no longer provided for, and so the trial court imposed an illegal sentence. This, however, is a misinterpretation of the decision of the Supreme Court in Francis Karioko Muruatetu & another v Republic [2017] eKLR. What the Court did was to remove the mandatory nature of the death sentence in section 204 of the Penal Code for being inconsistent with *the Constitution* of Kenya, 2010 and held that the court has the discretion to impose a sentence other than death in accordance with the circumstances of the case. In my understanding, the death penalty is still prescribed in law.
37. The directions given on 6th July 2021 by the Supreme Court in the case of Francis Karioko Muruatetu & Another vs Republic inter alia was that the said decisional law is not an authority to declare all mandatory or minimum sentences unconstitutional. Its application was limited to murder cases falling within its scope. Therefore, this being a case for robbery with violence, the request by the Appellant for review of sentence on the basis of Muruatetu case is misconceived. He has to argue his case on the basis of law and facts of the case.
38. The question is whether there is any lawful reason to interfere with the discretion of the trial Court in passing sentence.
39. In James Kariuki Wagana vs Republic [2018] eKLR, Prof. Ngugi J observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he “unnecessarily injure the Complainant during the robbery” and was not armed during the robbery. He therefore reduced the appellant’s sentence of death to imprisonment for fifteen years, from the date of conviction.
40. In the case before me, all the ingredients of robbery with violence have been met. The Appellant, who was in the company of others, not before the Court, robbed the complainant, and in the course of the robbery, the Appellant not only used force, but was armed with a dangerous weapon with which he used to beat or hit the complainant causing bodily injuries. PW3 assessed the degree of injury as harm.
41. The level of violence unleashed on the complainants is sufficiently serious to warrant long term imprisonment. The violence however did not cause death or grievous harm.
42. In the circumstances, I will reduce the death penalty to a term of imprisonment for Fifteen (15) years from the date of first arraignment in Court that is on 29th December 2015 in compliance with section 333(2) of the Criminal Procedure Code. At the time the offence was not bailable.
43. With regard to the sentence under Count 2, Section 251 of the Penal Code provides that a person who is guilty of the offence of assault occasioning actual bodily harm commits a misdemeanour and is liable to imprisonment for five years. The Appellant was sentenced to 2 ½ years therefor.



44. I have considered the nature, the manner of commission of the offence, the principles of sentencing and the amount of sentence imposed. I have considered the weapon occasioning actual bodily harm on PW1; the fact that it was not the 1st time the Appellant has attacked and that the Appellant's also rendered attacks on PW2 who within his authority was trying to help PW1. The sentence was legal and appropriate to the offence. I find no reason to interfere with the sentence imposed by the learned Magistrate. I also dismiss the appeal on sentence on count two.
45. The upshot is that the appeal partially succeeds on sentence of death as imposed by the lower Court. The same is hereby set aside and substituted with a sentence of Fifteen (15) years from the date of first arraignment in Court that is on 29th December 2015 in compliance with Section 333(2) of the CPC. The appeal on count two lacks merit and is dismissed.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF DECEMBER 2023

D. Kemei

Judge

In the presence of:

Chrispinus Juma Appellant

Mwaniki for Respondent

Kizito Court Assistant

