



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 130 OF 2019

CHRISTOPHER BILAL SABAYA.....APPELLANT

-V/S-

REPUBLIC.....RESPONDENT

(Being an appeal against the decision by Hon. F. W. Macharia, Senior Principal Magistrate on 30th October 2020 in Shanzu Criminal Case No. 575 of 2015, Republic v Christopher Bilali alias Suleiman Bilal Balozzi).

JUDGMENT

Background

1. Christopher Bilali alias Suleiman Bilal Balozzi was charged with the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.
2. Particulars are that Christopher Bilali on the 7th day of April 2015 at Borabora area in Kisauni sub-county within Mombasa County, while armed with a dangerous weapon namely gun robbed David Kyalo Kinyingi of cash Kshs. 290,000/= and immediately before the time of such robbery used actual violence to the said David Kyalo Kinyingi.
3. Upon conclusion of the prosecution and defence case, the trial magistrate found the Appellant guilty, convicted him and sentenced him to suffer death as provided for under Section 296 (2) of the Penal Code.
4. The appellant was aggrieved by the decision of the trial court and he preferred the appeal herein on the following grounds:-
 1. The learned, Hon. Magistrate erred in both law and fact in convicting the Appellant in the absence of any direct evidence and by relying on disjointed circumstantial evidence.
 2. The learned, Hon. Magistrate erred in both law and fact by convicting the Appellant on the basis of contradictory evidence which was speculative, inconsistent and uncorroborated.
 3. The learned, Hon. Magistrate erred in both law and fact by convicting the Appellant by relying on dock identification and without the witnesses laying any basis and without warning herself of the dangers of relying on such evidence.
 4. The learned, Hon. Magistrate erred in both law and fact by convicting the Appellant without establishing *mens rea* and *actus reus* considering that there are no recoveries made from the Appellant that are related to the charge as framed.
 5. The learned, Hon. Magistrate erred in both law and fact by convicting the Appellant while the prosecution had failed to prove their case beyond reasonable doubt.
 6. The learned, Hon. Magistrate erred in both law and fact by failing to link the arrest of the accused person to the charges as framed, hence misdirecting herself to arrive at a wrong decision in law.
 7. The learned, Hon. Magistrate erred in both law and fact by convicting the Appellant without considering the strong, un rebutted and unshaken defence of alibi put forth by the Appellant, hence arriving at a wrong conclusion in law.

8. The learned, Hon. Magistrate erred in both law and fact by sentencing the Appellant harsh while there were no aggravating factors and circumstances, which violated the sentencing policy guidelines, the *Muruatetu* decision and section 333(2) of the CPC.

Prosecution's Case

5. The prosecution's case was that on the 7th April 2015 in the morning, PW1 – David Kiale Kinyingi had come from Mtwapa KCB Branch where he had withdrawn Kshs. 1,000,000 out of which his employee was carrying Kshs. 600,000 and he carried Kshs. 290,000. That when they arrived at his mini market shop opposite Bamburi Police Station, he saw the Appellant herein coming from the side and asked if he was selling Airtel card. That he told him to buy from the next shop because he was not selling the cards but the Appellant insisted that he had the cards. That when he opened the last padlock of his shop, he saw the Appellant remove a pistol from a bag he was carrying around his neck and asked him to hand over all the money that he had. That when the Complainant hesitated, the Appellant put his hand in the Complainant's pocket and removed the Kshs. 290,000 from his pocket and marched majestically towards the Mombasa – Malindi Road. The Complainant's employee saw that when the Appellant was removing the pistol, he ran towards the nearby bar.

6. When the people saw the person who robbed PW1 started shouting 'thief' 'thief', he shot in the air and when the people continued shouting and throwing stones at him, he shot the second time and all vehicles on the road stopped. He boarded a matatu which the driver and passenger fled. That when the Appellant was unable to drive the matatu, he alighted and sat on the back seat of a small car which he commandeered and the driver sped off. When the Complainant reported the matter at Bamburi Police Station, he was told that the man who robbed him was a wanted man and he saw his picture on social media as a wanted person.

7. PW2, Albert Muramba Kahindi testified that he was an employee of the Complainant and that on 7th of April 2015 at 10.00 am, they had gone to KCB Mtwapa to withdraw cash and he was given Kshs. 200,000 to carry in his socks. That when they arrived at the shop and as his boss PW1 was opening the shop, a dark tall man approached him and asked for Airtel credit. He identified the dark tall man as the Appellant herein. When they told him that they did not have Airtel credit, he insisted and asked "you mean you do not have credit". He then produced a pistol from the black bag that was hanging on his neck and pointed at the Complainant. PW2 testified that he ran for his dear life when he saw a pistol pointed at his boss. He went to the nearby bar where workers and some travelers were drinking and told them his boss had been attacked and people took off. That after four minutes, he saw the man carrying the money and pointing a pistol in the air and people started shouting "thief" "thief" That the Appellant shot in the air, people scampered for safety and all motor vehicles stopped. That he stopped a matatu and the driver and all passengers alighted. The Appellant also got out and commanded a small car which he sat at the back and commanded the driver to drive off. PW2 said the police visited the scene and he later recorded his statement.

8. PW3, Michael Wanjohi Mtugi, an Mpesa shop operator Borabora testified that on 7th April 2015 at 10.00 am, he was seated outside at the Veranda when a large crowd of people came from PW1's shop shouting "thief" "thief". That he followed to see what happening and he saw a large tall dark man struggling with PW1. He identified the person as the Appellant herein. That after the struggle, the man left carrying money in one hand and a pistol in the other and walked towards the main road. That when people started shouting at him, he shot in the air and people scampered for safety. That he stopped a matatu which he tried to drive then he got out and stopped a small vehicle which he got into and was driven towards Mombasa direction. PW3 said his shop is very close to the complainant's and he saw the Appellant very well. PW3 said in cross examination that he informed the person who was recording his statement about the description of the Appellant but he did not know why it was not recorded.

9. PW4, James Njoroge Kiarie was driving Motor Vehicle KBS 623Q Toyota Fielder Silver in colour on the 7th of April 2015 and when he reached Bamburi Police Station at 10.00 am he saw a crowd of people throwing stones and then heard two gun shots. That a man who had a dark complexion emerged from the front and pointed a gun at him as he had stopped the motor vehicle and his passenger got out and ran. That the gun wielding man boarded the motor vehicle through the rear door and ordered him to turn and drive off. He said that he was trembling but he tried to drive towards Mombasa. That he told him to turn into Bamburi Mtamboni Road but when they reached the roundabout he told him to turn into the estate, pointed the pistol at him, told him to get out, jumped into the driver's seat and drove off.

10. That the friend John Oduor who had jumped out of the car called him to know his direction and in the company of the police came and gave chase and found out that the motor vehicle had been abandoned. They were informed the driver of the abandoned vehicle had boarded a bodaboda and left. In cross examination, PW4 said that the incident happened at 10.00 am, the Appellant had been armed with a pistol and he could not forget the appearance of the Appellant even if it took 10 years and that the appellant was sporting a beard on that day.

11. PW5, PC Phillip Karoney was assigned the duty of investigating the robbery herein that occurred against the Complainant but he recorded statements of the Complainant and some of the witnesses that on 19th May 2017, DCIO Kisauni informed him that the Appellant who had committed a robbery in Voi had been arrested and facing some charges and was being held at Manyani Prisons. That the Appellant was produced and remanded at Bamburi Police Station for investigations but he declined to undergo identification parade that his photos had been circulated in the media and everybody had seen them. PW5 then relied on the statements of the witnesses to charge the Appellant. He collected one cartridge at the scene, handed it over to DCIO Kisauni to forward to Ballistic Expert for examination.

12. PW6, ASP Alex Mundindi Mwandaro, a Ballistic Expert based at the Forensic Ballistic Laboratory at the DCI Headquarters Nairobi examined two spent cartridges that were handed over to him on 27th May 2014 and found that they were fired from two different guns and each had an identifiable marking on the rejecter, the firing pin and the breach face. He produced a report on examination of the spent cartridges as Exhibit 3.

Defence Case

13. DW1, the accused person was placed on his defence and he gave sworn evidence. He said that before he was arrested, he was a farmer and he got his farm produce from Taveta to Kongowea. He said that on 3rd of May 2015, he was heading to Taveta and when he reached Mangu area, he was called by a person who identified himself as OCS Changamwe Police Station and the OCS wanted him to report to the

station but he told him he would be back after two days. Upon reaching Voi, he was apprehended by police officers who had instructions from Mombasa to arrest him. He said he was arrested together with 3 other people who were in the same vehicle. The rest were released and the rest were let go. He was taken to Voi Police Station where ATPU police officers went and started to interrogate him. They asked if he was a Muslim or a Christian and he told them he was now a Muslim but previously a Christian. When they asked about his trip to Somalia, he told them he had never travelled to Somalia and he had no plans of travelling to Somalia. The following day, he was taken to Voi Law Courts where he was charged with being in possession of a gun. He was later brought to Mombasa and charged with the offence of robbery with violence. The Appellant says he was acquitted in the Voi case under Section 215 of the Criminal Procedure Code. He said he only went to Bamburi Police Station after his arrest and that he did not know Borabora area in Bamburi. He said he saw the Complainant in court for the first time and had never been involved in any Robbery with Violence case.

14. In cross examination, the Appellant said he was charged in four matters in Changamwe and 3 were withdrawn and that one was from Bamburi and the other one was from Mtwapa Police Station. He said he was framed because he was suspected to be a terrorist and since they had no evidence of him being a terrorist and that he was not in the ATPU database, they framed him with the offence of robbery with violence. He admitted that in the cases of Mtwapa, Bamburi and Changamwe, they were accusing him of being in possession of a gun where money was stolen. He said that no money was recovered from him.

15. This appeal herein was canvassed by way of written submissions.

Appellant's Submissions

16. The Appellant's counsel in highlighting written submissions, submitted that the evidence of PW1-PW4 who alleged to have been eye witnesses were extremely contradictory, lacked consistency and suffered from malnutrition of corroboration. That despite PW1,2,4 and 4 alleging that they heard gunshots, there was no confirmation from the Bamburi Police Station which was directly opposite the scene of crime. It was argued that the witnesses did not describe the firearm either by colour or size and the Appellant was not found with firearm on arrest.

17. On the issue of gunshots, the Appellant's advocate said that the alleged eye witnesses said that they heard gunshots but PW5 said that they were able to collect only one cartridge at the scene which was recovered by one Chief Inspector Chebii who was not called to testify as the chief witness to connect the same to the robbery. The Appellant's counsel also argued that the Ballistic expert also testified that the two cartridges recovered from scene were fired from two different firearms, a finding that contradicts the evidence of PW1 to PW4 who alluded to only one firearm. It was further argued that the recovery of the cartridges remained a mystery because PW1 to PW4 did not witness the same being recovered and were not produced in court. This should have raised doubt in the mind of the court and it was erroneous to convict the Appellant after the trial magistrate rightly found that the prosecution had failed to prove its case beyond reasonable doubt at page 6 paragraph 12 of the initial judgment.

18. On the issue of identification which according to the Appellant was the crux of the appeal, it was submitted that although the offence was committed during the day, it was not a guarantee that the victim was able to identify the assailant without giving a description and without establishing the period within which the assailant and the victim interacted. Refusal by the Appellant to attend identification parade was justified by the counsel that the Appellant had been exposed as his photographs were shown prior to his arrest. The Appellant contended that the police had a bone to settle with him and had therefore exposed him to the witnesses.

19. It was also contended that the arena of trial was not level as the Appellant was unrepresented while the prosecution was represented by a qualified advocate. That since there was no evidence of violence having been meted against the witnesses before, during and after the robbery and since the Appellant did not know the section under which he was charged meant, it was pleaded that the appeal has merit and allow it. The court was also urged to find the Appellant's defence of alibi to be merited.

Respondent's Submissions

20. The Respondent through Ms. Kambaga relied entirely on the submissions dated 18th October 2021 and urged that there was no duplicity under the two sections in the law under which the Appellant was charged as one defines the offence and the other defines the penalty.

21. It was submitted that the Appellant's defence of alibi was an afterthought and should be disregarded

22. On sentence, it was submitted that the *Muruatetu case* is only restricted to murder cases and not robbery with violence and that the conviction and sentence should be upheld.

Analysis and Determination

23. This being the first appellate court, it is guided by the principles in *David Njuguna Wairimu v Republic [2010] eKLR* where the court of appeal held:-

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

24. After considering the grounds of appeal, Records of the trial court, submissions and circumstances of the case, the issues for

determination are as follows:-

- i. Whether the Appellant was convicted on the basis of contradictory, disjointed circumstantial evidence which was speculative, inconsistent and uncorroborated.
- ii. Whether the Appellant was convicted on evidence of dock identification and without the trial magistrate warning herself of the dangers of relying on such evidence.
- iii. Whether the Appellant's defence of alibi was considered by the trial magistrate in arriving at his conviction.
- iv. Whether the sentence against the Appellant was harsh and excessive in the circumstances and whether the Appellant is entitled to the provisions under section 333(2) of the CPC.

Whether the Appellant was convicted on the basis of contradictory, disjointed circumstantial evidence which was speculative, inconsistent and uncorroborated.

25. The Appellant's counsel argues that there was no evidence that PW1 withdrew the money and that any money was stolen from his as he contradicts himself on how much money he withdrew and how much money he gave PW2 to carry for him and that the withdrawal slip was not produced in court. He also argued that the bank statement shown by PW1 to confirm the withdrawal of Kshs. 620,000 which was marked as MFI 11 was never produced by any official of KCB Mtwapa and the same cannot be used to prove any claim or fact.

26. Evidence of PW1 that he withdrew money from KCB Mtwapa and that he was robbed of the same was corroborated by his employee, Albert Mramba Kahindi who said he had accompanied his boss to the bank and that he carried part of the money Kshs. 200,000 in his socks whereas the rest was carried by his boss. He was with PW1 when he was attacked by the assailant who pointed a gun at him and he ran into the nearby bar for his life. PW2 confirmed that 4 minutes after the attack, he saw the assailant leave while carrying money and pointing the pistol in the air.

27. PW3 also testified that he saw the assailant leave while carrying money in one hand and a pistol in the other while he walked towards the main road while people were shouting at him. The person who robbed and attacked PW1 commandeered PW4 who was driving a motor vehicle registration KBS 623Q Toyota Fielder to turn and he ordered him to drive off from the scene of the robbery.

Whether the Appellant was convicted on evidence of dock identification and without the trial magistrate warning herself of the dangers of relying on such evidence.

28. The evidence that PW1 was robbed of his money was corroborated by PW2, PW3 and PW4. The offence was committed at 10.00 am in broad daylight. PW1 said that although he did not give a description of the Appellant to the police he knew him physically when he ordered him to give him the money and when he found him at the police station, he recognized him at once. PW1 said he interacted with the Appellant for 5 minutes and said that he did not frame him because he saw him on social media.

29. PW2 described the Appellant to the police as tall, huge and dark. He said he was with his boss when he pulled a black bag that was hanging around his neck, removed a pistol and pointed it at his boss. He saw the Appellant leave PW1's shop while carrying money and pointing the pistol in the air. He saw him enter into a matatu, then got out and commanded a small car which he boarded and it drove off. PW3 said he saw the Appellant 100% leaving the shop because they are very close neighbours. He said he gave the police the description but wondered why they did not write it down.

30. PW4 was driving and when he reached Bamburi Police Station, he saw a crowd of people throwing stones and heard two gun shots. He then saw a man emerge from the front and boarded the car through the rear door then ordered him to drive off towards Mombasa. He told him to turn towards the Bamburi – Mtamboni Road and at Bamburi, he told him to turn into the estate and at which point he pointed a pistol at him and told him to get out of the vehicle and drove off. PW4 said that even if it took 10 years, he would still remember the Appellant as the person who carjacked him. He had a beard on that day. He also noticed the bag that the Appellant was carrying on his neck as testified by PW1 and PW2.

31. In the case of *Francis Kariuki Njiru & others v R. Cr. A. No. 6/01 (ur)*, it was held that:-

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see *R. v Turnbull* [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in *Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported)*, held that:

... it is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.”

32. Evidence of all the witnesses as to the identity of the Appellant is corroborative to each other and the fact that the Appellant declined to

appear for identification parade is a fault that cannot be visited on the witnesses.

Whether the Appellant's defence of alibi was considered by the trial magistrate in arriving at his conviction

33. The Appellant said that his defence of alibi was not considered by the trial magistrate and that the burden to prove that he was in custody was shifted to him when in fact it is the prosecution which ought to have disapproved that allegation but the arresting officer failed to attend court that he was not in custody and was found in possession of a Ceska pistol.

34. The **Court of Appeal at Kisumu** in *Eric Otieno Meda v Republic* [2019] eKLR held as follows in respect to an alibi:-

(a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.

(b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

(c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.

(d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See Mhlungu v S (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014))

35. It was further held in the case of *R v Sukha Singh S/O Wazir Singh & Others* (1939) 6EACA 145 that:

“ if a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there's naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment, it will give prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness proceedings will be stopped.”

36. The offence herein was committed on 7th of April 2015 and the Appellant was arrested on 3rd of May 2015, almost one month apart. This court has relooked at the defence of the Appellant and he only says that he did not know Borabora area in Bamburi and that he went to Bamburi for the first time after his arrest. He did not raise the defence of alibi with the prosecution witnesses more so PW5 the Investigating Officer. All the four prosecution witnesses PW1 to PW4 placed the Appellant at the scene of crime at Bamburi. The Appellant's failure to raise the defence of alibi early enough for interrogation by the prosecution and the evidence of the four prosecution witnesses that the Appellant was the one who attacked and robbed PW1 and escaped from the scene using PW4's motor vehicle makes this court agree with the trial magistrates finding that the defence of alibi failed to raise reasonable doubt against the evidence of the prosecution.

Whether the sentence against the Appellant was harsh and excessive in the circumstances and whether the Appellant is entitled to the provisions under Section 333(2) of the CPC

37. The Appellant was sentenced to suffer death as provided under Section 296 (2) of the Penal Code. The Supreme Court's Advisory on the *Muruatetu* Petition was to the effect that the holding as to the unconstitutionality of the mandatory nature of the death penalty was in reference only in murder cases and not any other.

38. In the said *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curae)* [2021] eKLR, the Supreme Court held as follows:-

“To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other 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, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”

39. In the circumstances, the death penalty passed against the Appellant was lawful and therefore not harsh and excessive. Ground of appeal No. 8 must therefore fail.

40. In conclusion, this court finds that the Appellant's ground of appeal do not have merit as the prosecution proved the charge of robbery with violence beyond all reasonable doubt. The conviction and sentence are therefore upheld.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 10TH DAY OF JANUARY, 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Ms. Kambaga for the Respondent

Mr. Chacha for Appellant

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Mr. Chacha Advocate: We pray for typed proceedings and judgment

Order: Certified copy of proceedings and judgment to be supplied to the Applicant's counsel on payment of copying charges.

10.2.2022