



**Gachucha v Republic (Criminal Appeal 59 of 2020)
[2022] KEHC 11850 (KLR) (Crim) (24 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 11850 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL 59 OF 2020

DO OGEMBO, J

MAY 24, 2022

BETWEEN

JACKSON KIHARA GACHUCHA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from a conviction and sentence of B. Ochoi, Senior Principal Magistrate delivered on 20.4.2020 in Milimani Chief Magistrate's Court, Criminal case No. 829 of 2019)

JUDGMENT

- 1 The appellant herein Jackson Kihara Gachucha was charged before the lower court with the offence of Robbery with violence contrary to section 296(2) of the [Penal Code](#). The particulars of the charge were that on the night of 27.4.2015 at Kobil Petrol station along Langata Road in Nairobi within Nairobi County, jointly with another not before court, being armed with dangerous weapons namely wire, robbed David Gitari Kinyunjuri of a motor vehicle registration number KBS 338M Toyota Axio Saloon, valued at Ksh.650,000/= and the time of such robbery, used actual violence to the said David Gitari Kinyanjuri.
- 2 The case of the appellant went through a full trial, leading to the Judgment of the court being read out. On 20.4.2020, the appellant was sentenced to serve 20 years imprisonment, to be calculated from the date of remand of the accused i.e from 29.5.2019.
- 3 The appellant is aggrieved of the Judgment, conviction and sentence and has filed this appeal on 20.4.2020. The appellant later filed an amended grounds of appeal, raising 7 grounds as follows:
 1. That the trial court erred by convicting the appellant on identification evidence that failed to follow the laid down principles of identification and this prejudice the appellant



2. That the trial court erred by convicting the appellant while the prosecution witnesses lacked credibility and were coerced into giving evidence.
 3. That the learned trial court erred in law and fact by convicting the appellant while the court failed to avail very key witnesses contravening section 150 of the Criminal Procedure Code.
 4. That the trial court erred in law and fact by basing conviction on the doctrine of recent possession whereas the prosecution failed to prove the essential elements of possession.
 5. The trial erred in law and fact by convicting the appellant while failing to analyse the prosecution case which was made up case by the investigations officer.
 6. That the learned trial court erred in law and fact by convicting the appellant while shifting the burden of proof and dismissing the appellant's defence which was consistent and cogent without justifiable reasons.
 7. That the trial court erred in law by failing to take into account the time spent in custody since the appellant lost liberty which was on 15.5.2015 and therefore the appellant serves an excessive sentence.
- 4 The appellant has pleaded that this appeal do succeed in its entirety. The state Respondent on the other hand opposed this appeal and urged that the same be dismissed.
 - 5 This appeal has been canvassed by way of written submissions. Both parties duly complied and placed their submissions on record.
 - 6 For the appellant, it was submitted that the first issue was of identification that the court ought to consider any material discrepancy between the description of the accused given to the police and his actual appearance *Republic Versus Turnbull 9 others* (1976), and also danger of relying on the evidence of a single identifying witness (*Victor Mwendwa Mulinge Versus Republic* (2014)eKLR. That before an identification parade is held, a witness should be asked to give a description of the person to be identified (*Ajode Versus Republic* 2KLR 81).
 - 7 That in this case, the identification was by a single witness and so care ought to be taken to verify the evidence. And that the parade form shows the appellant was not only identified by the clothes he was wearing but also physical appearance. That conditions of identifications could not support positive identification since the incident was at night. That it is worth noting that PW3 did not give any description to the investigating officer.
 - 8 The appellant also challenged the propriety of the identification parade since the investigations officer was involved in conducting the parade (page 32, evidence of PW4). Also that the parade failed to adhere to the number of persons required as it had only 7 members, and who were not of similar appearance (page 26, evidence of PW3). He is also submitted that he had been exposed to the complainant before presented in the parade as he was produced in court on 27.5.2015, probably exposing him to the complainant.
 - 9 On credibility of the evidence of the prosecution, the appellant relied on the case of *Paul Ndoro Mwangi Versus Republic*(2016)eKLR, that where circumstances suggest that a witness may have been compelled coerced or intimidated to give evidence, then, such evidence ought to be treated with caution. He maintained that the evidence of the witnesses was incredible and subject to coercion by the investigating officers (page 13, 12). That these statements show the witnesses were unwilling to give evidence and were therefore coerced.



- 10 The appellant also challenged the credibility of the witness by the fact that the OB extract read a different vehicle, Toyota Crown KBS 338M. and that complainant never reported at Langata police station, and why the investigating officer did not hand over the matter to Langata police station.
- 11 On failure by the prosecution to call key witnesses, he relied on section 150 of the Criminal Procedure Code, that where it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case. He singled out the owner of the motor vehicle, one David Njuguna and the manager of Amarco Insurance company Limited.
- 12 The appellant also relied on the case of Donald Atemia Sipendi Versus republic(2019)eKLR, while challenging the mode of his arrest. And on Republic Versus Joseph Rioba Segeno (2018)eKLR, on the fact that poor investigations can lead to a state of lawlessness and anarchy when perpetrators of crime take advantage of police incompetence.
- 13 Submissions were also made on the issue of doctrine of recent possession. The appellant relied on Isaac Ng'ang'a Kibaga Versus republic, Criminal Appeal No. 82/2004 and Christopher Rabut Opaka Versus Republic, Ksm Criminal Appeal No. 82/2004 that;
- “It is trite law that before a court of law can rely on the doctrine of a recent possession as a basis of conviction in a criminal case, the possession must be proved positively. In other words, there must be positive proof, first, that the property was found with the suspect, secondly, that the property is positively the property of the complainant, thirdly, that the property was stolen from the complainant, and lastly, that the property was recently stolen from the complainant.”
- 14 That the elements of the doctrine of recent possession were never established, as there is nothing on record to show that the appellant was in possession of the vehicle at Milimani court.
- 15 Also that while the arrest was on 28.4.2015, the recovery form is dated 29.4.2015.
- 16 It was further submitted that the burden of proof was shifted to the appellant and his defence dismissed (Woolmington Versus DPP (1935)AC 462, Jane Nyamule Versus Republic (1953) CA Appeal No. 121/53. In his submissions he gave a good defence which ought to have been considered in his favour.
- 17 Lastly on sentence, he submitted that the sentence was excessive as same noted it would start running from 29.5.2019 and yet he had been in custody from 12.5.2019, the date of his arrest. And that in his case there were no aggravating circumstances (Benson Ochieng Versus Republic (2019)eKLR.
- 18 In opposing this appeal, the Respondent consolidated the issues into 4 grounds.
- 19 First, it was submitted that the complainant positively identified the appellant as they negotiated the fare at a well lit petrol station. He was also later identified at an identification parade, a process he appended his signature on in satisfaction. That though the parade had only 7 members, the fact is that appellant was properly identified, even if the parade was valueless.
- 20 Secondly, it was submitted that the prosecution gave credible evidence and that the reluctance of the witnesses to appear in court stemmed from the fact that this was a retrial and witnesses believed they had already finished with the case, a fact which has nothing to do with credibility.
- 21 Third, the prosecution proved the case beyond any reasonable doubt as all the ingredients of the charge were proved.



- 22 And lastly, on sentence, it was submitted that the sentence for robbery with violence is death. And that in exercising his discretion to sentence the appellant to 20 years imprisonment the court took into account the circumstances of the offence i.e that no one was injured and the vehicle was recovered. On date of commencement, it was noted that appellant had other unconcluded case. The court was asked to dismiss this appeal.
- 23 I have considered the 2 rival submission. This is a first appeal. The jurisdiction of the court was long settled in the case of *Okeno Versus republic* (1972)EA 32, that;
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.... In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witness.”
- 23 In simple terms, the duty of this court is to analyse and re-evaluate the evidence which was before the trial court itself and come to its own conclusion.
- 24 From the proceedings, the case of the prosecution commenced with the evidence of PW1, David Njoroge Njuguna, a taxi operator. His evidence was that David Gitari operated his taxi KBS 338M, Toyota Axio, around Langata Kobil. That on 28.4.2015, he had information that David had been car jacked and was at Thika police station. He went and found David. They were referred to Langata police station where he reported. The vehicle was later recovered. In court, he produced the logbook and also identified the photographs of the same. Shown the OB extract from Thika police station, the same noted the vehicle as Toyota Crown, white. PW2 PC Cleophus Musinga, produced the photographs of the motor vehicle together with the certificate.
- 25 The 3rd witness, PW3, David Gitari Kinyunjuri, recalled that on 27.4.2015 at 10:00pm, he was on duty as a taxi driver at Kobil petrol station, Carnivore, when he was hired by a customer who intended to go to Tangaza college. They agreed on fare of 1000/= . The man sat on front passenger seat while his brother set on the back seat behind the witness. On the way however, a rope was thrown on his neck. The vehicle stopped and he was tied and thrown on the back seat. The one at the front took his wallet, ID card, and phone, before taking control of the vehicle. He was later dropped at Kimunyu, from where he untied himself before finding his way to Thika police station. They were referred to Langata police station. On 15.5.2015, they were called to Central police station where they identified the vehicle which had been recovered.
- 26 The witness went on that he was able to identify one of the attackers in an identification parade of 10 people. His testimony was that he had seen the man well as they negotiated at the petrol station which was well lit. That the accused before the court is the one who had asked him to take him to see his sister and negotiated with him. He is also the one who drove the vehicle after the witness had been tied. He later identified him at the parade.
- 27 On being examined, the witness confirmed that the vehicle was Toyota Axio KBS 338M, and that it is appellant who negotiated the fare with him before calling his brother.
- 28 And PW4 Corporal Patrick Mangenyi, the investigating officer, testified that on 28.4.2015, he received a call from one Simon of Equity Bank, Nyeri about a person he had lodged a complaint about in Nyeri who also had a pending case at Milimani Law Courts coming up for mention on 28.4.2015. He proceeded to Milimani Law Courts and arrested the accused, who asked to be allowed to take his car parked at the court parking. That the accused went on to show them the motor vehicle KBS 338M,



- Toyota Axio, silver in colour. The same was driven to central police station by one Osman Yasmin Juma. That on interrogation, the appellant could not give the details of ownership of the car. The witness later received copy of records showing the vehicle was owned by David Njuguna.
- 29 That the appellant was then first charged with offence of conveying stolen property. On further investigations with the insurers, Armaco Insurance, he got the phone number of the owner of the car whom he called, and who confirmed that his car had been robbed of from his taxi driver. He interrogated both the driver and owner of the car. As the investigating officer, he obtained a production order of the appellant from remand for purposes of an identification parade since the driver had stated he could identify the person who had robbed him. The parade was conducted by inspector Cecilia Muthoni at Central police station. The car was also accordingly photographed and returned to the owner. This witness confirmed he knew the appellant beforehand over other previous cases. He produced the various exhibits.
- 30 The appellant cross-examined the witness stated that the OB extract from Thika police station showed the vehicle as Toyota Crown, but the registration number remained the same KBS 338M. he did not produce the OB of Langata police station. And that the appellant had 2 other cases involving theft of ladies bags.
- 31 PW5, CI Cecilia Muthoni gave evidence that on 28.5.2015 while at central police station she was requested by Corporal Patrick Magenyi to conduct an identification parade, which she did at Central police station. That the investigating officer opted not to be present during the parade. That the suspect Jackson Kihara Gachucha consented to participate in the parade and accordingly signed the parade form. He also did not need a friend to be present. That she got 7 men of the same physique and nature and the suspect had no objection, and took a position between No. 3 and 4. That the witness David Gitari Kinyunjuri, who had been in a nearby office, came and positively identified the suspect by touching. That the witness stated he identified the suspect by his appearance and physique and also because he was in the same black jacket during the incident. That the suspect only objected to his being identified by his clothing which could be worn by anyone. He however signed the parade form (Exh-9).
- 32 To the questions of the appellant, the witness had answered that for a parade, it is not a must that a description be given. And that the appellant was the 8th person in the parade.
- 33 On being placed on his own defence, the appellant gave a sworn defence that on 27.4.2015, he had been with his parents in Nyeri. And on 28.4.2015, he had a matter at Milimani Law courts, only for the investigating officer arrested him, allegedly from orders of Simon Mwangi of Equity Bank, Nyeri. He was taken to Nyeri. That when he came back to central police station on 12.5.2015, over settlement of Criminal case No. 621/2015, he was arrested and charged with being in possession of a stolen car. He was later subjected to an identification parade and then charged with the offence of robbery with violence.
- 34 He went on that the car was never produced and the photographs produced were of a different car. That the copy of records and the OB report were of a different vehicle from the one in the photographs. He also challenged the identification of the witness and that his parade was done after he had been exposed. He called no witness.
- 35 I have considered the whole evidence on record from both the prosecution and the defence sides. I have also considered the judgement of the learned Senior Principal magistrate, and the submissions filed by the 2 sides. In my view the following issues come up for determination in this appeal.
- i. Whether the offence of robbery with violence was committed against PW3 David Gitari Kinyanjui (Kinyanjuri)



- ii. Whether the appellant was identified as the perpetrator of the offence.
- iii. Defence of the appellant
- iv. Whether case was proved beyond reasonable doubt.
- v. The issue of sentence.

36 As put by the trial magistrate on the 1st issue, it is important to discern what exactly this offence entail. Section 295 of the penal code defines the offence of robbery as;

“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.”

40 And as for the offence of robbery with violence, section 296(2) of the penal code states;

“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 it at 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.”

41 The elements of the offence of robbery with violence are well settled in the case relied on by the lower court of *Oluoch versus Republic* (1985)KLR, 549, in which the Court of Appeal held;

“Under section 296(2) of the Penal Code , robbery with violence is committed in any of the following circumstances;

1. The offender is armed with any dangerous or offensive weapon or instrument.
2. The offender is in company with 1 or more person or persons or
3. At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other person violence to any person.

42 The 3 elements need not all be proved in proving robbery with violence. Proof of any single element would suffice, thus the use of the word “or”. In this case, the evidence of PW3 was that he was attacked by 2 men. The one seated behind him tied his neck with a rope. He was tied further and bundled into the back seat as the one at the front passenger seat took over to drive the vehicle. Whereas he had picked the 2 men at the filling station along Langata Road, he was driven and later abandoned in darkness away within the environs of Thika. The 2 went away with the motor vehicle together with his ID card, phone and drivers licence. The said vehicle was only to be later recovered on 28.4.2015 at a different location.

43 These factors convinces this court that the prosecution evidence actually proved the elements of the offence of robbery with violence. I so find on the 1st issue.

44 Regarding the 2nd issue of identification of the appellant as the perpetrator of the offence, there are 2 different positions to be considered, the identification during the incident, and the identification parade.

45 It was the evidence of PW4 that it is the appellant who approached him to hire his taxi. They were at the petrol station that was well lit. They took time to bargain on the fare and eventually settled on



Ksh.1000/=. That that is when the appellant signaled the other man to join in. that the appellant sat with the witness at the front while the other man sat at the back on the seat behind the driver. PW3 was categorical that he had ample time and opportunity to identify the appellant and that he confirmed the same both at Thika police station where he first made the report and also to the investigating officer, PW4.

In *Wamunga Versus Republic* (1988)KLR 426, the (CA) court held;

“It is trite that where the 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 can safely make it a basis of conviction.”

46 And while still on the evidence of identification by a single witness, the Court of Appeal, in *Kiilu and Another Versus Republic*(2005)1KLR 174 observed;

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or Jury can reasonably conclude that the evidence of identification, although based on a testimony of a single witness, can safely be accepted as free from the probability of error.”

47 The prosecution’s case on the issue of identification was based on the evidence of 1 witness, PW3. It is therefore imperative that the court considers the circumstances of such identification. It is important to note that the appellant approached the witness. This was at a well lit petrol station. The 2 of them talked as they bargained on the issue of fare, eventually settling at 1000/=. The witness then set to drive with the appellant seated at the front passenger seat. Upto the moment when he was attacked, the 2 related in a cordial business-client relationship. I am convinced that through this personal engagement, devoid of any fear, the 3 witness, PW3, was in a position to properly and accurately identify the appellant. And that it is because of this that he readily reported both at Thika police station and to the investigating officer (PW4) that he was able to properly identify the appellant.

48 The 2nd element of identification parade. In the evidence of PW5 CI Cecilia Muthoni, the parade was conducted in accordance with the rules and that the appellant consent to the same and duly appended his signatures to confirm his approval and satisfaction with the same. That the only objection the appellant noted was the fact that he was identified by his black jacket, which he noted, anybody could have. I do not find this objection plausible since the evidence of PW3 was that he identified the appellant by his appearance, physique and his black jacket, same that he had worn on the date and day of the robbery.

49 By way of his submissions, the appellant has raised the issue of the identification parade having been conducted in a flawed manner to the extent that it only had 7 members and not 8. The prosecutions in its own submissions has conceded to this anomaly. I need not say much on this issue in view of the position taken by the prosecution.

50 The appellant has raised a number of other issues in his submissions. First is that the prosecution failed to call certain key witnesses. With respect, I do not agree with the appellant on this score. The appellant has not specifically stated whom these witnesses are that were not called. Neither has he stated whether



these persons ever wrote any witness statements in the first place. Nor whether they had been listed on the list of prosecution witnesses. In the absence of such material specifics, the trial court and indeed this court would have no basis for invoking the powers of the court as conferred under section 150 of the criminal Procedure Code.

51 On the issue of alleged coercion of the witnesses, I have considered the proceedings of the lower court. All the prosecution witnesses, particularly the owner of the vehicle (PW1) the compliant (PW3), and the investigating officer (PW4) attended court and testified on the scheduled dates. Only PW5 the officer who conducted the parade had to be summoned by the court. Her explanation under oath was accepted by the court. In any case, there has been no allegation that the witnesses gave evidence that was not in tandem with their witness statements supplied to the appellant. I sincerely do not find any element of coercion on these witnesses.

52 The appellant has raised the doctrine of recent possession. In the case of *David Mugo Kimunge Versus Republic* (2015)eKLR, Court of Appeal, giving directions on the doctrine of recent possession, held;

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof;

- i. That the property was found with the suspect.
- ii. That the property is positively the property of the complainant.
- iii. That the property was stolen from the complainant.
- iv. That the property was recently stolen from the complainant.

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another.”

53 There is no doubt in our present case that the motor vehicle KBC 338M belonged to PW1 who duly produced its log book, and that the same was only recently stolen from PW3 to whom PW1 had assigned the vehicle to operate as a taxi. There is also no doubt, from the evidence of PW4, that it is the appellant who had been in actual possession of the same at the time of his arrest. I accordingly find that the doctrine of recent possession applies in this case.

54 As to whether the motor vehicle was a Toyota Axio or Toyota Crown, it is important to consider the evidence of PW1 and PW2, that it was a Toyota Axio. The log book of the same produced by PW1 confirms the same position. It is only the OB extract of Thika police station mentions the motor vehicle as Toyora Crown. The same OB extract otherwise notes the correct registration number of the motor vehicle as KBS 338M. the evidence of PW1 and PW3, supported by the details in the log book can only mean that the reference to the motor vehicle as Toyota Crown in the OB of Thika police station was an error which can only be attributed to the officer who booked the report. And this error, as found by the honourable trial magistrate, is not fatal to the prosecution’s case.

55 On the 3rd issue of the defence of the appellant the appellant only dwelt on how he was arrested when he presented himself at central police station to pursue settlement of a different case. While stating that he never saw any car being brought to court or being photographs produced were of a different car. With respect to the appellant, I do not find merit in this defence. The court has already pointed out the error in christening this motor vehicle as Toyota Crown in the OB report. This defence therefore does not stand. And even worth noting is that the appellant’s defence did not challenge in any way the



evidence of PW3 on his identification as one of the 2 men who robbed the complainant of the motor vehicle. I do not find any merit in the appellant's defence. I dismiss the same.

56 In the circumstances, I arrive at the same conclusion as that of the Honourable trial magistrate, that the prosecution discharged its burden of proof and indeed proved the case against the appellant beyond any reasonable doubt as required by the law (*Woolmington Versus DPP (1935)AC 462*).

57 Lastly, on the issue of sentence as already seen above, the section 296(2) of the Penal Code prescribes for a death sentence for the offence charged. The appellant was accorded the opportunity to mitigate which he did. In sentencing the appellant to serve 20 years imprisonment, the court took into account the mitigation of the appellant, and also the period he had served in custody while awaiting determination of his case.

58 In the case of *Benard Kimani Gacheru Versus republic* (2002)eKLR, the Court of Appeal held;

“It is now settled law, following several authorities by this court, and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances or that the trial court overlooked some material factor, or took into account some wrong material or acted on a wrong principle. Even if the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed the sentence, these alone are not sufficient grounds, for interfering with the discretion of the trial court on sentence, unless any one of the matters already stated is shown to exist.”

59 On my part, I am convinced that the sentence meted out against the appellant was both legal and proper. I have no reason whatsoever to interfere with the same.

60 The sum total is that I do not find any merit in the appeal of the appellant filed herein on 20.4.2020. I dismiss the same wholly.

JUDGMENT READ OUT IN OPEN COURT (ONLINE) IN THE PRESENCE OF THE APPELLANT (KAMITI) AND MR. KIRAGU FOR THE STATE.

HON. DO. O. OGEMBO

JUDGE

24.5.2022

Court

Judgment read out in open court (online) in the presence of the appellant (Kamiti) and Mr. Kiragu for the state.

HON. DO. O. OGEMBO

JUDGE

24.5.2022

