



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kigongo v Republic (Criminal Appeal E017 of 2021)
[2022] KEHC 15469 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15469 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E017 OF 2021
RN NYAKUNDI, J
NOVEMBER 17, 2022**

BETWEEN

SAMMY WANYOIKE KIGONGO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the conviction and sentence in Criminal Case No. 5506 of 2006 at Kapsabet delivered by Hon. Atonga CM on the 15th day of August 2008)

JUDGMENT

1. The appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the *penal code*. The particulars of the offence are that on the 6th day of March 2006 at Kapngetuny village, Kapsabet location in Nandi North District of the Rift valley province, jointly with others not before court, being armed with dangerous weapons robbed off Leah Chelagat cash money Kshs. 700, one black handbag containing her ID card all valued at Kshs. 2,200 and at or immediately before or immediately after time of such robbery wounded the said Leah Chelagat.
2. The prosecution called six witnesses to prove its case and after considering all the testimony and evidence, the trial court sentenced the appellant to death. The appellant, being dissatisfied with the decision of the trial magistrate, instituted this appeal vide a petition of appeal which was later amended by the amended grounds of appeal filed on February 14, 2022. The grounds of appeal were;
 1. That the learned trial magistrate erred in law and in facts where the appellant identification was not watertight.
 2. That the learned magistrate erred in law and facts by not considering that the prosecution case was based on doubtful, questionable, inconsistent, contradictory and therefore untrustworthy evidence.



3. That the learned trial magistrate erred in law and facts by failing to find that the appellants defence was cogent and believable and raised credible doubt against the petitioner's case.
4. That the learned trial magistrate erred in law and facts by sentencing the appellant to a sentence that is not only harsh but excessive in light of the circumstances.

Appellant's Case

3. The appellant's case is that his identification was not watertight. Further, that for the prosecution to prove in identification; condition favourable to positive identification must be shown to have subsisted at the time of commissioning of the offence. The factors for consideration include; whether the witness knew the suspect before the incidence, the time taken, the distance, whether the complainant gave any physical appearances, dressing code or any communication between the witness and the complainant. The above principles were not followed in the instant matter. Its trite law that a complainant should clearly give descriptions of her assailants to the police.
4. The appellant contended that the identification parade mounted by PW7 was an error in law. Further, he submitted that the complainant stated that the assailant was covered by lessos at the time of attacking them which corroborated the evidence of PW 2 and PW3. How then was he able to confirm their identity to the police?. He submitted that there were many abnormalities which the trial court ignored.
5. The appellant submitted that the complainants complained about being robbed of some valuables and cash but there were inconsistencies with regard to the amounts and the description of the robbers. Further, that the panga used in the incident belonged to the complainant and not the accused.
6. The appellant submitted that his defence was not rightly rejected since it was raised at the earliest instance, immediately after the appellant's arrest-at the commencement of the prosecution trial and not at the tail end of the trial. The prosecution had all the time and opportunity to lead evidence to dislodge it. He had given a chronological order of where he was on the material date and the burden of proof was shifted to the prosecution whose duty it was to adduce evidence to dislodge the defence. The same was not done. He cited the case of *Ssentale vs Uganda* (1968) E.A 365 to buttress this submission.
7. The appellant contended that the sentence passed was harsh and excessive. He was treated as a first offender and in mitigation he asked that the court forgive him as he would never repeat the offence again. According to the appellant the court disregarded this mitigation and sentenced him to death.
8. The appellant cited the case of *Francis Karioko Muruatetu and another VS Republic* petition no 15 of 2015 and submitted that on appeal, the appellate judge did not conduct a rehearing exercise to weigh the circumstances that prevailed at the time of the offence was committed and any other mitigating circumstances the court could have considered to enable the court to arrive at a reasonable sentence. He submitted that section 296(2) of the *penal code* makes the death sentence mandatory for offenders of robbery with violence. It deprives the court the use of its judicial discretion given to its under article 165(3); that the high court had unlimited jurisdiction in hearing a criminal matter when an appeal is filled and can pass any sentence which the court deems as appropriate gives the circumstances of the case. He submitted that the supreme court found that the mandatory death sentence is unconstitutional and asked that he be released as the time he has spent in custody is enough.

Respondent's Case

9. The respondent filed submissions on June 21, 2022 opposing the appeal. The respondent submitted that all the ingredients of the offence of robbery with violence were proved beyond doubt. As per the evidence of the complainant (PW1) her house girl (PW3) and (PW4) shamba boy on the material day



while they were at home at 7.30pm. Three (3) armed persons entered the complainant's house through the kitchen door. Inside the house the lights were on.

10. The thugs were armed with pangas. One of them had his head covered with a *lesso*. They demanded for cash from the complainant. One thug accompanied the complainant to the bedroom to go look for money. They made away with the complainant's money Ksh.1000/= National Identity card and a hand bag. In the process the complainant (PW1) was cut at the back with a panga. The complainant sustained injuries she was treated by Dr. Lubanga a P3 form Exhibit 1 was produced in court by PW5, PW2 was also injured by the thugs he was treated discharged. The P3 form Exhibit 2 was filled by Dr. Imbeko. It was confirmed that indeed PW2 sustained some injuries.
11. During the incident as the three (3) thugs entered the kitchen, electricity lights were on. PW3 was in the kitchen when they entered. The thug in front had his head tied up with a *lesso*. Two other thugs stood behind the first one. One thug ordered PW3 to lie down on the floor as her pushed her down. As per PW3 the thugs were strangers.
12. As PW2 heard screams in the kitchen, he came in and saw two thugs who were armed with pangas. They beat PW2 with pangas. PW2 indicates there was light on therefore he could see them clearly. PW1 also emphasized on the fact that there was light in the house as such she could see the thugs. As PW1 screamed for help, PW4 the neighbour heard the screams he responded by screaming other neighbours came out to assist. They chased the thugs as a result of which one was killed and one was arrested with a panga, a black handbag and a wallet. The appellant was the thug that was arrested by the villagers not far away from the scene of crime.
13. The respondents submitted that there was no issue of mistaken identity and the items the appellant was arrested with were produced as Exhibit 2 hand bag Exhibit 6 brown wallet, two national identity cards Exhibit 3 (a) and 3 (b). Further, that the evidence tendered by the appellante in his defence was very shallow as he did not controvert the evidence of the prosecution witnesses. He was arrested and found with items that were stolen from the complainant's house less than one hour ago. The doctrine of recent possession applies in this case. The doctrine further links the appellant to this offence.
14. With regard to the sentence the respondent submitted that the sentence was commensurate to the magnitude of the offence that was committed. The appellant and his team inflicted injuries upon PW1 and PW2. Neighbours intervened by screaming as a result of which the thugs ran away. If the thugs had a chance they would have ended up killing the complainants using the pangas that they were armed with. Appreciating the elements in Muruatetu, the respondent submitted that the death penalty was the ideal sentence.
15. Upon considering the submissions, record of appeal and the pleadings, the following issues arise for determination; Whether the prosecution proved its case to the required standard Whether the sentence was harsh or excessive

Whether the prosecution proved its case to the required standard

16. This being the first appellate court, it has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing and hearing the witnesses and observing their demeanour and so the first appellate court must give allowance of the same. See *Okeno V. Republic* [1972] EA 32



17. What constitutes the offence of robbery with violence was well captured in the case of *Oluoch vs Republic* (1985)KLR where the Court of Appeal stated as follows:-

“...Robbery with violence is committed in any of the following circumstances:

The offender is armed with any dangerous and offensive weapon or instrument; or

The offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.”

Whether the offender was armed with a dangerous weapon

18. The appellant was identified as being at the scene of the crime by the testimony of PW2 who came into the house on the material date upon hearing the screams and saw the thugs, one of whom was covered with a lessa. An identification parade was conducted and PW1 identified the appellant. The light in the house was on and thus it was easy to identify the appellant. The accused was apprehended by the villagers in possession of a panga which was identified by the witnesses as the one which was used in the robbery. PW2, PW3 and PW4 corroborated the identification as they identified the accused when the members of the public arrested him and killed one of his fellow assailants.

Whether the offender was in the company of more than one person

19. The evidence of PW1, PW2, PW3 and PW4 is that the appellant was in the company of a second and third suspect when the offence took place on the material date.

Whether the offender used violence

20. PW1 testified that one of the suspects cut her with a panga as he took the bag. PW2 also testified that he was hit with a panga in the process of the robbery. They produced P3 forms in court as evidence of the assault having occurred. PW5, a clinical officer attached at Kapsabet examined PW1 and PW2 and produced the P3 forms, thus corroborating that there was violence used by the offender(s).
21. In the premises, all the elements of the offence were proved to the required standard. Further, the appellant was found in the possession of the stolen items. An application of the doctrine of recent possession resulted in the conviction of the accused and I find that the same was merited.

Whether the sentence was harsh/excessive

22. Robbery with violence contrary to section 296 of the *Penal Code* is prescribed as follows:

“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 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”

23. It follows that the penalty prescribed in the *penal code* is death. The current position in law is that the mandatory death penalty is unconstitutional. In Criminal Appeal No. 84 of 2015, *Josbua Gichuki Mwangi vs R* (2022) (Unreported) the Court of Appeal held as follows;



We acknowledge the power of the Legislature to enact laws as enshrined in the Constitution. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.

This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence.

This goes against the independence of the Judiciary as enshrined in Article 160 of the Constitution. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of the Constitution to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the Constitution. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited.

24. In the premises it is my view that the sentence of death was excessive and in light of recent jurisprudence. In Francis Muruatetu -v- R 2017 Eklr commonly known as Muruatetu One, the Supreme Court identified several fundamental flaws with a mandatory capital punishment regime widely cited as the death penalty in section 204 of the penal code. First, a mandatory sentence simply written on paper without mitigation and unchecked judicial discretion risked the court from taking into account individualised personal circumstances of the convict. Secondly, the sentence treats individual offenders as faceless and undifferentiated mass of people who must be subjected to one model of sentence of death. The Supreme Court therefore advocated and emphasized that the benefit of discretion is a matter of life and death for the convicted persons and without regard to those specifics personal circumstances inappropriate cases the mandatory penalty may end up being unconscionable. The interplay of constitutional clauses on the right to a fair hearing provided a window for convicted offenders to challenge the mandatory death penalty in section 296(2) and 204 of the penal code. The mandatory death penalty as the jurisprudence stands in Kenya is inappropriate. That indeed is the notional punishment imposed upon the appellant and which he deems to be unconstitutional and excessive, in absence of mitigation and all other aggravating circumstances. As if that is not enough enforcement of the death penalty amounts to cruel, inhuman and degrading treatment and punishment of the condemned persons as provided for in article 25 of the Constitution. There is evidence of non-execution of that sentence by hanging as provided for in our policy and statutory framework. The appellant here was tried, convicted and sentenced to death for the offence of robbery with violence contrary to section 296(2) of the penal code. From the record it is clear that he was unfamiliar with the rules of evidence and the lack thereof of skill and knowledge to prepare a formidable defence against his accusers. In the case at bar the appellant was sentenced to death on 15/8/2008. Given the circumstances of the offence I am persuaded that the aforesaid sentence be varied and substituted with custodial sentence of 17 years with effect from the date of committal outlined above. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 17TH DAY OF NOVEMBER, 2022.

.....
R. NYAKUNDI

JUDGE

