



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 215 OF 2013

[FORMERLY NYERI HIGH COURT CRIMINAL APPEAL NO. 32 OF 2012]

EDWIN KAMAU MUNJIRU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the judgment by E.J. Osoro, Senior Resident Magistrate, in Muranga Criminal Case No. 2457 of 2010 on 16 February 2012]

JUDGMENT

1. The appellant was adjudged guilty of *robbery with violence* contrary to section 296 (2) of the **Penal Code**. He was sentenced to *death*.
2. The particulars were that on 15th November 2010 he and his co-accused jointly robbed *Ephantus Njoroge Kamau* of a mobile phone *Nokia 1110*, Kshs 300, a pair of shoes and a jacket all valued at Kshs 4000 and at or immediately before the robbery they used actual violence on the complainant.
3. He first lodged a petition of appeal at the High Court at Nyeri on 22nd February 2012. The appeal was transferred to this Court on 30th January 2013. It was heard by a *mixed* bench of a *High Court* Judge; and, an *Employment and Labour Relations Court* Judge. On 27th November 2013, the two learned judges dismissed the appeal.
4. The renewed appeal follows the directions by the Supreme Court in ***Republic v Karisa Chengo & 2 others***, Petition No. 5 of 2015 [2017] eKLR.
5. There were eleven *original* grounds of appeal. I can compress them into four. Firstly, that there was no positive identification; secondly, that the evidence was contradictory, inconsistent and insufficient to found the charge; thirdly, that the evidence of recent possession of a mobile phone tying him to the offence was tenuous and irregularly admitted. Fourthly, the appellant argued that the sentence handed down was too harsh and punitive.
6. The appellant thereafter lodged amended grounds of appeal. They can again be condensed into four. Firstly, that the learned trial magistrate breached section 150 of the **Criminal Procedure Code**; secondly, that the doctrine of recent possession of stolen property was inapplicable; thirdly, that the prosecution relied on the evidence of a single witness; and, fourthly, that the appellant's defence was disregarded.
7. At the hearing of the present appeal, the appellant relied wholly on the written submissions and a list of authorities filed on 10th February 2020.
8. The appeal is contested by the Republic. In a nutshell, the case for the State is that all the ingredients of *robbery with violence* were proved beyond reasonable doubt.
9. I have re-evaluated the evidence and drawn independent conclusions. I am alive that I neither saw nor heard the witnesses. ***Njoroge v Republic*** [1987] KLR 19, ***Okeno v Republic*** [1972] E. A. 32.
10. The appellant's conviction largely turned upon the *doctrine of recent possession* of stolen property.
11. On the material day, the complainant (PW 1) was walking home alone from Kiboi Trading Centre. It was dark. The time was between 8:30 p.m. and 9:00 p.m. Two men accosted him from behind. He said he recognized their voices because they were his neighbours. They hit

him with an object and he fell unconscious. He was hospitalized at Muriranj Hospital. He said he was robbed of some money, shoes, jacket and a mobile phone (exhibit 1).

12. Edward Irungu Mukami (PW2) testified that at about 9:00 p.m. while seated in a bar, the appellant sauntered in and sat next to him. The latter requested him to open a mobile phone to extract the *sim card*. PW2 became suspicious. When he asked the appellant whether the phone belonged to him, the latter hesitated. When PW2 started to scroll through the phone directory, the appellant took off and warned him of calamitous consequences.

13. PW2 later passed by the appellant's mother's home who told him her son did not own the mobile phone. PW2 scrolled through the phone and called a Faith Nduta whose name appeared in the list of contacts. The latter told him that the cell phone belonged to her brother, PW1. Both PW1 and PW3 (the appellant's wife) identified the cellphone.

14. There is then the evidence of Dr. David Kamau (PW6). He examined the patient on 23rd December 2010. The injuries were five weeks old. The degree was harm. He produced the P3 Form (exhibit 2) which showed a "mandible angle intermaxillary fixation" *in situ*. There was also a healed scar.

15. Section 296 (2) of the **Penal Code** provides:

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.

16. In our criminal justice system, the *legal burden* of proof lay throughout with the prosecution. **Woolmington v DPP** [1935] AC 462, **Bhatt v Republic** [1957] E.A. 332.

17. From the evidence of PW1, PW2, PW3 and PW6, I readily find that the complainant was robbed and injured during the robbery. All the elements of the offence of robbery with violence were present.

18. The only live question is whether the appellant committed the robbery. The key evidence connecting him to the robbery is the cellphone (exhibit 1). Like I stated, the robbery occurred between 8:30 p.m. and 9:00 p.m. The appellant soon thereafter sought the assistance of PW2 to open the gadget and extract its *sim card* at about 9.00 p.m. the same night. When PW2 sought an explanation from him, the appellant escaped.

19. The appellant did not give any plausible explanation as to how he came into possession of the stolen item. That evidence was *especially within his knowledge*. The burden shifted to him under section 111 (1) of the **Evidence Act** which provides:

When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him.

20. Granted that state of affairs, I concur wholly with the learned trial magistrate that the appellant was one of the two robbers who attacked the complainant and robbed him of the properties itemized in the charge sheet above.

21. I find that the doctrine of *recent possession* fits squarely in this case. First, the property was found with the appellant; secondly, the property was positively identified by the complainant; and, thirdly, the property was stolen from the complainant just a few minutes earlier. See **Samson Nyandika Orwerwe v Republic**, Court of Appeal, Nairobi, Criminal appeal 16 of 2013 [2014] eKLR, **Erick Gangai v Republic**, Kitale, High Court Criminal Appeal 125 of 2011 (unreported).

22. In the end, I find that the offence was *proved* beyond reasonable doubt.

23. I will now turn to the sentence of death. Until recently, the offence attracted the mandatory sentence of death. But the Supreme Court in **Francis Karioko Muruatetu & another v Republic** Petition 15 & 16 of 2015 [2017] eKLR held as follows-

"The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution."

24. This court on a first appeal *may* review the sentence. The sentence imposed on an offender must be *commensurate* to his moral blameworthiness. **Macharia v Republic** [2003] 2 E.A. 559

25. The appellant is a *first offender*. The appellant told the lower court that he was asthmatic. He prayed for leniency. I have considered those matters. The appellant and his accomplice attacked the complainant and caused him grave injuries. In this case, justice can only be served by a long prison term.

26. The upshot is that the appeal on conviction is *dismissed*. The sentence of death is *set aside*. I sentence the appellant to serve *fifteen (15) years imprisonment*. For the avoidance of doubt, the term of imprisonment *shall* take effect from 16th February 2012, the date of his original conviction and sentence.

It is so ordered.

DATED, SIGNED and DELIVERED at MURANG'A this 26th day of March 2020.

KANYI KIMONDO

JUDGE

Judgment read in chambers in the presence of:-

Appellant absent in line with NCAJ's Covid-19 pandemic guidelines of 15/3/2020.

No appearance by counsel for the Republic.

Ms. Dorcas, Court Assistant.