



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**(CORAM: KIMONDO & NGENYE-MACHARIA JJ)**

**CONSOLIDATED CRIMINAL APPEALS NOS. 180 & 181 OF 2011**

**HEWETT VOSENA KISUSA.....1<sup>ST</sup> APPELLANT**

**TERRENCE ATSANGO SHIKUTWA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Criminal Case No. 2842 of 2005 Republic vs Hewett Kisusa and Terrence Shikutwa in the Senior Resident Magistrate's Court at Kapsabet by A. Lorot, Senior Resident Magistrate dated 7<sup>th</sup> September 2011)*

**JUDGMENT**

1. The appellants were convicted for the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. They were sentenced to 14 years imprisonment. The appellants have appealed against the conviction and sentence. They filed separate appeals. On 26<sup>th</sup> March 2014 the two appeals were consolidated.
2. The charge was substituted on 1<sup>st</sup> October 2010. The particulars of the new charge were as follows: On 17<sup>th</sup> November 2005 at Kapchesir Village, Koibarak Location, Nandi South District, jointly with others not before the court, the appellants robbed Gilbert Adede of a television set make *Afron* coloured, 2 solar batteries, a solar panel, 12 sofa set cushions, 3 radio cassettes, 2 pairs of men leather shoes, a pair of gumboots, an empty drum, a sewing machine make *swan* a mobile phone make *Siemens*, an *Optimus* phone, one knapsack spray, aerial booster, torch, panga and personal documents all valued at Kshs 676,500 and at the time of such robbery wounded the said Gilbert Adede.
3. The primary grounds in the appeals can be condensed into eight. First, that the charge was defective by charging the appellants under section 295 as read with section 296 (2) of the Criminal Procedure Code; secondly, that the charges were not proved beyond reasonable doubt; thirdly, that there was no positive identification of the appellants; fourthly, that the stolen goods were not recovered or traced to the appellants; fifthly, that the evidence adduced at the trial was contradictory; sixth, that the investigations by the prosecution were shoddy; seventh, that the defences put forth by the appellants were not taken into account; and lastly, that the trial was marred by a myriad of adjournments that were anathema to a fair trial.
4. The State has contested the appeal. The case for the State is that the evidence tendered at the trial proved the charge beyond reasonable doubt. Regarding identification of the appellants, the State submitted that the appellants were known to the complainant and his wife (PW1 and PW2); that there was sufficient light from powerful torches carried by the attackers that reflected on a

- cupboard; and, in addition, there was voice identification. The appellants and other assailants were armed with offensive weapons and wounded PW1, PW2 and their daughter PW3. It was submitted that the defences urged by the appellants were considered but were not convincing. The fact that other suspects were released or not charged did not weaken the case or provide a defence to the appellants. In a nutshell, the State submitted that the appeal lacked merit and should be dismissed.
5. These are first appeals to the High Court. We are required to re-evaluate all the evidence on record and to draw our own conclusions. In doing so, we have been careful because we have neither seen nor heard the witnesses. See *Pandya v Republic* [1957] E.A 336, *Ruwalla v Republic* [1957] E.A 570, *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E.A 32, *Kariuki Karanja v Republic* [1986] KLR 190.
  6. We shall first deal with the matter of identification. PW1 had testified that the 1<sup>st</sup> appellant was his worker; while the 2<sup>nd</sup> appellant was a neighbor. He knew the appellants. On the material night, PW1, his wife PW2 and their daughter, PW3, were all asleep in their house. PW1 heard a group of people breaking the front and rear doors of the house. When the assailants entered, they put off or destroyed the lamps. The attackers included other people other than the appellants. They had powerful torches. The light from the torches was being reflected on a cupboard. He said in cross examination that the 2<sup>nd</sup> appellant cut his hand and head; he lost consciousness. He said that it was his wife who “saw the appellants during the attack” from where she was hiding. From that evidence, it is clear that PW1 did not positively identify the appellants.
  7. PW2 heard the attackers gain entry into the house. She hid in a room next to the bedroom. She saw a big group of people. She said that the house has five bedrooms. Under cross examination, she said that from where she was hiding, she “could see the sitting room, bedroom and all the other four doors”. After the lamps were destroyed, “darkness engulfed the house”. She then testified as follows-

*“I saw the 1<sup>st</sup> accused, he was leading them. I recognized them from their torches and his voice. The 2<sup>nd</sup> accused was telling PW1 to surrender the money”.*

8. When PW2 was cross examined by the 1<sup>st</sup> appellant, she answered as follows: *“I saw you as you lit your torch on PW1. I saw your face”*. The learned trial Magistrate however noted that PW2 refused to answer the question on the type of clothes the 1<sup>st</sup> appellant was wearing. PW2 saw the 1<sup>st</sup> appellant cut PW1 and PW3. The attackers then carted away the household goods. PW3 or the remaining witnesses did not see the attackers.
9. When cross examined by the 2<sup>nd</sup> appellant, PW2 said she recorded a statement with the police the next morning. She said she told them that the attackers were Mmaitisi, Terrence [2<sup>nd</sup> appellant], Vosena [1<sup>st</sup> appellant], and Okwemba. Upon further cross examination, she conceded that her written statement to the police did not *name* the suspects. But she stated she recognized their voices. When her neighbours came, she did not tell them that the 2<sup>nd</sup> appellant was the attacker. We find some inconsistency on that aspect. It is however not a material inconsistency. In *Joseph Maina Mwangi vs. Republic* Criminal Appeal No. 73 of 1993, the Court of Appeal held:-

*“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 of Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentences.”*

10. The appellants were not total strangers to PW2. If they were, we would have entertained some doubts. The witness was steadfast under cross examination. She saw and heard their voices during the robbery. That is the same conclusion reached by the trial magistrate. He stated in the judgment-

*“The evidence of the prosecution against the two accused persons can be said to hinge on the testimony of PW2 and her husband..... The 1<sup>st</sup> accused had worked for him before. He also knew the 2<sup>nd</sup> accused as a neighbour. From the evidence of PW2, she was hiding in the house.*

*She saw the men enter. She identified them and reported to the police. The 1<sup>st</sup> accused was arrested the very next day. He was found drunk by the roadside, a fact he too admits in his defence. He was seen clearly”.*

11. Evidence of recognition is generally more reliable than identification of a stranger, but mistakes may sometimes be made by witnesses. In Wamunga v Republic [1989] KLR 424, the Court of Appeal held as follows-

*“It is trite law that where the only evidence against a defendant is 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 from the possibility of error before it can safely make it the basis of a conviction.”*

12. In Republic v Turnbull & others [1976] 3 All ER 549, the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. In Kiarie v Republic [1984] KLR 739, the Court of Appeal had this to say-

*“It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction.”*

13. See also Joseph Ngumbao Nzaro v. Republic [1991] 2 KAR 212, Richard Gathecha Kinyuru & another v Republic Nairobi High Court Criminal Appeal 290 of 2009 [2012] eKLR. In Obwana & Others v Uganda [2009] 2 EA 333, the Court of Appeal of Uganda stated as follows at page 337;

*“It is now trite law that when visual identification of an accused person is made by a witness in difficult conditions like at night, such evidence should not ordinarily be acted upon to convict the accused in the absence of other evidence to corroborate it. The rationale for this is that a witness may be honest and prepared to tell the truth, but he might as well be mistaken. This need for corroboration, however, does not mean that no conviction can be based on visual identification evidence of a sole identifying witness in the absence of corroboration. Courts have powers to act on such evidence in absence of corroboration. But visual identification evidence made under difficult conditions can only be acted on and form a basis of conviction in the absence of corroboration if the presiding judge warns himself/herself and the assessors of the dangers of acting on such evidence”*

14. When we appraise the evidence, we find that there was a single identifying witness, PW2. We have warned ourselves of the dangers of relying on evidence of a sole identifying witness. But we are satisfied from the description of the location where PW2 was hiding that she could see the sitting room and the doors to the bedrooms. PW1 was attacked at the sitting room. PW2 identified the 1<sup>st</sup> appellant clearly when 1<sup>st</sup> appellant shone his torch on PW1. PW1 had testified that the attackers had powerful torches that were reflecting on the cupboard. The 1<sup>st</sup> appellant had worked for PW1 and PW2. He was not a stranger to PW2. We have accordingly reached the conclusion that the 1<sup>st</sup> appellant was recognized by PW2. His identification was positive.

15. From where PW2 was hiding, she heard the 2<sup>nd</sup> appellant telling PW1 to “surrender the money”. The 2<sup>nd</sup> appellant was her neighbor. He was equally not a stranger. PW3 said her father mentioned the 2<sup>nd</sup> appellant’s name immediately he recovered. In voice recognition, the words uttered are material. In Limbambula v Republic [2003] KLR 683, the Court of Appeal stated that evidence of voice identification is receivable so long as the person giving the evidence is familiar with it, recognizes it and there is no *mistake in testifying to that which was said and who said it*. We are satisfied that the 2<sup>nd</sup> appellant was in the company of the 1<sup>st</sup> appellant and other assailants. He was positively identified by PW2. In sum, the appellants were identified by both visual and voice identification.

16. The key ingredients for a robbery with violence charge are found in section 296(2) of the Penal Code. It provides as follows-

*“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”.*

17. In this case the appellants and other persons attacked the complainant. They beat, struck, wounded or used personal violence on PW1 and PW3. They stole the items particularized in the substituted charge. In the course of the robbery, they seriously wounded PW1 and PW3. PW1 was cut on the hand and head; PW3 was cut on the leg at the knee joint as the robbers left. PW1 and PW2 were hospitalized after the attack. PW6, a clinical officer at Kaimosi Hospital produced their P3 forms. PW1 had suffered cut wounds to the degree of maim while PW3 had a fracture on her patella. All the ingredients of robbery with violence were thus present.

18. The substituted charge sheet read out to the appellants was not defective by referring to both sections 295 and 296(2) of the Penal Code. The former describes simple robbery; the latter particularizes the ingredients that *aggravate* it to robbery with violence. That is why section 296 starts with the word *if*. So that *if* the attacker is accompanied by another person, or is armed with a dangerous or offensive weapon, or beats, strikes or threatens to use or uses personal violence before, during or after the act, the offence is aggravated to robbery with violence.

19. Fundamentally, no prejudice was suffered by the appellants merely by the citation of both sections in the charge. In *Joseph Onyango Owuor v Republic* Criminal appeal 353 of 2008 [2010] eKLR the court stated that section 295 of the penal code is merely a definition section and that “sections 296(1) and 296(2) of the Penal Code deal with specific degrees of the offence of robbery and have been framed as such”. In *Joseph Njuguna Mwaura and others v Republic* Court of Appeal Criminal Appeal 5 of 2008 [2013] eKLR, the five-judge bench said they “agree[d] that this is the correct proposition of the law”. Further down the judgment however, the Court stated that “it would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296(2) as this would amount to a duplex charge”. In the present case there is no duplex charge. The record clearly shows that on 1<sup>st</sup> October 2010, the charge was substituted for a capital charge under section 296(2) of the Penal Code and fresh pleas were taken.

20. We have then examined the defences put forward by the appellants. The 1<sup>st</sup> appellant stated as follows-

*“I recall the 18/11/2005, I woke up as usual and cut grass for my cattle. 2 women came and I gave them 2 crates of tomatoes for Kshs. 1,000/=. I then took a bath and I had Kshs. 2000/-. I gave my wife the money and remained with Kshs. 500/-. I went to drink chang’aa with other men. I took two glasses of chang’aa and I passed by my sister’s house. She is married in the neighbourhood. She had a cow that was about to give birth. She wanted me on standby just in case the cow would need assistance. I slept there”.*

21. The 1<sup>st</sup> appellant dealt with events of 18<sup>th</sup> November 2005. The offence is alleged to have taken place on 17<sup>th</sup> November 2005. The 2<sup>nd</sup> appellant on the other hand stated as follows-

*“It was around 1 am. People knocked my windows and the door. I woke up and found they had broken both windows and the door. I saw a flash light toward me. Then there was the sound of a gun shots. I found myself down, unconscious. After about 15 minutes, I woke up. I did not know what had happened. A neighbour came and asked what had happened. I could not explain. I found myself with gunshot wounds. I was bleeding up till 6a.m. Neighbours tried to assist. My father brought me to Kapsabet District Hospital. I was admitted. He went to report to the police station and I was told I am a suspect. The charges were then preferred. I still deny. The complainants found their goods with people who are not before court”.*

22. When juxtaposed against the clear evidence of the prosecution, the defences were unbelievable. But there is an important matter: both appellants were setting up a defence of an *alibi*. When *alibi* evidence is proffered, the prosecution is obligated to investigate it. The appellants had not given any notice that they would raise it. It was being set up well after the close of the prosecution’s case. It was thus open to the trial court to weigh it against the evidence already tendered. See

Wang'ombe v Republic [1976-80] KLR 1683.

23. The learned trial Magistrate was satisfied that the appellants were positively identified on the material night at the *locus in quo*. That in turn discounts the *alibis*. In his judgment, the learned Magistrate stated as follows-

*“The identification was not random. It was specific. They had been seen and their voices made out unmistakably”*

24. The typed record has erroneously put this last word as “circumstance ably”. It makes no sense. We have examined the handwritten record and confirmed the word used by the learned trial Magistrate is “unmistakably”. The learned trial magistrate then said “*I am convinced that the two [appellants] were properly identified*”. In a word, the defence of *alibi* could not stand.

25. We are satisfied there was sufficient evidence to convict the accused. We are not persuaded that the investigations were shoddy. It did not detract from the prosecution’s case that the stolen goods were not found in possession of the appellants or at all. The evidence of PW1, PW2, PW3 and PW6 was largely consistent. We remain alive that under section 143 of the Evidence Act, no particular number of witnesses is necessary to establish a fact. See Joseph Njuguna Mwaura and others v Republic Court of Appeal Criminal appeal 5 of 2008 [2013] eKLR, Bernard Kiprotich Kamama v Republic, High Court, Eldoret, Criminal Appeal 123 of 2010 [2013] eKLR. The appellants did not convince us that a witness who could have given exculpatory evidence was left out. The trial took long, partly due to transfer of judicial officers. But that did not compromise a fair trial. Those grounds of the appeal are thus without merit.

26. From our reconsideration of the evidence, we have found that the appellants robbed the complainant of the items listed in the particulars of the charge. The appellants were positively identified. The appellants were in the company of other robbers. In the course of the robbery, the appellants and their accomplices beat, struck, used personal violence and cut the complainant and his daughter, PW3. PW1 and PW3 suffered injuries that were confirmed in the P3 form produced by PW6. There is thus a clear evidential *nexus* between the robbery and the appellants. It then follows as a corollary that the key ingredients of the offence of robbery with violence were proved beyond reasonable doubt.

27. We would then go to the sentence. The appellants were sentenced to imprisonment for 14 years. That was an illegal sentence. It would have been applicable if the appellants were charged under section 296 (1) of the Penal Code. But in this case, the appellants were charged under section 296 (2) of the Code. The learned trial Magistrate found the charge was proved. He convicted them of robbery with violence. The mandatory sentence is death. There is no discretion. See Joseph Njuguna Mwaura and others v Republic Nairobi, Court of Appeal, Criminal Appeal 5 of 2008 [2013] eKLR.

28. Granted those circumstances, this is a proper case to enhance the sentences. Learned State Counsel, Mr. Omwega, asked for the death penalty. However, the State did not give appropriate notice to the accused. No suitable warning was given to the appellants at the commencement of hearing of these appeals. We are however alive that where the sentence is *illegal*, the Court is entitled to *enhance* it without *notice* to the appellants. In Stanley Nkunja v Republic Nyeri, Court of Appeal, Criminal appeal 280 of 2012 [2013] eKLR the learned Judges held as follows-

*“We wish to deal with the issue of whether the learned Judge erred in enhancing the appellant's sentence, without prior notice to him. The appellant was sentenced to 20 years imprisonment by the trial court. Subsequently, the High Court on a first appeal, enhanced his sentence to life imprisonment. It is not in dispute that the appellant was not served with a notice of enhancement of sentence by the respondent. Section 8(2) of the Sexual Offences Act prescribes a mandatory sentence of life imprisonment for the offence of defilement of a child below 11 years old. In this case V (victim) was 9 years old. Therefore, we find that the learned Judge was correct in holding that the sentence issued by the trial court was illegal. Consequently, was the appellant required to be served with a notice of enhancement of sentence in respect of the illegal sentence? While it is prudent, and fair, to warn the appellant and give him notice of enhancement, we are of the view that such a notice is not required in respect of an illegal sentence. This is because by virtue of the provisions of Section 347(2) of the Criminal Procedure Code, appeals to the High Court may be on*

*matters of facts and law. Illegality of a sentence is a matter of law and therefore, the learned Judge was correct in enhancing the sentence to life imprisonment. In Kingsley Chukwu -vs- Republic-Criminal Appeal No. 257 of 2007, this Court, on a second appeal enhanced an illegal sentence that was issued to the appellant despite the fact that a notice of enhancement of sentence was not given to the appellant”.*

29. The upshot is that these consolidated appeals lack merit and are hereby dismissed. Having found that the appellants were properly convicted for the capital offence of robbery with violence, we shall enhance the sentence. The appellants shall now suffer death.

It is so ordered.

**DATED, SIGNED and DELIVERED at ELDORET this 31<sup>st</sup> day of July 2014**

**GEORGE KANYI KIMONDO**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**JUDGE**

**Judgment read in open court in the presence of-**

Appellants.

Ms Mumu for the State.

Mr Kemboi, Court clerk.