Juma v Republic (Criminal Appeal E055 of 2023)
[2025] KEHC 3225 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 3225 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E055 OF 2023

AC MRIMA, J

FEBRUARY 13, 2025

BETWEEN

ELIAS JUMA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original Judgment and Conviction in Chief Magistrate's Court at Kitale Criminal Case No. E2566 of 2022 delivered on 31st May 2023 by Hon. S. K. Mutai- SPM)

JUDGMENT

1. The Appellant herein, Elias Juma, was charged, tried and convicted of the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*. The particulars of the offence were that on the 3rd day of September 2022 at Kiminini market in Kiminini I sub-county within Trans Nzoia County, jointly with others not before Court robbed Patrick Lumbuku Okumu of infinix mobile phone valued at Kshs. 17,000/= and immediately after the time of such robbery wounded the said Patrick Lumbuku Okumu'.
2. The prosecution called three witnesses after whose evidence the Appellant was placed on his defence. He gave a sworn defence and did not call any witness. The trial Court then convicted him as charged and sentenced him to 10 years imprisonment.
3. Aggrieved by the conviction and sentence, the Appellant preferred the instant appeal and proposed the following amended grounds:

    I. That, he pleaded not guilty at trial.

    II. That, the learned trial magistrate erred in both law and fact by failing to note that fundamental rights were violated.

III. That, the learned trial magistrate erred in both law and fact by failing to note that identification of the assailant was poor to amount a safe conviction.

IV. That, the learned trial magistrate erred in both law and fact by failing to note that the trial was unfair and the crucial key witnesses were not summoned to testify as per the law.

V. That the learned trial magistrate erred in both law and fact by failing to observe that the appellant was an underage at trial and consideration of sentencing policy guidelines.

4. The appeal was heard by way of written submissions. Both parties filed and exchanged their respective submissions.

5. This being a first appeal, it is the duty of this Court to reconsider and to re-evaluate the evidence adduced before the trial Court so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. (See: Okeno vs. Republic (1972) EA 32).

6. Addressing itself to the ingredients of the offence of robbery with violence, the Court of Appeal in Oluoch Vs Republic [1985] KLR stated as follows: -

> Robbery with violence is committed in any of the following circumstances: -
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> a. The offender is armed with any dangerous and offensive weapon or instrument; or
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> b. The offender is in company with one or more person or persons; or
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> c. 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.

7. In *Dima Denge Dima M Others vs Republic, Criminal Appeal No 300 of 2007*, the Court stated thus: -

> .... The elements of the violence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found a violence of robbery with violence.

8. In the instant case, the prosecution's case was made up of three witnesses. They were the complainant who testified as PW1. PW2 was the investigating officer No. 224232 Cpl. Gilbert Wechuli attached at Kiminini Police Station. PW3 was a Clinical officer.

9. PW1 testified that on 3rd September 2022 at around 7pm, as he headed home from Kitale, he took a motorcycle ridden by the accused, who was his neighbour, at Kiminini stage. PW1 further stated that they were three persons on the motorcycle being the Appellant, himself and another person whom PW1 found with the Appellant. They left Kiminini and shortly thereafter the Appellant stopped the motorcycle and the two robbed him off his Infinix phone and assaulted him. He was injured on his eye and nose. PW1 returned to Kiminini where he spent in a lodging. In the morning, he informed the boda boda riders at the town and when the Appellant appeared he was arrested and taken to Kiminini Police Station.

10. PW1 then proceeded to hospital. PW3 who was attached at Matunda Sub-county hospital confirmed the injuries. There is, therefore, no doubt that PW1 was injured in a robbery.

11. The next issue for determination is whether the Appellant was rightfully identified by recognition as the assailant. The identity of an assailant in criminal trials remains one of the most cardinal aspects in the justice system since in most cases the accused denies committing the offence.

12. Identification of assailants in law comes in many ways. In this case, the Appellant was identified by way of recognition and by only one witness, PW1. The law relating to identification by a single witness is by now well settled. The Court of Appeal in Peter Mwangi Wanjiku v Republic [2020] eKLR addressed the aspect of single identifying witness as follows: -

> 13. Section 143 of the *Evidence Act* provides that a court can convict on the evidence of a single witness. The said section reads, "No particular number of witnesses shall in the absence of any provision of law to the contrary be required for the proof of any fact." Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in Mailanyi vs Republic [1986] KLR 198:
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> > 1. Although it is trite law that a fact may be proved by the testimony of a single witness, this 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.
> > 2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.
> > 3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.
> > 4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.
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> 14. It is clear from the record of appeal that the trial magistrate was alive to his obligation to carefully test the evidence of Solomon. The issue is whether this was actually done. In Mailanyi v Republic (supra), the Court emphasized that:
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> What is being tested is primarily the impression received by the single witness at the time of the incident. Of course if there was no light at all, identification would have been impossible. As the strength of light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. ....
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> There is a second line of enquiry which ought to be made, and that is whether the complainant was able to give some description or identification of his or her assailants to those who came to the complainant's aid or to the police.

13. In R -vs- Turnbull & Others (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated thus: -

> ... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness

> when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

14. In Wamunga vs Republic (1989) KLR 426 the Court of Appeal stated as under: -

> .... It is trite law that where the only 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 from possibility of error before it can safely make it the basis of conviction.

15. In Anil Phukan vs. State of Assam (1993) AIR 1462 the Court held as follows: -

> .... A conviction can be based on the testimony of a single-eye witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passed the test of reliability in basing conviction on his testimony alone.

16. As said before, the identifying witness in this matter was the complainant, PW1. According to PW1, the Appellant was his neighbour and he rode on his motor cycle with that clarity of mind. He, however, did not recognise the other person he found the Appellant with. The relationship between the Appellant and PW1 was not impugned. PW1 readily gave the name of the assailant to the boda boda riders who arrested the Appellant and led him to the police. PW1 knew the Appellant as a rider and that he operated from Kiminini stage and that is why he reported to the Appellant's colleagues.

17. In his defence, the Appellant denied committing the offence and averred that he was a mason. That on the 4th of September 2022 he went looking for a job at Kiminini and some boys followed him saying that he had robbed someone. On cross-examination he said that he has no motorbike and that he was asleep at his house the night before and that was not at Kiminini. Further, he stated that he did not know how to ride a motorbike.

18. The incident as narrated by PW1 was simple, clear and straight-forward. PW1 knew the Appellant as his neighbour who was a rider. He approached him at the Kiminini stage where they talked and agreed on taking PW1 home. That in itself accorded PW1 an opportunity to interact with the Appellant and to re-affirm his identity. This Court is not slightly persuaded that PW1 was mistaken on whom he dealt with. He knew the Appellant by name and he was familiar with him as well. By taking into the above caution and parameters, this Court finds that indeed the identification of the Appellant by way of recognition was not in error. The defence is unbelievable and did not cast any doubt on the prosecution's case. The Court finds and hold that the Appellant was among the two people who robbed PW1.

19. As the Appellant was in the company of another person whom they jointly committed the offence, injured and abandoned PW1 on the way and fled, then the offence of robbery with violence was proved. The Appellant was, rightly so, found guilty and convicted accordingly.

20. As regards sentence, the question is whether there is any lawful reason to interfere with the discretion of the trial Court in passing sentence. The Appellant was sentenced to 10 years imprisonment. Under Section 296 of the *Penal Code*, the penalty for robbery with violence is a mandatory death sentence. However, at the time the sentence was passed, the legal jurisprudence then prevailing allowed a Court to exercise discretion in sentencing. Even though that position has now changed, this Court was not moved for enhancement of the sentence imposed. This Court shall, therefore, not interfere with the sentence.

21. The appeal on sentence is equally disallowed.

Disposition:

22. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and subsequently elected into the Judicial Service Commission thereby mostly being away from the station. Apologies galore.

23. In the end, the whole appeal is found and held to be without merit and is hereby dismissed.

24. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Elias Juma, the Appellant.

Mr. Mugun, Learned Prosecutor instructed by the Director of Public Prosecutions for the Respondent/State.

Chemosop/Duke – Court Assistants.