Oloo v Republic (Criminal Appeal E007 of 2023)
[2025] KEHC 4847 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4847 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL E007 OF 2023

DK KEMEI, J

APRIL 25, 2025

BETWEEN

MOURICE OTIENO OLOO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the Judgment of Hon. L.N. Sarapai, PM delivered on 8th February 2023 at Ukwala Principal Magistrate's Court in Criminal Case No. 672 of 2020)

JUDGMENT

1. The Appellant, Mourice Otieno Oloo, was arraigned and charged before the Principal Magistrate's Court at Ukwala in Criminal Case No. 672 of 2020, with the offence with robbery and violence contrary to Section 296(2) of the *Penal Code*.

2. The facts are that on 6th November 2020 at Uranga Village in Ugenya Sub County within Siaya County, jointly with others not before the court being armed with dangerous weapons, namely pangas and rungus, robbed Mary Akinyi Okumu of a handbag which had a dust coat, two account books, a box of face masks, all valued at Kshs. 5,000/- and cash Kshs. 16,000/- all valued at twenty-one thousand shillings and immediately before the time of such robbery used actual violence to the said Mary Akinyi Okumu.

3. The Appellant also faced an alternative charge of handling stolen goods contrary to Section 322(1) (2) of the *Penal Code*. The particulars of the offences are that on 6th November 2020 at Uranga Village in Ugenya Sub County within Siaya County, otherwise that in the course of stealing dishonestly retained a handbag and two account books knowing or having reason to believe them to be stolen goods.

4. On 18th November 2020, the Appellant denied the charges. The trial Court entered a plea of not guilty on both the first Count and the alternative Count. The trial Court granted the Appellant a bond of

Kshs. 500,000/- and one surety of like amount, but was later cancelled after it was found that the logbook from the surety was a forgery.

5. PW1 Mary Akinyi Okumu stated that on 5th November 2020, in the evening at about 8.00 Pm, someone whom she thought was her brother-in-law emerged from the shamba and held her neck. The person slapped and beat her using a small piece of metal on her face and head. The person snatched her purse, which had her blue and white checked apron and Kshs. 16,000.00. She stated that she screamed and struggled with the person who overpowered her. His brother-in-law, called Oduka, caught the person. She stated that they reported to the Bar-O-Ber police station. She stated that she was treated at Murumba at Buyanga Sub County Hospital. She stated that the assailant was in the company of three other men, but she recognized the person's face as the one who attacked her since she was very close.

6. On being cross-examined, she stated that she saw the person in court who was caught with the items by Oduka. She stated that she did not know the Appellant before until the day of the robbery. She stated that the person emerged from the maize farm. She stated that she had a small torch on her phone, which she used to light the path, while the Appellant also had a torch. She told the court that she saw the Appellant's face as they were struggling, and when he realized that he had been seen by her, he started hitting her with the rod. She heard the others but did not see them. She stated that she was able to identify the Appellant at the parade. She also stated that the Appellant was caught with all the items and escorted to the police station.

7. PW2 William Odinga Juma stated that on 5th November 2020 at about 8.00 pm, she heard someone saying that she was being killed. He left with his neighbor Brian. That the Appellant emerged with a bag around his neck in a rush, and when he saw them, he started running in the opposite direction. They gave chase and caught him. They could feel something metallic in his clothes. They escorted him to Mary's home, where other neighbours had gathered with rungus, pangas, ready to lynch the Appellant, but he advised them to go to the police station. He stated that he had never seen the Appellant before. On being cross-examined, he stated that they caught him with the bag and the small metal. That the bag belonged to his sister in law. That there was light from a nearby dispensary.

8. PW3 Consolata Akinyi Ngalo stated that on 6th November 2020, he went to see Mary who had been hit on the head. She stated that it was William who brought the thief. On being cross-examined, she stated that it was at 7.00 Pm. That the metal was found at the scene. She stated that she saw the bag on the Appellant's neck.

9. PW4 Sarah Cherutich, a Clinical Officer at Buyanga Sub County Hospital, stated that she filed a P3 Form on 6th November 2020 in respect of PW1. PW1 had a headache, swelling, and tenderness on the forehead. She had a swelling on the back thoracic spine and bruises on the limbs, but there were no injuries. The probable weapon was a blunt object. The injuries were assessed as harm. On being cross-examined, she stated that PW1 stated that she was attacked at 11.00 pm in the night by several assailants but was able to recognize the face of one. That she was injured on the head and her neck.

10. PW5 No. 46263 Sgt Abuyeka Ariwo, the investigating officer, told the court that on 6th November 2020, he was assigned the duty to investigate a robbery with violence reported at Bar-O-Ber office. He stated that Constable Kipchumba, who had visited the scene, took him through what had happened. He stated that the two suspects had been arrested. He could only recall the one on the dock, Maurice Otieno Oloo, though his name had not been captured with the two suspects. That the Appellant was placed among nine persons in an identification parade of the same height conducted by Inspector Kipsigei Ngetich. That PW1 was able to identify him. He stated that the constable had made recoveries of a handbag, two small rods, an iron bar, handmade toy gun. He produced the recovered items as well as the parade forms as exhibits.

11. On being cross-examined, he stated that he could not recall the date of the incident, but it was 6th November 2020. He stated the items were recovered from the Appellant. He told the court that the Appellant was given the opportunity to call a friend, an advocate, or members of his family for the ID Parade. He stated that the Appellant's companion was arrested but not charged because the evidence did not implicate him. On being re-examined, he stated that in Section B of the ID Parade, the accused was asked for his consent to the parade, whereby he stated that he had no objection. He stated that there was no need for a lawyer or a friend of family.

12. On 2nd November 2022, the trial Court found the Appellant had a case to answer and placed him on his defence.

13. In his defence, the Appellant stated that on 3rd November, 2020 he woke up at 5.00 pm and went to see his uncle. The boda boda he boarded got a puncture at Bar-O-Ber. He stated that he went to Maroro when he met five people who put a torchlight on him. They asked him where he was from and that he answered that he was from Sega. He thought they were police officers enforcing a curfew. He stated that he was not from the area. That they claimed that this was the one and started beating him while claiming that he had been suspected of theft. He was taken to the Bar Ober police station. The next morning, a lady came with some people. He was told to come out and go back inside. He was then taken to Ukwala police station. After two days, he was arraigned at an identification parade. He was then arraigned in court, and the charges that he did not understand were read to him. There was no cross-examination by the Prosecution.

14. In her judgment, the learned trial magistrate found the Appellant guilty of the offence of robbery with violence and convicted him. According to the learned trial magistrate, PW1 consistently and properly identified her attacker as the accused person at the scene and the identification parade. The accused was found in possession of PW1's bag within the vicinity of the incident. The learned trial magistrate stated that PW1 adduced strong evidence on the identification of the accused person, while the identification parade was conducted properly, from which the accused was positively identified by the complainant as the thief. The Appellant's defence was dismissed.

15. While sentencing the Appellant to suffer death under Section 296(2) of the *Penal Code*, the learned trial magistrate took into consideration the Appellant's previous conviction in Ukwala Cr. No. 611 of 2020, and him being a threat to the peace and security of the community as well as the victim.

16. In his Petition of Appeal, the Appellant contends that;

    1. The learned trial magistrate erred in both law and fact in convicting him against the weight of the evidence on record.

    2. The learned trial magistrate erred both in law and fact in convicting him by failing to observe that the prosecution failed to prove its case against him beyond a reasonable doubt.

    3. The sentence imposed is manifestly harsh and excessive.

    4. The learned trial magistrate erred in both law and fact in relying on contradictory evidence of the prosecution witnesses to base his conviction.

    5. The learned trial magistrate erred in both law and fact in convicting him without observing that some of the essential witnesses were not availed to support the prosecution's case.

    6. The learned trial magistrate erred in both law and fact by basing his conviction on identification parade matters, but failed to observe that the same was not conducted according to Cap. 46 of the Kenya Police Standing Order.

17. The Appellant urges this court to quash the conviction and set aside the death sentence.

18. The appeal was canvassed by way of written submissions. The Appellant submits that PW1 did not know the Appellant during, before, and after the said ordeal. It is submitted that the incident took place in total darkness scenario where there was no enough amount of light that could eventually aid PW1 in proper identification and the period of the incident. The Appellant submits that PW1 was overpowered and left unconscious.

19. The Appellant submits that the alleged recovered exhibits were not forensically proved, such as finger dusting to ascertain the immediate handlers/possessors of the exhibits. It is submitted that if PW2 did not visit the scene where PW1 was at the time, how then did PW2 know the Appellant was the right person involved in committing the offence?

20. The Appellant submits that the charge sheet as drafted indicates the incident occurred on 6th November 2020 and not 5th November 2020, while the prosecution witnesses state the date to be 5th November 2020. According to the Appellant, this is a fatal contradiction on the content of the charge sheet.

21. According to the Appellant, the learned trial magistrate erred in failing to consider the Appellant's defence of alibi, which was cogent and unshaken by the Prosecution. The Appellant submits that it is doubtful whether the items were found with the Appellant in the sense that PW2's evidence was not properly investigated, analyzed, and evaluated.

22. According to the Appellant, the sentence meted out was harsh as it subjects the Appellant to blind infliction. The Appellant urges this Court to set aside the sentence, quash the conviction, and he be set at liberty.

23. In the converse, the Respondent submits that there was actual violence since PW1 got hurt and was treated for the injuries. That PW4 produced the P3 Form, which exhibited the injuries sustained. That PW1 stated that she had ample time to see the Appellant and was able to identify the Appellant in the identification parade. That PW1 consistently and properly identified the attacker as the Appellant. It is submitted that the Appellant was flashed out of the maize plantation with the stolen bag around his neck within the vicinity of the incident by members of the public. It is submitted that the Appellant's defence was a fabrication, thus an afterthought and a mere sham. According to the Respondent, the case against the Appellant was proved beyond any reasonable doubt. The Respondent urged the court to dismiss the appeal.

24. I have considered the appeal in light of the evidence on record and submissions on behalf of the parties.

25. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to a fresh analysis to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. This mandate was explained in Okeno vs. Republic [1972] EA 32 where it was stated 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 (Pandya v. R., [1957] E. A. 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its findings and draw its conclusions. Only then can it decide whether the magistrate's findings should be

supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

26. To reach her conclusion that the offence of robbery with violence was established, the learned trial magistrate held that it was established that the Appellant was found in possession of PW1's bag within the vicinity of the incident. Further, the learned trial magistrate found that PW1 adduced strong evidence on the identification of the accused person both at the scene and at the identification parade from which the Appellant was positively identified by the complainant as the person who had robbed her.

27. The Appellant contends that the incident took place in total darkness for there to be proper identification. The Appellant has attacked PW2's testimony, contending that he did not visit the scene where PW1 was at the time for him to claim that the Appellant was the right person involved in committing the offence. According to the Appellant, the charge sheet as drafted indicates the incident occurred on 6th November 2020 and not 5th November 2020, while the prosecution witnesses stated the date to be 5th November 2020, thus a fatal contradiction in the prosecution's case.

28. Section 296(2) of the *Penal Code* reads:

> 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.

29. The Court of Appeal at Mombasa had this to say in Johana Ndungu vs. Republic [1996] eKLR, that:

> "In order to appreciate properly as to what acts constitute an offence under section 296 (2), one must consider the sub-section in conjunction with s.295 of the *Penal Code*. The essential ingredient of robbery under section 295 is the use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section: If the offender is armed with any dangerous or offensive weapon or instrument, or If he 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 violence to any person." See Oluoch vs. Republic [1985] KLR 549,

30. The Court of Appeal in Dima Denge Dima & Others v Republic [2013] KECA 480 (KLR) held:

> "The elements of the offence under Section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction." See Reimond Munene Kamau & another v Republic [2018] KECA 250 (KLR)

31. On the first ingredient, PW1 stated that she was hit with a rod after being accosted by the Appellant and after she had struggled with him. PW2 stated that they found the Appellant with a small metal rod. According to PW3, a metal rod was found at the scene. PW5 told court that constable Kipchumba found a handbag, two small rods, an iron bar, handmade toy gun at the scene. PW4 opined that the probable weapon was blunt. It is clear that the first ingredient was established since these were dangerous and offensive weapons used in the incident.

32. Regarding the second ingredient, PW1 stated that the Appellant was in the company of three other men, but she recognized the person's face as the one who attacked her since she was very close. I find the second ingredient was established since the Appellant was claimed to be in the company of three other persons.

33. On the third ingredient, what can be deduced from PW1's testimony is that she was held on the neck, was slapped and beaten using a small piece of metal on her face and head. According to PW1, she screamed and struggled with the person who overpowered her. It was PW1's testimony that when she saw the Appellant's face as they were struggling, and when the Appellant realized that he had been seen by her, he started hitting her with the rod. Again, PW2 came to her rescue and gave chase and managed to apprehend the Appellant who was by then in possession of the complainant's handbag around his neck and that they frog matched the Appellant to the police station. The said witness confirmed that there were lights from a nearby dispensary. The complainant stated that she had a torch and likewise the Appellant and thus was able to see him and later after his arrest and at the identification parade. The Appellant did not object to the said parade and the production of the parade identification forms as exhibits. PW4 assessed the injuries in respect of PW1 as harm. I find PW1's testimony established the third ingredient.

34. The ingredients required to establish the offence of robbery with violence may have been established, but the issue for determination is whether the Appellant is the offender. The Appellant contends that the learned trial magistrate erred in failing to consider his defence of alibi, which was cogent and unshaken by the Prosecution. Further, the Appellant asserts that the charge sheet as drafted indicates the incident occurred on 6th November 2020 and not 5th November 2020, while the prosecution witnesses stated the date to be 5th November 2020.

35. The court notes that the Appellant does not speak of the incidents of 5th or 6th November 2020, but of 3rd November 2020 when he stated that he went to see his uncle. He stated that he went to Maroro when he met five people who put a torchlight on him. According to the Appellant, he thought they were police officers enforcing a curfew. He stated that he was not from the area, and that's when they said this was the one and started beating him, saying that he had been suspected of theft.

36. The Appellant faults the learned trial magistrate for relying on contradictory evidence of the prosecution witnesses. PW5, the investigating officer, stated that he could not recall the date of the incident, but it was 6th November 2020. The charge sheet indicates the date of the incident as 6th November 2020, but PW1 and PW2 stated that the date of the incident is 5th November 2020. It was PW3's testimony that on 6th November 2020, she went to see Mary, who had been hit on the head.

37. The Uganda Court of Appeal in Twehangane Alfred vs Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6 held that it is not every contradiction that warrants rejection of evidence. The Court held that:

> "With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions, unless satisfactorily explained, will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case." See Dickson Elia Nsamba Shapwata & Another vs Republic, CR. APP. NO. 92 of 2007

38. In Joseph Maina Mwangi vs Republic, Criminal Appeal No.73 of 1993, this Court held inter alia that:

> " 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 the *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 sentence."

39. It is clear that PW1's testimony that she had a small torch on her phone, which she used to light the path, while the Appellant also had a torch, was not controverted. She told the court that she saw the Appellant's face as they were struggling, and when the Appellant realized that he had been seen by her, he started hitting her with the rod. PW1's evidence remained uncontroverted by the Appellant's evidence, which addressed incidents of 3rd November, 2020, instead of the 5th or 6th November, 2020. PW1 and PW2's evidence remained consistent on the date of the incident.

40. The Court in Sekitoleko versus Uganda [1976] EA53 held that:

> " As a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else"

41. It is the finding of this court that the Appellant, having failed to controvert the discrepancies of the date, the Prosecution's case was proved beyond a reasonable doubt through the testimony of PW1 and PW2 and corroborated by PW4 and PW5's testimonies. The discrepancies did not go to the root of the Prosecution's case to cause prejudice to the appellant. The said discrepancies are curable under section 382 of the *Criminal Procedure Code*. I find the conviction arrived at by the learned trial magistrate was safe and must be upheld.

42. As regards the sentence imposed, the Appellant contends that it is manifestly harsh. The learned trial magistrate took into consideration the Appellant's previous conviction in Ukwala Cr. No. 611 of 2020 and noted that he is a threat to the peace and security of the community, as well as the victim.

43. In Shadrack Kipchoge Kogo versus Republic Eldoret Criminal Appeal No. 253 of 2003, the Court had this to say:-

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred. See Ogola s/o Owuor vs Regina (1954) 21 270.

44. The Appellant was not a first offender having been previously convicted in a criminal matter. It is noted that the robbery did not cause the death of any person save for the injuries that PW1 sustained as a result of the attack by the Appellant.

45. In Michael Kathewa Laichena & Martin Mugambi Karindi vs Republic [2018] eKLR, Majanja J. held as follows:

> " 16. I now turn to consider the sentence to be imposed on the petitioners. The starting point of this inquiry is that although the mandatory death penalty has been declared unconstitutional, the death penalty still exists as the maximum sentence for robbery with violence under section 296(2) of the *Penal Code*. In my view, the death penalty should be excluded where the robbery does not

result in the death of a person. From the facts of the case, I have outlined, the petitioners did not kill anyone in the course of the robbery hence I would exclude the death penalty leaving life imprisonment as the maximum penalty."

46. Taking into consideration the Sentencing Policy Guidelines, 2016, and the Supreme Court decision in Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR, I find the sentence meted out against the Appellant to be harsh.

47. In Paul Ouma Atieno vs Republic Misc Appeal No. 23 of 2017, where the accused was also an accused person in Paul Ouma Otieno alias Collera and Another v Republic KSM CA Criminal Appeal No. 616 of 2010 [2018] eKLR and the Court of Appeal sentenced the appellants to 20 years imprisonment, Majanja J. held that in considering all the mitigating and aggravating factors, the period spent in pre-trial custody and the cases cited, re-sentenced the applicant to 20 years imprisonment.

48. I find that the sentence of the death penalty is lawful as meted out by the learned trial magistrate, but in my view, 25 years imprisonment is fair and proportionate with the circumstances of the case.

49. In the result, it is my finding that the Appellant's appeal against conviction lacks merit. However, the appeal against sentence partially succeeds to the extent that the trial court's sentence of death is hereby set aside and substituted with a sentence of twenty-five (25) years' imprisonment which shall commence from the date of his arrest namely 6/11/2020.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 25TH DAY OF APRIL, 2025.

D. K. KEMEI

JUDGE

In the presence of:

Mourice Otieno Oloo............ Appellant

Mocha................. for Respondent

Mboya................. Court Assistant