Dhadho v Republic (Criminal Appeal E041 of 2023)
[2025] KEHC 11378 (KLR) (9 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11378 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARSEN

CRIMINAL APPEAL E041 OF 2023

JN NJAGI, J

JULY 9, 2025

BETWEEN

SALAD KUNO DHADHO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from original conviction and sentence by Hon. M. D. Kiprono, SRM, in Hola Senior Resident Magistrate's Court Criminal Case No. 344 of 2015 delivered on 16/8/2016)

JUDGMENT

1. The Appellant was charged with the offence of robbery with Violence contrary to Section 295 as read with Section 296 [2] of the *Penal Code*. The particulars of the offence were that on the 13th day of November, 2015 at Dayati Location in Tana River sub-county within Tana River County while armed with a dangerous weapon namely, a knife, robbed Komora Salim Hiribae [herein referred to as the complainant] of cash Kshs. 1,200/-, a mobile phone, Nokia Model 105 serial number xxx worth Kshs. 2,500/- all valued at Kshs. 3,700/- and immediately before the time of the robbery he used actual violence to the said complainant.

2. The Appellant was convicted of the offence and sentenced to suffer death. He was aggrieved by the conviction and the sentence and lodged the instant appeal. The grounds of appeal are that:

    1. That the Learned Trial Magistrate erred in law and fact in finding that the prosecution had proved the charge of robbery with violence beyond any reasonable doubt.

    2. That the Learned Trial Magistrate erred in both law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witnesses.

    3. That the Learned Trial Magistrate erred in law and fact by failing to consider the defense evidence.

4. That the Trial Magistrate erred in law and fact in finding a conviction that was against the weight of evidence.

5. The Trial Magistrate erred in law and fact by passing a harsh sentence under the circumstances.

3. The brief facts of the evidence adduced against the appellant are that the complainant was a *boda boda* operator at Hola town. That on the material day at around 2:00 pm, he was at his *boda boda* base near Adhira stage. The appellant approached him and requested him to take him to a place called Diate. That the appellant directed him to take a route that he was not familiar with. That as they passed through the bush the appellant removed a knife and ordered him to give him all that was in his possession. The complainant produced cash Kshs. 1,200/- and a mobile phone Nokia model and gave them to him. The appellant then told him that his mother had been killed by a Pokomo and he wanted to revenge on him. He attempted to stab him with the knife but he got hold of it and it cut him on the hand. Some women then appeared and the appellant panicked and turned his attention to the women. He, the complainant, hiked onto his motor cycle and fled away. He went and made a report to some elders at Diate one of whom was Gobu Omar PW2. He returned to the scene with PW2 and other elders but they did not find the appellant.

4. Meanwhile an elder called Wario Duri Omar PW6 was informed by the village headman that there was a boy who had been robbed and he went in search of the person. When he got to the village he met a person hiding in the bush. Members of the public then gathered and arrested the person, the appellant. He, PW6, searched him and found him with a mobile phone and a knife. He confiscated them. The complainant later went to the place and identified the appellant as the person who had robbed him. He identified the phone as the one the appellant had stolen from him.

5. The area Assistant Chief Isak Duri PW3, was informed of the incident by PW2. He went to Hola police station and reported the matter. Cpl Tanui Muthui PW5 accompanied him to a scene where they found the appellant having been arrested by members of the public. They found the complainant bleeding on the hand. Cpl Tanui was handed over the knife and the phone. He re-arrested the appellant and took him to the police station. The complainant was issued with a P3 form. It was completed by Doctor Haidham Mohamed PW4 of Hola County Referral Hospital. The complainant was found with a cut injury on the left hand. He assessed the degree of injury as harm. The appellant was charged with the offence. During the hearing of the case in court the doctor produced the treatment notes and the P3 from as exhibits, P.Exh. 4 and 5 respectively. Cpl Tanui produced the knife, the phone and the receipt to the phone as exhibits, P.Exh. 1, 2 and 3 respectively.

6. When placed to his defence the appellant stated in an unsworn statement that he used to sell cubes. That he had a land dispute with the complainant and his mother that was resolved in his favour but the complainant was not satisfied with the outcome and fabricated the case that he was facing.

7. The appeal was canvassed by way of written submissions.

Appellant's Submissions

8. The Appellant submitted that it is the duty of the prosecution to prove the elements for robbery with violence beyond reasonable doubt and to do this they had to prove that there was theft of the complainant's property by the appellant. He submitted that those elements were not proved beyond reasonable doubt to warrant a conviction in that theft was not proved and the use of violence was not attributable to the alleged theft.

9. It was the Appellant's further submission that his purported identification was motivated by malice and that the evidence on identification was not corroborated. He relied on the cases of *Wamunga v Republic* [1989] KLR 424 and that of *Francis Muchiri Joseph v Republic* [2014] eKLR.

10. It was submitted that the prosecution failed to call the women who were said to have appeared at the scene which suggested that the charge was fabricated.

11. On the mandatory sentence imposed on him, the appellant submitted that the same was harsh and excessive and violates the appellant`s rights under Article 27 of *the Constitution*.

Respondent's submission.

12. Counsel for the respondent submitted that the ingredients of robbery with violence listed in Section 296 [2] are: if the offender is armed with dangerous or offensive weapon or instrument, or the offender is in the company of one or more other person or persons and if at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other person violence to any person. Counsel in this respect cited the case of *Jeremiah Oloo Odira v Republic* [2018] eKLR.

13. It was submitted that the prosecution proved its case beyond reasonable doubt that PW1 was robbed of his phone and money, that the appellant was armed with a knife and that he violently robbed PW1 by causing him harm while threatening to kill him.

14. On whether the sentence meted on the accused person was appropriate, it was submitted that the sentence under section 296 [2] of the *Penal Code* is death. The respondent relied on the case of *Benard Kimani Gacheru v Republic* [2002] eKLR where the court held as follows:

> " ...sentence is a matter that rests in the discretion of the trial court, similarly sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if the appellate court feels that the sentence is heavy and that the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

Analysis and determination

15. This being a first appeal, this court is expected to review and analyse the evidence afresh in order to form an independent opinion and draw its own conclusions while bearing in mind that it did not have the benefit of seeing and observing the witnesses -see *Okeno v Republic* [1972] EA. 32 and *Kiilu & Another v Republic* [2005] 1 KLR, 174.

16. I have considered the grounds of appeal, the record of the trial court and the submissions of the appellant and those of the respondent.

17. The offence of robbery with violence is contained in Sections 295 and 296[2] of the *Penal Code* as follows:

> " 295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent

or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

18. The ingredients of this offence were aptly discussed by Cockar, CJ., Akiwumi & Shah, JJA. in the case of *Johana Ndungu v Republic* CrA. 116/1995, [1996] eKLR where the Court of Appeal in Mombasa stated as follows: -

> " In order to appreciate properly as to what acts, constitute an offence under Section 296 [2] of one must consider the subsection in conjunction with Section 295 of the *PC*. The essential ingredient of robbery under Section 295 is 'use of or threat to use' actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore -described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 [2] which we give below and any one of which if proved, will constitute the offence under the subsection:
>
> i. if the offender is armed with any dangerous or offensive weapon or instrument; or
>
> ii. if he is in company with one or more other person or persons; or
>
> iii. 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 also *Oluoch v Republic* [1985] KLR].

19. In this case, the complainant testified that on the fateful day he met the accused at around 2:00 pm who requested him to take him to Diate using his motorcycle. That the accused directed him to take a route that he was not familiar with. When they got to the bush, the appellant removed a knife and robbed him of a mobile phone and money. That the appellant cut him with the knife on the hand in the course of robbing him.

20. A village elder PW6 testified that he recovered the phone and the knife from the appellant. The complainant identified the phone as the one the appellant had stolen from him and he gave the police a purchase receipt for the phone. He identified the knife as the one the appellant had cut him with during the incident.

21. From the evidence adduced before the trial court, there was no doubt that the complainant was robbed of a mobile phone and money. It is clear that the assailant was armed with a knife and cut the complainant with it in the course of robbing him. The injury sustained was corroborated by the doctor, PW4. The question was whether the appellant is the person who robbed the complainant.

22. The complainant never knew the appellant before the date of the incident. He was the only identifying witness in the case. The court has then to determine whether he properly identified the appellant as the person who robbed him.

23. The law on identification is well settled. The court before basing a conviction on such evidence is required to examine the evidence carefully and satisfy itself that the circumstances of identification

were favourable and free from the possibility of error. The Court of Appeal in the case of *Cleopas O. Wamunga v Republic*, Criminal Appeal No. 20 of 1989 stated as follows in that respect:

> " ..... evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. Whenever the case against a defendant depends wholly or to a great extent, on correctness of one, or more identification of an accused, which he [accused] alleges to be mistaken; the court must warn itself of the special need for caution before convicting the defendant in reliance on correctness of the identification...."

24. In *Kariuki Njiru and 7 others v. Republic* Cr. Appeal No. 6 of 2001 it was held by the Court of Appeal that;

> " The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

25. Where the evidence on identification is from a single identifying witness as in this case, a guide on how to treat the evidence was given in the case of *Kiilu & Another v Republic* [2005] eKLR, where the Court of Appeal held that;

> " Subject to well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect of identification especially when it is known that the conditions favoring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from where a judge or jury can reasonably conclude that the evidence of identification although based on the testimony of a single witness can be safely accepted as free from possibility of error."

26. The complainant said that he was robbed at 3.30 pm. He said that he talked to the appellant when he instructed him on where he was to ferry him. He said that he stayed with the appellant for about 30 minutes. I find that there was amble time for the complainant to see the appellant properly as the incident occurred in broad daylight. There is no possibility of mistaken identity. I have no doubt that the trial court correctly found that the complainant identified the appellant as the person who robbed him.

27. Besides the identification by the complainant, the appellant was found with the phone stolen from the complainant. The village elder PW6 said that he is the one who retrieved the phone and the knife from the appellant. There was no reason to doubt the evidence of PW6 that he recovered the phone from the appellant. He never knew the appellant before and there was therefore no reason for him to lie against him.

28. The appellant was found with the phone a few minutes after it was stolen from the complainant. He was thus found in possession of recently stolen property. He did not give an explanation of how he came into possession of the phone so soon after it was stolen from the complainant. The fact of being found in possession of recently stolen property corroborates the evidence of the complainant that the appellant is the person who robbed him. Consequently, I find that the identification of the appellant was free from the possibility of error.

29. The appellant stated in his defence that the charges were fabricated as a result of a grudge between him and the appellant and his mother over a land dispute. The trial court dismissed the defence as a made up story for purposes of the appellant`s defence. I have similarly considered the defence and I do not find any substance in it. The appellant did not raise the issue with the complainant during cross-examination. The defence must have been an afterthought. It did not cast any shadow of doubt on the prosecution case. The trial court rightly dismissed the defence.

30. Accordingly, I find that the appellant robbed the complainant of his money and a mobile phone. He was armed with a knife during the robbery. He injured the complainant in the course of robbing him. I am satisfied that the prosecution proved its case against the Appellant beyond any reasonable doubt. The conviction is thereby upheld.

31. The *Penal Code* prescribes a death sentence for the offence of robbery with violence. A mandatory sentence cannot be said to be harsh or excessive. Consequently, I find no reason to interfere with the sentence meted upon the Appellant by the trial court.

32. In the final end, I do not find any merit in the appeal and the same is consequently dismissed.

DELIVERED, DATED AND SIGNED AT GARSEN THIS 9TH DAY OF JULY 2025

J. N. NJAGI

JUDGE

In the presence of:

Miss Mkongo for Republic

Appellant – present virtually and in person at GK Prison Manyani

Court Assistant - Ndonye