



REPUBLIC OF KENYA



**Lucas v Republic (Criminal Appeal E005 of 2023)
[2024] KEHC 665 (KLR) (2 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL E005 OF 2023
RN NYAKUNDI, J
FEBRUARY 2, 2024**

BETWEEN

EKIRU LUCAS APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. C.A. Mayamba;
HSC in Kakuma law court Cr. Case No. E016 of 2021)*

JUDGMENT

Representation

Justice R. Nyakundi

Mr. Yusuf for the State

1. The Appellant was charged with robbery with violence contrary to Section 295 as read with section 296(2) of the *Penal Code*. Particulars stated that the Accused person on the 16th day of March, 2021 at Loyar village in Turkana West Sub- County within Turkana County, jointly with another not before court, while armed with a knife robbed Singiyunga Erick of his motorcycle registration no. KMFH 116T make TVS star valued at Kshs. 130,000/= at the time of such robbery used actual violence against the said Siyunga Erick. The Appellant was convicted of the charge and sentenced to 15 years imprisonment.
2. Being aggrieved by both the conviction and sentence meted out against him by the trial court, he filed the instant appeal. Both parties filed written submissions in support of their Case.



Appellant's submissions

3. It was the appellant's submission that the question to be answered in this case is whether the evidence from the witnesses is sufficient to establish guilt of the accused person beyond reasonable doubt. He submitted that the prosecution did not prove its case to the required standards.
4. The appellant submitted that he was convicted on an erroneous charge sheet. He stated that the evidence tendered was contradictory and that crucial witnesses were not called to testify. It was his submission that according to the victim, the motorcycle in question belonged to his brother-in-law and the said person was not called to testify.
5. He further submitted that according to PW1, he was approached by a pillion passenger at around 12:00-1:00PM whereas according to PW2, he had given his motorcycle to PW1 at around 3:00PM. He stated that the receipt produced in court was for motorcycle registration No. KMFH 116C.
6. Additionally, the appellant submitted that the evidence of PW1 was that he was rescued by a good Samaritan and another rider and on the way he met with bodaboda chairman. According to the appellant, such witnesses should have testified to corroborate the testimony of PW1.
7. In summary, he submitted that the prosecution's evidence was clouded with doubts and did not prove its case to the required standard and that he is innocent and should be acquitted and the case be dismissed.

Respondent's submission

8. The respondent submitted that evidence led showed a violent attack using a weapon on the victim by more than one person. A medical report confirmed the injuries suffered. Counsel stated that an ID parade, given the circumstances of arrest, was needless.
9. According to counsel, on contradiction, the ground does not set out which fact on record is contradictory. That Cardinaly, two pieces of evidence would contradict one another when they are inconsistent on material facts. Counsel relied on the case of *MW v Republic* (2019) eKLR.

Evidence adduced supported the findings. That the testimonies on pages 5-6 showed violent attacks using a weapon on a victim by more than one person, his motor cycle stolen. Injuries were confirmed. Counsel relied on the case of *Titus Wambua v. R* (2016) eKLR.
10. On the uncalled witnesses, counsel submitted that no oblique motive informed their failure to call any witnesses desired by the appellant. That PW3 was called to produce a P3 form filled by a colleague, Dr. Gideon Keter. Counsel stated that the basis of production was laid, a thing the appellant had no objection to. The form was admitted into evidence as contemplated by section 77 *Cap 80*.
11. Finally, counsel submitted that the court did not err in principle nor took into account an irrelevant factor on sentence. He prayed that the sentence and conviction be affirmed.

Analysis and Determination

12. Whether at the trial stage or on appeal the decisive factor is for the doctrine of beyond reasonable doubt to occupy that very space in which there is no suspicion that the absolute right of presumption of innocence was never displaced by the evidence called upon by the prosecution. In the persuasive case



of *State of U.P v Krishna Gopal & Another* reported in AIR 1988 SC p.2154, the concept of reasonable doubt was explained in the following words;

‘There is an unmistakable subjective element in the evaluation of the degree of probability and quantum of proof. Forensic probability must, in the last analysis, rest on a robust common sense and ultimately on the trained intuitions of the judge. While the protection given by the criminal process to the accused persons is not to be eroded, at the same time, uniformed legitimization of trivialities would make a mockery of administration of criminal justice.’

13. This being the first appellate court, my duty is to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32. The court should however bear in mind that it did not see witnesses testify and give due consideration for that.
14. Having considered the grounds of appeal, and evidence adduced before the trial court, it is my opinion that the paramount issue for determination is whether the prosecution proved its case to the required standard.
15. 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.”
16. Further, In *Jeremiah Oloo Odira v Republic* [2018] eKLR the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:

Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.
17. On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -
 - i. The offender is armed with any dangerous or offensive weapon or instrument, or
 - ii. The offender is in the company of one or more other person or persons, or
 - iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person” See *Olouch v Republic* (1985) KLR)



18. Based on the evidence of PW1 and PW2 who led evidence to what unfolded on the material night, it is clear that PW1 was assaulted and in the process robbed of his helmet and money (Kshs. 1,000/=).
19. PW3 testified that the complainant was examined in the hospital and there was no injury on the head and face, thorax and abdomen also had no injuries. That he had healed cut wounds on both palms. There was no injury noted on the lower limb. The approximate age of injury was 4 days probable type of weapon causing injury was a sharp weapon.
20. PW4 No. 105456 PC Stephen Bekerembe. He stated that on the 16.03.2021 at around noon members of the public led by boda boda chairman sacco Lotuk brought two young men on a motorcycle with both having injuries. The complainant reported that accused herein was with another not before court. They had hired him to take them to Lopur but on the way at Loyar, they stopped him after removing a knife and threatened to chop off his head. They demanded for the ignition key of which the complainant resisted hence a struggle ensued. The other person managed to snatch away the ignition key and sped off with the motorcycle. It was his testimony that the complainant managed to get hold of this accused person and snatched the knife, he was holding as he screamed for help. He stated that members of the community came to his rescue and the chairman of the bodaboda was summoned and they were escorted to the police station. At the station, it was his testimony that the accused informed him that he was with co-accused but had dropped his phone at the scene. He proceeded to the scene and recovered the mobile phone and also detained the knife which had been seized from him. He tendered the statement of the chairman of the boda boda as he had not managed to secure his attendance. It was his testimony that the motorcycle was never recovered as the co-accused was still at large. It was his testimony that the accused was arrested at the scene.
21. On identification, and considering the fact the trial court observed the demeanor of the witnesses, the court noted that when the accused was cross examining PW1 who had stated clearly in his evidence in chief to have arrested him after wrestling and screaming for help, he did not allude to this witness being one of the boys who were collecting illegal road tax. The court concluded that the defence was lying.
22. I have had the occasion to peruse the record as well as the judgment of the trial court and I wholly agree with the findings of the trial court that the elements of robbery with violence were properly established and I therefore affirm the conviction.

On sentence

23. In the case of *Ogolla s/o Owuor v Republic*, [1954]EACA 270, the court pronounced itself on this issue as follows:-

The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors”

24. The same court in *Shadrack Kipkoech Kogo v R Eldoret Criminal Appeal No.253 of 2003* the court held that

Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R*[1989 KLR 306]”

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.”

25. In the “*Murnatetu Case*”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;
- (a) age of the offender;
 - (b) being a first offender;
 - (c) whether the offender pleaded guilty;
 - (d) character and record of the offender;
 - (e) commission of the offence in response to gender-based violence;
 - (f) remorsefulness of the offender;
 - (g) the possibility of reform and social re-adaptation of the offender;
 - (h) any other factor that the Court considers relevant.”
26. In my considered view, the accused mitigation ought to count in sentencing. The objectives of sentencing should be considered in totality.
27. Further, the sentencing objectives in Kenya have been captured in the *Sentencing guidelines 2023* to be the following: -
- 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
 - 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 - 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
 - 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 - 5) Community protection: to protect the community by incapacitating the offender.
 - 6) Denunciation: to communicate the community’s condemnation of the criminal conduct.
 - 7) Reconciliation: To mend the relationship between the offender, the victim and the community.
 - 8) Reintegration: To facilitate the re-entry of the offender into the society.
28. There is a general indication that there is yet to be a complete paradigm shift on the part of the magistrate’s court on sentencing offenders under section 296 (2) of the *penal code*. There are quite a few important reasons for this emphasis. To begin with it is evident in our jurisprudence that the



interpretation and the structural scheme of this penal offence as legislated seems to occasion some kind of prejudice and injustice to those indicted as having implicated of the crime. Without breaking new ground the focus was on reestablishing a more precise, clear, consistent, unambiguous frame of elements which are not likely to impair fair trial rights under Article 50 of the constitution. There is a real quarrel with the statements in section 295 as read section 296(2) of the penal code. Unfortunately it is sometimes confused with the offence of stealing so long as there is medical evidence of a P3 from a clinician or a medical doctor. Some of the convicts end up being sentenced to harsh and punitive sentences so long as the said charge sheet incorporates the words robbery with violence. To ground a successful plea of robbery with violence all of what the prosecution must show is that the victim suffered some injuries. The injuries need not be grievous or serious in nature to qualify on offence within the rubric of section 296(2) of the penal code. This is the driving force behind the lengthy sentences imposed by the trial court. While the deterrent effect or punishment has remained as important as ever it is I think correct to say that the retributive aspect has tended to yield ground to the aspect of prevention and correction. By the measure of the circumstances and nature of this case and given the art of sentencing from an appellate court perspective I find no reason to interfere with the custodial sentence arrived at by the trial court. One other crucial aspect is the prima facie evidence that the appellant on being arraigned in court on 25th March, 2021 and being granted bail of 50,000 he did not seem to have fulfilled bond terms as ordered by the court. To that extent the appeal on conviction and sentence remain affirmed with a rider that the application of section 333(2) of the CPC be invoked to impose an appropriate custodial sentence in which the period spent in remand custody is given prominence. The committal warrant to that effect be amended for the commencement date of the sentence reflect 25th March, 2021.

It is so ordered.

DATED AND SIGNED AT LODWAR THIS 2nd DAY OF FEBRUARY, 2024

In the presence of;

Mr. Yusuf for the state

Appellant present

R. NYAKUNDI

JUDGE

