



**Seroney v Republic (Criminal Appeal 19 of 2023)
[2024] KEHC 2377 (KLR) (Appeals) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2377 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA
APPEALS
CRIMINAL APPEAL 19 OF 2023
CM KARIUKI, J
MARCH 7, 2024**

BETWEEN

JOEL KIPKORIR SERONEY APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. J. Wanjala (CM) in
Nyabururu CMC No. 2174 of 2016 on 7th February 2019)*

JUDGMENT

1. The Appellant was charged alongside two others with two counts of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. It is alleged that on the 8th day of September 2016 at 8.00 pm at Mumoi Village in Subukia Sub-District within Nakuru County with others not before the court, while armed with dangerous weapons namely an AK47 rifle robbed off Dickson Michael Murage his mobile phone Techno 501 worth 3,500/-, 20 heads of cattle worth Kshs 1,600,000/- all valued at Kshs 1,603,500/- and immediately before such robbery injured the said Dickson Michael Murage.
2. The Appellant faced a similar charge in count II, with particulars of offense being that on the 8th day of September 2016 at 8.00 pm at Mumoi Village in Subukia Sub-District within Nakuru County with others not before the court, while armed with dangerous weapons namely AK47 rifle robbed off Monica Wanjiru Mburu cash Kshs 2,000/- and her mobile phone make Techno 335 worth 2,500/- all valued at Kshs 4,500/- and immediately before such robbery threatened to use violence on the said Monica Wanjiru Mburu.



3. During the trial, the prosecution called 5 witnesses while the Appellant gave sworn testimony in his defense and did not call any witnesses. In the end, he was convicted on the charge of robbery with violence and sentenced to life imprisonment.
4. Having been dissatisfied with the conviction and sentence he filed this appeal. The Appellant cited 11 grounds in his petition of appeal dated 12th February 2019. He, however, filed amended grounds of appeal under Section 350 (3) (v) of the *Criminal Procedure Code* that:-
5. The learned trial magistrate erred in law and fact by awarding a conviction and a sentence in a prosecution case but failed to note that the charges were duplex framed under Section 295 as read with Section 296 (2) of the *Penal Code*.
 - I. The learned trial magistrate erred in law and fact by passing a conviction and a sentence of life imprisonment on evidence of identification by PW1, PW2, and PW3 but failed to note that the circumstances were too difficult for positive identification and there was no advance report on this identification made to the police.
 - II. The learned trial magistrate erred in law and fact by basing his conviction and sentence on evidence of identification parade which was flawed.
 - III. The learned trial magistrate erred in law and fact by convicting and sentencing the Appellant in a prosecution case but failed to note that the elements of the charge of robbery with violence as defined under Section 296 (2) of the *Penal Code* were not proved.
6. Reasons wherefore, the Appellant prays for the following orders: -

That the conviction be quashed and the sentence imposed on the Appellant be set aside and the Appellant be set at liberty.

That this honourable appellate court does issue any further orders as may be just and expedient in the circumstances.

That this honourable appellate court be pleased to re-evaluate the whole evidence tendered, evaluate the judgment, consider his submissions on matters of law, and make an independent finding on both conviction and proper sentence.

Appellant's Submissions

7.
8. The Appellant submitted that the charge was defective as the charges were duplex and therefore fatally defective. He was charged with general simple robbery but as read with the ingredients of robbery with violence which charge he was facing. He questioned which charge he was answering when he took a plea and stated that a trial under such a charge resulted in injustice on his part. Reliance was placed on *Joseph Mwaura Njoroge & 2 Others vs. R* [2013] eKLR, *Simon Materu Munialu vs. Republic* [2007] eKLR.
9. It was argued that the circumstances for the Appellant's positive identification were not conducive. Reliance was placed on *Joseph Ngumbau Nzalo vs. R* [1991] 2 KAR, *Wamunga vs. R* [1989] 1KLR. The Appellant stated that the identification of the Appellant by PW1, PW2, and PW3 was erroneous and cannot support a conviction. He stated that according to PW1's testimony, she could not see the attackers' faces as she hid under the bed and there were lighting issues, and that she only identified the Appellant after arrest.



10. Further, the Appellant cast doubt on PW2's evidence on recognition. That there were gaps and contradictions between his initial victim statement and his testimony in court. Reliance was placed on *Ndungu Kimanyi vs Rep* [1979] KLR 282. It was also stated that PW3's evidence on identification was not credible because she did not identify the Appellant but was influenced by the police. He reiterated that the offense occurred during the night and that no descriptions of the robbers were given in the first report or the initial statements by all the witnesses. They all recorded the statements at the police after the Appellant was arrested and only identified him at the police station and not at the scene of the crime.
11. The Appellant averred that the prosecution did not prove the ingredients for robbery with violence against the Appellant. He stated that the witnesses testified that he was armed with a gun but the complainants did not identify the Appellant as the person who had the said weapons. That no dangerous weapon was recovered by the police and none was brought to court. The witnesses did not state the role the Appellant played in the actual robbery. Reliance was placed on *Musa Ahmed vs Republic* [2016] eKLR.
12. It was asserted that the Appellant cannot be the offender within the meaning of Section 296 (2) of the *Penal Code* as he did not commit the act of robbery nor was he found with possession of stolen property/items. It cannot be said that he was guilty of robbery with violence merely because he was in company with others. The Appellant stated that although PW2 gave evidence that he was severely assaulted and injured no medical evidence was produced to prove the assault. Additionally, the Appellant submitted that there was no evidence that the identification complied with the guidelines set forth by the Police Force Standing Orders were breached.
 - a. Respondent's Submission; Not available at the time of drafting this judgment.

13. Analysis and Determination

14. As the first appellate court, this court is tasked with re-evaluating the evidence presented at trial and drawing its conclusions while bearing in mind that It neither saw nor heard the witnesses nor observed their demeanor when they gave their testimonies. (See *Okeno vs. Republic* [1972] E.A 32).
15. Having perused the petition of appeal herein, the amended grounds of appeal, the written submissions thereto, and the lower court record, the main issues that arise for determination herein are:-Whether the prosecution proved its case beyond reasonable doubt.; andWhether the sentence meted is appropriate to the offense in the circumstances?
16. The elements of the offense of robbery with violence were set out by the Court of Appeal in the case of *Oluoch vs Republic* [1985] KLR thus:

“Robbery with violence is committed in any of the following circumstances:

- a. The offender is armed with any dangerous and offensive weapon or instrument; or
- b. The offender is in the company of one or more person or persons; or
- 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
.....”



17. Additionally, according to the case of *Dima Denge Dima & Others vs Republic*, Criminal Appeal No. 300 of 2007:

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

18. In this case, the Appellant contended the charge was defective as the charges were duplex and therefore fatally defective. He was charged with general simple robbery but as read with the ingredients of robbery with violence which charge he was facing. Essentially, the Appellant argued that the charge was duplicitous for citing Sections 295 and 296 (2) of the *Penal Code*.
19. Section 295 is a definition section; it contains the ingredients of robbery with violence. In my considered view, the inclusion of Section 295 on the charge sheet did not make it defective as that section was merely descriptive.
20. The Court of Appeal in *Jobana Ndungu v Republic* [1996] eKLR set out the ingredients of robbery with violence and in doing so dealt with the issue of Section 295 of the *Penal Code* as it relates to Section 296(2). The court stated 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 is 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.

21. Further, in *Simon Materu Munialu v Republic* [2007] eKLR (Criminal Appeal 302 of 2005), the same court tackled the issue of whether a charge sheet citing only Section 296 (2) of the *Penal Code* was sufficient. The court considered the submission that Section 295 of the *Penal Code* creates the offence of robbery, but held that:

“...the ingredients that the Appellant and for that matter, any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the *Penal Code*. It is these ingredients that need to be explained to such an accused person to enable him know the offense he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the *Penal Code* as that would not contain the ingredients that are in section 296(2) of the *Penal Code* and might create confusion.”



22. Additionally, in the case of *Joseph Onyango Owuor & Cliff Ochieng Oduor vs R* [2010] eKLR (Criminal Appeal No 353 of 2008, the court stated as follows:-

“Mr. Musomba submitted that unless the afore quoted sub-section (section 296) is read with section 295 of the *Penal Code*, then reliance on section 296(2), above, without more will not disclose the commission of an offence. Section 295 of the *Penal Code* defines the offence of robbery. Section 296(1) and 292(2) of the *Penal Code*, have a common marginal note, namely “punishment of robbery”....

‘Section 295, does not deal with the degree of violence being merely a definition section... Sections 296 (1) and 296 (2) of the *Penal Code* deal with the specific degrees of the offence of robbery and have been framed as such.’

23. On the other hand, in *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR the Court of Appeal stated:

“We agree that this is the correct proposition of the law. Indeed, as pointed out in *Joseph Onyango Owuor & Cliff Ochieng Oduor v R* (Supra) the standard form of a charge, contained in the Second Schedule of the *Criminal Procedure Code* sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the *Penal Code*. This is the section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others, or if he uses any personal violence to any person.

The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that 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 to steal. It would not be correct to frame a charge for the offence of robbery with violence under sections 295 and 296 (2) as this would amount to a duplex charge.”

24. Accordingly, in my considered view, Section 295 of the *Penal Code* as quoted in this case was a definition section and from the trial record, the Appellant was aware of the charges facing him during the trial process and he failed to raise the issue of defective charge sheet at trial they proceeded to cross-examine the witnesses accordingly. From the *Joseph Njuguna Mwaura* [supra] case, one would argue that charging the Appellant under Section 295 as read with Section 296 (2) of the *Penal Code* is undesirable and may present a duplicitous charge but in my view and specifically in the appeal herein, the same did not amount to a fatal defect in the prosecution’s case and was curable by invoking Section 382 of the *Penal Code*. Moreover, I hold that in the circumstances of this case, there was no injustice was occasioned towards the Appellant and he did not suffer any prejudice as a result of charging him as he was. (See *Paul Katana Njuguna vs Republic* [2016] eKLR).
25. Secondly, the Appellant cast doubts on the evidence of identification by PW1, PW2, and PW3. He claimed that the circumstances were too difficult for positive identification and that there was no advance report on this identification made to the police.
26. PW1 who is the complainant’s daughter stated that on the fateful night, she was at home reading when she heard dogs barking outside and heard the door being hit by a stone. She ran to her bedroom and heard the house being hit by more stones then she heard her mother screaming before she heard people



- roughly entering the house. She stated that there were about 10 people and that she saw them while hiding under the bed. She also stated that there was light i.e. solar light and she saw some people and heard others talking to her parents. They demanded her mother's phone and after she showed them where it was, they took it and then proceeded to beat her parents demanding money.
27. It was her testimony that her mother gave them Kshs. 2,000 and that they also beat her sister a lot and then she was also pulled out from under the bed by one of the attackers who asked her where the keys to the cattle *boma* were. She stated that she recognized one of the attackers and she had known him as Kimondo. PW1 asserted that the attackers were carrying weapons like pangas, arrows, iron bars, and a gun. They took her to look for the key and then to the store where as they were leaving she recognized one of the attackers as Kebenei. She was then taken to the house and ordered to lie down then the attackers ordered her, her mother, and her sister to go outside the house where they were ordered to sit down and the attackers asked them how they could cross the river with the cattle. The attackers then went and broke the cattle *boma* and asked them to direct them as they drove the cattle away to cross the river. When they reached a certain place that had a forest they were told to go back home.
28. As they were going back home, they managed to get through to the police and were later taken to the police station where they reported the matter and slept there until morning. When they went back home with the police officers, she learned that her dad had been injured by the attackers and had been taken to hospital. She asserted that she had recognized and identified the Appellant's co-accused i.e. Kimondo and Kebenei. She also stated that she saw the Appellant and that she identified him when they were going with the cattle. That the Appellant was the one who was carrying the gun as they drove the cattle away although she did not know him from before.
29. PW2, the complainant in count 1 started by giving an account of what had happened between him and his neighbour 'Kebenei' months before the attack. He testified that on the material night, when he was attacked he was in bed at around 8 pm and had left his children singing. He heard his neighbour singing outside and other people responding. He then went outside and saw many people and after going back to his house, he was attacked. His door was hit with stones and his family started screaming. The door was hit and opened and the attackers entered and found him in the sitting room.
30. It was his testimony that the lights were on and he saw the first person to enter was tall but he did not know him, the person pushed him back to the bedroom. He turned and looked towards the window and saw Kebenei standing outside the window and looking into his bedroom. He stated that there were room lights and moonlight from outside. He then narrated how Kebenei instructed on who to cut and that the attacker aimed to hit him on the neck but he put his hand to protect his neck and was cut on the right hand. The tall man then threw him on the bed and a person that had a gun entered his bedroom. He asserted that he saw the person carrying the gun clearly as there was solar light in the house.
31. He testified on how the attackers demanded money from him, PW1, and PW2, and stated that he also saw the Appellant whom they used to refer to as Kimameni. He stated that it was the Appellant who told the other to stop beating his wife and also he told the tall guy that he should have not cut him. He asserted that the Kimindo, Kimameni, and the tall guy then started looking for money in their clothes but they did not find any. He stated that Kimameni was wearing a khaki jacket normally worn by police officers or prison officers. That the attackers then went outside with his wife and children and Kimameni came back and asked him for arrows. The attackers then broke into his cattle *boma* and took his cows i.e. 20 heads of cattle. His children and wife were taken and he was warned that if he screamed they would kill them.
32. After about 20 minutes, they alerted the neighbours and later the police arrived and he was taken to the hospital. Upon his discharge, he went to the police station to record his statement and was later



- called to attend an identification parade where he was able to identify the Appellant (Kimameni) and stated that he saw him at his house carrying a gun. He asserted that the Appellant was acting like the bodyguard because he had a gun.
33. PW3, the complainant in count 2, and PW2's wife corroborated PW1 and PW2's testimony. She stated that the attackers demanded money and she gave them about Kshs. 2,000/- and they also made away cattle from their *boma* and asked her and her daughters to accompany them. She stated that she was able to identify one of the attackers as their neighbour Kebenei and also the Appellant because he was carrying a firearm. She asserted that he had not covered his face. Later, she was able to identify the Appellant in an identification parade that was conducted by the police.
34. The incident occurred at night and care should be taken to ensure the Appellant was positively identified as one of the perpetrators of the offence. The court in *Wamunga v. Republic* (1989) KLR 424 at 426 had this to say:
- “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 the possibility of error before it can safely make it the basis of a conviction.”
35. Accordingly, having interrogated the circumstances under which the Appellant's identification was done, I concur with the trial magistrate that he was positively identified as one of the attackers on the material night. I find that there was sufficient light in the house to enable the witnesses to see the Appellant as there was light in the house from the solar and also the moonlight. The robbers including the Appellant were in the house with PW1, PW2, and PW3 for a considerable amount of time and he had not concealed his face. They even took PW2 and PW3 with them when they went outside and stole the cattle and took them away.
36. The Appellant even interacted with the complainant apologizing for them cutting him. PW3 also testified that the Appellant freely talked to her and I find her account both credible and consistent. Moreover, he stood out because he was armed with a gun. All these circumstances in my view favor positive identification.
37. I could not identify any element of mistake or delusion on the part of the witnesses in the Appellant's identification as one of the persons who robbed them on the fateful night. Accordingly, I am satisfied that the Appellant was positively identified by prosecution witnesses who saw him well on the fateful night.
38. Additionally, I have carefully perused the trial court record and I am satisfied that the identification parade was properly conducted. It is my considered opinion that none of the Appellant's arguments discredit the conduct of the parade to the extent of rejecting the results of the parade.
39. I do not find any prejudice and/or miscarriage of justice that he may have suffered. In view of the foregoing and having considered the evidence adduced in the trial court in totality, I find that the prosecution proved the case against the Appellant beyond a reasonable doubt. Consequently, the appeal on conviction fails.
40. On the final issue, Section 296(2) of the *Penal Code* stipulates a mandatory death sentence for the offence of robbery with violence. However, the inherent jurisdiction and discretion to determine the appropriate sentence in any case taking into consideration the circumstances of the offence and the mitigation of the offender has been placed back on the court's hands through several court cases



that declare mandatory minimum sentences to be unconstitutional. (See [James Kariuki Wagana vs Republic](#) [2018] eKLR)

41. In the instant case, the trial magistrate handed the Appellant a life sentence. The court of appeal in [Manyeso v Republic](#) (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) in determining the constitutionality of the mandatory sentence of life imprisonment has held that imposition of a mandatory indeterminate life sentence, is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 and 28 of the [Constitution](#) and therefore unconstitutional.
42. Accordingly, the Appellant alongside others brazenly attacked the complainants brandishing several weapons including pangas and a gun, and injured PW1 while at it. Taking into account all these factors, and the judgment of the Court of Appeal in [Evans Nyamari Ayako vs. Republic](#) Kisumu Criminal Appeal No. 22 of 2018 wherein the court held that life imprisonment translates to thirty years' imprisonment, I therefore set aside the appellant's life sentence and substitute it with an imprisonment of 30 years, which shall run from date he was arrested.
43. In the premises, the appeal succeeds partially in that the appellant's life sentence is substituted with 30 years imprisonment and shall commence from the date of his arrest. Therefore, the court makes the following orders;
 - i. The appeal on conviction fails and thus is dismissed and the conviction upheld.
 - ii. The appellant's life sentence is substituted with 30 years imprisonment and shall commence from the date of his arrest.

DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 7TH DAY OF MARCH 2024.

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CHARLES KARIUKI

JUDGE

