



REPUBLIC OF KENYA



KENYA LAW
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**Erasta v Republic (Criminal Appeal E001 of 2021)
[2024] KEHC 4253 (KLR) (17 April 2024) (Abridged Judgment)**

Neutral citation: [2024] KEHC 4253 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL E001 OF 2021
RN NYAKUNDI, J
APRIL 17, 2024**

BETWEEN

NSENGIYUMWA ERASTA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. J.M. Wekesa;
HSC in Kakuma law court Cr. Case No. E148 of 2019)*

ABRIDGED JUDGMENT

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 9th may, 2019, at Kalobeyei settlement in Turkana West Sub-County within Turkana County, jointly with another not before court being armed with stones robbed Ndayavugwa Theogene of his Kshs. 7,000/= and a mobile phone and immediately after the time of such robbery wounded the said Ndayavugwa Theogene.
2. The Appellant was convicted of the charge and sentenced to death.
3. Being aggrieved by both the conviction and sentence meted out against him by the trial court, he filed the instant appeal.
4. The appeal was lodged on grounds that:
 - i. That the learned trial magistrate erred in both law and facts when she convicted the accused person in this instant case without observing that there was a grudge between the complainant (father-in-law of the accused) and the accused person.



- ii. The learned trial magistrate erred in both law and facts when she convicted the accused person in this instant case without observing that there was collaboration about the time of the incident.
 - iii. That the learned trial magistrate erred in both law and fact when she convicted the accused person in this instant case without observing that there was no identification parade conducted.
 - iv. That the learned trial magistrate erred in both law and fact when she convicted the accused person in the instant case without observing that there was a contradiction in the instant case.
 - v. That the learned trial magistrate erred in both law and fact when she convicted the accused person in the instant case without observing that there was no investigation done.
 - vi. That the learned trial magistrate erred in both law and fact when she convicted the accused person in the instant case without observing that there was no exhibit brought before court that shows the accused person was the one who did it.
5. The respondent filed his submissions whereas I have not seen any for the Appellant.

Respondent's submissions

6. The Respondent made submissions on five limbs.
7. On the ingredients of the offence of robbery with violence, it was the Respondent's submission that the affirmative findings by the court below had sufficient basis. It was submitted that there was a violent attack using a weapon on the victim by more than one person and money together with a phone were stolen. In support, PW6 confirmed the injuries.
8. Secondly, according to the respondent's counsel, the appellant's recognition was safe. Witnesses placed the victim into the appellant's hands. That the two initially spent considerable time together under favorable conditions. Counsel was of the view that an ID parade agitated for in the petition would be of no value because the appellant was known to the victim prior.
9. To the second limb, the Respondent urged this court to reject the ground on contradictions. Counsel submitted that no witness said the opposite of what the other had stated, much less anything that would warrant a rejection of their evidence by the court below. Counsel maintained the view that no inconsistency on a material fact is apparent on the record.
10. On the ground of a grudge as raised by the appellant, the Respondent submitted that such could be an afterthought. It was stated that there was no such issue raised whether in cross examination or in the appellant's defence. Counsel further maintained that investigations were conducted, which established culpability.
11. Finally, it was submitted for the Respondent that the court exercised its discretion in imposing the death sentence. That the court neither erred in principle nor took into account an irrelevant factor on sentence which could warrant an interference.

Analysis And Determination

12. 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.



13. Having considered the grounds of appeal, and evidence adduced before the trial court, my duty is to determination whether the prosecution proved its case to the required standard.
14. 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.”
15. 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.
- 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)

16. Based on the evidence of PW1 and PW5, the investigating officer who led evidence to what unfolded on the material night, it is clear that the complainant was assaulted and, in the process, robbed of Kshs. 7,000/= and his mobile phone.

17. According to PW6, the complainant alleged to have been assaulted by persons known to him. That his clothes were stained by blood. There was no smell of alcohol, drug or substance abuse. The neck and head had deep cut wounds. The Thorax and abdomen had chest pain. PW6 also confirmed that the complainant had multiple cut wounds on both upper and lower limbs. The probable type of weapons used was established to be a machete/thorns. That the degree of injury was grievous harm. He produced the said medical report as an exhibit.

18. On identification of the trial court’s judgment did not come out clearly as it appears it was not such a contested issue. According to the Respondent, the witnesses placed the victim into the appellant’s hands. The two initially spent considerable time together under favorable conditions. I couldn’t agree



more. It is evident from the record that the appellant was well known to the complainant. The appellant even confirmed to have had a relationship with the complainant.

19. Having read through the record of the trial court, I am inclined to agree that the conviction was safe and the elements of robbery with violence were established and as such the conviction was proper.
20. The upshot of this analysis is that the appeal on conviction is quashed and the conviction at the trial court upheld.

On sentence

21.

“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.”

22. The sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

- a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
- b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
- d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- e. Community protection: to protect the community by incapacitating the offender.
- f. Denunciation: to communicate the community’s condemnation of the criminal conduct.
- g. Reconciliation: To mend the relationship between the offender, the victim and the community.
- h. Reintegration: To facilitate the re-entry of the offender into the society.

23. In the case of *R v Karg* 1961 (1) SA (231) the court addressed the issue of sentencing principles which are actually universal in nature whether one is talking about common law, or inter American criminal Justice System in the following words. “While the deterrent effect of punishment has remained as important as even, it is I think correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing or but the element of retributions historically important is by no means absent from the modern approach. It is not wrong tht the natural indignation of interested persons and of the community at large should receive some recognition in sentences that courts impose. And it is not irrelevant to bear in mind tht if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally righteous anger should not becloud judgment.



24. With respect to mandatory minimum sentences the court of Appeal has rendered its position in the cases of *Julius Kitsao Manyeso v Republic* COA Criminal Appeal No 12 of 2021, *Philip Mukeke Mainigi & 5 Others v Director of Public Prosecution & A.G* HC Petition No E017 of 2021.
25. The *Penal Code* prescribes a death sentence for the offence of robbery with violence. I am alive to the decision in Muruatetu and it has been said time and again that it is the mandatory nature of the death sentence that was declared unconstitutional. Judicial officers have room to exercise discretion in sentencing an accused person to death, depending on the circumstances. The courts are now moving away from imposing the minimum sentences, which in essence allows a judicial officer discretion to impose a sentence depending on the circumstances of a case and the aggravating factors.
26. Therefore, in accordance with the decisions of the Superior Courts cited above have no other recourse but to review the death penalty and have it substituted to a terminable offence of 30 years imprisonment with effect from 18.12.2020 in adherence to Section 333(2) of the *CPC* to give credit to the Appellant for the period spent in a pre-trial detention. .
27. It is so ordered.

DATED AND SIGNED AT ELDORET THIS 17TH DAY OF APRIL, 2024

R. NYAKUNDI

JUDGE

