



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Lentirangoi v Republic (Criminal Appeal 259 "B" of 2011)
[2024] KEHC 5203 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 5203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 259 "B" OF 2011
PN GICHOHI, J
APRIL 11, 2024**

BETWEEN

MPAYO LENTIRANGOI APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from conviction and sentence in Senior Resident
Magistrate's Court at Maralal Criminal Case No. 292 of 2009
dated 07/03/2011 by Hon. A.K. Ithuku Senior Resident Magistrate)*

JUDGMENT

1. The background of this appeal is that both Mpayo Lentirangoi (herein referred to as the Appellant) and another (who is not involved in this appeal), appeared before the trial court to answer various charges. The Appellant was the 1st accused.
2. They were jointly charged with four counts of robbery with violence contrary to section 296 (2) of the [Penal Code](#), that is, Count I, II, III and IV. The Particulars were as follows:-

Count I : On the 9th day of November 2009 at Lemisigio area in Samburu Central District within Rift Valley Province jointly being armed with dangerous weapons namely rifles robbed Boniface Owino of his one mobile phone, make Motorola C200 valued at Ksh.500/=, one letter jacket, a driving licence, National ID Card sim cards and cash Ksh. 350/= and immediately before or immediately after such robbery threatened to use actual violence to Boniface Owino .

Count II : On the 9th day of November 2009 at Lemisigio area in Samburu Central District within Rift Valley Province jointly being armed with dangerous weapons namely rifles robbed Samson Langei of his mobile phone make LG KF 755 valued at Ksh. 20,000/=, one



baby toy car and cash Kshs.800/= and at or immediately after such robbery threatened to use actual violence to Samson Langei.

Count III : On the 9th day of November 2009 at Lemisigio area in Samburu Central District within Rift Valley Province jointly being armed with a dangerous weapon namely rifles robbed Tobias Ochieng of his mobile phone Nokia 1110 valued at Ksh. 5,000/=, one National ID Card, one ATM and cash Kshs. 450/= and at or immediately after such robbery used or threatened to use actual violence to Tobias Ochieng.

Count IV : On the 9th day of November 2009 at Lemisigio area in Samburu Central District within Rift Valley Province jointly being armed with dangerous weapons namely rifles robbed Lawrence Njeru Muindi of his mobile phone make Fashion 30 valued at Kshs. 7,000/=, 20 Kgs of cooking fat, 4 packets of biscuits , one jacket and cash Kshs. 2,430/= and at or immediately after such robbery threatened to use actual violence to Lawrence Njeru Muindi.

3. The Appellant was charged with Count V that is, being in possession of a firearm without a firearm certificate contrary to section 89 (1) of the [Penal Code](#). The Particulars were as follows:-

Count V : On the 29th day of November 2009 at Lemisigio area in Samburu Central District within Rift Valley Province without reasonable excuse had in his possession a firearm namely Rifle Serial No. 12050509 without a firearm Certificate which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

4. He was also charged with the offence of being possession of ammunition without a firearm certificate contrary to section 26 (1) as read with section 26 (2) of the [Firearms Act](#) Cap 114 Laws of Kenya. The particulars were:-

Count VI : On the 29th day of November 2009 at Lemisigio area in Samburu Central District within Rift Valley Province without reasonable excuse had in his possession seven rounds of ammunition 7.62 mm special without a firearm Certificate.

5. The 2nd accused was charged in Count VII being that is, being in possession of a firearm without a firearm certificate contrary to section 89 (1) of the [Penal Code](#) , the particulars were:-

Count VII : On the 30th day of November 2009 at Lemisigio area in Samburu Central District within Rift Valley Province without reasonable excuse had in his possession a firearm namely M16 Serial No. 008569 without a firearm Certificate which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.

6. He was also charged in Count VIII that is, being possession of ammunition without a firearm certificate contrary to section 26 (1) as read with section 26 (2) of the [Firearms Act](#) Cap 114 Laws of Kenya.

Count VIII : On the 30th day of November 2009 at Lemisigio area in Samburu Central District within Rift Valley Province was found in possession one round of ammunition 7.62 mm without a firearm Certificate.



7. The Appellant faced an alternative charge of handling stolen goods contrary to section 322(2) of the Penal Code. The particulars were that:-

On the 29th day of November 2009 at Lemisigio area in Samburu Central District within Rift Valley Province otherwise than in the cause of stealing retained one mobile phone make Nokia 1110, one mobile phone make Fashion 30 Knowingly or having reasons to believe them to be stolen goods or unlawfully obtained.

8. After hearing, the Appellant was convicted on Count I, II, and III and sentenced to death. He was also convicted on Count V and VI and the sentences were held in abeyance. The 2nd accused was acquitted on all the charges.

9. Aggrieved by both conviction and sentence, the Appellant filed an appeal before High Court. The appeal was heard and determined by two Judges and vide their judgment dated 10/12/2013, the two judges:-

1. Dismissed appeal on Counts I, II, III, V and VI for lack of merit.
2. Acquitted the Appellant on Count IV.

10. Aggrieved, the Appellant preferred an appeal before the Court of Appeal vide Nakuru Criminal Appeal No. 9 of 2014 but in compliance with the Supreme Court decision in Republic v Karisa Chengo & 2 others [2017] eKLR, the Court of Appeal found the panel of R.V. P. Wendo and L.N. Waithaka JJ had no jurisdiction to hear the appeal as L.N. Waithaka J was a Judge of the Environment and Land Court.

11. The Court therefore declared the said proceedings High Court Criminal Appeal No. 259 “B” of 2011 a nullity, quashed the judgment and directed that Appellant’s appeal be heard afresh before a competent High Court Judge other than the two said Judges.

12. This Court now notes that the Appellant had raised three main grounds of appeal in his what he called supplementary grounds of appeal. Further he, has taken opportunity to file supplementary grounds of appeal on 13/02/2023. When combined, the grounds are follows:-

1. That the learned trial magistrate erred in law and fact by failing to find that the purported identification was unsatisfactory, doubtful, could not support a conviction and the Appellant was a victim of mistaken identity.
2. That the learned trial Magistrate erred in law in convicting the Appellant on the basis of an identification parade that was not properly conducted.
3. That the learned trial Magistrate erred in failing to consider the Appellant's defence including his alibi defence.
4. That the learned trial Magistrate erred law and fact in relying on the ballistics report produced by an unqualified person.

13. The Appeal was canvassed by way of written submissions. The Appellant submitted that it was the first time PW1 and PW2 saw him yet the trial magistrate held that this was evidence of recognition. Referring to the circumstances surrounding the incident, the Appellant submitted that PW1 must have been scared to death and therefore, he could not have identified the Appellant.

14. He further submitted while PW1 and PW2 stated that the robbery was on 09/11/2009, PW4 said it was on 06/09/2009 and further, PW3 and PW5 testified that it was on 28/11/2009.



15. He termed the identification by voice as an afterthought as the PW1 did not say he knew the Appellant's voice and neither did PW1 and PW2 claim to know who spoke during the robbery.
16. On identification parade, the Appellant submitted that manner in which it was conducted failed to comply with the rules thus rendering it a nullity.
17. Further, the Appellant submitted that the trial court failed to consider his defence of alibi and that PW3 had a grudge with him for having been arrested by the Appellant's father who was a chief.
18. On sentence, he relied on the Muruatetu case and urged the court to consider a different sentence.
19. The Respondent opposed the appeal through Mr. James Kihara. The learned prosecution counsel submitted that the evidence was properly corroborated, all ingredients of the offences the Appellant was charged with proved and in totality, the prosecution case proved beyond any reasonable doubt. He therefore urged the Court to dismiss the appeal on conviction.
20. Regarding sentence, he acknowledged that death sentence has been declared unconstitutional and urged the Court to consider a determinate deterrent sentence considering the manner in which this robbery was executed.
21. This being a first appeal, this Court's duty is to examine and evaluate afresh the evidence adduced before the trial court and arrive at its own independent conclusions bearing in mind that it did not have the advantage of seeing the witnesses testify- see *Okeno v Republic* (1972) EA 32.
22. The Prosecution case was advanced by seven (7) witness while the Appellant was the sole witness for his case.
23. In summary, the evidence was that Boniface Owino (PW1) was driving his motor vehicle registration number KAJ 802T from Siaya to Maralal on 09/11/2009 and his passengers were Samson Langi (PW2), Tobias Ochieng Ouma (PW4) and Francis Maina. Upon reaching Lemisigiyo next to Kisima between 5.00 and 5.30 pm, they were stopped by two men who were armed with guns, ordered to get out of the vehicle with their hands raised and lie down.
24. The two robbed them of several items including money, wallets and mobile phones. They were then ordered to return to their vehicle and complied. They drove to Kisima and reported the matter at Kisima Police Post but they were referred to Maralal Police Station where they recorded their statements. They told the police that they could identify the robbers if they saw them again.
25. According to PW1, PW2 and PW4, they were able to identify one of the attackers during the robbery. PW1 and PW4 could identify him as he spoke to them and had a gap in his teeth and was of light complexion. PW2 saw the face of one of the attackers and he was the one with a short gun. None of them could identify the second attacker as he wore a hood.
26. PW1 and PW2 were summoned to Maralal Police Station on 07/12/2009 while PW4 was summoned on 09/12/2009. The purpose was to identify suspects who had been arrested and stolen items recovered. At the parade, each of them identified the Appellant. Of the property stolen, only PW4 recovered his Nokia 1110 phone. It had the name "Tom".
27. On 28/11/2009, Katuka Lesuuda (PW3) who was a KPR within Suguta was in Nkutoto near Lemisigiyo at around 7.00 pm when he received information that there were 2 armed men stopping vehicles near the culvert. He called Letubar Lesuuda (PW5) and several other people. They surrounded the shamba where one of the men had fled to. They pursued and exchanged fire in the process. They



- convinced him to surrender and he complied. It was the Appellant and they arrested him. On searching him, they recovered a rifle carbine S/No.12050509, 7 rounds of ammunition and six mobile phones.
28. PW3 testified that on 28/11/2009, he was on the way to Kisima Police Post when he received a call (PW5). He went and found several people surrounding the forest and saying that there was a man inside the forest and had a gun. They entered the forest and found an M16 Rifle S/No. 008569 with one round of ammunition. The Appellant was arrested. He denied having a grudge with the Appellant
 29. PW4 Tobias Ochieng Ouma restated the evidence by PW1 and 2. He however stated that they were attacked on 06/11/2009.
 30. PW5 testified that while at Lekerio Lesuuda's home at 8.00pm on 28/11/2009, they received a call that some people were attacking vehicles on Kisima- Maralal road. They went to the road where they seven men including PW3. They were informed that two armed men had entered the shamba.
 31. The following morning at 6.00 am , they followed the footsteps and later, PW3 called them saying that they had arrested the Appellant. PW5 found the Appellant with a gun. The Appellant tried to shot at them but they shot back and the Appellant surrendered. They took the gun from him . It had three rounds of ammunition. They searched and revered other rounds of ammunition and six phones.
 32. Chief Inspector Charles Marangu (PW6) conducted the Identification parade. He selected 8 people who were of same height and build as the Appellant to participate in the parade. He explained to the Appellant that he had the right to choose where he wished to stand.
 33. The Appellant opted to stand between member No. 2 and 3. Tobias Ochieng (PW4) was the first witness and requested that the members of the parade be asked to say "*Jambo*". They did so in turns and he was able to identify the Appellant.
 34. Thereafter the Appellant chose to stand between the 3rd and 4th members of the parade. Samson Langi (PW2) requested that each of the members of the parade be asked to say that "*karatasi ya mama yako*" which they did he was able to identify the Appellant.
 35. It was the turn for the last witness. The Appellant opted to remain between the 3rd and 4th members. Boniface Owino (PW1) proceed and touched the Appellant as a way of identifying him.
 36. PW6 asked the Appellant if he was satisfied with the parade and he said he was satisfied. He signed the parade form. None of the witnesses were able to identify the 2nd accused as among the robbers.
 37. No. 82313 Cpl Stephen Otieno (PW7) was the investigating officer. On 27/12/2009, he received a call from one Sgt. Maritim that at 7.00 pm informing him that the 2nd Accused had bee arrested at Suguta area. By then, the Appellant had already been arrested. PW7 proceeded there and found the 2nd accused tied with ropes. He re-arrested him and took him to Marala Police Station the following day. He explained that some of the property stolen had been recovered from the accused persons.
 38. The Appellant gave an unsworn statement in his defence and denied the charges against him. He told the court that he had gone to the market to purchase goats on 28/11/2009. Darkness set in before he could reach home forcing him to spend the night at a neighbour's Manyatta.
 39. The following day, PW3 came accompanied by seven other people. They accused the Appellant of stealing the goat he was found with. He was arrested and taken to PW3's home with whom he had a grudge. The reason for the grudge was that the Appellant's father, who was a former chief, had accused PW3 of theft.



40. He was later taken to Maralal Police Station and placed in custody for one week after which he attended a parade where he was identified by strangers. He told the court that he objected to the parade on the grounds that he was the only one who was wearing a shuka and had red ochre on his head.

Determination

41. From that evidence and the submissions by both parties, the broad issues for determination are :-
1. Whether the witnesses properly identified the Appellant.
 2. Whether the Identification Parade was properly conducted.
 3. Whether the Appellant's defence was considered.
42. On identification which is the first ground, the evidence is clear that robbery occurred during the day. He appeared on the right side of the road, pointed a gun at them and ordered them to get out of the vehicle. He is the one who demanded money and other valuables from them. The Appellant did not have a hood. He was at close range to PW1, PW2 and PW4. He was of light complexion. As he spoke, they noted a gap in his teeth. The identity was not based on the clothes that the Appellant wore on the date of robbery or the colour of his hair.
43. Next is the issue of identification parade. The reason for the request by the witnesses that he utters the said word "Jambo" and "karatasi ya mama yako", was for them to see if the man they had seen during the robbery was in the parade and had the gap between the teeth which was one of the marks by which they had described him. That was also the context under which PW1 and PW4 testified that they also recognised by his voice. From the evidence on record, it is clear that PW6 fully complied with the Force Standing Orders when he conducted the identification parade was carried out in accordance with the Force Standing Orders.
44. PW1 and PW2 testified that the robbery was on 09/11/2009 while PW4 stated that it was on 06/09/2009. He was with the PW1 and PW2 during the robbery. They reported to the place on the same day. The 28/11/2009 referred to in evidence is in regard to the date the Appellant was arrested. From the totality of evidence herein, the contradiction by PW4 on dates is not fatal and Court is satisfied that there was no error in the identity of the Appellant.
45. On the last ground, the Appellant's defence was that PW3 had a grudge with him and therefore fabricated the case against him. It is noted that during cross-examination the Appellant, PW3 responded that he had no grudge against him. The Appellant was identified by the Complainants during robbery. They did not know him before. They identified them again during the Identification Parade. Further, PW3 was not the Investigating Officer. He was not alone during the arrest on 28/11/2009. He was with PW5 corroborated his evidence and who did not know the Appellant before.
46. The Appellant was further aggrieved that his alibi defence was not considered by the trial court. Regarding alibi defence, the Court of Appeal in *Erick Otieno Meda v Republic* [2019] eKLR had this to say:-
- “In considering an alibi, we observe that:
- (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
 - (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.



- (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
- (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.”

47. In this case, the Appellant never mounted any such defence during the prosecution case. His statement of defence was on how he was arrested on 28/11/2009 and not on the date of robbery being 09/11/2009. There was no alibi defence to be considered by the trial court in the circumstances. From the evidence on record, the convictions on counts I, II and III were safe and therefore upheld.
48. From the judgment, it is clear that the trial court did not make any finding in relation to Count 1V. Further, no evidence was adduced in support of the said Count whatsoever. In the circumstances, the Appellant is acquitted on the said count.
49. When the Appellant was arrested on 28/11/2009, the police recovered a rifle and rounds of ammunition. They were taken for examination by the Ballistic Expert. According to the ballistic Report, the Rifle was found to be broken but capable of being fired. The ammunition was live. Both the Rifle and the ammunition were found to be capable of being fired under the *Firearms Act* Chapter 114.
50. The Appellant’s issue now is that the said report was produced by unqualified person. Section 77 of the *Evidence Act* provides that:-
- (1) In criminal proceedings any document purporting to be report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
 - (2) The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it. (3) When any report is so used the court may, if it thinks fit, summon the analyst, ballistics expert, document examiner, medical practitioner, or geologist, as the case may be, and examine him as to the subject matter thereof.”
51. The ballistics report was produced by Investigating Officer. The Appellant did not raise any issue on the said production and did not seek to have the Ballistic expert attend for cross examination. His cross examination of the investigating officer was whether he was the one who arrested him not anything to do with the report. Failure to have the expert personally produce the report did not prejudice the Appellant in any way. It is a fact that the Appellant did not produce any certificate or permit allowing him to be in possession of the said items. This upholds the trial court’s finding on Count V and VI.
52. On sentence, the trial record shows that there were no records for the Appellant. The Prosecutor however told the court that robbery cases were on the rise and therefore urged for a deterrent sentence. In mitigation, the Appellant told the court that he had nothing to say.
53. While sentencing, the trial magistrate stated:
- “The sentiments noted. In the 1st, 2nd and 3rd count, the accused person has been convicted with robbery with violence. The sentences under section 296 (2) of the *Penal Code* is mandatory death. We really have no options. The accused is accordingly sentenced to death



on the 3 counts as by law provided. Sentences on the fifth and sixth counts are hereby held in abeyance. R/A 14 days ”

54. Death sentence has since been declared unconstitutional. However, it has not been declared unlawful. That sentence is still applicable as a maximum sentence at the discretion of the court. To the extent trial magistrate imposed the sentence clearly based on mandatory sentence provided for under Section 296 (2) of the Penal Code, then the said sentence calls for interference by this Court.
55. In conclusion this Court makes the following orders:-
1. Appeal on counts on counts I, II, III, V, and VI is dismissed and Conviction upheld.
 2. The Appellant is acquitted on count IV.
 3. The death sentence on count is I, II and III set aside and substituted with a sentence of Twenty (25) years imprisonment on each of the three counts.
 4. The order putting in abeyance Count V and VI is set aside and substituted with a sentence of Seven (7) years imprisonment on each of the two counts.
 5. The sentences in Count I, II, III, V and VI shall run concurrently.
 6. The period the Appellant spent custody pending trial being 29/11/2009 when he was arrested to 07/03/2011 when the Appellant was committed to serve prison sentence be put into account when computing the said sentences.

Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11TH DAY OF APRIL, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Mpayo Lentirangoi- Appellant

Mr. Kihara for Respondent

Ruto, Court Assistant

