



REPUBLIC OF KENYA



**Ngimusug & 2 others v Republic (Criminal Appeal E014 of 2020)  
[2024] KEHC 3691 (KLR) (17 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3691 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL APPEAL E014 OF 2020  
RN NYAKUNDI, J  
APRIL 17, 2024**

**BETWEEN**

**LOCHOOI NYAKAA NGIMUSUG ..... 1<sup>ST</sup> APPELLANT**

**ECHOM NAMODING LOROGOI ..... 2<sup>ND</sup> APPELLANT**

**EKOWOM LOCHARA EKAI ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. C.  
Wekesa in Lodwar law court Cr. Case No. E31 of 2019)*

**JUDGMENT**

1. The Appellants were charged with 3 counts of attempted robbery with violence, possession of firearm and causing grievous harm.
2. On the first count, the appellants were charged with the offence attempted robbery with violence contrary to section 297(2) of the penal code. The particulars were that together with others not before court, the accused persons on the 4<sup>th</sup> day of January, 2019 along Lokori-Lokwamosing road in Turkana East sub-county, Turkana County being armed with offensive weapon namely AK-47 rifle attempted to rob Esinyen Erupe and others.
3. On Count II, the appellants were charged with the offence of possession of firearm contrary to section 89(1) of the penal code. The particulars were that on 4<sup>th</sup> January, 2019 at Turkana East within Turkana County without reasonable excuse carried a firearm namely AK47 in circumstances which raised a reasonable doubt presumption that the said firearm had been used in manner prejudicial to public order.



4. On the count III, the appellants were charged with the offence of grievous harm contrary to section 234 of the Penal Code. The particulars were that on the 4<sup>th</sup> day of January, 2019 at Turkana East in Turkana County unlawfully did grievous harm to Esinyen Rupe.
5. They were tried, convicted and sentenced to serve 15 and 7 years respectively.
6. Being aggrieved by both the conviction and sentence meted out against them by the trial court, they filed the instant appeal on various grounds couched as follows: -
  - i. That the prosecution's case had no identification parade conducted at Lokori police station to establish the prosecution case beyond any reasonable doubt.
  - ii. That there was no significant gun exhibit which was duly found within the possession of the Appellants.
  - iii. That PW4 misled the court by identifying the 2<sup>nd</sup> appellant mistakenly for the 3<sup>rd</sup> appellant.
7. Reasons wherefore the Appellants prayed that the appeal be allowed, conviction quashed and the sentence set aside.
8. Both parties filed written submissions in support of their Case.

#### **Appellants' submissions**

9. It was the appellant's submission that the prosecution did not prove its case beyond reasonable doubt.
10. On identification, the appellants submitted that Pw8 categorically stated that he did not see shooter. The appellants were of the view that there is much dispute arising on the issue of identification. That the circumstances favoring identification were difficult as the lorry in question was in motion speedily.
11. The appellants argued that PW1 was coached in order to bring her sham evidence without being supplied with witness statements. The appellants submitted that there are many herders who heard their animals and it is difficult to trace the footprints of the attackers. That none of the arresting officer who testified that he had photographed the footprints, which could tighten the identification. On this the Appellants relied on *Wamunga Vs. Rep (1989)*.
12. The appellants equally submitted that the prosecution did not call crucial witnesses. That the two conductors who were on board were not called to testify. They argued that it could have been vital to call them to effectively corroborate the testimony as to the actual occurrence of events. On this the appellants relied on the case of *Bukenya & other vs Uganda (1972)*.
13. In sum, the appellants submitted that the overall prosecution case was clouded with doubts and as such they urged this court to allow the appeal and dismiss this case.

#### **Respondent's submission**

14. It was submitted for the Respondent that save for the 1<sup>st</sup> count, all the ingredients in count 2 and 3 were fully proved and that the appellants were identified to the required standard.
15. The Respondent's counsel further submitted that the appellants were seen with firearms at the place of incident and at the time of their arrest. They were found in possession of the firearms at the time or arrest. Counsel maintained that there was no material contradiction in evidence.
16. On the issue of calling crucial witnesses, the respondent submitted that all material witnesses required to prove the facts in the issue were called. Counsel cited section 143 of the *Evidence Act* which provides



that there is no particular number of witnesses required to prove a particular fact unless specifically stated.

17. As to whether there were procedural illegalities as raised by the 3<sup>rd</sup> Appellant, counsel argued that the same was not true as he was supplied with witness statements.
18. Finally, on sentence, the respondent submitted that the appellants were convicted of all the three counts. It appears they were sentenced in only count one and two. The Respondent urged the court to dismiss the appeal save as suggested in count I.
19. On count I, the prosecution's counsel submitted that the complainant did not testify. That the phone that was stolen from him was never recovered. Counsel concluded that the conviction was unsafe and submitted that the appellant may be acquitted.

### **Analysis And Determination**

20. 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.
21. 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 the three counts to the required standard.

### **Count I**

22. The appellant faced a charge of attempted robbery with violence contrary to the provisions of section 297 (2) of the Penal Code. That section provides as follows: -

“297(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years

297 (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 before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

23. The trial court analyzed the evidence on record, particularly that PW1 saw three youth, two of them were armed with AK 47 rifles, and that of the three, it's the 3<sup>rd</sup> appellant who fired at her, she also identified the 1<sup>st</sup> and 2<sup>nd</sup> accused, she testified that the 1<sup>st</sup> accused had a gun, and the 2<sup>nd</sup> accused had a stick; her evidence was corroborated by PW4, the one who had hired the Lorry. He gave a vivid account of what transpired on that day as well as the description of the accused persons.
24. Further corroboration is with regard to possession of firearms by the rest of the witnesses i.e. the arresting officer especially PW2, PW5, PW6 and PW7. There was no evidence to disprove the prosecution evidence that the appellants were armed with firearms and a stick. I am satisfied that the trial court correctly appraised the evidence on record.



## On sentence

25. Regarding the 1<sup>st</sup> count, section 296(2) prescribes the sentence to meted out, the provisions state 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.”

26. On the 2<sup>nd</sup> count, the penal code provides as follows:

89(1) Any person who, without reasonable excuse, carries or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that the firearm, ammunition, offensive weapon, incendiary material or explosive is intended to be used or has recently been used in a manner or for a purpose prejudicial to public order is guilty of an offence and is liable to imprisonment for a term of not less than seven years and not more than fifteen years.

27. On the 3<sup>rd</sup> Count, section 234 of the Penal code states as follows:

“Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life.”

28. In the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to 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-adaption of the offender;
- (h) any other factor that the Court considers relevant.”

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

- i. Retribution: to punish the offender for his/her criminal conduct in a just manner.



- ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.
  - iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
  - v. Community protection: to protect the community by incapacitating the offender.
  - vi. Denunciation: to communicate the community's condemnation of the criminal conduct.
  - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.
  - viii. Reintegration: To facilitate the re-entry of the offender into the society.
30. The appellant complained that the sentence was illegal and discriminatory. This court in the case of Bernard Kimani Gacheru vs Republic (2002) eKLR had this to say on sentencing. "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the fact of each case. On appeal the appellate court will not easily interfere with sentence unless, that 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 matter already started is show to exist."
31. My overview on sentencing is that when considering the imposition for a sentence of imprisonment for any particular offence, the court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community and Further " The court must not impose a sentence of imprisonment unless it is satisfied that. (a) a sentence is being imposed for all or any of the (statutory) purposes (of sentencing and (b) those purposes cannot be achieved by a sentence other than imprisonment and (c) no other sentence would be consistent with the application of the principles of sentencing.
32. The object of sentencing is not to satisfy public opinion but to serve the large public interest predominantly applying sentencing objectives and principles combined with case law for the courts to fearlessly impose and appropriate and fair sentence. My attempt to find any errors of law or fact or application or wrong principles or exercise of excess jurisdiction in sentencing by the trial court as urged by the appellant remains in the horizon of unknown. The upshot of it there is no quarrel with the sentence of 15 years imprisonment on count 1 and 7 years imprisonment in Count II against each of the Appellant. The appeal lacks merit on both conviction of sentence save that the sentences shall run concurrently.

Orders accordingly.

**DATED AND SIGNED AT ELDORET THIS 17<sup>TH</sup> DAY OF APRIL, 2024**

**R. NYAKUNDI**

**JUDGE**

In the Presence of:



Onkoba for the State

Accused

