



REPUBLIC OF KENYA



**Njoroge v Republic (Criminal Appeal 81 of 2023)
[2024] KEHC 4292 (KLR) (15 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4292 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 81 OF 2023
DR KAVEDZA, J
APRIL 15, 2024**

BETWEEN

ROBINSON MWANGI NJOROGE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. E. Riany (SRM) on 19th December 2023 at Kibera Chief Magistrate's Court Criminal Case no. E1300 of 2022 Republic vs Robinson Mwangi Njoroge)

JUDGMENT

1. The appellant jointly with another not before this court was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the [Penal Code](#), Cap 63 Laws of Kenya. After a full trial, he was sentenced to death. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his petition of appeal dated 27th February 2023, he raised 16 grounds, which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He contended that his defence was not considered by the trial court. He argued that the sentence imposed was harsh and manifestly excessive. He urged the court to quash his conviction and set aside the sentence.
3. In response, the respondent filed grounds of opposition dated 14th November 2023. The grounds raised were that the appeal was misconceived and unsubstantiated. The appeal is an abuse of the court process as the prosecution proved its case beyond reasonable doubt. The appeal lacks merit and should be dismissed.



4. The key ingredients for a robbery with violence charge are found in section 296(2) of the *Penal Code*. It provides as follows-

“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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.
5. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt leading to a proper conviction and sentence.
6. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32)
7. The prosecution called four (4) witnesses in support of their case. Kenneth Njoroge, (PW 1), recounted that on August 19, 2022, around 11:00 pm, as he was walking home, he encountered two men ahead of him. One of them brandished a knife, while the other held an object resembling a gun. They demanded money from him and also confiscated his Tecno phone valued at Ksh 12,000. When he resisted and attempted to raise his alarm to shout for help, they stabbed him in the hand.
8. Hearing his cries, neighbours emerged to assist him, prompting the assailants to flee. Despite being at night, the complainant was able to discern their faces due to the illuminating street lights in the area. He told the court that he sustained head injuries from being beaten during the encounter and lost Ksh 6,000 as well as his phone which was stolen by the assailants. The incident took place approximately 500 meters from his residence. In court, he identified the appellant as the assailant wielding the knife. He maintained that he saw him and could remember his attackers.
9. Evanson Hunja (PW2) was inside his residence on the material day. At around 11 pm, he heard a disturbance outside his gate. Upon investigating, he discovered the victim lying on the ground with the appellant holding a knife to him and another assailant pinning him down. He confronted them, questioning their intentions and expressing concern for the victim who appeared to have been assaulted. The victim had visible injuries to his head and small finger. When prompted by PW 2, the assailants fled the scene.
10. He told the court was able to recognize the appellant, since before the incident, the appellant had approached him seeking to hire a car. Additionally, the area was well-illuminated by street lights. Following the appellant's escape, community members mobilized to search for him, as he was known in the vicinity. Subsequently, he was apprehended at his residence.
11. Dr. George Kungu (PW 3) from Kinoo Medical Clinic examined the complainant and completed his P3 form, which was presented in court. The complainant reported being assaulted on August 19, 2022, and had bruises and swelling on the lips, cheeks, and head, a swollen and bruised right thumb and shoulder, bruised right knee and thigh, and a deep cut around the right little finger. The degree of injury was classified as harm.
12. CPL Benjamin Kimeli (PW4) the investigating officer took up the investigation after a complaint was made by the complainant. He recorded witness statements, issued the complainant with a P3 form, and charged the accused who had already been arrested on the night of the incident.



13. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence, he gave sworn evidence and did not call any witnesses. He told the court that on August 17, 2022, the appellant had a disagreement with his wife regarding infidelity. Consequently, he traveled to Ol Kalou seeking advice. Upon returning to Nairobi on August 10, 2022, at 9:00 am, he discovered that his wife was not at home. Despite returning home, his wife was still absent, prompting him to retire for the night. In the early hours of the morning, at 3:46 am, he was startled by a knock on the door, only to find his wife accompanied by police officers and two men. One of the men menacingly asserted he, the appellant should be imprisoned so they could have unrestricted access to his wife. As a result of this confrontation, the appellant was charged.
14. The appeal was canvassed by way of written submissions which have been considered. The offence of robbery with violence under section 296(2) of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR and *Oluoch v Republic* [1985] KLR 549)
15. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt. The evidence on record does prove that PW 1 was stopped by the appellant and another assailant on his way home. He was attacked with the appellant brandishing a knife and the other assailant holding what looked like a gun. When he tried to raise an alarm, he was attacked and sustained injuries.
16. During the incident, the attackers stole cash and a mobile phone worth Kshs. 12,000. The appellant's identity was clear, as one of the assailants. PW2, who knew the appellant was an eyewitness to the attack and when he intervened, the appellant and his accomplice ran away. In addition, he knew the appellant having previously interacted with him over the hiring of a motor vehicle. Furthermore, the area was well-lit with street lights and the appellant's identity was not in doubt.
17. From the material placed before the court, PW 1 and PW 2, were very clear on the facts of the incident, and their evidence was not shaken on cross-examination. It is my considered view that the appellant was properly and positively identified and apprehended after the incident. I find the testimony of the prosecution's witnesses to be reliable direct evidence of visual identification against the appellant.
18. For consideration is whether force was used to rob the victim. It was the testimony of prosecution witnesses that the assailants were wielding a knife and an object that looked like a gun. When he tried to resist, the assailants used actual violence resulting in injuries that the medical examiner classified as harm. Violence was therefore present. This court is satisfied that the prosecution proved that the appellant and his accomplices robbed and used actual violence to harm the complainant. His conviction for the offence of robbery with violence was therefore safe.
19. The appellant also argued that the trial court failed to consider his defence. In his defence, the appellant denied committing the offences and maintained his innocence. He alleges that the charges against him were a fabrication. From the record, the trial court considered the appellant's defence and found it to be unbelievable and an afterthought. The ground of appeal therefore fails. His conviction was proper.
20. On sentence, the appellant was sentenced to death. Section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the



offence is prescribed. In that regard, I find the sentence imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh.

21. Therefore, the appeal on the sentence succeeds. The sentence of death is hereby vacated. I hereby re-sentence the appellant to fifteen (15) years imprisonment having considered the time spent in remand custody. The sentence shall run from the date of his conviction.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 15TH DAY OF APRIL 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Abdullahi h/b for Muiruri for the Appellant

Mr. Mutuma for the Respondent

Nelson Court Assistant

