



REPUBLIC OF KENYA



**Obong v Republic (Criminal Appeal E024 of 2023)
[2024] KEHC 3221 (KLR) (4 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3221 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL E024 OF 2023
RN NYAKUNDI, J
APRIL 4, 2024**

BETWEEN

LOKURE OBONG APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. C.A. Mayamba;
HSC in Kakuma law court Cr. Case No. E139 of 2022)*

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 on 8th July, 2022 at around 1400 hours at Kakuma refugee camp in Turkana West Sub County within Turkana County, jointly with others while armed with a knife robbed Bigirimana Domotien of one mobile phone make Infinix hot 10 valued a Kshs. 14,000/ and cash Kshs. 550 at the time of such robbery and actual violence to the said Bigirimana Domotien.
2. The Appellant was convicted of the charge and sentenced to 20 years in prison.
Being aggrieved by both the conviction and sentence meted out against him by the trial court, he filed the instant appeal.
The appeal was lodged on grounds that:
 - i. The trial magistrate erred in law and fact when he convicted the accused person without observing that there was no eye witness who was secondary to the matter.
 - ii. That the trial magistrate erred in both law and facts when he failed to consider that there was no identification parade conducted to implicate the accused person for the purpose of proper identification.



- iii. That the trial magistrate erred in both law and facts when he failed to affirm the fact that the overall prosecution case was contradicting.
 - iv. That the trial magistrate erred in law and facts when he failed to observe that the prosecution did not prove their case against him to the required standards of the law. i.e. beyond reasonable doubt.
 - v. That the learned trial magistrate erred in both law and facts without considering that the prosecution case was full of fabricated facts and testimonies.
 - vi. That the learned trial magistrate erred in both law and facts when he failed to consider the appellant's defence.
3. The Appellant filed his written submissions which I have considered in making a determination.

Appellant's Submissions

4. It was the appellant's submission that the considering the prosecution evidence, the appellant ought to be freed. That the stolen mobile phone was not recovered. Further, the fact that the head of investigation could not tell who had a knife among the accused persons, it meant that the appellant was framed up.
5. The appellant submitted that the complainant did not issue any receipts to confirm that he had a phone. That the appellant was not arrested with anything that belonged to the complainant. He argued that the victim deceived everyone including the magistrate.
6. The appellant maintained that the knife injuries should have been clearly established. He stated that given the fact that there was a fight and no stab on the body of the victim means the accused was harmless and unarmed. He argued that it was a case of mistaken identity given that he was walking to the hospital to meet his granny.
7. The appellant submitted that there was a discrepancy in the prosecution's evidence, particularly on the amount of money robbed from the victim. That the prosecution evidence was inconsistent and uncorroborated yet it led to conviction. The appellant also argued that he was never presented for age assessment given that he was a minor, a fact that ought to have been considered in sentencing.
8. The appellant urged the court to consider the circumstances of the case and the trial court record in allowing the instant appeal as prayed.

Analysis And Determination

9. 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.
10. Having considered the grounds of appeal, and evidence adduced before the trial court, it is my considered opinion that the paramount issue for determination is whether the prosecution proved its case to the required standard.



11. 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.”

12. 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).

13. The prosecution qualified the offence of robbery with violence with the fact that the complainant was assaulted prior to the theft. PW1 stated that the 2nd accused person was aiming at him with a knife as his accomplices roughed him with one holding him by the neck as they removed his property from the pocket. The prosecution tendered a P3 form which confirmed that the complainant had sustained neck pain with human bite on facial and also in the left thumb. The degree of injury was assessed as harm. To this end, the trial court concluded that the aspect of assault prior to robbery was established.

14. It was the prosecution case that the 2nd accused person was armed with a knife. That they used the weapon to threaten the complainant while at the same time, the others were manhandling him while emptying his pockets whereby they stole his mobile phone make infinix hot 10 and cash amounting to Kshs. 550.

15. On identification, the prosecution’s case was that the 2nd accused was arrested at the scene by the complainant who was helped by PW2. That they arrested him and managed to take away the knife that he had. The trial court considered his claim that he was arrested after taking his grandmother to the hospital and found it not convincing.



16. Based on the evidence of PW1 and PW2 who led evidence to what unfolded on the material night, it is clear that the complainant was assaulted and, in the process, robbed of mobile phone make Infinix hot 10 valued at Kshs. 14,000/= and Kshs. 550/=.
17. According to PW5, he was able to examine the complainant who gave history of assault. It was his testimony that the complainant had neck pains and was unable to turn the same. He had a human bite on the lateral side of the thorax. He also had a human bite on the left thumb. That the injuries were a day old with the probable weapon being both sharp and blunt object. It was his testimony that the complainant was given analgesics and antibiotics. He tendered the P3 form as PEX2.
18. I have had the occasion to peruse the record as well as the comprehensive judgment of the trial court and I wholly agree with the findings of the trial court that the elements of robbery with violence were properly established and as such the conviction was proper.
 19. The upshot of this analysis is that the appeal on conviction is quashed and the conviction at the trial court upheld.
On Sentence
 20. “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.”
21. In the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-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-adaptation of the offender;
 - h. any other factor that the Court considers relevant.”
22. In my considered view, the accused mitigation ought to count in sentencing. The objectives of sentencing should be considered in totality.

Further, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -
 1. Retribution: to punish the offender for his/her criminal conduct in a just manner.



2. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
 4. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
 5. Community protection: to protect the community by incapacitating the offender.
 6. Denunciation: to communicate the community's condemnation of the criminal conduct.
 7. Reconciliation: To mend the relationship between the offender, the victim and the community.
 8. Reintegration: To facilitate the re-entry of the offender into the society.
23. 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. In considering the above-mentioned factors and circumstances of the case, I will interfere with the sentence and substitute it with 15 years' imprisonment. The sentence ought to run from the date of arrest.
24. It is so ordered.

DELIVERED, DATED AND SIGNED AT LODWAR THIS 4TH DAY OF APRIL, 2024.

In presence of;

Mr. Onkoba for the state

Appellant present in person

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R. NYAKUNDI

JUDGE

