



**Sammy & another v Republic (Criminal Appeal E029 of 2022)  
[2024] KEHC 3723 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3723 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL APPEAL E029 OF 2022  
RN NYAKUNDI, J  
APRIL 4, 2024**

**BETWEEN**

**EMURIA EPUYA ALIAS SAMMY ..... 1<sup>ST</sup> APPELLANT**

**LOKURUN LOWA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. C.A. Mayamba;  
HSC in Kakuma law court Cr. Case No. E251 of 2019)*

**RULING**

1. The Appellants were charged with robbery with violence contrary to Section 295 as read with section 296(2) of the *Penal Code*. Particulars stated that on 4<sup>th</sup> September, 2019 while armed with AK47 rifle, Claw bar and machete, the appellants robbed the complainant Kshs. 80,000/=, perfumes worth Kshs. 60,000/=, assorted clothes worth Kshs. 20,000/=, foodstuff valued at Kshs. 10,000/= and 2 mobile phones worth Kshs. 15,000/=.
2. The Appellants were convicted of the charge and sentenced to 30 years in prison. Being aggrieved by both the conviction and sentence meted out against them by the trial court, they filed the instant appeal.

The 1<sup>st</sup> Appellant lodged his appeal on grounds that:

- i. The trial magistrate erred in law and fact when he failed to consider that the prosecution case did not prove against him to the required standards by law.



- ii. The learned magistrate erred in both law and facts when he accepted shoddy clinical evidence from the prosecution i.e. the P3 form was filled three weeks prior to the alleged time of the offence or incident.
- iii. The learned magistrate erred in both law and facts when he failed to acknowledge the fact that the medical practitioner who testified in a court of law was not the one who examined the victim and who filled the P3 form.
- iv. The learned magistrate erred in both law and facts when he failed to affirm that the overall prosecution case was contradicting and the evidence adduced in court was un-corroborative.
- v. The learned magistrate erred in both law and facts when he failed to consider that the evidence adduced by the complainant on identification was not watertight to justify a conviction since the conditions favoring identification were difficult.
- vi. The learned trial magistrate erred in both law and facts when he failed to acknowledge that nothing significant and portable was found in the appellant's possession that might link the appellant with the present offence.
- vii. The learned magistrate erred in both law and facts when he failed to consider his defence.

The 2<sup>nd</sup> appellant filed his appeal on the following grounds:

- i. That the learned trial magistrate erred in both law and facts when he failed to consider that the exhibit of a firearm that was brought to court was not found in his possession.
- ii. That the learned trial magistrate erred in both law and facts when he failed to acknowledge the fact that he was arrested 6 months prior to the alleged time of the incident.
- iii. That the learned magistrate erred in both law and facts when he failed to consider that the overall prosecution case was contradicting and clouded with doubt.
- iv. That the learned trial magistrate erred in both law and facts when he failed to observe that the medical officer who came to testify in court was not the one who did examination on the complainant.
- v. The learned trial magistrate erred in both law and facts when convicting the appellant without observing that the complainant was examined by the medical officer 3 three weeks prior to the time and date of the alleged incident.
- vi. That the learned trial magistrate erred in both law and facts when he failed to consider his defence.

### **Appellants' Submissions**

- 3. The appellants' submission were expressed in the Kiswahili language. According to the Appellants, the prosecution did not prove their case to the required standard. The 1<sup>st</sup> appellant submitted that this was a case of mistaken identity for reasons that there are many persons named Sammy and he was identified using many other names which are not his names.
- 4. It was the appellant's submission that the considering the prosecution evidence, the appellant ought to be freed. That the fingerprints on the AK47 rifle were not examined to establish that he was the criminal. In essence, the appellants' submissions were around the question of identity and the fact that the prosecution did not establish their case to the required standard. The appellants urged the court to consider the circumstances of the case and the trial court record in allowing the instant appeal as prayed.



## Respondent's Submissions

5. It was submitted for the respondent that all the ingredients of the offence of robbery with violence were proved to the required standard. That the 1<sup>st</sup> appellant was properly identified as the shortest of the rest and that the 2<sup>nd</sup> appellant was identified by PW1 and the evidence corroborated by PW6.
6. On sentence, the respondent submitted that given the proliferation of small arms in the region, the sentence meted out to the appellant is proportionate to the offence. That there is need to pass deterrent sentence to serve as a lesson to the would-be offenders.

## Analysis And Determination

7. 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.
8. 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.
9. 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.”
10. 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)

11. The prosecution qualified the offence of robbery with violence with the fact that the complainant was assaulted prior to the theft. According to the prosecution, at the time of robbery, the complainant was subjected to personal violence at or near the time of theft/violence to extort or overcome resistance. The Complainant narrated to the trial court how she was accosted by a group of thieves numbering about 10. They were armed with crude weapons baying for blood in return for the valuables.
12. It was the prosecution case that the complainant was hit during the stealing incident. PW4 who was the doctor confirmed that the complainant had sustained soft tissue injuries. To this end, the trial court concluded that the aspect of assault prior to robbery was established.
13. The trial court further considered the issue raised by the accused persons to the extent that the doctor did not know the gender of the complainant thus casting doubt on his credibility. The court concluded that on cross examination, the accused persons failed to raise the same and as such it is settled.
14. On identification, the prosecution’s case was that the 1<sup>st</sup> appellant was the one armed with a gun at the time of the raid. The Complainant stated that the 1<sup>st</sup> appellant was the one armed with a gun though at the same time she alluded to using the torchlight by the accused to see him.
15. In further evidence, the complainant corroborated her visibility, by participating in an identification parade, in which she was able to pick the 1<sup>st</sup> appellant. In his defence, the 1<sup>st</sup> appellant contended that he had been photographed while being taken to the toilet. The trial court noted that the 1<sup>st</sup> appellant did not raise any objection to identification parade exercise as he thumb printed on the same.
16. It was evidenced that it was the 1<sup>st</sup> accused who led the police to the 4<sup>th</sup> accused whom they found in possession of one of the perfumes which had been stolen from the complainant. In identifying the 2<sup>nd</sup> appellant, it was the prosecution’s case that he was identified in the identification parade. PW6 narrated to the trial court how the 2<sup>nd</sup> appellant duped his children into giving him the firearm under the pretext that he was going to collect the animals from Loret village. He stated the 2<sup>nd</sup> appellant was his son in law.
17. The 1st appellant accused the 7<sup>th</sup> accused (deceased) who led the police to the 8<sup>th</sup> accused herein. The trial court established that PW6 was able to corroborate the fact that indeed the 2<sup>nd</sup> appellant had taken his firearm after cheating his grandchildren.
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.

The upshot of this analysis is that the appeal on conviction is upheld.

### **On Sentence**

19.

“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.”

20. 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.”

21. 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.

22. The approach I take in this matter on sentence is guided by the principles in *Benard Kimani Gacheru v Republic* [2002]eKLR restated that:

“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 facts 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 matters already states is shown to exist”

23. The only question for this court to determine as has been pointed out by the superior courts in *Ogolla s/o Owuor v Republic*, [1954]EACA 270 and *Shadrack Kipkoech Kogo v R*. Criminal Appeal No. 253 of 2003 Eldoret. Over and over again is whether the sentence imposed by the trial court was such that it could not reasonably have been imposed. The enquiry in this appeal must accordingly be directed as to whether the sentence of death imposed is such that in the circumstance of the case it could and should not reasonably have been imposed as punishment against the appellant. It is difficult to imagine a situation where sentence is imposed by the court but the same cannot be executed by The Executive Branch of Government which has the liberty under the Constitution to sign the legal instruments for the sentence to take effect. The fact of the crime of robbery has been singled out for severe punishment by the legislature but due regard to the bench mark which the judiciary has provided for in the various jurisprudential decisions cannot just be wished away. Having had the opportunity to peruse the record I remain persuaded that the sentence of death for the kind of robbery committed by the appellants may be too severe and harsh that it induces a sense of shock bearing in mind that no convict has ever served the sentence in its fullness.
24. 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 20 years’ imprisonment. The sentence ought to run from 10<sup>th</sup> September, 2019 giving effect to the letter and spirit of section 333(2) of the criminal procedure code.
25. In my judgment the appeal on conviction is dismissed whereas the sentence so imposed by the trial court be and is hereby reviewed to be substituted with a terminable period of 20 years imprisonment against each of the appellant. Fourteen (14) days right of appeal explained.
26. It is so ordered.

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

In the presence of;

Mr. Onkoba for the state

Accused persons present

.....

**R. NYAKUNDI**

**JUDGE**

