



**Kimonge v Republic (Criminal Appeal 135 of 2023)  
[2024] KEHC 4960 (KLR) (15 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4960 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 135 OF 2023**

**DR KAVEDZA, J**

**MAY 15, 2024**

**BETWEEN**

**NESTORY OKINDO KIMONGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by  
Hon. E. Boke (S.P.M) on 23rd March 2023 at Kibera Chief Magistrate’s Court  
Criminal Case no. E1532 of 2020 Republic vs Nestory Okindo Kimonge)*

**JUDGMENT**

1. The appellant was charged and convicted with one count of attempted robbery with violence contrary to section 297 (2) of the Penal Code. He was sentenced to life imprisonment. In count II, he was sentenced to serve seven (7) years imprisonment for the offence of being in possession of a firearm without a firearm certificate contrary to section 4 (1) as read with section 4(2)(a)(b) of the Firearm Act, Cap 114 Laws of Kenya. In counts III, he was charged, convicted, and sentenced to seven (7) years for the offence of being in possession of live ammunition without a firearm certificate contrary to section 4(2)(a) as read with section 4(3)(b) of the *Firearms Act*.
2. Being aggrieved, he filed an appeal challenging his conviction and sentence. In his petition of appeal filed on 30<sup>th</sup> May 2023, the appellant raised four (4) grounds which have been coalized as follows. He challenged the totality of the prosecution’s evidence against which he was convicted. He complained that his defence was not considered. He argued that the sentence imposed was harsh and excessive. He urged the Court to quash the conviction and set aside the sentence.
3. As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must



have regard to the fact that I never saw or heard the witnesses testify (see *Okeno v Republic* [1973] EA 32).

4. The Prosecution in this regard called eleven witnesses to prove their case. PW1 Edwin Omondi Muga, on the 5th of December 2020, was in his movie shop at 1:00 pm. He recalled hearing a male voice outside inquiring if they had closed, assuming it was potential customers, he promptly opened the door, only to be confronted by two young men. As the two entered, one stationed himself by the door while the other positioned himself in a corner of the room. Suspicion arose when the one near the door kept checking outside, exhibiting behaviour that suggested he was monitoring something. PW1's unease intensified when the individual near the door revealed a homemade pistol concealed in his armpit. A struggle ensued between PW1 and the armed individual, prompting PW1 to scream for assistance.
5. PW1's neighbour, known as Mama Ken, responded to his cries and opened the door, causing one of the assailants to flee. However, PW1 managed to wrestle the pistol from the main assailant, later identified as the appellant, before he and his accomplice fled the scene on a waiting motorcycle.
6. Following the incident, law enforcement arrived and collected the weapons left behind by the assailants. PW1, in his testimony, emphasized his ability to identify the appellant, particularly noting a distinctive mark or scar on his right cheek, which became visible when the appellant's face mask slipped during the struggle.
7. PW2, Jane Njeri, testified about the attempted robbery she witnessed from her shop opposite the complainant's. She observed two men trying to enter the complainant's closed shop, which was opened for them. Later, she heard a commotion and rushed to help, where she ended up grappling with one of the assailants who dropped a small gun during the scuffle. Members of the public had already arrived, they tried to run after them but the motorcycle went away. Despite her efforts, both perpetrators managed to escape on a motorcycle.
8. PW3, Lucy Wamboi, operates an MPESA and gas shop near the complainant's establishment. She recounted being in a nearby salon when she heard a commotion outside. Upon investigation, she found PW2 and Damaris raising the alarm about a thief, with PW2 struggling with one on the ground. She joined them in alerting others, prompting a crowd to gather.
9. As the thief spotted the growing crowd, he dashed to a waiting motorcycle, with another person emerging from the complainant's shop to join him. Together, they fled the scene on the motorcycle. PW2 recovered a small pistol from the ground amidst the chaos. Subsequently, police officers arrived, secured the pistol, and initiated an investigation. She later participated in a police identification parade but was unable to identify any suspects. She clarified during cross-examination that the motorcycle was not stationed as a taxi, as it already had a rider waiting for the suspects, indicating premeditated involvement.
10. PW4, Damaris Wanini Njuguna also identified as Mama Ken detailed how she intervened during the attempted robbery. Rushing to aid the complainant upon hearing his cries, she forcefully ejected one of the assailants from the shop. Despite their efforts, the perpetrators managed to escape on a waiting motorcycle. Law enforcement later retrieved the two abandoned pistols. Damaris cooperated with the police but was unable to identify the ejected assailant.
11. PW5, IP Samwel Mwalukuku, recounted receiving a call from CPL Galgalo on December 5th, 2020, informing him of an attempted robbery at a PlayStation shop. He promptly rushed to Muthuine police station and found CPL Galgalo already there with an imitation gun and a genuine pistol, both seized



from the scene. He reported the incident to the DCI and handed over the exhibits. He later learned that the suspects had escaped on a motorcycle, but he did not see them himself.

12. PW6, PC Dancun Mogusu, testified about an operation conducted on December 21st, 2020, based on information received about a suspect named Nestory who was allegedly involved in terrorizing the public with a motorcycle. They located the appellant's residence, where they found a motorcycle covered in black. Upon questioning the appellant, he admitted to being the owner but denied knowledge of any firearm. During the search of his premises, PC Muiruri discovered a homemade pistol hidden in a jacket on the wall. They also found ammunition, jackets, foreign currencies, mobile phones, caps, and ID cards belonging to the appellant and another individual.
13. The appellant was arrested and taken into custody. PW6 further mentioned that the motorcycle was linked to multiple robberies seen on CCTV footage, with the appellant wearing police jackets and displaying the distinctive face mark mentioned in court. The footage was however not produced as an exhibit in this case.
14. PW7, PC Victor Abuga Nyanumba, testified that on 5<sup>th</sup> December 2020, he was on patrol duty in Dagoreti, alongside CPL Galgalo (PW9) and PC Ouma (PW8). They received a call from their supervisor, Elizabeth Onzalo, reporting thugs causing distress in the Saigoni area. Upon arrival, they met the complainant, who provided details of the incident and handed over firearms retrieved from the robbers, one containing a single round of ammunition. They promptly informed their superiors about the weapons recovered upon returning to the station. Subsequently, PW7 was summoned to court and became aware of the suspect's arrest.
15. PW8, PC Joab Ouma, and PW9 CPL Yatani Galgalo corroborated the testimony of PW7 confirming their joint patrol and the recovery of the firearm.
16. PW10, Alex Muindi, the firearm examiner, testified that on December 30th, 2020, he received a pistol marked "X," a homemade gun marked "Y," and ammunition marked "Z" for examination. He determined that pistol X was in good condition, capable of firing, and 8mm caliber. The homemade gun Y was functional but had a non-working trigger, measuring 17.7cm in length. He concluded that both firearms fell under the *Firearms Act*. Additionally, he examined the ammunition, noting it could be used in the homemade gun and had signs of attempted firing. His report dated 1<sup>st</sup> March 2021 was produced as an exhibit.
17. PW11, CPL Francis Kimemia, the investigating officer told the court that he received a call from the DCIO Dagoreti regarding the incident in the Saigoni area. Upon arrival, he found that officers from Muthuine police station had collected two firearms from the scene. He later retrieved these firearms from the Muthuine police station and presented them as exhibits. He prepared an exhibit memo and handed over the exhibits for examination. He also detailed the identification parade conducted later, during which the complainant identified the appellant. He explained that IP Farah, who conducted the parade, couldn't attend court due to transfer, and submitted the parade form on his behalf.
18. During cross-examination, PW11 emphasized that witnesses are not allowed to see suspects before an identification parade and maintained that the complainant hadn't seen the appellant before. He rejected the appellant's claim that witnesses might have seen him at the DCIO's office in handcuffs, clarifying that the appellant was taken there on a different day. CPL Kimemia noted that fingerprints could not be lifted from the guns due to public handling. He clarified that the accused was arrested for a different case, with items found in his house used as exhibits in that case. The suspect's description was provided in statements rather than the OB, and the complainant described the appellant as having a facial mark.



19. 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 testimony and called two witnesses. In his defence, the appellant provided a detailed account of his background, including his employment as a tailor and subsequent business ventures. He emphasized his busy schedule and the success of his businesses, refuting the possibility of his involvement in the alleged crime due to his work commitments. The appellant denied the allegations against him and challenged the credibility of the witnesses' identification, citing a facial injury sustained after the alleged incident. He maintained his innocence and presented documents related to his business as evidence and questioned the handling of exhibits and the conduct of the investigation.
20. DW2, the appellant's sister testified to his character and the absence of prior complaints against him. She also provided insights into his business operations but acknowledged not being present with him throughout the day of the incident.
21. DW3, the appellant's brother corroborated aspects of his testimony, detailing their interactions with the police during the search of the appellant's residence. He raised concerns about missing items and discrepancies in the investigation by law enforcement.
22. I have considered the evidence adduced in total, on the offence of which the appellant was convicted. It is an offence of; attempted robbery with violence contrary to section 297 (2) of the Penal Code. The subject provisions state that: -
  - (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. It suffices to note that, section 297 (2) of the Penal Code cannot be read independent of; section 297 (1) thereof, which states as follows:
  - (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 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.
24. Therefore, the two sections must be considered together, but even more so, the offence herein is of; attempted robbery, and once again the definition of robbery under section 295 of the Penal Code comes into play. The subject provisions state as follows: -

“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”
25. The aforesaid provisions thus require that, for the offence of attempted robbery with violence to be established, it must be proved inter alia that the robber; -
  - a) Attempted to rob the victim;
  - b) Was armed with a dangerous or offensive weapon;
  - c) Was in the company of one or more other person(s);



- d) Assaulted, wounded, beat or threatened to use violence against the victim, in order to steal or resist an attempt to thwart the act of stealing
26. I have evaluated the evidence adduced in the trial court afresh, as expected of the 1<sup>st</sup> appellate court, to arrive at its own conclusion as to whether there was adequate evidence to sustain a conviction. The witnesses' testimonies collectively depict a coordinated attempt at robbery involving the appellant and an accomplice. PW1's vivid description of the altercation inside the movie shop, coupled with his ability to identify the appellant based on a distinctive facial mark. PW2, PW3, and PW4 eyewitness testimonies provide additional context, detailing the assailants' actions before and after the confrontation with PW1. PW3 corroborated the escape. The appellant's distinctive facial scar was noted. The evidence collectively supports an attempted robbery with violence. PW2's account of seeing the assailants attempting to enter the closed shop and then fleeing on a motorcycle, along with her recovery of a dropped pistol, strengthens the narrative of the attempted robbery.
27. PW1 testified that one of the assailants revealed a homemade pistol concealed in his armpit during the altercation inside the movie shop. Additionally, PW2 mentioned grappling with one of the assailants who dropped a small gun during the scuffle. These testimonies suggest that at least one of the assailants was armed with a firearm during the attempted robbery. Furthermore, the pistols left behind by the assailants and subsequently collected by law enforcement serve as tangible evidence supporting the presence of weapons during the incident.
28. The ballistic expert PW10 examined firearms and ammunition received with regard to this case. His finding was that one of the recovered pistols was operational with an 8mm calibre and another was a homemade gun that was operational. Both of them fell under both falling under *Firearms Act*.
29. On whether the appellant was properly identified, the evidence linking the appellant to the crime includes testimony from PW6, PC Dancun Mogusu, who found a homemade pistol hidden in the appellant's residence during a search. PC Mogusu also mentioned that the appellant's motorcycle was linked to multiple robberies seen on CCTV footage, with the appellant wearing police jackets and displaying the distinctive facial mark mentioned in court. Although the CCTV footage was not produced as an exhibit in this case, this information supports the identification of the appellant as a suspect in the crime. Additionally, PW11, CPL Francis Kimemia, testified about the identification parade conducted, during which the complainant identified the appellant as one of the assailants involved in the attempted robbery. Despite the absence of the parade officer, the identification parade form was submitted as evidence.
30. The other issue to consider is; whether the assailant attempted to steal from the complainant. The trial Magistrate found that the appellant with his accomplice tried to rob the complainant's movie shop. When he cried for help, members of the public including PW2, PW3, and PW4 came to his aid. The prosecution therefore proved beyond reasonable doubt that the appellant assaulted the complainant specifically to steal the complainant's PlayStation and immediately before the said attempted robbery, he threatened to use violence to obtain the goods.
31. In his appeal, the appellant contends that his defence was not considered. From the record, the trial court considered his defence and found it to be incredible. The ground consequently fails.
32. On the second and third counts, the appellant was charged with the offence of offence of being in possession of a firearm without a firearm certificate contrary to section 4 (1) as read with section 4(2) (a)(b) of the Firearm Act, being in possession of live ammunition without a firearm certificate contrary to section 4(2)(a) as read with section 4(3)(b) of the *Firearms Act*.



33. Having already analysed the evidence above, there is no doubt in my mind that the appellant was properly convicted on counts II and III as charged. The prosecution's evidence was solid and well corroborated that the appellant was found in possession of a firearm and live ammunition without a firearm certificate.
34. To this end, the appellant's conviction on the three counts is found to be proper and is affirmed.
35. On sentences, the appellant was sentenced to life imprisonment on counts I, seven (7) years imprisonment for counts II and III respectively. The sentences were to run concurrently. During the sentencing proceedings, the court considered the appellant's mitigation, that he was a first offender, the pre-sentence report, and the seriousness of the offence he had been convicted of.
36. 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 that the sentence meted out was lawful and in accordance with the trial magistrate's discretion. Although the sentence imposed by the trial court was lawful, I find that it was harsh and excessive.
37. The Court of Appeal in the case of Evans Nyamari vs Republic Criminal - Kisumu (Court of Appeal) Criminal Appeal 22 of 2018 and Julius Kitsao Manyeso v Republic - Malindi (Court of Appeal) Criminal Appeal No. 12 of 2021 the Court in applying Articles 27 and 28 of the Constitution to sentencing, declared that life imprisonment means a determinate sentence of thirty (30) years imprisonment.
38. Therefore, the appeal on the sentence succeeds. The sentence of life imprisonment is hereby substituted with a sentence of 30 years imprisonment. The sentences in counts II and III are maintained. Consequently, the sentence is as follows:
  - i. In count I, the appellant is sentenced to serve thirty (30) years imprisonment.
  - ii. In count II, the appellant is sentenced to serve seven (7) years imprisonment.
  - iii. In count III, the appellant is sentenced to serve seven (7) years imprisonment.
  - iv. The sentences shall run concurrently from 22<sup>nd</sup> December 2020, the date of his arrest.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 15<sup>TH</sup> DAY OF MAY 2024**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant absent

Ms. Tumaini for the Respondent

Joy Court Assistant

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