



**Naukon & another v Republic (Criminal Appeal E026 of 2023)  
[2024] KEHC 5858 (KLR) (22 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5858 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL APPEAL E026 OF 2023  
RN NYAKUNDI, J  
MAY 22, 2024**

**BETWEEN**

**EKIRU NAUKON ..... 1<sup>ST</sup> APPELLANT**

**LOSIKE E TOOT ..... 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. E046 of 2023)*

**JUDGMENT**

1. The Appellants were charged with two counts of robbery with violence contrary to Section 295 as read with section 296(2) of the Penal Code. Particulars stated that the Accused person on 5<sup>th</sup> January, 2023, at around 2200 hours at around Kakuma refugee Camp in Turkana West Sub County Within Turkana County, jointly with others not before court while armed with AK47 rifle robbed Martha Paul Anun of her television set make Vitron 43' valued at Kshs. 27,000/=, mobile phone make Nokia 105 valued at Kshs. 1,500, mobile phone make infinix hot 12i valued at Kshs. 15,000 and mobile phone make techno valued at Kshs 13,000 and at the time of such robbery used actual violence to the said Martha Paul Anun.
2. Count II was that of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars were that on the 5<sup>th</sup> day of January 2023 at around 2200 hours at Kakuma Refugee Camp in Turkana West Sub County within Turkana County, jointly with others not before court while armed with an AK47 riffle robbed Elizabeth Nakine of her school box with clothing and food all valued at Kshs. 30,000/= and five plastic chairs valued at Kshs. 5,000 and at the time of such robbery used actual violence to the said Elizabeth Nakine.



3. Count III the appellants were together charged with were charged with the offence of being in possession of a specified firearm without a firearm certificate contrary to section 4A(1) as read with section 4A(2) of the Firearms Act, chapter 114 laws of Kenya. The particulars of the offence were that on the 5<sup>th</sup> day of January, 2023 at Kalobeyei center in Turkana County without reasonable excuse had in his possession a specified firearm namely AK47 rifle with serial number 3570/7294 in circumstances which raised reasonable presumption that the said firearm was intended to be used in a manner prejudicial to public order.
4. The Appellants were convicted of the charges and sentenced to death in count 1 and 2, whereas in Count III they were sentenced to 30 years imprisonment.
5. Being aggrieved by both the conviction and sentence meted out against each one of them the trial court, they filed the instant appeal

The appeal was lodged on grounds that:

- i. The trial magistrate erred in law and fact when convicting the accused person without observing that no exhibit was availed in court.
  - ii. The trial magistrate erred in law and fact when convicting the accused appeared for two different case files in the same honorable court that infringed article 50 (2) of the 2010 constitution.
  - iii. The trial magistrate erred in law and fact when convicting the accused person without observing that there was no single evidence of identification of the accused persons
  - iv. The trial magistrate erred in law and fact when convicting the accused persons without considering that it was a mistaken identity.
    - a. The trial magistrate erred in law and facts when convicting the accused persons without observing that the fingerprint examination was not done that linked the accused person with the gun.
    - b. The trial magistrate erred in law and facts when convicting the accused person without observing that no investigation was done.
    - c. The trial magistrate erred in law and fact when convicting the accused persons without considering the evidence of the accused person.
    - d. The trial magistrate erred in law and fact when convicting the accused persons without observing that the identification parade was conducted using photos of the accused person which were taken by the police at the police station.
6. The appeal was canvassed way of written submissions.

### **The 1<sup>st</sup> Appellants Submissions**

7. It was the appellant's submission that his rights guaranteed in Article 49(f) (i) of the Constitution of Kenya 2010 were violated by the police at Kakuma police station by putting him in a police cell from date 7<sup>th</sup> to 24<sup>th</sup> without appearing in court within 24 hours pursuant to Article 49(f) (i) of the Constitution of Kenya.



8. The appellant submitted that the evidence ought to be considered in totality. That the p3 form was filled on 10-2-2023 and yet the incident occurred on 5-1-2023. That PW1 was not admitted in any hospital, no medical notes were availed in court by the Complainant or by the Clinical Officer.
9. Further that the trial court allowed Kennedy Okelo (PW7) a clinical officer working with the Red cross hospital within Kakuma town to testify and produce the P3 report prepared by Timothy Wanda. That the reasons advanced were that PW7 had worked with Timothy Wanda for 3 years and he knew his handwriting and signature. The Appellant contention was that the evidence was in breach of the principles in the case of *NDIKI SENZE V R (2022) eKLR* and Section 33 of the *Evidence Act*.
10. It was also the submissions by the Appellant on identification, that when the incident was reported to the Clinical officer, the victims reported that they were assaulted by persons not known to them. Similarly, PW4 on her testimony stated that the assailant was wearing or was covered on his face. Further that the evidence of PW1 and PW4 was contradicting when PW1 testified that he saw a group of two people, one with a gun whereas PW4 saw a group of 3 people and they all alleged that the incident occurred on the same day.
11. The appellants further submitted that the death penalty was nullified by the supreme court in the case of *Francis Karioko Muruatetu & another versus Republic (2017) eKLR*. On the stolen items, the appellant submitted that none of them were found in his possession and they were not availed in court.
12. The appellant urged the court to consider the circumstances of the case and the trial court record in allowing the instant appeal as prayed.
13. The second Appellants submissions were based on the following grounds of Appeal.
  - a. That the trial magistrate erred in law and in fact by failing to observe Article 49(f) (i) of *the constitution* of Kenya 2010
  - b. That the trial magistrate erred in law and in facts by failing to observe that the P3 form of PW1 on a count (1) was filed after one month
  - c. That the trial magistrate erred in law and in facts by failing to observe that there was a contradiction of the complainant's testimonies Evidence on the issue of the numbers of the people who robbed them at the night of the incident.
  - d. That the trial magistrate erred in law and in fact by failing to note that identification of the appellant was not clear
  - e. That the trial magistrate erred in law and in fact by failing to observe unconstitutionality of the DEATH penalty.

Apparently, the content of the submissions are identical as those canvassed by the 1<sup>st</sup> Appellant.

### **Analysis and Determination**

14. The case for the prosecution before the trial court. In order to discharge the burden of proof of beyond reasonable doubt both direct and circumstantial evidence was to be tested by the trial court in consonant with the Principles in *Abu Ngobi v Uganda S.C.CR. App No. 10 of 1991*. The Supreme Court Expressed itself as follows on treatment of evidence. "Evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. There proper approach is to consider the strength and weakness of each side, weigh the evidence as a whole, apply the burden of proof as always resting upon the prosecution, and decide whether the defence has a reasonable doubt. If the defense has successfully



done so, the accused must be acquitted, but if the defence has not raised a doubt that the prosecution case is true and accurate, then the witnesses can be found to have correctly identified the appellants as the person who was at the scene of the incidents as charged.”

### **The Summary of the Evidence**

15. PW1 Matha Paul Anun testified in court and recalled that on 5.1.2023 at around 10.00pm she was in her house with her family watching television. That is when they heard someone tearing polythene paper which they have used to fence their compound. In a short while they saw somebody who had a knife cutting the polythene. Simultaneously thereafter they saw two people enter the compound armed with a rival. PW1 was able to see the events by the electricity source in their homestead. The armed robbers caught with PW1 and her family as their door was broken making it easier for them to enter their house. According to PW1 a first accused was armed with a gang and was threatening to shoot the husband PW2 Ojulu Ochana if no money was forthcoming the risk to be shot at with that gang. Further PW1 & PW2 told the court tht they pleaded with the robbers to take everything from the house but spare their lives. It was at that moment, the 1<sup>st</sup> Appellant and his colleagues carried away a television set, mobile phones. Nokia, Infinix and Techno, solar inverter, a bag of children clothes. As soon as they left PW1 and PW2 reported the matter to Kakuma Police Station for further investigation. It was further PW1 and PW2 evidence that during that robbery the positive identified the Appellants before court.
16. The other witness called by the State was Hussein Makonasina who testified that on the material day he heard screams from PW1’ s house. He also responded by raising an alarm and on rushing on the scene he found PW1 had suffered injuries to the head and mouth. He made a decision to escort her to the hospital so that he could receive medical treatment. The prosecution also summoned the evidence of PW4 Elizabeth Luvale who testified that on the material day on 5.1.2023 at around 10.30pm she was in the bedroom while the children were in the sitting room. By use of solar light and moonlight she saw 3 people armed with gangs enter their compound ordering them to seat down and by force robbed them of a Mobile phone infinix. In the testimony of PW4 he was hit on the waist and ordered to part with 7100, a box containing clothes and books, 5 chairs which they all carried away as mission of robbery accomplished. In the same trial pw5 Nakidole John testified that on the 5.1.2023 he was watching a movie with his mother one Elizabeth Nakina. In a swift move he was confronted by 3 men who threatened them with gangs demanding for money and other properties. In circumstances of fear and risk to their lives the robbers took away a box containing clothes and 5 plastic seats. The witness told the court that he was later to report the matter to the police station followed with the recording of the statement.
17. Further PW6 one by the name John testified that on 5.1. 2023 he was in the same house with PW5 when the robbery occurred involving 3 armed robbers.
18. The other witness was PW7 Kenndy Okello who identified himself as the clinical officer working with the Kenya Red Cross. He gave evidence on behalf of his colleague Timothy Wanga who filled the P3 of the complainants. The P3 was tendered in evidence as exhibit 1 & 2
19. The other key witness who gave evidence was PW8 Inspector Paul Wachira of Kakuma Police Station. His role in this investigation was the one who carried out the identification parade in compliance with the guidelines on the instrument dealing with the identification parades. PW8 explained to the court the procedure adopted to conduct the identification parade in which PW1 and PW4 positively identified the Appellants before court. The identification parade forms were produced before court in support of the prosecution case.



20. The last witness for the case was Simon Mucheri of DCI headquarters and Ballistic examiner. Given the background of his expertise PW9 examined AK 47 assault rifle marked as exhibit 1 which he ascertained to be under the firearm's Act and capable of firing. He also proceeded to inform the court that he testified ammunitions in caliber 7.62 mm which revealed that the rifle was in good mechanical condition. Following the examination he produced the Ballistic report as an exhibit. On the part of PW10 PC Ben investigated the instant case of robbery and happened to recover the AK47 used found in possession of the 1<sup>st</sup> accused person.

### **The Defence Case**

21. The 1<sup>st</sup> Appellant in answer to the prosecution case denied that he has never met the 2<sup>nd</sup> appellant or participated in commission of the robbery. The 2<sup>nd</sup> Appellant likewise denied the offence and denied that all the allegations made by the prosecution witnesses are false.
22. 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.
23. 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 its case to the required standard.
24. 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.

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(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.”

25. 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).
26. Based on the evidence of PW1 and PW2 who led evidence to what unfolded on the material night, it is clear that they were assaulted and, in the process, robbed of their mobile phones, Television make Vitron 43” and other items as listed in the charge sheet. his helmet and money (Kshs. 1,000/=).
  27. According to PW7, a complaint by one Martha Paul was examined, who complained to have been assaulted by persons not known to her with a gun. She was together with her children and husband. On examination, she had active bleeding on the left temporal part of the head. The dental examination revealed that she had lost 2 incisors tooth. On the upper limb, she had right shoulder pain and left hip pain. It was his testimony that she had sustained injuries as she had been knocked by a gun. That the degree of injury was harm. He tendered the P3 form for PW1 as PEX1.
  28. It was further his testimony that the complainant one Elizabeth Nakine was also examined. She gave history of assault by unknown people. They attacked her with a gun handle on the left ear which had an active bleeding. It was his testimony that she had an open wound and swelling on the left ear. She had sustained injury on the left shoulder and left hip joint pain. She was given pain management and the wound was dressed. The degree of injury was assessed as harm. He tendered the P3 form as PEX2.
  29. On identification of the appellant, and considering the fact the trial court observed the demeanor of the witnesses, the court noted that both the complainants identified him at the parade of which he admitted that he was subjected to. He admitted that the two women were able to pick him from a group of 9. He further signed the identification parade form without any reservations at all. That in is defence he claimed that he did not know the 1<sup>st</sup> accused person but at the same time admitted to knowing him while insisting that they were not together. He was getting mixed up while knowing very well that they knew each other.
  30. He further urged the trial court to forgive him for getting involved in worldly things. The court noted that the aspect of forgiveness can be read in his first admission of knowing the 1<sup>st</sup> accused. That the forgiveness stemmed from the identification made by the two complaints to the extent that he was the one who was taking their items under the command of the 1<sup>st</sup> accused. The trial court concluded that the defence was just a general denial.
  31. 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.
  32. The upshot of this analysis is that the appeal on conviction is quashed and the conviction at the trial court upheld.

### **On Sentence**

“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.



- (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.”
33. 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-adaption of the offender;
  - h. any other factor that the Court considers relevant.”
34. 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.
35. 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, I will interfere with the sentence and substitute it with 35 years’ imprisonment in both counts. The sentence ought to run from the date of arrest.



36. It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET THIS 22<sup>ND</sup> DAY OF MAY , 2024**

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**R. NYAKUNDI**

**JUDGE**

