



**Yusuf v Republic (Criminal Appeal E002 of 2023)
[2024] KEHC 5152 (KLR) (17 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5152 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E002 OF 2023**

**M THANDE, J
MAY 17, 2024**

BETWEEN

JAFAR SHEE YUSUF APPELLANT

AND

REPUBLIC RESPONDENT

*(An Appeal from the judgment of Hon. M. Maina Wachira, PM
delivered on 5.1.23 in Lamu Criminal Case No. E024 of 2022)*

JUDGMENT

1. Jafar Shee Yusuf the Appellant herein was tried and charged with 2 offences before Hon. M. Maina Wachira, PM in Lamu Criminal Case No. E024 of 2022. The first offence was robbery with violence contrary to Section 296(2) of the *Penal Code*. The particulars of the offence are that on 24.1.22 at around 1900 hours in Duduvilla area of Shella location in Lamu Central sub county within Lamu County, with others not before court, robbed George Anyona Manyisa (the Complainant) of Kshs. 500/= and immediately after such robbery used actual violence by beating the Complainant. The second count was resisting lawful arrest by police officers, contrary to Section 103(a) of the *National Police Service Act*. The particulars of the offence are that on 26.1.22 at around 2030 hours in Mararani area of Shella location in Lamu Central sub county within Lamu County, resisted the arrest by No. 11xxxx PC Robert Kirui and No. 24xxxx PC Abdul Bwana, police officers from Lamu Tourist Police Unit by fighting them back and refusing to be handcuffed in due execution of their lawful duties.
2. The Appellant was on 5.1.23 convicted of the offence of robbery with violence and sentenced to death. He was acquitted of the offence of resisting arrest.
3. Being aggrieved by the decision of the trial court, the Appellant, filed a petition of appeal in this Court on 11.1.23. Thereafter on 11.10.23, the Appellant filed amended grounds of appeal and prayed that the same be allowed. In summary, the grounds are that the trial court erred in:



- i. Convicting him in spite of the evidence of PW1 not linking him to alleged offence.
 - ii. Failing to observe that he was not accorded a right to fair trial as guaranteed under Article 25(c) of the Constitution.
 - iii. Failing to find that the prosecution did not discharge its burden of proving the offence beyond reasonable doubt as required by law.
4. The Appellant prayed that the conviction be quashed and the sentence which he termed unconstitutional be set aside and that he be set at liberty.
5. The facts of the case according to the prosecution are that on 24.1.22 the Complainant was returning to his home in Ras Gitau from Lamu. When he got to Dudu Villa at around 6.30 and 7pm, 3 people came down from mango trees holding pangas. One of them was the Appellant whom he recognised. The Appellant asked him where he was coming from and what he was carrying. The assailants then took Kshs. 500/= and phone from the Complainant and beat him up injuring him on the head and both hands had cuts. The Appellant attacked him with a stick while the others used pangas.
6. The appeal was canvassed by way of written submissions. The Appellant submitted that the testimony of the Complainant did not link him to the offence. He submitted that the Complainant contradicted himself in that he told the name he mentioned in his first report is Jafar Shee. He argued that this was a case of dock identification. On the sentence imposed, he submitted that a sentence of death or life or long-term imprisonment would not be appropriate. Further that there are exceptional mitigating circumstances which warrant a lesser sentence. He urged the Court to declare the death sentence unconstitutional in the event it upholds the conviction.
7. For the Respondent, it was submitted that the evidence adduced showed that the Complainant was robbed by the Appellant and 2 other men. Further that Complainant testified that after being robbed of Kshs. 500/= the assailants beat him up. The Appellant used a wooden rod while the other 2 cut him with pangas. It was further submitted that the Appellant was a person well known to the Complainant. Additionally, when the Appellant was placed on his defence and Section 211 of the Criminal Procedure Code explained to him, he chose to remain silent and await the court's decision. As such, the offence of robbery with violence was established and the prosecution proved its case beyond reasonable doubt.
8. Section 296 of the Penal Code proves as follows:
 1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
 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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.
9. The elements of the offence of robbery with violence are 3 and were set out by the Court of Appeal in the case of *Oluoch v Republic* [1985] KLR as follows:

“Robbery with violence is committed in any of the following circumstances:

 - a) The offender is armed with any dangerous and offensive weapon or instrument; or
 - b) The offender is in company with one or more person or persons; or



- c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person
.....”

10. The use of the word “or” at the end of each ingredient shows that they are to be read disjunctively and not conjunctively. As such, any one of the ingredients is adequate to establish the offence of robbery with violence.
11. The Complainant stated that he was accosted by 3 people one of whom was the Appellant. They robbed him of Kshs. 500/= and a phone and then beat him up with a wooden stick and pangas. PW2, the clinical officer at King Fahd Hospital who attended to the Complainant on the material date stated that his shirt was torn and that he had bruises on the upper right arm, shoulder and left elbow joint. He produced the P3 form and medical treatment book. Additionally, PW3, the Complainant’s employer who showed the police where the Appellant lives, testified that he saw the Complainant with scratches on the arm and face. This evidence by the prosecution was not shaken by the Appellant in cross examination.
12. The Court further notes that when the Court gave the Appellant an opportunity to defend himself and to call witnesses pursuant to Section 211 of the *Criminal Procedure Code*. The Appellant however opted to say nothing. He further chose not to call any witnesses and await the court’s judgment.
13. From the evidence on record, the Court is satisfied that all 3 ingredients of the offence of robbery with violence were established. I therefore find no basis for interfering with the decision of the trial Magistrate to convict the Appellant.
14. As regards sentence, Section 296(2) of the *Penal Code* provides that a person convicted of the offence of robbery with violence shall be sentenced to death. During sentencing, the Appellant opted not to say anything in mitigation. The trial Magistrate while noting that the Appellant was a first offender observed that he was not remorseful. Although the trial Magistrate stated that the amount stolen was only Kshs. 500/= he noted that his hands were tied as the death sentence was the only penalty available in law. He thus proceeded to so sentence the Appellant.
15. The Appellant has submitted that the sentence of death is unconstitutional and urged the Court to set it aside. The Respondent contended that the sentence imposed was within the scope of the law and ought not be interfered with. Reliance was placed on the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR.
16. The death penalty is still available in our statute books for the offences of murder and robbery with violence. The emerging jurisprudence from our superior courts however is that courts should exercise discretion in sentencing. In this regard, I associate with the sentiments expressed by Ngugi, J. (as he then was), in the case of *James Kariuki Wagana v Republic* [2018] eKLR. The learned Judge stated:
32. The law of the land as it stands today, therefore, is that the maximum penalty for both murder and robbery with violence is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances.
33. In light of this, I will, therefore, proceed to determine the appropriate sentence. First, it is true that all the elements for the offence of robbery with violence were proved. However, there are no truly aggravating circumstances which would lift this case to the scales of the death penalty. Death sentence should be reserved for the highest and most heinous levels of robbery with violence or



murder. That is not the case here. While force was used, one cannot say here that the Appellant used excessive force; and neither did he unnecessarily injure the Complainant during the robbery. He was not armed with any offensive weapon.

17. I also concur with Gikonyo, J. who in the case of *Paul Njoroge Ndungu v Republic* [2021] eKLR, stated:
39. In the case before me, all the ingredients of robbery with violence have been met. The appellant, who was in the company of others, robbed the complainants, and in the course of the robbery, the appellant not only used force, but was armed with a dangerous weapon with which he used to beat or hit the complainants causing bodily injuries. The PW1 assessed the degree of injury as harm.
40. The level of violence unleashed on the complainants is sufficiently serious to warrant long term imprisonment. The violence did not cause death or grievous harm.
41. In the circumstances, I will reduce the death penalty to a term of imprisonment for 35 years from the date of first arraignment in court that is on 4/4/2007 in compliance with section 333(2) of the *CPC*. At the time the offence was not bailable.
18. As indicated herein, the Court is satisfied that the evidence adduced by the prosecution established the offence of robbery with violence. All the ingredients of the offence were established. The Court however notes that PW2 classified the injuries sustained by the Complainant in the violence meted on him in the course of the robbery as harm. The violence did not cause him death or grievous harm to warrant the death sentence.
19. In light of the foregoing, while I uphold the conviction, I set aside the death sentence and substitute therefor the sentence to a term of imprisonment for 15 years which I deem fit and just in the circumstances. In compliance with the provisions of Section 333(2) of the *Criminal Procedure Code*, the sentence shall be reduced by the period the Appellant was held in custody pending trial from 26.1.22 when he was arrested to 3.3.22 when he was admitted to bond.

DATED SIGNED AND DELIVERED VIS MS TEAMS THIS 17TH DAY OF MAY 2024

M. THANDE
JUDGE

