



**Anyamba v Republic (Criminal Appeal 132 of 2023)
[2024] KEHC 7406 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 132 OF 2023
DR KAVEDZA, J
JUNE 21, 2024**

BETWEEN

GEORGE ANYAMBA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence of the
Chief Magistrate's Court at Kibera Criminal Case No.3588 of
2017 delivered by Hon. M. W. Murage (PM) on 18th July 2023)*

JUDGMENT

1. The appellant, George Anyamba, was charged with robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. The particulars of the offence were that the appellant on 5th November 2016 at Royal Park in the Langata area within Nairobi county jointly with others not before the court, while armed with dangerous weapons, robbed Stephen Bichange Masini a motorbike registration No. xxxx make Boxer (BLX) 150 black in colour valued at Kshs. 110,000 and at the time of the robbery killed the said Stephen Bichange Masini. The appellant was tried and at the end convicted of the offence and sentenced to death.
2. The appellant was aggrieved by the said conviction and sentence thus provoking the instant Appeal on 3 grounds further expounded in his written submissions filed in court on 2nd April 2024. The main grounds are as follows. The appellant argued that the trial court erred in law and fact by not evaluating and analysing the identification by recognition evidence which was marred with contradictions. The appellant faulted the trial court for relying on the confession evidence which was illegally obtained. Lastly, the appellant faulted the trial court for failing to appreciate his defence hence contravening section 111 of the *Evidence Act*.



3. As this is a first appeal, I am enjoined to consider all the evidence and reach an independent decision whether or not to uphold the judgment. In so doing, it is necessary to set out the facts as they emerged before the trial court. See *Okeno v Republic* [1972] E.A 32.
4. PW1, Peter Kisange Kioko, testified that he was the landlord and recounted events on November 5, 2016, when he received news that a motorcycle had been stolen and was being tracked. He heard people shouting "Whose is it?" as they entered his compound, threatening to burn down the house. He stated he had rented the house to a woman on August 16, 2016, for Kshs. 2,700, but she left around October, after which he secured the premises with padlocks. He mentioned seeing a man with a motorcycle helmet entering late at night and leaving early in the morning. When he asked other tenants, they claimed not to know the man. It later emerged that the motorcycle had been tracked to the vicinity of his property. During the investigation by CID officers, he identified the appellant at his house as the man residing on the premises.
5. PW2, Richard Masini, testified that on November 5, 2016, he received a call asking about the last time he saw his younger brother. He was informed that his brother had been murdered, and his body was found in Ngong forest. He visited the city mortuary, identified his brother's body, and witnessed the post-mortem examination. He stated he did not know the appellant before these tragic events unfolded.
6. PW3, Phylis Ongonga, testified that she owned motorcycle registration No. xxxx, purchased from Motor Cycle Enterprises in Rongai on October 14, 2016, for Kshs. 110,000. She insured the motorcycle and on November 4, 2016, she gave it to Stephen for work. When Stephen did not return by 1 pm and his phone was off, she tracked the motorcycle to Mashimoni Kibera, then to Kenyatta Market, and back to Mashimoni. That night, she stayed at a friend's house in Highrise. The next morning, she went to the stage but was informed Stephen hadn't been seen. Later, she learned Stephen was found dead in Ngong forest. At the city mortuary, they identified his body and later retrieved the motorcycle from Mashimoni amidst threats of violence. People identified the motorcycle's last user as "Baba toto" and showed his house, where a knife, helmet, and car keys were found. The motorcycle was taken to the police station.
7. PW4, Mchehi Kepha, a teacher in Garissa Galmagalla, testified that in 2016, PW3 asked him and Justus to help track her motorcycle. They traced it to Mashimoni Kibera, where they were told the user had died. They viewed the body at the mortuary and later found the motorcycle parked at a plot. People stated the user had multiple motorcycles. They recovered a reflector, sword, and helmet at the scene, and the motorcycle was taken to Capitol Hill Police Station, with its key found in the house.
8. PW5, Sergeant George Odhiambo from DCI Ongata Rongai, testified that on January 30, 2017, Inspector Muturi requested him to photograph motorcycle registration number xxxx, a blue Boxer. He took three photos showing the registration number, the motorcycle's tires, and its chassis number, preparing a report submitted as evidence.
9. PW6, John Kevin Mbugua Maina, testified that he works at the National Registrar Bureau. He received a letter on December 7, 2016, from DCI Langata requesting a report on ID Number xxxx belonging to Mukuta Ndambio, including his photograph. He prepared and submitted this report as evidence. During cross-examination, he clarified that Mukuta Ndambio, the person in the photograph, was not present in court.
10. PW7, Inspector Kennedy Owino, testified that on November 4, 2017, he and P.C. Karanja were tasked with locating a robbery suspect who had stolen a motorcycle. Using a private tracker, they traced the suspect's location and arrested him. The appellant confessed to Chief Inspector Nyaga that he had



previously stolen a motorcycle and was involved in killing someone. The confession was recorded by CID Langata for further investigation. In re-examination, Inspector Owino confirmed the appellant's confession and noted his prior involvement in another robbery case.

11. PW8, Inspector Florence Mutua, testified that on November 5, 2016, she responded to a call from DCIO to visit a crime scene near Ngong Forest. There, she found the body of a man with injuries and bleeding and recovered items including a wallet, identification documents, and mobile phone Sim cards. They also recovered a motorcycle registered as xxxx, which belonged to the deceased, Stephen. Inspector Mutua conducted further investigations, obtaining photographs and documents including a tenancy agreement dated August 16, 2016, from PW1. She also wrote to the registrar of persons regarding ID Number xxxx, linked to Mukuta Ndambio, and received a report confirming her identity. She oversaw the post-mortem conducted by Dr. Ndegwa and identified the appellant, noting his subsequent confession during the investigation.
12. PW9, Chief Inspector Derrick Nyaga, told the court that between 2016 and 2018 the OCS Langata Police Station. On 11 November 2017, he was asked by PW8 to record a confession statement for the appellant who had been accused of robbery with violence. He informed the appellant that he would write the statement under inquiry in Kiswahili which the appellant agreed by putting his right thumbprint on the confession. The confession was produced as an exhibit and he maintained that the appellant had not been coerced. On cross-examination, he told the court that he allowed the appellant to call a lawyer but he was not interested.
13. During his defence, the appellant stated that on December 9, 2017, he was arrested around 8 pm after work and taken to Langata Police Station. He recounted being brought before the court where charges were read, and he pleaded not guilty. Later, he was transferred to the Industrial Area Police Station and after a month, a production order was issued, leading to his appearance in court again. While in custody, he heard the name George Wesonga mentioned. He was subsequently taken to court where charges were read once more, and he maintained his plea of not guilty. The appellant denied confessing to the alleged offense and disputed the validity of any confession used against him in previous proceedings. Under cross-examination, he refuted previous charges of robbery with violence and denied any association with PW1, claiming the name George Wesonga was the tenant, not him. He denied residing in Kibera and rejected any connection to the identity of George Wesonga.
14. The appeal was canvassed by way of written submissions which have been considered. The offence of robbery with violence under section 296(2) of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR and *Oluoch v Republic* [1985] KLR 549)
15. The issue for determination is whether the appellant was positively identified and if the prosecution has proven its case beyond reasonable doubt. The prosecution relied on the evidence of the recovery of the stolen item and the evidence of a confession to secure the conviction of the appellant before the trial magistrate's court. The appellants complain that the said evidence of the recovery of the motorcycle did not connect them to the robbery in question. They also criticized the trial magistrate for admitting the evidence of the confession which in their view was illegally obtained.
16. It was the prosecution's evidence that on 5th November 2016 at Royal Park in the Langata area within Nairobi county, the victim Stephen Bichange Masini was riding his motorcycle when he was accosted



by the appellant jointly with others and robbed of the said motorcycle registration No. xxxx make Boxer (BLX) 150 black in colour valued at KShs. 110,000. He was also killed during the incident.

17. PW1, the landlord, testified that after a motorcycle theft was reported and tracked to his property, he identified the appellant at his house during the CID investigation. PW3, the motorcycle owner, recounted how she lent the motorcycle to a person named Stephen, who subsequently went missing and was later found dead. The motorcycle was traced to locations where it was seen in use, eventually leading to the appellant's residence where incriminating items like a knife, helmet, and car keys were discovered. PW4 corroborated this account by confirming the recovery of the motorcycle and related items from the appellant's residence. Additionally, PW7, Inspector Owino, testified that the appellant confessed to stealing a motorcycle and involvement in a murder during his arrest, which was documented and submitted as evidence.
18. After the appellants had been arrested, PW9 CI Nyaga recorded a confession from the appellant. In the said statement, the appellant admitted to being involved in a robbery in the company of two other assailants namely Tony and Kennedy. They robbed the victim and beat him with a metal bar on the head. After the robbery of the motorbike, they left the victim bleeding from the nose and the head. He went with the motorcycle to his residence where it was eventually tracked and recovered by police officers.
19. Although the statement was retracted by the appellant during trial, the same was admitted in evidence by the trial magistrate. I have looked afresh at the evidence adduced before the trial magistrate and we are of the view that the evidence of the recovery of the motorcycle in the possession of the appellant sufficiently connects him to the robbery of the deceased. As it was held in the Court of Appeal case in Nyeri, *Isaac Nganga Kahiga v Republic* C.A Cr. Appeal No. 272 of 2005 (Nyeri) (Unreported) at page 7

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to another. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view, any discredited evidence on the same cannot suffice no matter from how many witnesses.”
20. In the present case, the stolen motorcycle was found in the possession of the appellant. It was also positively identified by the owner PW1 that it was in possession of the deceased victim when it was stolen. The appellant could not offer a satisfactory explanation of how he came to be in possession of the said motorcycle which was robbed from the deceased. I find that in the circumstances of this case, the doctrine of recent possession applies to prove the charge of robbery with violence against the appellant.
21. It is my finding that it is the appellant, jointly with others not before this court who robbed the deceased. This evidence was fortified by the statement under inquiry produced by PW9 written by the appellant whereby he confessed to being involved in the commission of the offence in the course of robbing him and fatally injuring him. Although the statement was retracted by the appellant during



trial, the confession was admitted in evidence after a trial within a trial. The Court of Appeal held in *Tuwamoi v Uganda* [1967] E.A 84 on page 91 para. FG:

“A trial court should accept any confession which has been retracted or repudiated or both retracted and repudiated with caution and must before founding a conviction on such a confession be fully satisfied in all the circumstances of the case that the confession is true. The same standard of proof is required in all cases and usually, a court will only act on the confession if corroborated in some material particular by independent evidence accepted by the court.....”

22. In the circumstances of this case, I find that although the appellant retracted his confession during the trial, the evidence contained in the said confession was corroborated by the evidence of the recovery of the stolen item in his possession. In any event, considering the totality of the evidence adduced by the prosecution it is clear that what the appellant stated in the said confession was in fact true.
23. I have also considered the defence put forward by the appellant and hold that it did not displace the otherwise strong culpatory evidence adduced by the prosecution. I hold that the prosecution proved its case to the required standard of proof on the charge of robbery with violence against the appellant beyond reasonable doubt. The conviction by the trial court is therefore affirmed.
24. The trial court sentenced the appellant to death. The current jurisprudence emerging from the Court of Appeal (*Manyeso v Republic* Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) and (*Evans Nyamari Ayako v Republic* Criminal Appeal No.22 of 2022 Kisumu Court of Appeal) is that life sentences are unconstitutional due to their indeterminate nature. It is equally my view that a sentence imposed on a convict has to meet the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection, and denunciation. Therefore, it is no longer necessary or desirable to hold a convict for an indeterminate amount of time as this does not meet the objectives of the *sentencing policy guidelines*.
25. In this case, it appears that in determining the sentence, the learned trial magistrate's decision was primarily influenced by the mandatory nature of the applicable law. This jurisprudence has since shifted after the promulgation of the *Constitution* of Kenya, 2010.
26. In the instant case, the appellant was charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code* and was sentenced to death as per the law. I am guided by the recent court of appeal decision in the case of Nyamari (*supra*) where life imprisonment was construed to mean a maximum of 30 years imprisonment.
27. In the premises, I hereby set aside the sentence imposed by the trial court and substitute it with a sentence of thirty (30) years' imprisonment from the date of the applicant's arrest, 11th November 2017.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF JUNE 2024

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D. KAVEDZA

JUDGE

In the presence of:

Appellant Present



Joy Court Assistant

