Kimengich & another v Republic (Criminal Appeal E121 of 2022)
[2024] KEHC 7412 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7412 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E121 OF 2022

JRA WANANDA, J

JUNE 21, 2024

BETWEEN

SAMUEL KIMENGICH ..... 1ST APPELLANT

ERIC NYONGESA WANJALA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellants were jointly charged with the offence of Robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence are that on 22/05/2018 at Mukunga "B" village in Likuyani sub-county within Kakamega County, while armed with dangerous weapons robbed one Daniel Wamalwa one mobile phone and cash Kshs. 10,000/- both totalling to Kshs. 13,000/- and immediately after the said robbery used actual violence to the said Daniel Wamalwa.

2. There were also charges of assault causing actual bodily harm presented as Count II and III, respectively.

3. The Appellants pleaded not guilty to the charges and the matter proceeded for hearing. The Prosecution then called 5 witnesses after which the trial Court found that a case to answer had been established against the Appellants. The matter then proceeded to defence hearing in which the Appellants gave unsworn statements and did not call any witnesses. Thereafter, upon considering the evidence before the Court and the testimonies of the witnesses, the trial Magistrate on 14/10/2022 made a finding that the prosecution proved its case and convicted both Appellants of the main charge of offence of robbery with violence and sentenced each one of them to life imprisonment of 50 years.

4. Aggrieved with the conviction and sentence, the Appellants instituted the present Appeal vide the Petition of Appeal filed on 16/12/2022 through Messrs Ombima & Co. Advocates. The Petition is premised on the following grounds;

i. The learned trial Magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt when in fact it had not.

ii. The learned trial Magistrate erred in law and in fact in failing to independently analyze and/or evaluate the evidence on record hence an erroneous determination.

iii. The learned trial Magistrate erred in law and in fact in convicting and sentencing the Appellants without taking into account the weight of the defence evidence adduced.

iv. The learned trial Magistrate erred in failing to appreciate and find that the charges preferred against the Appellants had not been established and proved as required by law.

v. The learned trial Magistrate erred in law and in fact by relying on the wrong principles of law in reaching her conclusion.

vi. The learned trial magistrate erred in Law and in fact in failing to hold that the prosecution had not and/or did not link the Appellants to the alleged crime.

vii. The learned trial Magistrate erred in law and in fact in convicting and sentencing the Appellants without sufficient evidence and rejecting the Appellants defence.

viii. The learned trial Magistrate erred in law and in fact in failing to acquit the Appellants of the charges against them for want of proof beyond reasonable doubt.

ix. The learned trial magistrate erred in law and in fact for meeting upon the Appellants a sentence that was harsh and excessive in the circumstances of the case considering the accused were first time offenders.

x. The learned trial magistrate erred in law and in fact by failing to take into account, analyze and/ or give reasons why evidence of the accused persons was not considered while writing the judgement.

Prosecution evidence before the trial court

5. PW1, was the complainant, Daniel Wamalwa. He testified that on 22/05/202018 at around 3 am, he was on his way taking his wife to hospital after she went into labour and that they were in the company of a neighbour known as Florence Nanjala, that when they got to the bridge Florence told him that there was someone following them with a torch, that he looked back and saw that there were many people, that one of them told them to sit down and they then heard the sound of pangas being hit against each other, that they tried to tell the people that they were taking a patient to hospital, that instead, the attackers cut Florence with a panga and they also cut PW1 two times on the forehead, that PW1 had a D-light in his hands and held on to one of the attackers whom he recognised as Gilbert who called out for reinforcement as 2 others were hitting the women, that another young man came with the Appellants and they took his phone valued at Kshs 3,000/- (although he did not have a receipt) and a jacket which had Kshs 10,000/-, that they continued to hit him and they injured him on the left arm and on his left leg at the cuff with a stick on which they had fixed a nail and he sustained a fracture, that the women started screaming and a good Samaritan, one Kennedy came with his wife and another neighbour and they had a torch which they were using to cast light.

6. He testified further that when Kennedy came, the 2nd Appellant alleged that "this woman has disturbed me for long" and claimed that they were looking for their "missing goat", that 2 men, Benson Wanjala Magonga and Chuma Magonga appeared threated to rob him of his shoes too, that at point Kennedy pleaded with them to allow PW1 to take his wife to hospital, that they agreed and the women took

her to hospital, that PW1 went to Kennedy's home to rest, that he went to hospital and later reported the incident at the Matunda Police Station where he was given a P3 form, and that he gave the names of those that he had recognized. He stated further that he had a D-light with him while on his way to the hospital and was thus able to see those who attacked them since they were well known to him and that he gave the police the names of 4 out of the 8 attackers and these were the 2 Appellants, Vicky and Gilbert Wamalwa Wanjala. He claimed further that he knew them well as they used to go the same shops and the 2nd Appellant used to go the same church as PW1's wife. In conclusion, he stated that the Appellants are brothers.

7. In cross-examination, he conceded that in his statement, there was no reference of the D-light that he alleged to have had, and that although he gave the police the names of some of the attackers, the same were not indicated in the Occurrence Book. He testified that Gilbert who was not in Court was the one who ordered the rest to cut him and the 2nd Appellant is the one who cut him, that 4 of the attackers, including the Appellants had pangas, that it is Gilbert who gave the order that PW1's phone be taken, and it is the 1st Appellant who took it and it is 2nd Appellant who took the money. He also conceded that Kennedy's name (who came to assist) does not appear in PW1's statement as is the allegation that the 2nd Appellant claimed that "this woman had disturbed me for too long" or the allegation that 2 witnesses came to the scene. He claimed that he gave all this information to the police and it is them who did not include it in the statement. In re-examination, he claimed that the 2 elderly men who came to the scene are the fathers of the Appellants.

8. PW2 was PW1's wife, Violet Musumba Musera. She stated that on 22/05/2018, she was at home went she went into labour and at around 3 am, they were on their way to hospital with PW1 and a neighbour named Florence Nanjala, that when they reached the Railway line, Florence alerted them that there was somebody following them and they then saw 7 people and one ordered them to sit down, that one was the 1st Appellant who then cut Florence 3 times, that another one was Gilbert with whom PW1 got into a struggle, that the 2nd Appellant hit PW2 on the back and she was also injured on her right finger and the arm, that when she pleaded, the 2nd Appellant said that they wanted the goat and the lady who was with them but PW2 did not understand what the 2nd Appellant meant by referring to a goat, that she then saw a bright light and saw PW1 lying on the ground while bleeding from the head, that she lay on her husband begging them not to kill him but instead the 1st Appellant hit PW2 on the head, she screamed and one Kennedy appeared with 2 women, that 2 old men, Stephen and Benson also appeared. He added that when asked, the 2nd Appellant pointed to PW1's shoes and claimed that those were the same boots that had been where the goats were but Stephen disagreed that they were the same boots, that Vicky then came with a metal rod and hit PW1 on the face and head and they then scattered, that it is at that point that PW1 told PW2 that the 1st Appellant had taken the phone, that later Benson returned one phone, that after the attack, they left PW1 at a neighbour's house and she proceeded to the hospital where she gave birth, they later reported the incident at the Matunda Police Station and she was given a P3. She then reiterated that there was a large flashlight which made it possible to see clearly, that PW1's phone was returned but her own phone was never returned and that she did not have a receipt for the phone as she had bought it second-hand.

9. In cross-examination, she insisted that knew the 2nd Appellant well as they go to the same church and that his house is not far from hers. She conceded that although she recorded her statement on 23/05/2018, the statement in Court bears the date of 22/05/2018. She stated that the attackers had both a small and a big torch. She conceded that her statement has no mention of the goat issue or the presence of Kennedy as a witness or Benson and Stephen as also having come to the scene. She reiterated that it is the 2nd Appellant who took the money from PW1 and it is the 1st Appellant who

took her phone which Benson later returned. She stated that she did not know anything about another phone being taken from PW1. In re-examination, she insisted that the 2nd Appellant had a metal rod.

10. PW3 was Kennedy Wanjala who testified that on 22/5/2018 at 3 am, he was sleeping when he heard calls for help, that he woke up and went to the source of the calls which was near his home where he found PW2 who was going to give birth, PW1 and Florence were escorting her, that they had been attacked by people claiming that their goat had been stolen, the Appellants were among those who were attacking them and with whom he pleaded to stop the beatings, that one Patrick came with a torch and looked at the footprints then said that those were not the footprints of the person who had stolen the goats, Florence helped PW2 to go to hospital and he remained with PW1 whom he took to hospital at 4 am. In cross-examination, he stated that there were about 10 people who were commanding the victims to sit down, that he saw the Appellants assaulting PW1 and PW2, it had rained and not very dark, he used a torch to see the Appellants the scene of the incident when he got there and he used a torch to see the accused persons but he only recognised the 2 Appellants.

11. PW4 was one Saib Ongoma who testified that she used to work at Matunda sub-County Hospital. She referred to the P3 Form issued to PW1 and stated that PW1 came to the hospital on 22/05/2018 and reported that he had been attacked by 7 people at Mukanga area, that PW1 was in pain and was full of blood, that on examination, it was found that the scalp was bruised and he had a cut wound on the right ear, swelling on the lower limbs and tenderness bilaterally, that the injuries were hours old and had been caused by a blunt object, and that the injuries were assessed as harm. She then produced the P3. She testified that she also issued a P3 for PW2 who also informed her that she had been attacked by 7 people, 6 of whom were known to her, that she was in pain, her chest was swollen and tender, her lower limbs were both swollen, the injuries were caused by a blunt object and that her injuries were also assessed as harm. She then also produced the P3 for PW2. In cross-examination, she stated that PW1 came to the hospital on 24/05/2018 and that he been treated on 23/05/2018

12. PW5 was one Police Constable Emmanuel Biwot. He stated that the incident was reported at Matunda Police Station by PW1 and one Florence on 22/5/2018 at around 3 am, that they were bleeding and they reported they had been attacked by the Appellants and one Wamalwa, they said that the attackers were 7 in total, their clothes were blood stained, they also told him that they were taking PW2 to hospital to deliver, he recorded the report and asked the 2 to go to hospital where they had been before and come back on the next day, that the matter was assigned to him and in his investigations, he noted the victims' statement that the attackers had claimed that they were looking for their lost sheep. He added that they did not manage to get the perpetrators until 3/12/2019 when PW1 came and informed him that the attackers had been spotted at night. PW5 stated that they went to the 2nd Appellant's house and arrested him then charged him in Court, that on 11/09/2019, PW1 came again and informed him that the 1st Appellant had also been spotted, that they went to the 1st Appellant's house, arrested, and also charged him in Court. He then stated that he was transferred and he did not know whether the others were also arrested. In cross-examination, he stated that he visited the scene of crime, that it was a field, nothing was recovered and that PW1's home is about 200 metres from that of the Appellants.

Defence evidence before the trial Court

13. After the Appellants were placed on their defence, they both gave unsworn statements. The 1st Appellant testified as DW1 and stated that he was not at the scene of the crime when the incident occurred and that he was at his home sleeping. On his part, the 2nd Appellant, testifying as DW2, also stated that he too was not at the scene at the time when the incident occurred, that he was with his wife at home and that she would have called her as his witness save that she went to Saudi Arabia until 2024.

Hearing of the Application

14. It was then agreed, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Appellants, through the said Messrs Ombima & Co. Advocates filed their Submissions on 28/07/2023. The Respondent's Submissions were then filed on 9/10/2023 through Senior Prosecution Counsel, Ms Emma Okok.

Appellants' Submissions

15. Counsel for the Appellant cited Section 296 of the Penal code and the case of Jeremiah Oloo Odira -V- Republic (2018) eKLR and submitted that the definition of robbery with violence made therein is clear, that based on such definition, there was no evidence presented at the trial Court to prove that robbery with violence was committed. He submitted that according to the evidence of PW1, a mobile phone worth Kshs 3,000/- and cash in the sum of Kshs l0,000/- were taken from him but the prosecution failed to prove whether PW1 owned these items before, that there was no receipt or any other proof of ownership of a phone make Nokia worth Kshs 3,000/- and neither were there any statements of money transfer or withdrawal transactions for the amount of money to prove that the complainant had the cash in his jacket, that none of the items were recovered by the investigating police hence it was important for the prosecution to prove that PW1 actually had the items in his possession before the incident. Counsel also observed that it was the evidence of the witnesses that the Appellants were armed with dangerous weapons namely: pangas, a metal rod and a stick fixed with a nail, that however, none of these weapons were traced and/or brought as exhibits before the trial Court, that the only evidence presented was that PW1 was treated after sustaining injuries, which is not sufficient proof of robbery with violence, and that in criminal justice system in Kenya, there is no duty on an accused to prove anything on allegations of a criminal nature filed by the State.

16. Counsel also urged that the Appellants dispute the manner in which they were identified by the prosecution witnesses and presented as the accused persons, that the prosecution having failed to present any of the alleged stolen property, it was important that proper identification be proved, that the Courts have held, vis-a vis positive identification of robbers by witnesses, that there are several factors which Courts need to consider. He cited the Court of Appeal case of Maitanyi -vs- Republic (1986) KLR 1986, the case of Wang'ombe v Republic and also the case of Donald Atemia Sipendi vs Republic (2019) eKLR.

17. Counsel urged that in his testimony, PW1 indicates that the incident occurred at 3.00 am and that he told the police that he had a D-light, that PW1 admitted that there was no indication of a D-light in his statement recorded at the police station. Counsel observed that PW1 alleged that as he was being attacked, he held on to one of the people whom he recognized as Gilbert who called out for help and that another young man came accompanied by the 2 Appellants. Counsel posed the question; how was PW1 able to identify the two Appellants whilst he was holding on and/or defending himself against Gilbert? He further asked; what was the position of the D-light vis a vis the Appellants? and, did PW1 shine the D-light directly on the faces of the Appellants so as to identify them? He argued further that PW1 did not give the trial Court evidence of the intensity and/or quality of the light emitted by the D-light, the duration which he had in seeing the Appellants and his position from the Appellants. According to him, the Court is left to speculate on whether PW1 had a D-light.

18. Counsel submitted further that PW1 alleged that he gave 4 names of the people who attacked them when he reported the incident to the police, that however in cross-examination, he conceded that the names he gave the police are not in the Occurrence Book (OB) extract. According to him, the identification cannot be termed to be identification by recognition.

19. Counsel contended further that that PW2 was allegedly in labour at the time of the attack, that in her testimony, she did not did not state how she was able to recognize the attackers, that she did not state if she had a torch or any other source of light that enabled her identify the attackers. Counsel analysed PW2's testimony and submitted that it is clear that she had no light with her to enable her identify the 2nd Appellant as being among the attackers, that PW2 further claims that she suddenly saw a bright light which enabled her see PW1 on the ground bleeding but does not state where this bright light came from or whether it is this light that enabled her to see the 2nd Appellant. Counsel argued further that PW2 alleged that the 2nd Appellant is the one who took money from PW1's jacket pocket while the 1st Appellant took a phone but there is no evidence that in her statement to the police, she gave the names of the persons who allegedly attacked them. Regarding PW3, Counsel submitted that he alleged that he used a torch to see the Appellants but he did not state who had the touch, and that it is not clear whether his statement contains the names of the Appellants.

20. Counsel submitted that the offence allegedly occurred at very dark hours of the night, that the light available at the scene was allegedly a light from a torch, and that the witnesses did not give sufficient evidence regarding such alleged lighting. He cited the case of Kura Charo v Republic (2003) eKLR and claimed that the Court failed to give sufficient reasons as to why it held that the Appellants were positively identified, that being dark at night the conditions for positive identification of the attackers were not favourable. He cited the case of Anjononi & Others vs. Republic (1980) KLR 59 and submitted further that the witnesses did not give a description of the offenders who had attacked them to the police when the report was made and when they were recording their statements and that it is possible that they could have been attacked by strangers and for other reasons thought it was the Appellants.

21. Her submitted further that the trial Court convicted the Appellants on evidence of recognition and agreed that recognition has in many similar circumstances been viewed as a more reliable way but that it should however not be accepted simply on the account of the witnesses having said so. He cited the case of R. Vs Turnbull [1976] 3 ALL ER 549, the case of John Mwaura Muchiri v Republic (2007) eKLR, the case of Abdalla Wendo v Republic (1953) EACA 166 and also the case of Hassan Abdalla Mohammed v Republic (2017) eKLR. According to Counsel, if at all robbery with violence occurred on the material date and at the stated hour, then the complainants were robbed by strangers that they could not recognize but chose to implicate the Appellants for reasons best known to them, that the Appellants were framed by the complainants, and that the complainants were attacked by about 10 people yet no identification parade was conducted to ensure that the offenders were positively identified. Counsel submitted that the trial Court erred in law and in fact in convicting the Appellants on insufficient, contradictory and uncorroborated evidence.

22. Counsel observed further that PW1 testified that he had a D-light but later confirmed that he did not mention that he had such D-light, that PW1 also mentioned that the attackers had a small torch and a big torch but confirmed that in his statement, he only mentioned that the attackers had 1 torch, that PW1 stated that PW3 came to their aid however there was no mention of PW3 in PW1's statement recorded at the police station, that PW1 also stated that he was attacked by 7 people however the OB stated that they were attacked by 8 people, that PW3's evidence was not corroborated and he only gave dock identification as he did not state whether he recognized the Appellants previously, that PW3 was not attacked or robbed when he allegedly went to the scene, and that according to PW3, there were about 10 people in the scene and he could only recognize 2. Counsel posed the question; if this was a robbery with violence crime as alleged, why was PW3 not attacked or robbed? Counsel also observed that in the testimony of the witnesses, there is mention of other witnesses who are crucial in the determination of the case but none was called, that one Florence who allegedly accompanied the

complainants that night could fully recognize the Appellants since they were her cousins, that there was also mention of other people who also came to the scene, that PW1 mentioned 2 elderly men known to him and PW2 mentioned that eye witnesses came with 2 women but all these witnesses were never called.

23. He submitted further that the Appellants were convicted purely on suspicion and circumstantial evidence which however strong cannot sustain a conviction as was held in the case of Joan Chebii Sawe vs Republic, Criminal Appeal No. 2 of 2002. He added further that timelines within which the arrests were made raises eyebrows, that the incident allegedly occurred on 22/05/2018 but the Appellants were arrested on 3/01/2019 and 11/09/2019, respectively.

24. Regarding sentence, Counsel submitted that a sentence of life imprisonment of 50 years against each Appellant was a defective sentence, that the criminal justice system of Kenya only provides for either life imprisonment or imprisonment to a definite term, that the learned Magistrate erred in issuing an undefined sentence against the Appellants, that the Court of Appeal recently declared the imposition of life imprisonment as unconstitutional in the case of Julius Kitsao Manyeso v Republic (2023) KECA 827 (KLR), that further, 50 years imprisonment, given the circumstances is a harsh sentence, that the trial Court failed to consider the circumstances of the case and the mitigation of the Appellants. He cited the case of Edwin Otieno Odhiambo vs R, Cr. App. 359 of 2006 and also the case of Benson Ochieng & Francis Kibe v Republic [2018] and also submitted that as indicated in the Probation Officer's Report, the 1st Appellant is the sole breadwinner of his family, he has an elderly mother and an ailing brother whose spine is broken and thus always needs his help, that the 2nd Appellant has a young family to support, and that he has 2 children of tender age under his care as his wife left the children with him, that the Court ought to have also considered the fact that the Appellants are 1st offenders, had no previous criminal records and that throughout the period of trial they presented themselves before Court and obeyed all Court directives, that the offenders were armed with a panga and a metal rod but there is no evidence to show that they repeatedly assaulted the victims, and that injuries sustained were only soft tissue. According to Counsel, the sentence imposed was unreasonable and failed to meet the main objective of sentences which is to correct offenders but the sentence imposed is more of a punitive that a corrective measure. He cited the case of Peter Maina Kimani V Republic (2019) eKLR where according to him, the circumstances were similar to those herein and in which the Court set aside a sentence of life imprisonment and substituted it with one of 20 years.

25. In conclusion, Counsel urged the Court to take into account the principles laid down in the case of Okeno V Republic (1972) E.A 32 regarding the duty of a first Appellate Court to subject the evidence to a fresh and exhaustive examination.

Respondent's Submissions

26. In her Submissions on behalf of the State, Senior Prosecution Counsel Ms. Okok submitted that for the charge of robbery with violence, the Courts have held that it is not a requirement that all the elements must be proved and that any of the elements is sufficient to establish an offence under Section 296(2) of the Penal Code.

27. Counsel submitted that the complainant, (who testified as PW1) stated that on the material date at around 3.00 a.m., his wife, PW2 went into labour, that heading to the hospital, they were attacked by a group of people who included the Appellants, that he held on to one Gilbert whom he was able to identify, that he narrated how he was assaulted and they were robbed of their belongings, that PW1 later went to hospital where he was treated and examined by PW4 who filled the P3 form, that PW4 confirmed that PW1 had injuries, that PW1 was categorical that he was able to identify the Appellants as being among those who attacked him since he had a D-light/torch and the Appellants were people

who were well known to him as they were brothers, the 2nd Appellant attended the same church as PW2 and that the 1st Appellant would occasionally visit his neighbour one Florence who is their cousin. Ms. Okok submitted further that PW 1's evidence was well corroborated by the evidence of PW2 who was clear that during the incident she saw the 1st Appellant cut Florence 3 times, that the 2nd Appellant hit her on the back using a metal rod and the 1st Appellant hit her on the head, that she too was categorical that she was able to identify the Appellants as being among the 7 attackers as there was a light that enabled her to see clearly. Counsel also submitted that PW3 too confirmed that he responded to the distress calls by PW1, and that that he went to the scene and found the Appellants among those who were attacking PW1 and PW2.

28. Counsel submitted further that upon being placed on their defence, the Appellants gave unsworn evidence, that they attempted to raise defences of alibi claiming that they were not present at the scene when the incident occurred. According to Counsel, this defence was clearly an afterthought as it was not raised at any point during the prosecution case and that the trial magistrate was therefore right in disregarding the same.

29. Counsel reiterated that the Prosecution discharged its burden of proof to the required standard of reasonable doubt and that all the ingredients of the offence were met, that the Appellants were properly identified and placed at the scene of crime, that they were people who were well known to the witnesses who were also clear that there was light coming from torches that made it possible for them to identify the Appellants, that by reason thereof, there was no need for conducting an identification parade since identification in this instance was by way of recognition.

30. On the issue of failure to call crucial witnesses, Counsel cited Section 143 of the *Evidence Act* and urged that there is no law compelling the prosecution to avail a certain number of witnesses in order to prove its case, that the prosecution is at liberty to avail the number of witnesses they believe will be crucial in proving their case and thus failure to call one Florence Nanjala and other witnesses was not fatal to the prosecution case.

31. Counsel submitted that the Appellants' actions after the incident further point to their guilt, that they ran away and according to the investigating officer who testified as PW5, the Appellant were arrested after a long time.

32. On sentencing, Counsel submitted that the offence of robbery with violence attracts a mandatory death penalty. She conceded that she is aware of emerging jurisprudence holding that the mandatory death penalty is unconstitutional and Courts have since been exercising discretion while meting out sentences in capital offences. She however submitted that looking at the circumstances of this case, it is evident that the Appellants robbed the victims in a heinous manner, that they did not consider that PW1's wife was expectant, was going into labour and needed to be rushed to hospital, that the Appellants were given a chance to mitigate and they only asked the trial Court to put into consideration the fact that they had never failed to come to Court during the trial. According to Counsel, the Appellants were not remorseful at all, that the sentence imposed by the trial court is commensurate to the offence and this Court not to interfere with the same.

Determination

33. As this is a first appellate Court, this Court has a duty as has been set out in many cases, including Kiilu & Another vs. Republic [2005] 1KLR 174 (following Okeno vs. Republic [1972] EA 32) where the Court of Appeal stated that:

> " 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

34. Upon considering the Petition of Appeal and the Submissions of the parties, I find the issues that arise for determination to be the following:

i. Whether the prosecution proved its case beyond reasonable doubt.

ii. Whether the sentence was harsh/excessive in the circumstances.

35. I now proceed to analyze the above issues:

i. Whether the prosecution proved its case beyond reasonable doubt

36. Section 296 of the Penal Code provides as follows:

> " 296. Punishment of robbery
>
> (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.

37. The above provision was elaborated by the Court of Appeal in the case of Oluoch –Vs – Republic [1985] KLR in the following terms:

> " 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 ....."

38. Further, in the case of Dima Denge Dima & Others vs Republic, 2013 eKLR, the Court of Appeal explained further as follows:

> " ...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence." [Emphasis mine]

39. It is therefore apparent that for a charge of robbery with violence under Section 296(2) of the Penal Code, it is not a requirement that all the 3 elements must be proved. Proof of any one of the 3 elements is sufficient to establish the offence.

1. Regarding the evidence presented, PW1 testified that on the material date at around 3.00 am., his wife, PW2, went into labour, that heading to the hospital and while walking towards Matunda Headquarters they noted that there were people following them, and that when they reached the bridge, the people attacked them. PW1 stated that he had a D-Light, that he held on to one Gilbert whom he was able to identify, that the attackers assaulted the victims and robbed them of a phone and cash, and that PW1 later went to hospital where he was treated and later examined by PW4 who filled the P3 form. PW4 confirmed that PW1 had a bruised scalp, a cut wound on the right ear, and also a swelling on the lower limb and that he classified the injuries as harm. PW1 was categorical that he was able to identify the Appellants as being among those who attacked him as he had a D-light/torch, that the Appellants were people who were well known to him as they were brothers, the 2nd Appellant attended the same church as PW1's wife, PW2, and that the 1st Appellant would occasionally visit his neighbour Florence who is their cousin.

41. I also observe that PW1's evidence was corroborated by the evidence of PW2 who was clear that during the incident she saw the 1st Appellant cut Florence 3 times, that the 2nd Appellant hit her on the back using a metal rod, and that the 1st Appellant hit her on the head. She reiterated that she was able to identify the Appellants as being among the 7 people who attacked them since there was sufficient light that enabled her to see clearly. PW3, Kennedy Wanjala confirmed that he responded to the distress calls by PW1, that he went to the scene and found the Appellants among those who were attacking PW1 and PW2, that he asked them to stop beating PW2 who was on her way to hospital and that is when they left. It was also his evidence that he assisted PW1 and later took him to hospital.

42. There is also ample evidence that the attackers, who included the Appellants, were armed with dangerous weapons. PW1 stated that that he saw 4 pangas, one was with the 2nd Appellant and another with Gilbert. It was PW1's testimony that they were robbed and which evidence was corroborated by PW2. The evidence of the attack was the injuries sustained by PW1 and PW2 and which were corroborated by the respective P3 Forms produced by PW4. I am therefore unable to fault the trial Magistrate for finding that the prosecution proved that the attackers were armed with dangerous and offensive weapons or instruments and that at or immediately before or immediately after the time of the robbery wounded, beat, strike or used personal violence on the victims.

43. At the close of the prosecution case, the Appellants were placed on their defence and they gave unsworn evidence. They raised defences of alibi and claimed that they were in their respective homes at the time of the incident. They however called no witness to substantiate the alibis.

44. The Appellants also challenged the issue of identification. I agree that the incident having taken place at 3 am in the dead of night, the issue of identification was imperative in proving that the Appellants

were the actual attackers. The Court, in the case of Wamunga v. Republic (1989) KLR 424 at 426 stated as follows:

> "Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

45. Regarding identification of the Appellants, in my view, the evidence in this case was watertight as the Appellants were placed at the scene of crime by PW1, PW2 and PW3. The Appellants were also people were well known to the witnesses as these were people who were all from the same neighbourhood. PW2 and PW3 were clear that there was light from torches at the scene and which made it possible to identify the Appellants.. PW1 testified that he had a D-Light which he had left the house with to take his wife to hospital. 2 of the assailants are also said to have had torches with them and the 2 were identified as the Appellants. PW3 also testified that he arrived at the scene with a torch and that it was not very dark as it had rained. From their testimonies, PW2 and PW3 clearly knew the Appellants well before the incident and easily recognized them. It is therefore my considered view that the lighting was sufficient enough for identification of the Appellants.

46. In the circumstances, I agree with Prosecution Counsel that there was no need for conducting an identification parade. I am also constrained to concur with the trial Magistrate that identification in this case was by way of recognition which is generally agreed as the best form of identification.

47. On the the claim of failure to call all possible witnesses, I again agree with Prosecution Counsel that there is no law compelling the prosecution to avail a certain number of witnesses in order to prove its case. Indeed, Section 143 of the *Evidence Act* provides as follows:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact"

48. It is therefore evident that the prosecution is at liberty to avail the number of witnesses they believe will be sufficient to prove their case. The failure to call one Florence Nanjala and other possible witnesses cannot therefore be deemed to be fatal since whatever they would have been called to prove was sufficiently proved by the other witnesses called.

49. Prosecution Counsel also submitted that the Appellants' actions after the incident further pointed to their guilt, that they disappeared immediately after the incident on 22/05/2018 and according to the investigating officer who testified as PW5, the 2nd Appellant was arrested on 3/01/2019 and the 1st Appellant much later on 11/09/2019. I agree this is a credible and relevant observation.

50. In the circumstances, I find no material to fault the trial Magistrate for finding that the prosecution discharged its burden of proof to the required standard of reasonable doubt and that all the ingredients of the offence of robbery with violence contrary to Section 296(2) of the Penal Code were met. In the end, I concur with the trial Court that the evidence adduced proved beyond reasonable doubt that the Appellants, in the company of others and armed with dangerous weapons, robbed the complainants and also used violence on them immediately before or during or immediately after the robbery. The appeal against conviction therefore fails.

ii. Whether the sentence was harsh or excessive

51. The Appellants were each sentenced to 50 years imprisonment. Under Section 296(2) of the Penal Code cited above, the only one express and mandatory sentence prescribed upon conviction for the

offence of robbery with violence is the death penalty. Emerging jurisprudence however is that such mandatory sentences are unconstitutional. For this reason, it is now generally accepted that despite the mandatory language adopted in various statutes, Courts still retain the right to exercise discretion while meting out sentences in criminal cases. It is on this basis that in the case of Francis Karioko Muruatetu & Another v Republic [2017] eKLR), although dealing with a case of murder, the Supreme Court of Kenya declared the mandatory death sentence unconstitutional and stated as follows:

> "(66) It is not in dispute that article 26(3) of *the Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in article 50(1) of *the Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

52. The above may explain why in this case, the trial Magistrate, did not impose the death sentence but imposed 50 years sentences, respectively.

53. It should however be recalled that the said decision of the Supreme Court in Muruatetu (supra) only faulted the mandatory nature of the death sentence which it termed inconsistent with *the Constitution*. The Court did not outlaw the death sentence but held that the Court has the discretion to impose a sentence other than death in accordance with the circumstances of the case. The death penalty is therefore still prescribed in Kenyan law and can still, in appropriate cases, be imposed.

54. Looking at the circumstances of this case, it is evident that the Appellants attacked the complainants in a heinous manner. They did not even care that one of their victims was an expectant woman who was going into labour and needed to be rushed to hospital. I also note, as pointed out by Ms. Okok that when given the chance to mitigate, the Appellants did not at all talk of any remorse or regrets for their actions and only asked the trial Court to consider the fact that they had never failed to attend Court during the trial. I find the above to constitute aggravating circumstances.

55. There are however also mitigating circumstances that arise. For instance, there is the Probation Officer's Report which, as recounted by the Appellant's Counsel, states that the 1st Appellant is the sole breadwinner of his family, that he has an elderly mother and an ailing brother, that the 2nd Appellant has a young family to support, and that he has 2 children of tender age under his care as his wife left the children with him. The Appellants are also said to be brothers and as per the Probation Report, were aged 28 and 22 years, respectively, as at November 2022. They were also 1st offenders who had no previous criminal records and throughout the period of trial they religiously attended Court and co-operated. I also note that although the Appellants were armed with a panga and a metal rod, they did not inflict on the victims serious or life-threatening injuries. They could have caused much more harm than they did but the injuries sustained were only of the soft tissue. The value of the phone and cash said to have been robbed was also minimal

56. In the circumstances, I agree with the Appellants' Counsel that the respective sentences of 50 years imprisonment, while entirely lawful, appears excessive. In my view, the sentence is unlikely to meet the main objective of correcting offenders as it appears to have been targeted for purely punitive consequences, not as a corrective measure.

57. Regarding sentence, Majanja J, quoting Muruatetu 1, in the case of Michael Kathewa Laichena & another v Republic [2018] eKLR, stated as follows:

> "The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. Since the Guidelines did not take into account the fact that the death penalty would be declared unconstitutional, the Court in the Muruatetu Case (Supra, para. 71), considered that in re-sentencing in a case of murder, the following mitigating factors would be applicable;
>
> (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.

58. Applying similar reasoning, the Court of Appeal has on several occasions reduced sentences imposed on convicts for the offence of robbery with violence. For instance, in Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR, the Court of Appeal set aside a death sentence and substituted it with a prison sentence of 20 years. The Court noted that the robbery was at a Mpesa shop, considered the circumstances of how the robbery was committed and took into account the fact that although the Appellant was armed with a gun with which he threatened the Mpesa attendant, he was subdued before he used it.

59. Similarly, the Court of Appeal in the case of Paul Ouma Otieno –Vs- Republic (2018) eKLR substituted the death sentence imposed on a conviction for the offence of robbery with violence with a sentence of 20 years imprisonment.

60. Further, in Peter Maina Kimani v Republic [2019] eKLR, the Petitioner jointly with others while armed with a panga and metal rod robbed a complainant of Kshs.4,000/- and a mobile phone valued at Ksh 3,500/=. These circumstances are similar to those herein. During resentencing, the Court took into account the fact that Appellant was a first offender and that the sentence imposed must be commensurate to a convict's moral blameworthiness. The Court set aside the life imprisonment, and substituted it with a sentence of 20 years imprisonment.

61. From the testimony of the Prosecution witnesses, it appears that the attackers may have assaulted and confronted the complainants because they suspected or mistook them for thieves who had stolen the attackers' goats. According to the witnesses, this is what the attackers kept alluding to during the incident. This may not therefore have been an outright robbery in the ordinary sense of things but perhaps a case of overzealous violent reaction to an alleged theft of goats by unknown people. The

Appellants do not therefore seem to have been the usual dangerous and habitual robbers against whom the society needs to be protected from. The mistake that the Appellants seem to have done after the loss of their goat was to turn themselves into a vigilante group and to unnecessarily take the law into their own hands instead of reporting the same to the police for action.

Final Orders

62. In the end, I make the following orders:

    i. The conviction is upheld.

    ii. On sentence, I hereby set aside the respective sentences of 50 years imprisonment imposed by the trial Court on each of the Appellants and substitute the same with respective sentences of 8 years imprisonment for each one of the two Appellants.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 21ST DAY OF JUNE 2024

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Mr. Mugun for the State
Lubanga for Appellants
Both Appellants also present

Eldoret High Court Criminal Appeal No. E121 of 2022