**Ayub v Republic (Criminal Appeal E209 of 2022)**
**[2024] KEHC 8168 (KLR) (Crim) (9 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8168 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL E209 OF 2022**

**K KIMONDO, J**

**JULY 9, 2024**

**BETWEEN**

**GEOFFREY OMONDI AYUB ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from the judgment of A. Mwangi, Principal Magistrate, in Makadara Criminal Case No. 4818 of 2019 delivered on 21st July 2022)***

## JUDGMENT

1. The appellant challenges his conviction and sentence for the felony of robbery with violence.

2. The particulars were-

   That on December 18, 2019, at Umoja Estate within Nairobi county he together with others not before court and armed with offensive weapons namely a metal bar and gun, robbed Purity Kageni of one mobile phone make Tecno Camon, one blender, one electric iron box, one gas cylinder make pro gas 13kgs, two-burner cooker, one home theatre, one heater, and one TV make Hisense all valued at Kshs 75,000 the property of Purity Kageni and immediately before the time of such robbery threatened to use actual force to the said Purity Kageni.

3. The petition of appeal was filed out of time but with leave of the High Court granted on November 3, 2022.

4. There are three amended grounds pursuant to further leave under section 350 of the *Criminal Procedure Code* granted on January 24, 2024. The appellant contends, firstly, that the learned trial magistrate erred by relying on the doctrine of recent possession. Secondly, that the conviction was based on the evidence of a single identifying witness; and, thirdly, that his defence was completely disregarded.

5. At the hearing on May 11, 2024, the appellant relied wholly on his written submissions filed on July 27, 2023.

6. The Republic contests the appeal. By January 24, 2024, the learned Prosecution Counsel had not filed submissions. I was magnanimous and granted a final 21 days to do so. As it turned out, the State did not file any submissions before the hearing.

7. This is a first appeal to the High Court. I have re-evaluated all the evidence and drawn independent conclusions. I remain cognizant that I neither saw nor heard the witnesses. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.

8. On the material date, the complainant (PW1) was asleep when she was woken up at about 03.00 hours by noise from persons breaking into her house. She went to the sitting room and encountered four men. One was wielding a metal rod; the other one "a small gun". She said that the appellant instructed her to sit down and allow the intruders to finish their business. The robbers then stole all the items above-mentioned. One of them asked to escort them to the gate. She informed the caretaker. It turned out that her neighbor, Victor, had already alerted the police who came into the premises a few minutes later.

9. According to Corporal Leah Cherop (PW2), she and her colleague were doing the beat in Mowlem area on December 18, 2019 at about 18:00 hours. They saw the appellant carrying a bed-sheet which had wrapped an item. It turned out to be the TV stolen from the complainant. He offered no sufficient explanation and was arrested.

10. According to the Investigating Officer, PC Daniel Toya (PW3), they summoned the complainant to the station who not only identified her TV (exhibit 1) but also presented a copy of the purchase receipt (exhibit 2).

11. In our criminal justice system, the legal burden of proof lay throughout with the prosecution. *Woolmington v DPP* [1935] AC 462, *Bhatt v Republic* [1957] E.A. 332.

12. From my re-appraisal of the evidence, I am satisfied that the appellant was positively identified by the complainant (PW1). It is true that the robbery took place at 03:00 hours in the night. It is equally true that the complainant did not know the appellant. But when she went into the sitting room, the lights were on. The four robbers also took considerable time as they dismantled and carted away the home appliances. The appellant even went into her bathroom and took a shower. He is the one who had instructed her to seat down, not to raise any alarm, and to let the robbers finish their business. See generally, *Wamunga v Republic* [1989] KLR 424, *Maitanyi v Republic* [1986] KLR 198 at 201.

13. Furthermore, following the arrest of the appellant a few hours later, the complainant identified him on the same day at the police station as one of the robbers. It is instructive that the appellant was found in possession of the complainant's Hisense Television stolen during the robbery.

14. When the appellant was put on his defence, he protested his innocence. He claimed that on the material day he was with another person ferrying goods loaded on a cart. On their way back, he decided to smoke some bhang. He then saw a vehicle trailing them. He alighted from the cart and went into a car-wash station. While there, a police officer named Nderitu arrested him. He testified that PW2 demanded that he discloses where he sells bhang. He was then charged with robbery.

15. That defence was not only evasive but a red herring. He offered no explanation about the Television set. It was a matter especially within his knowledge. I thus find no rational basis or evidence to show that he was being framed up by the police. I am also unable to find that the burden of proof was shifted to him.

16. I also readily find that the doctrine of recent possession fits squarely in this case. Firstly, the property was found with the appellant; secondly, the property was positively identified by the complainant; and, thirdly, the property was stolen from the complainant just a few hours earlier. See *Samson Nyandika Orwerwe v Republic*, Court of Appeal, Nairobi, Criminal appeal 16 of 2013 [2014] eKLR, *Erick Gangai v Republic*, Kitale, High Court Criminal Appeal 125 of 2011 (unreported).

17. I will now turn to the elements of the offence. Section 296 (2) of the *Penal Code* provides-

> 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. [underlining added]

18. From the evidence of PW1, I readily find that the appellant robbed the complainant of the items above-mentioned and that during the robbery, he threatened to use personal violence against her. The appellant was in the company of other armed assailants. They had offensive weapons, namely a firearm and a metal rod. As I have stated one of the stolen items, the Hisense Television was recovered from the appellant just a few hours later.

19. From my analysis of the evidence and the law, the defence tendered by the appellant was bogus. I thus readily find that all the elements of the offence of robbery with violence were proved beyond reasonable doubt. I concur fully with the learned trial magistrate on those findings. The appeal against conviction is accordingly dismissed.

20. I will now briefly turn to the sentence. The appellant was sentenced to death. Section 354 (3) of *Criminal Procedure Code* empowers this court to review the sentence. The court considered the mitigation tendered by the accused but found that its hands were tied by the mandatory sentence prescribed by the *Penal Code*.

21. However, and by parity of reasoning in the momentous decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic*, Consolidated Petitions Nos. 15 & 16 of 2015 [2017] eKLR, mandatory sentences unfairly tie judicial hands. This court on a first appeal may thus review the sentence.

22. Considering all the circumstances of this case, including the fact that the complainant did not suffer physical harm, I will reduce the sentence to 20 years imprisonment. In accordance with section 333 (2) of the *Criminal Procedure Code*, the period spent in remand custody from the date of his arrest on December 19, 2019 (but excluding any period when he may have been out on bond) up to the date of his sentence on July 21, 2022 shall be deducted from the sentence.

23. The upshot is that the appeal on conviction is hereby dismissed. The sentence is set aside and substituted thereof with the sentence outlined in paragraph 22 of this judgment.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY 2024.**

**KANYI KIMONDO**

**JUDGE**

Judgment read virtually on Microsoft Teams in the presence of-

The appellant.

Ms. Wafula for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.