



REPUBLIC OF KENYA



KENYA LAW
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**Tanui v Republic (Criminal Appeal E035 of 2023)
[2024] KEHC 9748 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E035 OF 2023
F GIKONYO, J
JULY 23, 2024**

BETWEEN

JULIUS KIPLANGAT TANUI APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence of Hon. M.I.G
Moranga (S.P.M) in Kilgoris SPM No. 76 of 2019)*

JUDGMENT

1. The appellant is challenging his conviction and sentence of 20 years imprisonment for the offence of robbery with violence, section 296 (2) of the Penal Code.
2. The petition of appeal dated 29.11.2023 cites the following grounds of appeal;
 - i. That the Learned Magistrate erred in law and fact in convicting the Appellant when the evidence on record was manifestly insufficient, inconsistent, and had glaring gaps hence incapable of sustaining a conviction.
 - ii. That The learned trial magistrate erred in law and fact when failed to note that no investigations were carried out but the prosecution and failed in law not analyzing the whole prosecution evidence as adduced thus occasioning a miscarriage of justice.
 - iii. That the Learned Magistrate erred in law and fact in convicting the Appellant against the weight of evidence on record.
 - iv. That the Learned Trial Magistrate erred in law and in fact by convicting the Appellant in a prosecution case where identification of the Appellant was not free from the possibility of error and obtained in difficult situations.



- v. That the Learned Magistrate erred in law and fact by passing a sentence which was manifestly harsh and excessive in the circumstances, in any event.
- vi. That the Learned Magistrate erred and misdirected himself in law by selectively interpreting the law and thereby aiding the cause of the Respondent against the Appellant.
- vii. That the learned trial magistrate erred in law and fact by awarding a severe sentence despite a favourable pre-bail report that conformed with the recent decision in Karioko Muruatetu & Another Vs Rep. Petition 15 of 2015[2017] eKLR.
- viii. That the Learned Magistrate's decision does not conform to the relevant laws

Brief facts

- 3. The Appellant, alongside one Desmond Langat, is alleged to have violently robbed the Complainant, one Wesley Kiprotich Kemei on the night of 19th December 2018. During the melee, the Complainant lost consciousness and was saved by the appellant's mother who took him to Angata Hospital for treatment. He was allegedly robbed off some Kshs. 3,700/= he had on him.
- 4. The appellant was charged with the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code.
- 5. Particulars are that on 19.12.2018 at Angata Location Transmara West Sub County within Narok county jointly with others who are not before the court being armed with offensive weapons namely a metal bar, stick, and a bottle robbed Wesley Kemei of his Ksh.3700/- and immediately before the time of said robbery wounded the said Wesley Kemei on the forehead and the left arm.

Directions of the court.

- 6. The appeal was canvassed by way of written submissions.

Appellant's submissions.

- 7. The appellant submitted that the trial court did not properly re-evaluate the case as it ought to have done. The appellant contends that care was not taken to ensure that the Appellant was properly and positively identified as the incident happened at night. The appellant further contends that the key witness admitted to having been drunk at the time of the incident and other witnesses for example the person who took the complainant to the hospital were not called and a medical doctor. The appellant relied on R. vs Turnbull [1977] QB 224, [*Michael Kimani Kungu v. Republic \(Criminal Appeal No.686 of 2010*](#) (R)), and Cleophas Otieno Wamunga Versus Republic (1989) KLR 424.
- 8. The appellant submitted that the prosecution fell short of proving the Appellant was actually involved in the said offence. The appellant contends that the presence of the Appellant at the place of the alleged offence is in contention. He was not properly identified. The alleged crude weapons used in the commissioning of the supposed attack were not produced before the Court. The Doctor's medical report for the supposed injuries incurred by the Complainant was not adduced in Court to ascertain the alleged injuries. There was no medical officer or clinical officer who was called to testify. The appellant relied on Johana Ndungu Vs Republic CRA 116/1195[1996] eKLR.
- 9. The appellant submitted that the sentence meted on the appellant was too severe given that the appellant had no prior convictions and that the trial court disregarded the presentence report and his mitigation. the appellant relied on Francis Karioko Muruatetu & Another Vs. Republic (2017).



The respondent's submissions.

10. The respondent submitted that the appellant's version as to whether he was known to the complainant is doubtful for three reasons. Firstly, the Investigating officer, PW3, confirmed that the appellant was arrested near Angata Trading Center after the matter was reported by the complainant. It appears from the charge sheet, that the appellant was arrested on 22nd January 2019. This was about one month later after the incident. Secondly, the complainant was rescued by the appellant's mother on the date of the incident as per the complainant's testimony. Thirdly, during the plea taking, the appellant admitted to the charges and the particulars as indicated in the charge sheet and only denied the facts prompting entry of a plea of not guilty. It cannot be said that all these three were merely unfortunate coincidences on the appellant's part. Rather they are indicative that the complainant was telling the truth when he stated that the appellant was his neighbor.
11. The appellant submitted that the appellant was known to the complainant prior to the incident. The complainant and the culprit at large had a conversation with the complainant where they demanded money. He walked with them in the moonlight and the appellant had a torch. The attack and struggle between the complainant and the two assailants lasted about 10 minutes of the record where the complainant had ample time to identify the appellant and was in close enough proximity to him.
12. The respondent submitted that according to the complainant, the appellant and his accomplice were armed with a metal bar and bottle. They beat him up using the said items. He lost consciousness upon the beatings and was escorted to Angata Hospital by the appellant's mother, where he sought treatment for the injuries inflicted on him by the appellant and his accomplice.
13. The respondent submitted that the sentence of 20 years imprisonment was within the legal limits.
14. The respondent submitted that sentence is at the discretion of the trial court. While a report prepared by the probation and aftercare services office would be informative in determining the sentence the court is not bound to follow the sentencing recommendations therein.

Analysis And Determination.

Court's duty

15. First appellate court is obligated to re-evaluate the evidence and make its own conclusions bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See *Okeno vs. Republic* [1972] E.A 32
16. The court has considered the grounds of appeal, the evidence adduced in the lower court, and the respective parties' submissions. The broad issues for determination are;
 - i. Whether the prosecution proved its case beyond a reasonable doubt.
 - ii. Whether the sentence was manifestly harsh and excessive

Elements of the offence of robbery with violence

17. The appellant was charged with the offence of robbery with violence contrary to Sections 295 and 296(2) of the Penal Code which 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."



18. Robbery with violence under section 296(2) of the Penal Code when any one or more of the elements thereto is proved.
(See *Olouch v Republic* (1985) KLR)
19. PW1-Wesley Kiprotich Kemei testified that on 19.12.2018 at 10 p.m. he was on his way home from Kieneret when he met the appellant and one Desmond Langat. They landed on him using a metal bar and bottle while demanding for money from him. He lost consciousness. They robbed him of Kshs. 700.
20. The appellant's mother came to his rescue and escorted him to safety. He was treated at Angata Hospital on 20.12.2018. He produced treatment notes Pexh 1(a), and P3 form as P Exh 1(b).
21. He claimed that the appellant had a torch and that enabled him to identify the appellant as they struggled for 10 minutes. He had known the appellant as a neighbor for three years.
22. PW2- Stanley Ngeno a neighbor to the complainant and village elder confirmed that around 10 a.m. on 20.12.2018 the complainant reported that 2 persons had attacked him and showed him where the offence took place. He said the complainant did not know the people but on being declared a hostile witness admitted the complainant did not disclose that he was told who the suspect was. He later reported the matter to the police station.
23. PW3 - PC Ngata Numbe testified that the complainant reported the incident in which he was injured and robbed by the appellant and others. He issued him with a p3 form which he filled. The appellant was later arrested at Angata Trading Centre.
24. DW1 – the appellant denied that he knew the appellant who testified in court. He denied robbing and injuring the complainant. He noted that no weapon used was produced in court. He claimed that at 11 p.m. he was at Tumaini guarding maize at the border. He referred to the charges as arising from a mistaken identity by the complainant since the incident occurred at night.
25. The trial court warned itself of the evidence of a single eye witness; i.e. PW1. The trial court also considered the fact that PW2 became a hostile witness.
26. Based on the evidence of PW1 distinctly gave a recollection of what unfolded on the material night, that the appellant in company of another, attacked him with dangerous weapons; metal bar, stick and a bottle; injuring him and robbing him of Kshs. 700. He was able to identify his attackers from the moon light and the torch light. They also wrestled for about 10 minutes and had really close encounter with his attackers. The evidence left no doubt that PW1 was attacked leading to grievous injury and in the process robbed of money.
27. Even if the medical note PMFI and P3 PMFL2 may not have been produced, there was ample evidence that PW1 was injured by the appellant and his accomplice.
28. From the evidence, the complainant knew the appellant well although the appellant denied this fact. Evidence had it that PW1 was rescued by the appellant's mother after which he was taken to hospital. These pieces of evidence discount the denial by the appellant that he did not know PW1.
29. The appellant had a torch and was the one who demanded for the money before hitting him with a bottle as the other beat PW1 up.
30. The complainant also stated that the appellant was armed with a stick, bottle, and metal bar all of which are dangerous weapons which may seriously injure or maim a person. Evidence show that they used violence upon the appellant during the robbery.



31. Again, from the evidence, the appellant was in company of another person.
32. Two of the elements for robbery with violence were proved. The law requires proof of just one of the elements in section 296(2) of the Penal Code to found the offence of robbery with violence.
33. Whereas the complainant admits that he had taken alcohol earlier, he asserts that he was sober enough to make an identification free from error. His detailed recollection and precise narration of the events of the incident, including how the appellant and his accomplice were armed, and the logical sequence of the events as they unfolded, is a testament to this fact
34. The court, therefore, finds that the appellant was properly convicted based on evidence that proved the case against him beyond reasonable doubt.
35. In the upshot, the appeal on conviction is dismissed.

On sentence.

36. The Penal Code prescribes a maximum sentence of death for the offence of robbery with violence. A sentence for 20 years' imprisonment is, therefore, within the law. Similarly, it was not shown that, in sentencing the appellant, the trial court committed error in principle. Upon perusal of the record and consideration of the law, this court finds that, in sentencing the appellant to 20 years imprisonment, the trial court exercised discretion properly. Accordingly, there is no reason for interfering with the sentence imposed upon the Appellant.
37. The upshot of this analysis is that the appeal lacks merit and is hereby dismissed. It is so ordered.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS
ONLINE APPLICATION THIS 23RD DAY OF JULY , 2024.**

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HON. F. GIKONYO M.

JUDGE

In the presence of:

C/A – Mr. Leken

Mr. Okeyo for ODPP - Present

Mr. Kiprotich Roberts for Appellant - Present

