**Abongo v Republic (Criminal Appeal 30 of 2021)**
**[2024] KEHC 12922 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12922 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VIHIGA**

**CRIMINAL APPEAL 30 OF 2021**

**JN KAMAU, J**

**OCTOBER 23, 2024**

**BETWEEN**

**ANTHONY NGOLA ABONGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal from the Judgment of Hon M. L. Nabibya (SRM) delivered at Hamisi in Senior Resident Magistrate's Court in Criminal Case No 1277 of 2016 on 16th January 2018)***

**JUDGMENT**

## Introduction

1. The Appellant herein was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).

2. He was tried and convicted by the Learned Trial Magistrate, Hon M. L. Nabibya, Senior Resident Magistrate who sentenced him to death.

3. Being dissatisfied with the said Judgement, on 26th October 2018, he lodged the Appeal herein. The same was dated 5th March 2018. He set out five (5) grounds of appeal. He incorporated three (3) Supplementary Grounds of Appeal dated 2nd January 2024 in his Written Submissions of even date.

4. His Written Submissions were filed on 10th January 2024 while those of the Respondent were dated and filed on 1st February 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

**Legal Analysis**

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Grounds of Appeal, his Supplementary Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

**I. Proof of Prosecution's Case**

9. Grounds of Appeal Nos (1), (2), (3), (4) and (5) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1) and (2) were dealt with together but under different and distinct heads.

**A. recovery and possession of stolen goods**

10. Both the Appellant and the Respondent did not submit on this issue.

11. Suffice it to state that Brian Inyanje Bahati (hereinafter referred to as "PW 2") told the Trial Court that he lost his shoes, trousers, house keys and sim cards in the attack. No 92540 PC Stephen Kazungu (hereinafter referred to as "PW 4") testified that the said shoes were found five (5) metres from the scene of crime. However, PW 2's trousers were never recovered.

12. This court did not deem it necessary to say more on this issue as it was not clear what the Appellant's submissions on this issue were.

**B. Use of offensive and/or dangerous weapons**

13. The Appellant did not submit on this issue. The Respondent submitted that the testimony of Julius Wabwile (hereinafter referred to as "PW 1") was proof that offensive weapons were used at the time of the commission of the offence thus violence was occasioned on PW 2.

14. Notably, PW 2 testified that he sustained deep cut wounds and lost his left hand completely. He added that he was also cut on the left side of the face and stabbed on the back. He pointed out that the left hand was amputated after it rotted completely.

15. PW 1 was the Clinical Officer who examined PW 2 on the material date. He confirmed that PW 2 had cut wounds on the left side of the head, upper limbs, left side of the face and back. He pointed out that the cut wounds on the left upper limb were severe and had reached his bones. He added that PW 2 had bled a lot and was weak. He opined that the injuries were grievous and had been caused by sharp objects.

16. Although no weapon was recovered, it was clear that indeed PW 2 was attacked by use of dangerous weapons thus an occasioning of violence on his part. Those injuries could only have been caused by a weapon.

**C. Company of others**

17. PW 2 testified that six (6) people attacked him on the material date. They robbed him while armed with a dangerous weapon. Immediately before, during and after the robbery, they cut him all over his body.

18. According to Section 295 of the Penal Code Cap 63 (Laws of Kenya), the elements of robbery with violence are as follows :-

    a. That the offender is armed with any dangerous weapon or offensive weapon or instrument;

    b. That the offender is in the company of one or more persons;

    c. That 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.

19. The Trial Court therefore proceeded correctly when it found that the Prosecution had demonstrated that all the ingredients of proving the offence of robbery with violence.

**D. Identification**

20. Having said so, the question of who committed the offence was a pertinent issue in the mind of this court in determining whether the offence was committed by the Appellant herein or not.

21. The Appellant faulted the Trial Court for having relied on inconclusive and uncorroborated evidence of identification of a single eye witness to convict him. He placed reliance on the cases of Maitanyi vs Republic (1986) KLR 198 at 200, Obwana & Others vs Uganda (2009) 2 EA 333, Paul Etole & Reuben Ombima vs Republic Criminal Appeal No 24 of 2000 and R vs Turnbull (1977) OB 224 without highlighting the holding that he relied upon.

22. He reproduced the testimony of PW 1, PW 2, Phylis Bahati (hereinafter referred to as "PW 3") and PW 4" and questioned the intensity of light that was used to identify him on the material night, the fact that he may not have been the only person with dreadlocks, failure of the Trial Court to consider whether there was corroboration of direct or circumstantial evidence and the failure to conduct an identification parade.

23. It was his case that the Trial Court did not consider his cogent defence of alibi. He was emphatic that he was not present at the scene of crime and that the blood stain on the Appellant's white t-shirt was the Appellant's own blood.

24. On its part, the Respondent also rehashed the Prosecution witnesses' evidence and pointed out that in the circumstances of this case, there was clear recognition and identification of the Appellant herein.

25. PW 2 told the Trial Court that on the material date of 26th December 2016, at around 8.30pm, he was on his way home after watching football at Cum Lodge Bar in Mbale when he was attacked by six (6) men who suddenly cut him. He identified one person who had dreadlocks and a white shirt as he was first to attack him. He pointed out that there was some light from a neighbour's electricity bulb thirty (30) metres away which enabled him identify his attacker.

26. PW 3 was PW 2's mother. She testified that when she was called by police to identify his son and to take him to hospital, she saw the Appellant who had a blood stained vest. He had already been arrested

by the police. She said that the Appellant informed her that PW 2 was injured by other assailants. She added that while she was at the hospital, PW 2 informed her that the man who attacked him had dreadlocks and had a shirt that had blood stains at the front part of his shirt because he touched him.

27. PW 4 testified that after he was informed by boda boda men that there was a man on the ground bleeding, that together with other police on patrol, they took PW 2 to Majengo hospital. He stated that while on patrol at Musoli junction, they found a man in a white t-shirt which had blood stains on the chest area. He added that the man had dreadlocks and was three hundred (300) metres away from the scene of the incident and that they arrested him.

28. In this case, the chain of events from the time PW 2 recognised the Appellant to when he was arrested at Musoli Junction was unbroken. The description of the Appellant having dreadlocks and with a white t-shirt that was blood stained at the front matched the appearance of the Appellant at the time of arrest. The dreadlocks were a distinct description of the Appellant at the material time of the incident and at the time of his arrest.

29. The Appellant gave an alibi defence. He denied having been at the scene of crime and/or committed the offence. He pointed out that at the material night he was drunk and injured his mouth after he fell. He explained that the blood stains on his shirt were as a result of the said injury.

30. It was evident from PW 2's that the incident occurred at night when conditions of a favourable identification of a person were challenged. During his examination-in-chief, he stated that he relied on a bulb that was thirty (30) metres away. When he was cross-examined, he stated that the bulb was a hundred (100) metres away. The Prosecution did not interrogate the intensity of the light to ascertain if the same was sufficient for identification of another.

31. The persons who attacked PW 2 were strangers to him. He admitted that he did not know the Appellant herein previously. He asserted that he gave the description of his attacker to the police when he was in hospital to wit that he had dreadlocks and was wearing a white shirt. Although he also said that he could not figure the assailant, he was emphatic that the Appellant was the person that he identified as his attacker.

32. PW 3 said that the Appellant told her that he did not injure PW 2 but that he was injured by others. She presumed the Appellant must have been the person who attacked PW 2 as he had fresh blood.

33. PW 4 testified that on the material date of 26th December 2016 at about 10.00 pm, they were on patrol at Mable Town when two (2) Boda Boda men informed them that there was a person who was bleeding lying on the ground. They proceeded to the scene and found PW 2 unconscious. They took him to Majengo Hospital.

34. Thereafter, together with Administration Police, they went on patrol. At Muholi Junction, they found the Appellant in a white T-shirt with blood at the chest area.

35. The questions that arose in the mind of this court was whether PW 2's attacker was wearing a white shirt or a white t-shirt. This was pertinent because these are different types of clothing. A shirt cannot be said to be a t-shirt. This piece of clothing was important for the reason that PW 4 extracted DNA sample from the Appellant's white t-shirt. His DNA analysis showed that the DNA of the blood samples from the red socks, yellow/black stripped t-shirt and white t-shirt belonging to PW 2 matched PW 2's DNA profile while the DNA of the blood samples of the Appellant's white t-shirt matched the Appellant's DNA Profile.

36. PW 2's clothes had his distinct DNA profile while the Appellant's clothes had his distinct profile. There was nothing in the Government Chemist Report to show that PW 2's blood was found on the

Appellant's clothes. PW 3's evidence that PW 2 told her that his attacker was a person who had blood stains on his shirt because that person had touched him was therefore neither supported by scientific evidence not corroborated by PW 2 who never mentioned of his attacker's shirt having been blood stained at the front. The evidence of PW 4 and No 62735 PL Silas Anambi (hereinafter referred to as "PW 5") that P 2's attacker was wearing a blood stained white t-shirt also fell by the wayside.

37. Going further, it was not exactly clear how much time the police officers elapsed from the time they took PW 2 to Majengo Hospital and the time they got to Mukoli Junction so as to effectively state that the chain of events was unbroken.

38. PW 2 had told the Trial Court that his attacker's dreadlocks were long and had reached the middle of his back while the Appellant herein stated that his dreadlocks were short, average baby locks. The Trial Court's finding that the length of PW 2's attacker's dreadlocks was immaterial could not have been further from the truth. This is because dreadlocks could be both a unique feature and not a unique feature considering that very many people have dreadlocks. However, the length and style of dreadlocks could be a distinguishing feature.

39. This court thus differed with the opinion of the Trial Court that PW 2 positively identified the Appellant herein as there were unexplained gaps that raised doubts in the mind of this court.

40. Indeed, in view of the fact that the Appellant was wearing a white t-shirt at the material time and no DNA profile of PW 2's blood was found thereon, it made this court doubt if PW 2's assailant was really the Appellant herein. Indeed, a perusal of the Report dated 10th July 2017 by Richard Kimutai Langát, Government Analyst (hereinafter referred to as "PW 4 (sic)") showed that PW 1's DNA profile was 99.9% his while that of the Appellant was 99.9% his and none of their DNA profiles were found on each other.

41. This was a fact that was confirmed by PW 4 (sic) on 23rd October 2024 when he adduced additional evidence pursuant to this court's order of 30th April 2024.

42. Notably, the standard of proof in criminal cases is proof beyond reasonable doubt. If this court was to uphold the decision of the Trial Court, it would be proceeding on a balance of probability, which is the standard required in civil cases and thus would be a travesty of justice against the Appellant herein. Once doubt was created in the mind of a court, that appellant must be set free.

43. It was more prudent to release a person who may have committed an offence if there was no evidence placing him or her at the scene of the incident than to put an innocent person behind bars on mere suspicion. Suspicion, no matter how strong, ought not to be a basis to convict an accused person. This case was hinged on suspicion. It appears to his court that the police officers already had a description of PW 2's assailant and the Appellant fitted the description of having dreadlocks. However, the medical evidence exonerated him from this case.

44. It is unfortunate that PW 2 lost his arm and was going to be traumatised by the incident for the rest of his life. It is even more unfortunate that his attackers are still out there roaming free and the Appellant who he said was his attacker was exonerated by scientific evidence. However, the sword of Damocles cuts both ways. Justice must not only be done but it must be seen to be done for the Appellant herein.

45. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4) and (5) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1) and (2) were merited and the same be and are hereby upheld.

**II. Sentence**

46. Having found that the Prosecution did not prove its case to the required standard, it would not have been necessary to have rendered itself on the question of appropriateness of the sentence.

47. Be that as it may, as the Appellant had raised the issue and there was a possibility of this court's decision being overturned on appeal at the Court of Appeal, this court dealt with Supplementary Ground of Appeal No (3) with under this head.

48. The Appellant submitted that he was a first offender and that he had served sufficient term to meet the requirements of punishment and deterrence. He asserted that the rehabilitation he had undergone had transformed him into a person who no longer posed any threat to the public.

49. He also urged this court to consider Section 333(2) of the Criminal Procedure Code and mete out a least sentence. The Respondent did not submit on this issue.

50. Be that as it may, this court noted that Section 295 of the Penal Code states that:-

> " Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

51. Further, Section 296 (1) and (2) of the Penal Code provides 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.

52. Thus, the Trial Learned Magistrate did not err when he sentenced the Appellant to death as that was lawful having found him guilty of the offence of robbery with violence.

53. Notably, on 6th July 2021, the Supreme Court of Kenya gave guidelines in the case of Francis Karioko Muruatetu & Another vs Republic (Supra) to the effect that the said decision only applied in respect to sentences of murder under Sections 203 and 204 of the Penal Code and that it was not applicable to capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2) and attempted robbery with violence under Section 297 (2) of the Penal Code.

54. The holding in the case of Francis Karioko Muruatetu & Another vs Republic (Supra) was inapplicable herein as the Appellant had been charged and convicted of the offence of robbery with violence and not murder as was emphasised by the Supreme Court in its aforesaid guidelines.

55. Further, Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) could not apply as the Appellant's sentence was indeterminate.

56. Be that as it may, it was the considered view of this court that the circumstances of this case befitted the death sentence that was meted out as the perpetrator attacked PW 2 with a panga in a manner that he almost lost his life in a bid to steal from him. PW 2 only had one (1) hand as a result of the incident. For that reason, if it would have found the Appellant to have been culpable of the offence herein, it could not have faulted the Trial Court for having arrived at the decision that it did as it would have been safe

and sound. It would have had no hesitation in dismissing the Supplementary Ground of Appeal No (3) for lack of merit.

**Disposition**

57. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated March 5, 2018 and lodged on October 26, 2018 was merited and the same be and is hereby allowed. The Appellant's conviction and sentence be and are hereby set aside and/or vacated as they were both unsafe.

58. It is hereby directed that the Appellant be released from custody forthwith unless he be held for any other lawful cause.

59. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 23RD DAY OF OCTOBER 2024**

**J. KAMAU**

**JUDGE**