



**Kimutai v Republic (Criminal Appeal 016 of 2024)
[2024] KEHC 12031 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12031 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL 016 OF 2024**

JR KARANJA, J

OCTOBER 8, 2024

BETWEEN

WESLEY KIMUTAI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant, Wesley Kimutai, was charged before the Chief Magistrate at Kapsabet with the offence of Robbery with Violence, Contrary to Section 295 as read with Section 296(2) of the Penal Code, in that on the 5th day of May 2020 at Kiplolok Kilibwoni Ward, Nandi County, with others not before the court robbed Benjamin Kipngetich Tuwei of Kshs. 24,000/- and during the time of the robbery did grievous harm to him.

An alternative count of causing grievous harm Contrary to Section 234 of the Penal Code, was also preferred.

2. After full trial, the Appellant was convicted on the main count and sentenced to fifty (50) years imprisonment. Being aggrieved, the Appellant preferred the present appeal on grounds set out in the Petition of Appeal filed herein on 14th February 2024 in which he essentially complains that the trial court convicted him on the basis of evidence which was inconsistent and not worthy of belief and that the sentence imposed upon him was harsh and excessive.

3. The appeal was canvassed by way of written submissions and at the hearing the Appellant appeared in person.

The Learned Prosecution Counsel, Ms. Oduor (SPPC) represented the Respondent and opposed the appeal.

The duty of this court was therefore to reconsider the evidence and draw its own conclusion bearing in mind that the trial court had the benefit of seeing and hearing the witnesses.



4. In that regard the prosecution evidence as confirmed in the testimonies of the five prosecution witnesses (i.e. PW1 to PW5) was considered as against the Appellant's defence reflected in his own testimony and duly supported by that of his witnesses (DW2).
5. Clearly, on conviction, the evidence against the Appellant was sufficient, cogent and credible enough in establishing and proving beyond reasonable doubt the material ingredients of the charge of robbery with violence against the Appellant who was a person previously known to the Complainant (PW1) and his wife (PW5) and who was recognized by them when he and others confronted and attacked the Complainant in his house and stole money from him.
6. In fact, the evidence by the Complainant's wife (PW5) indicated that the Appellant was her nephew while the evidence by the medical officers (PW2 and PW4) showed that the Complainant suffered grievous bodily harm after being assaulted by this attackers in the cause of the robbery.
7. The Investigating Officer (PW3) confirmed that the Complainant was indeed attacked, robbed of his money and seriously injured to the extent that he lost consciousness as at the time he was admitted to the Kapsabet County Referral Hospital before being transferred to the Moi Teaching and Referral Hospital at Eldoret.
8. The foregoing evidential factors clearly disproved the defence raised by the Appellant which was essentially an alibi, but which was discredited and disproved by the evidence of the Complainant (PW1) and his wife (PW5) which placed the Appellant at the scene of the offence at the material time.
9. The Appellant's conviction by the trial court was therefore correct, sound and safe and is hereby upheld. As to the sentence of fifty (50) years imprisonment imposed on the Appellant, it was lawful but was in the opinion of this court rather harsh and excessive considering that the offence occurred within a family set up and may have been prompted by factors which were not laid bare by both the prosecution and the defence.
10. Although in the pre-sentence report dated 4th March 2024, it was indicated that the Appellant was a first offender and was remorseful, the lower court record does not show that the prosecution confirmed that indeed the Appellant was a first offender, neither does it show that the Appellant pleaded for leniency. Simply put, the record shows that the sentence hearing was devoid of any mention of previous antecedents respecting the Appellant and any mitigation plea from the Appellant.
11. This implied that the Appellant was sentenced prior to being heard in mitigation. Even though the pre-sentence report portrayed the Complainant Victim as a person who was extremely bitter with the Appellant for having offended him at his age and being members of one broad family, the Appellant deserved to be heard in mitigation, notwithstanding that the Complainant remains with the scars of the attack as he appears to have been psychologically affected by the trauma.
12. In the circumstances, and considering that a more appropriate sentence other than the fifty (5) year imprisonment sentence ought to be imposed, this court would ask for a second pre-sentence report to accord with the present circumstances before interfering with the current sentence in making it less harsh and excessive. Otherwise, the appeal on conviction is disallowed and dismissed. The matter shall be given a date for presentation of a new pre-sentence report and fresh sentencing of the Appellant.

Ordered accordingly.

DELIVERED AND DATED THIS 8TH DAY OF OCTOBER, 2024

J. R. KARANJAH,

JUDGE

