



**Ouma v Republic (Criminal Appeal E027 of 2022)
[2023] KEHC 2372 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2372 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E027 OF 2022
RE ABURILI, J
MARCH 16, 2023**

BETWEEN

STEPHEN OCHIENG OUMA APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the judgement, conviction and sentence by the Hon. J.P. Nandi on the 27.7.2022 & subsequent sentence passed on the 23.08.2022 in the Principal Magistrate's Court at Bondo in Bondo PM's Court Criminal Case No. E034 of 2021-Robbery with violence)

JUDGMENT

Introduction

1. The appellant herein Stephen Ochieng Ouma was charged with the offence of robbery with violence contrary to section 295 as read with 296 (2) of the [Penal Code](#). The particulars of the charge were that on the December 25, 2021 at around 2200hrs at Manywanda village, Kagwa sub-location in West Uyoma location in Rarieda sub-county within Siaya County, jointly with others not before court robbed one John Obange Obilo of one mobile phone make KGTEL, a pair of rubber shoes, one cap and Kshs. 600 all valued at Kshs. 3,350. He also faced the alternative charge of handling stolen goods contrary to section 322 (1) (2) of the [Penal Code](#).
2. The appellant pleaded not guilty to the charge and the case proceeded to full trial. The prosecution called three witnesses in support of their case against the appellant herein who, on being placed on his defence, he gave his testimony on oath and called no witness.
3. In the impugned judgement, the trial magistrate found that the prosecution proved its case against the appellant beyond reasonable doubt, found the appellant guilty and sentenced him to suffer death as stipulated in section 296(2) of the [Penal Code](#).



4. Aggrieved by the trial court's finding, the appellant filed his petition of appeal dated August 26, 2022 on the 31st August 2022. The petition of appeal raises the following grounds of appeal:
 - i. That the trial court failed to observe that the sentence imposed is/was manifestly harsh and disproportionate.
 - ii. That the court be pleased to consider that the ingredients forming the offence was not proved beyond reasonable doubt.
 - iii. That the court be pleased to consider that the investigation tendered was shoddy.
 - iv. That the trial court did not consider the circumstances that surrounded the veracity of the offence.
 - v. That the trial court failed to consider the 's defense statement which was cogent and reasonable.
 - vi. That, the trial court failed to consider the animus of witnesses and their credibility.
 - vii. That I wish to be present at the hearing of this appeal and or be supplied with trial record to enable me erect more grounds.
5. The parties agreed to canvass the appeal by way of written submissions.

The Appellant's Submissions

6. The appellant submitted that there were contradictions as brought forth in the testimony of PW3 regarding the phone alleged to have been stolen as the phone alleged to be stolen by PW3 was the model of ITEL valued at Kshs. 1,800 whereas the charge sheet indicated that the phone was model KGTEL. He thus submitted that the alleged phone was not positively identified as the property of the complainant and further that the value of the said KGTEL phone was not established.
7. It was further submitted by the appellant that there were shoddy investigations. The appellant submitted that his arrest, search and the recovery of the alleged stolen phone was not properly evaluated by the court as the trial court failed to enumerate the inconsistencies, insufficiencies and contradicting pieces of evidence and as a result, the element of recent possession was not proved.
8. The appellant submitted that the trial court erred in both law and fact by imposing a sentence that was mandatory in nature without considering that the was a first offender with no previous criminal record. It was his submission that the trial court failed to consider the mitigating factors.

The Respondent's Submissions

9. Mr. Kakoi Senior Principal Prosecution Counsel for the Respondent State submitted opposing the appeal arguing that the appellant's conviction was safe although the sentence meted out was excessive. Counsel submitted that the appellant was properly identified by the complainant at the time of the attack as there was light and that the complainant recognized the appellant as Akwom.
10. The respondent's Counsel further submitted that the complainant's property to wit, the KGTEL phone was found in the appellant's possession and further that the complainant provided proof of possession through a receipt for the phone.
11. Mr. Kakoi further submitted that an identification parade though conducted of the appellant was superfluous as the complainant knew the appellant prior to the incident and thus the Chief and the police knew whom they were going to arrest after positive recognition by the complainant.



12. Regarding the death sentence meted out to the appellant, Mr. Kakoi submitted that the same was excessive taking into account the violence meted out on the complainant was not aggravated. Mr. Kakoi urged the court to impose a sentence of 10 years' imprisonment.

Role of this Court

13. The role of this appellate Court of first instance is well settled. As was held in the case of *Okeno v R* (1977) EALR 32 and further in the Court of Appeal case of *Mark Oiruri Mose v R* [2013] eKLR, this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

Evidence before the trial Court

14. PW1, the complainant John Obange Obilo testified that on the material day of December 25, 2021 at 2200hrs, he was walking home from Manyuanda area when he met 3 people on the road, one of whom tripped him causing him to fall down. He testified that the people ransacked his pockets and took his cap, shoes, Kshs. 600 and mobile phone model KGTEC after which they ordered him to stand up and go home without making any noise.
15. PW1 testified that he identified one of his attackers called Akuom by face and his cap. It was his testimony that the area was lit by light from a mast nearby. PW1 testified that Akuom had a mavin. He testified that when he went home, he told his brother and a 12-year-old child of what had happened on his way home then he went and slept.
16. It was his testimony that the following day, he tried calling his phone but no one picked it then he called it on the January 14, 2022 and someone answered the call so he went and reported the matter to Manyuanda Police who in turn called the phone then it was picked and the Chief went with the police and they arrested the person who had received the call.
17. PW1 testified that he was shown the phone by police, which he was able to identify. He also identified the white marvin which he said he saw the attacker wearing that night. He also identified the receipt for the purchase of the said phone. PW1 identified his attacker as the accused in the dock and as the person who was arrested by the police with the phone.
18. In cross-examination, PW1 stated that no violence was meted on him and that he was only tripped and fell. He stated that he did not scream during the attack.
19. PW2, Samuel Onyango Guege, the Chief of West Uyoma location testified that on the January 14, 2022, he was called by the police from Manyuanda who asked him to accompany them help them trace a suspect who had robbed a complainant of his phone. He testified that they went and arrested the appellant herein who upon being searched was found in possession of a black mobile phone of model KGTEL. PW2 further testified that the complainant identified the accused with a white marvin which he alleged the accused wore on the night of the robbery.
20. In cross examination, he reiterated that the phone was recovered on January 14, 2022 and that they traced it by calling the phone and the suspect responded. ore during the robbery. He stated that the appellant was also known by the name Akwom.
21. PW3, PC Richard Ombunya stationed at Manyuanda police post who was also the investigating officer testified that the complainant reported to them that he had been robbed of his phone on the January



- 14, 2022 and informed them that he had been robbed of a mobile phone, model KGTEL, shoes and cash amounting to Kshs. 600 on his way home on the December 25, 2021.
22. PW3 testified that he called the complainant's number and that the person receiving responded saying that he was at Manyuanda centre where PW3 proceeded and arrested the suspect He testified that an Identification parade was conducted at Aram Police Station and the complainant was able to identify the accused. The witness only identified the police identification parade form which was not produced as an exhibit.
23. In cross-examination, PW3 stated that he was not the one who conducted the identification parade and further that the appellant herein was found in possession of the stolen phone. In re-examination, PW3 stated that the complainant was threatened with death if he screamed. He further stated that the complainant saw the accused at Manyuanda Police Station before he was taken to Aram Police Station.
24. Placed on his defence, the appellant testified on oath and denied committing the offence. He stated that on the December 25, 2021, he went to church in the morning after which he went to graze cattle then later went to Kings Club in Bondo as there was a musician where he stayed till 4am. He testified that he then went home and slept.
25. It was his testimony that it was dark at 11pm and thus one could not identify a person. He admitted that he came from the same area with the complainant and stated that after his arrest, he was taken to the police post at Manyuanda before proceeding to Aram Police Station where an Identification parade was carried out.

Analysis and Determination

26. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions by both the appellant and oral submissions by the respondent's counsel. I find the following issues arising for determination:
- a. Whether the prosecution's case was proven beyond reasonable doubt and
 - b. Whether the sentence imposed on the appellant was excessive and harsh.
27. In addition to the aforementioned issues for consideration, I will also consider the grounds raised in the 's petition and supplementary petition and in the submissions.

Whether the prosecution proved its case beyond reasonable doubt

28. The offence of robbery with violence is provided for under sections 295 and 296(2) of the [Penal Code](#) as follows:

“295. 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.

296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”



29. The elements of the offence of robbery with violence were set out by the Court of Appeal in the case of *Oluoch v Republic* [1985] KLR thus:

“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...” [Emphasis added].

30. Further, in *Jeremiah Oloo Odira v Republic* [2018] eKLR, the Learned Judge condensed the aforementioned sections and elaborated on the offence of robbery with violence as follows:

“Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

- i. The offender is armed with any dangerous or offensive weapon or instrument, or
- ii. The offender is in the company of one or more other person or persons, or
- iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person”

31. Further, in the case of *Dima Denge Dima & others v Republic*, Criminal Appeal No. 300 of 2007, it was stated that:

“... 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.”

32. In the instant case, the complainant testified how he was walking home when he was confronted by three people, one of whom tripped him and he fell after which his assailants ransacked his pockets and robbed him of his shoes, money and mobile phone. He testified that the assailants threatened him not to scream.

33. Accordingly, the prosecution proved beyond reasonable doubt that;

- (ii) the offenders were in company with one or more other person or persons; and



- (iii) at or immediately before or immediately after the time of the robbery the offenders wounded, beat, struck or used other personal violence them, i.e. the act of tripping the complainant so as to make him fall.
34. Nonetheless, as the incident occurred at night, care should be taken to ensure the appellant herein was positively identified as having been one of the perpetrators of the offence. The court in Wamunga v Republic (1989) KLR 424 at page 426 stated as follows on this aspect of identification or recognition of an offender:
- “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.”
35. I have interrogated the circumstances under which identification of the appellant was made. The appellant testified before the trial court that it was dark at night at 11pm and thus it was impossible for the complainant to identify his assailants.
36. On his part, the complainant testified that there was light from a mast shining on the scene and further that he managed to identify one of his assailants whom he knew as Akuom. He further testified that Akuom wore a marvin which the appellant herein was found with when he was arrested and PW2 corroborated this testimony.
37. In his judgment, the trial magistrate after analyzing the evidence and various decisions found that the circumstances, the conditions for positive identification of the appellant were not free from error. However, he found that the fact that the appellant was found in possession of the complainant’s phone reportedly stolen connected the appellant to the offence of robbery with violence.
38. The appellant further submitted that the prosecution failed to prove the doctrine of recent possession. The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarized the essential elements of the doctrine of recent possession in the case of Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR, where the court stated as follows:
- “In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”
39. Thus, once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession of recently stolen property. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be a plausible. In Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008, the Court of Appeal observed that:
- “Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (*sic*) especially within the knowledge



of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.”

40. The appellant herein failed to provide a reasonable explanation as to how he came into possession of the complainant’s mobile phone and thus failed to discharge this burden.
41. Regarding the issue of contradictory evidence, the appellant stated that there was contradictory evidence by PW3, the investigating officer who testified that the make of the phone was ITEL whereas the charge sheet provided that the make KGTEL.
42. It is trite that, a court should weigh the nature and strength of the alleged contradictory evidence against the evidence tendered as a whole before dismissing a case. It is not every contradiction that calls for an acquittal. It will depend on the magnitude of the contradiction against delivery of substantive justice.
43. In the case of Leonard Kipkemoi v Republic [2018] eKLR the court cited the case of Erick Onyango Ondeng’ v Republic [2014] eKLR where it was stated that:

“The primary duty of the trial court is to carefully analyse that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honored device for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyse the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See Okeno vs Republic (1972) EA 32).”
44. In Peter Ngure Mwangi v Republic [2014] eKLR the Court of Appeal, dealing with the question of alleged inconsistencies in evidence, stated as follows:

“We, therefore find that on the totality of the evidence before us, any difference there may have been in the evidence adduced by the prosecution consisted of minor discrepancies and inconsistencies. We find that these were not material and did not weaken the probative value of the evidence tendered by the prosecution in support of their case.”
45. Having considered the appellant’s submissions and the evidence adduced in the lower court, I do not find any material contradiction in the prosecution witnesses’ evidence that would weaken the probative value of the evidence tendered by the prosecution regarding the occurrence of the robbery in question. PW3 testified that the mobile phone that was reported to have been stolen from the complainant was of the make KGTEL. This was the make provided in the charge sheet. There was no contradiction in the testimonies of all the 3 prosecution witnesses on the mode of the phone reportedly robbed and recovered from the appellant. Furthermore, a receipt was produced as evidence of ownership of the said phone by the complainant.
46. The appellant pleaded and submitted that the trial court failed to consider his defence. However, my reading of the judgement reveals that the trial magistrate considered the same and found it to be wanting. I have also re-examined the defence proffered by the appellant and I find it to be a mere denial and devoid of any substance although the appellant bore no burden to testify but taking into account the watertight evidence of recent possession of the stolen property and the denial by the appellant who nonetheless never explained how he came into possession of the complainant’s phone reportedly stolen, I am satisfied that the defence was a sham and that the prosecution tendered more than sufficient



evidence to establish all the elements of the offence of robbery with violence against the appellant herein.

47. Accordingly, I am satisfied that the evidence adduced against the appellant proved beyond reasonable doubt that, the appellant, in the company of others not before court robbed the complainant and also threatened to use violence on the complainant immediately before or during or immediately after the said robbery.

Whether the sentence meted out on the appellant was excessive and harsh

48. The appellant pleaded in his grounds of appeal and submitted that the trial court erred by passing the mandatory death sentence upon him considering he was a first time offender. He further submitted that the trial court failed to consider the mitigating factors.
49. The Penal Code prescribes a death sentence for the offence of robbery with violence, upon conviction. The trial court imposed the sentence as provided for in the law. I have perused the decision by the trial court and it is apparent that the death penalty was imposed because it was the only sentence prescribed in law. That is so.
50. However, the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR removed the mandatory nature of the death sentence in section 204 of the *Penal Code* for being inconsistent with the *Constitution*; and held that the court has the discretion to impose a sentence other than death having regard to the circumstances of the case and mitigation by the accused person.
51. Indeed, the death penalty is still prescribed in law and this is evident from the directions given on 6th July 2021 by the Supreme Court in the case of *Francis Karioko Muruatetu & Another v Republic inter alia* was that the said decision is not an authority to declare all mandatory or minimum sentences unconstitutional. Its application was limited to murder cases falling within its scope.
52. The question this court is faced with is whether there is any lawful reason to interfere with the discretion of the trial court in passing sentence. In *James Kariuki Wagana v Republic* [2018] eKLR, Prof. Ngugi J observed that whereas the death penalty is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he

“unnecessarily injure the Complainant during the robbery”

and was not armed during the robbery. He therefore reduced the appellant’s sentence of death to imprisonment for fifteen years, from the date of conviction.

53. In the case before me, all the ingredients of robbery with violence have been met. The appellant, who was in the company of others, robbed the complainant, and in the course of the robbery, threatened to use force on the complainant. Other than falling to the ground and as no medical evidence was tendered, PW1 did not sustain any bodily injuries as a result of the robbery and therefore the level of violence unleashed on the complainant was not sufficiently serious as to warrant death penalty or long term imprisonment. The violence did not even cause harm. I observe that the presentence report filed by the probation officer describes the appellant as a notorious criminal who had other cases of similar nature against him and that his family members were protective of him whereas the community at large were tired of his criminal behavior.



54. In the circumstances, I find that the death penalty imposed on the appellant was manifestly harsh and excessive and is amenable for interference by this court. I hereby set aside the death penalty imposed on the appellant by the trial court and substitute it with a prison term of 15 years to be calculated from the date of arrest on January 14, 2022 as the appellant did not raise bail granted to him. this is in line with section 333(2) of the *Criminal Procedure Code*.
55. Signal to issue forthwith.
56. This file is hereby closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 16TH DAY OF MARCH, 2023

R.E. ABURILI

JUDGE

