



**Shikutwa v Republic (Criminal Appeal 117 of 2019)
[2023] KEHC 2679 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2679 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL 117 OF 2019
WM MUSYOKA, J
MARCH 24, 2023**

BETWEEN

JOSEPHAT KIPTOO SHIKUTWA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from judgment and decree of Hon. ML Nabibya, Principal
Magistrate, in Hamisi SRMCCRC No. 1101 of 2019, of 22nd October 2019)*

JUDGMENT

1. The appellant, Josephat Kiptoo Shikutwa, had been charged before the primary court, of the offence of robbery with violence, contrary to section 295, as read with 296(2) of the *Penal Code*, cap 63, Laws of Kenya. The particulars of the charge were that on 20th day of April 2018, at Munugi area, Lyaduwa Sub-Location, Sabatia Sub-County within Vihiga County, with others not before court, while armed with a dangerous weapon, an AK47 rifle, he robbed Alphas Akaranga, of Kshs. 500, 000.00 cash, and, during the time of the robbery, killed Maximilla Makhungu, the spouse of the said Alphas Akaranga. The appellant denied the charge, on November 22, 2018, and a trial ensued, where 7 witnesses testified.
2. The complainant, PW1, Alphas Akaranga Ngala, a miner, testified that he was at his home, on the evening of April 20, 2018, when robbers stormed the compound and fired gunshots at him and his family. He was shot on his left abdomen, and rushed to safety in a nearby maize plantation. Police came to the scene, and he was rushed to hospital, where he remained admitted for 4 days. His wife was shot dead in the raid. He lost gold worth Kshs. 3, 000, 000.00 and Kshs 123, 000.00 in cash. An unknown amount of money, that was in the custody of his late wife, was also lost. He said that he also lost logbooks and title deeds.
3. PW2, Rono Benard, was the clinician who attended to PW1. He testified that when admitted in hospital, PW1 had blood soaked clothes, and there was wound at the entry point of the bullet on the



- left side of his lower abdomen. He was unconscious on arrival. An examination later revealed that he had a lateral neck swelling abdomen and the thorax showed a wound on the left side of eth stomach, which was 7 centimeters. He had a swelling on the left upper hand and a lower limb swelling.
4. PW3, Golder Kanyera, was a sister-in-law of PW1. She was at the home of PW1, when the attack happened on April 20, 2018. She was outside relieving herself, when she saw 2 people, 1 of whom had a rifle, emerge from behind the house. She screamed, but kept quiet, after she was commanded to by the men. They entered the hose, while she fled into a maize farm to hide. She approached a neighbour for assistance, who advised that they should keep away from the house, for safety. She later went back to the home, and found that her sister had been shot dead. PW1 had also ran into the maize farm. She said that she did not witness what the men did at the home. She did not identify anyone. She said that the robbers had greeted her, but she did not respond, then they had fired in the air, before getting into the house.
 5. PW4, Alex Chirchir, was a ballistics expert. He had examined 2 spent cartridges, 1 fired or used bullet (jacketing). He established that they were of caliber 7.62x39mm. .
 6. PW5, Police Constable, Daniel Karani Njeri, Number 984469, attached to the office of directorate of criminal investigations at Hamisi, was the investigating officer. He was informed of the robbery incident by his superior, on 20th April 2018, at 10.00 PM. He proceeded to eth scene. He found a body lying in the house, of the wife of PW1, with a gunshot wound at the left side of the left hand, exiting at the right side of eth neck. 2 spent cartridges were recovered, at the entrance and rear of the house. A used bullet head was also recovered, and it had hit the wall after exiting. There were about 10 bullet holes, but they only recovered 1 used bullethead. Scenes of crime personnel came to the scene, but by then the scene had been interfered with. He commenced his investigations thereafter, and recorded statements from the witnesses. He stated that the witnesses did not identify the assailants at the scene. 4 suspects were later arrested, after a gun found on them was connected to the robbery of April 20, 2018.
 7. PW6, Dr. Collins Masika, was the pathologist who conducted autopsy on the body of the wife of PW1.
 8. PW7, Police Constable Moses Biwott, Number 83212, testified on another robbery incident at Musasa trading centre, at a supermarket at the centre, which was reported at Serem police station on 2nd June 2018. Money was stolen, together with Safaricom scratch cards. The robbers had escaped, but 6 spent cartridges were recovered. The cartridges were taken to a ballistics expert, and he received a report. Investigations from the serial numbers of the scratch cards led him, on 18th June 2018, to arrest the appellant, at Cheptret, who confessed to his involvement in the robbery. He received an AK 47 rifle, serial number UG88472000/UG8847. The appellant then led him to arrest the other suspect and co-accused, Hilary Litiolo. The gun was taken for ballistics, and the results connected it to the robbery at Musasa. He stated that the same gun had been used in the robbery of PW1.
 9. The appellant was put on his defence, vide a ruling that was delivered, apparently, on 2 dates, on 24th July 2019 and on 9th August 2019. He made a sworn statement, on 4th September 2019. He stated that he did not know the charges against him, and he did not know PW1 or his wife. He said that there was no identification parade, and that the rifle was not dusted to confirm whether or not he had handled it. He asserted that he did not commit the offence, saying that he had been framed. He said that he was forced to confess.
 10. In its judgment, the trial court found the appellant guilty of robbery with violence, on the basis that he was found in possession of the gun, which had been used to emit the cartridges and used bullet that was recovered from the home of PW1.



11. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that the trial court presided over a trial without proper quorum; the court erred in finding that there was a nexus despite flimsy and inadequate evidence; the defence was rejected without proper evaluation; it was not proved that the exhibit relied upon was used in the alleged crime; and the evidence was uncorroborated and inconsistent.
12. I mentioned the matter on June 28, 2022, when it transpired that the appellant had filed written submissions. The submissions were not highlighted. The respondent did not file submissions.
13. In his written submissions, the appellant argues 2 grounds, after merging several of his grounds of appeal.
14. The first ground turns on the constitutional right to a fair trial, specifically that relating to being afforded adequate time to prepare defence. The appellant submits that he faced 3 charges of robbery with violence in 3 different cases, being numbers 1092/18, 1100/18 and 1101/18. He submits that the same were tried in the same court and by the same magistrate, and were scheduled for hearing on the same day. He protests that he was not given enough time to prepare his defence. He submits that, in the case the subject of the instant appeal, it was alleged that he had possession of an AK47 No. UG/88472000/UG8847T, which was also the subject of proceedings in case number 1092/18, yet in that case the gun produced had a different serial number, being UG/88472000/49887.
15. With respect to this ground, I will start by saying that those other files are not before me, and I cannot verify the correctness of the allegations made by the appellant. In any case, there is nothing wrong with the same court or the same magistrate handling several criminal cases relating to one accused person. Judicial officers are trained in law, and they determine disputes before them based on the law and facts. The appellant has not demonstrated that he was prejudiced by the 3 cases being tried in the same court and by the same magistrate. Secondly, he has not demonstrated that the same was in violation of *the Constitution*, and he has not pinpointed the particular provisions of *the Constitution* that were allegedly violated. On not being afforded time to prepare his defence, I note, from the record, that he was represented by an Advocate, Mr. Maxwell Didi, who attended court and participated fully in the trial and proceedings. At no time did Mr. Didi raise issue that the defence was not given time to prepare for trial. I am not persuaded that anything turns on this ground.
16. The second ground is on the ballistics evidence. The submissions are not coherent, for they refer to a PW4, Alfred Mbalani Kahi, who testified on behalf of Mr. Chirchir, and that the said PW4 testified on a firearm different from the firearm referred to in the report by Mr. Chirchir. Alfred Mbalani Kahi did not testify in the trial proceedings the subject of this appeal. The person who testified as PW4 was No. 231710 Mr. Alex Chirchir ASP. In his testimony, the said Alex Chirchir did not make reference to a serial number of any gun, leave alone an AK47. It would appear that the appellant is perhaps mixed-up on the facts, and is probably referring to events in one of the other 2 cases.
17. Be that as it may. I have read carefully through the record. The appellant was convicted, in this case, on the basis that he was found in possession of a gun, that was claimed to have been used to fire or emit the ballistics material that PW4, Alex Chirchir, testified on and produced. PW4 only conducted forensics on 3 items: 2 spent cartridges and a used bullet (jacketing/copper cover). He did not conduct any forensics or examination on the gun that was alleged to have been used to fire or emit those materials. He, therefore, did not provide evidence that connected the gun, allegedly found in the possession of the appellant, and the spent cartridges and used bullet that he examined. The person who testified on the gun was PW7, but he did not testify on the events the subject of these proceedings, but those in another case and another incident. He was not a ballistics expert, but the investigating officer in that other case. He did not conduct any forensics on the gun in question. He only came to court to say that he



recovered the gun from the appellant. He did not lead any evidence that linked the gun recovered from the appellant with the materials that PW4 testified on. As it is, there was no material, before the trial court, linking the appellant to the ballistics materials that were allegedly recovered at the home of PW1 and were handed over to PW4 for forensics. There was no evidence that the gun, that PW7 was talking about, was the one that fired or emitted the materials that PW4 was talking about. Consequently, there was a gap in the prosecution's case, with regard to that. That gap ought to have raised a doubt, which could only be resolved in favour of the appellant. With that gap, it cannot be said that the prosecution had established, beyond any reasonable doubt, that the appellant was party to the raid, on 20th April 2018, at the home of PW1, for the eyewitnesses did not identify him, and the ballistics evidence did not link him to the crime. What ought to have been done was that the gun recovered from the appellant ought to have been subjected to ballistics, with respect to the 2 spent cartridges and the used bullet head examined by PW4, to link it to the 3 materials, and a report generated on the same.

18. In view of what I have stated above, it is my conclusion that the material before me, indicates that the case presented by the prosecution, did not reach the threshold of a case beyond reasonable doubt, that the appellant herein participated in the robbery, the subject of the appeal herein. There was doubt as to whether the gun allegedly found in his possession was the one that fired the materials that PW4 examined. PW7 talked of a confession by the appellant, but no such confession was placed on record, and no concrete evidence was adduced on it, for the court to evaluate it, and decide on its validity.
19. Overall, it is my finding, and holding, that the appeal herein has merit, for the reasons given above. I accordingly allow it, quash the conviction, and set aside the sentence imposed on the appellant, Josephat Kiptoo Shikutwa. He shall be set free, unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF MARCH 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Josephat Kiptoo Shikutwa, the appellant in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

