Gathung'u v Republic (Criminal Appeal E054 of 2021)
[2023] KEHC 3595 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3595 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E054 OF 2021

LN MUGAMBI, J

APRIL 20, 2023

BETWEEN

JOHN GATHUO GATHUNG'U ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from original conviction and sentence in Gatundu Chief Magistrate's Court in Criminal case No. 115 of 2017 by Hon. E. N. NYONGESA- Senior Resident Magistrate)

JUDGMENT

1. The Appellant was charged with robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code* before the Chief Magistrate's Court at Gatundu.

2. The particulars were that on October 23, 2017, at Kimaratia bridge within Nembu Sub-location in Gatundu South Sub- County within Kiambu County, the accused person jointly with others not before court robbed JOHN Chege Njoroge three chinese gaming machines, one motor vehicle radio, battery, one woofer, two speakers and cash money Kshs. 33,000/= all valued at Kshs. 220,000/= and immediately after the time of such robbery used actual violence to the said John Chege Njoroge.

3. He faced an alternative count of handling stolen property contrary to section 322 (1) (2) of the *Penal Code*.

4. The particulars of the offence being that on the 28th day of October 2017, at Masaku estate within Ruiru Township of Kiambu County, otherwise than in the course of stealing, the accused person dishonestly retained two Chinese gaming machines valued at Kshs. 100,000 knowing or having reason to believe them to be stolen property.

5. After a full trial the Lower Court convicted the Appellant on the main count of Robbery with violence and sentenced him to death.

6. The date when the trial Magistrate signed off the written judgment is incomplete as it has only the day which is 12th and the year (2019). The month was omitted.

7. The sentence was rendered on her behalf, but even the sentencing Magistrate, H.M. Ng'ang'a, Senior Resident Magistrate did not indicate the date of passing the sentence when he signed off after passing that sentence.

8. The Appellant was dissatisfied with the decision of the trial court and thus preferred this appeal.

9. During submissions, he amended his earlier petition of appeal pursuant to section 350 (2) (v) of the *Criminal Procedure Code* to rely on the following four (4) grounds;

    a). That the prosecution did not prove its case beyond reasonable doubt.

    b). That identification parade was shoddy and cannot be relied upon to base a conviction.

    c). That there was no link between the robbery and the appellant based on defence case.

    d). That the trial court failed to caution itself before convicting the Appellant on the evidence of prosecution which was marred with inconsistencies.

10. This being the 1st appeal, it is my duty to re-evaluate the entire case and arrive at my own independent conclusion on the evidence, but giving allowance to the fact that I did not have the chance to watch or hear the witnesses testify (*Okeno vs. R* [1972] E.A.

11. Considering that the appellant pleaded not guilty to the charges the effect of that plea was to put every element of the charges he was facing in issue which Prosecution was required to prove beyond reasonable doubt.

12. I begin by detailing the prosecution's case against the Appellant as testified to by the prosecution witnesses.

13. John Chege Njoroge (PW1) the Complainant in this case was a business man carrying out shop and bar business at Kegogo Shopping Centre. On 23.10.2017 at about 10.00 p.m., he was driving back home in his car, KCE 024E. When he reached Kirimata bridge, he found the road barricaded using huge stones and as he pondered what to do, four men suddenly accosted him. Two of them were armed with knives.

14. They searched his pockets and removed cash Kshs. 28,000/= which he was carrying. They also forced him to give them the gaming machine keys which they opened and emptied some amount of cash which he could not ascertain.

15. They then took control of the car and drove around with him as they debated whether to kill him or spare his life. They eventually abandoned him in Murera area at a place known as Kwa Kairo.

16. He testified that he was able to identify one of the robbers, namely the accused who was before the court and who he referred to by his name John Gathua. He reported the incident at Juja Police Station.

17. On 30.10.2017, he was asked to go to Gatundu police station where he was shown two gaming machines and identified them as part of what he had lost during the robbery. He stated that he had inscribed his ID card number on the machines which he pointed out to the court and further produced his original identity card to confirm that the inscription was matching with his national identity card number.

18. An identification parade was thereafter conducted and he was able to pick out the appellant who was at standing as number five in a group of ten men who were participating in the parade.

19. In cross examination he conceded that he did not provide the police with the physical description of the attackers in his initial report. Further, in the original report he had said that he had stated that two of them were armed with pistols while the rest had knives.

20. On re- examination, he said he was able to identify the Appellant using car lights as he was close to him when they were tying him up.

21. PW2 – Pauline Mweru was an employee of the complainant (PW1). She did not witness the robbery. Her evidence was confined to identifying the two gaming machines that the complainant had employed her to operate (P. exhibit 1 (a) & (b). She established they were the machines she used to operate by identifying the labelling that the complainant had inscribed on each of them.

22. PW4 P.C. Kipkurui Yegon testified that he received a call from a police informer that some three men had gaming machines which they were trying to dispose. Together with other police officers they proceeded to Masaku area as informed. They found the appellant with the gaming machines and pretended to be customers interested in buying before revealing that they were police officers. The Appellant was unable to explain how he acquired the two gaming machines that he was now trying to dispose. They thus prepared an inventory of search (P. exhibit 4) which the appellant signed before seizing the machines and escorting him together with the machines to the police station.

23. On cross examination, the PW 4 denied that the informer was one Moses Mburu as put to him by the Appellant. He also denied that they took photos of the Appellant during the arrest.

24. PW3 was PC. Andrew Mutai who participated in the arrest and recovery of the two gaming machines with PW4 and his testimony was materially similar to that of PW4 – PC Kipkurui Yegon.

25. The Investigating Officer (PW 5) Corporal Johnson Wambulwa of DCI Gatundu. He pieced together the case by interviewing and recoding statements of witnesses and taking possession of the recovered exhibits which, he produced in court.

26. Concerning the identification parade, the Investigating Officer (PW 5) explained as follows:

> " ... identification parade was done on 30.10.17 where Accused in court was identified by the Complainant. The suspect had put a white jacket on the date of the incident which had a cover. The Complainant therefore identified the suspect as the person who came from their village and whom he knew before..."

27. The Appellant gave sworn evidence in his defence. He explained that on 28.10.17, he was arrested while on his way to work at Ruiru market where he worked as a loader.

28. He stated that on the day of his arrest he was confronted by four men on allegations that he had been selling bhang but upon searching him they found nothing on him. One of the four men was one Stephen Mburu whom he had previously lodged a complaint against through O.B number 13.10.17. They found that O.B. extract and destroyed it.

29. They then escorted him to Ruiru police station where he was put in cells on allegations that he had been found with a knife.

30. The following day he was taken to CID's office where he was informed that the reason for his incarceration was because he had stolen someone's gaming machines.

31. 31. He said he was asked to sign a statement and when he refused he was hanged by the hand cuffs and beaten up hence he had to sign to stop further beating.

32. He also explained that another suspect, one Boniface Kuria had been arrested to be charged jointly with him but the said suspect was released. He acknowledged that the identification parade was done but contrary to the assertion by the complainant that he was number 5 in the identification parade he was actually number 9 in that parade.

Appellant's Submissions

33. The appellant submitted that the Prosecution did not prove its case because even after stating in its particulars of the charge that assorted goods worth 220,000 were lost in the robbery, in his evidence before the court the complainant only mentioned gaming machines and cash of Kshs. 28,000/-. That it was curious that in his evidence, the complainant did not talk about all that had been enumerated in the charge sheet except the two gaming machines were produced in evidence. He contended that an inference should be drawn to the effect that the complainant did not know what was stolen and who stole, but was merely called to identify a culprit yet he could not tell what was stolen from him. He relied on the case of *Terekali Vs. Republic* (1952) EACA where the Court underscored the importance of first report as follows:

> "…. Evidence of first report by the complainant to a person in authority is important as often provides a good test by which true and accuracy of subsequent statement may be gauged and provides a safeguard case. Truth will always come out from a statement taken from a witness at time when recollection is very fresh and has no time for consultation with others…"

34. Submitting on identification, he relied on various judicial precedents and contended that one of the key factors to be considered is whether the eye-witness gave description of his/her attackers to the police at the earliest opportunity as well as the lighting that enabled correct identification. He relied on the case of *Mohamed Elibite Hibuya Vs. R* – Criminal Appeal Number 22 of 1996 Unreported- where the court stated as follows:

> " …It is for the Prosecution to elicit evidence as to whether the witness observed features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the Investigating Officer and the Prosecutor to ensure such information is recorded during investigations and elicited in court during evidence…"

35. He contended that in the first report to the police, the complainant said he was attacked by two people who were armed with a pistol and a knife yet in his evidence in chief he changed and said he was attacked by four people.

36. Further, he pointed out that in his report, the complainant had not given the description of the attackers hence it was impossible for him to purport to identify the appellant in an identification parade.

37. He also relied on *Abdulla Bin Wendoh & Anor Vs. Reginam* (1953) EACA 166 followed in *Roria Vs. Republic* (1967) EA 583 which emphasized the need to test with greatest care the evidence of a single identifying witness as was the complainant in this case.

38. Arguing his last ground, he contended that the trial court disregarded his defence without giving any cogent reasons particularly because he had clearly stated that the informer who was used by the police

was his enemy whom he had filed a complaint against in the O.B report he mentioned during his defence.

Respondent's Submissions

39. The Prosecution insisted that none of the grounds raised warranted the interference with the findings of the trial court and contended that it had proved all the elements of the offence beyond reasonable doubt.

40. In addition, it countered that the appellant was guilty by virtue of doctrine of recent possession citing the case of *Erick Otieno Arum Vs. Republic* KSM C.A Criminal Appeal Number 85 of 2005 since he was found in possession of the gaming machines the victim had positively identified as part of his property which he lost during the robbery and the Appellant could not explain how he came by the same in conformity with section 111 of the *Evidence Act*.

Determination

41. There are two main issues in this appeal,

    a. Whether the elements of the offences charged have been proved beyond reasonable doubt

    b. If so, whether the participation of the accused in the commission was proved beyond reasonable doubt.

    .

42. Firstly, let me address a preliminary matter that I noticed. I note that the Prosecution framed its statement of the offence as follows: "Robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code.' Was this statement of offence correctly framed? Going by the Court of Appeal decision Simon Materu Munialu Vs. R (2007) eKLR, it explained that section 296 (2) of the Penal Code alone was sufficient because it fused both the offence and punishment in section 296 (2). In elaborating section 295 vis-à-vis 296 (2) of the Penal Code, Justices R.S.C Omolo, J.W. Onyango Otieno and W.S. Deverell JJA held:

> " ...We do agree with Mrs. Murungi that much as section 295 creates the offence of robbery , the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296 (2) of the Penal Code. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296 (2) is not only a punishment section but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such an offence with robbery under section 295 as read with section 296 (2) of the Penal Code as that would not contain the ingredients that are in sub-section 296 (2) of the Penal Code and might create confusion. It is our considered view, section 137 of the Criminal Procedure Code would be complied with if an accused is charged, as appellant was under section 296 (2) because section 137 requires one to be charged under section creating the offence and in the case of robbery with violence under section 296 (2), that section creates the offence by giving ingredients required under it and it also spells the punishment..."

43. Despite the defect detected in the statement of the offence, after a careful examination of the particulars supporting the charge, I was persuaded that this confusion which reigned in the statement of the offence was not imported into the particulars which I found to be in consonance with an offence under section 296 (2) of the Penal Code. I was thus convinced that the Appellant was not misled as what he was charged with or defending. In so holding, I was also persuaded by the High Court decision of Silas Amadi Dhikas Vs. Republic (2020) eKLR where Justice Matheka faced with similar situation she relied on the case of Paul Njuguna Vs Republic (2016) eKLR where the Court of Appeal held as follows:

> " .... Neither Section 295 nor 296 refers to an offence of 'robbery with violence'. Indeed, the felony termed robbery as described under section 295 of the Penal Code may involve use of actual violence or threat to use violence, while the aggravated offence of robbery as described under section 296 (2) of the Penal Code may be complete with use of violence as long as there has been a theft and the offenders are either armed with offensive weapons or offenders are more than one, (see Oluoch Vs. Republic (1985) KLR 549..."

44. The Court however did not declare the charge sheet duplex reasoning thus:

> " ...The particulars as stated are clear and do support the offence of aggravated robbery. The defect is alleged to be in the statement of the charge in the count in which the appellant was charged with robbery with violence contrary to section 295 as read with section 296 (2). Is that fatal. We think not..."

45. Simply put, the Prosecution ought to have charged the Appellant under section 296 (2) only but even though it made the mistake in framing the charge by indicating that it is founded 'under section 295 as read with 296 (2)' that did not invalidate it as that mistake did not permeate into the particulars provided.

46. Having said so, it is also apparent from the decisions of the Court of Appeal that I have referred to that for an offence under section 296 (2) the Prosecution is required that:

> an act of theft/or depriving another of his/her property was done under the following circumstances:
>
> a. if the offender was armed with any dangerous or offensive weapon or instrument
>
> b. If the offender was in company of one or more other person or persons or
>
> c. If at or immediately before or after the time of robbery, he wounds, beats, strikes, or uses any other violence to any person.
>
> 2. That the appellant involved/participated?

48. Turning now to the substance of this appeal, it was clear from the eye witnesses account of PW1 – John Chege Njoroge, he was robbed cash Kshs. 28,000 plus other unknown amounts that was removed from the the gaming machines by the gang which forced him to give them keys and they then opened and emptied them of all the cash. They also took his three gaming machines which he was carrying in the car.

49. The robbers were armed with knives. The Appellant submitted that the Complainant did not mention all the the items in the charge sheet which should lead to an inference that he was not forthright.

50. I do not think that failing to recall everything that the complainant lost to the robbers that night in minute detail is an indication of his undependability. It was enough that the complainant was able to describe to a substantial degree what he lost, the experience itself was traumatising and in recounting such a horrible experience some details can easily escape the mind.

51. He was however able to recall that the men who forcefully took away his property were armed with knives and were definitely more than one.

52. That suffices to establish that the offence of robbery with violence was committed against the complainant on night of 23.10.2017.

53. The next issue to consider is whether the Appellant was in the gang of robbers that robbed the Complainant on the night in question.

54. It was evident that the only eye witness to the robbery incident was the Complainant. He was alone in the car that night when he found the barricade at the point the robbers emerged and robbed him under threat of violence.

55. In *Cleophas Otieno Vilaunga Vs. R* [1989] eKLR and also in the authorities cited by the Appellant namely Abdullah Bin Wendo & Anor (supra) and Roria Vs. Republic (supra) the Court of Appeal cautioned that such evidence of a single identifying witness must be carefully evaluated to ensure that it was free from error.

56. Matters such as the intensity of the light, the nature of the light, the length of time taken in observing the perpetrator, the state of mind, the first report made indicating any identifying features noted are some of the factors that courts have held ought to be taken into account in great detail while ascertaining if visual identification of the perpetrators was correct and free from possibility of error.

57. The leading case of *R. vs. Turnbil* 1977 Q3. 224 is what spelt out a comprehensive illustrative guide of the factors that the court should look for when dealing with the question of contentious identification by a single identifying witness. It held:

> a. "... how long did the witness have with the Accused under observation? At what distance? In what light? was the observation impeded in any way...? Had the witness ever seen the Accused before? How often? In only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and subsequent identification to the police? Was there any material discrepancy between the description of the accused given to me by the witness when first seen by person and actual appearance ...? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made ...".

58. The submissions by the Appellant that a first report by the Complainant was critical in verifying the accuracy of the testimony of the Complainant was thus on point and I entirely agree with him.

59. When the Complainant made a report to the police, he did say that he mentioned that he knew the Appellant or that he gave the police any description of any of the gang members. It is thus a wonder that the investigating officer Corporal Wambulwa (PW 5) told this court that the Complainant had identified the Appellant who was wearing a white jacket as one of his neighbours. The Complainant did not give any such evidence before the Court.

60. In the judgment of the lower court, the trial court in its analysis stated:

a. "...PW1 further told court that he was able to identify one of the suspects during the incident namely Gathuo using car lights which were on throughout as the said John Gathuo, was the one seated closest to him during the incident and was the one who had tied his hands using a rope..."

61. From the testimonies police officers gave before court, no police officer said that the complainant had in his prior report given the name of the Appellant as one of the men that attacked him and robbed him that night. In his evidence in chief, the Complainant did not make any mention of the fact that he identified any of the robbers, let alone recognise the Appellant. It is only in his re-examination that he indicated that he identified the Appellant through the motor vehicle headlights as he participated in tying him up.

62. The fact that such evidence was elicited at re-examination stage jostled me to examine the cross examination conducted by the Appellant to check whether the issue had been raised by the Appellant for it to arise in re-examination. Clearly the issue of lighting and whether the Complaint identified the Appellant that night did not feature anywhere during cross-examination. That testimony was thus adduced in blatant violation of rules of examination of witnesses by the prosecution and the court ought to have stopped it for the Appellant had no opportunity to cross-examine on the same. The record shows he was not accorded another shot to cross-examine on that issue despite not having raised it in his cross-examination yet the court went ahead and used the evidence elicited in that manner against him knowing too well the Appellant had no opportunity cross-examine the complainant on the same. That part of the testimony which was improperly admitted by the court and was prejudicial to the Appellant. It is expunged from the record.

63. I would thus agree with the Appellant after dissecting the evidence of identification that was tendered in this case, it was too weak and risky as a basis for arriving at a conviction against him in this case.

64. That leads me to the only other evidence that provided a nexus between the Appellant and the said robbery, that is the doctrine of recent possession of stolen property.

65. As was rightly submitted by the State, the Court of Appeal laid down the guiding principle for the application of the doctrine of recent possession in the case of Erick Otieno Anyim Vs. R Kisumu Court Of Appeal No. 85 of 2005 [2006] e KLR as follows:

i. Possession must be positively proved, that is, there must be positive proof that the property was found with the suspect.

ii. That the property is positively the property of the Complainant.

iii. That the property was stolen from the Complainant.

iv). The property was recently stolen.

66. If the Prosecution establishes the above, then the Accused pursuant to section 111 of *Evidence Act* bears an evidential burden (not legal burden) to provide a credible explanation on a balance of probability as to how he came to acquire the possession of property found on him.

67. In the present case, evidence was given by PW4-P.C Kipkurui Yegon and PW3- P.C Andrew Mutai that upon getting information from police informer, they visited Masaku area where they had been briefed the Appellant was selling some gaming machines and pretended to be customers after finding the Appellant with the two machines and then shortly blew their cover and identified themselves as police officers. When they questioned the Appellant he could not provide a satisfactory account of how he had acquired the gaming machines he was selling.

68. In court, the Complainant who had lost the said gaming machines during the robbery positively identified them by the inscription bearing his identity card numbers that he had put on each of them, a fact corroborated by his employee, PW 2 Pauline Mweru who knew the machines had been marked by the complainant using his identity card number.

69. The Appellant did not dispute the evidence of ownership of the said machines by the Complainant.

70. At the point that the police officers decided to confiscate the machines after the appellant failed to give a satisfactory account, they had the appellant sign a inventory of seizure.

71. The Appellant denied that the machines were found on him and said that he was arrested while on his way by four men who included a purported informer 'Stephen Mburu' on allegations of selling. That he had even lodged an earlier complaint against Stephen Mburu at the police station.

72. He said he signed the seizure inventory to stop the intense beating had been subjected to.

73. The Appellant's defence that he was arrested while on the way to the market on allegations that he was selling bhang was raised for the first time during his defence. When PW4 and PW3 who were arresting officers testified as to the circumstances under which they arrested him, he did not confront them with those allegations. He also did not raise the issue that they beat him up to sign the inventory of seizure. Further, he alleged that he knew who squealed on him was one 'Stephen Mburu' who he had lodged a complaint against at the police station but that was mere suspicion. The police did not disclose the informer who gave them the information.

74. This defence in my view cannot thus be truthful for if it were, the Appellant would have seriously contested the evidence they had given by way of cross-examination. His defence was most likely post-scripted.

77. I find that the evidence of the prosecution concerning the circumstances of the possession and recovery were correct and credible.

78. The Appellant was found with the gaming machines belonging to the Complainant which machines were part of the property that the Complainant lost during the night of robbery. The complainant was able to positively identified them before the trial court by the marking which bore his identity card and the original identity card he had in court matched those details.

79. Despite having been found in possession of the complainants gaming machines, the Appellant could not/does not explain that possession. He had full control and dominion over the two gaming machines which he even tried to sell them to PW3 and PW4 before they revealed themselves as police officers and arrested him.

80. In Court, the Appellant simply tried to escape culpability by crafting an incredible story which the trial Court rejected and I too find it unbelievable for reasons given in the foregoing.

81. It was approximately seven (7) days or one week after the robbery incident. The character of the goods was in my view the type that one cannot reasonably expect to change hands quickly as can even be demonstrated by fact that the Appellant was arrested as struggled to find a buyer seven days after the robbery.

82. Consequently, it is my view that the most compelling and reasonable inference to make in the circumstances of this case, considering that the robbery had only happened a week earlier is that the Appellant was actually a participant in that robbery. Even without evidence of identification, the circumstantial evidence against the appellant by reason of this possession was clear evidence of his

complicity in this offence and by reason of doctrine of recent possession, I find he was guilty. The appeal against conviction thus fails.

83. On sentence, I have considered the circumstances of the robbery. The robbery occurred at night as noted by the trial court and put the life of the Complainant at great risk. The Complainant lost property in the incident and was put under considerable danger of physical harm.

84. Nevertheless, the robbers spared his life and they did not hurt him in any way. They only targeted his property and abandoned him after the robbery. The ultimate sentence for the offence of robbery with violence is death, it is no longer mandatory to impose death sentence and the Court now has a free hand to discretionary decide the most suitable sentence after the Supreme Court decision in Muruatetu case.

85. It is a fact that the robbers were armed with dangerous weapons. The complainant testified that they debated among themselves whether to kill him or spare his life. Eventually, they not only spared his life but also did not hurt him other than stealing from him. The fact that they did not hurt him and spared his life shows that they had a sense of respect for human life which despite the horror they subjected the complainant to, I consider as a mitigating circumstance. Passing the ultimate sentence of death when the trial court had discretion to pass any other sentence in the circumstances of this case was excessive. I will thus set aside the sentence of death and also uphold the appellant's right to life despite the grave offence he was convicted of. The sentence of death shall be substituted with a term of imprisonment.

86. Finally, I would like to make a few observations on the omissions I highlighted at the beginning concerning failure by the trial to date its judgment and also the sentence.

Section 169 (1) of the Criminal Procedure Code provides as follows:

> "Every judgment shall except as otherwise expressly provided by this code, be written by an under direction of the presiding officer of the court in the language of the court, and shall contain the point or points of determination, the decision herein, and reasons for decision and shall be dated and signed by the Presiding Officer in open court at the time of pronouncing it.

87. Any judgment that is not properly dated thus violates the said section 169 (1) of the *Criminal Procedure Code* but it is my view that this would not invalidate a decision unless substantial injustice is shown to have occurred. It is a curable defect under section 382 of the *Criminal Procedure Code*.

88. In the light of the above, I make the following orders:

    a. Conviction is confirmed on the basis of doctrine of recent possession.

    b. The sentence of death is set aside and substituted with a term of imprisonment for fifteen (15) years commencing from 12.2.19 when the Appellant was sentenced by the trial court

SIGNED, DATED AND DELIVERED THIS 20TH DAY OF APRIL 2023.

L.N. MUGAMBI

JUDGE

In the presence of:

Appellant-

Advocate for Appellant-

State- Mr. Gacharia

Court Assistant- Alice

Court

This Judgement be transmitted digitally by the Deputy Registrar.

L.N. MUGAMBI

JUDGE.