



**Ngatia v Prosecutor (Criminal Appeal 29 of 2018)  
[2023] KEHC 3768 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3768 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CRIMINAL APPEAL 29 OF 2018  
SC CHIRCHIR, J  
APRIL 18, 2023**

**BETWEEN**

**PAUL KARURI NGATIA ..... APPELLANT**

**AND**

**PROSECUTOR ..... RESPONDENT**

*(Being an Appeal from the Judgment of A. Mwangi (SRM) delivered on 25th April 2018 at the chief Magistrate's Court at Kigumo Criminal Case NO.1225 of 2016)*

**JUDGMENT**

1. The Appellant was charged with robbery with violence contrary to section 296(2) of the penal code. It is alleged that on 23<sup>rd</sup> day of April 2012 at around 03.00 hours at Maragua Ridge village within Muranga County jointly with others not before court while armed with dangerous or offensive weapons namely, a jembe and iron bars robbed Francia Mwaura Mungai cash Ksh.22,000, three speakers, DVD machine, motorcycle, radio, one crate of beer, a crate of soda, and a mobile phone make Nokia all valued at Ksh. 44,600 and at or immediately before or immediately after the time of such robbery used actual violence on said Francis Mwaura Mungai by occasioning him bodily harm. He was convicted of the charge and sentenced to death.
2. Aggrieved by the Judgment, he filed this Appeal against both the conviction and the sentence.

**Grounds of Appeal**

3. The Appellant filed grounds of appeal on 7<sup>th</sup> May 2018 but in his submission, he has presented slightly different grounds for consideration. Being mindful of the fact that the Appellant was not represented I will consider both the grounds set out in his petition and in those in submissions. From the petition and the submissions these are what I decipher to be the Grounds of Appeal:



- a. That his rights to a fair trial were violated.
- b. That the identification parade was not conducted and if it was done, there were procedural violations.
- c. That no nexus was established between him and the offence.
- d. That the prosecution's case was not proved beyond reasonable doubt.
- e. That the sentence imposed was harsh and excessive.

### **Appellant's Submission**

4. It is the Appellant's submission that his rights under article 50(2) of the constitution were violated in that he was not given statements and exhibits which the prosecution was relying on. The Appellant relied on the case of Joseph Ndungu Karigi vs Republic (2007) E.A 461 to buttress his submission in this regard. He further contends that as per Article 25 of the constitution this right is non-derogable . It is further contended that the trial court failed to comply with Article 50(2) (g) (h) of the constitution and section 43 of legal aid Act 2016, relating to the right to be informed about the right to legal representation and being provided with an advocate.
5. It is further submitted that no identification parade was done and if there was one, the procedure thereof were not followed. The Appellant has relied on the case of John Mwangi Kamau vs Republic (2014) eKLR and Gabriel Kamau vs Republic (1982-1988) IKAR 1134.
6. On whether a nexus was established between him and the offence, it is in the Appellant's submission that the confession obtained from him was illegally obtained and therefore could not have been used to establish the nexus.
7. On whether the charge was proved beyond reasonable doubt, the Appellant argues that the case was not proved. He relies on the case of Woolmington vs DPP (1935) A.C 462 and Elizabeth Waithiengo VS Republic (2015) eKLR. To emphasize the fact the burden of prove is always on the prosecution.
8. The Appellant further submits that the trial had rejected his defense without giving reason for the rejection.
9. Finally, it is submitted that the sentence handed down was excessive. The Appellant urges the court to be guided by the court of Appeal finding in the case of finding Joseph Kaberia & 11 others vs the A.G (2016) Eklr in considering an appropriate sentence.

### **Respondent's submission**

10. On the witness statements and Exhibits, the Respondent submits that the same were supplied and indeed the hearing was adjourned a number of times at the request of the Appellant to allow the prosecution avail the statements.
11. On identification parade, the respondent's submission is that failure to hold an identification parade was not fatal, as the prosecution provided other sufficient evidence to prove that the appellant was involved in the crime.
12. On whether a nexus was established between the Appellant and the offence, the Respondent's contends that the doctrine of recent possession was established as against the Appellant. In this regard,



the respondent has relied on the case of Arum US Republic – Kisumu CR. Appeal no 85/ 2005 and George Otieno & Ano vs. Republic.

13. The Respondent further submits that the prosecution’s case was proved beyond reasonable doubt.
14. On sentence it is submitted that the sentence meted out was within the law.

### **Analysis of the Evidence and Determination**

15. This is the first Appeal and this court is mandated to have a fresh look at the evidence, reevaluate it and make its own finding (see Oneko vs. Republic (1952) E.A 32. )
16. In my view, the following issues lend themselves for determination:
  - a).Whether the accused’s rights to fair trial were violated.
  - b). whether the identification parade was held and if not, what were the consequences
  - c). whether the nexus between the Appellant and the offence was established.
  - d). whether the prosecution proved its case beyond reasonable doubt.
  - e). whether the sentence was lawful and/ or excessive.Whether the accused’s right to fair trial were violated
17. Article 50 (2) of the constitution sets out the principle of fair trial. They include the right of an accused person to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to the evidence (see Article 50(2)(j)).
18. The record shows that on 29/8/2016, 5/9/16, 28/9/2016, 5/10/16, 28/10/16 and 1/11/16 the court directed the prosecution to avail the statements to the Appellant , but the statement were not supplied for various reasons. However, on 7/11/106, the court recorded, “The accused is supplied with witness statements in open court.”
19. Then on 31/1/17 the Appellant requested for copies of the “1<sup>st</sup> report”. The prosecutor responded that she had the copy of the report in question and the Magistrate recorded: “The same is supplied to the Accused”.
20. Contrary to the Appellant’s allegations therefore the statements and documents were supplied. There was therefore no violation of Article 50(2) of the constitution in this regard.
21. As regards legal representation, at some point during the proceedings, the Appellant appointed an advocate. On 18/12/17, he told the court that he now had an advocate but the advocate was unable to attend to court. The court adjourned the hearing to enable the Appellant’s Advocate to appear.  
On 27/12/17, the matter was again adjourned at his request based on the same reasons as that of 18<sup>th</sup> December 2018. On 31/1/2019, he informed the court that his advocate has now prepared his submissions which he then handed in.
22. In view of the above, it is evident that not only was the Appellant aware about his right to legal representation but had actually hired an advocate at some point. From what he reported to the court, his advocate is the one who prepared the submissions.
23. The Appellant hired an Advocate because he knew he was entitled to one.  
To turn around and accuse the trial court of failure to inform him is rather odd. Even if the court was to do so it would have been engaging in purely an academic exercise. I do not think that was the intention



of the constitution. The Appellant's submission in this regard is devoid of sincerity. I am satisfied that the Appellant's right to be informed of his right to an Advocate was not violated.

24. What about his right to a state appointed Advocate? An accused person is entitled to a state appointed advocate if in the court's view, substantial injustice would otherwise be occasioned to the accused (Article 50(2) (h) of the constitution). Whereas the constitution does not define what constitutes substantial injustice, the Legal Aid Act under in section 43 (A) provides as following "In determining whether substantial injustice referenced to in paragraph (1) (b) is likely to occur the court should take into consideration-
- a) The severity of the charge and the sentence
  - b) The complexity of the case
  - c. The capacity of the accused person to defend themselves."
25. Further in the case of Republic vs Karisa Chengo & 2 others( 2017) eKLR the court stated that "in determining whether substantial injustice will result, the court ought to consider in addition to the relevant provisions of the legal aid Act, several other factors which include:
- i. The seriousness of the offence
  - ii. The severity of the sentence
  - iii. The ability of the accused person to pay for his legal representation.
  - iv. Whether the accused is a minor
  - v. The literacy level of the accused
  - vi. The complexity of the charge against the accused"
26. In the case of Charles Maina vs Republic (2018) eKLR the Supreme Court while considering an application for additional evidence touched on the matter of legal representation. The court went on to state that Legal representation is not an inherent right available to an accused person under Article 50 of the constitution and that under section 36 (3) of the legal aid Act no. 6 of 2016, an accused person has to first establish that he was unable to meet the expense of the trial.
27. Thus whereas the right to legal representation under article 50(2) of the constitution is non- derogable , my understanding of the above supreme court decision is that the Appellant must first meet the conditions set out in section 36(3) of the Legal Aid Act.
28. I am bound by the above Supreme Court's decision. The Appellant did not raise the issue of legal representation at the trial court, neither did he first comply with section 36 (3) of the Legal Aid Act. Also based on his own word he had hired an advocate at some point, meaning that he could afford to hire one.

In light of the aforementioned, this ground for appeal fails.

### **The identification parade**

29. There was no identification parade, and an identification parade is not mandatory. Each case must be dealt with based on its circumstances. In this case, the conviction was not based on identification as the complainant clearly told the police that he never saw his attackers. He maintained the same position in court. The issue of a parade was therefore a non- issue in this case.



### **Whether a nexus was established between the Appellant and the offence**

30. In the case of *Arum vs Republic (2006) eKLR* cited by the Respondent to establish the doctrine of recent possession, the prosecution must prove the following:
- a). That the property was stolen from the complainant.
  - b). the property is positively identified by the complainant.
  - c). the property was found with the culprit
  - d). the property was recently stolen from the complainant.
31. The property in this case was the Ksh. 30, 100. According to PW1, the investigations officer, the robbery took place at about 4:00 a.m and at 4:28 a.m., the Complainant's Mpesa Account showed that Ksh. 30, 100 was transferred to the Appellant's phone no. 0728 110 730 . Safaricom records (PExb. 5) show that the no. 0714585255 was registered in the name of the complainant. At 7:10 a.m., the money was reversed back to the complainant's phone. The theft of the money, the owner of the said money and the person who took it, plus the time of theft was all contained in Safaricom records namely the Mpesa statements. I have no doubt that the doctrine was established hence the nexus between the Appellant and the crime.

### **Whether the case was proven beyond reasonable doubt**

32. To constitute an offence of robbery with violence the prosecution must establish the following:
- a). That the offender was armed with a dangerous weapon or instrument or
  - b). the offender was in the company of one or more persons
  - c). At or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any form of violence on any person. (Section 296(2) of the penal code.
33. The prosecution is required to prove only one of the above ingredients. According to PW1 and PW2 the Appellant and his accomplice were armed during the attack. There was medical records showing that the complainant was injured, during the robbery. There was also solid evidence showing that the complainant's funds were transferred to the Appellant's Mpesa account a few minutes after the robbery.
34. The explanation given by the Appellant did not add up. He told the court that his then co-accused, one Charles Mbariku told him he is the one who had sent the money but Mpesa statements spoke for themselves. The money was not sent from Charles Mpesa line but the complainant's. The doctrine of recent possession in respect to the funds stolen from the complainant's Mpesa account was clearly established.
35. Am satisfied that the case against the Appellant was proved beyond reasonable doubt.

### **Whether the sentence was excessive**

36. The Appellant was sentenced to death, being the minimum mandatory sentence under section 296(2) of the penal code.
- It is the Appellant's submission that the imposition of the minimum mandatory sentence was illegal. He based his argument on the Supreme Court decision in *Francis Muruatetu & Anovs Republic (2017) e KLR*



37. However the Supreme Court has since clarified that the findings in the Muruatetu case is only applicable to murder cases. This position has not changed. The penalty of death for the offence of Robbery with violence is mandatory and I have no reason to fault the Trial court in this regard.

This Appeal fails in its entirety. It is hereby dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 18<sup>TH</sup> DAY OF APRIL 2023.

S. Chirchir

Judge

In the presence of:

Susan- Court Assistant

Appellant – present

Ms Muriu for the Respondent.

