



**Gikenyi & another v Republic (Criminal Appeal E058 of 2022)
[2023] KEHC 18779 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18779 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E058 OF 2022
HK CHEMITEI, J
JUNE 14, 2023**

BETWEEN

EDWIN GETANDA GIKENYI 1ST APPELLANT

MICHAEL OGARO OBIYE 2ND APPELLANT

AND

REPUBLIC RESPONDENT

***(BEING AN APPEAL FROM THE JUDGEMENT OF HON. R YATOR (PM)
IN MOLO CMCRC NO. E3042 OF 2021 DATED 30TH AUGUST 2022)***

JUDGMENT

1. The appellants were jointly charged with the offence of Robbery with violence contrary to Section 297(2) of the *Penal code*. The particulars of the offence were that on the 10th day of December 2021 at Shalom area in Rongai sub county within Nakuru county, the appellants jointly attempted to rob Duke Motanya John a motor cycle registration number KMEN XXXF make Bajaj boxer red in colour valued at ksh 50,000 and immediately before or immediately after the time of such robbery used active violence to the said Duke Motanya John.
2. When the matter came up for plea the appellants denied the offence and the respondent called a total of 5 witnesses to prove its case. They were found to have a case to answer and the 1st appellant gave sworn evidence while the 2nd appellant gave unsworn evidence and none called any witnesses. The trial court found them guilty and sentence each to serve 25 years' imprisonment.
3. The appellants have filed this appeal citing several grounds which fundamentally centres around identification, lack of sufficient evidence and the fact that the sentence was excessive in the circumstances.



4. The court directed that the appeal be canvassed by way of written submissions which the parties have complied. Before looking at the same it is necessary to get a snapshot of what the witnesses said.
5. PW1 Sgt Isaac Langat from Shalom patrol base testified that he heard some shouting from the members of the public on 10th December 2021 around 9pm. He rushed to the scene with some of his colleagues and they were told that some people wanted to rob someone of his motorbike.
6. After a while PW2 who was a guard at Springs high school came with a bag containing some assorted items which were later produced as part of the exhibits. The following day he received a call from the said PW2 Daniel Korir who told him that an injured suspect had been found and he was the second appellant. He was escorted to Rongai police station where another suspect had also been apprehended.
7. The witness identified the items before court including a phone of the 2nd appellant.
8. PW2 Daniel Korir testified that he was a security guard at Shalom springs high school and he left his shift at 6pm after handing over to his colleague. Shortly thereafter he heard some screams and he rushed to the scene and he found the complainant injured and his motorbike was down. He told them of what had happened and they decided to patrol the area.
9. When they reached a maize field they met the two persons and a scuffle ensued but they managed to injure them although they escaped. They also recovered a bag which contained assorted items and the same were released to the police. The following morning, they were informed by a villager about an injured man who was found and was a stranger in the area.
10. The witness identified him as the person whom he had encountered the previous night. They informed the police who rearrested him. He said that they heard that another suspect had been arrested and was at the Rongai police station.
11. PW3 Rose Cheptoo Rotich a clinical officer from Rongai health centre produced a p3 form as well as treatment chits of the complainant on behalf of her work mate Lucy Chepkemai who had prepared them. She classified the injuries suffered by the complainant as harm.
12. PW4 Duke Motanya the complainant testified that he was approached by two people who requested that he ferries him using his motorcycle to a place called Shalom. As they approached the place he stopped and one of them decided to go for a call as his colleague pretended to make a call. When they resumed the journey he was hit on the back of the head and he screamed. As they attempted to go away with the motor cycle some youths came to assist him and they fled to the maize field leaving the motorcycle behind.
13. The witness then went to seek treatment and later reported at Salga police station. He was treated at Amua health centre as well. Later he learned that the suspects had been arrested and were at the police station. He went there and was able to identify them. He said that he had identified them during the incident as there was moonlight and with the help of the light from his motor cycle.
14. On cross examination he said that it was the second appellant who approached him while carrying a bag.
15. PW5 PC Dan Maina from Rongai police station carried out the investigation after receiving information from ACC/DO of a person found lying injured on the road. They went and took him to Rongai health centre and he introduced himself. This was the 1st appellant.
16. At the health centre they received information from PW1 concerning another person who was arrested and was almost lynched by the members of the public. The said person was the 2nd appellant who by



that time was as well injured. He told the public that he had been injured by a cow. He was also brought for medication.

17. The complainant at the same time arrived from Salgaa police station and was able to identify the two suspects as the persons whom he had carried the previous evening and had injured him in an attempt to steal his motorcycle. He proceeded to record statements from the witnesses and preferred charges against the appellants. He also produced the exhibits in court.
18. When placed on his defence the 1st appellant denied the charge and he said that on 10th December 2021 he went about his business of selling scrape metals and later went to watch football till 9pm when he went home. That on the way he was attacked by some youths who injured his head and leg and he managed to escape.
19. That he ran into a maize plantation and since he was bleeding he lost strength and he walked for some time without getting any help. He went on to state that since it was almost daytime he boarded a vehicle and sought treatment. He was however unable to get treatment as he was unable to pay and he collapsed at the hospital gate. Later the police came and took him and by then a report of what had happened the previous night had been received by the police.
20. He was accused by the police whom he accused of not carrying their investigations well. He denied that he was identified by the complainants or he was involved in the offence.
21. The 2nd appellant as well denied the offence in his unsworn evidence. He said that he was a welder and on the material day he had gone to get some measurements of a client who was at Shalom area. As he waited for him some people came and asked him whether he was a stranger in the area and his efforts to tell him his mission felt on deaf ears and they began attacking him with all manner of weapons. The police were called and they took him to the station.
22. The appellant was then taken to the hospital where he met his co -appellant undergoing treatment. Both were brought back to the station and accused of stealing the motor bike. He said that the complainant was not able to identify him at the police station.
23. When the matter came up for directions the court directed the same to be heard by way of written submissions. The court has perused both submissions and it does not wish to reproduce the same here. The court has also perused the cited authorities.
24. The court at this appellate level is supposed to analyse afresh the issues in question and come up with an independent finding noting that it did not have the opportunity to see the witnesses and their demeanour unlike the trial court. See *Okeno v Rep* 1972 EA 32
25. Section 2797 (1) and (2) of the [Penal code](#) states as hereunder;

“(1) Any person who assaults any person with intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or to prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.

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



26. These are the ingredients to be satisfied before the court arrives at its decision. Of critical importance is the identification of the perpetrator. The evidence of PW2 is critical in the sense that he was among the persons who confronted the assailants.
27. In his evidence, he graphically explained how they managed with his fellow watchman to fight the two persons and inflicted injuries upon them before they took off. The said incident took place after PW4 had raised an alarm. He went on to state that he was able to identify the persons as there was moonlight.
28. Although the intensity of the moonlight was not explained i doubt whether the time he spent with the assailants he was unable to see them well.
29. Coupled with these, the said assailants were later in the morning arrested in various places within the vicinity of the incident. Both appellants had various injuries and i do not think the respondent's witnesses lied to the court. This position is buttressed by the fact that checking the witnesses, they were each on their frolics and nothing showed any conspiracy against the appellants.
30. The complainant was in my view clear on whom he had carried in his boda boda motorcycle that night. He had sufficient time to check on them and taking the time they took from Salgaa to Shalom, which was about half an hour clearly gave him the advantage of seeing and identifying them.
31. Although the complainant stated that there was an identification parade, which was not there as per the respondent, he was able to pick the appellants at the police station very well. The moonlight again as well as light from his motorcycle were able to aid in his identification.
32. In the premises, I think that this line of submissions which the appellants have made heavy reliance on is not watertight enough to aid their case.
33. The goods recovered from the bag clearly belonged to the assailants. The complainant mentioned the said bag as the one which the appellants carried. Thereafter PW2 recovered the bag not far from where the incident occurred. It therefore belonged to the appellants.
34. I do not find the appellant's sworn and unsworn defence plausible. They may have raised an alibi defence but that did not come during the substantive hearing of the respondent's case. Moreover, the unsworn evidence by the 2nd appellant was not of much probative value as it was not tested on cross examination. In any case they did not call any witness to support their case.
35. On the issue of sentencing, the court is well aware of the discretion accorded to the trial court. The trend however is to take into consideration the degree of aggravation. I note that although the 25 years was reasonable, the appellants were treated as first offenders and the degree of injury of the complainant was found to be harm.
36. Consequently, this court taking cognisance of Section 389 of the [Penal code](#) which states;

“ Any person who attempts to commit a felony or a misdemeanor is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.”
37. I therefore set aside the 25 years' sentence meted against the appellants and sentence them to 7 years' imprisonment from the date herein.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 14TH DAY OF JUNE, 2023.



H. K. CHEMITEL.
JUDGE

