



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Republic (Criminal Appeal 187 of 2015)
[2023] KEHC 19051 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19051 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 187 OF 2015
HK CHEMITEI, J
JUNE 21, 2023**

BETWEEN

MOHAMED MBUGUA KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgement of Hon. L. W. Gicheha (SPM)
dated 4th August 2015 In Nakuru CMCRM Case No. 2414 Of 2013)*

JUDGMENT

1. The appellant and another were charged with three counts of robbery with violence contrary to Section 296(2) of the *Penal code*. The first count was that on the night of 24th and 25th January 2013 at Oraimutia village ,Oraimutia location Oljoroorok division within Nyandarua county jointly with others not before court while armed with offensive weapons namely pangas and iron bars ,axes and knives robbed David Mbogo Nginya of his motor vehicle make Ferosa Daihatsu registration number KAJ xxxS ,red in colour ,gasoline generator ,water pump , a pair of black half boots ,black jacket with grey strip ,a lamp ,a rechargeable torch ,mobile phone kabambe ,mobile phone make Motorola and foodstuffs all valued at kshs 538,950 and immediately after the time of such robbery murdered the said David Mbogo Nginya.
2. The Second count was that on the night of 24th January 2013 at Oraimutia village, Oraimutia location in Oljoroorok division within Nyandarua county jointly with others not before court while armed with offensive weapons namely pangas, iron bars, axes, knives robbed Peter Kamau Kiarie of his cash kshs 11,400, mobile phone make nokia 1208, a black hat, a green torch and bread all valued at kshs 15895 and immediately after the time of such robbery wounded the said Peter Kamau Kiarie.
3. The third count was that on the nights of 24th and 25th January 2013 at Oraimutia village ,Oraimutia location in Oljoroorok division within Nyandarua county jointly with others not before court while



armed with offensive weapons namely pangas ,iron bars ,axes and knives robbed Peter Macharia Mbugua a mobile phone make nokia 1280 serial number not known ,a pair of black leather shoes and a cap all valued at kshs 2400 and immediately before the time of such robbery wounded the said Peter Macharia Mbugua.

4. The alternative charge in respect to the appellant alone was Handling stolen property contrary to section 322 (2) of the penal code. The particulars were that on the 12th day of February 2013 at Kiamaina estate Maina location within Laikipia county otherwise than in the course of stealing dishonestly retained a pair of black half boot and a black jacket with a grey strip both valued at kshs 7300 the property of the deceased David Mbogo Nginya having reasons to believe them to be stolen goods.
5. The alternative charge against the appellant and his co accused was also handling stolen property contrary to Section 322(2) of the penal code. The particulars of the charge were that on the 12th day of February 2013 at Kiamaina estate, Maina location within Laikipia county otherwise in the course of stealing dishonestly retained a green torch valued at kshs 150 the property of Peter Kamau Kiarie having reasons to believe it to be stolen good.
6. The appellant and his co accused denied the charges when the matter came up for plea. The prosecution called a total of 14 witnesses to establish the charges against them. They were both found guilty and sentence to suffer death in all the three counts.
7. The appellant was dissatisfied with the trials courts judgement and has appealed against both conviction and sentence. In his amended grounds of appeal, he has stated that the case was not proved beyond reasonable doubt against him as the elements of robbery with violence were not proved; his arrest was suspect and the trial court shifted the burden of prove to him.
8. Before delving into the merits or otherwise of the appeal it is necessary to summarise the evidence as presented during trial.
9. PW1 Peter Kamau Kiarie testified that he was walking to his home on the 24th January 2013 around 8pm when he was accosted by six people who were armed with crude weapons namely pangas and axes. He flashed his torch to them and he was hit on the head. The said persons proceeded to steal the cash he had as well as his mobile phone and the iron rod. They then tied him inside the forest and left. He later managed to free himself.
10. He went to the Gachugu dispensary where he was treated and later reported the matter at the police station where he was issued with a p3 form.
11. He went on to state that he was able to identify one of the assailants as the cap he was wearing felt down. The person he was able to identify was the appellant.
12. On cross examination by the appellant he maintained that he was able to see him well and that he was bald headed.
13. PW2 Margaret Nyambura Ngigi was the wife of the deceased. She said that she was in Nairobi and she received the news from his brother in the morning of 25th January 2013. She was able to identify the assorted items belonging to her husband including the motor vehicle.
14. PW3 Wilson Mbaire Mologo testified that he received a call in the morning from one George Kimani about the incident. He went to the deceased house and saw how the house was in disarray. He was also able to identify the weapons used by the assailants and the deceased body which had been tied with ropes and the mouth covered with a cloth.



15. PW4 George Kimani was also among those who went to the scene and saw the deceased's body and the state it was in. He also saw the crude weapons used by the robbers.
16. PW5 PC Edivane Esango who was a crime scene personnel took several photographs of the scene and he did produce them in court as exhibits.
17. PW6 Duncan Bernard Nyinyi was also one of the persons who went to the scene after the incident. He said that by the time he arrived there the police were already present and he saw the crude weapons as well as the deceased body and the injuries he had been inflicted.
18. PW7 James Migwi is a clinical officer from Kariuki dispensary who examined and treated Peter Kamau Kiarie and filled the p3 form. He identified the injuries and concluded the same as harm and the probable type of weapon used as a sharp object. He produced the p3 form as an exhibit.
19. PW8 Peter Macharia testified that he had been employed by the deceased as a herder and a gardener. He said that he was awoken by noise from the door which had been broken by use of a stone. The assailants whom he did not recognise demanded money but he did not have. They took his mobile phone and tied him after hitting his head.
20. The assailants also covered him with a blanket and warned him not to raise any alarm. In the morning around 6.40 am one Karani came and called him and he untied him. They went to see the house of his employer whom they found dead and tied with some rope and his mouth covered and was lying on the floor. He said that he was unable to identify the assailants.
21. PW9 SGT Marobi Brundi from crime section Oljoroorok police station was on duty that day when he got information and went to the scene. He interrogated Peter Macharia the deceased employee and went to the deceased house where he witnessed the whole scene including the state of the deceased body. He also went to where the deceased car was and the crime scene officers took photos of the area. The body was later moved to the mortuary where post-mortem was undertaken.
22. He said that when he went back to the police station he found pw1 who had been attacked by a group of six people. He issued him with a p3 form and he concluded that the two cases were related.
23. PW10 APC James Maina Nganga was informed by an informer about the whereabouts of some suspects to the incident. They went to his house at 4am and arrested him. This was the appellants co accused. They were able to recover assorted items which were later identified by some of the witness.
24. PW 11 IP David Langati was among the police officers who went to the scene that morning. He testified of what he saw including the state of the deceased body. He said that the body was later taken to Nyahururu district hospital mortuary.
25. PW12 Dr. Pauline Wabu Mukuria performed post mortem exercise on the deceased body and concluded that the cause of death was suffocation and blunt trauma to the head.
26. PW13 Julius Mutich Gathua attached to CID headquarters Nairobi and a finger print expert carried out an analysis of the appellant's fingerprints which had been submitted to him. The finger prints did not match those of the appellant.
27. PW14 CPL Benedict Mwanza was the investigating officer. He gave a chronology of the events including visiting the scene and recording evidence from the witnesses. He explained how the appellants co accused was arrested and assorted items recovered from his house which included the deceased items as well as pw1.



28. He said that during the investigation the co accused mentioned the appellant herein and they also went to arrest him after missing to arrest him the first time. They were able to recover the black boots and a jacket which were identified by the deceased wife as belonging to her late husband. Pw1 was also able to identify the torch and the twisted iron bar.
29. When placed on his defence the appellant gave unsworn evidence denying the charges. He said that on 12.2.2013 he had gone to plough his land and was heading to Nyahururu when he was arrested by some person posing as a police officer and taken to Maili nne police station. Other persons were as well arrested and booked at the cells. He was also told to sign some forms which he did and the finger prints were taken. He was later arraigned in court for an offence which he did not know.
30. The court directed the parties to file written submissions which they have complied.
31. The appellant basically submitted that the identification was not conclusive since none of the witnesses had ever seen him before. He also dwelt on his arrest which he submitted that the same had nothing to do with the incident at hand. He said that the finger prints expert was not able to find any evidence leading him to the offences.
32. He submitted that the respondent could not prove that the items recovered from him belonged to the deceased. He therefore prayed that his appeal be allowed.
33. The learned state counsel in his submission supported the findings of the trial court and asked that the appeal be dismissed. He said that all the ingredients of the offences had been established.

Analysis and determination.

34. At this juncture this court is expected to analyse the evidence afresh and come up with an independent conclusion noting that it did not have the luxury of conducting the trial and therefore seeing the witnesses like the trial court. See *Okeno v. Republic* 1972 E A 32.
35. The ingredients of the offence herein are clearly spelt out under section 296(2) of the [penal code](#). The same states as hereunder;
 - (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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”
36. In this case the evidence that led to the arrest of the appellant was basically that of pw1 as well as pw10. The rest of the witnesses generally testified on how the scene was that morning among others. There was no direct evidence from them linking the appellant.
37. Pw1 stated in his evidence in chief;

“...when i pushed one down his cap fell and i flashed my torch and saw him when they were tying me he asked me if i could see him. I can identify one of them. First accused identified in the dock. This is the one i pushed down. He is kind of bald. “
38. When cross examined by the appellant he said that he saw him very well when the cap felt. The court noted that the appellant was bald headed. He also went ahead to respond that when he flashed the torch he saw the appellant with an axe.



39. As was clearly stated in the celebrated case of *Roria v. Republic* (1967) E A 583 such evidence of identification must be taken with great care and caution as there could be mistaken identity and more particularly from a single witness.
40. It appears in this case that when pw1 was accosted there was no effort by the six assailants to cover their identity save the use of a cap. The cap according to the pw1 felt down when the appellant and others were tying him. Even before this at the initial stage the witness was able to see that the appellant was the one carrying an axe. He was able to recognise that he was bald headed a fact which the court was able as well to see.
41. Taking the totality of the above i find that in the absence of any effort by the assailants to hide their identity the witness was able to pick the appellant when he was being attacked and with the aid of the light from his torch.
42. As regards the evidence of pw1 the items recovered included pw1 torch which was recovered from the appellant's house and which he identified in court. The jacket and the shoes were also identified by the deceased wife.
43. Clearly the said items were recently stolen from the victims and were found in the appellant's house. The appellant's defence essentially did not allude to this although it was not of much probative value as it was unsworn.
44. The appellant has submitted that there was no prove that the recovered items belonged to the deceased and pw1. I do not think that this line of submission waters down much the respondents case. Pw1 in particular was able to explain himself how he used the said torch to identify the assailants that night. The said torch was recovered in the appellant's house.
45. At any rate he signed the inventory willingly and he never made much resistance when the same was alluded to by the investigating officer.
46. Secondly the jacket and the half boots which belonged to the deceased were identified by his wife. The same had recently been stolen from her late husband. I think in all fairness it is easy to conclude that it was for the appellant to explain how he came into possession of the recently stolen items.
47. This is a case that heavily relied on circumstantial evidence especially in regard to how the deceased met his death. The assailants were able to gain access to his house by using heavy stones. The same applied to the house of his worker. They managed to access and killed him heinously. The metal rod that was taken from pw1 was found again used against the deceased. The two offences and incidences although done in two different locations on the same night were closely related.
48. In the premises, the appeal is not meritorious and the same is hereby dismissed. The appellant and his accomplices clearly terrorised the area that night which culminated into the unfortunate death of the deceased and injury to two other persons.
49. As regards the sentencing, the trial court properly applied its mind as that was and is still the only sentence available. In line however with the recent trend after *Muruatetu case* by the Supreme court of Kenya, and other case laws flowing therefrom it is imperative that there is a definite period of the sentence meted out against an accused person.
50. The above reasoning is due to the fact that death sentence is no longer exercised in this country despite being in our statutes. Most of such sentences are now commuted to life imprisonment.



51. In the premises, the death sentence imposed against the appellant is hereby set aside and substituted with a custodial sentence of 30 years from the date of the trial courts judgement.
52. The appeal is otherwise dismissed.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 21ST DAY OF JUNE 2023.

H. K. CHEMITEI

JUDGE

