



**Lenkishili v Republic (Criminal Appeal E010 of 2021)
[2023] KEHC 18456 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18456 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E010 OF 2021
AK NDUNG’U, J
JUNE 14, 2023**

BETWEEN

SAIYON LENKISHILI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from Original Conviction and Sentence dated 30/08/2018
in Maralal PM Criminal Case No 485 of 2017– R K Koech, PM)*

JUDGMENT

1. The Appellant in this appeal, Saiyon Lenkishili was convicted after trial of robbery with violence contrary to Section 296(2) of the *Penal Code*. On August 30, 2018, he was sentenced to life imprisonment. The particulars of the charge were that on June 12, 2017 at Ngare Narok area, in Samburu Central Sub-County within Samburu County jointly with others not before court, stole from Manila Loloju a motor cycle registration KMEA 536E make Tiger valued at Kshs 105,000/- property of Araman Loloju and at the time of such robbery, killed the said Manila Loloju.
2. The Appellant was dissatisfied with the conviction and the sentence hence his appeal to this court against both. The appellant filed his appeal in person. The memorandum of appeal filed challenges the conviction and the sentence on the following grounds;
 - i. That the trial magistrate convicted the Appellant notwithstanding that the prosecution failed to prove the case beyond reasonable doubt.
 - ii. That he was convicted notwithstanding the fact that crucial witnesses were not availed.
 - iii. The trial court convicted the Appellant on evidence that was riddled with contradictions, inconsistencies and fabricated evidence that resulted in a selective judgement.
 - iv. That the Appellant’s defence was not given due consideration.



- v. That the Appellant was convicted notwithstanding that identification parade was not carried out as law requires.
 - vi. That the charge sheet was defective.
 - vii. The trial court convicted the Appellant not considering that the vital ingredients of the offence were not proved as stipulated by law.
3. The appeal was canvassed by way of written submissions. Briefly, the Appellant submitted that the prosecution failed to produce Safaricom data to show that PW2 had contacted the Appellant and that the number alleged that he gave PW2 belonged to him. That vital witnesses were not called to testify and that his request for finger prints to be taken to verify whether he had taken out an Identification card was not headed to. He further submitted that his defence was rendered as an afterthought by the trial court and that section 78 of the Evidence Act was not complied with since the Investigating Officer was the one who produced the pictures instead of a crime scene personnel. The pictures produced were not accompanied by a certificate.
 4. The Appellant further submitted that the report by the government chemist was produced by the investigating officer contrary to section 144 of Criminal Procedure Code and Section 84 of the Evidence Act. That identification parade was not conducted hence dock identification was worthless and that there were contradictions on dates that was not given due considerations by the trial court.
 5. Learned counsel for the Respondent supported the conviction. It is submitted that the appeal is bad in law for being time barred and should therefore be struck out since the appeal was filed without the leave of this court. On the submissions by the Appellant, counsel submitted that the charge sheet provided the information that reasonably allowed the Appellant to understand the charges facing him, hence no objection can be sustained as to the appropriateness of the charge. Furthermore, the Appellant ought to have raised the issue of defective charge during trial but he failed to do so.
 6. It is further submitted that the prosecution case was proved beyond reasonable doubt since it is the Appellant who led the police to the recovery of the stolen motor cycle and that it was his relatives who had reported him to the police after seeing him with the stolen motor cycle. That there was no need of identification parade since the Appellant took the police to the petrol station where he was identified by PW2 as the person who had left the motor cycle there. Counsel urges that contradictions on dates were immaterial and that the witnesses who testified sufficiently brought out the elements of the charge. On the Appellant's defence, it is submitted that the Appellant did not explain where he was on June 12, 2017.
 7. That is the summary of submissions filed by the respective parties herein. This being the first appellate court, my duty is to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
 8. In deference to this legal duty, I have painstakingly perused and considered the evidence tendered at the trial court. I have borne in mind however, that I neither saw nor heard the witnesses testify and I have given due allowance for that fact. I have had due regard to the submissions made, case law cited and the applicable law.
 9. The Respondent's counsel took a preliminary point of law to oppose the appeal on the ground that the appeal was filed out of time without leave of this court hence, the same is bad in law and should be struck out.



10. I have perused the court file and noted that an order was given by Waweru (J) dated March 16, 2021 allowing the Appellant to file the appeal out of time. It seems that the Appellant had filed a miscellaneous application number E009 of 2021 though the same is not in this appeal file.
11. Another preliminary issue is that the Appellant had alluded in his grounds of appeal that the charge sheet was defective but he did not submit on this ground. I have also carefully examined the charge sheet and I have not noted any irregularity in the same.
12. Moving on, having considered the grounds of appeal, submissions thereon and evidence adduced before the trial court, it is my opinion that the paramount issue for determination is whether the prosecution proved the offence of the robbery with violence against the Appellant beyond any reasonable doubt.
13. The case before the trial court was that a boy rushed to PW1 who was at her home and informed her that he had seen a human body lying in a river. She followed the boy to where the body was and she peeped and saw that blood was oozing from the head. She reported to the chief.
14. PW2 Wesley Kipkurui Ngetich was a security officer at view point Kobil Petrol Station in Nyandarua. He testified that on June 15, 2017 he was at work at 3:00 am. The Appellant stopped at the petrol station in need of fuel but the petrol station was closed. The Appellant was in a hurry and he wanted to leave his motor cycle there to collect it on the following day at 11:00am. He testified that he inspected the motor cycle registration number KMEA 536E and other items that the Appellant left. The Appellant also showed him his identity card but he did not take the details. He also gave him his phone number which was 074016xxxx.
15. He testified that the Appellant did not show up at 11:00am as promised. He tried calling him twice in the day but the calls were not answered. He saw the Appellant on June 17, 2017 when he was taken to his place of work accompanied by police officers. He was asked whether he knew the Appellant and he answered in the affirmative. He was also asked whether the Appellant left anything and he showed the police the motor cycle which the police took.
16. He testified that there are security lights at his place of work and he spoke to the Appellant on the material time face to face. He testified that the Appellant had not shaved, he had dreadlocks. He identified the motor cycle and other items that the Appellant left in court. He testified that he recalls seeing the name Joshua in the Appellant's ID card.
17. On cross examination, he testified that he saw the appellant very well since he stayed with him for about one hour. He did not have a special mark but he marked his face very well. That he had an ID card and the picture on the ID matched the Appellant's features. He did not see the name Joshua in the ID card. That he saved the Appellant's mobile number as Joshua when he realized that he had not saved the Appellant's number.
18. PW3, Chaplain Loloju was the deceased's brother. He testified that the deceased left home on June 12, 2017 to Kisima. He was a boda boda rider. He did not return and on 13/6/2017, he went to Kisima to look for him and on June 14, 2017, he received information that somebody had been killed at Nkare Narok. He went to the scene where he found the Deceased's shoes and jacket. He was thereafter shown the body of the deceased in the mortuary which he identified.
19. PW4, Araman Loloju was the owner of the motor cycle. He testified that the deceased was his nephew and that he had given the deceased the motor cycle to operate as a boda boda rider. He produced ownership documents as Pexhibit 6(a) and (b). PW5 PC Stephen Sachita produced the motor cycle as Pexhibit 1.



20. PW6, Sergeant Soita visited the scene and took the body of the Deceased to the mortuary.
21. PW7, the chief testified that he was contacted and was informed that a herder had found a body in a valley. He reported the matter to the police and they proceeded to the scene and the body was loaded to the police lorry.
22. PW8 PC Ronald Lesecketeti, the arresting officer testified that he was contacted by his friend Mike on June 14, 2017 that someone had been killed at Suguta Marmar and he was seeking help in arresting the suspect who was believed to be in Kayole. Accompanied by his two colleagues, he met Mike and his two cousins and they proceeded to a house where the Appellant was believed to be staying. They did not find him but the next morning they surrounded the plot but those who were inside refused to open. They jumped over the wall and arrested the Appellant who was hiding under the bed and he was identified by the cousins of the reporter. He arrested the Appellant and the OCS Suguta Marmar contacted him and confirmed that they were looking for the Appellant.
23. He testified on cross examination that he did not record the conversation between him and the Appellant confessing to have committed the offence. That the Appellant was seen in Matopeni Kayole accompanied by his wife and that he did not recover any weapon from him.
24. PW9, was the medical officer who conducted the post-mortem on the body of the Deceased and his findings were that the cause of death was cardio pulmonary arrest secondary to severe head injury.
25. PW10 PC Kennedy Otieno was the investigating officer. He took over the matter from the previous investigating officer, PW5. He testified that he was in the area when the offence was committed and that he even visited the scene. He testified that the Appellant who lives in Nairobi had visited home briefly. While at home, the Appellant was seen with the Deceased's motor cycle at his manyatta near Lemisigiyo primary school and which was near the scene where the Deceased's body was recovered. That the Appellant's family suspected that he was involved since they had seen the Appellant with the Deceased's motor cycle. He left for Nairobi riding the said motor cycle and upon reaching View Point Kobil Petrol Station at Naivasha, he left the motor cycle there with PW2. He testified that a message on Deceased's death and the Appellant's involvement was relayed from his home to his relatives in Nairobi. The relatives and the police searched for the Appellant and he was arrested. He was interrogated and he cooperated with the police. He led the police to Kobil View Point Petrol Station where he had left the motor cycle where they found the watchman who confirmed that the Appellant had left the motor cycle there.
26. On cross examination, he testified that that Appellant was seen by his relatives riding the motor cycle on the 12/6/2017 and June 13, 2017 who informed his other relatives residing in Nairobi. He testified that some witness feared to testify but they helped the police to have the Appellant arrested. That some children who had seen the Appellant did not testify for security reasons. That he took the police to the petrol station where the motor cycle was recovered. He testified that the motor cycle would not have been found if the Appellant had not disclosed where it was. That he led the police to where the motor cycle was held and the watchman identified him hence, identification parade was not necessary in the circumstances.
27. The Appellant in his unsworn defence testified that on June 15, 2017, he was at work on a night shift and he left in the morning and proceeded to his house. He slept until 9:00am when he heard a knock on his gate. While proceeding to open the gate, someone jumped over the fence and snatched the gate keys from him. That person opened the gate and four persons entered and they started assaulting him until he lost consciousness. He found himself at Obama police post. He inquired why he was arrested but he was not informed of the reasons for his arrest. He was thereafter taken to Maralal police station where



he was informed that he should ask Mike Lenkishili, his uncle why he was arrested. He was thereafter charged with charges which he knew nothing about.

28. He stated that, in his evidence, PW2 testified that the person who took the motor cycle to the petrol station had dreadlocks yet he did not have dreadlocks. PW2 further stated that the person had an ID card yet he did not have an ID and was planning to apply for one. He produced his birth certificate as D exhibit 1. That it was his uncle Mike who caused his arrest since Mike wanted to grab the Appellant's deceased father property. That his mother visited him in prison and informed him that Mike had visited her claiming that he could take what he wanted.
29. That was the totality of the evidence before the trial court.
30. The Appellant was charged under Section 296(2) of the Penal Code which provides as follows;

"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."
31. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of Oluoch -vs- Republic [1985] KLR where it was held:

"Robbery with violence is committed in any of the following circumstances:

 - a. The offender is armed with any dangerous and offensive weapon or instrument; or
 - b. The offender is in company with one or more person or persons; or
 - c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person
 32. The use of the word or in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. The prosecution's duty was therefore to establish any of the above ingredients and to show the court that the Appellant robbed the deceased.
 33. It is in evidence that the body of the deceased was discovered in a valley. PW1 confirmed seeing a body with blood oozing from the head. PW3 and PW4 identified the deceased's body. PW8, the medical doctor conducted the post-mortem and his findings were that the cause of death was cardio pulmonary arrest secondary to severe head injury.
 34. The evidence before the trial court also reveals that the Deceased was a motor cyclist popularly known as boda boda operator. PW3 told the court that the Deceased was operating along Kisima-Maralal road. PW4 was the owner of the motor cycle, P exhibit 1 and he produced the sale agreement and the receipt as P exhibit 6(a) and (b). He testified that he had employed the deceased who was his nephew as the rider of the subject motor cycle.
 35. At the time the deceased's body was recovered, the motor cycle was not recovered. The motor cycle was recovered on June 17, 2017. PW10 the investigating officer testified that the Appellant led the police officers to Kobil View Point Petrol Station where the motor cycle was recovered. This was confirmed by PW2. PW2 told the trial court that on the night of June 15, 2017, the Appellant left the motor cycle at the petrol station and he informed PW2 that he was to collect it the next day. He did not collect it as



promised and he saw the Appellant on June 17, 2017 accompanied by the police. He was asked by the police whether the Appellant had left anything and he showed the police the motor cycle. The motor cycle was taken by the police.

36. A keen analysis of the evidence reveals the following salient features;
- a. The Appellant was not placed at the scene of crime by way of direct evidence.
 - b. The Appellant led the police to the recovery of the stolen Motor cycle soon after the subject robbery.
 - c. The Appellant did not give a plausible explanation as to his possession of the motor cycle.
 - d. His alleged alibi cannot possibly be true in light of his unexplained knowledge of where the motor cycle was and in view of the confirmation by PW2 that it is the Appellant who took the same to the petrol station.
 - e. In the circumstances, the doctrine of recent possession comes into play.

37. The Court of Appeal summarised the essential elements of the doctrine of recent possession in [*Eric Otieno Arum v Republic*](#) KSM CA Criminal Appeal No 85 of 2005 [2006]eKLR, where the court stated as follows:

“In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other”.

38. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be a plausible (see [*Malingi v Republic*](#) [1988] KLR 225. In [*Paul Mwita Robi v Republic*](#) KSM Criminal Appeal No 200 of 2008, the Court of Appeal observed that;

“Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden”.

39. Did the Appellant discharge this duty in our instant case? The evidence on record points directly to his involvement. What led to his arrest was that he was seen with the stolen motor cycle by his family members. When his family members heard about the robbery, they suspected that the Appellant was involved since they had seen him with the motor cycle. His family members contacted their relatives in Nairobi who led the police to his arrest. Upon his arrest, the Appellant led the police to the recovery of the stolen motor cycle. PW2 also identified the Appellant as the person who had left the motor cycle at the petrol station. He testified that he was asked by the police whether the Appellant had left anything and he showed the police the motor cycle. This was on June 17, 2017 just a day after the Appellant had left the motor cycle.



40. The Appellant gave no explanation as to how he came to be in possession of the motor cycle which had been stolen from the Deceased. Under section 4 of the [Penal Code](#) possession is defined as follows:
- “(a) “be in possession of” or “have in possession” includes not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use of benefit of oneself or of any other person.”
41. In view of the foregoing, there can be no doubt that the Appellant was in possession of the motor cycle stolen from the Deceased during the robbery on June 12, 2017 as he gave no explanation as to how he came to be in possession of the said motor cycle. The ingredients of the offence of robbery with violence are proved as the victim was fatally wounded during the commission of the offence.
42. The Appellant argued in his submissions that identification parade was not carried out. My finding based on the evidence is that an identification parade was not necessary and indeed would have served no purpose, the Appellant having led to the recovery of the motor cycle and there being no evidence of an eye witness at the time of the commission of the offence.
43. Upon my own evaluation and consideration of the recorded evidence, I am satisfied that the conviction of the Appellant was based on sound and reliable evidence.
44. In his submissions, the Appellant argued that crucial witnesses were not called to testify being the boy who informed PW1 about the body and his relatives who are alleged to have helped the police. From the record, it is clear that it is the Appellant’s relatives who led to the arrest of the Appellant. None of the said relatives testified. PW10 told the trial court that some witnesses refused to come forward to testify but they helped the police in arresting the Appellant. He further testified that some children who had seen the Appellant could not be called as witnesses due to security reasons.
45. It is trite law that the prosecution is not bound to call numerous witnesses to prove a fact. This is in line with section 143 of the [Evidence Act](#) which provides that;
- “In the absence of a provision of the law, no particular number of witnesses is required to prove a fact.”
46. In [Bukenya And Others V Uganda](#) [1972] EA 349 it was held that;
- “While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that the evidence of those witnesses, if called, would have been or would have tended to be adverse to the prosecution case.”
47. There is no requirement that the prosecution has to call a number of witnesses to prove a fact. But, if he fails to call crucial witnesses, an inference can be made that their evidence would have been in adverse to their case. However, as per the above case, the inference can only be made where the evidence is barely adequate. In the instant case, the evidence tendered by the prosecution was sufficient to prove the charge.
48. Another issue raised by the Appellant was on contradictions. He submitted that PW10 testified that the Appellant went to Nairobi on June 15, 2017 whereas PW8 testified that the Appellant was spotted



in Kayole on June 14, 2017 and he arrested the Appellant. That PW2 testified that the motor cycle was left at his place of work on June 15, 2017.

49. When it comes to contradictions, it is trite law as set out in numerous authorities that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case. (See *Erick Onyango Ondeng v Republic* [2014] eKLR, the Court of Appeal cited *Twebangane Alfred v Uganda*, (Crim App No 139 of 2001, [2003] UGCA, 6,).
50. Taking the whole evidence into consideration, it is my finding that the discrepancy on the dates cited by the Appellant did not affect the main substance of the prosecution's case. The Appellant himself confirmed in his testimony that he was arrested on June 15, 2017.
51. The Appellant complained that his defence was not considered. As seen earlier, the Appellant gave unsworn testimony. He testified that he was at work on the night of June 14, 2017 and on June 15, 2017, he was arrested while at his house. He did not however state where he was on the 12th to 13th June of 2017. He also alluded that he was framed by his uncle Mike due to a land dispute since Mike wanted to take the Appellant's Deceased father's property. The trial magistrate considered this line of defence and termed as a sham in the face of overwhelming evidence and my evaluation of the evidence confirms as much.
52. His defence was properly considered by the trial court and properly rejected. The evidence on record was overwhelming weighed against the Appellant's defence.
53. In conclusion, the Appellant's appeal is devoid of merit and is dismissed.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 14TH DAY OF JUNE 2023

A. K. NDUNG'U

JUDGE

