



REPUBLIC OF KENYA



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**Shikutwa v Republic (Criminal Appeal 116 of 2019)  
[2023] KEHC 17970 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 17970 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL APPEAL 116 OF 2019  
WM MUSYOKA, J  
JUNE 2, 2023**

**BETWEEN**

**JOSEPHAT KIPTOO SHIKUTWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from judgment and decree of Hon. ML Nabibya, Principal  
Magistrate, in Hamisi SRMCCRC No. 1100 of 2018, of 5th November 2019)*

**JUDGMENT**

1. The appellant, Josephat Kiptoo Shikutwa, had been charged before the primary court, of the offence of robbery with violence, contrary to section 295, as read with 296(2) of the *Penal Code*, Cap 63, Laws of Kenya. The particulars of the charge were that on April 21, 2018, at 19.30 hours, at Imara Supermarket in Chavakali township, within Chavakali Location, Sabatia Sub-County within Vihiga County, with others not before court, while armed with a dangerous weapon, an AK47 rifle, he robbed the said supermarket of an unknown amount of money, and immediately after such time of robbery killed Bruce Lumwamu. The appellant denied the charges, on 28<sup>th</sup> August 2018, and a trial ensued, where 7 witnesses testified.
2. PW1, Getrude Mwekeni, was an employee of Imara Supermarket, at Chavakali, where she was a cashier. She was on duty, at the counter, on April 21, 2018, when, at around 7.20 PM, she heard a gunshot sound, and a male voice ordering everyone to lie down. She was frightened, and she just found herself outside. The witness was stood down during examination-in-chief, and was never recalled to complete her testimony.
3. PW2, Dr. Collins Masika, did postmortem on the body of the deceased, Bruce Lumwago, on 22<sup>nd</sup> April 2018. He noted a gunshot injury entry point, under the right armpit region, and exited at the left armpit. The body also had bruises on the chest. Internally, the respiratory system showed collapsed



lungs, blood in the chest cavity, the aorta was ruptured, there was a wound on the left aorta and blood in the intra-cardia cavity. He opined that cause of death was the bleeding into the chest cavity, and collapsed lungs, due to gunshot trauma.

4. PW3, Redempta Mmboga, was an attendant at the Imara Supermarket. She was on duty at the material time, when a man in black jacket came in and went around. She followed him. He went out through the back door. She heard 2 gunshot sounds. She ran and hid in a store, where she remained until she was rescued. She learnt that the deceased had been killed. Some money was taken from the counter and the MPesa. She said that she did not recognize the man in the jacket, and she did not see the others. She saw the CCTV images, but she was not able to identify anyone from them. She stated that she did not know the accused persons.
5. PW4, Alfred Mbalani Kahi, was a ballistics expert. He had examined 6 spent cartridges. He established that they were of calibre 7.62x39mm. He also established that the firearm that fired them had been used in other incidents. He identified the firearm as an AK47 assault rifle serial number UG88472000. He stated that the 6 cartridges were from the same firearm. He said that the firearm was not examined, as it was an exhibit in another case. He said that the said firearm, was, however, within the laboratory, and the report was updated to indicate that the firearm, brought in at a later stage, was the one that fired the spent cartridges.
6. PW5, Police Constable, Moses Biwott, Number 883212, attached to the office of directorate of criminal investigations at Hamisi, was the arresting officer. He stated that he had recovered a firearm from the appellant, serial number UG 88472000/UG8847. He stated that when it was subjected to ballistics, it was established to have had been linked to another incident at Chavakali. He informed his colleagues, who picked the suspects, for investigation, with respect to the robbery with violence case. He produced the firearm, and the report. He stated that he arrested the appellant at his home, in the presence of his wife and parents. He arrested all of them, for they knew about the firearm, but had not reported. The firearm was retrieved from the ceiling.
7. PW6, No. 235242 Chief Inspector of Police Beneutychus Wanjohi, was a forensic expert on imaging. He examined CCTV footage, with a view to preview the footage, capture the pictures, process them and certify them for production in court. he captured 5 photographs, and certified them. The first photograph showed a man in a leather jacket, who was seen with another, as they ransacked a counter. Dust was shown near the counter, and it was interpreted as where a bullet hit a wall. He said that he did not link any of the accused persons to the photographs. He said that properties of the DVR, the storage of the CCTV footage, could not be edited. He said he could not identify the accused persons from the footage.
8. PW7, Police Corporal Daniel Chepkwony, Number 61065, was the investigating officer. He was given 6 spent cartridges collected at the scene. He visited the scene, and asked for the CCTV footage. He forwarded the 6 cartridges and the CCTV footage to Nairobi for forensics. He was informed that the firearm which emitted the 6 spent cartridges had been used in another incident at Musasa, and in 20 other cases. He was informed that suspects had been arrested at Eldoret, and had been transferred to Serem Police Station. He went to Serem Police Station, and took fingerprints, and photographs of the suspects. He said that the firearm was recovered by officers from Serem. He later charged the suspects. He stated that the spent cartridges linked the suspects to the crime. He said that the accused were not identified from the CCTV footage. He said that he charged them only on account of the firearm recovered from them. He said that the firearm was recovered at Eldoret, but he was not party to the recovery. He said that the Musasa case linked the accused to the robbery.



9. The appellant was put on his defence, vide a ruling that was delivered on August 14, 2019. He made a sworn statement, on September 19, 2019. He denied the charges. He said that he was arrested on August 19, 2018, on way from church. He said that he had other cases at Hamisi.
10. In its judgment, the trial court found the appellant guilty of robbery with violence, on the basis that he was found in possession of the firearm, which had been used to discharge the 6 cartridges recovered at the scene of the robbery.
11. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that the trial court presided over a trial without proper quorum; the court erred in finding that there was a nexus despite flimsy and inadequate evidence; the defence was rejected without proper evaluation; it was not proved that the exhibit relied upon was used in the alleged crime; and the evidence was uncorroborated and inconsistent.
12. I mentioned the matter on June 28, 2022, when it transpired that the appellant had filed written submissions. The submissions were not highlighted. The respondent did not file submissions. The appellant filed amended grounds of appeal, attached to his written submissions, around the issues of the charges being defective, trial not being in accordance with Article 50 of the *Constitution*, the exhibit produced in court not support the evidence on record, and the case was not proved beyond reasonable doubt.
13. In his written submissions, the appellant argues 2 grounds, after merging several of his grounds of appeal.
14. The first ground turns on the constitutional right to a fair trial, specifically that relating to being afforded adequate time to prepare defence. The appellant submits that he faced 3 charges of robbery with violence in 3 different cases, being numbers 1092/18, 1100/18 and 1101/18. He submits that the same were tried in the same court and by the same magistrate, and were scheduled for hearing on the same day. He protests that he was not given enough time to prepare his defence. He submits that, in the case the subject of the instant appeal, it was alleged that he had possession of an AK47 No. UG/88472000/UG8847, which was also the subject of proceedings in another case.
15. With respect to this ground, I will start by saying that those other files are not before me, and I cannot verify the correctness of the allegations made by the appellant. In any case, there is nothing wrong with the same court or the same magistrate handling several criminal cases relating to one accused person. Judicial officers are trained in law, and they determine disputes before them based on the law and facts. The appellant has not demonstrated that he was prejudiced by the 3 cases being tried in the same court and by the same magistrate. Secondly, he has not demonstrated that the same was in violation of the *Constitution*, and he has not pinpointed the particular provisions of the *Constitution* that were allegedly violated. On not being afforded time to prepare his defence, I note, from the record, that he was represented by 2 Advocates, Mr. Didi and Mr. Wekesa, who attended court and participated fully in the trial and proceedings. At no time did Mr. Didi and Mr. Wekesa raise issue that the defence was not given time to prepare for trial. I am not persuaded that anything turns on this ground.
16. The second ground is on the ballistics evidence. The firearms referred to by PW4, Alfred Mbalani Kahi, PW5, Moses Biwott, and PW6, Daniel Chepkwony, all bear the same serial number, and I do not see how the 3 witnesses could not be referring to the same firearm. Secondly, there would be nothing wrong with it being alleged that the same firearm was used in other incidents of robbery, the subject of other prosecutions.
17. I have read carefully through the record. The appellant was convicted, in this case, on the basis that he was found in possession of a firearm, that was claimed to have been used to fire or discharge the ballistics



material that PW4, Alfred Mbalani Kahi, testified on and produced. PW4 only conducted forensics on 6 items: spent cartridges. He did not conduct any forensics or examination on the firearm that was alleged to have been used to fire or discharge those materials. He, therefore, did not provide evidence that connected the firearm, allegedly found in the possession of the appellant, and the spent cartridges and used bullet that he examined. The person who testified on the firearm was PW5, Moses Biwott. He said that he arrested the appellant and recovered the firearm from him. He was not a ballistics expert, but the arresting officer. He did not conduct any forensics on the firearm in question. He only came to court to say that he recovered the firearm from the appellant. He did not lead any evidence that linked the firearm recovered from the appellant with the materials that PW4 testified on. He allegedly produced the said firearm, and the forensic report on it, but I have not seen a report on record relating to that firearm. A report ought to have been produced, identifying it as a functional firearm, of a given calibre. There must be some report showing that that firearm could fire the ammunition that was collected at the scene, and produced by PW4. It is not enough for PW4 to produce a forensics report on 6 spent cartridges, which says that they were fired from some firearm, whose forensics are not produced in court, to link the firearm to the spent cartridges. I only see 2 forensic reports, the one on the CCTV footage, dated October 26, 2018, and the other on the 6 expended cartridges, dated September 26, 2018. There is no forensic report on the firearm, said to have fired the 6 expended cartridges, being the AK47 assault rifle serial number UG 8847 2000.

18. As it is, there was no material, before the trial court, linking the appellant to the ballistics materials that were allegedly recovered at the supermarket, and were handed over to PW4 for forensics. There was no evidence that the firearm, that PW7 was talking about, was the one that fired or discharged the materials that PW4 was talking about. Consequently, there was a gap in the prosecution's case, with regard to that. That gap ought to have raised a doubt, which could only be resolved in favour of the appellant. With that gap, it cannot be said that the prosecution had established, beyond any reasonable doubt, that the appellant was party to the raid, on 21<sup>st</sup> April 2018, at Imara Supermarket, for the ballistics evidence did not link him to the crime. What ought to have been done was that the firearm, allegedly recovered from the appellant, ought to have been subjected to ballistics, with respect to the 6 spent cartridges and a report generated on the said firearm.
19. The case against the appellant hinged only on the firearm that was allegedly recovered from him, yet the recovery evidence is very flimsy. The officer who allegedly did the recovery was PW5 Moses Biwott. He said that he was then attached to Hamisi DCI, and the firearm was recovered at the home of the appellant, but he did not disclose where that home was situated. That bit of information was important, because the investigating officer, PW6, Daniel Chepkwony, said the appellant was arrested at Eldoret, and was moved to Serem. The question then would be, if PC Moses Biwott was stationed at Hamisi, Vihiga, how did he get to arrest the appellant at Eldoret, Uasin Gishu, and recover a firearm from him. That was another police jurisdiction. Did he really arrest the appellant at Eldoret, or was he handed over to him? He did not give details of how he recovered the firearm, who directed him to where the firearm was, and how he got to know the firearm was where he found it.
20. His testimony in chief on the recovery is as follows:

“From DCIO office Hamisi. I am arresting officer in this case. On 19/8/2018 I made an arrest in relative to suspect before the court in warrant of arrest to an earlier case I was investigating i.e. Hamisi cr. 1092/2018. I recovered a firearm from Josphat Kiptoo, s/No. UG88472000/UG8847. During investigations, I subjected firearm to ballistic examiner who gave a report which indicated the same was linked to another crime in chavakali. I informed my Mudete



colleagues who picked the suspects for further investigations to the Robbery with Violence case.”

21. During cross-examination, he said:

“The arrest was done in Hamisi Cr. 1092/2018. Each of the accused persons was arrested at different dates. Accused 1 was arrested at his home. I was with other officers during the arrest. I gave direction to my colleague to take the firearm from the ceiling. When 1<sup>st</sup> accused was being arrested, he was home, his wife, mother and father. I arrested all in the said case. The wife and parents are before this court, in this court. I’m the investigating officer in 1092/2018. I charged the 1<sup>st</sup> accused’s wife, parent coz she knew the husband had a firearm but never reported...”

22. The statements above are very casual about the only evidence that connects the appellant herein to this case. Just how did PW5 recover the firearm? Where did PW5 recover it? At Serem or Eldoret? Who led him to the firearm? Who directed him to where the firearm was? The duty is to adduce evidence to the standard required in criminal cases, beyond reasonable doubt, so that no one can say that the firearm was planted on the appellant. A step by step, blow by blow, account should be given of the recovery. It is not enough to just say that I recovered a firearm at the home of the appellant. It is not enough to say that I directed someone to get it from the ceiling. Who told him that the firearm was at the ceiling? How did he know that it was at the ceiling?

23. More crucially, investigation protocols require that an inventory of recovery of any items, to be used as exhibits in the case, from suspects, must be prepared, and signed by the officers involved in the recovery, as well as by the suspects, found in possession of the items, or in whose presence the recovery is made, and any other person present. The inventory is a tool to assist the police in investigations, but it is critical as an accounting tool. The investigators have to account for anything taken from the custody or residence of a suspect, and more importantly, there must be integrity to the recovery, where whatever is recovered is to be used as evidence against the person in whose possession or custody it is found or recovered. The recovery ought to be documented, for it to be authentic. That documentation can be through the inventory or the investigation diary, which is a log of what the investigator does step by step. The inventory is the more important of the 2 documents, for it would be signed by the persons who purportedly made the recovery, the person from whom recovery is made, and any other individuals who might be present at the recovery. No such evidence was tendered here, to authenticate the alleged recovery of the firearm from the appellant. There can possibly be no integrity to the alleged recovery process, and the same cannot be the basis upon which to convict the appellant.

24. In view of what I have stated above, it is my conclusion that the material before me, indicates that the case presented by the prosecution, did not reach the threshold for a case beyond reasonable doubt, that the appellant herein participated in the robbery, the subject of the appeal herein. There was doubt as to whether the firearm allegedly found in his possession was the one that fired the materials that PW4 examined. In fact, it is doubted whether the firearm was recovered from him in the first place.

25. Overall, it is my finding, and holding, that the appeal herein has merit, for the reasons given above. I accordingly allow it, quash the conviction, and set aside the sentence imposed on the appellant, Josephat Kiptoo Shikutwa. He shall be set free, unless he is otherwise lawfully held.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS  
2<sup>ND</sup> DAY OF JUNE 2023**

**W MUSYOKA**



## **JUDGE**

Mr. Erick Zalo, Court Assistant.

## **Appearances**

Josephat Kiptoo Shikutwa, the appellant in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.

