



REPUBLIC OF KENYA



**Kimani v Republic (Criminal Appeal 69 of 2016)
[2023] KEHC 19989 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19989 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL 69 OF 2016
F GIKONYO, J
JULY 12, 2023
(FORMERLY NAKURU HCCRA NO. 139 OF
2013)**

BETWEEN

JOHN KIMANI APPELLANT

AND

REPUBLIC RESPONDENT

*(Revision from Original Conviction/Sentence of Hon. C.A.
Nyakundi (P.M.) in Narok CMCR No. 169 of 2012 on 7/6/2013)*

JUDGMENT

1. The appellant was charged with Robbery with violence contrary to Section 296(2) of the Penal Code. It is alleged that on 12/2/2012 at Lenana Estate in Narok North District of the Rift Valley province, the appellant jointly with others not before court while armed with swords robbed George Mungai a motor cycle engine with No. 102 FMJ-8A302276 make king bird mobile phone make Nokia 6230 cash Kshs. 84,000 and immediately after such robbery used actual violence against the said George Mungai.
2. The appellant also faced an alternative count of handling suspected stolen property contrary to Section 322(2) of the Penal Code. Particulars of the offence were that on Ntulele area in Narok North district of the valley province, the appellant otherwise than in the cause of stealing dishonestly handled one motorcycle make king bird engine No. 162FMJ-8A302276 which is believed to have been stolen or unlawfully obtained.
3. The prosecution called 6 witnesses to prove their case. The appellant gave sworn statement of defence and called no witnesses.



4. He was tried for the offence and convicted on the charge of robbery with violence and sentenced to death.
5. Having been dissatisfied with the conviction and sentence he filed this appeal.
6. The appellant filed a petition of appeal on 19/7/2013 at Nakuru High Court. The appellant filed undated and unstamped amended grounds of appeal. The appellant sought to amend his earlier tendered grounds of appeal under Section 350(2) (v) of the CPC. He cited 4 grounds in his petition of appeal that;
 - i. That the learned trial magistrate erred in law and facts by convicting the appellant on evidence of visual recognition, PW1 did not identify the appellant at the scene of crime.
 - ii. That the conducting of an identification parade was an error in law, the appellant had already been exposed to the complainants; on the morning of 13/02/2012 he had been arraigned in court for traffic offences only to be subjected to an identification parade on 13/02/2012 at 2.00p.m. this was an abuse of identification procedures.
 - iii. That the learned the trial magistrate erred in law and facts by convicting the appellant but failed to note that, the evidence in record was contradictory, uncorroborated false statements therefore insufficient to support a conviction of death.
 - iv. That the learned trial magistrate erred in law and facts when she misconstrued his arrest for traffic offences and connected him with this purported robbery; which by the circumstances which prevailed, he never committed it as vividly explained in his defence statement.
7. The appeal was canvassed by way of written submissions.

The appellant's submissions.

8. The appellant filed undated and unstamped written submissions.
9. The appellant orally submitted that the investigating officer did not investigate. That he did not know who gave the complainant accommodation. That the I.O. stated that the complainant slept in the ditch yet he told the court that the appellant gave him a place to sleep.
10. The appellant orally submitted that the arresting officer told the court that he arrested him along the road. Yet he found him standing on the road waiting to milk.
11. The appellant submitted that the evidence of visual recognition at the scene of crime was not conclusively proved. That PW1 and PW2 did not give evidence to the effect that he was at the scene of the robbery and that he committed the offence. The PW1's version of evidence was contradictory to PW2's version of evidence. That he was identified because he had been arraigned in court and the court premises and the police station are adjacent to each other. That in the OB NO. 56/13/2/2012, there was no prior descriptions of the assailants.
12. The appellant submitted that identification parade was flawed.
13. The appellant submitted that the evidence on record was contradictory, uncorroborated and false statements therefore insufficient.
14. The appellant submitted that his arrest was not connected to any robbery. That he was charged with traffic offences.



15. The appellant submitted that the trial magistrate did not analyze critically the prosecution evidence against the strong and truthful evidence of the defence which was given under oath. That this was an error in law and it prejudiced the appellant.
16. The appellant urged the appellate court fully analyzes the prosecution evidence as presented by the trial court, peruse through the lower court judgement: critically read his submissions and find that his conviction and sentence of death was founded on unsound evidence. That therefore his appeal should be allowed.
17. The appellant relied on the following authorities;
 - i. Kariuki Njiru and 7 Others Vs Republic; CR App No. 6 of 2001 (UNR).
 - ii. R V Turnbull (1976) 63; Criminal Appeal R: 132
 - iii. Anjononi V R (1980)KLR 59.
 - iv. Musyoki Ndothia Vs Rep App No. 21 (2006)eKLR.
 - v. Telekai and Another Vs Republic 1952(EA)
 - vi. David Mwiti Wanja and Another Vs Republic Criminal Appeal No. 117 of 2005.
 - vii. R Vs Mwangi S/O Manaa [1936] 3EACA29
 - viii. Njihia Vs Rep[1986] KLR 422.
 - ix. R Vs Asumani Ogani S/O Muza[1943] 10 EACA92.
 - x. Casino S/O Walwa Vs R[1956] 23 EACA 453
 - xi. R Vs Baskerville
 - xii. Oumas Vs Rep [1986] KLR 619.

The respondent's submissions

18. Respondent submitted that there were circumstances which favored positive recognition of the appellant by the complainant. That the appellant was recognized by PW1-the complainant and PW2-Jeremiah Emekui Logiana.
19. The respondent submitted that there was sufficient light. PW1 stated that it was about 9.00 p.m. and he was on his way home when he was stopped by the appellant at the junction. The motorcycles head lights were on and he was able to see the appellant. He even engaged in conversation with the appellant who was asking PW1 if he could supply him with vegetables. The complainant while giving his testimony was able to state when he saw the appellant the following day when an identification parade was carried out, he was able to identify him and pick him out from the parade. That further the appellant was still wearing the clothes that he had the previous night when he robbed the complainant. The complainant was categorical that the appellant herein was armed with a metal bar and a sword.
20. The respondent submitted that the evidence of PW2 on identification is that of recognition, the appellant was a person who was well known to him as he had interacted with him. He had previously seen the appellant air wheat at a nearby field and the appellant resided near his employer's residence. PW2 was able to identify the motorcycle that he had seen the appellant remove from the trench as the same motor cycle produced in court.



21. The respondent further submitted that both PW1 and PW2 was able to recognize the clothes that the appellant had worn during the night of the robbery.
22. The respondent submitted that PW1 and PW2 during the night of the robbery engaged in conversation with the appellant. That there cannot be an issue of mistaken identity.
23. The respondent submitted that the appellant during cross examination was unable to shake the process of parade as being not in compliance with the rules.
24. The respondent submitted that nothing could be further from the truth. That the prosecution had the burden of proving one of the elements of the offences of robbery with violence.
25. The respondent submitted that PW1 was very clear that the appellant was aided in the robbery by two accomplices who were all armed with metal bars and swords. He saw the assault him.
26. The respondent submitted that after the violence, the appellant and his accomplices made away with the properties of the complainant.
27. The respondent submitted that the doctrine of recent possession apprehended with the stolen motorcycle the next day after the robbery. He was unable to give a reasonable explanation as to how the motorcycle came into his possession.
28. The prosecution submitted that they proved beyond reasonable doubt all the ingredients of the offence of robbery with violence. That there is no doubt in their mind that the appellant was recognized by the witnesses as the perpetrator of the crime together with his accomplices.
29. The respondent submitted that the trial court considered the defence of the accused and his cross examination of the prosecution witnesses. The trial court in its judgment considered the same and dismissed it as a red herring that could not shake the prosecution's evidence.
30. The respondent submitted that the conviction was safe as against the appellant.

ANALYSIS AND DETERMINATION

Court's Duty

31. First appellate court re-evaluates the evidence presented before the trial and draws own conclusions. Except, bearing in mind that it neither saw nor heard the witnesses first hand. Thus, demeanor is best observed by the trial court (Okeno vs. Republic [1972] E.A 32).
32. Upon perusal of the trial court's record, written submissions and authorities relied upon by both parties, the broad issues arising herein are: -
 - i. Whether the prosecution proved its case beyond reasonable doubt.; and
 - ii. Whether the sentence imposed is harsh or excessive in the circumstances?

Elements of robbery with violence

33. '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 ...' Oluoch vs. Republic [1985] KLR: -



34. The three elements of the offence of robbery with violence under section 296(2) of the Penal Code are, however, to be read disjunctively and not conjunctively. Thus, proof of one element beyond reasonable doubt founds an offence of robbery with violence (*Dima Denge Dima & Others vs Republic*, Criminal Appeal No. 300 of 2007)
35. PW1-the complainant- stated that it was about 9.00 p.m. and he was on his way home when he was flagged down by the appellant at the junction. The appellant inquired from him if he was going to bring vegetables which he sells. As the complainant was having the conversation with the appellant, two people emerged from a nearby trench. One of them hit his head using a metal bar. The complainant fell down. The appellant held to the complainant's motor cycle.
36. PW1 further stated that the 3 people including the appellant assaulted him as he laid on the ground. The appellant used a metal bar and a sword to assault him. He screamed for help but the appellant and his accomplices branded him a thief. A mob which had been attracted by his screams turned upon PW1 and beat him up till he lost his consciousness. When he regained his consciousness around midnight, he went to a nearby dairy where he sought refuge. He found that he had lost his Kshs. 6,000 and mobile phone Nokia 6320.
37. PW2 stated that he met with the complainant the next day and noticed that he was limping.
38. PW3, a medical officer examined PW1. On examination, he noted that PW1 had a swollen bruised left head, swollen chin, tender chest tender right leg and both hands were swollen. He produced a P3 form (P Exh 3) filled by Mr. Kotikot on 13/2/2012. The degree of injury was indicated as harm.
39. The foregoing evidence by the prosecution witnesses was uncontroverted. Accordingly, the prosecution proved beyond reasonable doubt that;
 - i. the offenders were armed with dangerous and offensive weapon or instrument;
 - ii. the offender was in company with one or more person or persons; and
 - iii. at or immediately before or immediately after the time of the robbery the offenders wounded, beat, struck or used other personal violence upon the complainant.
40. Nonetheless, as the incident occurred at night, care should be taken to ensure the appellant were positively identified as the perpetrators of the offence.
41. Where the only evidence against a defendant is evidence of identification or recognition, a trial court is [enjoined] to examine such evidence carefully [and] to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.' *Wamunga v. Republic* (1989) KLR 424 at 426
42. The court has interrogated the circumstances under which identification was done.
43. PW1 stated that he was flagged down by the appellant whom he could clearly see from the headlights of the motor cycle. He stopped and engaged in a conversation with the appellant.
44. PW1 stated that he was left unconscious by his attackers. The following day he went to Narok police station to report the incident. At the station he was informed of a motor cycle which had been recovered at Ntulele police station. He went to Ntulele police station to check. He found his motor cycle make King bird, blue in colour which he had been robbed of the previous night. He identified the motor cycle. He produced official purchase receipt dated 9/9/2010, serial No. 1990 for Kshs. 83,000 in the name of PW1, a delivery note dated 9/9/2010 in his name, a registration process letter dated 9/9/2010



- by King bird (k) Ltd, and service receipts as P Exh 1(a) (b) (c). He identified the motorcycle (P Exh2) by matching the frame No. Indicated in the purchase receipt.
45. PW1 further identified the appellant in an identification parade which was carried out.
 46. PW2 testified that on the material night, he was on foot to Lenana area. He found the appellant removing a motor cycle from a trench at Lenana junction. He stated that he knew the appellant well. He used the oncoming vehicle's light to see the appellant. He spoke to the appellant. He inquired from him what he was doing with the motor cycle. The appellant told him that he had found a thief with the said motor cycle and he was taking it to the police station. He identified the appellant on the dock. He stated that the appellant was still wearing the same clothes he had worn when he found him at Lenana Junction area.
 47. PW2 further stated that he knew the appellant before the incident since he used to air wheat at Lenana area where he also lives and grazes cattle for his employer one Oiyie.
 48. The appellant stated that the identification parade was not properly conducted and ought not to be considered.
 49. PW5 conducted the identification parade. He stated that he notified the appellant of the purpose of the parade. The appellant did not oppose the same.
 50. It was PW5's evidence that the witness was kept at the crime office and thus was unable to see the appellant before the parade was conducted.
 51. PW5 stated that PW1 was able to identify the appellant by touching him on the shoulder. The position that the appellant picked to stand in the parade was noted. The appellant then signed the ID parade form showing that he was satisfied in the manner the parade was conducted. The parade form was produced as P Exh 4.
 52. The motor cycle which was one of the properties stolen from PW1 was recovered the next day by PW4 of Ntulele traffic when he flagged down the appellant at Eor Ekule along Narok - Maai Mahiu at 8.00 a.m. for traffic offences.
 53. DW1 in his defence did not dispute the fact that he encountered PW1 and PW2 on the material date at the scene. He confirmed that he removed the motor cycle from the trench as stated by PW2. He did not deny that he took the motor cycle from PW1. He also confirmed that he was charged with traffic offences after being arrested by traffic officers at Ntulele area.
 54. The motor cycle linked the appellant to the said robbery as it was traced to him.
 55. The appellant stated that the trial court erred in law and fact when he failed to note that no investigations were carried out and he failed to analyze the prosecution's case thus occasioning a miscarried of justice.
 56. Perusal of the record and the recording by the trial magistrate show that, the trial court was not only alive to, but understood and accordingly applied the doctrine of recent possession.
 57. Contrary to the submission by the appellant, the trial court diligently set out the context and proof of recent possession of the motor cycle, thereby, safely fastening a conviction thereon.
 58. The motor cycle was recently stolen from PW1. PW1 identified and proved the motor cycle to be his. PW2 and PW4 identified the appellant as the person who had the motor cycle the following day after the robbery. PW2 knew the appellant well. He was therefore not under any illusion as to the person who had the motor cycle. PW4 had charged the appellant with traffic charges in respect of the said



motor cycle on the morning of the following day. The appellant did not provide any or reasonable explanation on how it came into his hands. Just as the trial court noted this was a perfect case to found conviction on the doctrine of recent possession.

59. The court finds no element of mistake identity or delusion on the part of the witnesses in the identification of the appellant as the one who had the motor cycle when it was recovered by the police. The circumstances favour positive identification and do not exhibit any particular difficulty in the identification of the assailant.
60. It bears repeating that, the evidence adduced proves beyond reasonable doubt that, the appellant, in company with others and armed with dangerous weapons, robbed the complainant and also used violence on person thereto immediately before or during or immediately after the robbery.
61. Accordingly, the appeal on conviction fails

Sentence

62. Death sentence is still lawful in Kenya, and may be imposed where circumstances so deserve. It has been observed that death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder say, where excessive or brutal force has been employed, or offence committed in most bizarre manner, or in circumstances which expose many to danger or injury or death. (Prof. Ngugi J in James Kariuki Wagana vs Republic [2018] eKLR);
63. In the case before me, all the ingredients of robbery with violence were satisfied by the prosecution beyond reasonable doubt. The appellant, who was in the company of others, robbed the complainant, and in the course of the robbery, brutal force was used, and also they were armed with a dangerous weapon which was used to injure the complainant.
64. The level of violence unleashed on the complainant is sufficiently serious to warrant death sentence or long period of imprisonment.
65. The court is aware that death sentences were commuted by the president to life imprisonment. In most recent judicial decision by the Court of appeal, it appears life sentence has been declared to be counter the main objective of sentencing- rehabilitation (Julius Kitsao Manyeso vs. Republic [2023] eKLR. In the circumstances, the life sentence commuted is inappropriate sentence. I formally set aside the death sentence and the life sentence and impose a 40 years' imprisonment upon the appellant. orders accordingly.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION, THIS 12TH DAY OF JULY, 2023

F. GIKONYO M.

JUDGE

In the presence of:

1. Appellant
2. Mr. Kasaso CA
3. Ms. Mwaniki for DPP

