



REPUBLIC OF KENYA



KENYA LAW
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**Kibet v Republic (Criminal Appeal E041 of 2022)
[2023] KEHC 19898 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19898 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E041 OF 2022**

JR KARANJA, J

JULY 6, 2023

BETWEEN

COLLINS KIBET APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Collins Kibet, is the Appellant herein, he appeared before the Chief Magistrate at Kapsabet facing a charge of Robbery with Violence, contrary to section 295 as read with section 296(2) of the Penal Code. It was alleged that on the June 20, 2021 at Chepkongony in Nandi South – Nandi County, he robbed Musa Koech cash Kshs. 21,000/- and assaulted him immediately before the time of such robbery.
2. After trial, the Appellant was convicted and sentenced to fifty (50) years imprisonment. Being dissatisfied with the outcome, he preferred the present appeal on the strength of the grounds set out in his petition of appeal filed herein on 15th September 2022. His major complaint is that he was convicted on the basis of evidence which was insufficient, inconsistent and uncorroborated. He therefore prays for the conviction to be quashed and the sentence set aside. He appeared in person at the hearing of the appeal and placed reliance on his written submissions while bringing to the attention of the court that the victim of his alleged criminal act (i.e. the Complainant) has since forgiven him and that the trial court declined the probation report which was favourable for him.
3. The state/ respondent, represented by the Learned Senior Principal Prosecution Counsel, Ms. Brenda Oduor, opposed the appeal and relied on its written submissions in that regard. In essence, the respondent contended that the necessary ingredients of section 296(2) of the *Penal Code* were duly established and proved and so was the identification of the Appellant as the offender. That, the appellant's defence was displaced by the prosecution witnesses who placed him at the scene of the incident at the material time. The respondent therefore urged the court to disallow the appeal for the want of merit.



4. Having given due consideration to the appeal, this court was duty bound to revisit the evidence and draw its own conclusion bearing in mind that the trial court had the advantage of seeing and hearing the witnesses.

In summary, the prosecution case was that the appellant and the Complainant, Musa Kiprotich Koech (PW1), were known to each other and on the material date having sold some maize the Complainant was paid a sum of Kshs. 25,000/- by one Enock Kosgei. He then utilized a sum of Kshs. 4,000/- to indulge in alcohol drinking at Kaptumo. With a sum of Kshs. 21,000/- left in his pockets, he proceeded to Chepkongony accompanied by one Kiprop and on their arrival they proceeded straight to a bar for more alcohol upto 9:00pm when he requested the Appellant to take him home on his motor cycle taxi (boda-boda). The Appellant was a motor cycle taxi operator.

5. The fare was agreed at Kshs. 100/- and the Complainant boarded the motor cycle accompanied by Wilson Kimutai Mosbei (PW4). The Appellant then rode the Motor Cycle through a forested area but stopped in the middle. It was then that the appellant asked the Complainant to surrender the money in his possession. In the process, the appellant hit the Complainant using his fist and removed the sum of Kshs. 21,000/- from his pockets. He (Complainant) fell down but managed to escape deep into the forest where he took refuge upto day break. His friend (PW4) was too intoxicated to the point of falling down but still managed to walk to his home. the incident was reported to the police at Kaptumo.
6. The Chairman of the Local Community Policing Unit, William Kurgat (PW2), received information that the Complainant had been attacked and robbed on the previous night. He then proceeded to the complainant's home and thereafter went in search of the appellant but did not trace him immediately. He found him later at Chepkongony Trading Centre and alerted the police who arrested him.

Wycliff Kipserem Mise (PW3), a Clinical Officer at Kaptumo Sub County Hospital examined the Complainant on the 22nd June 2021 and compiled the necessary medical report form (P3 form) (P. Ex.1a) which showed that the Complainant suffered injury on the left side of his neck caused by a blunt object.

7. PC Daniel Muigai (PW5), investigated the case and subsequently preferred the present charge against the appellant who in his defence implied that the charge was a frame up on account of a land dispute prompted by his refusal to the sale of family land. The trial court after considering the evidence in its totality concluded that the case against the appellant had been proved beyond reasonable doubt. The appellant was therefore convicted and sentenced accordingly.
8. Having considered the evidence afresh it became clear to this court that the basic issue which arose for determination by the trial court was whether the necessary ingredients of the charge were duly established and proved and if so, whether the appellant was positively identified as the offender.

A person is said to commit robbery when he steals anything and at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to it being stolen or retained. (See, section 295 *Penal Code*).

9. Under section 296(2) of the *Penal Code*, if the Offender is armed with any dangerous or offensive weapon or instrument, or is in the company of one or more other person or person, 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. Basically, section 296(1) *Penal Code*, is the punishment provision for the offence of plain or simple robbery while section 296(2) is the likewise provision for robbery with violence. However, the mandatory nature of the punishment has since been outlawed by the Supreme Court in the famous "Muruatetu" case.



10. The evidence availed by the prosecution through the Complainant (PW1), Wilson (PW4) and the Clinical Officer (PW3) was sufficient and credible enough in establishing the material ingredients of the charge of robbery with violence and the Appellant's criminal responsibility in that regard. Although the Appellant's defence was a denial and a contention that he was maliciously framed on account of a family land dispute, the evidence against him disproved and shattered the defence. There was nothing to suggest that the Complainant acted maliciously by pinpointing the Appellant as the person who robbed him of his money and injured him in the process. The two were known to each other and in fact, distant relatives.
11. This court is therefore satisfied that the trial court directed and acted properly by convicting the Appellant on the basis of the evidence availed by the prosecution. The conviction was sound and safe and is hereby upheld. With regard to the sentence, the maximum sentences provided Under section 296(2) of the *Penal Code* is the death sentence, but the trial court considered it fit to instead impose a custodial sentence of fifty (50) years imprisonment.
12. Although the sentence was lawful, it was rather harsh and excessive for a first remorseful offender who sought forgiveness from his victim and which forgiveness was accepted.

The pre-sentence report submitted to the court by the Probation Officer was in favour of a non-custodial sentence but was not binding upon the trial court which therefore was at liberty to accept or refuse its recommendation.

Taking into consideration the circumstances of the case and the mitigating factors, it's this court's opinion that the Appellant deserves a reduction of the sentence imposed upon him by the trial court.

In that regard, the fifty (50) years imprisonment sentence is hereby set aside and substituted for a sentence of five (5) years imprisonment. It is to that extent that the appeal partly succeeds.

Ordered accordingly.

DELIVERED AND DATED THIS 6TH DAY OF JULY, 2023

**J. R. KARANJAH,
JUDGE**

