



REPUBLIC OF KENYA



KENYA LAW
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**Mbuthia v Republic (Criminal Appeal 42 of 2017)
[2023] KEHC 21210 (KLR) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21210 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL 42 OF 2017**

F GIKONYO, J

JULY 25, 2023

(FORMERLY NAKURU HIGH COURT CRIMINAL APPEAL NO. 55 OF 2016)

BETWEEN

ELIUD MBUTHIA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. T.A.Sitati
(SRM) in Narok CMCR No. 1492 of 2019 delivered on 21/08/2013)*

JUDGMENT

1. The appellant was charged with two counts of Robbery with violence contrary to Section 296(2) of the [Penal Code](#).
2. In count I, the particulars were that on October 30, 2012 at Narok Town jointly with two others not before the court while armed with dangerous weapons namely a Ceska pistol, robbed John Waweru Wachira of Kshs 90,000 in cash and at or immediately after the time of such robbery used actual violence on the said John Waweru Wachira.
3. In count II, the particulars were that on October 30, 2012 at Narok Town jointly with two others not before the court while armed with dangerous weapons namely a Ceska pistol, robbed Judy Muthoni of her mobile phone make Techno valued at Kshs 1,800/= and at or immediately after the time of such robbery used actual violence on the said Judy Muthoni.
4. In count III, the appellant was charged with the offence of being in possession of a firearm without a firearm certificate contrary to section 4(2) (a) as read with section 4(3) (a) of the [Firearms Act](#).
5. The particulars of count III were that on October 30, 2012, at Narok town, the appellant was found in possession of a firearm namely a Ceska pistol caliber 9mm serial No F8679 without a firearm certificate.



6. The prosecution called 6 witnesses while the defense gave unsworn testimonies and did not call any witnesses.
7. The appellant was found guilty and convicted on all three counts.
8. In count I, the appellant was sentenced to death. In count II, the court held in abeyance imposing a second death sentence pending execution of the first sentence. In count III, the court held in abeyance pronouncing its sentence pending execution of count I sentence. The trial court further ordered that the pistol confiscated from the appellant be forfeited to the chief firearms licensing officer for destruction.
9. Having been dissatisfied with the conviction and sentence he filed this appeal.
10. The appellant cited 4 grounds in their amended grounds of appeal;
 - i. That the trial court erred in fact and law by not considering his defense and treating it as is required by law.
 - ii. That the trial court erred in convicting the appellant on inconsistent and uncorroborated evidence.
 - iii. That the trial court erred in law and fact by relying on theory evidence that was not supported by documented evidence.
 - iv. That the trial court erred in law and facts by relying on circumstantial evidence that left room for a hypothesis and other explanations.

Directions of the court

11. The appellant and the respondent intimated to the court that the appeal be canvassed by way of written submissions. Directions were given to that effect.

The appellant's submissions.

12. The appellant submitted that this court has unlimited jurisdiction in criminal matters and supervisory power over subordinate courts. Therefore, this court should call for records and make or give directions for the purpose of fair administration of justice.
13. The appellant submitted that the trial court failed to recognize that OB No 36 was registered under the name of Eliud Kamau who was arrested on October 30, 2012 and not Eliud Mbutia. That OB 27 indicates that Eliud Mbutia was arrested on October 31, 2012. But, despite the order of this court, the prosecution has not supplied OB 27 contrary to section 134 of the criminal procedure code.
14. The appellant submitted that the trial court failed to note that the charge sheet shows that Eliud Kamau was arrested on 30/10/212 and Eliud Mbutia was arraigned in court on 1/11/2012, more than 24 hours contrary to article 49(f) of *Constitution*.
15. The appellant submitted that the trial court failed by admitting the count of possession of a pistol on a charge which was not supplied by the crime scene's first report as should have been supported in the chain of custody as enshrined in forensic investigation guidelines chain of custody.
16. The appellant submitted that the trial court erred in that there was no first evidence that the pistol was collected from the appellant and therefore the trial magistrate relied on oral testimony which can be manipulated and distorted.



17. The appellant submitted that the trial magistrate failed to take into account that PW1 admitted indeed OB 36 belonged to Eliud Kamau not the appellant and it is the police who told him the name of the appellant.
18. The appellant submitted that the trial court failed by admitting there was violence when actually there was no medical report that PW1 and PW1 were injured. This shows that the learned trial magistrate relied on hearsay with no expert support.
19. The appellant submitted that by admitting the phone evidence despite lacking ownership proof from the alleged owner and despite the fact there was no phone presented in court.
20. The appellant submitted that the trial court failed to note that nothing was stolen as the prosecution was unable to prove the ingredient of money and actually, the money was given back to him by the trial court.
21. The appellant submitted that the trial court failed to recognize that PW5 had no hardware shop but was a bar dealer with the name kandas bar.
22. The appellant submitted that the trial magistrate failed to note that all three counts were not proved beyond a reasonable doubt.
23. The appellant urged this court to subject the whole evidence to a forensic expert. The appellant relied on articles 19, 22, 47, 50,165(3)(a)(6)(7) of Constitution and section 134 of the Criminal Procedure Code.

The respondent's submissions

24. The prosecution submitted that three elements of robbery with violence were proved beyond reasonable doubt. The respondent relied on the cases of Mombasa Criminal Appeal No 13 of 2017 Mohammed Ali v The Republic [2013] eKLR, Dima Denge Dima & Others Vs Republic, Criminal Appeal No 300 of 2007.
25. The respondent submitted that the circumstances leading to the arrest of the appellant and the time at which the incident took place were favourable enough to properly and positively identify the appellant.
26. The respondent submitted that the death sentence imposed on the appellant was lawful and constitutional. The respondent relied on Article 26 of Constitution and the Francis Muruatetu Case.
27. In the end, the respondent prayed that this appeal be dismissed in its entirety and conviction and sentence be upheld as it is within the law.

Analysis and Determination

Court's Duty

28. The duty of the first appellate court is to re-evaluate the evidence presented at trial and draw its own conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses firsthand. Thus, demeanor is best observed by the trial court (Okeno v Republic [1972] E.A 32).
29. I have perused the lower court 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. What sentence is appropriate to the offence in the circumstances?



Elements of robbery with violence

30. According to the Court of Appeal;

‘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 v Republic* [1985] KLR).

31. 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. Therefore, proof beyond reasonable doubt of one element will sustain a conviction for the offence of robbery with violence (*Dima Denge Dima & Others vs Republic*, Criminal Appeal No 300 of 2007)
32. In this case PW5 stated on 30/10/2012, the appellant in the company of two others approached him at his premises. They pretended to be selling cement. As PW5 made inquiries, the appellant drew a pistol and pointed it at him demanding for all the money he had. He had Kshs 90,000/= that he was counting when they walked in. He handed over the money to the appellant. They then hit PW2, Judy Muthoni who screamed. The scream attracted members of the public. They stormed out. As they went downstairs they met PW1, Yusuf Maenye who was at the said bar downstairs. He heard PW2 scream. They flushed the pistol at him. He gave them the way and allowed them to pass him
33. PW2 stated that on the material date at around 11.00 a.m. She was at Kandas bar owned by PW5 when the appellant in the company of two others came into the premises and posed as customers. They requested to know if they were interested in buying cement. One of them held PW2 by the neck and the appellant whom he referred to as the pistol man drew a pistol and pointed it at them. The man holding her neck took away her Techno phone.
34. PW2 further stated that she had been strangled and suffered neck muscle pain though she never sought any medical assistance.
35. PW1, PW2, and PW5 all stated that the incident took place at around 11.00 a.m. thus in broad daylight.
36. PW5 stated that the appellant; was the first one to enter into PW5’s premises; and was armed with a black pistol. That though he had not given the police the description of the assailants he saw the appellant alighting from the police land rover and identified him since hardly an hour had not lapsed from the time of the incident.
37. PW2 stated that the incident took place for about 20 minutes. It was in broad daylight. She noted the appellant’s outfit. She also pointed him out at the dock as the pistol man.
38. PW1 stated that he and other members of the public gave chase and they managed to arrest the appellant who was cornered along a corridor and was immediately disarmed of the pistol by PW6, PC Ekidor Samwel.
39. PW6 stated that on the material date, he saw the appellant pointing a pistol at the crowd and tried to fire, but no bullet came out. The angry mob started throwing stones at the appellant. PW6 rescued him and confiscated the pistol from him before escorting him to the police station.



The incident occurred during the day. However, care should be taken to ensure the appellant was positively identified as the perpetrator of the offence. The court should ‘... 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)

41. The court has interrogated the circumstances under which identification was done.
42. The court has also perused OB No 36. The report is made of one Eliud Kamau Kibe however the circumstances of the incident tally with the evidence of the prosecution witnesses. There is no proof that the report was in relation to a different incident.
43. Accordingly, the prosecution proved beyond reasonable doubt that; (i) the offenders were armed with dangerous and offensive weapons or instruments; (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 on the victims.

Of possession of a firearm without a firearm certificate

44. Upon perusal of trial court’s record; according to the evidence of PW1, PW2 and PW5- they all saw the appellant with a pistol. PW6 took the pistol from the appellant. The pistol was handed over to PW3, CPL Paul Sitienei. PW3 dispatched the pistol for ballistic tests. PW4 superintendent of police Johnstone Musyoki Mwangela, a ballistic test examiner. PW4 tested the pistol and confirmed that it was a firearm capable of firing ammunition within the meaning of the *Firearms Act*.
45. The appellant did not provide a firearm certificate to show that he had the legal right to own or possess the firearm.
46. On the basis of the evidence, therefore, the court finds that the evidence by the prosecution that the appellant was at the material time in possession of a firearm without a license was not controverted. The charge was proved beyond reasonable doubt.
47. In the upshot, the appeal on conviction on all the counts fails and is dismissed.

Sentence

48. Death sentence is still lawful in Kenya and may be imposed where circumstances so deserve. It has been observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder (see Prof. Ngugi J (as he then was) in *James Kariuki Wagana vs Republic* [2018] eKLR); say, where excessive or brutal force has been employed, or offence committed in a most bizarre manner, or in circumstances which expose many to danger or injury or death.
49. In the case before me, all the ingredients of robbery with violence have been met. The appellant robbed the complainants, and in the course of the robbery, used force, and also they were armed with a dangerous weapon that was used to threaten the complainants, and they also left with their valuables; money and mobile phone.
50. The level of violence unleashed on the complainants is sufficiently serious to warrant a death sentence or long period of imprisonment.
51. There is nothing upon which the court may interfere with the sentence imposed. The appeal on sentence is also dismissed.
52. Orders accordingly.



**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH TEAMS APPLICATION, THIS
25TH DAY OF JULY 2023**

.....

F. GIKONYO M.

JUDGE

In the presence of:

1. Ms. Mwaniki for DPP
2. The Appellant
3. Mr. Muraguri - CA

