



**Gachucha v Republic (Criminal Appeal 24 of 2020)
[2023] KEHC 23169 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CRIMINAL APPEAL 24 OF 2020
RB NGETICH, J
OCTOBER 4, 2023**

BETWEEN

JOHN MWANGI GACHUCHA APPELLANT

AND

REPUBLIC RESPONDENT

***(BEING AN APPEAL AGAINST BOTH THE CONVICTION AND
SENTENCE ARISING FROM THE JUDGEMENT OF HON. R. YATOR
(SRM) DATED 26 TH APRIL, 2016 IN THE PRINCIPAL MAGISTRATE'S
COURT AT ELDAMA RAVINE CRIMINAL CASE NO. 408 OF 2014)***

JUDGMENT

1. The Appellant was charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence being that on the 10th day of May, 2014 at Timboroa trading Centre in Koibatek Sub- County of Baringo county, jointly with another not before court and armed with dangerous weapons namely knife and beer bottle, the Appellant robbed Harrison Wanyoko Mwangi of his cash Kshs. 3,500/= and at the time of such robbery, used actual violence to the said Harrison Wanyoko Mwangi.
2. The Appellant pleaded not guilty to the charge and the prosecution availed 5 witnesses in support of the charge against the accused; and upon the closure of the prosecution's case, the trial court found that the prosecution had made out a prima facie case against the Appellant. He was placed on his defence. He gave sworn statement denying the offence. He stated that he was framed by the complainant.
3. The trial court upon hearing both the prosecution and the defence case made a determination that the prosecution proved its case beyond the required standard of proof, convicted the accused and sentenced him to life imprisonment.



4. The Appellant being aggrieved and dissatisfied with the Judgment of the Trial Court, filed this petition of appeal on the 19th August, 2020 on the following grounds: -
 - i. That the Learned trial magistrate erred in law and fact by convicting the appellant in the instant case yet failed to appreciate that identification was not positively proved.
 - ii. That the learned trial magistrate erred in law and in fact by convicting the Appellant but failed to note the ingredients of the offence were not conclusively proved.
 - iii. That the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defence was cogent and believable.
 - iv. That the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that prosecution did not discharge the burden of proof.
5. The appellant filed supplementary grounds of appeal under section 350(2) of the CPC and brings forth the following grounds: -
 - i. That the learned trial magistrate erred in law and fact by convicting the appellant notwithstanding that identification was not positively proved.
 - ii. That the trial magistrate erred in law and fact by convicting the appellant notwithstanding that the prosecution evidence was riddled with contradictions and inconsistencies.
 - iii. That the trial magistrate erred in law and fact in convicting the appellant notwithstanding that the witnesses were incredible and therefore their evidence was not credit worthy.
 - iv. That the trial magistrate erred in law and fact by convicting the appellant yet the charge was clearly faulty and defective.
 - v. That the trial magistrate convicted the appellant notwithstanding the fact that very crucial witnesses and pertinent to the case were not summoned.
 - vi. That the sentence is manifestly harsh and excessive.
6. The Appellant prays that this Appeal be allowed, conviction and sentence be set aside and the Appellant set at liberty.

Appellant's Submissions

7. The appeal proceeded by way of written submissions; the appellant filed written submissions on 8th March, 2023. The Appellant states that two witnesses claimed to have identified him being Pw1 and Pw3; that both agreed that it was at night and it was therefore difficult for the witnesses to identify him as the assailant.
8. The appellant further submits that Pw1 testified that he heard the voice of the Appellant which amounts to voice identification; and Pw3 said he could see with the aid of reflected light from the plot next to theirs and therefore no one save for Pw3 claims to have witnessed the incident and the only visual evidence from the records is that of Pw3.
9. The Appellant argues that evidence of visual identification can cause miscarriage of justice if not carefully tested; that the court must satisfy that in all circumstances, it is safe to act on such identification particularly where conditions favoring a correct identification were difficult. The appellant states that the identification relied on by the trial court was below the set threshold and incapable of leading to a conviction.



10. The appellant further submits that there are several contradictions and inconsistencies in evidence adduced by the prosecution witnesses which puts a dent in their credibility. The appellant submits that Pw2 testified that he was called by his wife Njoki but the person who came to testify in court was a different person by the name Joyce Wangui.
11. The appellant states that Pw2 contradicted himself when he said he was called while enroute to Timboroa from Nyahururu and later said that he was from Nairobi; further that Pw2 stated that he was called shortly before 7 P.M only to receive the call at around midnight.
12. The appellant further submits that Pw1 informed the court that the incident occurred at or after 9:30p.m yet Pw 3 says that the incident occurred slightly before 7.00 p.m. That the time and place of the incident is very crucial and is clearly part of facts in issue. The appellant submits that the evidence of Pw4 was contradictory as he indicated in the charge sheet that the complainant was robbed Kshs.3,500 but testifies that it was Kshs.3,000 and a phone only and later stated that they never recovered the knife, bottle, phone, money nor clothes of the complainant. That the evidence of the prosecution witnesses raises more questions than answers and leaves one with serious doubts as to whether the incident took place. That the evidence adduced by the prosecution witnesses is contradictory, inconsistent, incredible and unreliable and far much below the evidential threshold and ought to have been expunged from the records.
13. The appellant submits that the charge was defective and or faulty. That it was alleged but not proved that the appellant had a beer bottle and his accomplice had a knife; but no such bottle was produced as evidence in court neither was it proved that it was used to injure the complainant and the perpetrator was the appellant. The appellant proceeds to state that it was alleged that he had an accomplice known as Gikuyu who was not apprehended despite the witnesses stating that the crowd immediately pursued them after the incident; further the fact that the appellant was arrested immediately after the supposed robbery and no money or phone was recovered from him rules out robbery hence identification by voice was never sufficient prove of identification throughout the trial making the charge faulty and defective.
14. The appellant submits that Pw1 asserted that he was threatened by the appellant when they were waiting for pay in presence of other colleagues who were also waiting to be paid and none of the neighbors among those who took him to hospital and among the group which pursued the appellant was brought to court to shed light on the case.
15. On the issue of the sentence, the appellant submits that the sentence meted against him is harsh, excessive, punitive and went against all the principles of sentencing.
16. The Respondent filed written submissions dated 9th June, 2023 and submits that the evidence of the complainant was unshaken; that complainant knew the appellant and there was therefore no possibility of mistaken identity. That the appellant had shortly before the incident talked to the complainant and informed him that he was pursuing him into his plot and to that extent, the complainant identified the appellant by recognition notwithstanding the fact that it was dark hence the appellant was positively identified.
17. The state counsel further submits that going by the evidence on record, it is clear that all the elements of robbery with violence were established and proved by the prosecution against the appellant; that the appellant was armed with a bottle; he was with another who was armed with a knife and they assaulted the complainant using the said weapons inflicting severe injuries on him.
18. The state counsel further submits that the learned trial magistrate considered each issue raised by the appellant in his defence, made decisions thereon and gave reasons for the decision as required by section



169 of the Criminal procedure Code Cap 75 Laws of Kenya; that the appellants defence was duly considered and a reasoned decision made thereon.

19. The state counsel further submits that in this case, the burden of proof lied squarely upon the prosecution to prove existence of facts and circumstances alleged in the case and from the evidence on record, the prosecution effectively discharged its burden of proof as required by law. That the appellant in his cross examination of the prosecution witnesses and defence was not able to dislodge and or rebut existence of those facts and circumstances.
20. The respondent urges this court to find that there was no material contradiction in evidence adduced by the prosecution witnesses.

Analysis and Determination

21. This being the first appellate court, I am expected to subject the entire evidence adduced before the trial court to fresh evaluation and analysis. This I do while bearing in mind the fact that I never had the opportunity to hear the witnesses and observe their demeanour. For this, I give due allowance. The principles that apply in the first appellate court are set out in the case of *Okeno vs Republic* [1972] EA 32 where it was stated as follows:-

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v. Republic* [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See *Peters v. Sunday Post*, [1958] EA 424.)”

22. In view of the above, I have perused the record of appeal, the submissions by parties herein and find the following as issues for determination: -
 - i. Whether the charges against the accused was proved beyond reasonable doubt.
 - ii. Whether sentence imposed was harsh and excessive.

(i) Whether the charges facing the accused was proved beyond reasonable doubt.

23. Ingredients for the offence of robbery with violence are set out Sections 295 and 296(2) of the Penal Code as follows: -

“295. Any person who 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 its being stolen or retained, is guilty of the felony termed robbery.

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- (2). 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 after the time of robbery, he



wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

24. In the case of *Jeremiah Oloo Odira v Republic* [2018] eKLR the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:

“Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

- i. The offender is armed with any dangerous or offensive weapon or instrument, or
- ii. The offender is in the company of one or more other person or persons, or
- iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person” (See *Olouch v Republic* (1985) KLR)

25. From the evidence of PW1 and PW3, there is no doubt that PW1 was attacked and injured and in the process robbed of his money Kshs. 3,500/=.PW1 and PW3 testified that the Appellant together with two others jointly participated in attacking the complainant as he went home from work. They narrated how they were accosted by the Appellant and another on his way home. From evidence adduced, PW1 and PW3 saw the Appellant and another namely Gikuyu attack Pw1. In company of another offender identified as Gikuyu, the appellant was armed with dangerous and/or offensive weapon identified as beer bottle which the appellant used to cut the complainant in his left eye, while his accomplice had a knife which he used to cut Pw 1 on the left elbow.
26. The witnesses narrated how the two assailants attacked PW1 twice, Pw1 stated that he met the accused with his friend Gikuyu behind plaza building and he identified them from their voices and the lights from the plaza, that the accused questioned him about the clothes he had demanded and then hit him with a beer bottle and he lost his lower incisor tooth and the bottle got broken. He stated that the appellant then used the bottle to cut him on the left eye while his friend Gikuyu cut him with a knife on the elbow region. He stated that upon being attacked, he fell down and the accused then removed Kshs. 3,500/= from the right-side pockets of his trouser and that he could not manage to scream as he had been cut on the lower lip. Pw3 corroborated pw1’s evidence by stating that he saw two people assault Pw 1.she managed to identify the appellant from the lights at the flats next to her plot.
27. Pw5 testified and produced discharge summary from Mercy Mission Hospital confirming that Pw 1 was admitted for 2 days and the diagnosis showed severe facial lacerations due to assault; he also produced treatment notes from Molo District Hospital with diagnosis indicating dislocated lens on the left eye. He produced the P3 form which confirmed that pw1 sustained gravious harm.
28. From the evidence adduced before the trial court, there is no doubt that the Appellant was positively identified by the PW1 and PW3 as one of the two people who attacked and robbed the complainant herein. Both said they knew the Appellant and the other attackers prior to the incident as he was their



neighbor and they were able to see them using lights from the flats in next plot. Evidence of PW1 and PW3 is direct evidence of visual identification of the Appellant contrary to appellant's argument that the trial magistrate erred in law and fact by failing to find that the circumstances at the alleged time of robbery were not conducive to allow proper identification of the alleged attackers. Further, the Appellant also admitted that he knew the complainant.

29. In *Hassan Abdallah Mohammed v Republic* [2017] eKLR, it was stated that:

“Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. The court in *Wamunga v Republic* (1989) KLR 424 at 426 had this to say:

“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 favorable and free from possibility of error before it can safely make it the basis of a conviction.”

30. I am satisfied the Appellant was recognized by prosecution witnesses who knew him well. The area where the incident took place was well lit by the lights from next building and therefore, I do not see any doubt in the manner in which the Appellant was identified. I am satisfied that the prosecution proved their case against the Appellant beyond any reasonable doubt.

31. In respect to submission on contradictions and inconsistencies, evidence of a witness that would be fatal must relate to material facts and must be substantial. It must deal with the real substance of the case. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. It is only when inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from (See *Theophilus vs State* {1996} 1 NWLR (Pt.423) 139).

32. In view of the above, I find no contradictions in the prosecution evidence and even if there are any, they are not substantial to the extent of affecting the conviction. Reasonable doubt is not mere possible doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it can say it feels an abiding conviction to a moral certainty of the truth of the charge. Further, the evidence in question is to be considered together with the rest of the evidence including the defense. Accordingly, the argument that the prosecution evidence was tainted by inconsistencies and contradictions fail.

33. From the foregoing there is overwhelming evidence that Appellant was indeed part of the people who attacked and robbed pw1. In my view there is no material inconsistency sufficient to shake evidence linking the appellant to the offence herein.



34. On whether the appellant's defence was considered, record show that on the 21st March,2016, accused gave unsworn statement and from the judgment, the trial magistrate captured his defence as hereunder:-

“The accused denied the incident and stated that he did not rob the complainant and that he had only gone to help him get to hospital after being injured by other people. The trial court stated that his defence is not convincing and found it as mere lies.

35. From the foregoing, it is therefore not true that his defence was not taken into consideration. I agree with the trial magistrate that the accused merely denied the crime as the prosecution case was proved beyond reasonable doubt and his defence did not shake evidence adduced by prosecution witnesses.

Whether the sentence was harsh or excessive in the circumstances

36. In his mitigation before the trial court, the appellant stated that he has never committed an offence, he sought for leniency from the court. The appellant was sentenced to life imprisonment. I however take note of decision of the Court of Appeal in Malindi Criminal Appeal No.12 of 2021 Between *Julius Kitsao Manyeso vs Republic* which declared the sentence of life imprisonment unconstitutional; Justice Nyamweya, Lesiit and Odunga stated that it is unfair for a person to be behind bars until they die.

37. In view of the above Court of Appeal decision, I am inclined to reduce the sentence of life imprisonment to a term of imprisonment for 20 years from the date of the sentence of the lower court.

38. Final Orders: -

1. Appeal on conviction is hereby dismissed.
2. Appeal on sentence is allowed. Sentenced of life imprisonment is hereby set aside and replaced with sentence of 20 years imprisonment.
3. Period served in remand to be reduced from sentence in order 2 above.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 4TH DAY OF OCTOBER 2023.

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RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for State.

Appellant present.

