



**Mwaniki v Republic (Criminal Appeal E050 of 2024)  
[2024] KEHC 14465 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14465 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CRIMINAL APPEAL E050 OF 2024  
LM NJUGUNA, J  
NOVEMBER 20, 2024**

**BETWEEN**

**KELVIN MWANIKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising from the decision of Hon. S.K. Ngii (PM) in the Principal Magistrate's Court at Siakago Criminal Case No. E437 of 2023 delivered on 22nd May 2024)*

**JUDGMENT**

1. The appellant filed the petition of appeal dated 27<sup>th</sup> May 2024 seeking for orders that the appeal be allowed and the sentence be substituted with a soft, lenient and proportionate one. The appeal is premised on the following grounds:
  1. That the learned trial magistrate erred in law and fact by imposing a harsh and excessive sentence without considering that the appellant was a first offender who should benefit from the law;
  2. That the learned trial magistrate erred in law and fact by failing to consider that the appellant was qualified to benefit from the least severe punishment, hence contravened Article 50(2)(p) of *the Constitution*;
  3. That the learned trial magistrate erred in law and fact by imposing a harsh and excessive sentence that will completely ruin his life as a young man;
  4. That the learned trial magistrate erred in law and fact by imposing an excessive sentence without considering that the primary purpose of a sentence of imprisonment is not only for retribution; and



5. That the learned trial magistrate erred in law and fact by failing to consider that the amount of money stolen from the complainant was not that much to warrant the appellant to suffer such an excessive sentence.
2. The appellant was charged with 2 counts. The first count was the offence of robbery with violence contrary to section 296(1) of the Penal Code. The particulars of the offence are that on 01<sup>st</sup> June 2023 at around 8PM within Nguthi sublocation Kanyuambora location Mbeere North sub-county within Embu County, the appellant robbed Mercy Mbura of Kshs.3,400/= and at the time of the robbery, he used actual violence to the said Mercy Mbura.
3. He faced the second count of malicious damage to property contrary to section 339(1) of the Penal Code whose particulars are that on 01<sup>st</sup> June 2023 at around 8PM within Nguthi sublocation Kanyuambora location Mbeere North sub-county within Embu County the appellant willfully and unlawfully damaged a phone (Nokia) valued at Kshs.1,500, the property of Mercy Mbura.
4. The appellant pleaded not guilty to this charge and a plea was duly entered before the matter went to full hearing.
5. PW1 was the complainant, who stated that she hawks porridge at Kanyuambora market and the appellant is one of his customers. That on the material day, she had closed her work for the day and as she was walking home, she was attacked by the appellant who stabbed her 3 times and stole Kshs.3,000/= from her apron. She couldn't identify the weapon he used to stab her and she went to the hospital that night. She also reported the incident at the police station. That she was able to recognize the appellant using moon light and how he was dressed that night and she gave the appellant's name to her daughter Alice when she asked her who her perpetrator was.
6. PW2 was Alice Wanyaga, PW1's daughter who was in her company that night. She stated that they were walking with PW1 when she remembered that she had not bought sugar which PW1 had been sent by her mother and so she went back to the market. That PW1 took too long to return and she left her behind but waited for her some distance ahead. That soon afterwards, she heard PW1 screaming and she ran back and found her with injuries on her head and face. When she asked her what had happened, she said that she had given way to the appellant to pass but he attacked her and stole her money. That they reported the matter at Kanyuambora police post and then PW1 went to the hospital for treatment.
7. PW3 was Joshua Ireri Njagi of Siakago District Hospital who stated that PW1 went to the hospital presenting with cut wounds on the head, a swollen eye, tenderness on the shoulders, bruises and swelling on the legs and she was coughing blood. She was treated with prescription medicine and stitching of the wounds. She was attacked with sharp and blunt objects. He produced the P3 form as evidence.
8. PW4 was PC Brian Mwangi of Kanyuambora Police Post who stated that PW1 reported that she had been attacked and Kshs.2,400 stolen from her. That her assailant also damaged her phone. That he booked the report and sent PW1 away to seek treatment and 30 minutes later, a member of the public reported that there was someone in trouble at the market. When he went to check, he found the appellant who had been arrested and beaten by members of the public. He stated that he took him to hospital for treatment and then processed him and charged him with the offences.
9. At the close of the prosecution's case, the court found that the appellant had a case to answer and thus placed him on his defense.



10. DW1 was the appellant who stated that he was at home helping his parents to arrange their new house when he heard people saying that he was involved in a crime. That the people alleged that he had stolen Kshs.3,400 from PW1 and in the process of stealing, he had attacked her. He was arrested and charged with the offence.
11. After the close of the defense case, the trial court considered the evidence and convicted him. The trial court departed from the mandatory prescribed death sentence and sentenced the appellant to 25 years imprisonment.
12. In this appeal, the court directed the parties to file their written submissions but only the respondent complied.
13. In its submissions, the respondent relied on the cases of Shadrack Kipchoge Kogo v. Republic Criminal Appeal No. 253 of 2003 and Bernard Gacheru v. Republic (2002) eKLR and stated that the sentence meted out by the trial court is based on correct principles of the law and the appellant has not given this court reasons to review it since the trial magistrate had already exercised leniency during sentencing.
14. The appeal is against sentence only, and the issue for determination is whether the sentence meted out to the appellant was harsh and excessive.
15. The circumstances leading to occurrence of the offence should be considered while relooking the sentence meted out to the appellant. The trial court sentenced the appellant to 25 years imprisonment noting that it was a departure from the prescribed death sentence. In mitigation, the appellant stated that he has younger siblings who depend on him for their upkeep. The trial court was guided by the Supreme Court in Francis Karioko Muruatetu & Another v. Republic (2017) eKLR (Muruatetu 1) which restored judicial discretion during sentencing.
16. The trial magistrate noted the manner in which the offence was committed and the injuries inflicted upon the complainant and he stated that the appellant deserved a sentence that is both retributive and deterrent, to serve as a lesson to him and as a warning to other likeminded members of the society. According to the Judiciary Sentencing Policy Guidelines, the sentencing is meant to attain the following objectives:
  - i. Retribution: To punish the offender for their criminal conduct in a just manner.
  - ii. Deterrence: To deter the offender from committing a similar or any other offence in future as well as to discourage the public from committing offences.
  - iii. Rehabilitation: To enable the offender to reform from his/her criminal disposition and become a law-abiding person.
  - iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs.
  - v. Community protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
  - vi. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
  - vii. Reconciliation: To mend the relationship between the offender, the victim and the community.



viii. Reintegration: To facilitate the re-entry of the offender into the society.

17. From a perusal at the evidence, the appellant's actions on the material night can only be described as gruesome. The sentence meted out to him is not supposed to have been measured against the amount of money he stole, as he has argued in the grounds of appeal. The offence he committed is against the State and the same is punishable according to the law. It is possible that the occurrence of that night could have resulted in a much worse outcome than the injuries sustained by the complainant. The appellant must understand that the offence of robbery with violence is very serious, hence why it carries the death sentence. In this case, the trial court already departed from the death sentence having exercised much leniency. It is my view that this court has not been given sufficient reasons to reduce that sentence any further below the prescribed death sentence.

18. Therefore, I find that the appeal lacks merit and the same is hereby dismissed.

19. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**L. NJUGUNA**

**JUDGE**

..... for the Appellant

.....for the Respondent

