



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 28 OF 2018

(Appeal against conviction and sentence in SRM Criminal Case No. 892 of 2014 Hamisi by M. Nabinya SRM on 24/7/2017)

MICHAEL MUSUNGU.....1ST APPELLANT

ALEX NAVULU.....2ND APPELLANT

JOSEPH IDAMBO.....3RD APPELLANT

ALFRED JUMA.....4TH APPELLANT

IDRIS IZALIA.....5TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Introduction

1. The Appellants herein were charged with the offence of Robbery with Violence Contrary to Section 295 as read with 296 (2) of the Penal Code. The particulars being that on the 8th September 2014 at [particulars withheld] in North Maragoli within Vihiga County with others not before court while armed with offensive weapons namely pangas and runqus, robbed GM of her cash Ksh 40,000, two mobile phones Techno and Nokia valued at Ksh 5,000/=Panasonic valued at Ksh 4,000/= 13 kg gas cylinder and burner valued at Ksh 5,000/=, kettle valued at Ksh 1,000/= and assorted clothes all to the value of Ksh 75,000/=. Property of GM and at the time of such robbery used actual violence on the said GM.

2. The 1st and 5th Appellants were also charged with the offence of Gang rape contrary to section 10 of the Sexual Offences Act No 3 of 2006 and an alternative charge of indecent assault contrary to section 11(A) of the sexual offenses act. The trial Magistrate acquitted them of the two offences.

The Trial Magistrate, convicted them of the offence of robbery with violence and sentenced them to death.

The Appeal.

3. Being dissatisfied with the conviction and sentence, each of the Appellants filed appeals. The appeals raise the following grounds of appeal.

1. That they pleaded not guilty

2. That the Trial Magistrate erred in law and fact to convict by relying on the purported identification without considering that circumstances were not favorable for proper identification.

3. That the trial court erroneously relied on the parade identification to convict without considering that the same was conducted in contravention of the applicable law.

4. That the trial court erroneously relied on contradictory and uncorroborated evidence from the prosecution witnesses without considering that the prosecution case was unsatisfactory in law.

5. That the prosecution case was not proved beyond reasonable doubts in the absence of essential witnesses hence section 150 of the CPC was not complied with as per the law.
6. That the trial court erroneously convicted that 3rd Appellant on the basis of recognition without considering that the parade lacked merit in its totality under the circumstances.
7. That the trial court erroneously failed in its findings to convict by not considering that no investigations were done to implicate the accused to the crime in question.

Duty of the Court

4. The duty of the first appellate court is to re-analyze and re-consider the evidence tendered before the trial court with a view to arriving at its own independent conclusions. See **OKENO VS REPUBLIC [1972] EA 32.**

In **KIILU & ANOTHER VS. REPUBLIC [2005]1 KLR 174,** the Court of Appeal stated thus:

- “1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.**
- 2. 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; 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.”**

The same was reiterated in the case of **DAVID NJUGUNA WAIRIMU V – REPUBLIC [2010] eKLR** where the court of appeal stated:

“The duty of the first appellate court is to analyze the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

The main issue for determination before this Court is whether the conviction is sustainable on the strength of the evidence adduced in the trial court.

The Evidence and Submissions

The Prosecution Case

5. The prosecution called 7 witnesses Pw 1 GM a salonist testified that on the 8th September 2014, at about 2.00 am, she saw a group of 7 people enter her house. They were armed with pangas and rungas and they carried torches. She testified that they hit the bulbs in the house but she was able to see them before they did so. She testified that she and the other occupants in the house were bundled in one room and tied and that the robbers took their cash and other household items.
6. PW1 testified that she recognized the 1ST and 4TH appellants amongst her assailants and that the 2ND Appellant ordered her to lie on the bed and he raped her. The incident was later reported at Mudata police station and Pw1 was treated at sabatia hospital. Pw 1 testified that the 1ST and 4TH Appellants were her neighbors and more or less related to her and that she was able to identify the other assailants via identification parades organized by the police. Her evidence was corroborated by PW2 and PW3.
7. PW5 Corporal Maina testified that the incident was reported and that based on the description by the complainant and her witnesses arrests were made. PW6 inspector Kimanzi conducted an identification parades in which the Appellants were positively identified by the complainant and her witnesses as their assailants.

The Defence Case.

8. The Appellants testified and gave accounts of how they were arrested and the identification parade. None of them gave an account of their whereabouts on the date of the alleged incident. In their submissions the Appellants challenged the prosecution’s evidence on identification and the proof of robbery. They also challenged the manner in which the identification was carried out. The Prosecutor on their part opposed the appeal and submitted that they had proved their case to the required standards.

Issues for determination

9. From the Appeal and submissions, the issues for determination by this Court are:

- (a) Whether the prosecution proved the offence of Robbery with violence to the required standard.

(b) Whether the evidence of identification irresistibly pointed to appellant.

a) Whether the prosecution proved the offence of Robbery with violence to the required standard.

10. The ingredients of robbery with violence are as set down in section 296 (2) of the Penal Code, as follows:

“296. Punishment of robbery

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(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 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.”

Thus in determining whether the ingredients of the offence of robbery with violence are proved, the evidence on the theft, the number of attackers, appellant being armed with a dangerous weapon and the beating of the complainant are determinants. See *Titus Wambua v Republic [2016] eKLR*.

The Court of Appeal in the case of *Odhiambo & Another vs Republic [Omolo, Githinji & Deverell JJA] [2005] 2 KLR 176* explained the ingredients of the offence of robbery with violence as follows:

“The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc. the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295.”

11. In *Suleiman Kamau Nyambura vs Republic [2015] eKLR* the Court of Appeal held: -

“Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under Section 296 (2) of the Penal Code. See *Oluoch vs Republic [1985] KLR 549*.”

That should be either Proof of theft, the number of attackers, and whether the appellant being armed with a dangerous weapon harmed the Complainant.

12. The Complainant herein testified that she was robbed by a group of about 10 men the appellants being amongst them. She testified that the robbers made away with cash Ksh 40,000, two mobile phones Techno and Nokia valued at Ksh 5,000/=Panasonic valued at Ksh 4,000/= 13 kg gas cylinder and burner valued at Ksh 5,000/=-, kettle valued at Ksh 1,000/= and assorted clothes all to the value of Ksh 75,000/= which they forcefully took from her with the threats of injuring her with the pangas they carried.

In *Samuel Kariuki Wanjiku v Republic [2019] eKLR* Muriithi J held that

“2. As shown in the definition of the offence of robbery in section 295 of the Penal Code, the offences of robbery or robbery with violence under section 296 must first prove theft

295. Definition of robbery

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.

15. The considerations as to the ingredients of robbery with violence, which distinguishes the aggravated robbery from simple robbery do not fall into consideration in the offence of robbery with violence until theft or stealing is proved. The alternative ingredients of the offence robbery or robbery with violence go to the manner of execution of the offence of the theft or stealing component of the offence. They are not of themselves robbery. They are only the adjectival element of the offence of theft which for the circumstances in which it is done makes it simple robbery in circumstances of section 296(1) of the Penal Code, or robbery with violence if under circumstances set out in sub-section (2) thereof. It was of no consequences, therefore, whether or not the Prosecution proved that the appellant was (a) in the company of two other attackers or (b) whether they were armed with dangerous or offensive weapons or (c) whether he or they wounded, struck or beat any person, because the substratum of the offence, that is stealing, is not established.”

13. From the evidence it is clear that there was theft of cash and mobile phones and other household items that are yet to be recovered. The complainant further testified that the Appellants were in the company of others and that they were armed with pangas and rungas that they used to threaten and to injure her and her family. Her evidence was corroborated by that of Pw 2 and Pw3 who stated that they saw ten men armed with pangas.

14. It is the finding of this court that the evidence adduced by the Prosecution proved that the assailants were more than one, they were

armed with pangas that was used to threaten and to injure the Complainant and that they robbed the Complainant of her mobile phone and Ksh 40000 and other household items. This court finds that all the ingredients of the offence of robbery with violence were proved.

(b) Whether the evidence of identification irresistibly pointed to Appellant.

15. It was PW1's evidence that she saw the appellants enter her house at 2.00am. She explained that she was just from receiving maize from kitale and that the lights were on. She stated that she was fully awake and that the house was well lit. She stated that she saw them before the 2nd Appellant broke the bulbs with a panga. Her evidence on the lighting was corroborated by that of PW2 and PW3 who saw the Appellants using the light bulbs that were later broken by the appellants.

16. The prosecution led evidence that the complainant was able to recognize the 1st and the 4th Appellants as they were well known to her, a fact that the two did not dispute in their defence when the 1st Appellant confirmed that the complainant was his "mother" and the 4th Appellant confirmed that they were neighbors and that they were well known to her. Nevertheless, they still participated in the identification parade and they were all identified by the complainant as their assailant.

17. In the case of **BENARD GITONGA KARANU V REPUBLIC [2019] eKLR** the court observed that

"The law on identification is settled by various judicial decisions. In Maitanyi vs Republic, (1986) KLR 196 the Court set out what constitutes favourable conditions for a correct identification by a sole testifying witness as follows:

"Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error".

15. I have also reminded myself of the guidelines in the case of Mwaura v Republic [1987] KLR 645, in which the Court of Appeal held, inter alia, that:

"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light".

16. Similarly, in the case of Wamunga vs. Republic, (1989) KLR 424 it was held inter alia as follows: -

"1. 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.

1. Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made."

18. In **DONALD ATEMIA SIPENDI V REPUBLIC [2019] eKLR** the court observed that

"34. To determine whether identification is truthful, that is, not deliberately false, the court must evaluate the believability of the witness who made an identification. In doing so, the court may consider the various factors for evaluating the believability of a witness's testimony. Regarding whether the identification is accurate, that is, not an honest mistake, the court must evaluate the witness's intelligence, and capacity for observation, reasoning and memory, and be satisfied that the witness is a reliable witness who had the ability to observe and remember the person in question. Further, the accuracy of a witness's testimony identifying a person also depends on the opportunity the witness had to observe and remember that person, and whether the victim knew the accused before.

35. I am also alive to the fact that it is necessary to test the evidence of a single witness respecting to identification, and take great care and caution to ascertain whether the surrounding circumstances were favourable to facilitate proper identification. These in my view include light, time spent with the assailant, clothes or any item that the witness may positively identify and whether the accused was known to the complainant. Such evidence may be reinforced by sufficient collaboration and where there is no collaboration the court needs to treat it with caution. Thus, in evaluating the accuracy of identification testimony, the court should also consider such factors as: -

a) What were the lighting conditions under which the witness made his/her observation?

b) What was the distance between the witness and the perpetrator?

c) Did the witness have an unobstructed view of the perpetrator?

d) Did the witness have an opportunity to see and remember the facial features, body size, hair, skin, color, and clothing

of the perpetrator?

e) For what period of time did the witness actually observe the perpetrator?

f) During that time, in what direction were the witness and the perpetrator facing, and where was the witness's attention directed?

g) Did the witness have a particular reason to look at and remember the perpetrator?

h) Did the perpetrator have distinctive features that a witness would be likely to notice and remember?

i) Did the witness have an opportunity to give a description of the perpetrator? If so, to what extent did it match or not match the accused, as the court finds the accused's appearance to have been on the day in question?

j) What was the mental, physical, and emotional state of the witness before, during, and after the observation?

k) To what extent, if any, did that condition affect the witness's ability to observe and accurately remember the perpetrator?

36. The positive identification of an accused is an essential element of any offence. It is a fundamental part of the criminal process. Properly obtained, preserved and presented, eyewitness testimony directly linking the accused to the commission of the offence, is likely the most significant evidence of the prosecution”

19. Relating the above case to the facts herein this court is satisfied that the identification of the appellants was through the electric bulb which in my opinion was sufficient for positive identification of the appellants. It should also be noted that at the time of the robbery, the Appellants before hitting the bulbs engaged PW2 in conversation and she was able see them clearly.

20. With regard to the validity or otherwise of an identification parade, see **John Mwangi Kamau v. Republic (2014) e KLR** where the Court of Appeal held as follows:

“15. Identification parades are meant to test the correctness of a witness’s identification of a suspect. See this Court’s decision in John Kamau Wamatu –vs- Republic – Criminal Appeal No. 68& 69 of 2008. In this case Eliud, George and Joseph testified that they had indicated in their initial reports that they had gotten impressions of the assailants and they could identify them. However, we cannot help but note that DW1, CPL John Makumi (CPL John), in producing the Occurrence Book testified that the incident was recorded as OB. No. 45 of 24/6/2003; the assailants’ were never described in the said report. We also note that the aforementioned witnesses did admit that they never gave the physical description of their assailants to the police. In Gabriel Kamau Njoroge –vs- Republic (1982-1988) 1KAR 1134, this Court observed: -

“A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade.”

21. The Appellant submitted that the Complainant did not give the police a description of her assailants and thus the identification parade was worthless. It should be noted that although the Complainant knew two of her assailants, she was still able to identify them through an identification parade. PW7 who conducted the identification parade gave evidence of how the parade was conducted. The identification parades were conducted in the prescribed manner and the Appellants all noted that they were satisfied with the manner in which they were conducted.

22. As stated in the above authority, the failure by the Complainant to describe her assailants to the police in her initial report does not in any way invalidate the identification parade. It is the finding hereof that the identification of the Appellants was positive and that the same was free from any mistake.

23. The 1st Appellant herein has also challenged the fact the Trial magistrate did not conduct *Voire Dire* examination on PW2 to decide whether he could give sworn or unsworn evidence. From the Proceedings, the minor gave sworn evidence and there is no record of *Voir Dire* Examination.

Section 19(1) of the Oaths and Statutory Declarations Act, Chapter 15 of the Laws of Kenya stipulates that:

Where, in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth;and his evidence in any proceedings against any person for any offence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 233 of the Criminal Procedure Code (Cap. 75), shall be deemed to be a deposition within the meaning of that section.”

So was the Complainant herein a child of tender years?

24. In Patrick Kathurima vs. Republic Court of Appeal at Nyeri Criminal Appeal No. 131 of 2014 [2015] eKLR , the Court of Appeal held that:

"Whereas the question of whether a child is of tender years remains a matter for the good sense of the court as was stated by this Court in MOHAMMED –VS- REPUBLIC [2008] IKLR (G&F) 1175, we see no reason for departing from the observation made in KIBANGENY –VS- REPUBLIC (Supra) that the expression “child of tender years” for the purpose of Section 19 of the [Act] means, “in the absence of special circumstances, any child of any age, or apparent age, of under fourteen years.” That indicative age has been followed by courts ever since, See, for instance, JOHNSON MUIRURI –VS- REPUBLIC [1983] KLR 445, where this Court, in respect of a 131/2-year-old child approved the step taken by the trial court;

“The learned Judge substantially followed the correct procedure before allowing her to be sworn by recording his examination of her whether she was possessed of sufficient intelligence to justify the reception of her evidence and that she understood the duty of speaking the truth”.

We take the view that this approach resonates with the need to preserve the integrity of the viva voce evidence of young children, especially in criminal proceedings. It implicates the right to a fair trial and should always be followed. The age of fourteen of Section 19 of Cap 15. We are aware that Section 2 of the Children Act defines a child of tender years to be one under the age of ten years. That definition is preceded by the words “In this Act, unless the context otherwise requires...”. That definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes.”

Also see Samuel Warui Karimi v Republic [2016] eKLR.

25. From the above authorities, it is clear that for purposes of Section 19 of the Oaths and Statutory Declarations Act, it is now settled that a child of tender years is a child under the age of 14 years. The complainant herein was 16 years old and thus cannot be regarded as a child of tender years and ought not to have been taken through *voir dire* examination. Had he been a child of tender years would the omission have been fatal to the Prosecution case?

26. The Court of Appeal in the case of Maripett Loonkomok vs. Republic [2016] eKLR observed that:

"It follows from a long of decisions that voir dire examination on children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child’s intelligence or understanding of the nature of the oath cannot be used to convict an accused person. But it is equally true, as this Court recently found that;

“In appropriate case where voir dire is not conducted, but there is sufficient independent evidence to support the charge... the court may still be able to uphold the conviction.”

27. From the above authorities, it is clear that the failure to carry out *Voire Dire* examination is not fatal to the prosecution case as the circumstance of the case ought to be considered. In this case the PW2’s evidence was cogent. He was subjected to cross examination by the Appellant and was able to maintain her narration of the incident. Her evidence was corroborated by that of PW1 and PW3.

28. In the circumstance, this court finds that the appellants’ conviction by the trial court was safe and lawful and is hereby upheld.

Sentencing

29. The Appellants herein were sentenced to death by the trial court. they prayed that the court reduces the sentence and consider their mitigation. The Supreme Court in the Francis Karioko Muruatetu decision gave the following guidelines when this court will be considering the applicants’ application for re-sentencing:

“[71]. As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- a. age of the offender;
- b. being a first offender;
- c. whether the offender pleaded guilty;
- d. character and record of the offender;
- e. commission of the offence in response to gender-based violence;
- f. remorsefulness of the offender;

g. the possibility of reform and social re-adaptation of the offender;

h. any other factor that the Court considers relevant.

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

“25. GUIDELINE JUDGMENTS

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”

The Court of Appeal In *William Okungu Kittiny vs. Republic* ([2018] eKLR) applied the case in a robbery with violence case a where it was stated:

“...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu’s case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is a discretionary ...”

According to The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

(a) **Retribution:** To punish the offender for his/her criminal conduct in a just manner.

(b) **Deterrence:** To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.

(c) **Rehabilitation:** To enable the offender reform from his criminal disposition and become a law-abiding person.

(d) **Restorative justice:** To address the needs arising from criminal conduct such as loss and damages.

(e) **Community protection:** To protect the community by incapacitating the offender.

(f) **Denunciation:** To communicates the community’s condemnation of the criminal conduct.

30. In *Peter Maina Kimani v Republic* [2019] eKLR the Petitioner jointly with others while armed with a panga and metal rod robbed a complainant of Kshs.4000/- and itel Phone valued at Ksh 3,500/=. During resentencing the court took into account the fact that Appellant was a first offender and that the sentence imposed on an offender must be commensurate to his moral blameworthiness. The Court set aside the life imprisonment, sentencing the Appellant to serve 20 years imprisonment.

31. In the circumstance of this case, having considered the mitigation of the appellants, all of them are hereby sentenced to serve a term of twenty three (23) years in prison from the date of arrest.

Conclusion.

32. In an upshot the orders are issued as under:

(i) Conviction of the appellants by trial court is upheld.

(ii) 1st, 2nd, 3rd and 4th appellants are jailed to a term of twenty three (23) years from the date of arrest.

Dated, Signed and Delivered in Open Court at Kakamega this 13th day of December, 2019.

E. K. OGOLA

JUDGE