



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL APPEAL NO. 72 OF 2014**

**PAUL SOBUTIA.....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the judgment, conviction and sentence of Hon. A. Alego, Principal Magistrate in Eldoret Chief Magistrates Court Criminal Case No. 972 of 2013 delivered on 24/04/2014)***

**JUDGMENT**

1. **Paul Sobutia**, the Appellant herein, was charged with the offence of robbery with violence before the Chief Magistrate Court at Eldoret. He denied the offence, was tried, convicted and sentenced to suffer death.
2. The particulars of the offence were that ‘*On the 11<sup>th</sup> day of March 2013 at Eldoret Township in Eldoret West District within Rift Valley Province jointly with others not before court robbed Shadrack Kipchonge of cash Kshs. 1500/= wallet all valued at Kshs. 1650/= and at the time of such robbery used actual violence to the said Shadrack Kipchonge.*’
3. Five witnesses testified in a bid to prove the charge. They were **Shadrack Kipchonge**, the complainant, who testified as **PW1**. **PW2** and **PW3** were arresting officers **No. 208062438 APC Joseph Njema** and **No. 2008131172 APC Noel Bernard** respectively. A Senior Clinical Officer attached to Uasin Gishu District Hospital one **Gabriel Kirui** testified as **PW4** and the investigating officer was **No. 85185 PC Stephen Mbiti** from Eldoret Police Station who testified as **PW5**. I will for the purpose of this judgment refer to the witnesses in the sequence in which they testified.
4. It was the prosecution’s case that PW1 spent in a hotel in Eldoret town on 10/03/2012 having looked a tractor to plough his farm. He left early the following morning to the farm and proceeded to the bus terminus to pick a matatu. That was around 05:30am. As he approached the bus stage he was accosted by three men who held him by the neck and took away all what he had in his pockets including the wallet and Kshs. 1,500/= in cash. He was also hit with a stone. PW2 and PW3 who were on patrol bumped into the ordeal. They swung into a rescue mission and managed to arrest the Appellant as his two accomplices escaped. The Appellant was taken to the police station whereas PW1 was escorted to hospital. PW4 filled in and produced the P3 Form as an exhibit and confirmed injuries on PW1. PW5 produced the stone and the blood-stained clothes which PW1 wore as exhibits.
5. When the prosecution closed its case the trial court put the Appellant on his defense. The Appellant opted to and gave unsworn statement without calling any witness. The appellant stated that he was a Brick Maker who had alighted from a vehicle at the bus stage and was heading to his work place when he was arrested by PW2 and PW3 on false allegations of robbery. That, it was him who lost his Kshs. 5,000/= during the arrest and that he was charged because he refused to bribe the police. He prayed that the charge be dismissed.
6. The Appellant was subsequently found guilty as charged and convicted. He was sentenced to suffer death.
7. It is that conviction and sentence which solicited this appeal. The Appellant mounted the appeal in person by filing a Petition of Appeal which raised seven grounds of appeal as follows: -

1. ***That the trial magistrate erred in both law and fact by convicting me without considering the dispute that existed between me and trial court to transfer the alleged case under section 79 and 80 of the criminal procedure code law of Kenya.***
2. ***That the trial magistrate failed to follow rule of law by hurrying to convict me to death without waiting to resolve the dispute by way of an application I had made to the chief magistrate and served her with a copy.***
3. ***That the trial magistrate erred in both law and fact to convict me while holding I did not cross examine without considering that I had faith with the entire court including the prosecution hence denying me chance to adduce and challenge evidence.***

4. *That the trial magistrate erred in both law and fact by convicting me while holding that, she will take the complaint against my money as my defence without considering that one should be given time to prepare his defence.*

5. *That the trial magistrate erred in both law and fact by convicting me on prosecution case which was not proved beyond reasonable doubts as required by the law.*

6. *That the trial magistrate erred in both law and fact by convicting by disregarding my application to transfer the alleged case and acted favourably to consider that is prosecution side.*

7. *That the trial magistrate erred in both law and fact by convicting by acting imprudently deviating from the rule of law.*

8. The appeal was canvassed by way of written submissions on the part of the Appellant as the State made an oral response. In a nutshell, the Appellant mainly attacked the conviction on the issue of the defectivity of the charge sheet for not identifying the weapon used, that he was not arrested with any of the alleged stolen items, that **Section 200(3)** of the CPC was not complied with, that the evidence was riddled with contradictions and that the investigations were shoddy and cannot sustain a conviction.

9. In response Counsel for the State submitted that the charge was clearly and certainly proved as the Appellant was arrested at the scene and that all the ingredients of the charge were proved. Counsel prayed that the appeal be dismissed.

10. This being a first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okemo vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

11. In discharging the foregone duty, I have carefully read and understood the proceedings and judgment of the trial court as well as this appeal. I will endeavor to deal with the following issues: -

(a) **Whether the Appellant was one of the assailants;**

(b) **Whether the offence was proved as required in law: and**

(c) **Other issues raised by the Appellant.**

I will consider each of the above issues singly.

(a) **On whether the Appellant was one of the assailants:**

12. PW2 and PW3 corroborated the testimony of PW1 that he was accosted by three people and robbery as he approached a bus stage. PW2 and PW3 who were their regular patrol saw the ordeal unfolding in their presence. They however managed to arrest only the Appellant as the two escaped. The Appellant denied as much and stated that he was arrested as he had alighted from a vehicle and was heading to his work place.

13. By placing the evidence of the prosecution and the defence side by side I find that the defence is outweighed by the prosecution. I find that the defence did not create any reasonable doubt on the evidence of the three eye-witnesses. This Court therefore finds that the Appellant was one of the assailants who attacked PW1 and that he was arrested at the scene.

(b) **Whether the offence was proved in law:**

14. The Appellant was convicted of the charge of robbery with violence. The starting point is the legal provision. The offence of robbery with violence is a creation of **Sections 295 and 296(2)** of the Penal Code. For clarity purposes I reproduce the sections as tailored: -

*“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.*

*296(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.”*

15. From the foregone legal provisions, it can be seen that the offence of robbery with violence is made up of two parts. The first part is the **robbery** and the other part is the **violence**.

16. **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.**

17. 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: -

*(a) The offender is armed with any dangerous or offensive weapon or instrument, or*

*(b) The offender is in the company of one or more other person or persons, or*

*(c) 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.*

18. In this case there is credible evidence that the Appellant was in the company of two other persons who escaped. Each of them executed a clear role in the act. It was the Appellant who hit PW1 with a stone as the others took away his belongings and that explains why none of the items were recovered on the Appellant (See the Court of Appeal decision in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret Peter Okee Omukaga & Another vs Republic (unreported)** that such non-recovery of the items did not in any way point to the innocence of the Appellants).

19. The three persons acted together to further a common intention and as such the doctrine of common intention under **Section 21** of the **Penal Code** Chapter 63 of the Laws of Kenya comes to play. The Court of Appeal in the case of **Njoroge v. Republic (1983) KLR 197** explained the doctrine as follows:

*‘...If several persons combine for unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavor to effect the common object of the assembly...’*

20. In the case of **R v. Tabulayenka s/o Kirya (1943) EACA 51** the Court of Appeal of East Africa held that common intention may be inferred from the accused presence, their actions and omissions of either of them to disassociate himself from the assault. In this case the appellant and the other two who are still at large are the ones who executed a common unlawful intent against PW1.

21. The attackers also used actual violence on PW1. Apart from PW1 being attacked and manhandled he was hit with a stone on the face. There is uncontroverted evidence of the injuries PW1 sustained. The P3 Form vouch for that. I find that the weapon used being a stone in the circumstances of this case was a dangerous weapon.

22. As to whether there was theft, there is as well evidence to that end. PW1 narrated so well that he had money with him. It was Kshs. 1,500/= which was in his wallet. That evidence was uncontroverted. It is therefore reasonable and believable that PW1 lost that money and his wallet in the attack and that constitutes theft.

23. The upshot is that all the ingredients of the offence of robbery with violence were proved. The Appellant was hence rightly found guilty and convicted.

**(c) The other issues raised by the appellant:**

24. The Appellant further raised several other issues which I must consider. One of them was that the charge sheet was defective as it did not state the weapon used. Whereas it is true the charge sheet did not state the weapon used as a stone nevertheless the charge sheet stated that *‘.....and at the time of such robbery used actual violence to the said Shadrack Kipchonge’*. The actual violence was proved in evidence and the weapon produced as an exhibit. Further, on 20/05/2013 the court made an order for the Appellant to be supplied with witness statements and the Appellant never informed the court otherwise. I find the error so superficial and is outrightly taken care of by **Section 382** of the **Criminal Procedure Code**.

25. On a like note, the alleged contradiction on the evidence of PW2 and PW3 on whether the offence was committed at 05:00am or 05:30 am was so minor that it caused no prejudice to the Appellant. **Section 382** of the **Criminal Procedure Code** therefore comes to play.

26. On the alleged non-compliance with **Section 200(3)** of the **Criminal Procedure Code**, the entire trial was conducted before the same court and all applications were rightly dealt with including the recusal of the trial court and the recall of witnesses. I have addressed my mind carefully on the proceedings and I find no error on the part of the trial court in complying with the law.

27. I hence find that the investigations were properly conducted and the Appellant was accorded a fair trial. The appeal on conviction is hence dismissed.

28. The Appellant also contended that the sentence was very harsh and excessive. I have looked at the sentencing proceedings where the court was then rightly guided by the mandatory nature of the then sentence. The court then had no option but to hand down the death sentence.

29. That legal position has by now changed courtesy of the Supreme Court in **Francis Karioko Muruatetu & Another v. Republic (2017) eKLR**. The Court, rightly so, found and held that the mandatory nature of the death sentence in capital offences is unconstitutional since mitigation is an important congruent element of fair trial. The Supreme Court remitted the matter to the High Court being the trial and sentencing court for purposes of sentence re-hearing. I have no doubt that such remain the only reasonable way forward as the sentencing court will receive appropriate submissions from the prosecution and the defence prior to the sentencing.

30. One thing which I must clarify is that although the decision in Francis Karioko Muruatetu (supra) was on a murder case, the position changes not in the case of robbery with violence cases since **Section 296(2)** of the **Penal Code**, Cap. 63 of the Laws of Kenya provides the only sentence on conviction to be a death sentence.

31. The upshot of the foregone analysis is that the appeal is dismissed on conviction and allowed on sentence only. The matter is hereby remitted to the Chief Magistrate's Court at Eldoret for hearing on sentence only and on priority basis.

It is so ordered.

**SIGNED BY:**

**A. C. MRIMA**

**JUDGE**

**DATED, COUNTERSIGNED and DELIVERED at ELDORET this 1<sup>st</sup> day of November, 2018.**

**H. A. OMONDI**

**JUDGE**