Barawa v Republic (Criminal Appeal E022 of 2023)
[2025] KECA 1524 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1524 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E022 OF 2023

AK MURGOR, JA

OCTOBER 3, 2025

BETWEEN

NICKSON BARAWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (A. Ongeri & S.J. Chitembwe, JJ.) dated 27th April 2016 in CR.A. No. 45 of 2013)

JUDGMENT

1. The appellant, Nickson Barawa, was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence were that on 10th December 2011 at Mida Village in Geda Location within Kilifi County, with another not before the court, being armed with a dangerous weapon namely a sword robbed Rama Gona of a motorcycle registration number KMCN 539F Bajaj Boxer valued at Kshs. 80,000.00 and during or before the time of such robbery wounded the said Rama Gona. He was tried before the Chief Magistrate's court at Malindi and convicted, he was thereafter sentenced to death.

2. Aggrieved, the appellant lodged an appeal before the High Court on the grounds that the prosecution did not prove its case to the required standard; that his identification by a single-identifying witness was not safe; and that his defence was not considered.

3. In its judgment delivered on 27th April 2016, the High Court (Chitembwe and Ongeri, JJ.) dismissed the appeal having been satisfied that the prosecution proved its case to the required standard; that the offence having been committed during daylight, the circumstances were favourable for positive identification of the appellant; and that there was no merit in his complaint that his defence was not considered.

4. Still dissatisfied, the appellant lodged the present appeal which is based on grounds that the High Court erred in: upholding the conviction and sentence; failing to appreciate that the evidence of identification was based on a single identifying witness in difficult circumstances; not finding that the elements of the offence were not proved to the required standard; failing to appreciate that his defence was not adequately analysed; and in failing to find that the death sentence meted out was harsh and degrading and against his constitutional rights under Article 50(2), (p) and (q) of *the Constitution*. In addition, in his supplementary memorandum of appeal, the appellant complained that the High Court abdicated its responsibility in upholding the death sentence without considering his mitigation in violation of his constitutional rights, thereby occasioning a miscarriage of justice.

5. We heard the appeal on 26th February, 2025. Learned counsel Miss. Julu appeared for the appellant, who was also virtually present from Naivasha Maximum Prison. Miss. Nyawinda, learned Principal Prosecution Counsel, appeared for the respondent. Counsel relied on their respective written submissions.

6. It was submitted for the appellant that the circumstances in which the complainant testified that he was able to identify the appellant were not conclusive for positive identification, and that the two courts below did not exhaustively analyse the evidence. In that regard, the decision in Roria v Republic [1967] EA 583, among others, was cited for the proposition that the greatest care was required in testing the evidence of PW1.

7. It was submitted further that the elements of the offence of robbery with violence, as set out in Ganzi & 2 Others v Republic [2005] 1 KLR and in Johanna Ndungu v Republic, Cr. App. No. 116 of 2005 were not proved.

8. It was submitted further that the appellant raised the defence of alibi which was not adequately considered by the two courts below.

9. As regard sentence, it was submitted that the death sentence meted out is in conflict with Article 50 of *the Constitution*; that the High Court had a duty to analyse the sentence imposed and that the both courts below did not consider the mitigation. Reference was made to the Supreme Court decision in Muruatetu & Another v Republic;Katiba Institute & 5 Others (amicus curiae) (Petition No. 15 &16 of 2015 (consolidated) [2017] KESC (KLR) urging that the jurisprudence in that case applies to all offences where the death sentence is mandatory. Therefore, it was urged, that this Court is not powerless and should in the interest of justice, interfere with the sentence.

10. Opposing the appeal, counsel for the respondent submitted that the prosecution proved its case beyond reasonable doubt; and that the ingredients of the offence of robbery with violence were proved. Citing the case of Oluoch v Republic [1985] KLR, it was submitted that robbery with violence is committed when the offender is armed with any dangerous and offensive weapon or instrument; or, the offender is in the company with one or more persons; or 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. It was urged that proof of any one of those elements is enough. The case of Dima Denge Dima & Others v Republic, Criminal Appeal No. 300 of 2007 was cited (UR). It was submitted that in the present case, the evidence shows that the appellant was accompanied by another person when PW1 was robbed of the motorcycle using a dangerous weapon.

11. Regarding identification, it was submitted that both courts below properly analyzed the evidence; that PW1 testified that the offence occurred in broad day light at about 1.00pm; that PW1 spent sufficient time with the appellant to be able to identify him.

12. As regards the sentence, it was submitted that it remains legal, and this Court has no basis for interfering with the trial court's discretion in sentencing absent demonstration that such discretion was not exercised lawfully. The decision in David Mutai v Republic [2021] eKLR was cited.

13. We have considered the appeal and the submissions. This being a second appeal, under Section 361(1) of the Criminal Procedure Code, the mandate of the Court is confined to matters of law. As the Court stated in Peter Mwangi Gachie v Republic [2015] KECA 997 (KLR):

> " ... by dint of the provisions of Section 361 (1) (a) of the Criminal Procedure Code, only matters of law fall for our determination unless it is demonstrated that the two courts below failed to consider matters they should have considered or looking at the entire case, their decisions on such matters of fact were plainly wrong in which case this Court will consider such omission or action as matters of law."

14. Earlier in Karingo vRepublic [1982] KLR 214 the Court expressed that "a second appellate court will not as a general rule interfere with concurrent findings of fact of the two courts below unless they are shown not to have been based on evidence".

15. With those principles in mind, there are four issues for consideration. First is whether the concurrent findings by the trial court and the High Court that the appellant was positively identified are supported by evidence. Secondly, whether the ingredients of the offence of robbery with violence were established to the required standard. Third is whether the defence put forth by the appellant was considered. And lastly whether this Court has any basis for interfereing with the sentence.

16. The facts as established by the courts below based on the testimonies of seven prosecution witnesses are that on 10th December 2011 at about 1.00 p.m., the complainant, Karama Gona (PW1) was at Gede Stage with his father's motorcycle KMCN 539F. He was approached by two people, one of whom was the appellant. They requested him to ferry them to a destination and a fee of Kshs. 50.00 was agreed upon. On reaching the destination, in the words of PW1:

> " ...one of them put a knife on my neck. I fell down and one of the people lay on me. The other one took the motor bike and called on the other so that they could run away. I screamed and one person came and I told him what had happened."

17. Wilson Nzombo (PW2) is the person who responded to the scream by PW1 and together they pursued the assailants. PW1 stated that they "... saw tyre marks that the motor bike had been taken to the bush" and that the appellant was removed from the bush by members of the public.

18. On his part, PW2 stated that a motorbike which had three occupants sped past him and shortly thereafter "heard someone screaming for help"; that on responding he found "a young man who was screaming...was bleeding on the hand and has (sic) a knife." He testified that the young man (PW1) explained to him that he had been robbed of his motorcycle and together they decided to follow the motorcycle. PW2 testified that further ahead, they found a group of people who directed them to the bush where they found the appellant hiding and the motorcycle.

19. Katanzi Kalu (PW3) recalled that on 10th December 2011, he got to his home after church at around noon; that he heard screams and went to find out what had happened; that on learning that a motorcycle had been stolen, he called the police.

20. Kalama Masha Kalolo (PW4), the complainant's father and owner of the stolen motorcycle, testified that he purchased the motorcycle in question for Kshs. 80,000.00. He produced the supporting

invoice, sales agreement, delivery note, and record of registration of the same with Kenya Revenue Authority.

21. Ibrahim Abdullahi (PW5) a Clinical Officer at Malindi District Hospital, is the one who treated the complainant. He observed that the complainant had a small cut wound on the throat and the right hand, which were healing, and which he attributed to a sharp object. He produced the P3 Form which he filled out.

22. Sergeant Benard Muzungu (PW6), the arresting officer, re- arrested the appellant who had been arrested by members of the public. He also took possession of the Motorcycle and the knife, which were produced before the trial court as exhibits by the investigating officer, Police Constable Simom Mutunga (PW7), who was attached to Watamu Police Station.

23. In his sworn testimony in defence, the appellant stated that on the material day, he was at home constructing a house when he decided to go to a forest in Gede; that he was in the forest putting together the trees he had cut to take home when he heard screams nearby; that he decided to find out what was happening when he saw a group of people who started shouting at him and assaulted him alleging that he had stolen a motorcycle; that he was thereafter taken to the Administration Police Camp and onto Watamu Police Station before being charged in court for an offence he knew nothing about.

24. Based on that evidence, the concurrent findings of fact by the trial court and the High Court that the prosecution had proved its case against the appellant, and that he was positively identified as the perpetrator of the crime are, in our considered view, well founded.

25. Notwithstanding the above conclusion, the appellant's complaint that he was not positively identified, apart from this being a matter of fact, PW1, testified that he was approached by two people in daylight to ferry them on the motorcyle to a specified destination. A fee was agreed upon before they embarked on the journey after which his passengers turned on him. Apart from PW1, the appellant was also identified by PW2 who came to PW1's rescue on hearing screams. Furthermore, evidence was led that the assailants were pursued into the bush by members of the public where the appellant was apprehended alongside the motorcycle. The conclusion by the trial court and the High Court that the appellant was positively identified is well supported by evidence.

26. As to whether the ingredients of the offence of robbery with violence were established to the required standard,the Court in the case of Johana Ndungu v Republic [1996] eKLR stated that:

> "In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the subsection:
>
> 1. If the offender is armed with any dangerous or offensive weapon or instrument; or
>
> 2. If he is in company with one or more other person or persons; or
>
> 3. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

27. In the present case, the prosecution evidence showed that, apart from being armed with a knife which he used to inflict injuries, albeit minor, on the victim, the appellant was in the company of another person when he attacked and robbed PW1 of the motorcycle. The ingredients of the offence were established against the appellant and there is no merit in his complaint in that regard.

28. Regarding the complaint that his defence was not considered, the appellant in his submissions complained that he raised an alibi which was not considered. That is however not supported by the record and the defence offered during the trial. What he said is that he was at his home constructing a house before he went to the forest/bush where the offence was committed. That is not an alibi defence. He was placed at the scene, where he acknowledges he was present. Accordingly, there is no merit in this complaint.

29. Last is the complaint regarding the sentence. In this regard, we echo the sentiments expressed by the Court in Omudi v Republic (Criminal Appeal 84 of 2018) [2022] KECA 436 (KLR) (11 March 2022) (Judgment) that "the facts and circumstances of this case, in our view, lend themselves to the exercise of the court's discretion in favour of the appellant, and to the imposition of a sentence other than the sentence of death." We say so because the injuries inflicted as captured by the clinical officer were minor and the motorcycle was recovered. It is a matter in which, a court exercising discretion, would have meted out a sentence other than death. However, in the light of the Supreme Court of Kenya directions issued on 6th July 2021 in Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR we cannot interfere with the sentence meted out by the trial court and upheld by the High Court.

30. In conclusion, the appeal fails and is accordingly dismissed.

DATED AND DELIVERED AT MALINDI THIS 3RD DAY OF OCTOBER 2025.

S. GATEMBU KAIRU,C.Arb, FCIArb.

JUDGE OF APPEAL

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A.K. MURGOR

JUDGE OF APPEAL

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DR. K. I. LAIBUTA, CArb, FCIArb.

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR