IN THE COURT OF

APPEAL AT MALINDI

(CORAM: GATEMBU, MURGOR & LAIBUTA, JJ.A.)

CRIMINAL APPEAL NO. E020 OF 2023.

BETWEEN

SHUKURI MOHAMED.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(***An appeal from the judgment of the High Court of Kenya at Malindi (W. Korir, J.) delivered on 6th December, 2018***

in

Criminal Appeal No. 8 of 2014)

****

JUDGMENT OF THE COURT

The Appellant, Shukuri Mohamed, was charged with the offence of robbery with violence contrary to ***Section 296 (2)*** of the Penal Code. The particulars of the charge were that, on 14th April, 2012 at Simba Dishes in Malindi Town within Kilifi County, the Appellant, jointly with others not before court, while armed with an offensive weapon, *to wit*, an AK47 rifle, robbed ***Said Mohamed Njoroge, PW1*** *(the complainant),* of Kshs. 96,000 and

two mobile phones valued at Kshs. 14,000 and at, or immediately before, or immediately after such robbery,

threatened to use actual (sic) on Said Mohamed Njoroge and shot dead Hassan Karisa Njongoro.

The Appellant pleaded not guilty and the matter proceeded to hearing where the prosecution called 8 witnesses.

The prosecution's evidence was that, on 14th April, 2012 at about 9.30 p.m., PW1 was at his place of work at Simba Hotel in Malindi working as a cashier with his colleagues Marijan, Swaleh and other workers who were in the kitchen. While going about his duties, a gang of three people arrived at the hotel on a motorbike, entered the premises, and ordered everyone to lie down. One of the assailants pointed a big gun at him, and he was able to see him clearly as the lights were on. Another assailant pushed him to the ground, opened the drawer and took Kshs. 96,000, his two Nokia mobile phones and ran out to board the motorbike followed by the gun bearer.

As they were leaving, a cleaner, one Hassan, came out with a huge cooking stick and hit the gun bearer, the Appellant, on his head and hand causing him to fall off the motorbike. As Hassan attempted to again hit the gun bearer, he was shot by the

assailant who then ran into an alley. According to PW1, a group of people pursued the escaping gunman. They later received information that the police had apprehended him. He stated that he remembered seeing the

Appellant, who was holding the gun, though it was for the first time. He stated that Hassan succumbed to the injuries soon after being shot.

During cross-examination, PW1 told the court that he was able to pick out the Appellant in the identification parade that was conducted, as he recognized him as the one who pointed a gun to his head.

Marjan Mohammed (PW2), a customer at the hotel, had just finished eating at the restaurant and was waiting for a hand napkin at the counter when he was ordered to lie down. The lights were on, and he heard the sound of a gun being cocked. When he turned on his side, he saw two men, one of whom was pointing a gun at the cashier while the other took the money from the cashier. As they left, a worker in the restaurant, Hassan, hit one of the intruders with a cooking stick, causing the assailant who was carrying the gun to fall off the motorcycle. The assailant shot Hassan and, thereafter, ran into the alley. He identified the Appellant as the one who had the gun and shot Hassan. The witness took Hassan to hospital, but he succumbed to the injuries he sustained following the attack. He was present when the post-

mortem was performed on the deceased.

Hassan Mohamed Simba (PW3), the owner of the establishment, was in the kitchen when he heard the order commanding everyone to lie down. According to PW3, he had counted the money that was with the cashier totaling to Kshs.

96,000. PW3 peeped through the service window and saw a gun pointed at the cashier. He identified the gun, as there was light, and he could see. He heard the cashier being ordered to hand over the money and, after a short while, he heard gunshots. On running outside to check what had happened, he found his worker Hassan had been shot. Together with PW2, they took Hassan to hospital where he succumbed to the bullet injuries and died.

Abdil Komoro (PW4), a watchman at the establishment, was in the kitchen when he heard a commotion and customers being ordered to lie down. He peeped through the door and saw someone pointing a gun at the cashier. He also stated that: *"I was able to see the person who had the gun. There was a power outage after the incident, and the police came"*. He identified the Appellant in court and confirmed that Hassan died from the gunshot wounds. On cross-examination, he stated that he looked at the Appellant for a few minutes and was able to describe to the police how the Appellant was dressed.

Allan Makokha (PW5), performed post-mortem on the body of the deceased and concluded that the cause of death was severe hemorrhage due to gunshot wounds. He produced the

post-mortem report as an exhibit.

Chief Inspector Daniel Ndomi (PW6), conducted an identification parade where PW1 picked out the Appellant in the line-up. He stated that he enlisted 7

people with similar height and complexion to the Appellant and lined them up in the parade. The witness identified the Appellant, whereafter the Appellant signed the parade form signifying his satisfaction with the conduct of the parade.

On the material day, ***Police Constable Fredrick Otieno (PW7)*** heard a gunshot coming from the direction of the town centre. Accompanied by a colleague who is since deceased, he went to the location of the sound. On arrival, they were informed that a robber was hiding in a nearby bush. When they checked, they found a person bleeding from the head holding an AK47 rifle. They arrested him and recovered a firearm with eight bullets. They took the man to the police station. They later heard that a robbery had taken place at Simba Dishes where someone had been shot during the robbery. He identified the Appellant in court as the person they had arrested. He also identified the firearm recovered from him.

Corporal Fred Eseme (PW8), the investigating officer, established that a robbery had taken place at a hotel, culminating in the death of a person. He stated that the suspect was identified at a parade and produced a gun serial number 2112455 with

eight rounds of ammunition together with a ballistics report. He confirmed that the expended cartridges recovered from the scene were fired from the rifle which he had produced.

Deputy Inspector Alex Mudindi (PW9), a firearms officer, tested the gun serial number 2112455 and found it to be in a serviceable condition. He found that the spent cartridges forwarded to him for examination had been fired from the rifle. He produced his report as an exhibit.

In his defence, the Appellant stated that, on the material day at about 5.30 p.m., he received a call from somebody that she had goats from Tana River to sell. He bought a goat and sold it. As he was going home, he met a vehicle with three occupants who assaulted him and took him to the police station; that no identification parade was held, and that he was surprised when a gun was produced as an exhibit in court.

The trial Magistrate, upon considering the evidence, convicted the Appellant as charged and sentenced him to death as by law prescribed.

Aggrieved, the Appellant filed an appeal to the High Court in which he faulted the trial court for failing to consider that the death sentence imposed on him was excessive; failing to consider that there were contradictions in the amount of money stolen;

failing to consider the contradictions in the serial number of the rifle adduced and as captured in the occurrence book; failing to consider that the identification parade was not conducted in compliance with the Police Standing Orders; failing to consider that no names or descriptions of

the suspects were given to the police and recorded in the occurrence book; failing to consider that no post-mortem report was produced; and failing to consider the defence case.

The 1st appellate Judge, upon considering the appeal, upheld the conviction but substituted the death sentence for 30 years' imprisonment.

Dissatisfied, the Appellant has filed an appeal to this Court on the grounds that: the learned Judge failed to appreciate that the evidence relied on was that of a single identifying witness under difficult circumstances; that an identification parade conducted was not fair or in accordance with the parade regulations, as the Appellant was the only member of the parade who had injuries, and therefore stood out from the rest and was easily picked out; in failing to find that the Appellant was allegedly arrested with an AK47 rifle serial number 21124551, which was never dusted for finger prints; in failing to find that there was a break in the chain in the chase of the suspect and, as such, his arrest was a mistake; and that the sentence imposed upon the Appellant was excessive, harsh and unjust.

Both the Appellant and the Respondent filed written submissions. In their written submissions, ***Ms. Mulago,*** learned counsel for the Appellant, submitted that the manner in which the identification parade was conducted was flawed,

since he was the only person of Somali origin in the parade line-up. It was submitted that Somali names do not infer similarity of ethnicity as required by the Standing Orders, with the result that the learned Judge was wrong in finding that the identification parade was properly conducted.

Counsel further submitted that identification by the single witness who claimed to have seen the Appellant during the robbery whilst he was hiding was improper; that, in addition, the 1st appellate court wrongly considered the identification of the Appellant by PW2 yet, the witness did not participate in the identification parade and, therefore, his dock identification was incapable of supporting a conviction.

Counsel finally faulted the learned Judge for holding that, because the two different serial numbers for the firearm were almost similar, the numbers were with respect to one and the same firearm, and for failing to appreciate that every gun has a serial number that is unique to the specific firearm.

On their part, Assistant Director of Public Prosecutions ***Ms. Mutua*** for the Respondent submitted that where the two lower

courts have made concurrent findings of fact, then this Court is obliged to uphold those findings of fact; that the appeal raises issues of fact, and this Court’s mandate is limited to matters of law only. Counsel further submitted that, in its Judgment, the High Court went

to great lengths to reanalyze all the evidence adduced before the trial court and still found the Appellant culpable for the offence for which he was charged and rightly convicted.

On sentence, counsel submitted that the High Court sentence was in compliance with the decision in the case of ***Muruatetu & Another vs Republic [2017] KESC 2 (KLR),*** and that the sentence of 30 years' imprisonment was lawful and not harsh in the circumstances.

This is a second appeal. In a second appeal, the jurisdiction of this court is limited by dint of ***Section 361(1)(a)*** of the ***Criminal Procedure Code*** to deal with matters of law only, and not to delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court. For purposes of this section, severity of sentence is defined as a matter of fact. See ***Samuel***

Warui Karimi vs Republic [2016] eKLR; David Njoroge Macharia s. Republic [2011]

eKLR); Chemogong vs R [1984] KLR 611; and ***Ogeto vs R [2004] KLR 14);*** and

Karingo & 2 Others vs. Republic [1982] KLR.

Having carefully considered the record in light of the rival submissions, the issues of law that fall for this Court's determination are: i) whether the Appellant was positively identified; ii) whether the identification parade was properly conducted; iii) whether the Appellant was arrested with the AK47 rifle

serial number 21124551 which connected him to the robbery; iv) whether the offence was proved to the required standard; and v) whether the sentence was harsh and excessive in the circumstances.

We begin with the issue as to whether the Appellant was properly identified. The Appellant contends that he was not positively identified because the evidence of a single identifying witness could not be relied upon, as the prosecution witnesses did not provide a description of him when the incident was first reported, and also because the identification parade was flawed as he was the only participant in the parade with an injury and of Somali extraction. In evaluating this evidence of identification, the High Court elucidated it thus:

> ***"PW1's testimony was that he faced the Appellant as he pointed the gun at him. He described to the police how he was dressed. There was sufficient light. The fact of sufficiency of light was confirmed by PW2, PW3 and PW4. Even though PW4 talked of power outage he stated that this occurred after the robbers had exited the scene".***

In the case of ***Abdulla Bin Wendo & Another vs Republic [1953] 20 EACA***

166, the Court there addressed the manner in which the

evidence of a single identifying witness should be treated and stated thus:

> ***"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 the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring a correct identification were difficult."***

In respect of the contention that the trial court ought not to have relied on the evidence of the single identifying witness due to the difficult conditions prevailing during the robbery, PW1 positively identified the Appellant. He stated that the Appellant pointed the gun at him during the incident, which lasted about 5 minutes; that the restaurant lights were on and he was able to clearly see the Appellant; and that, further, he was also the only witness who attended the identification parade and picked out the Appellant. During cross-examination, he stated that he described the Appellant to the police and also how he was dressed.

But PW1 was not the only person who saw the Appellant during the robbery. Though they did not attend the identification parade, PW2, a customer, and PW4, the watchman, also saw the Appellant in the restaurant pointing the gun at the cashier. They confirmed that there was light in the restaurant, which enabled them to see him clearly. This was before a power outage occurred after the robbery. On the basis of the identification of the Appellant by PW1, PW2 and PW4, it cannot be doubted that the Appellant was properly identified as one of the robbers. Given this evidence, we are satisfied that it could not have been a case of

mistaken identity.

Concerning the Appellant’s contention that he was not positively

identified because PW1 did not describe his appearance to the police, it is clear

from the evidence that the prosecution witnesses provided descriptions of the Appellant's appearance to the police following the incident. More significantly, however, was the prosecution witnesses' description of the head injury he sustained after being whacked on the head with a large cooking stick by one, Hassan, whereafter he was found hiding in a bush bleeding from his head. As observed by the learned Judge, and we agree, the fact of the head injury he sustained immediately after the robbery sufficiently identified him as one of the assailants who carried out the robbery.

With regard to the complaint that during the identification parade he was the only one who had an injury which rendered his identification improper, we find that this issue was not raised in the trial court or the High Court. It cannot therefore be raised at this stage. But having said that, the Appellant's complaint is that the court below failed to find that the identification parade was flawed because he was the only person of Somali extraction who took part in the parade. In addressing this issue, the learned Judge had this to say:

"A perusal of the identification parade form

that was produced by PW6 shows that PW1 Said Mohammed was the witness for the parade. Apart from the appellant three members of the parade had Somali names. This confirms that the appellant was not the only person of Somali extraction in the parade, as he claims in this appeal. The identification parade was therefore properly conducted and there is no support to the appellant's case that the parade breached the police standing orders."

In the case of ***Samuel Kilonzo Musau vs Republic* [2014] eKLR,** this Court,

whilst dealing with a question concerning an identification parade, observed:

> ***"The purpose of an identification parade, as explained in Kinyanjui & 2 others v Republic [1989] KLR 60, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion. It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification." (Emphasis ours).***

In interrogating the conduct of the identification parade, according to PW6, the Chief Inspector who organized and oversaw the parade, seven people with the same height and complexion as the Appellant took part. After the parade, the Appellant signed the form indicating that he was satisfied with the conduct of the parade. It is not lost on us that the Appellant did not raise this issue during or after the parade. Instead, he signed the parade

form to confirm his satisfaction with its conduct.

Needless to say, it is clear from the evidence that PW6 mounted a lineup of 7 participants with similar height and complexion as the Appellant. And, as observed by the learned Judge, the lineup also included 3 participants with Somali names. In our view, since the parade comprised persons who were not

only of the Appellant's height and complexion, but also persons with names of Somali extraction, we find that the parade conformed to the requirements of the Police Standing orders. We say so because, in compliance with the Police Standing order, PW6 included persons of similar height and complexion, some of whom had Somali names, thereby effectively ensuring that the parade, *"...as far as possible..."* comprised persons "... *of similar age, height, general appearance and class of life as..."* the Appellant.

Consequently, when the evidence of his positive identification by PW1, PW2 and PW4 is considered, we are satisfied, as was the trial court and the High Court that, not only was the Appellant properly identified as one of the assailants of the gang that robbed PW1, he was again positively identified by PW1 during the identification parade which was properly conducted in accordance with the Police Standing Orders. This ground therefore fails.

The next issue was whether the offence of robbery with violence was proved. Both the trial Court and the High Court were satisfied that robbery with violence was proved beyond

reasonable doubt.

Section 296(2) of the ***Penal Code*** sets out the ingredients for a charge of robbery with violence and provides:

> ***"If the offender is armed with any dangerous or offensive weapon or instrument, or is in the 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."***

As regards proof of the necessary ingredients under ***section 296 (2)*** and whether the prosecution was able to demonstrate that an offence under the section had been committed in the circumstances of this case, the case of ***Johana Ndungu vs Republic Criminal Appeal No. 116 of 1995*** sets out the requirements in these words:

> ***"(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in 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 sub-section.***
>
> ***(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.”

If the court finds that immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person, the offence under ***subsection (2)*** is proved.

In determining whether the offence of robbery with violence was proved in this case, we return to the facts. On 14th April, 2012 at about 9.30 p.m, whilst PW1 was at his place of work at Simba Hotel in Malindi working as a cashier, a gang of three people arrived on a motorbike, entered the hotel and ordered everyone to lie down. One of the assailants who he saw clearly, pointed a big gun at him. Another assailant pushed him to the ground, opened the drawer and took Kshs. 96,000, his two Nokia mobile phones and ran out. As they boarded the motorbike, the Appellant was struck on his head with a big cooking stick by one Hassan. He fell off the motor bike and ran into an alley. He was later found hiding in a bush bleeding from a wound where he was struck.

When the events as they unfolded are re-analysed, we come to the conclusion, as did the courts below, that the prosecution proved the offence of robbery with violence to the required standard, that it was the Appellant and his gang of assailants whilst armed who violently robbed the complainant of Kshs. 96,000 and two Nokia mobile phones at gunpoint, and who were responsible for the death of one Hassan who the Appellant shot at point blank range. With all the ingredients for the offence having

been established, we are satisfied that the offence of robbery with violence was proved without doubt.

Turning to the gun and the evidence concerning the two different serial numbers, and whether the Appellant's possession of the gun connected him to

the offence, we would state at the outset that nothing really turned on this. To prove the offence of robbery with violence, what the prosecution was required to establish was that the complainant was violently robbed by a person who was armed with any dangerous or offensive weapon or instrument, or was in the 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. The ingredients being disjunctive, the prosecution is only required to prove the existence of one ingredient and not all three.

Evidence was adduced that the Appellant was arrested with a firearm, a fact that he did not deny. PW1, PW2, PW3 and PW4 all stated that a gun was used during the robbery, and which was produced in court. As such, not only was the Appellant in a gang of robbers who robbed PW1, he was armed with a dangerous weapon, and the violent robbery culminated in the death of one Hassan. Consequently, the prosecution having established not only one, but the existence of all three ingredients for the offence of robbery with violence, the conviction was safe, and this ground

has no merit.

On sentence, the Appellant has asserted that the sentence meted out on him was manifestly harsh and excessive.

At this juncture, it is important to point out that the Penal Code prescribes the death sentence for the offence of robbery with violence, yet his sentence was reduced by the High Court to a term of imprisonment for 30 years.

With regard to the severity of sentence, ***section 379 (1)(a)*** and ***(b)*** of the ***Criminal Procedure Code*** provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court exercising original jurisdiction.

This Court in the case of ***Bernard Kimani Gacheru vs R. [2002] eKLR*** held that:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless any one of***

the matters already stated is shown to exist…"

We have considered the record and find that, nothing discloses that the learned Judge overlooked some material factor, or considered wrong material, or acted on a wrong principle of law. Given that the sentence for the offence he faced was the death sentence, and he only received an imprisonment of 30 years for a robbery which resulted in the death of a hardworking and dedicated

Kenyan, one Hassan, contrary to his contention that the sentence imposed was excessive, we find that it was lenient. However, we have no basis upon which to interfere with it.

In sum, the Appeal against conviction and sentence has no merit and is hereby dismissed.

It is so ordered.

Dated** and **delivered** at **Mombasa** this **3rd** day of **October, 2025.

S. GATEMBU KAIRU, C.Arb, FCIArb.

.....
JUDGE OF APPEAL

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

I certify that this is a True copy of the original
Signed

DEPUTY REGISTRAR