

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL APPEAL NO. E015 OF 2024

MORRIS KIMANTHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 742 of 2023 in the Principal Magistrate's Court at Marimanti delivered by Hon. Mbayaki Wafula (PM) on 12th August, 2024.)

JUDGEMENT

1. The Appellant was charged with the Offence of Robbery with Violence contrary to section 295 (1) as read with section 296(2) of the Penal Code. The particulars of the charge were that on 24th June, 2023 at around 00.30hrs at Ngutune village in Tharaka North Sub-County in Tharaka Nithi County robbed Rael Karuta of 45 kgs of sorghum valued at

2,250/- and immediately after such robbery did use violence and injured Rael Karuta.

2. The Appellant pleaded not guilty and he was tried and convicted by Hon. Mbayaki Wafula (PM) vide a judgement dated 30th July 2024. He was sentenced to suffer death as provided by law.

3. Aggrieved by the conviction and sentence, the Appellant filed the present appeal dated 21st August 2024 in which he raised eight grounds to the effect that the Prosecution case was not proven as the evidence was contradictory and unreliable; that he was not positively identified and that the sentence was harsh and excessive.

4. The Appellant later amended his grounds of appeal which I paraphrase as follows:-

(i) That the learned trial magistrate erred in law and fact by relying on contradictory evidence.

(ii) That the learned trial magistrate erred in both matters of law and fact by rejecting the appellants defence, which was sufficient to displace the Prosecution case.

(iii) That the Prosecution did not prove its case beyond reasonable doubt.

(iv) That the learned trial magistrate showed open bias and disregarded the Appellant's credible defence.

(v) That the sentence imposed was harsh and excessive.

5. The appeal was canvassed through written submissions. The Appellant's submissions were dated 14th February, 2025 and received in court on 18th February, 2025, while the Respondent's submissions were dated 18th March, 2025.

6. The gist of the Appellant's submissions was that the Prosecution's case was not proved beyond reasonable doubt as evidence of violence against the complainant was not credible and the witnesses gave contradictory evidence. On sentence, the Appellant urged that the sentence was harsh and excessive and robbed him of his dignity.

7. The Respondents submitted that sentencing was the discretion of the trial court and that the death sentence was still valid in Kenyan Law. The Respondent relied on the case of **William Okungu Kittony Vs Republic [2018] eKLR** where the Court of Appeal applied the reasoning of the Supreme in the Muruatetu case to hold that the death sentence was discretionary and not mandatory. They submitted that the Appellant's death sentence could be commuted into

quantifiable years taking into account the brutality committed on the victim during the commission of the offence.

8. The Respondents further submitted that there were no material contradictions in the Prosecution evidence and that the ingredients of the offence were proven to the required legal standard.

9. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. This duty was succinctly stated by the Court of Appeal in **Njoroge vs. Republic (1987) KLR 19** where it held: -

“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that

court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect (see Pandya V. R [1957] E.A 336, Ruwalla vs. R. [1957] E.A 570)."

10. From my appreciation of the evidence laid before the trial court, the Appellant's grounds of appeal and the respective submissions of the parties, the following issues arise for my determination:-

- (i) Whether the ingredients of charge of robbery with violence were proved beyond reasonable doubt.
- (ii) Whether there were contradictions in the Prosecution case.

- (iii) Whether the Appellant's defence cast doubt on the Prosecution case.
- (iv) Whether the sentence was harsh and excessive.

Analysis and determination

11. The offence of Robbery with violence is provided for under the 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.*

12. In the case of **Johana Ndungu vs. Republic CRA. 116/1995, [1996] eKLR** the Court of Appeal sitting in Mombasa interpreted the law as follows:-

“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:

(i). If the offender is armed with any dangerous or offensive weapon or instrument; or

(ii). If he is in company with one or more other person or persons; or

(iii). 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.”

13. The victim of the offence was Rael Karuta (PW1). She testified that she was sleeping in her house on 24th July 2023 when she heard something moving in the house. That she lit her torch and saw the door open. When she tried to close it, she saw the Appellant hiding behind the door, that the Appellant attacked her, pushed her down, assaulted her and bit her right hand. That she screamed and her father and other neighbours responded. They found the appellant had already loaded her sorghum onto his bicycle which was outside the house. They subdued and arrested him.

14. PW1 stated that she went to Marimanti hospital the next day and her P3 dated 24th August, 2023 was filed on 28th August, 2023. She told the court that the attack took about 30 minutes. She identified the Appellant whom she said she had never seen before.

15. Juster Kagendi (PW2) was the complainant's 14 year old daughter. She told the court that while sleeping about mid-night of 23rd /24th July 2023, she heard her mother scream and on waking up saw a criminal cutting her mother, she screamed and her grandfather Patrick Mutiga who lived about 100 metres away responded. That when he arrived, the attacker released her mother and walked out. That the Area Manager and other members of the public also responded. She further stated that the Appellant assaulted the Area Manager and escaped but was apprehended by members of the public

and brought back while bleeding from his shoulders.

16. Josephat Njagi Mwaniki (PW3) was the Area Manager. He told the court that he was called by the complainant Rael Karuti (PW1) who was also his neighbour and informed that a thief had attacked them and had been apprehended. He woke up his brother and they proceeded to the complainant's home where they found the Appellant already subdued and bleeding. That Peter Mbatia, Isaac Murithi, the complainant and her daughter, escorted the Appellant to the Kathitini police station where they reported the robbery.

17. No. 72237 Cpl. Julius Magit (PW4) was the investigating officer. He testified that the Appellant was brought to Kathitini police post by members of the public on 24th July, 2023. That the complainant reported that she was asleep when

she felt movement in her house and on waking up saw someone who grabbed her but in self defence she got a panga and cut him. That she screamed and neighbours went to her rescue. They found the complainant's millet tied onto a bicycle outside. PW4 further stated that the accused was injured and he arranged for him to be taken for treatment. He stated that the complainant also had injuries as she had been bitten on her right hand, chest, face, head and left foot.

18. PW4 produced P3 Form in respect of the complainant (Exhibit1). He stated that the maker could not be reached without additional cost.

19. Having set out the Prosecution evidence above, I proceed to analyse the same bearing in mind the ingredients of the offence.

20. The first issue is whether the Appellant robbed the complainant of her bag of sorghum. There was

sufficient evidence that the Appellant entered the complainant's house in the dead of the night. She stated that she woke up when she heard movement and on checking using a torch, she saw her door open. When she tried to close it, she saw a person in the shadows, who then pounced on her and attacked her and there was a struggle. She narrated the injuries she suffered and stated in cross-examination that she did not recall what she used in self defence.

21. The neighbours who responded found the 45 bags of sorghum on a bicycle outside. This shows that the Appellant had already stolen the sorghum. PW1 identified the photographs showing the millet, and bicycle which were marked by the court as PMF1 2 (a) and (b) and PMF1 3 respectively.

22. The investigating officer (PW4) when testifying on 17th July, 2024 stated that the bicycle (PF1 3) could not be produced as it was stolen property and had been produced in Criminal Case No. E680 of 2023 as an exhibit. PW4 did not produce PMF1 2 (a) and (b) which were the photographs taken of the 45 kgs of sorghum. The record however shows that the 45 kgs of sorghum had been produced in court and photographs taken.

23. It is my finding based on the evidence of PW1, PW2 and PW3 that the sorghum was stolen from the complainant's house on the material night.

24. I have critically examined the evidence of identification. The time of the robbery was, in the evidence of the complainant and her daughter, about 2 am in the dead of the night. This means that it was dark. The complainant (PW1) stated that she lit her torch and the intruder quickly

grabbed and attacked her. That she did not know him before.

25. I would have been wary of such identification evidence save for the fact that the intruder (now Appellant) was arrested on the spot by the members of public including the Area Manager who responded to the distress call. He was arrested and escorted to the police at Kathitini police station where he was re-arrested. According to the investigating officer, the Appellant had been injured by the complainant in self-defence and had also been subjected to mob injustice.

26. I am satisfied therefore and it is my finding that the Appellant was positively identified as the robber. While conditions of identification were unfavourable because it was night, his arrest at the scene provided conclusive evidence of identification. As it were, he was caught in the act.

27. Having found that the Appellant stole the complainant's millet, the following questions must necessarily follow.

28. Was the Appellant armed? Was he in the company of others? And finally, did he use or threaten to use violence?

29. PW1 stated that when she realized some movement in the house, she woke up and lit her torch. That the Appellant immediately attacked her, wrestled her to the ground and bit her right thumb and the nail came off. Her evidence that she was injured was corroborated by the daughter (PW2). PW3 also stated that Rael (Complainant) was injured on the head and the right thumb where the nail was missing.

30. The Investigating officer (PW4) testified that the complainant was injured-bitten on her right hand, her chest and face and her thumb nail was

missing. He also stated that the Appellant was injured.

31. The investigating officer produced the P3 Form (Exhibit 1) dated 24th July, 2023 which was filled by one Wahu Lilian on 28th August, 2023. He told the court that the maker could not be reached without additional cost.

32. The P3 Form was issued by Gathithini Police Post on 24th July 2023, and the complainant was, according to P3 Form, examined on 9th August 2023. The form was filled and signed by one Lilian Wahu on 28th August 2023. No treatment notes were annexed to the P3 Form to show the injuries suffered by PW1 immediately after the attack.

33. The legal issue which, arises here is whether the investigation officer, not being a person qualified in the medical field had the legal competency to testify on the injuries sustained by

the complainant and produce the P3 which though a police document, is essentially a medical report.

34. The Court of Appeal in **Sibo Makovo vs. Republic, Criminal Appeal [1997] eKLR**, addressed a similar issue as follows:-

“The P3 form was filled in by the Medical Officer, Naivasha District, was produced by PW 3. The record does not show that the contents of the P3 form were explained to the appellant. Nor does the record show that the maker of the report (P3 form) was not available to give the requisite evidence. No foundation was laid so as to produce the P3 form by a person other than the maker thereof. It is trite law that if the maker of a document is not available the document can be produced only after another person

identifies the signature of the maker and in terms as laid down in section 33 of the Evidence Act (Cap 80, Laws of Kenya) so far as relevant. It appears to us that production of P3 forms in courts is to be taken seriously and we wish to impress upon trial magistrates to be careful in admitting P3 forms when the maker is not called.”

35. The production of the P3 Form by the Investigating officer left the evidence on the use of violence by the Appellant against the complainant on shaky ground and without corroboration.

36. I have looked at the Prosecution evidence as a whole. There was evidence that the neighbours including the victim’s father who lived 100 metres away responded almost immediately. None of the Prosecution witnesses stated that the Appellant

was armed. They all testified that he had a bicycle (which turned out was stolen property) and a bag of millet was already strapped onto the bicycle.

37. On the other hand, Prosecution witnesses admitted that the Appellant was injured when he tried to evade arrest. PW1 in her testimony that she fought back in self-defense when the Appellant attacked her. According to PW4, the panga that was used in the attack belonged to PW1; while PW1 stated in cross-examination that she could not remember whether she cut the Appellant or not.

38. It is my conclusion from my appreciation of the evidence that the Appellant was not armed. The panga as shown above belonged to the complainant and she admitted to having fought off the Appellant in self-defense. There was also no evidence that the Appellant was in the company of other assailants.

The Appellant's defence

39. The Appellant gave sworn testimony in his defence. He told the court that he was a farmer and casual labourer from Miomponi. He said that on 27th July, 2023 while on his way to his wife's home, stopped over at the home of the complainant to drink alcohol. That at about 4.00 pm Josephat Njagi (PW3) arrived with two other people pushing a bicycle and asked for one James Mwiti who was said to have fled along that route after stealing a bicycle at Mukothima. That PW3 stated that the complainant (PW1) was his wife and threatened to fix the Appellant if he did not leave her alone.

40. The Appellant further stated that the complainant refused to give back his change of Kshs.800 as he had consumed alcohol worth

Kshs.200. That the complainant who cut him with a panga and her relatives attacked him for demanding his change. That the complainant's father cautioned them against robbing him of his money and assaulting him.

41. The Appellant further stated that the police officers at Kathitini took him to Marimanti Level 4 hospital where he was admitted for 4 days between 30th July, 2023 and 7th August, 2023, when he was discharged. That he was arrested for stealing Njagi's bicycle and charged.

42. The Appellant stated in cross-examination that he had known the complainant (PW1) for more than 7 years as she had a drinking joint. That he also knew Njagi (PW3) as they had been meeting at PW1's house. He stated that the sorghum was

taken from the house, while the bicycle was recovered from a thief who fled.

43. I have considered the Appellant's defence. He admits that he was at the scene on the material date but on a drinking mission. He denies the offence and insists that he was fixed and the case fabricated because PW3 was not happy that he was at PW1's house and also because he (Appellant) demanded his change.

44. I do not find the Appellant's defence believable. It looks like he made up a story to create a scenario where his presence at the complainant's house would be lawful. Seen against the Prosecution evidence that the incident occurred at night and he was arrested at mid night, his explanation as to why he was there is unbelievable.

45. However, his defence that he was not armed and was not in company of others was believable. None of the Prosecution witnesses stated that he was armed and none stated that he was with others when he was arrested. I have also found the evidence that he attacked, wounded or visited personal violence on PW1 wanting.

46. In the end, the only facts proved by the Prosecution to the required legal standard being that the Appellant entered the complainant's house at night, shoved the complainant down and stole a bag of millet amounted to simple robbery under section 295 of the Penal Code.

47. I apply the provisions of Section 179(2) of the Criminal Procedure Code to substitute conviction for the offence of robbery with violence contrary to section 295 as read with section 296(2) with

that of simple robbery contrary to section 295 as read with section 296(1) of the Penal Code.

48. I set aside the death sentence and impose a sentence of 14 years' imprisonment.

Orders accordingly.

Judgement delivered, dated and signed at Chuka this 30th day of April, 2026.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant present acting in person and Ms Rukunga for the Respondent. Muriuki (Court Assistant).