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Ochieng & another v Republic (Criminal Appeal 133 of 2019) [2025] KECA 13 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 13 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 133 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

STEPHEN OMONDI OCHIENG .... 1ST APPELLANT

ERICK ONYANGO OCHIENG .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (D.S. Majanja, J.) dated 30th November 2016 in HCRCA. No. 31 of 2012)

JUDGMENT

1. Stephen Omondi Ochieng, the 1st appellant, Erick Onyango Ochieng, the 2nd appellant and Erick Onyango Otieno, the 3rd respondent, were arraigned before the Principal Magistrate's Court at Winam and jointly 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 27th November 2010 at Arya Nursery School in Kisumu District while armed with pangas, they robbed Walter Arthur Nondi of 3 iPhones, a Nokia phone 1201, and one bag of assorted clothes all valued at Kshs. 50,000/-; and at or immediately before or after such robbery wounded the said Walter Arthur Nondi. In the alternative, each appellant was charged with handling stolen property.

2. Following their trial, the trial court found all appellants guilty of the offence of robbery with violence, convicted and sentenced them to death. Being dissatisfied with the decision of the trial court, they appealed to the High Court. Upon hearing the appeal, Majanja, J. dismissed it in its entirety.

3. Undeterred, the appellants are now before this Court on a second appeal against their conviction and sentence. The appellants fault the learned judge for failing to find that the offence was not proved, the

doctrine of recent possession did not pass the muster, their identity was not positive, the charge sheet was defective, their rights to a fair trial were violated and the sentence imposed was unconstitutional.

4. Briefly, the prosecution case was that on the material day, Walter Arthur Nondi (Walter), PW1, had arrived home from a shopping trip to Dubai. He took the night bus to Kisumu and arrived on 27th November 2010 at about 4.00 am. After alighting, he decided to walk home and as he reached Arya Nursery School, he was attacked by a group of panga-wielding boys. He was robbed of 3 phones, a Nokia 1201 and his bag with clothes and personal items. He was injured on the left hand, knee and shoulder. Walter managed to reach his home where his brother, Erastus Okeyo Tito (Erastus), PW7, an administration police officer, woke up after hearing his calls for help. Walter narrated to him his ordeal; and with the assistance of a neighbour's vehicle, they went to Kisumu Central Police Station and reported the incident at about 6.45 am. While returning home, Walter spotted some of the suspects but could not catch up with them, so he reported the matter at the Railways Police Station who took over the matter.

5. On receiving the report, PC Paul Tirop, PW3, started conducting investigations. Together with PC Matina Wanyonyi, PW2, they proceeded to Lwangni area where an informer had told them some of the suspects were. The officers managed to arrest 3 suspects among them being the 2nd appellant, who was caught trying to hide a mobile phone in his underwear while attempting to flee. At 3.30 pm, they arrested other suspects who told the police that one of the phones had been sold to a woman by the name Mary. Mary was arrested and recorded a statement in which she stated that she bought the Nokia 1201 from Benard Odhiambo (who was acquitted).

6. Later that night, the officers received information from informers that a suspect was at the bus stage. Walter and other officers proceeded there and the informer directed them to the 3rd appellant who had in his possession a mobile phone which Walter identified as his. They also received a report from an informer that another suspect was living at Railways. When they went there at night, they found the 1st appellant, who produced a phone that Walter identified as his.

7. Placed on their defence, the 1st appellant denied that he robbed the complainant or that he was found in possession of Walter's mobile phone. The 2nd appellant also denied that he robbed Walter as alleged or that he was found in possession of Walter's mobile phone as alleged.

8. In support of the appeal, the appellants submitted that the offence was not proved as the prosecution evidence was contradictory, the complainant did not produce the treatment chits but relied on a P3 Form which is a secondary document, there were inconsistencies between the testimonies of PW1 and PW6 on the date of the offence, the weapon which injured PW1, ownership of the alleged recovered phones was not established and that the appellants were not properly identified.

9. The appellants submit that the doctrine of recent possession was not properly applied as there was no documentary evidence in the form of photographs to indicate this, nor was the ownership of the recovered phones proved.

10. Regarding identification, the appellants submit that it was done in darkness, and the intensity of the light was not established despite the complainant stating that he was alone at the time of the incident. Reliance is laid on the case of Cleophas *Otieno Wamunga vs. Republic Criminal Appeal No. 20 of 2019* and the case of Titus Wambua vs. Republic [2016] eKLR.

11. In arguing that the appellant's right to a fair trial were infringed by being denied legal representation, it is submitted that they were not informed of their rights to legal representation, nor were they assigned an advocate by the court which is contrary to Article 50[2][h] of the *Constitution* which guarantees the

right to a fair trial. In support, they rely on the case of David Njoroge Macharia vs. Republic [2011] eKLR.

12. Regarding the sentence, the appellants submit that the mandatory sentence imposed is unconstitutional owing to the Supreme Court decision in Francis Karioko Muruatetu vs. Republic [2017] eKLR. Further, the circumstances of this case did not warrant the harsh sentence, as the injury inflicted was minimal, no disability resulted, and the property was recovered and bestowed to the owner.

13. The appeal is opposed by the respondent who contends that the prosecution proved all the ingredients of robbery with violence. The evidence of PW1 was clear as to how he was violently attacked by a group of boys and even cut with a panga which evidence was never rebutted. Reliance is laid on the case of Joseph Njuguna Mwaura & 2 others vs. Republic [2013] eKLR in which the court stated as follows;

> " We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person."

14. It is contended that the three ingredients are mutually exclusive, that is, one need not prove all three to sustain a charge of robbery with violence. Proof of even a single ingredient suffices to prove robbery with violence. In his evidence, PW1 told the court that he was attacked by boys who were armed with a panga. That upon arrest, the 3rd appellant led the police to where the pangas were hidden. PW1 also testified how he was attacked and cut by a panga which evidence was corroborated by the evidence of the clinical officer who confirmed the injuries on the complainant and concluded that the injuries were caused by a sharp object.

15. Regarding identification, it is submitted that PW1 stated that he saw the boys who attacked him by the light from the moonlight. Further, upon being assisted by PW6, he was able to identify the boys shortly after the incident between Mayfair and Yatin Supermarket as such there was no need to conduct an identification parade as the appellants were arrested in the presence of the complainant.

16. The identification was further buttressed by the application of the doctrine of recent possession as the appellants were each found with items belonging to the complainant that had been recently stolen. The appellants failed to give an explanation of how they came into possession of the same hence identification was positively established.

17. Relying on the case of Isaac Ng'ang'a Kahiga & Another vs. Republic [2006] eKLR, the respondent submits that the elements of recent possession were satisfied. Each of the appellants was found in possession of a phone belonging to the complainant. There was sufficient evidence that these items among others had been recently stolen from the complainant.

18. As to whether the charge sheet was defective, the respondent submits that the issue was well determined by the 1st appellate court which found that the failure to give the identity of each phone was not fatal. From the record, it is evident that the charge sheet was amended, to include the serial numbers for the alternative charges where they were each found with a phone as each of the appellants faced an alternative charge of handling stolen goods.

19. On the right to legal representation, the respondent contends that the ground is improperly before this Court as it was never raised before the first appellate court and was being raised for the first time.

20. Lastly on sentence, it is submitted that the sentence meted against the appellants is the legal sentence for robbery with violence. Notably, the Supreme Court in Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR (Muruatetu 2) was categorical that:

> " the decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code."

21. This, being a second appeal, the mandate of this Court limited by Section 361(1) (a) of the Criminal Procedure Code is to consider issues of law as opposed to factual matters that have been tried by the trial court and re-evaluated on first appeal and concurrent findings arrived at, unless it is demonstrated that the two courts below-considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were wrong in their decision. In that event, such omission or commission would be treated as matters of law entitling this Court to interfere. In such appeals, this Court has a duty to pay homage to concurrent findings of fact made by the two courts below, unless such findings are based on no evidence at all or a perversion of the evidence, or on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings, in which event, the decision is bad in law, entitling this court to interfere. See Nyale vs. *Republic (Criminal Appeal 54 of 2021*) [2023] KECA 1081 (KLR) (22 September 2023) (Judgment)

22. Having carefully considered the record, the rival submissions and the principles of law relied upon by the respective parties, the issues of law that fall for this Court's determination are whether the offence was proved to the required standard and the excessive nature of the sentence imposed if at all.

23. The offence of robbery with violence is provided for under sections 295 and 296(2) of the Penal Code as follows:

> " 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 the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

24. In Johanne Ndungu vs. R, Mombasa Criminal Appeal No.116 of 1995 as cited in Patrick & Anor v. R (2005) 2 KLR 162, 167 this Court held as follows:

> " What acts constitute an offence under section 292 (2) of the Penal Code? This Court considered that question in Johana Ndungu vs. Republic – Criminal Appeal No 116 of 1995 (unreported) where it stated: "In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the Penal Code. 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 before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed 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 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.

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the Court to so Convict him.

In the same manner in the second set of circumstances if it is shown and accepted by the Court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The Court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The Court is not required to look for the presence of either of these two ingredients. If the Court finds that or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (maybe a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."

25. From the foregoing, it is clear that the offence of robbery with violence is committed when the robbery is proved to have been committed in any of the following circumstances:

    i. The offender is armed with any dangerous or offensive weapon or instrument, or

    ii. The offender is in the company of one or more other person or persons, or

    iii. 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.

26. Thus any one of the above elements if proved, is sufficient to find a conviction. That is to say, the three elements of the offence are to be read disjunctively and not conjunctively. See Dima Denge Dima & amp; others vs. Republic [2013] eKLR

27. The evidence tendered by the prosecution in support of any of the ingredients aforesaid has to be cogent. In this case, the complainant testified that he was robbed on 27th November 2010 by the appellants who were armed with pangas. In the process, they violently injured his left hand, knee and shoulder. Further, from the complainant's evidence, it is evident that more than one person was involved in the robbery.

28. On the issue of identification, contrary to the appellant's submissions that it was done in darkness, and the intensity of the light was not established it is apparent from the judgments of the two courts

below that apart from visual identification, the trial court also based the appellants' conviction on the doctrine of recent possession.

29. The guidelines for reaching a conviction on recent possession were succinctly set out by this Court in Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs. Republic – [2006] eKLR, where it was stated thus,

> " ....It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

30. And in Peter Kariuki Kibue vs. Republic, Nairobi Criminal Appeal No. 21 of 2001 (unreported) when dealing with a similar matter where the appellant failed to explain how he came to be in possession of the complainant's leather jacket and jeans trousers shortly after a robbery, this Court stated that:

> " The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items, otherwise than as the thief or guilty receiver. Since he did not offer any explanation the rebuttable presumption in law raised, based on the provisions of Section 119 of the *Evidence Act*, is that he was one of the people who robbed Damaris of the items together with her car and also robbed Irungu of his car. It is a presumption of fact which courts often refer to as the doctrine of possession of recently stolen property".

31. In this case, it is undisputed that the complainant was violently robbed and injured on the morning of 27th November 2010 at Arya Nursery School, where various items including mobile phones were stolen from him. The evidence on record shows that three iPhones were recovered from each appellant upon arrest. The same mobile phones were retained as an exhibit and produced in court.

32. In their defence, the appellants did not offer any explanation as to how the complainant's mobile phones came to be in their possession. As a consequence, there is no doubt that the appellants were amongst the gang that robbed the complainant on the morning of 27th November 2010.

33. It is clear therefore that all the ingredients of the offence were established beyond uncertainty, contrary to the submissions of the appellants. The trial court and 1st appellate court, were all justified in concluding that the ingredients of the offence were met as such there is no reason(s) to depart from those concurrent findings.

34. Regarding failure to be informed of their right to legal representation, it is contended that the failure by the High Court to inform the appellant of the right occasioned an unfair trial placing reliance on Article 50 of the *Constitution* which provides:

50.

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate,

(2) Every accused person has the right to a fair trial, which includes the right of another independent and impartial tribunal or body....

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

35. In the case of R vs. Chengo & 2 Others (Petition No. 5 of 2015) [2017] KESC (15) (KLR), the Supreme Court stated as follows concerning legal representation:

> "We are thus in agreement with Mr. Ole Kina, that the right to legal representation at State expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the *Constitution*, this particular right is not open-ended. It only becomes available "if substantial injustice would otherwise result".

36. Similarly, in the case of David Macharia Njoroge vs. R, [2011] eKLR this Court considered the applicability of Article 50 of the *Constitution* and held:

> "State-funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under the *Constitution*, however, provisions of international conventions that Kenya is a signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where "substantial injustice" would otherwise result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided."

37. From the above analysis it is evident that the appellants did not demonstrate that they met the criteria that would have enabled them to be accorded a counsel at the expense of the State. Further, as stated earlier this Court lacks jurisdiction to deal with this ground that was not canvassed in the High Court and the same must fail.

38. The appellant has challenged the death sentence imposed by the trial court and upheld by the first appellate court on the basis that the same was excessive, harsh and unconstitutional. In challenging the sentence of death prescribed under section 296(2) of the Penal Code, the appellant has relied on the decision of the Supreme Court in Francis Kariako Muruatetu & Others vs. Republic [2017] eKLR. (Muruatetu 1).

39. It must however be noted that, in its directions in Muruatetu & Another vs. Republic; Katiba Institute & 4 Others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (Muruatetu 2), the Supreme Court directed that its decision in Muruatetu 1 only applied to the mandatory death sentence for the offence of murder under sections 203 as read with section 204 of the Penal Code.

40. Looking at the circumstance of this case and the manner in which the appellants executed the robbery it is our considered view that the sentence was commensurate to the charges against the appellants; thus the sentence was legal and proper and is hereby upheld.

41. Accordingly, the appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

....

JUDGE OF APPEAL

H. A. OMONDI

....

JUDGE OF APPEAL

JOEL NGUGI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR