Okorodei alias Okumu & another v Republic (Criminal Appeal 196 & 193 of 2018 (Consolidated)) [2025] KECA 1 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 1 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 196 & 193 OF 2018 (CONSOLIDATED)

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

BENJAMIN OKORODEI ALIAS OKUMU ..... 1ST APPELLANT

BONIFACE OGEMA OILE ALIAS OBARA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Busia (K.W. Kiarie, J.) dated and delivered on 3rd May, 2018 in HCCRA No. 48 of 2015 as consolidated with HCCRA No. 47 of 2015)

JUDGMENT

1. The 1st appellant, Benjamin Okorodei alias Okumu and the 2nd appellant, Boniface Ogema Oile alias Obara, were the accused persons in the trial before the Chief Magistrate's Court at Busia in Criminal Case No. 1802 of 2013. They were 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 the 15th day of October, 2013, at Okame Bridge, Chakol Division within Busia County, the appellants jointly while armed with a dangerous weapon namely a panga, robbed Andrew Odoto Amerikwa (Deceased) of his motor cycle registration no. KMCQ 265U make Bajaj Boxer, valued at Kshs. 83,000/= and after such robbery, caused the death of the Deceased.

2. The appellants pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted and sentenced them to death.

3. The appellants were aggrieved by the decision of the lower court and filed two separate appeals against the conviction and sentence before the High Court. The appeals were consolidated and heard together.

4. The High Court (K.W. Kiarie, J.) dismissed the consolidated appeals and upheld the conviction and sentence in a judgment dated 3rd May, 2018.

5. The appellants were again dissatisfied with the decision of the High Court and have lodged two separate but identical appeals. During the plenary hearing of the appeal, we consolidated them and heard them together. Both appellants were represented by the same counsel. They raised two (2) grounds in their Memorandum of Appeal, which are that:

    1. The 1st appellate court erred in law by failing to consider/subject the evidence to fresh scrutiny, re-evaluate the same and analyze as required of it.

        i. Had it done so it would have arrived at a conclusion that identification by recognition relied upon by the prosecution was inconclusive and unreliable.

        ii. Had it done so it would have arrived at a conclusion that all ingredients of the offence were not proved.

2. The sentence meted down against the appellants is excessive in the circumstances given that the mandatory death penalty is outlawed.

    1. A brief summary of the evidence that emerged at the trial through eight (8) prosecution witnesses, and which was subjected to a fresh review and scrutiny by the High Court, is as follows.

    2. The Deceased was a boda boda operator. He had been hired to operate the boda boda owned by Moses Maloba Onyango (Moses), who testified as PW1. On 15th October, 2013, while at the Adungosi bus stage, Moses observed the appellants as they approached the deceased to ferry them on the boda boda, to an area called Asinian. It was around 7.30pm and other motorcyclists were also at the stage. They agreed with the deceased on the fare and left for Asinian but the deceased never returned. Moses testified that he clearly saw and recognized the two appellants as he knew them before.

    3. The following morning at 6.00am, Moses was informed by a certain motorcyclist that a badly injured person had been found at the flyover, which was enroute to Asinian. Alarmed that the injured person could be the Deceased, Moses quickly went to the scene. He found the deceased lying on the ground. His

        motorcycle was not on site. The deceased had a cut on his head and his pelvic bone had been injured. Moses took him to hospital.

9. Moses knew the homes of the appellants. Therefore, he went to the home of the 2nd appellant in the company of other boda boda operators and the assistant chief (PW3). Upon inquiry, the 2nd appellant denied that he had attacked the deceased, but he led them to the home of the 1st appellant. On approaching the home, the 1st appellant saw them and fled into a sugar cane plantation. The crowd pursued him in vain. In their pursuit to catch him, they saw tyre marks of a motorcycle in the 1st appellant's farm, which disappeared into the river. They later found the motorcycle. It had been submerged into the river. PW1 reported incident to the police who went to the scene and took the motorcycle; and also arrested the 2nd appellant.

10. Before he was taken to hospital, the deceased told Collins Madadi Ochieng (PW4), a boda boda rider, that he was attacked by the two appellants the previous night. PW4 testified that he was at the bus stage on the material night and saw the appellants negotiating fare with the deceased. The following morning, he got information from one of his colleagues that one of them had been attacked. He went

to the scene and found the deceased, who had a head injury, being taken to hospital. There was also blood and feaces at the scene. Thereafter, he joined the group of people who went to the home of the 2nd and 1st appellant. They later found PW1's motorcycle submerged in the river.

11. Quentiene Simbale Ebeli (PW3), the area assistant chief, testified that on the morning of 16th October, 2013, he was alerted by his neighbour that the deceased never returned to his home the previous night. He did not think much of it. On his way to work, he learnt that there was a person who had been found injured near Chakol river. He rushed to the scene but did not find the person. However, he saw some blood and human feaces at the scene. He was informed that the person had been taken to hospital. He joined PW1 and other boda boda operators and went to the 2nd appellant's home, who led them to the 1st appellant's home; where they found PW1's motorcycle submerged in the river near his farm. Later that day, PW4 got information that the 1st appellant had been found and arrested.

12. Meanwhile, on 16th October, 2013, it was reported to Vincent Ekamran (PW2), the village elder, that there was a suspicious person looking for employment in the village. PW2 testified that he had never seen him before that day. He observed that the 2nd appellant seemed nervous and did not have shoes on. He asked him his name and also searched his pockets and found a key. He asked him what the key was for and the 2nd appellant told him that it was his house key. But PW2 noticed that the key did not look like it was for a house. He decided to take the man to Sagero AP Camp where he was informed that a motorcycle had been stolen and a rider injured. Shortly afterwards, a group of boda boda riders arrived at the AP Camp and the 1st appellant was arrested. PW2 handed over the key that he found on the 1st appellant, to the police.

13. The police officer who received the key was APC Bernard Muriuki (PW5). His testimony tallied with that of PW2 and confirmed that the PW1 confirmed that the key which was found on the person of the 1st appellant was, indeed, the ignition key to the motor cycle which the deceased was riding on the day he was attacked.

14. The other witnesses were Antony Ong'ala, PW6, the deceased's uncle who identified the deceased's body before the postmortem was conducted and Corporal Gibson Lesiamo, PW7, the investigation officer who testified about how he conducted the investigations – including details about the arrests of the two appellants. Importantly, though, Cpl Lesiamo told the court that he visited the deceased at the hospital and that the deceased told him that he was attacked by both appellants. PW7 testified that the deceased kept saying "Benjamin has killed me".

15. The last witness was Dr. Faith Atieno. She testified on behalf of Dr. Muganda who conducted the postmortem on the deceased. He observed the deceased had: visible hematoma on the right temporal region with a visible wound; and a fractured head skull which caused subdural hematoma at the temporal region. He concluded that the cause of death was subdural hematoma secondary to head injuries; which meant that he bled in between the membranes that covered the brain.

16. When they were placed on their defence, the appellants gave sworn testimony and called no witnesses. Both of them denied the charges and said that they knew nothing about the incident that led to the death of the deceased.

17. The appeal was argued by way of written submissions by both parties. During the virtual hearing, learned counsel, Mr. Lugano appeared for the appellants, whereas learned counsel, Ms. Busienei appeared for the respondent. Both parties relied on their submissions and orally highlighted them.

18. Counsel condensed the grounds of appeal into three grounds namely:

    1. The appellants were convicted on the reliance of the doctrine of identification by recognition.

2. The appellants were found guilty of the charge of robbery with violence, which ingredients were not proved by the prosecution.

3. The sentence meted down against the appellants is excessive in the circumstance given that the mandatory death penalty is outlawed.

19. On the first ground, counsel contended that the identification evidence was not watertight because the evidence of PW1 and PW2, who are brothers was never corroborated by any other independent witness and that while PW1 testified that he knew the appellant because he used to work at a hotel, he never stated how often he used to visit that hotel for service. Counsel also argued that neither witnesses had testified about the length of time they had seen the appellants on the night of the attack. Counsel relied on this Court's decision in Wamunga vs. Republic (1989) KLR 426; Nzaro vs. Republic (1991) KAR 212; Kiarie vs. Republic (1984) KLR 739; and Republic vs. Turnbull & Others (1976) 3 ALL ER 549.

20. It was difficult to understand counsel's arguments on the second point but he suggested that the ingredients of the offence of robbery with violence were not proved because the panga that was ostensibly used in the attack was not definitively shown to have been the one so used; and because the appellants' defence that they were not on the scene was not displaced meaning that the prosecution cannot be taken to have proved the number of assailants beyond reasonable doubt.

21. On the third ground, counsel argued that while the death penalty was never declared unconstitutional, the Supreme Court, in the case of Francis Kariko Muruatetu & Another vs. Republic (2017) eKLR, declared the mandatory aspect of death sentence unconstitutional. Thus, that declaration gave judicial officers discretion to prescribe alternative sentences besides the death sentence to convicts of capital offences.

22. Opposing the appeal, Ms. Busienei rejected the appellant's submission that the prosecution did not prove the ingredients of robbery with violence. She reiterated the testimonies of PW1, PW2, PW4 and PW8 as summarized herein above, and submitted that they proved the ingredient that the deceased's assailants were armed with offensive weapons as the deceased was seriously injured. She further submitted that PW1's evidence was corroborated by PW4. She also submitted that PW1 and PW2 testified that they saw the deceased with two people, which proved the second ingredient that the offender was in the company of one or more parsons.

23. On the issue of identification, counsel argued that the evidence of PW1 and PW4 was very consistent and PW1 confirmed that even though it was 7.30pm, it was still bright and he saw the two appellants who wanted to be transported to Asinian. Further, PW1 testified that he knew the homes of the appellants; while PW4 mentioned the 2nd appellant by name, which gave the impression that he was known to him. The evidence of PW1 and PW4 was not challenged. In addition, counsel reiterated the evidence that the 1st appellant ran away when the 2nd appellant led a group of people to his home where they found the stolen motorcycle submerged in the river near his farm and, thereafter, PW2 found him with its ignition key. For this reasons, counsel submitted that the identification was proper as there was sufficient light and the appellants were persons known to PW1 and PW4.

24. On sentence, counsel argued that the death penalty meted out by the trial court is lawful since the same is still applicable as a discretionary maximum punishment, in line with the 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). She submitted that the trial court had the opportunity to hear the mitigation of the appellants and applied its discretion in meting out the death penalty under the circumstances. Ultimately, she argued that the prosecution proved its case beyond reasonable doubt and urged this Court to dismiss this appeal.

25. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

> "This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

26. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. In our view, three issue falls for determination on this second appeal, that is, whether the evidence of identification by recognition was properly relied on; whether the ingredients for the offence of robbery with violence were proved; and whether the sentence meted out is excessive in the circumstances.

27. As regards the first issue, we have set out above the evidence as it emerged at the trial. It is readily obvious that no eye witness to the offence testified. The evidence of identification was, therefore, circumstantial. It follows that the Court has to exercise a lot of caution before confirming the conviction based on identification evidence which is circumstantial. The question is whether, in the present case, the circumstantial evidence unerringly points to the two appellants as the perpetrators of the offence.

28. The principles applicable to circumstantial evidence in criminal cases were restated by the Supreme Court in Republic vs Ahmad Abdolfadhi Mohammed & Anor 2019 eKLR as follows:

> "(55) The law on the definition, application and reliability of circumstantial evidence, has, for decades been well settled in common law as well as other jurisdictions. Circumstantial evidence is "indirect [or] oblique evidence ... that is not given by eyewitness testimony." It is "[a]n indirect form of proof, permitting inferences from the circumstances surrounding disputed questions of fact." It is also said to be "[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence...."
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> .....
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> 59. To be the sole basis of a conviction in a criminal charge, circumstantial evidence should also not only be relevant, reasonable and not speculative, but also, in the words of the Indian Supreme Court, "the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established...." As was stated in the case of Kipkering Arap Koskei & Another v. R (1949) 16 EACA 135, a locus classicus case on reliance of circumstantial evidence in our jurisdiction, for guilt to be inferred from circumstantial evidence the "...the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt, ..."
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> 60. As was further stated in the case of Musili v. Republic CR A No.30 of 2013 (UR) "to convict on the basis of circumstantial evidence, the chain of events must be so complete that it establishes the culpability of the appellant, and no

> one else without any reasonable doubt." The chain must never be broken at any stage. In other words, there "must be no other co- existing circumstances weakening the chain of circumstances relied on" and the circumstances from which the guilt inference is drawn must be of definite tendency and unerringly pointing towards the guilt of the accused. "Suspicion however strong, cannot provide a basis for inferring guilt."

29. In short, the principles for circumstantial evidence to justify the inference of guilt, the evidence must irresistibly and unerringly point to the accused as the person who committed the crime; the incriminating factors must be inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt; and the chain of events must be so complete that it establishes the guilt of the accused and no one else.

30. The question in the present appeal is whether this threshold was met. Upon consideration, we think it was. First, we point out that the two courts below concurrently found the facts established that PW1 and PW4 recognized the appellants at the bus stage where the appellants had gone to look for a boda boda.. PW4 explained the circumstances including the lighting at the stage as well as the time they took to speak with the appellants. It also turned out that both PW1 and PW4 knew the appellants before the incident and that this was, therefore a case of identification by recognition.

31. The circumstantial identification evidence is further fortified by three other pieces of evidence. The first one are the dying declarations given to PW1, PW4 and PW7. They each categorically said that the deceased told them that it was the appellants who attacked him. The dying declarations were remarkably consistent: that while the 2nd appellant held the deceased by the waist, the 1st appellant cut his head using a panga. This evidence was not shaken during cross examination. The second one is the fact that the ignition key to the stolen motor cycle was found on the person of the 2nd appellant. He had no explanation for that finding. The third one is that both the appellants conducted themselves in a manner inconsistent with their innocence. The 1st appellant ran away into the sugarcane plantation and escaped being apprehended by the members of public. However, he was later found with the ignition key of the stolen motorcycle. On the other hand, the 2nd appellant was released from police custody until further investigations were conducted after the 1st appellant absolved him of the offence. But he was directed to report back at the police station on a particular date. He defied and was on the run until a few months later when he was re-arrested through the help of informers. This was conduct that was inconsistent with innocence. Lastly, the motor cycle tyre marks in the 2nd appellant's farm, while solely not incriminating, in the totality of circumstances here add to the weight of circumstantial evidence tying the appellants to the offence. The appellants' guilt is further confirmed by the dying declarations.

32. Given our analysis of the evidence presented at trial above, it is a chimerical to maintain that not all the ingredients of the offence of robbery with violence were established. In Johana Ndungu vs. Republic [1996] eKLR this Court considered the ingredients of the offence of robbery with violence and observed as follows:

> " In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of the penal code 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."

33. Hence, the ingredients of the offence of robbery with violence are to be read disjunctively, not conjunctively. In the present case, the evidence, as analyzed above, showed that there was a theft of a motor cycle; and that there were at least two assailants; and that the assailants used a weapon to injure the deceased; and finally, that the deceased was fatally wounded as a result of the offence. The question whether the panga produced was comprehensively linked to the offence is a red-herring: other disjunctive elements of the offence of robbery with violence were established anyway.

34. Turning to the final issue of sentence, the appellants' argument is that the trial court erred by not considering their mitigation since it sentenced them to the mandatory death penalty stipulated in section 296(2) of the Penal Code. In raising this argument, the appellants rely on the reasoning of the Supreme Court in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR (Muruatetu 1). Unfortunately for them, the argument cannot succeed for two reasons. First, the Supreme Court has given categorical guidance in Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) (2021) eKLR (Muruatetu 2) that the holding in Muruatetu 1 is inapplicable to the offence of robbery with violence. Second, as the Supreme Court reiterated recently in Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR), this Court is deprived of jurisdiction to consider a matter which was not first raised at the High Court. The appellant cannot now raise this issue before us for the first time. As stated by the Supreme Court in Republic - vs- Mwangi (supra), such an issue must be raised and fully argued in the High Court, before it can be escalated to this Court.

35. The upshot is that the appeal herein lacks merit. It is hereby dismissed in its entirety.

36. Orders accordingly.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar