



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wamwoma v Republic (Criminal Appeal 19 of 2018)  
[2024] KECA 546 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KECA 546 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 19 OF 2018  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
MAY 23, 2024**

**BETWEEN**

**MARGARET NECHESA WAMWOMA ..... APPELLANT**

**AND**

**REPUBLIC ..... APPELLANT**

*(Being an Appeal from the Judgement of the High Court of Kenya at Kakamega  
(Chitembwe & Thurania Jaden, JJ.) dated 28th June, 2012 in HCRA No. 155 of 2010)*

**JUDGMENT**

1. On 30<sup>th</sup> July, 2010, Margaret Nechesa Wamwoma, the appellant herein, was convicted by the Chief Magistrate Court at Kakamega, of the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*, and sentenced to death.
2. It was alleged that on 6th October, 2009 at Bukura village, South Butsotso Location in the then Kakamega Central District within Western Province, jointly with another person not before the court, being armed with a dangerous or offensive weapons namely a kitchen knife, a rope and rungu, she robbed Fanuel Waka Mukholia his motorcycle Reg. No. KMC xxxB make TVS Star valued at Kshs.87,000/=, a mobile phone make Motorola Cxxx valued at Kshs.3,000/=, one Safaricom wallet containing Kshs.420/=, all to the value of Kshs.90,420/= and during the time of robbery she used actual violence on the said Fanuel Waka Mukholia.
3. Briefly, the facts leading to the appellant's conviction were that the complainant Fanuel Waka Mukholia (Waka), a "boda boda" motorcycle operator in Shibuli-Bukura area, was on 6<sup>th</sup> October, 2009 at about 4.00 p.m., in Bukura area, when the appellant approached him seeking to be ferried to Shibuli Area. Waka agreed to transport the appellant together with her companion who was a young man, at a fee of Kshs.40/= each. The appellant took Waka's telephone number so that she could telephone him when they were ready for the return trip. At about 8:00 p.m., the appellant telephoned Waka and



requested him to pick the two from Shibuli to return them to Bukura at a fare of Ksh.100/= each. The appellant and her companion paid an extra amount of Kshs.60/=, and requested to be dropped further ahead. The complainant obliged, but when they reached the junction of Star Secondary School, the appellant and her companion attacked Waka. The appellant tied a rope around Waka's neck, while her companion hit Waka with a hammer on the head. Waka fell down and lost consciousness. He regained consciousness five days later and found himself at Moi Referral Hospital with injuries. His upper and lower teeth were missing, his left eye damaged, and he had stab wounds on the face. Waka's Motorola mobile phone, cash Kshs.340/= and his motorcycle were all missing. He remained in the hospital for three weeks.

4. Meanwhile, Wellington Saul Atira (Wellington), who had on the same night seen Waka at Shibuli with the appellant and another male passenger on his motorcycle, learnt of the robbery the following day. He recalled that the appellant and his companion were the last passengers that Waka had been seen with before the attack. Wellington led Waka's relatives to a bar in Bukura where he used to see the appellant, but she was not there. On 9<sup>th</sup> October, 2009 Administration Police Constable Asheri Imbyakha (APC Asheri) received information from motorcycle operators in the Bukura area acting on which he proceeded to a bar in Bukura where he found and arrested the appellant, and escorted her to Kakamega Police Station where a report of the robbery had already been made. Consequently, the appellant was charged with the offence of robbery with violence.
5. When placed on her defence, the appellant gave unsworn evidence in which she explained how she was arrested from her place of work at a Bar in Bukura area. This happened, she said, when an Administration Police Officer who had entertained her with drinks and food but whose sexual advances she rebuffed, threatened to beat her up, and she ran to Bukura Police Post, but the Officer followed her there and had her placed in the cells, demanding a refund of the money he had used to buy her food and drinks. After five days in police custody, the appellant was questioned about a missing motorcycle, phone, and money. She denied any knowledge of the robbery.
6. The appellant who was aggrieved by her conviction and the sentence that was imposed by the trial court, appealed to the High Court. On September 28<sup>th</sup> June, 2012 her appeal having been heard by a two Judge Bench (Chitembwe and Thurania-Jaden, JJ.) was dismissed in its entirety. In dismissing the appeal, the learned Judges of the High Court found that the appellant was recognized by both Waka and Wellington, who had seen her before; that her defence was properly rejected; and that there was sufficient evidence in proof of the robbery.
7. Undeterred, the appellant is now before this court on a second appeal against her conviction and sentence. The appellant has filed a memorandum of appeal through her advocates Olonyi & Awuor Associates, in which she has raised 3 grounds, faulting the learned Judges for upholding her conviction on prosecution evidence that did not support the offence as charged; convicting the appellant when the burden of proof was shifted from the prosecution; and in upholding a sentence which was excessive, harsh, unconstitutional and unlawful.
8. In her written submissions, filed in support of the appeal, the appellant contends that the offence of robbery was not proved to the required standard. That the alleged evidence linking her to the offence of robbery was circumstantial, namely, that she was the last person seen in the company of Waka before the robbery occurred. The appellant relied on *Abanga alias Onyango v Republic*, Criminal Appeal No 32 of 1990, cited in *Erick Odhiambo Okumu v Republic* (2014) eKLR, for the conditions in which circumstantial evidence can be relied upon to sustain a conviction. The appellant argued that there must be a strong basis for relying on the said evidence to establish the guilt of an accused person. She pointed out that Waka, in his testimony, told the court that he fell unconscious, and when he regained consciousness, he found himself at Moi Teaching and Referral Hospital, and discovered that his mobile



phone Motorola C117, together with his Kshs. 340/= and motorbike were missing. This meant that he could not tell what had happened to him.

9. The appellant submitted that the learned Judges misdirected themselves in finding that Wellington saw Waka carrying the appellant and her companion on his motorbike, as this was not possible because Wellington was in Shibuli and Waka in Bukura. The appellant further poked holes in the prosecution evidence stating that although APC Asheri arrested her, the identity of the boda boda riders who gave him information was not clear, nor was there any evidence as to how the boda-boda operators identified her.
10. She dismissed the evidence of the investigation officer maintaining that he did not conduct any investigations that could establish her culpability. She faulted the learned Judges for upholding her conviction without satisfying themselves that the inference of guilt drawn from the circumstantial evidence was incompatible with her innocence, or failing to find that the onus of proof was wrongly shifted from the prosecution to the appellant. The appellant argued that she was not at the scene of the crime and the mere fact that she might have had the opportunity to commit the offence was not sufficient to prove that she indeed committed the offence.
11. With regard to the sentence of death which was imposed on the appellant by the trial court, and upheld by the 1<sup>st</sup> appellate court, the appellant argued that since the mandatory death sentence was declared unconstitutional by the Supreme Court in *Francis Kariokor Muruatetu & Another v Republic* (2017) eKLR, and the Court should, therefore, set aside the sentence.
12. The respondent filed written submissions in which it was argued that the ingredients of the offence of robbery with violence were proved, as the appellant attacked Waka while in the company of another person, who hit Waka with an axe on the head, and the appellant also tied Waka with a rope around his head; In addition, the Clinical Officer who examined Waka, testified that he had a cut wound, scars on the head, a fracture and loss of four incisor teeth. The respondent submitted that Waka was able to identify the appellant as she is a person she used to see and knew that she worked in a bar at Bukura. Furthermore, the two took time negotiating before they left for Shibuli and the appellant later called Waka to pick her and her companion from Shibuli.
13. On the mandatory death sentence the respondent conceded that the death sentence that was imposed on the appellant is unconstitutional, but left the issue of sentence to the discretion of the Court. The respondent urged the Court that in exercise of its discretion in sentencing, it should consider the severe nature of the injuries that were sustained by Waka, and, the fact that in her mitigation the appellant was not remorseful and only prayed for leniency. The respondent proposed a sentence of 40 years' imprisonment.
14. We have considered the record of appeal in light of the rival submissions of the respective parties, and the principles of law relied upon. This being a second appeal, under Section 361 of the Criminal Procedure Code, the Court's mandate is confined to consideration of matters of law and not facts. This means that the Court ought not to interfere with the concurrent finding of fact arrived at in the two courts below, unless the finding was based on evidence. See *Chamagong v Republic* (1984) KLR 611.
15. It is clear that the evidence implicating the appellant was the oral evidence of Waka who swears that the appellant was one of the pillion passengers that he was carrying at the time he was attacked. This is the circumstantial evidence that implicated the appellant. The principle governing the application of circumstantial evidence has been stated in several cases including the case that was cited by the appellant. These are cases such as *Kipkering Arap Koskei v Kirire Arap Matetu* 1949 EACA 135; *Sawe v Republic* KLR 364 and *Peter Mugambi v Republic* 2017 eKLR, the principles that emerge are:



- i. That the inculpatory facts must be incompatible with the innocence of the accused.
  - ii. That the facts must be incapable of explanation upon any other hypothesis than that of the accused's guilt.
  - iii. There must be no other existing circumstances weakening or destroying the inference.
  - iv. Every element making the unbroken chain of evidence must be proved by the prosecution.
16. In the instant case the two lower courts believed and accepted Waka's evidence that he knew the appellant before and that the appellant was his last passenger on the fateful day. This evidence was consistent with the evidence of Wellington, who was also familiar with the appellant as he used to see her at a bar in Bukura. Wellington confirmed that he saw Waka near Lucky bar in Shibuli and that at that time Waka had two passengers, the appellant and a man, and they were headed to Bukura. From the evidence of Waka, the appellant first approached him when he was at Bukura and he transported her from Bukura to Shibuli and later transported her and her companion from Shibuli to Bukura. Wellington's evidence was, therefore, consistent with Waka's evidence. It is also consistent with the fact that the appellant was arrested from a bar in Bukura. The appellant's evidence denying having been the passenger that Waka transported was, therefore, properly rejected.
17. The appellant having been the last passenger that Waka transported, and the attack on Waka having taken place as he was on the motorcycle riding the motorcycle with the appellant and her companion sitting next to him as pillion passengers, Waka was right in implicating the appellant. The facts, as testified to by Waka, placed a burden upon the appellant under Section 111 of the *Evidence Act*, to exonerate herself as she was the one in a position to explain the special facts concerning what may have happened to Waka. Having failed to give any explanation, the irresistible conclusion is that the appellant and her companion were the ones who attacked Waka.
18. There was clear evidence that Waka was robbed of several items including the motor cycle, and violence was meted upon him during the robbery. In accordance with the Court's decision in *Johana Ndungu v Republic Criminal Appeal No. 116 of 1995*, the elements of the offence of robbery were established, and the appellant was properly convicted of the offence
19. On the issue of sentence, the appellant was sentenced to the mandatory death sentence as provided for the offence of robbery with violence under Section 296(2) of the *Criminal Procedure Code*. The appellant contended that the sentence imposed upon him was unconstitutional. However, in *Francis Kaiorko Muruatetu & Another v Republic; Katiba Institute & 5 Others (amicus curiae)* (2021) eKLR, (Muruatetu 2), the Supreme Court clarified that notwithstanding its holding in *Muruatetu I* that the mandatory nature of the death sentence under Section 204 of the *Penal Code* is unconstitutional, the death sentence in regard to the offence of robbery with violence under Section 296(2) remains valid until the constitutional validity of that sentence is fully argued before the High Court and escalated to the Court of Appeal. As this is yet to be done, the sentence of death that was imposed upon the appellant, remains a lawful sentence.
20. The upshot of the above is that this appeal fails in its entirety. Accordingly, we uphold the appellant's conviction and sentence and dismiss the appeal.

**DATED AND DELIVERED AT KISUMU THIS 23<sup>RD</sup> DAY OF MAY, 2024**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**



**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

