



REPUBLIC OF KENYA



KENYA LAW
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**Wandera v Republic (Criminal Appeal 63B of 2017)
[2024] KECA 547 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KECA 547 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 63B OF 2017
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
MAY 23, 2024**

BETWEEN

JOSEPH SUNDAY WANDERA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (Ali.A. Aroni & Francis Tuiyott, JJ) dated 17th March, 2016 in HCCRA No. 48 of 2011)

JUDGMENT

1. The appellant, Joseph Sunday Wandera, was tried and convicted of the offence of robbery with violence contrary to Section 296(2) of the Penal Code following which he was sentenced to death. His appeal to the High Court was dismissed against both conviction and sentence.
2. Briefly, the circumstances leading to the appellant's arrest as gleaned from the evidence that was adduced in the trial court was as follows: On 24th May, 2010, at 6.30pm, the complainant Sellina Awino Musumba (Sellina), was on her way home from the depot where she sells bread. She was in the company of her six-year-old daughter. The depot was about two and a half kilometres from her home. Before she got to her home, she was attacked and robbed of her wallet which contained 92,500/-, a Nokia 1201 mobile phone worth Ksh. 1,950/-, an ATM Card for KCB, and an ATM Card for National Bank of Kenya. Both Sellina and her daughter screamed for help, and Winnie Ndaika (Winnie), who was in her house responded to the screams.
3. Winnie learnt from Sellina that she had been robbed and that Sellina suspected the last customer whom she had served. Winnie accompanied Sellina to Funyula Police Post where they reported the matter to PC Micah Yator (PC Yator). Sellina was issued with a P3 form which was later filled out by a clinical officer at Sio Port Hospital. Investigations were carried out and a few weeks later, PC Yator and Sellina proceeded to a house where they found the appellant. The house was searched and a Nokia 1202 mobile



- phone, which Sellina identified as hers, was recovered. Sellina produced a receipt for a phone and the serial number indicated on the receipt was the same as that on the phone recovered from the appellant. Consequently, the appellant was charged with the offence of robbery with violence.
4. In his defence, the appellant gave sworn evidence in which he explained that the phone was given to him by Sellina who was his employer, and who owed him Kshs 3000 as he had not been paid his salary for two months. He stated that the employer became annoyed when he decided to leave his employment, but he denied that it was his employer who framed him.
 5. The appellant who is dissatisfied with the judgment of the High Court, has now lodged this second appeal. In his memorandum of appeal which was filed in person, the appellant has raised four grounds in which he faults the learned Judges of the High Court for failing to properly evaluate the credibility of his alibi defence; failing to appreciate that there was material inconsistencies in the evidence of Sellina and the arresting officer regarding the mode of recovery of the exhibits, which was the basis of his conviction; failing to note the glaring contradictions on the manner in which the exhibits were found; failing to appreciate the weight or bearing of the circumstances admitted or proved; failing to properly scrutinise and analyse the elements of the charge as stated in the charge sheet as the same did not meet the required standards of Section 295 of the Penal Code, to justify the death sentence; failing to note that no medical evidence was adduced to prove any violence.
 6. The appellant also filed a memorandum of appeal through his advocate Ms. Anyango Ida Rayner, in which two additional grounds were added: that is, that the learned Judges erred in relying on evidence of identification without an identification parade having been done; and failing to find that based on the evidence presented the prosecution failed to prove its case.
 7. The appellant filed written submissions in support of his appeal in which he urged that since Sellina did not know her attacker, an identification parade would have been the best way of identifying her attacker. Referring to Gabriel Kamau Njoroge -vs- Republic [1982 – 1988] 1KAR 1134 and Wamunga -vs- Republic [1989] KLR 424, the appellant urged the Court to find that his identification by Sellina was only dock identification which was worthless.
 8. In addition, the appellant submitted that the prosecution failed to prove its case as the evidence adduced was not sufficient to prove the charge; that he provided a reasonable explanation as to how he came by the phone; and that the learned Judges were wrong in rejecting his alibi defence.
 9. The respondent opposed the appeal through written submissions that were prepared by Mr. Patrick Okango, Senior Principal Prosecuting Counsel in the office of the Director of Public Prosecutions (ODPP) Kisumu. The respondent cited Paul Mwenda -vs- Republic [2015] in which it was stated that when a right of appeal is confined to questions of law, the appellate court has the loyalty to accept the findings of facts of the lower court, and to resist the temptation of treating findings of fact as holdings of law, or mixed findings of fact and law. Nor should the second appellate court interfere with the decision of the trial court or first appellate court, unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion.
 10. The respondent argued that the appellant had raised factual matters relating to evidence of identification without an identification parade; that this being a second appeal, the Court cannot determine issues of fact; and that in any case, the issue of identification parade was not a ground cited in the memorandum of appeal. In addition, the respondent submitted that the appellant's conviction was not anchored solely on identification evidence; that the High Court took into account that there was no identification parade held, and noted the impact of this on the identification evidence; that the conviction was not based on the identification evidence but on the recovery from the appellant of a



mobile phone that was identified by Sellina as having been stolen from her, during the robbery; and that the appellant was not able to provide a reasonable explanation for his possession of the phone.

11. The respondent stated that there were concurrent findings of facts made by the trial court and the first appellate court, which were sufficient to prove the offence of robbery with violence. This included the evidence of Sellina and her daughter which proved that Sellina was attacked and robbed; and the evidence of recovery of the phone from the appellant which showed that the doctrine of recent possession was properly applied as the appellant was not able to offer any satisfactory explanation for his possession. The Court was therefore urged to dismiss the appeal.
12. We have carefully considered the record of appeal, the contending submissions by the respective parties and the law. This being a second appeal, our jurisdiction is limited under Section 361(1) of the Criminal Procedure Code to matters of law only. The respondent has raised an issue concerning his identification and the application of the doctrine of recent possession. These are issues of law and therefore we are properly seized of this appeal.
13. The trial court and the first appellate court made concurrent findings of fact that Sellina was attacked and robbed. This was clear from the evidence of Sellina, her daughter and Winnie. The question for determination is whether the appellant was the person who robbed Sellina.
14. Sellina explained that the person who robbed her was the last customer that she served. She did not apparently know this customer before. However, she gave this information to both Winnie and PC Yator to whom she reported the matter on the same day. PC Yator carried out investigation and received information that led him, together with Sellina, to the house of the appellant. The identification of the appellant by Sellina under these circumstances was not adequate as it was not independent identification. The issue of the recovery of Sellina's phone from the appellant, therefore, becomes crucial.
15. In *Erick Otieno Arum v Republic* [2006] eKLR this Court laid out the following principles with regard to the application of the doctrine of recent possession:

“In our view, before a court of law can rely on the doctrine of recent possession as a basis of 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; that 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. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.
16. In this matter, the appellant did not deny having been found in possession of the phone. On her part, Sellina positively identified the phone as hers, and even produced a receipt that had serial numbers which matched with that on the phone. There was also sufficient evidence that the phone was one of the items stolen from Sellina during the robbery. The appellant did not deny his possession of the mobile phone. His explanation that Sellina was his employer and that she gave him the phone to make up for his unpaid salary, was a cock and bull story that was rightly dismissed as untruthful and an unreasonable explanation for his possession of the phone. If, indeed, Sellina knew him before, she would have easily given his name when she narrated her ordeal to Winnie and the police. The



appellant's possession of the recently stolen mobile phone implicated him and led to the conclusion that he was the person who robbed Sellina.

17. In the circumstances, we find that the doctrine of recent possession was properly applied, as the recovery of Sellina's phone, and the appellant's failure to provide a satisfactory explanation for his possession, is what nailed the appellant to the offence of robbery with violence. His conviction was therefore safe and correctly upheld by the High Court

18. In sentencing the appellant, the trial magistrate noted that the only sentence for the offence of which he was convicted was death. Similarly, on first appeal, the learned Judges of the High Court noted:

“...the learned magistrate imposed the mandatory death sentence. That is the only sentence available for the offence of Robbery with violence contrary to section 296(2) of the Penal code (Joseph Njuguna Mwaura & others vs Republic [2013] eKLR). The order on sentence cannot be faulted.”

19. It is trite law that sentencing is an exercise of discretion by the trial court. (see Bernard Kimani Gacheru vs. Republic [2002] eKLR; and Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003). This was reiterated by the Supreme Court in Francis Karioko & another v Republic Petition No 15 & 16 of 2015 (Consolidated)[2017]eKLR (Muruatetu 1), when the Court declared the mandatory nature of the death sentence under Section 203 of the Penal Code unconstitutional.

20. We have therefore grappled with the fact that both courts did not consider the exercise of discretion, but imposed the mandatory minimum sentence provided under Section 296(2) of the Penal Code. Unfortunately, the appellant cannot ride on Muruatetu 1, as the Supreme Court has clearly stated in Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Muruatetu 2) that:

To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.

21. To date neither this Court nor the Supreme Court has had the opportunity to consider a constitutional petition properly escalated to it, on the constitutional validity of the mandatory death sentence for the offence of Robbery with violence under Section 296(2) of the Penal Code. This means that the mandatory death penalty under Section 296(2) of the Penal Code remains the only lawful sentence for that offence. For this reason, the appellant's appeal against sentence fails. The upshot of the above is that we dismiss the appeal against both conviction and sentence.

DATED AND DELIVERED AT KISUMU THIS 23RD 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

