



**Chogo v Republic (Criminal Appeal 185 of 2017)
[2024] KECA 468 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KECA 468 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 185 OF 2017
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
MAY 9, 2024**

BETWEEN

ABISAI ABWONZA CHOGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at
Kakamega (Majanja, J.) dated 31st August 2017 in HCCRA No. 116 of 2016)*

JUDGMENT

1. Abisai Abwonza Chogo, the appellant, was charged in the lower court with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*, which occurred on 24th November 2015 at Chavakali Location within Vihiga County; in which the appellant was alleged to have robbed Isaac Nyapola of Kshs.12,060/-, one phone make Oking valued at Kshs.2,100/- and one camera make Kodak valued at Kshs.16, 000/- and immediately before such robbery threatened to shoot the complainant with a pistol. The appellant denied the charge.
2. The trial court, after carefully considering the evidence before it, was satisfied that the prosecution had proved its case beyond reasonable doubt and found the appellant guilty as charged and proceeded to convict him accordingly. He was sentenced to ‘death by hanging’. Aggrieved by both the conviction and sentence the appellant then appealed to the High Court via Kakamega Criminal Appeal No. 116 of 2016 on grounds that:
 - i. the trial court did not consider the charge of robbery with violence was framed on the appellant due to a standing grudge between him and the complainant.
 - ii. the first report made to the police did not clearly indicate where the offence was, nor neither did it include any identification marks of the attacker.



- iii. crucial evidence from Safaricom company (data print-out) was not produced in court to prove any kind of communication between the appellant and the complainant.
 - iv. the ingredients of robbery with violence were not proved beyond reasonable doubt.
3. The High Court, having re-considered and re-evaluated the evidence on record, was satisfied that the conviction was based on sound evidence; confirmed the conviction; and dismissed the first appeal. It is against that decision that this appeal finds its way to us, set on the following grounds: that the prosecution failed to prove its case beyond reasonable doubt; the conviction was based on the evidence of a single witness; there was an erroneous application of the doctrine of recent possession; the defence was not considered; and the death sentence meted was illegal and contra to the Supreme Court decision in *Francis Karioko Muruatetu and Another v R* [2017] eKLR on the place of the death penalty available to the courts.
4. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a second appeal, this Court is mindful of its duty as a 2nd appellate court, that a 2nd appeal must only be confined to points of law and this Court will not interfere with concurrent findings of the two courts below unless based on no evidence.

Our mandate on a second appeal is conferred by Section 361(1) (a) of the *Criminal Procedure Code*, which provides:

“ 361

- (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-
 - i. on a matter of fact, and severity of sentence is a matter of fact.”

5. The jurisdiction of this Court on a second appeal, as is the case here, has been the subject of judicial pronouncements in various cases, such as *Stephen M’Irungi & Another v Republic* [1982- 88] 1 KAR p.360 where it was held:

“Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

6. This position was amplified in *Samuel Warui Karimi v Republic* [2016] eKLR 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 v R*, [1984] KLR 611.”



7. Ultimately, from the foregoing, we confine ourselves to the points of law raised in this appeal, including the question as to: whether the concurrent findings of fact in the two courts were based on misapprehension of evidence; whether the trial court and the High Court acted on wrong principles in making the findings of evidence leading to the appellant's conviction and sentence; and the subsequent decision to dismiss his first appeal.
8. The evidence which the High Court considered was the following.

PW1, Isaac Nyapola, (a photographer) narrated how the appellant called him to Ambwere Complex for an assignment. On arrival in the company of his friend, Billy Amos, PW2, the appellant told them that he needed only one of them for the job. As the complainant and the appellant proceeded to Majengo, the appellant produced a pistol and ordered him to give up the Kodak camera, the Kshs.12,060/= he had on him and his smart phone. The complainant complied.
9. In the evening, PW1 shared with PW2 about the incident; and a report was made to the police. A search at the appellant's home at Lumakanda resulted in recovery of some of PW1's stolen items.
10. In his sworn defence, the appellant maintained that he was a photographer; and on 28th February 2016 he was called for a job in Kakamega, he went to Ambwere Plaza, where he met his boss, PW1. PW1 demanded from the appellant his phone and camera which he did not have. The appellant further stated that he was taken to the police station where he was asked for a gun he did not have; and was arrested thereafter. In cross examination, he stated that on 24th November 2015 he was teaching in Eldoret.
11. In his judgment, as regards whether the prosecution proved the ingredients of the charge, the learned judge noted that PW1's narration of ownership of the items; and how he was robbed of them with the threat of a gun, which the learned judge noted was a dangerous weapon; that the prosecution's case was grounded on direct evidence of identification, and on the doctrine of recent possession; that the incident occurred in broad daylight, observing the opportunity for the interaction between PW1 and the appellant was witnessed by PW2, to whom PW1 later narrated the robbery;
12. As to whether the conviction was based on the evidence of a single witness, the learned judge noted that PW2's testimony corroborated this evidence; that the opportunity for identification was favourable as the interaction with the identifying happened in the morning when there was sufficient daylight. The learned judge also noted that in his defence, the appellant described PW1 as his boss, thus identification was by recognition. In invoking the doctrine of recent possession, the learned judge also pointed out that the appellant was also found in possession of a photograph belonging to PW1; and with no plausible explanation as to why he was in possession of said photograph; this was fortified by the evidence of PW3, a carpenter, who confirmed that he had requested PW1 to take a photograph of a bed he had made, only to later learn from PW1 that he had lost the photograph to some robber at gun point.
13. Ultimately, the learned judge held that the evidence of identification and recent possession all pointed to the appellant. Having considered all the evidence in totality, the High Court found the appellant guilty of the offence as charged; and confirmed the conviction and sentence of the lower court.
14. The appellant submits that the conviction and sentence was based on the doctrine of recent possession premised on illegally obtained evidence, and as such the conviction ought to be quashed and the sentence set aside. The appellant further submits that the alleged stolen items, the smartphone, Kodak camera worth Kshs.16, 000/= and Kshs.12,060/= in cash were not the ones recovered in his possession, since what were presented as exhibits were, a jungle green bag and two photographs. The appellant also submits that there was no evidence direct or corroborative indicating that he threatened the



complainant using a pistol to violently rob him; as such he ought to have been charged with simple robbery.

15. He also contends that that this was a case of single witness testimony; as such it was the complainant's word against his; that the circumstance under which the complainant identified him were not favorable, hence the possibility of mistaken identity; and that the commission of the crime by the appellant was grounded on weak circumstantial evidence.
16. The appellant also submits that the High Court failed to consider his defence that PW1 was his boss; which would explain why the photographs were found in his possession; that his alibi defence, about being in Eldoret for a seminar to train people on soap processing with one Benta was not considered by the court.
17. On the issue of sentencing the appellant submits that the death sentence was unconstitutional and should be set aside.
18. In opposing the appeal the respondent submits that the prosecution proved its case to the required standard of proof beyond reasonable doubt; pointing out that the concurrent findings by both the trial court and the first appellate court on this issue; that the trial court made factual findings that the complainant was indeed robbed of the items mentioned in the charge sheet; and both courts also found that the appellant was armed with a pistol, which matter was not controverted; as well as the evidence that the appellant threatened the complainant which was equally not controverted.
19. As regards the elements of the offence of robbery with violence, in *Jobana Ndungu vs Republic* [1996] eKLR, this Court explained as follows:

“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:

If the offender is armed with any dangerous or offensive weapon or instrument, or

If he 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 violence to any person.”

20. In *Dima Denge Dima & Others v Republic* Criminal appeal No. 300 of 2007 this Court stated;

‘The elements of the offence under section 296(2) are three and they are to not be read conjunctively, but disjunctively. One element is sufficient to find an offence of robbery with violence.’

21. As regards the issue on identification, from the testimony of the complainant PW1 and PW2, it is apparent from the above extract of the judgment that the learned judge properly analysed and evaluated all the circumstances of the appellant's identification in accordance with the relevant parameters in this regard, we draw from the case of *Wamunga vs. Republic*, (1989) KLR 424 as follows:

- i. “The length of time the witness had the accused under observation and in what distance and light.



- ii. Whether the observation by the witness was impeded in any way.
- iii. Whether the witness had ever seen the accused before, and if so, how often.
- iv. The length of time that elapsed between the original observation and the subsequent identification to the police.
- v. Whether there is any material discrepancy between the description given by the witness and the actual appearance of the accused.”

The learned judge observed that PW2 had accompanied PW1 for a job at the appellant’s behest only to be told it was a one-man job, and later to be told by PW1 that he had been robbed by the appellant on the way to the assignment; and that the appellant and PW1 knew each other, hence identification by recognition. For purposes of amplification we reproduce what the learned judge said:

“In this case, the incident took place in broad daylight. The appellant is the one who called the (sic) PW1 and invited him for the business opportunity. They interacted before they proceeded on the fateful journey. This interaction was witnessed by PW2 who was later informed by PW1 that he had been robbed by the appellant. The appellant’s defence implied that he knew PW1 as his boss. The totality of the evidence is that this was not a case of identification of a stranger but recognition of someone he knew well in circumstances that negate any notion of mistaken identity.”

We therefore find that the learned Judge considered appropriate principles to be taken into account regarding identification, and properly analysed and evaluated all the circumstances relating to the appellant’s identification in accordance with the relevant parameters set out in *Wamunga v Republic* (supra); and concluded that the appellant was properly identified. Evidently, the learned Judge took into consideration the opportunity available for identification, including time spent together, the light available, pointing out that the incident occurred in broad daylight.

- 22. On the argument that the appellant was convicted on the basis of the evidence of a single witness, it is not disputed that PW1 & PW2 met with the appellant for a job on the appellant’s request. PW4 testified that a photograph taken by the complainant and a jungle green bag belonging to the complainant were found in the possession of appellant and his wife respectively. The appellant was unable to give a plausible explanation as to how these items were in possession. PW3 testified that the photos found in the appellant’s possession were of a bed he had made; and were taken by PW1, how then would the appellant have them in his possession? The circumstances flowed too close to be wished away as a coincidence; for instance, how did the appellant’s wife come to be in possession of the PW1’s jungle green bag? We hold the view that the evidence was well corroborated and implicating the appellant.
- 23. This court has summarized the essential elements on the doctrine of recent possession in *Eric Otieno Arum v Republic* Ksm. CA Criminal Appeal No. 85 of 2005 [2006] eKLR:

‘Before a court of law can rely on the doctrine of recent possession as a basis for conviction, the possession must be positively proved. There must be proof that first the property



was found with the suspect, secondly that the property is positively the property of the complainant, and thirdly the property was stolen from the complainant...’

24. Once the primary facts are established, which in this case they were, the appellant bears the evidential burden to provide a reasonable and/or plausible explanation for the possession, which the appellant did not do. (See *Paul Mwita Robi v Republic* Ksm. Criminal Appeal No. 200 of 2008)
25. On the issue of sentence being harsh and unconstitutional, the court having found that the elements of robbery with violence had been proved beyond reasonable doubt, drew from the provisions in the Penal Code which at section 296(2) of the Penal Code, the prescribes that the sentence for the offence of robbery with violence is death.
26. The appellant cites *Karioko Muruatetu & Another v Republic* Petition No. 15 of 2015 (Muruatetu 1) in his appeal against sentence, that the mandatory sentence is inconsistent with *the Constitution* of Kenya. The respondent argues that the decision in *Muruatetu 1* only applies in relation to the offence of murder under sections 203 and 204 of the Penal Code, as clarified by the Supreme Court advisory in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (Amicus Curiae)* [2021] eKLR (Muruatetu 2); and as such it is the respondent’s submission that the death sentence is still a legal penalty for conviction of the offence of robbery with violence.
27. As regards the severity of the sentence that was imposed upon the appellant, Section 361 of the *Criminal Procedure Code* provides that severity of sentence is a matter of fact. But there is the other limb that the appellant introduces regarding the constitutionality of the sentence. Our reading of the Supreme Court’s Advisory in *Muruatetu 2* at paragraph 4 (a) is that the Supreme Court directed that the mandatory nature of the death sentence as provided for under section 204 of the Penal Code was declared unconstitutional, but that the order did not disturb the validity of the death sentence in all the other capital offences that attract a mandatory death sentence.
28. The question left for this Court to now answer is whether there is any lawful reason to interfere with the sentencing of the High Court. Just apart from the fact that the Penal Code prescribes the death sentence for the offence of robbery with violence and that sentence is still legal, the Supreme Court has spelt it out clearly that the sentence remains as provided in the statute, and the appeal against sentence fails. Ultimately, this appeal lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 9TH 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

