



REPUBLIC OF KENYA



KENYA LAW
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**Mukwana v Republic (Criminal Appeal 049 of 2022)
[2024] KECA 991 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 991 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 049 OF 2022
MA WARSAME, LA ACHODE & WK KORIR, JJA
JULY 26, 2024**

BETWEEN

EMMANUEL MUKWANA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Bungoma
(Sewe, J.) dated 8th August, 2018 in H.C.C.R.A No. 72 of 2016)*

JUDGMENT

1. Emmanuel Mukwana (the appellant) was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code Chapter 63, Laws of Kenya. The particulars of the offence are that on 27th day of December 2013 at Milimani village, in Lugari District within Kakamega County, together with others not before court, while armed with offensive weapons, namely; axe, panga and a spear, robbed Sammy Ngaa Osome of one mobile phone make Samsung (622), one white jacket and cash Kshs.200/- all valued at Ksh.5,700/- and immediately before the time of such robbery used actual violence to the said Sammy Ngaa Osome.
2. The appellant and his co-accused denied the charge after which a full trial ensued, with the Respondent calling a total of 7 prosecution witnesses, while the appellant elected to give an unsworn statement and did not call any witnesses.
3. Briefly, the facts of the case are that on the night of 27th December 2013 at about 7.00 p.m., Sammy Ngaa (PW1) was riding his bicycle home while using a torch to light the path. He then encountered three man gang standing 50 meters before him. Two of the faces were familiar as he had welcomed them into his home regularly to do manual work on many occasions. However on this night, his acquaintances were armed. The appellant was armed with an axe, his co-accused -Nelson wielded a panga and their accomplice brandished a spear.



4. They grabbed him, hacked him several times on the head and forehead, covered his face with a leso so he would not identify them, strangled him and blocked his mouth to prevent him from raising an alarm while robbing him of his belongings. They then fled to a nearby plantation.
5. PW1 was rescued by PW5, a good Samaritan and later reported the matter to the police. Corporal Edward Oketch (PW7) who investigated the matter testified that they searched the appellant's house and recovered a wet axe with a new handle under the mattress. They also retrieved a spear hidden between the bed and mattress in Nelson's house. They later located the appellants hiding in the compound of PW3, Dismas Osiko who had hired the accused persons to demolish his late father's house as according to Luhya tradition. He identified the confiscated spear as belonging to his deceased father. The Appellant and co-accused were then arrested and charged.
6. In their defence they both denied the charges against them and gave unsworn evidence. They intimated that on the material day, they were busy working on the demolition of PW3's father's house when a crowd pounced on them and beat them without reason. They were then arrested and charged.
7. In a judgment delivered on 26th July 2004, the trial court found the appellant and his co-accused guilty of the offence and sentenced the appellant to suffer death as provided by law.
8. The appellant was dissatisfied with the court's decision and appealed to the High Court at Eldoret. The High Court (Sewe, J), heard the appeal, and after re-appraising the evidence adduced before the trial court, agreed with the trial court and found no reason to interfere with the court's decision.
9. The appellant has now preferred the second appeal before us against his conviction and sentence. He faults the learned Judge for upholding his conviction, whereas identification was faulty; failing to find that the offence was not proved to the required standard and imposing an illegal sentence. These are the three issues before us for determination.
10. When the matter came up for plenary hearing on 25th June 2022, Mr. Ng'ang'a learned counsel appeared for the appellant while Miss Kimaru learned counsel appeared for the respondent.
11. Mr. Ng'ang'a relied on his written submissions. It was submitted that the appellant's conviction, which was upheld on identification, was unsafe, given that it was impossible for the PW1 to simultaneously ride a bicycle and hold the torch which enabled him to see his alleged assailants. Furthermore, the intensity of the torch was not ascertained nor was the alleged torch part of the evidence submitted in court.
12. It was further asserted that there was no link between appellant and the axe that was allegedly recovered from the appellant's house as no member of his family corroborated the allegation that it was indeed found in his room. Consequently, we were urged to find that the prosecution did not prove its case beyond reasonable doubt.
13. Opposing the appeal, the respondent submitted that the ingredients of the offence were sufficiently proved and that the identification of the appellant by PW1 was proper given, that it was by recognition and that the complainant had known the appellant for 10 years and had contracted him to work for him on different occasions. He further indicated that there was corroborative evidence in the matter and that the sentence given was within the law.
14. We have considered the record of appeal, submissions made by counsel and the law. By dint of Section 361(a) Criminal Procedure Code, we are permitted to only consider matters of law in a second appeal. (see Njoroge vs. Republic [1982]) KLR.



15. Both the courts below were alive to the fact that the identification of the appellant was not that of a stranger, but of persons previously known to him and, therefore, it was identification by recognition. As this Court stated before in *Anjononi vs. Republic* [1980] KLR 59 at page 60:

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

16. PW1 knew the Appellant quite well. He was not a stranger given that PW1 had often called him and his co-accused who was his nephew to his home to do manual jobs for a period of over 5 years. The appellant also confirmed that he had been working for the complainant.

17. In addition, PW1 gave a detailed account of what transpired and the role the appellant played during the incident. He first recognized him standing with his accomplices 50 metres away armed with a newly curved axe with a new handle. PW1 testified that he was able to recognize the appellant with the light of his torch which he was using to shine the path before him. He was also able to see the face of his co-accused who was carrying a panga and a lesso with blue flowers. He also saw their faces as they hacked him during the attack. He was emphatic that the appellant hit him on the forehead with the axe, while his co-accused hit him on the back of the head. It therefore follows that the Appellant’s subsequent arrest was one of recognition, dependent on personal knowledge which is more satisfactory, more assuring, and more reliable.

18. In *Peter Kifue Kiilu & Another vs. Republic* [2005] 1 KLR 174 the Court of Appeal held –

“Subject to certain well-known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude.”

19. Both courts were cautious of relying on the identification testimony of a single witness as the basis of convicting the appellant given the possibility of mistaken identity which could lead to a mis-carriage of justice. Both courts relied on uncontroverted circumstantial evidence as a basis to determine the guilt of the accused appellant. The caution by both courts below is a clear testimony that the appellant was properly and correctly recognized.

20. PW5 who was the Good Samaritan who found the complainant after the attack at about 8.30p.m, testified that he saw a torch, a bicycle and a lesso on the ground near the complainant when he rescued him. He then took him to report the matter to the Lugari police station where PW7, Corporal Edward Oketch recorded their statements. PW5 then took the complainant to hospital where he was treated by PW6, Fred Osaka. PW6 testified that the complainant gave a history of having been assaulted by people known to him and determined that the injuries sustained were caused by sharp objects.

21. PW3, testified that he met the complainant at his shop after he was discharged from hospital the same night of the attack and he confirmed that he had been attacked by the Appellant and the 2nd accused. Angered by the attack, PW3 joined a mob that intended to confront the assailants in their



- respective houses. By the time they arrived at the appellant's house, they were intercepted by PW7 as word had already reached the police that a mob intended to harm the appellant. Only the members of the appellant's household were present when they arrived at the appellant's house and upon carrying out a search, they retrieved a wet axe under his mattress. They also went to the house of the 2nd accused which was in the same compound and similarly found a spear hidden underneath a mattress. They were subsequently directed by the family members of the accused persons to the home of PW3, where the appellant was found.
22. PW3 testified that he had contracted the appellant and co-accused to dig a pit latrine and bring down his late father's house according to Luhya traditions. However, on the day of the incident, the accused persons had left early for the day without completing their assigned work. He was shocked to learn that the accused persons had returned to his compound at around 8.10 p.m. and to find a mob demanding justice seeking to lynch them. Even more shocking was that upon his arrival at the police station to record a statement, he found his late father's spear which had been in his father's house. He testified that the accused persons were the only ones who had access to the house and the spear in question which was supposed to be removed before the demolition took place.
 23. According to PW4, Concepta Kilembuli, on the day of the incident, she was having dinner with her children using a lamp when the accused persons, who are her neighbours, came to her home at about 7.30 p.m. to buy cigarettes. The appellant was carrying an axe which he left by the door and a panga which he had tucked into his shorts. His co-accused was carrying a black spear. They refused to pay, assaulted her and left stating that they had work to do. She later heard that the appellant and his co-accused had attacked a neighbour, recorded her statement and identified the weapons submitted to the police as the same ones the accused persons came with to her home.
 24. In our view, the evidence of PW3, PW4, PW5, PW6 and PW7 whose summary we have outlined hereinabove, and which was believed by the two courts below, squarely established and proves that the appellant and his co-accused were not innocent of the charges preferred against them. Indeed, there was ample evidence corroborating the testimony of PW1.
 25. Taken cumulatively, the evidence formed a chain so complete that we cannot escape from the conclusion that the crime was committed by the accused persons and none else. The appellant's allegation that he was being framed by PW3 because some money went missing as he was working for him cannot stand. Furthermore, his attempts to fault his identification on the basis that the complainant could not have been simultaneously riding a bicycle and holding a torch and that the alleged torch was not provided in evidence and the intensity of the said torch was not proved, hold no water.
 26. Taking into account everything therefore, we are satisfied that the prosecution's case against the Appellant was overwhelmingly credible and that the High Court weighed all the evidence before it and properly directed itself in dismissing the appeal against conviction. There are therefore no reasons for interfering with the findings of the two courts below. In the premises, the appeal against conviction fails. We are satisfied the case against the appellant was proved beyond any reasonable doubt. He was placed at the scene of crime and all the circumstantial evidence point to his guilt.
 27. On the issue of sentence, it is the case of the appellant that the same is unlawful and utterly harsh. The trial court imposed a death sentence on conviction, which was upheld by the High Court. Whereas, we agree with the courts below, that the sentence imposed is lawful, we think the circumstances and facts of the case clearly points to the conclusion that the imposition of death is somewhat inappropriate and harsh. Taking into consideration, the injuries suffered by the complainant, we think this is a fit case for setting aside the death penalty. The appeal against sentence succeeds partially.



- 28. We note that the appellant did not give any mitigation, therefore, in the circumstances of this case, a sentence of 35 years is appropriate.
- 29. The appeal against conviction fails, while the appeal against sentence succeed to the extent herein above. In the premises, we set aside the death sentence and substitute with a sentence of 35 years from the date of conviction.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF JULY, 2024.

M. WARSAME

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JUDGE OF APPEAL

L. ACHODE

.....

. JUDGE OF APPEAL

W.K KORIR

.....

. JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

