



REPUBLIC OF KENYA



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**Abdallah v Republic (Criminal Appeal 18 of 2018)
[2024] KECA 1108 (KLR) (30 August 2024) (Judgment)**

Neutral citation: [2024] KECA 1108 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 18 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
AUGUST 30, 2024**

BETWEEN

RAJAB SENELWA ABDALLAH APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of the High Court of Kenya at Kakamega
(Majanja, J.) dated 15th November 2017 in HCCRA NO. 56 of 2016)*

JUDGMENT

1. Rajab Senelwa Abdallah, the appellant, was charged alongside Joseph Oduko Rajab and Evans Osango Omido, at Hamisi Senior Principal Magistrate's Court, with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The appellant and two others were also charged with gang rape and indecent act with a woman contrary to section 10 and section 11(1) of the [Sexual Offences Act](#) respectively. The co-accused were acquitted on all charges while the appellant was acquitted on the rape charge, but convicted on the principal charge of robbery with violence.
2. The offence occurred on 20th March at Lyaduywa village, Lyaduywa Sub location in Vihiga County, when the appellant, jointly with his co-accused, while armed with offensive weapons namely pangas, metal bars and hammers robbed Patrick Ndimuli of 50 kg of sugar, two mobile phones make Nokia 1110 and Alcatel, one dozen Kifaru matches, 10 pieces of 100gm Blue band, one dozen close up, five 500gm Chipsy cooking fat, three 500ml Popco cooking fat, one dozen mariandazi baking powder, one dozen tiptop milking jelly, six pieces of Geisha soap, fifteen sachets 15gm tea leaves, five pieces of Lido bar soap, 12 sachets of Omo, 10 tissue papers, 3 pieces of sunlight soap, Kshs.5,000/= in cash and two 1kg Jambo maize flour all valued at Kshs.30, 000/=. At the time of the robbery actual violence was used. The appellant denied the charge.



3. He also faced an alternative charge of handling stolen property contrary to section 322 (1) of the Penal Code, that on the same date and place, other than in the course of stealing, he received 50kg of sugar, one mobile phones make Alcatel, one dozen Kifaru matches, 10 pieces of 100gm Blue band, one dozen Close Up, five 500gm Chipsy cooking fat, three 500ml Popco cooking fat, one dozen mariandazi baking powder, one dozen tiptop jelly, six pieces of Geisha soap, fifteen sachets 15gm tea leaves, five pieces of Lido bar soap, 12 sachets of Omo, 10 tissue papers, 3 pieces of sunlight soap, Kshs.5,000/=in cash and two packets of 1kg Jambo maize flour all valued at Kshs.30, 000/-, knowing or having reason to believe them to be stolen property. He denied this charge as well.
4. The trial court after carefully considering the evidence, was satisfied that the prosecution had proved its case beyond reasonable doubt and found the appellant guilty on the charge of robbery, and sentenced him to death.
5. Aggrieved by the outcome, the appellant appealed to the High Court, against both the conviction and sentence; faulting the evidence relied on with regard to identification; lack of an inventory form to prove the alleged recovery of the items; failure to prove ownership of the alleged exhibits produced in court;the trial court’s failure to consider an alleged grudge that existed between the arresting officer and the appellant, which according to the appellant must have instigated the fabrication of the charge; and the trial court erroneously rejecting his sworn defence without giving cogent reasons.
6. The High Court, having reconsidered and evaluated the evidence on record, held that failure to compile an inventory of recovered items was a procedural step which did not prejudice the appellant in any way; and the appellant was found in possession of recently stolen goods, for which he could not offer a proper explanation. The conviction was thus upheld as being based on sound evidence.
7. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This Court is mindful of its duty as a second appellate court, namely that the appeal must only be confined to points of law; and this Court will not interfere with concurrent findings of the two courts below, unless the finding is based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See *Karingo & 2 Others v Republic* [1982] eKLR.
8. The evidence at the trial was that, PW1, Patrick Indimuli owned a shop selling assorted consumer goods. On the night of 30th March 2012 while at home with his wife Phoebi Kendi, PW3, there was a knock at the door which was open, and 6 people got into the house and put off the lantern. The intruders had torches; and three of them had their faces covered. The assailants took PW1 and PW3 into the bedroom and demanded for money and their phones, while threatening to kill them. PW1 gave them Kshs.5,000/= as well as his phone. The assailants cut PW1 on his back and proceeded to rape PW3 in his presence. PW1 was then frog marched to his shop about 500m away where they met PW2, Edward Nyavanga, who was sleeping in the shop. PW1 further testified that after the assailants had removed the goods from the shop they locked him in the latrine together with PW3.
9. PW2, testified that on the said date, he was sleeping when he heard someone attempt to open the padlock. He woke up and opened the door, and saw several people with torches. They blocked his mouth, tied his hands and legs while threatening to kill him. Both PW1 & PW2 saw the assailants taking coins and removing assorted goods from the shop, and they also recall that the other assailants kept referring to one who was leading the group as ‘Corporal Rono.’
10. PW5, Corporal Ben Oruka, an officer at Kegondi AP Post received the report of the robbery from PW1 & PW3, both of whom were injured and he advised them to go to hospital as he and a colleague visited the scene. On 20th March 2013, he received information that some goods had been found in a certain



house under suspicious circumstances. At about 9 am he went to the house and found the appellant with assorted goods which were taken to the police station. The appellant was arrested and PW1 was able to identify the goods recovered at the police station.

11. The clinical officer SK (PW6), testified that she examined PW3 on 19th March 2013, and confirmed that she had been injured and raped. She also examined PW1 and noted that PW1's face had injuries and was swollen, he was complaining of chest pains and pains along the spinal area, and his legs were swollen. PW6 classified his injuries as harm.
12. In his sworn defence the appellant told the trial court that on 20th March 2013 at 8am, PW5 (with whom he alleged to have had a grudge over a woman), and another officer went to his home arrested him, and later on he was charged.
13. The High Court in its judgment pointed out that proof of any one of the ingredients of robbery with violence was sufficient to establish the offence under section 296(2) of the Penal Code. The learned judge was satisfied that a robbery did take place as corroborated by the evidence of PW1, PW2 and PW3; that the prosecution's case was grounded on direct evidence of identification in difficult circumstances and the doctrine of recent possession; that both PW1 and PW2 admitted that the incident took place in the dark, yet they did not testify as to how they identified the appellant, nor was it clear whether they knew him prior to the incident; and no identification parade was conducted. The Court found that the circumstances were not favorable for identification, thus leaving the prosecution's case to be hinged solely on the doctrine of recent possession.
14. The court noted the testimony of PW1, 2 and 3, as to how the assailants robbed PW1's shop and stole an assortment of goods including mobile phones. PW5 testified that he recovered an assortment of goods at the appellant's house the very next day, which goods were subsequently identified by PW1 as part of his stolen ones. On cross examination, PW5 maintained that the appellant did not own a shop.
15. In his defence, the appellant did not give an explanation as to why he had such a large assortment of consumer goods when he did not own a shop nor lay claim to any of the items. The learned judge also noted that the appellant admitted that PW5 went to his home on 20th March 2013. The appellant also complained that there was no inventory of recovered items, but the High Court dismissed this argument finding that preparation of inventory was procedural and was not necessary for as long as the recovery and chain of evidence established that the items in court were the ones recovered.
16. In the final analysis the High Court held that the evidence of recent possession was proved by the prosecution, and pointed to the appellant as the culprit. Having considered all the evidence in totality, the High Court found the appellant guilty of the offence of robbery with violence, and affirmed the conviction and sentence of the lower court.
17. Although the appellant, in his submissions, indicates that he has raised 9 grounds of appeal related to conviction and sentencing we have not had sight of the memorandum of appeal, and the two documents supplied are titled supplementary grounds of appeal condensing the grounds to issues of identification, and sentence.
18. The appellant submits that he was not positively identified by the prosecution's witness. This Court notes that the High Court did, indeed, find the identification by PW1, PW2 and PW3 to be unfavourable as the incident took place in the dark and that the witnesses did not testify to knowing the appellant prior to the incident, despite them stating that he was referred to as 'Corporal Rono' during the incident.



19. From the onset, and without belabouring the point, the learned judge acknowledged that the evidence on identification was wanting, and had no leg on which to stand. We can safely state that the conviction of the appellant was not based on identification, and does not warrant our consideration.
20. On the issue of sentencing, the appellant submits that the death sentence was unlawful, harsh and excessive. He contends that the death sentence meted is unconstitutional and amounts to cruel, inhuman and degrading treatment.
21. The offence of robbery with violence is provided for under sections 295 and 296(2) of the Penal Code as follows:
295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.
- 296 (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.
22. In *Johana Ndungu v Republic* [1996] eKLR this Court explained the offence of Robbery with violence as follows:
- “In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the Penal Code. 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:
1. If the offender is armed with any dangerous or offensive weapon or instrument,
or
 2. If he is in company with one or more other person or persons, or
 3. 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.”
23. The elements of the crime of robbery with violence were set out by the court of appeal in the Case of *Oluoch vs. Republic* [1958] KLR. In the case of *Dima Denge Dima & Others vs. Republic* Criminal Appeal No. 300 of 2007 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.’
- Taking into consideration that the High Court found the circumstances for identification to be unfavorable for conviction, this court must now determine whether the High Court was correct in convicting the appellant on the doctrine of recent possession.



24. This Court has summarized the essential elements on the doctrine of recent possession in *Eric Otieno Arum vs. 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...”

Once the primary facts are established, the appellant bears the evidential burden to provide a reasonable and/or plausible explanation for the possession. (See *Paul Mwita Robi vs. Republic KSM Criminal Appeal No. 200 of 2008*). This Court agrees with the trial judge that the prosecution did establish the primary facts as set out in the Arum Case (supra) and further that the appellant did not have an explanation and/or plausible explanation why the stolen goods were in his house when he did not run a shop or have some sort of claim to the said unusually large consignment of consumer goods. We find that the learned judge aptly considered and evaluated the circumstances, and correctly applied the doctrine of recent possession.

25. On the issue of sentence, the appellant relies on the Supreme Court decision in *Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015* [2017] eKLR, wherein the mandatory death sentence was declared unconstitutional. The appellant argues that the death sentence imposed is not only inimical to international law and customs but also unfair, as it took away his inherent right to dignity contrary to Article 28 of *the Constitution*; cruel and inhuman punishment contrary under Article 25 to Article 29 of *the Constitution*, so the sentence should not be upheld. Further, that he was not given an opportunity to tender his plea in mitigation before sentence.
26. The respondent, on the other hand, contends that Section 296(2) of the Penal Code prescribes the death penalty for the offence of robbery with violence, and that although there were conflicting decisions on whether a court could depart from the mandatory sentence, the Supreme Court had given directions in *Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 & 16 (Consolidated) of 2015*, commonly referred to as *Muruatetu 2*, wherein the Supreme Court asserted that the decision in *Muruatetu 1* was not intended to apply to all cadre of cases of mandatory minimum or maximum sentences. We are, thus, urged to find that the sentence of death imposed upon the appellants was in accordance with the law, and was neither excessive nor illegal.
27. Our reading of the Supreme Court’s 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) (*Muruatetu 2*), is that its initial decision in *Muruatetu 1* only applied to the mandatory death sentence for the offence of murder under sections 203 as read with section 204 of the Penal Code. It succinctly states that:

“..., this Court’s decision in *Muruatetu*, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute...”

- (15) 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.”

28. It, then, follows that the issue regarding the constitutionality of the mandatory death sentence under Section 296 (2) of the Penal Code is yet to be addressed as recommended by the Supreme Court. Therefore, the death sentence under section 296(2) of the Penal Code is not, at this jurisprudential moment, and by dint of the Supreme Court’s directions, unconstitutional, and remains a valid and legal penalty. In this case, the ingredients of robbery with violence have been met. The appellant robbed the complainant, and in the course of the robbery was armed with a dangerous weapon which he used to injure the complainant with and there is evidence to that effect. The Penal Code prescribes the death sentence for the offence of robbery with violence and that sentence is still legal.

The upshot is that this appeal lacks merit and is dismissed. We uphold the judgment of the High Court and affirm the death sentence.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF AUGUST, 2024.

HANNAH OKWENGU

JUDGE OF APPEAL

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H. A. OMONDI

JUDGE OF APPEAL

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JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

