



**Nduati v Republic (Criminal Appeal 2 "A" of 2018)
[2024] KECA 1253 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1253 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 2 "A" OF 2018
W KARANJA, LK KIMARU & AO MUCHELULE, JJA
SEPTEMBER 20, 2024**

BETWEEN

PETER NGOTHO NDUATI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the orders from the judgment and decree of the High Court at Nanyuki (M. Kasango, J.) dated 24th May 2017 in HCCRA No. 77 of 2016)

JUDGMENT

1. This is a second appeal. Our jurisdiction under section 361 of the *Criminal Procedure Code* is limited only to matters of law. We will not interfere with the concurrent findings of fact arrived at by the two courts below unless the findings were based on no evidence (See *Karingo v Republic* [1982]KLR 213).
2. The appellant, Peter Ngotho Nduati, was jointly with Lawrence Kaberia Muchoki Muriuki alias Shoto and Nahashon Kariuki Ritho charged before the Chief Magistrate's Court at Nanyuki with robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on the night of 25th /26th of March 2013 at Embori Farm in Buuri District in Meru County, they jointly with others not before the court, and while armed with offensive weapons namely metal bars and pangas, robbed Livingstone Karugu and Elias Kimathi of 27 sheep valued at Kshs.229,500 and at or immediately before or immediately after the time of such robbery used actual violence to Livingstone Kalulu and Elias Kimathi. In the course of trial Lawrence Kaberia died. At the conclusion of the trial, the appellant and Muchoki Muriuki were jointly convicted and each sentenced to death. Aggrieved, the two appealed to the High Court at Nanyuki. The learned M. Kasango, J. found that the appeal was not merited and dismissed it.



3. Undeterred, the appellant and Muchoki Muriuki each appealed to this Court. Muchoki Muriuki's appeal in Nyeri Criminal Appeal No. 93 of 2017 was heard and judgment delivered on 10th November 2023. The appeal against conviction was dismissed, but the sentence was reduced to 12 years in jail.
4. The evidence on which the appellant was convicted was as follows. Andrew Nyaga (PW 5) owned a lorry registration number KAS 952Z and its trailer number ZC2531. PW 5 and the appellant knew each other well. The appellant owned a chemist in Nairobi where PW 5 was based. PW 5 bought drugs from the chemist. The relationship had gone on for amount 5 years. On 16th March 2013, the appellant approached PW 5 to hire the latter's lorry saying he was going to use it to carry wheat from Timau. The hire charge was agreed at Kshs.75,000. The appellant paid a deposit of Kshs.40,000 and fueled the vehicle after it was released to him. The lorry's driver was Boniface Lukwa who was employed by PW 5. PW 5 asked his nephew Charles Wachira (PW 8) to accompany the appellant to manage the lorry. On 21st March 2013 the lorry was driven to Donholm for mechanical repair, before they left for Timau.
5. In Naromoru, the lorry was involved in a minor accident. The lorry was detained at Narumoru Police Station until 25th March 2013 when it was released. When they got to Nanyuki they stopped for the appellant to withdraw money. They were joined in the lorry by one Mungai. The appellant then informed PW 8 that, instead of wheat, they were going to carry sheep and that he had obtained a permit for that purpose. In Timau, the appellant directed the lorry into Embori Farm where about 100 sheep were. He stated that the owner of the sheep would join them soon. Suddenly, a patrol vehicle drove towards the lorry. All the occupants of the lorry came out and took off. PW 8 ran to Timau Police Station to report what had happened.
6. Elias Kimathi (PW 1) and Livingstone Kalulu worked at Embori Farm as herders. On this night at 11.00 pm they were at the farm asleep. Kalulu woke up PW 1 to inform him there were people in the farm. PW 1 noticed through his torch that sheep had been moved from the boma which had been broken into. Suddenly the two were attacked and injured using pangas, their hands were tied at the backs and their faces covered. PW 1 could hear sheep being driven away.
7. Maho Abdilu Maalim (PW 3) was employed at the farm as security officer. He was on duty this night patrolling the farm using a vehicle whose driver was Kagwe. When they got to boma No. 3, it was open and over 90 sheep were missing. PW 3 noticed the watchman were equally missing and their house had been broken into. They drove to the office and got two other officers. Together, they drive towards boma No. 34 where they found a 22 tyre lorry with farm sheep loaded thereon. It was abandoned here without occupants. This is the lorry that PW 5 had hired to the appellant. At the lorry, PW 3 found PW 1 and another herder tied with their hands at the back. They had been injured and were bleeding.
8. At Nanyuki Police Station, PW 8 reported the incident. Before then, the incident had been reported by the farm's security officer. Police headed by OCS Alexander Shikondi (PW 7), rushed to the scene and found the lorry with sheep thereon. Members of the public had gathered wanting to burn the lorry. It was rescued. Back to the station, the appellant contacted PW 8 who had been detained. Police were able to trace and arrest the appellant. They also arrested the other co-accused. Police retrieved the livestock permit that the appellant had obtained. Investigations were conducted before the charge of robbery with violence was preferred.
9. The appellant gave sworn defence and denied the offence. He admitted knowing PW 5 and PW 8, and also that he owned a pharmacy in Nairobi. He, however, denied that he had hired PW5's lorry or that he stole sheep. He stated that on 26th March 2013 he was attending a training at Nanyuki Police Station. He went there and got arrested. He learnt of the incident while at the police station.



10. This is the evidence that the trial court considered and found that the prosecution had proved beyond doubt that the appellant was one of the people who had on the material night violently robbed the complainants. He was, jointly with others, convicted and sentenced to death. On appeal, the learned Judge affirmed the conviction and sentence.
11. The grounds upon which the appellant came before this Court were as follows:-
 - “ 1) That the appellate judge erred in law and facts while upholding my conviction in reliance on the identification evidence at the scene of crime without considering that no initial first report was tendered to record with my description by the identifying witness as the record reveals.
 2. That the appellate judge erred in law and facts by being influenced by the adduced evidence that one Elias was inflicted with injuries with a panga in the alleged house by his assailants without considering that there was no supportive evidence that I the appellant was positively identified as one of the intruders.
 3. That the appellate judge erred in law and facts in upholding my conviction in believing that the offence of robbery with violence was adequately proved without considering that there was no concrete evidence on the production of exhibits thus they were not positively identified e.g the caprons used to tie the herders and registration numbers of the lorry at the scene of the crime.
 2. That the appellate judge further lost direction on not observing that misdirection arrived at a wrong conclusion while believing that it was not vital for the prosecution to call essential witnesses without considering that section 150 of the CPC was violated.
3. That the appellate judge erred in law and facts while he became influenced with the adduced evidence and rejected my defence which same was not displaced by the prosecution side as per section 212 of the CPC Cap 75 LOK.”
12. During the hearing of this appeal, learned counsel Mrs. Ndiangui was present for the appellant while learned counsel Mr. Naulikha represented the State. Each counsel had filed written submissions on which they relied. Mrs. Ndiangui, during the highlight, submitted that the prosecution’s case rested on weak evidence as none of the witnesses saw the appellant steal the sheep; that the prosecution case was circumstantial as no witness saw the appellant in the attack. Learned counsel submitted that it was not clear when the lorry was hired, if at all; that the livestock (sheep) permit that PW 7 recovered from the appellant had the dates 6th February 2013 to 6th March 2013 which was before the date of the incident in question. Therefore, it was contended, the permit could not be relied upon to show that the appellant intended to use it to transport the stolen sheep.
13. In opposing the appeal, Mr. Naulikha submitted that it was evident through the evidence of PW 5 and PW 8 that the appellant who was known, had hired the lorry on the understanding that it was going to carry wheat from Timau but that along the journey he had procured the livestock permit and led the lorry to Embori Farm where the robbery had taken place. According to learned counsel, the evidence was overwhelming as there was injury to the herders and the sheep had been loaded onto the lorry when the farm’s patrol vehicle showed up and the robbers, including the appellant, fled from the scene.



14. We have considered the appeal and the rival submissions. To our mind, the issues for determination are whether, on the evidence before the trial court, the learned Judge was correct in finding that the appellant had been convicted on overwhelming evidence; and whether the sentence was appropriate in the circumstances.
15. According to the learned Judge, the appellant masterminded the robbery. This is what she indicated in the judgment.
 - “25. In this court’s view, it is erroneous for the 1st appellant to submit that he was only convicted because he hired the lorry. That submission is contrary to the evidence on record. The prosecution adduced very cogent and credible evidence which showed that Peter was the mastermind of the robbery. He hired the lorry, paid the owner a deposit and traveled in the company of Charles on the pretext that they were going to get wheat in Timau. On reaching Nanyuki and armed with the ‘no objection certificate’ to transport sheep, Peter informed Charles, and that is confirmed by the driver in his statement, that they were going to carry sheep and not wheat. Peter gave directions, to the driver, of the place where they were to get sheep. On arrival, they loaded sheep into the lorry and only ran away when the farm’s patrol car was driven there. That evidence was not circumstantial, it was clear and direct evidence that placed Peter at the center of the crime of robbery with violence. It’s clear that Peter’s denial of hiring the lorry, in his defence, was obviously false denial. The trial court was persuaded by the prosecution’s witnesses and dismissed Peter’s defence as mere denial. This court supports that trial court’s finding.”
16. Both the trial court and the 1st appellate court accepted as true the prosecution evidence that the appellant was known to PW 5 for a long time. The appellant hired PW 5’s lorry to go and carry wheat from Timau. The appellant paid the deposit. PW 5 gave out PW 8 to manage the lorry. The appellant and PW 8 travelled on the lorry up to Nanyuki. Here, the appellant, having got a livestock permit, declared that the mission had changed. They were now going to carry sheep from Timau. This is how the lorry with the appellant and PW 8 on board drove into Embori Farm. It does appear clear that the appellant had people on the ground. Because the herders, including PW 1, were attacked, tied and injured; the bomas where the sheep were kept were opened; sheep were taken out and loaded into the lorry; and that the lorry was intercepted when the patrol vehicle showed up. We have no reason to depart from these findings.
17. PW 5’s lorry was found inside Embori Farm with sheep loaded on it. The appellant was found and arrested in Nanyuki on the following morning. This is the lorry he had hired from PW 5 to come to Nanyuki and which, according to PW 8, on his instructions, had been diverted into Embori Farm to carry sheep. PW 8’s evidence was that when the patrol vehicle showed up, all the occupants of the lorry took off. PW 8 went to the Nanyuki Police Station from where he contacted the appellant who came and was arrested. In total, we find that the appellant was convicted on safe and overwhelming evidence. He masterminded the violent robbery. We dismiss this appeal against conviction.
18. Regarding sentence, we consider that the grounds of appeal did not raise any issue regarding the appropriateness of the death penalty which was the lawful sentence for the offence in respect of which the appellant had been convicted. We can only interfere with the sentence imposed by the trial court if the court did not consider a relevant fact or if it considered an irrelevant factor or if given the circumstances, the sentence was manifestly harsh or excessive (See *Wanjema v Republic* [1971] EA 493).



19. However, for the same offence in Nyeri Criminal Appeal No. 93 of 2017, we reduced the death penalty for Muchoki Muriuki to twelve (12) years. Ideally, unless there are compelling circumstances, accused persons convicted for the same offence should receive the same sentence. In the instant appeal, however, we have already indicated that the appellant masterminded the commission of the offence. Secondly, the Supreme Court has in the recent decision in *Republic v Joshua Gichuki Mwangi & Others*, Petition No. E018 of 2023 clarified that its decision in *Francis Karioko Muruatetu & Another v Republic*, SC Petition No. 15 of 2015 cannot be the basis to reduce a sentence that has been provided by a legislation; that where Parliament has enacted a legislation, the judiciary should adjudicate disputes based on the provision of the law. This Court is bound by the decision, which means that the appellant's appeal against the death penalty cannot succeed.

20. The result is that, the appeal is not merited, and is dismissed.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024

W. KARANJA

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

