



**Carlos v Republic (Criminal Appeal 63 of 2019)
[2024] KECA 1884 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KECA 1884 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 63 OF 2019
W KARANJA, J MOHAMMED & LK KIMARU, JJA
DECEMBER 20, 2024**

BETWEEN

HASSAN MWENDA CARLOS APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgement of the High Court of Kenya at Meru
(F.M. Gikonyo, J.) dated 15th February, 2018 in HCRA No. 25 of 2017)*

JUDGMENT

1. Hassan Mwenda Carlos (Hassan) the appellant herein, was charged before the Maua Chief Magistrate's Court with the offence of robbery with violence contrary to section 295 as read together with section 296(2) of the Penal Code. It was alleged that on 26th February, 2014 at Maua Township in Igembe South District within Meru County jointly with others not before court, while being armed with a dangerous weapon, namely rifle robbed John Kobia Mutuura of his Kshs.273,000.00 and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said John Kobia Mutuura.
2. He pleaded not guilty to the charge and the matter proceeded for hearing where four (4) witnesses testified for the prosecution. On his part, the appellant testified on oath in his defence and called no witnesses. After full trial, the appellant was found guilty of the offence, was convicted and sentenced to death.
3. Being aggrieved by the decision of the trial court, the appellant appealed to the High Court, but his appeal was dismissed and both conviction and sentence upheld. He is now before us on his second and last appeal challenging both conviction and sentence.
4. The appellant initially filed homemade grounds of appeal but subsequently, J.Nelima & Associates filed a supplementary memorandum of appeal in which counsel raised three grounds of appeal in



- which she faulted the High Court; for failing to direct their minds properly to the need to enquire fully into the conditions facilitating identification and thus arrived at a wrong finding that the appellant was properly identified as one of the robbers; in relying on evidence of recognition to convict the appellant yet the same did not meet the requirements set out in law; and in dismissing the appellant's alibi which was not rebutted by the prosecution despite being given time to investigate it.
5. In a nutshell, the prosecution case was as follows; PW1 (John Kobia Mutuura) (Kobia), testified that on 26th February 2014 at around 10:30pm he left North Gate bar while headed home in the company of his wife and drove to Arimi Sacco where he was to park his vehicle and go to his house. He stopped the vehicle outside the gate. While waiting for his wife to open the gate, he was accosted by some men who ordered him to stop; placed a gun on his head and robbed him of his money. His testimony was that the bank security lights were on and he could see clearly and he recognized the man who was standing ahead of him as he used to see the man in Maua Town.
 6. It was Kobia's testimony that as he was being frisked and money removed from his pockets, he screamed and the bank watchman rushed to his aid. It was his evidence that his wife was also screaming 20 meters away saying "Carlos kumbe ni nyinyi mnaibia bwana yangu". He testified that other members of the public came and gave chase but retreated when the assailants attempted to shoot. He then asked his wife who Carlos was and his wife told him that he was referring to Mwenda (the appellant). They then proceeded to Maua Police Station and reported the matter. They also informed the police that he had identified the appellant. The following day they looked for the appellant all over Maua and surrounding areas with no success.
 7. PW2 (Winfred Kathure) the complainant's wife corroborated his evidence in all material details. She stated that on the material night, as they headed home, she walked ahead of her husband to go and open the gate. Before she got to the gate, she met Carlos who was fiddling with his phone, but he didn't talk to her. Shortly after, she heard her husband screaming saying he had been robbed and she proceeded to where he was. It was her testimony that besides Carlos, there were two other men attacking her husband but she did not recognize them and that there was sufficient light from the bank's security lights.
 8. It was her testimony that the men robbed her husband and then took off. She further testified that they pursued the robbers but lost them. They then reported the matter at Maua Police Station and told policemen that one of the robbers was Carlos. On 3rd March 2014, she saw the appellant and called her husband who came with policemen and had the appellant arrested.
 9. PW3- Henry Ndubi, a security guard with Arimi Sacco, testified that on 26th February 2014, he was on duty when he heard screams outside the Bank. He said that he witnessed the entire incident. It was his further evidence that he had seen Carlos (the appellant) hanging around the scene before the robbery occurred.
 10. PW4 - PC Kimilu Wambua, the investigations officer in this case, testified that on 3rd March 2014 he was at the DCIO's office when PW1 arrived and reported having been robbed near Arimi Sacco. He told the court that Kathure (PW2) had told him that she had identified one Carlos as one of the robbers. PW4 was one of the officers who arrested the appellant later at Kariene within Maua Town after he was identified by Kathure.
 11. In his sworn statement of defence, the appellant denied committing the offence, and explained that on the material day he went to Maua and bought miraa and went to Isiolo and sold it there. He said that he spent the night at Isiolo at Karimi lodge. He stated that he was popularly known as Carlos in Maua Town. He also stated that there was no light for PW2 or PW3 to identify him at the scene.



12. In support of the appeal, the appellant filed submissions dated 21st November 2023 which were highlighted by learned counsel Ms. Nelima during the plenary hearing.
13. The gist of the submissions is that the incident occurred at night, and the robbers asked the complainant to lie down. PW1 and PW2 testified that the appellant, wore a cap; there was no evidence on the type or intensity of light from the nearby building raising doubts about PW2's ability to identify the appellant and the evidence on identification of the appellant was in the circumstances, unreliable and insufficient to support a conviction. Counsel submitted that the two courts below had not tested the said evidence properly and had, therefore, arrived at the wrong conclusion.
14. On the question whether the appellant's defence was considered, it was submitted that the two courts below erred in dismissing the appellant's alibi. That even though the prosecution was given time to investigate the receipt produced by the appellant as part of his defence they did not do so and, therefore, the appellant's defence remained unchallenged.
15. Counsel submitted that the appellant had produced a receipt as proof of where he was when the robbery took place and that the two courts below erred in holding that the appellant's alibi was dislodged. We were urged to allow the appeal.
16. Ms. Nandwa, learned State Counsel from the office of the Director of Public Prosecution, opposed the appeal. She submitted that the ingredients of robbery with violence were proved; that the assailants were more than one and that the prosecution was able to prove that the appellant was one of them.
17. On identification, it was submitted that the appellant's identification was positive and free from error. That the incident happened at 10.00pm and that the complainant had parked his car next to a bank which had security lights which he used to identify the appellant and that in his testimony he stated that he used to see the appellant in Maua Town and that in addition PW2 also identified the appellant who was fiddling with his phone and that she saw him when she had gone to open the gate. Further, it was submitted that when PW2 heard PW1 screaming that he had been robbed, she responded quickly and rushed to where PW1 was while saying "Carlos kumbe ni nyinyi mnaibia bwana yangu" which clearly showed that PW2 had known the appellant prior to the incident and also that she was able to give a description of a red cap which the appellant was wearing.
18. Counsel submitted that PW3 the security guard at Nyambene Arimi Sacco testified that through the security lights of the bank, he noted that three people had robbed PW1 and that before the incident he had seen the appellant hanging around the bank. Counsel maintained that there was enough light to identify the appellant and that the identification was by recognition. Further, that PW2 identified the appellant by calling his name Carlos which the appellant confirmed to be known by within Maua Town. Reliance was placed on Mamush Hibro Faja -vs- Republic [2019]eKLR and Anjononi & Others -vs- Republic [1980]KLR.
19. On alibi evidence it was submitted that the appellant claimed he had gone to Isiolo on the date of the robbery where he also spent the night. It was submitted that the defence was an afterthought for the reason that he never raised the same when the prosecution witnesses were testifying and that the prosecution evidence outweighed that of the appellant and dislodged the appellant's defence as PW1, PW2 and PW3, who knew the appellant before, placed him at the scene of crime. Reliance was placed on R. -vs- Sukha s/o Wazir Singh & others [1939]6 EACA 145.
20. As regards the sentence, it was submitted that the death sentence which was meted by the trial court was not excessive and that it was the right sentence taking into consideration the nature of the offence and



the manner in which the appellant attacked the complainant. Reliance was placed in Bernard Kimani Gacheru -vs- Republic [2002]eKLR and James Kariuki Wagana -vs- Republic [2018]eKLR.

21. Finally, it was submitted that the death sentence in robbery with violence is legal and that if the appellant wanted to challenge the same, he ought to have done so at the High Court where he could have challenged the constitutionality of the sentence. We are urged to dismiss the appeal as both the conviction and sentence were safe.
22. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the Criminal Procedure Code. See. Karingo -vs- Republic [1982] KLR 213.
23. Having carefully considered the record of appeal, the impugned judgment, the respective submissions by the parties and the law, we have identified the following as our issues for determination:-
 - a. whether the appellant was properly identified.
 - b. whether the appellant's alibi defence rebutted the prosecution's case; and
 - c. whether the sentence meted on the appellant should be interfered with.
24. On the 1st issue from the record before us, we are convinced that there was sufficient light at the crime scene as confirmed by PW1, PW2 and PW3 to enable the identifying witnesses positively identify the appellant. PW 2 saw the appellant clearly as she passed him fiddling his phone. When her husband was being attacked, she identified the appellant as one of the attackers and shouted out his name asking him why they were robbing her husband. These three witnesses confirmed there was sufficient electric light which illuminated the scene. The witnesses were, therefore, able to see and identify the robbers clearly. This evidence was amplified by the fact that PW2, gave the appellant's name to the police when they reported the matter. The mention of the appellant's name was not an afterthought. Like the two courts below, we find that the appellant was properly identified as one of the persons who robbed the complainant on the night in question and we have no reason to interfere with the concurrent findings by the two courts below.
25. Turning to the 2nd issue as to whether the appellant's defence of alibi was proved. He said that he was at Isiolo and that he spent the night there and he provided a receipt from Karimi Lodge where he claimed he slept on the night in question. As noted by the two courts below, the appellant raised the alibi defence when he testified and had not even alluded to the same when the prosecution witnesses testified. He admitted that he did not have the receipt he produced in evidence as at the time he was arrested.

Why did he not produce it when the investigating officer testified so that he could be cross-examined on its authenticity? When considering this point, the learned Judge of the High Court stated:

In this case the appellant raised the defence of alibi at the defence hearing. From the evidence on record, I am satisfied that the alibi was dislodged as the appellant was placed squarely at the scene of crime. And I am in agreement with the Learned Trial Magistrate that the alibi was an afterthought.

(25) From the circumstances of this case and the evidence on record, I am satisfied from the totality of the evidence on record that there was overwhelming evidence that placed the Appellant at the scene of crime and this evidence dislodged the Appellant's alibi..."



26. The principles that guide the court when dealing with an alibi defence were enunciated by this Court in *Erick Otieno Meda -vs- Republic* [2019] eKLR in the following words:

- “(a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.
- b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
- c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
- d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail.”

27. In the same vein, in *R. vs. Sukha Singh s/o Wazir Singh & Others* [1939] 6 EACA 145, the predecessor to this Court held that:

If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards there is naturally a doubt as to whether he has not been preparing it in the interval, and secondly, if he brings it forward at the earliest possible moment it will give the prosecution an opportunity of inquiring into that alibi and, if they are satisfied as to its genuineness, proceedings will be stopped.”

28. The above case is on all fours with the appeal before us. We find that the appellant’s alibi defence was an afterthought and the same was dislodged by the prosecution which placed him squarely at the scene of crime on the material date and time. Ultimately, our finding is that the learned Judge arrived at the correct conclusion after re-evaluating the evidence tendered before the trial court and she did not err in dismissing the appellant’s appeal. The appeal against conviction is without basis.

29. On the issue of the sentence, though raised as a ground of appeal before us, the same was not challenged before the High Court. Learned counsel for the appellant did not make any submissions on the issue relating to the severity of the sentence meted on the appellant.

30. On their part, counsel for the respondent submitted that the issue of the constitutionality of the sentence was not raised in the High Court and that there is no reason to interfere with the sentence meted out by the trial Court.

31. We have perused the record and confirm that the issue of sentence was never raised by the appellant before the first appellate court. That being the case, the issue does not fall for determination in this appeal. The appeal against sentence therefore fails.

32. Consequently, this appeal fails against both conviction and sentence. It is dismissed in its entirety.

DATED AND DELIVERED AT NYERI THIS 20TH DAY OF DECEMBER 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED



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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

