



REPUBLIC OF KENYA



KENYA LAW
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**Parkiom v Republic (Criminal Appeal 72 of 2018)
[2023] KECA 176 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 176 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 72 OF 2018
F SICHALE, LA ACHODE & WK KORIR, JJA
FEBRUARY 17, 2023**

BETWEEN

SAMMY PARKIOM APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the judgment of the High Court of Kenya at Eldoret
(Kariuki and Mativo, JJ.) dated 24th July 2015 IN HC. CRA NO. 181 of 2013)*

JUDGMENT

1. Sammy Parkiom (the appellant herein), has preferred this second appeal against the judgment of Kariuki and Mativo, JJ dated July 24, 2015, in which he was initially charged at the Kabarnet Senior Principal Magistrate's Court with the offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#) cap 63 of the Laws of Kenya.
2. The particulars of the offence were that on 3rd March 2013 at Perekerra river in Marigat District within Baringo County jointly with another not before the court while armed with dangerous weapons namely; knives robbed Wesley Samoei cash Kshs 14,000/=, mobile phone make Techno all valued at Kshs 18,500/= and at or immediately before or immediately after the time of such robbery threatened to use actual violence to the said Wesley Samoei Chepsat.
3. The appellant denied the charge after which a full trial ensued. In a judgment delivered on September 20, 2013, Hon E. Bett (the then Ag. SRM), convicted him of the offence and sentenced him to death.
4. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on 24th July 2015, Kariuki and Mativo, JJ. found the appeal to be lacking in merit and dismissed the same.



5. Undeterred, the appellant has now filed this appeal and probably the last appeal vide a Notice of Appeal dated August 4, 2015 and Memorandum of Appeal dated 3rd April 2019 and a supplementary Memorandum of Appeal dated December 15, 2019, which is a replica of the grounds of appeal set out in the Memorandum of Appeal raising the following grounds of appeal:
 1. The learned appellate judges erred in law and fact by failing to analyse the evidence before it fully before conviction.
 2. The learned appellate judges erred in law and fact by passing the burden of proof on the appellant.
 3. The learned appellate judges erred in law and fact in convicting the accused based on identification which was not proved.
 4. The learned appellate judges erred in law and fact by convicting the appellant based on contradicting evidence.”
6. A brief background to this appeal is as follows: PW1 Wesley Samoei Chepsoit was in Marigat on 3rd March 2013, at 9pm at a boda boda park when he requested a boda boda rider outside Yellow Bar to take him home at Muchongoi. He paid the rider Kshs 1000.00. He testified that the appellant hopped at the back of the motorcycle and the two sandwiched him whereupon he protested but the rider of the *boda boda* told him that the appellant was alighting not too far away. Upon reaching river Perekerra, the rider stated that he was not going further as it was late and he stopped the motorcycle whereupon they both alighted with the appellant. Shortly thereafter, the appellant grabbed him and took away his mobile phone whereupon, the *boda boda* rider held him by the neck and the appellant removed a knife and removed some money from his back trouser pocket. After that, both the rider and the appellant rode away. He was able to get another motorcycle that took him to Marigat police station where he reported the incident.
7. It was his further evidence that on March 5, 2013, PW2 sent for him and stated that he had seen somebody with a phone that looked like his. On March 6, 2013, he was called to Marigat police station and he was shown a phone which he identified as his. On 15th March 2013, he saw the appellant at Yellow Bar and alerted the police but when the appellant saw them, he ran away but he was later arrested and brought to Marigat police station.
8. PW2 was Cosmas Kiptri, a *boda boda* operator at Marigat. It was his evidence that he knew both PW1 and the appellant as he resides at Marigat. He further testified that on 4th March 2013, he met a young man who was going to Marigat who boarded his motorcycle and informed him that his father had been robbed and he realized that he knew his father. That, on reaching the parking lot he saw his colleague with a techno phone and remembered what the young man had told him and he borrowed the same and upon scrolling, he realized that the phone book had names of people from Liboi and became suspicious. He sent for PW1.
9. On 6th March 2013, PW1 came to the parking lot and he showed him the *boda boda* rider who removed his phone and made a call and PW1 told him that that was his phone. That later in the evening, he spotted the *boda boda* rider and alerted the police who came and arrested him though he had attempted to escape. It was his further testimony that before the *boda boda* rider escaped, he had admitted that he had committed the offence with Parkiom (the appellant), and even offered to settle the matter. The following day they traced the appellant who was arrested. His accomplice was however not traced.
10. PW3 was Moses Komen Kendagor a *boda boda* operator at Marigat. It was his evidence that he knew PW1 who hailed from his home area and the appellant, a fellow *boda boda* rider. He corroborated



PW1's evidence that on March 3, 2013, a customer came and said that he wanted to be taken to Muchongoi but since he did not have enough fuel in his motorcycle, the appellant offered to ferry the said customer together with a fellow rider. PW1 was sandwiched in the middle. That, they then left and later on he got a customer to Njemp and on his way back he met PW1 walking on foot at around 1AM. He took him to Marigat police station.

11. PW4 was PC Albert Waweru attached to Marigat police station. It was his evidence that on March 5, 2013, he was in Marigat when he was called by PW2 who informed him that he had spotted a suspect but since he didn't have reinforcement, he went and met the informer who showed him the suspect and he arrested but he ran away as he was not handcuffed, leaving behind his mobile phone.
12. PW5 was PC Gabriel Muoki from Marigat police station and the investigating officer who arrested the appellant.
13. The appellant in his defence gave an unsworn statement and did not call any witness. He denied having committed the offence.
14. When the matter came up for plenary hearing on 17th October 2022, it transpired that Mr. Bichang'a the then learned counsel for the appellant was deceased. The appellant sought to rely on his written submissions filed by his counsel on December 21, 2020. Mr. Onkoba, learned counsel for the respondent equally sought to rely on his written submissions dated 8th February 2021, which he orally highlighted in court.
15. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of section 361 (1) (a) of the [Criminal Procedure Code](#) we are mandated to consider only matters of law. In *Kados vs. Republic* Nyeri Cr. Appeal No. 149 of 2006 (UR) this Court rendered itself thus on this issue:

"...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

16. In [David Njoroge Macharia v Republic](#) [2011] eKLR it was stated that under section 361 of the [Criminal Procedure Code](#):

Only matters of law fall for consideration and the court 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 also *Chemagong vs. Republic* [1984] KLR 213)."

17. With regard to the first issue, the learned judges were faulted for failing to analyze fully the evidence before them before conviction. We have perused the record and there are quite a number of disturbing facts. Firstly, P.W.2 told the trial court that on 4th March, 2013, this was a day after the robbery, he saw a rider with a phone which he borrowed and upon scrolling, he saw it had names of people from Liboi. The court was not told the peculiarity of these names, if at all. The presumption here is that P.W.1 hailed from Liboi and hence, the presumption that the phone having names of persons from Liboi could only belong to P.W.1. This of course is presumptuous as it is also possible for a person not from Liboi to have names of persons from Liboi in his phone book. It is this suspicion that led P.W.2 to call P.W.1 who came to the *boda boda* parking bay on 6th March, 2013. Whilst P.W.1 was at the parking bay, P.W.2 made a call to the rider who then removed his phone to answer P.W.2's call. It is then that P.W.1 is said to have identified the phone being used by the rider. The trial court was not given the specifications of this phone and no reason was advanced as to why P.W.1 concluded that the phone



belonged to him. It is this rider who said he had committed the offence with Parkiom, the appellant. This rider did not testify and what he told P.W.2 is hearsay. And even if the rider had testified, then his evidence would be that of an accomplice.

18. Then there is the evidence of P.W.3 who told the trial court that it is the appellant who offered to take P.W.1 together with a fellow rider to Muchongoi on 3rd March, 2013. This evidence is in contrast with the evidence of P.W.1 who told the court that the rider who agreed to take him home was not the appellant, the appellant being the one who climbed on the motor-cycle, thus he was sandwiched between the rider and the appellant.
19. PW5 is said to be the one who arrested the appellant. Where was this arrest effected and what was he found with if it is the rider who was with P.W.2 who had the phone allegedly belonging to P.W.1?
20. In our view, the appellant's conviction was not safe as there exists doubt as to whether he was one of the two persons who robbed P.W.1 on the night of 3rd March, 2013. The benefit of doubt is to be construed in favour of the appellant.
21. Accordingly, the conviction and sentence of the appellant is quashed. He is to be set on liberty, unless otherwise lawfully held.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF FEBRUARY, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

