



**Kahiga & another v Republic (Criminal Appeal 99 of 2018) [2023] KECA 110 (KLR)  
(3 February 2023) (Judgment) (with dissent - S ole Kantai, JA)**

Neutral citation: [2023] KECA 110 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 99 OF 2018  
MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA  
FEBRUARY 3, 2023**

**BETWEEN**

**PETER WANYUTU KAHIGA ..... 1<sup>ST</sup> APPELLANT**

**CONSTANTINE GITONGA MWENDA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Kiambu (J.N Mulwa, J.) delivered on 26th July, 2018 in Kiambu H.C.CR. Appeals Nos. 60 and 101 of 2017)*

**JUDGMENT**

**Background**

1. The appellants, Peter Wanyutu Kahiga and Constantine Gitonga Mwenda, were charged with the offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#). The particulars of the charge were that; on the June 18, 2014 at Miguta village in Githunguri District within Kiambu County, jointly with others not before court, they robbed Joel Gikundi Dio of motor cycle reg KMXXX 7XXX make Tiger valued at Kshs 85,000/-, and at or immediately before or immediately after the time of such robbery, while armed with crude weapons, used personal violence against the said Joel Gikundi Dio.
2. The appellants pleaded not guilty. Upon trial, the trial court found them guilty and sentenced them to suffer death. Aggrieved by their conviction and sentences, the appellants preferred respective first appeals to the High Court at Kiambu. The same were consolidated and heard by Mulwa, J who affirmed their conviction but substituted the death sentences with life imprisonment.
3. The appellants have now preferred this second appeal to this court and have raised the following 4 grounds of appeal which we have condensed into three thus: they were not positively identified; the necessary ingredients for the offence of robbery with violence were not proved; and the entire case of



- the prosecution was based on contradicting evidence, conjectures, presuppositions, surmises and gaps that were left unresolved thereby raising reasonable doubt as to whether it was them (appellants) who committed the offence.
4. This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law and not matters of fact. See *Joseph Njoroge vs Republic [1982] KLR 388*. We shall however summarize the facts of the case so that we satisfy ourselves that the two courts below carried out their mandates as required by the law.
  5. The prosecution's case can be summarized as follows: Joel Gikundi Dio 'the deceased' had been employed as a bodaboda rider of the motor cycle registration No KMXXX 7XXX make Tiger by its owner PW4, Atansia M Mugo. On June 19, 2014 PW4 learnt that the deceased had not returned home on June 18, 2014 as he was attacked and robbed of the motorcycle. PW4 and the deceased's neighbour PW5, Naston Maina Murage found him in a tea plantation seriously injured and rushed him to the hospital where he succumbed to those injuries after a few days. PW4 informed the deceased's father PW1, Isaiah Kamwenda about the attack and that the motor cycle had been recovered in Igoji area in Meru in the possession of PW2, Douglas Githinji Mutuma.
  6. Meanwhile, on June 18, 2014 PW3 Kanyaru Kabaya was in Majengo selling Miraa at 11pm when the 2<sup>nd</sup> appellant called him and told him that he had a motorcycle and wanted a rider. PW3 called PW2, who was a bodaboda rider and informed him that he was looking for a rider. PW2 went and met PW3 in the company of the appellants who were pointed out to him as the owners of the motorcycle. The 2<sup>nd</sup> appellant told him that he wanted somebody to transport miraa to Meru and gave him Kshs 3,000/- for fuel and his services. PW2 left for Meru at 4:00pm but the motorcycle developed some mechanical problems. He took it to a mechanic who said that the motor cycle looked like stolen property. Members of the public came and started beating PW2 but the police officers intervened and rescued and took him to Nkubu Police Station.
  7. PW1 travelled to Meru to confront PW2 who confessed that he got the motor cycle from PW3 and gave him PW3's mobile phone number. PW2 called PW3 and informed him that he had been arrested on the grounds that the motor cycle had been stolen. PW3 called the 2<sup>nd</sup> appellant who said he would travel to Meru to follow up. PW1 called PW3 through the number obtained from PW2 and asked to meet him. On June 25, 2014 which was the day of their meeting, PW1 was escorted by police officers who arrested PW3 at Majengo and took him to Githunguri Police Station. On July 21, 2014, the investigating officer, PW6, No 79XXXX PC Benard Odoyo from CID Githunguri interrogated PW3 who was still in custody. PW3 informed him that it was the appellants who had given him the motor cycle and he was willing to help trace them. They managed to trace the appellants through their phone numbers. The 1<sup>st</sup> appellant was arrested in Kayole while the 2<sup>nd</sup> appellant was arrested in Meru.
  8. PW8, Jenipher Kinuthia from the office of the registrar of persons, Githunguri testified that on October 30, 2015, she received a letter from DCIO, Githunguri to confirm the registration particulars of the persons whose identity numbers and names were listed in the letter being Peter Kahuga of Id No xxxx and Constantine Mwenda of Id xxxx. She was able to produce print outs to confirm that the Id numbers belonged to the appellants.
  9. When placed on their defence, the appellants gave unsworn testimonies. The 1<sup>st</sup> appellant denied committing the offence. He testified that on the date of the alleged incident, he went to Githunguri to sell miraa until 11.00pm then went home. The next day, he took the remaining miraa to his store in Eastleigh. On July 23, 2014, PW3 called him on phone and requested they meet. He went to Kayole and found him with police officers. He was arrested and taken to Githunguri Police Station. The 2<sup>nd</sup> appellant also denied participating in the robbery. He stated that on the alleged date, he went to see



PW3 who used to sell miraa to him. He took the miraa to Githunguri and sold it till 10.00pm then took the remaining miraa back to PW3 in Majengo, Nairobi. A few days later he went to Meru where he was arrested and taken to Meru Police Station then later escorted to Githunguri Police Station.

### Submissions

10. When this appeal came up for virtual hearing on October 5, 2022, the 1<sup>st</sup> appellant was represented by learned counsel, Ms Ngetich and Mr Kimathi represented the 1<sup>st</sup> and 2<sup>nd</sup> appellants respectively. The respondent was represented by learned prosecution counsel, Ms Matiru. Counsel relied on the parties' written submissions dated March 14, 2022, August 17, 2022 and March 21, 2022 respectively which they briefly highlighted on the hearing date.
11. Ms Ngetich questioned the admissibility of the Safaricom printout tendered in evidence by PW6 during the trial. She argued that the same did not adhere to the mandatory provisions of section 65(8) of the Evidence Act as there was no accompanying certificate to confirm authenticity of the electronic record. She submitted that for a conviction to be founded on circumstantial evidence, it must meet the threshold set down in the cases of *Abanga Alias Onyango v R, Cr Appeal No 32 of 1990 (UR)*; *Joan Chebichii Sawe v Republic [2003] eKLR*; and *Rex v Kipkering Arap Koske & Another (1949) 16 EACA 135*. Further, Ms Ngetich faulted the courts below for placing reliance on the evidence of PW3 yet he was present in court while PW2 was testifying. She held the view that the said evidence ought not to have been considered as there was a possibility of fabrication of evidence in the circumstances. Lastly, counsel urged for the reduction of sentence pursuant to the Supreme Court case of *Francis Kariokor Muruatetu & Another -v- Republic [2017] eKLR* stating that it applies mutatis mutandis to cases of robbery with violence.
12. Mr Kimathi submitted that the only evidence linking the 2<sup>nd</sup> appellant to the offence was the motorcycle which was not adduced in evidence. In his view therefore, the chain of events was not complete and the omission violated the 2<sup>nd</sup> appellant's right to a fair trial. It was also his submission that the sentence was harsh and excessive. He relied on the case of *James Kariuki Wagana v Republic [2018] eKLR* by Ngugi, J (as he then was) who pronounced that death sentences should be reserved for most heinous and violent of robberies.
13. On her part, Ms Matiru submitted that there was no break in chain of evidence. Accordingly, the trial court was right in convicting the appellants on circumstantial evidence. Nor did the 1<sup>st</sup> appellate court err in confirming the conviction and sentence on that basis. That failure to adduce a certificate under section 65(8) of the Evidence Act was not prejudicial to the appellants. She relied on section 78(A) of the Evidence Act on admissibility of electronic evidence and noted that it was PW2 who led the arresting officer to the arrest of the two appellants. She therefore, urged that the appeal be dismissed and life imprisonment imposed be upheld.
14. In rebuttal, Ms Ngetich and Mr Kimathi submitted that the provisions of section 65(8) of the Evidence Act are compulsory and the failure to comply with them shuttered the prosecution case.

### Analysis and determination

15. We have considered the appellants' grounds of appeal and the respective rival submissions upon which we have distilled the issues for consideration to be whether; the Safaricom data printout was admissible; the appellants were positively identified, the ingredients of the offence were proved, and the sentence was legal and proper.
16. On the 1<sup>st</sup> issue, it is not in dispute that PW6, the investigating officer produced mobile phone print out from Safaricom in an attempt to show that there was indeed communication from the appellants at the



scene of crime and between the appellants on one hand and PW2 and PW3 on the other. He however did not produce the certificate envisaged under section 65(8) of the *Evidence Act* which provides as follows: -

- (8) In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—
- a. Identifying a document containing a print-out or statement and describing the manner in which it was produced;
  - b. Giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
  - c. Dealing with any of the matters to which conditions mentioned in the subsection (6) relate, which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence.'

17. From the above provisions, the certification referred to is a mandatory requirement. In this case, PW6 was mandated to adduce a certificate detailing how the Safaricom call data print out was generated and by whom to warrant it to be admissible in evidence. This was not complied with, implying then that, the Safaricom records were not admissible in evidence and could not be relied upon to link the appellants to the offence for which they were convicted. This court in *Charles Matu Mburu v Republic [2014] eKLR*, while dealing with circumstances where the certification required by section 65(8) of the *Evidence Act* was not adhered to, observed as follows:-

' In this case, the computer print-outs that were produced by the prosecution of the call history on the deceased's mobile phone do not contain the certification mentioned in the above provision. Further, no evidence was tendered on how the said print-outs were generated. We agree with the appellant's submission that the said print-outs had not been verified by Safaricom, hence they were inadmissible. We find that the two lower courts erred in relying on the said print-outs.'

18. Moving on to the issue of identification, it is evident that the trial court and the first appellate court were both cognizant of the fact that the entire case revolved around circumstantial evidence. This court has on numerous occasions established the principles for basing a conviction on circumstantial evidence. See *Abanga alias Onyango v Republic (supra)*, *R v Kipkering Arap Koske [1949] 16 EACA 135* and *Sawe v Republic [2003] KLR 364*. These are as follows:
- a. The inculpatory facts must be incompatible with the innocence of the accused.
  - b. They must also be incapable of explanation upon any other hypothesis other than that of guilt of the accused.
  - c. There must be no other co-existing circumstances weakening or destroying the inference; and that
  - d. Every element making the unbroken chain of evidence that would go to prove the case must be proved by the prosecution.



19. The circumstantial evidence adduced by PW1, PW2 and PW3 linked the appellants to the offence. PW2 and PW3 tendered consistent and corroborative evidence of how PW2 came to be in possession of the stolen motor cycle. PW2 was categorical that it was the appellants who gave him the motorcycle and presented themselves as the purported owners of the motorcycle. They hired him as a rider and gave him Kshs 3,000/- out of which he was to use Kshs 1,500 for fuel. This all happened on the material night when the deceased was attacked and robbed of the motorcycle. This is the very motor cycle that was handed over to PW3 by the appellants to ride to Meru where he was arrested with it. This series of events presents a chain of evidence so complete and unbreakable that there is no other hypothesis other than that of guilt of the appellants.
20. Further to the foregoing, we reject Mr Kimathi's contention that the fact that the motorcycle was not physically produced as an exhibit meant that the chain of events was not complete. From the record, it is clear that PW4 produced a logbook of the motorcycle which had his identity card number together with his name indicating that he was the registered owner of the same. The failure to produce the motorcycle in evidence was therefore not fatal to the appellants' case. No miscarriage of justice was occasioned by the same on the part of the appellants and neither did it amount to a violation of their fundamental right to a fair trial.
21. Turning to the third issue, which is whether in the absence of the computer generated Safaricom call data printout, the prosecution case was not proved, it is imperative to first consider the admissibility of PW3's evidence. It is noteworthy that during trial, an objection was raised by the defence for the court to disallow PW3 from testifying as he had sat in court throughout the proceedings. The trial court overruled the objection stating that there was no law barring a witness who sat in court from giving evidence save that the evidence of such a witness would be considered with caution and carefully weighed against that of other witnesses.
22. The reasoning for barring a witness who has not testified from sitting in court when taking the evidence of other witnesses is to prevent deliberate falsification and fabrication of evidence. However, the mere fact that a witness is in court cannot disqualify him from testifying but rather, the court should proceed with great caution when considering the evidence, as was in this case. We cannot therefore fault the trial court for its approach as it warned itself that it would consider the evidence of the witness with caution. In any event, we note that the appellants were represented by counsel and were accorded the opportunity to cross examine the said witness hence they were not prejudiced in any manner.
23. On whether the ingredients of the offence of robbery with violence were established, section 296(2) of the Penal Code provides that:

' If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company of one or more other person or persons, or if, at or immediately before 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.'
24. It is trite law that a prove of any one of the ingredients of the offence of robbery with violence would warrant a conviction. In the instant case, the deceased from whom the subject motor cycle was robbed was found in a coffee plantation seriously injured, a pointer that the robbers were armed with dangerous weapons. Indeed, the deceased subsequently succumbed to those injuries. The motor cycle was proved to have been stolen from the deceased and it was established that the appellants were linked to the robbery. We sum it by finding that all the ingredients of the offence of robbery with violence were established and, in our view, the appellants' conviction was based on sound evidence.



25. On the issue of sentence, learned counsel, Ms Ngetich cannot purport to rely on Supreme Court Muruatetu I (Francis Kariokor Muruatetu & Another -v- Republic [2017] eKLR) in urging for a lighter sentence. The same court later clarified its decision in Muruatetu II (*Francis Kariokor Muruatetu & Another -v- Republic & Katiba Institute 5 5 Others {amicus curiae} [2021] eKLR*) that Muruatetu I is only applicable to murder cases. As regards Mr Kimathi's arguments, we note that a heinous and violent crime was committed and it resulted in an innocent life being lost. We therefore find that the sentence meted out on the appellants was fair and proportionate to the crime and we have no reason to interfere with it.
26. Accordingly, we find the appeal lacking in merit and the same is dismissed in its entirety.
27. This judgment is delivered pursuant to rule 34(3) of the *Court of Appeal Rules, 2022*, as Kantai, JA has declined to sign.

**DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.**

**ASIKE-MAKHANDIA**

.....

**JUDGE OF APPEAL**

**GW NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

