**Biwott v Republic (Criminal Appeal 263 of 2018)**
**[2023] KECA 1528 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1528 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT ELDORET**

**CRIMINAL APPEAL 263 OF 2018**

**F SICHALE, FA OCHIENG & WK KORIR, JJA**

**DECEMBER 15, 2023**

**BETWEEN**

**MICHAEL KIMUTAI BIWOTT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the judgment of the High Court of Kenya at Eldoret, Kimondo & Ngenye (as she then was) JJ,), dated and delivered on 2nd October 2014) In HC. CRA NO. 187 OF 2010)***

## JUDGMENT

1. Michael Kimutai Biwott (the appellant herein), has preferred this second appeal challenging the dismissal of his first appeal by the High Court which he had lodged against his conviction and sentence that had been imposed by the Chief Magistrate's Court in Eldoret (Hon A Ong'injo, then Senior Principal Magistrate), for the offence of attempted robbery with violence contrary to Section 297 (2) of the *Penal Code* Cap 63 of the Laws of Kenya.

2. The particulars of the offence were that on 21st June 2009, at Tulwet centre in Uasin Gishu District within the Rift Valley Province jointly with others not before court being armed with offensive weapon namely; knife attempted to rob Paul Kipkemboi Kebenei off his motor vehicle registration number KAM 878Y make Toyota Corolla and immediately before the time of such attempt, wounded the said Paul Kipkemboi Kebenei.

3. The appellant denied the charge after which a full trial ensued with the State calling a total of 10 prosecution witnesses while the appellant gave a sworn statement and did not call any witnesses. In a judgment delivered on 8th December 2010, Hon A Ong'injo found the appellant guilty of the offence and convicted him of the same and sentenced him to suffer death as by law provided.

4. Being aggrieved with the aforesaid conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on 2nd October 2014, Kimondo & Ngenye JJ, found the appeal to be devoid of merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

5. Unrelenting, the appellant has now filed this appeal vide a Notice of Appeal dated 10th October 2014 and a Memorandum of Appeal dated 4th August 2015 and undated supplementary grounds of appeal raising 4 and 2 grounds of appeal respectively. Subsequently thereafter, the appellant through his counsel filed supplementary memorandum and grounds of appeal raising 4 grounds of appeal as follows;

    i. The learned Hon Judges erred in law by failing to fairly and judiciously re-evaluate the evidence on record vis-a- vis the age of the appellant at the time of the trial, despite the age issues having been the basis of grant of bond pending appeal at the High Court.

    ii. The learned Hon Judges erred in law in their failure to find that the appellant was a minor or call for evidence in support of the same, and that he was entitled to legal representation as a matter of right and at the expense of the state and that he was prejudiced and the trial ought to be declared a mistrial.

    iii. The learned Hon. Judges erred in law in finding that the offence of attempted robbery with violence was proven beyond reasonable doubt under the circumstances.

    iv. The learned Hon. Judges erred in law in upholding the sentence of death despite, which is/ was illegal and more so after the respondent had conceded that the appellant was a minor all through."

6. The relevant facts in this appeal as narrated by the testimony of the prosecution witnesses are as follows; Paul Kipkemboi (PW1) was a taxi driver operating between Kesses and Lessos. On 21st June 2009, at around 8:30PM he was at Lessos with his brother Jonathan Sitienei when he received a phone call from Nge'no (PW5), who told him that someone wanted a taxi to take his father to hospital and that the person was between Kesses and Lessos.

7. He then proceeded to Kesses and entered into a petrol station whereupon the said PW5 came with the man who wanted to hire the taxi; that person is the appellant. There was light at the petrol station. The appellant informed him that there were many people to be carried from home and that he should therefore not carry other persons. He dropped his brother back to his house and the appellant who was sitting at the rear passenger seat came to the front.

8. PW1 requested the appellant to bring the sick man on the road as he would not go off the road but the appellant told him that he had left his phone at home whereupon he took out his phone and dialled a number that the appellant gave him. The number did not go through and when they were about to get to Tulwet junction, PW1 called the number again and someone picked it up but switched off whereupon he decided to turn and park and wait for the appellant to go and bring the sick man.

9. After 3 minutes, he felt that the place was too dark and went to park in a lighted place when he suddenly saw the appellant coming back running and opened the door and sat in the rear passenger seat and when he asked him where the patient was, he told him that the man had deteriorated and that they should go home and pick him up. That, after moving for about 100 metres, he heard the appellant warning him not to try to stop and when he turned, and looked at him, he saw him wielding a knife at him. He raised an alarm 3 times and turned and held the knife which cut him on the palm.

10. It was his further evidence that the appellant ordered him to open the door as he struggled with him and he unlocked the doors and they both got out whereupon he found one Mr. Rop's brother and informed him that he had been injured. His brother and relatives went to Lessos to try and trace the person who had attacked him and reported the matter to the police. Later on, he was called to attend an identification parade and he was able to identify the person who had attempted to rob him as the appellant.

11. Matthew Kibwambok Sang, a bicycle taxi operator, testified as PW2. On 21st June 2009, at about 8:00pm he was at Kesses centre at a petrol station when someone came and enquired if he could get a taxi. He then informed him that all taxis had wound up business for the day. The appellant and PW2 went to Nge'no's shop (PW5) and found his wife (PW3) and PW3 informed them that PW 5 had the contacts of a taxi operator. PW3 then relayed the request to PW5 of a customer who wanted a taxi.

12. PW2 introduced the appellant to PW5. He was later informed that PW1 had been stabbed. He attended an identification parade at Kitale Police Station upon being summoned. He was able to identify the person who had approached him at the petrol station as the appellant as there was light at the petrol station and that further the appellant was carrying a paper bag.

13. PW3 was Prisca Nge'no. On 21st June 2006, she was at her shop when PW2 came with a person (the appellant), who wanted contacts of a taxi driver whereupon she informed her husband (PW5) who made a phone call to PW1. Later that night, she learned that PW1 had been stabbed. It was her evidence that when PW2 and the appellant came to her shop, the appellant was carrying a blue and white stripped paper bag and that her shop was lighted with electricity and that she was able to identify PW2 and the appellant. She was later summoned to Kitale police station to attend an identification parade where she identified the appellant as the one who was looking for a taxi to hire.

14. PW4 was Stephen Kibet a guard at Moi University. On 21st June 2009, he had gone to Kesses centre to visit PW5 who was his friend. He was present when PW5's wife came and told them that there was a person who wanted a taxi. PW5 called PW1. He saw the person who wanted the taxi though he did not talk to him. That after about 10 minutes, PW3 informed them that the customer who had hired PW1's taxi had stabbed him.

15. Joseph Nge'no (PW5) was a retail shop operator at Kesses. On 21st June 2009 at about 8:30pm, he was at the shop with PW4 when his wife came and requested for PW1's telephone number as there was someone who wanted a taxi to take his father to hospital. He called PW1, a taxi driver who at the time was at Lessos and eventually PW1 decided to come to Kesses. He later closed the shop and went home in the company of his wife (PW3) and PW4.

16. On 20th January 2010, he was called to Kitale police station where an identification parade was conducted and he was able to identify the appellant as the man who had hired PW1's taxi.

17. PW6 was IP Abdi Noor Hussein(PW6) the Deputy OCS Langas police station. He conducted the identification parade. He explained to the suspect why they were conducting the identification parade and asked him for his consent to appear on the parade to which the appellant had no objection. It was his further evidence that he asked the appellant if he was satisfied with the conduct of the identification parade to which he answered in the affirmative and later prepared a certificate to the effect that the parade was conducted according to the rules and regulations. He produced the certificate to this effect as an exhibit in court.

18. Dr. Paul Kipkorir Rono (PW7) from Moi Teaching and Referral Hospital produced a P3 Form in respect of PW1 prepared by his colleague, one Dr. Embezi. According to the P3 form, PW1 had sustained injuries on the right cheek, which penetrated through the oral cavity and had visible scars.

Additionally, there was a stab wound on the back and chest interiorly and there was a cut wound on the right hand which PW1 sustained when he tried to snatch the knife from the appellant. Further, there was also an injury on the right hand involving the ulna nerve leading to wrist claw. He classified the injuries as grievous harm and produced the P3 Form as an exhibit.

19. PC Simon Kariuki (PW8) was at Kesses police post. On 21st June 2009, when PW1 and his brother reported that PW1 had been attacked by someone posing as a taxi customer. He then commenced investigations and managed to get data sheet from Safaricom which data sheet led them to the house of one Arap Rotich in Lessos and he established that the appellant was the one involved. He later recorded statements from PW1 and his brother and the appellant was subsequently arrested and charged.

20. PC Simon Likonyi (PW9) attached to the scenes of crime, Eldoret. On 5th May 2010, he took photographs of vehicle registration number KAM 878Y; Toyota Corolla which was grey in colour which was brought to the office yard by PW1. He then took 2 photographs of the same and the films and negatives were subsequently printed under his supervision which he produced in court as exhibits.

21. Corporal Beatrice Lagat (PW10) attached to Eldoret Police Station caused the issuance of a production order on 19.10.2010 for the appellant to be produced from Kitale G.K. Prison and to be remanded at Kitale police station.

22. The appellant in his defence gave a sworn statement and called no witnesses and denied having committed the offence and testified inter alia that PW1 had demanded Kshs. 100,000/= from him and that the reason why he was charged was because his father and PW1 had failed to agree on the payment of the said sum. He had been held at the Kitale G.K. Prison as his mother had caused his arrest on account that he had allegedly stolen her motorbike.

23. When the matter came up for plenary hearing on 18th July 2023 Mr. Chacha Mwita learned counsel appeared for the appellant and relied on his written submissions dated 24th April 2023. Mr. Mureiithi while conceding the appeal on sentence appeared for the respondent and relied on his written submissions dated 14th February 2023.

24. It was submitted for the appellant that the violations meted out on the appellant at the time of the trial were gross and infringed on his right to a fair trial and thus the conviction and sentence thereof should be declared a nullity ipso facto. It was further submitted that during mitigation at the lower court, the appellant pleaded with the court to allow him to go back to school; that he was a first offender but this contention was disregarded for the reason that the trial court chose to be held hostage by legislation and failed to read in between the lines that the appellant was a minor.

25. It was further submitted that had the appellant been informed of his right to legal representation, as demanded by Section 186 (b) of the *Children's Act*, his age would have been brought to the attention of the trial court and the death sentence should not have been the appropriate sentence as pronounced by Section 190 (1) (2) of the *Children's Act*.

26. On the other hand, the respondent conceded the appeal on sentence on the basis that as at the time that the offence was committed on (21st June 2009), as contained in the charge sheet, the appellant was 16 years old and thus the sentence of death imposed on him was illegal.

27. We have carefully considered the record, the rival written submissions by the parties, the authorities cited and the law. 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 ..."

28. In *David Njoroge Macharia vs. 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)."

29. Having carefully gone through the pleadings and the rival submissions by the parties, we are of the considered opinion that the following 2 main issues arise for our determination;

    i. Whether the learned judges erred in law in finding that the offence of attempted robbery with violence was proven beyond reasonable under the circumstances.

    ii. Whether the learned Hon. Judges erred in law in upholding the sentence of death despite, which is/was illegal and more so after the respondent had conceded that the appellant was a minor all through.

30. Turning to the first issue, it is common ground there was an attempt to rob PW1 of his vehicle motor registration number KAM 878Y on the night of 21st June 2009, in the course of which he sustained serious stab wounds on his face, back and the right elbow. Additionally, PW1, PW2, PW3, PW4 and PW5 all identified the appellant as the perpetrator of this heinous crime and their evidence towards this respect remained largely uncontroverted in cross examination.

31. The learned Judges of the High Court while analyzing the evidence on record stated as follows;

> " From the evidence, the appellant was clearly identified by PW1, PW2, PW3, PW4 and PW5. He was identified from electric light at both the petrol station and the shop. As the appellant was making enquiries for a taxi, there was sufficient time to identify him. Fundamentally, he spent time with PW1 at the shop and on the journey in the taxi for a positive identification. In addition, the appellant was also identified by PW1 and PW5 at the identification parade conducted by the police. We agree with the learned trial magistrate that the parade was conducted fairly and in accordance with the rules. Granted the evidence, we are satisfied that the appellant was positively identified as the person who accompanied PW1 on the taxi and who attacked and injured PW1."

32. The evidence in this case was overwhelming to say the least. Perhaps this would explain the reason as to why despite the appellant raising this as a ground of appeal, no attempt whatsoever was made to submit on the same.

33. In view of the above, and having re-evaluated the evidence on record, we are satisfied that all the ingredients of the offence of attempted robbery with violence were proved to the required standard and this ground of appeal must fail in its entirety.

34. Accordingly, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of attempted robbery with violence against the appellant as there was overwhelming evidence to sustain a conviction against the appellant for a charge of attempted robbery with violence.

35. We therefore find and hold that the appellants' conviction for the offence of attempted robbery with violence was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction. Our only reservation would be with the use of the word "conviction" as Section 189 of the then *Children's Act* (Act No. 8 of 2001) which was in force when the appellant was being tried prohibited the use of the word "conviction" in cases involving minors. Be that as it may, we note that this issue is not the subject of this appeal and we will make no further comment regarding the same.

36. Turning to the second issue, the High Court was faulted for upholding the sentence of death more so after the respondent had conceded that the appellant was a minor all through. It is common ground that the appellant was charged with the offence of attempted robbery with violence on 25th January 2010, that occurred on 21st June 2009. He was subsequently sentenced to suffer death as by law provided on 8th December 2010.

37. We have looked at the record and indeed the appellant had raised the issue of his age in his appeal before the High Court where he contended that he was 16 years old at the time of commission of the offence. The High Court in dismissing this ground of appeal noted that he had not raised this issue during the trial and that further there was no evidence to show that at the time of the offence or even his trial that he was a minor.

38. Be that as it may and during the pendency of this appeal, the appellant vide a motion dated 19th July 2022, made an application seeking to be allowed to avail new and compelling evidence which application was allowed by this Court on 24th March 2023. In pursuance of the aforesaid ruling, the appellant produced a Birth Certificate and correspondences showing that he was born on 26th January 1994. This gives credence to the appellant's contention that he was 15 years at the time of commission of the offence on 21st June 2009.

39. Section 190 of the then *Children's Act* (*supra*), placed restrictions on the nature of sentences that can be imposed upon minors. The same provided thus;

> " 190. Restriction on punishment
>
> (1) No child shall be ordered to imprisonment or to be placed in a detention camp.
>
> (2) No child shall be sentenced to death." (Emphasis Ours)"

40. This Court in *JKK vs Republic* (2013) eKLR which was followed in *R v Dennis Kirui Cheruiyot* [2014] eKLR, stated as follows as regards sentences involving minors;

> " The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent

> life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence."

41. We fully reiterate and agree with the above position taken by the Court. In view of the above, it is evident that the sentence of death that was imposed on the appellant herein was an illegal sentence which cannot be allowed to stand. Additionally, we note that the appellant has been in custody for a period of about 13 years serving an illegal sentence. We hope that the 13 years of incarceration have helped him understand the consequence of his unlawful behaviour.

42. Further, there was one troubling aspect in this appeal regarding how the appellant was arrested. Whereas PW8 stated in his evidence that he managed to get data sheet of calls from Safaricom that led them to the house of one Arap Rotich in Lessos location, the connection between the said Arap Rotich and the appellant was not stated and the evidence on record showed that the appellant did not have a mobile phone a fact that was confirmed by PW1. In addition, a production order had to be issued in respect of the appellant who was then incarcerated at Kitale GK prison for purposes of carrying out the identification parade at Kitale police station.

43. From the circumstances of this case and due to the above reasons, we have no choice other than to allow the appellant's appeal on sentence which we hereby do.

44. Accordingly, we set aside the sentence of death meted out and substitute it with a sentence of imprisonment for the period he has already served. Accordingly, we now issue an order that the appellant be set at liberty forthwith unless otherwise lawfully held.

45. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF DECEMBER, 2023.**

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

**F. OCHIENG**

**.....**

**JUDGE OF APPEAL**

**W. KORIR**

**.....**

**JUDGE OF APPEAL**

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

Signed:

DEPUTY REGISTRAR