



REPUBLIC OF KENYA



KENYA LAW
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**Natse v Republic (Criminal Appeal 41 of 2018)
[2022] KECA 417 (KLR) (4 March 2022) (Judgment)**

Neutral citation: [2022] KECA 417 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 41 OF 2018
PO KIAGE, J MOHAMMED & M NGUGI, JJA
MARCH 4, 2022**

BETWEEN

VINCENT SHATUMA NATSE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Eldoret, (F.A. Ochieng and G.W. Ngenye-Macharia, J.J.) dated 6th June, 2014 in HCCRA NO. 54 OF 2011)

JUDGMENT

1. **Background**

The appellant, Vincent Shatuma Natse was charged alongside another with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the [Penal Code](#) before the Principal Magistrate's Court at Kapsabet.

2. The particulars of the offence were that on 18th December, 2009 at Kapsabet Location in Nandi Central District of the then Rift Valley Province while armed with dangerous weapons, namely knives and rungun he robbed Shadrack Ekume Namuyenga of three pairs of shoes, calculator, one trouser, two television remote controls, 26 CD's and CD holder all valued at Kshs. 15,000/- and at or before the time of such robbery used actual violence to the said Shadrack Ekume Namuyenga.

3. Following their trial, the trial court found both accused persons guilty of the offence of robbery with violence. However, the appellant's co-accused was released before mitigation with no reasons advanced by the trial court while the appellant was subsequently sentenced to 14 years' imprisonment and after completion of the sentence to be placed under police supervision for a period of 5 years.



4. Aggrieved, the appellant lodged an appeal to the High Court at Eldoret. By a judgment dated 6th June, 2014 the appellant's conviction was upheld and the 14 years' imprisonment sentence substituted with the death sentence.
5. The learned Judges (F.A. Ochieng & G.W. Ngenye-Macharia, JJ.) in arriving at the decision to enhance the sentence noted that although the appellant was not called to plead afresh to the substituted charges, this did not occasion him any prejudice since he gave no indication that he intended to change the plea and the trial was conducted on the basis that he had pleaded not guilty and no flaw was noted in the manner in which the trial was conducted.
6. The learned Judges further held that none of the prosecution witnesses contradicted the evidence of the other; there was no doubt that the appellant was caught red-handed at the scene inside the complainant's house with a kitchen knife; the appellant was known to the complainant by name and where he came from and was taken to the police station with the sack of exhibits he was arrested with hence his identification was by direct recognition by the complainant and required no further proof.
7. The learned Judges further held that the authenticity of the P3 form was confirmed by Josephat Embeko (PW1) a Clinical Officer at Kapsabet District Hospital whose evidence was unchallenged. The failure by Caleb Okoth to testify did not in any way prejudice the appellant's case as his testimony would not have added any value to the testimony of PW6. Further, dusting of fingerprints was unnecessary as the appellant was caught red-handed at the scene and the evidence linking him to the scene was direct.
8. The learned Judges held that the omission of the Occurrence Book (OB) number from the charge sheet did not prejudice the appellant as the case was properly reported to the police and challenge raised to that respect. They concluded that despite having been properly warned about the enhancement of sentence, the appellant nevertheless opted to argue the appeal.
9. Dissatisfied with the judgment of the High Court, the appellant filed a memorandum of appeal to this Court in which he raised nine (9) grounds of appeal to wit; that the first appellate court erred in law by failing to find and hold that there was no robbery that took place on 18th December, 2009 to constitute an offence under Section 295 as read with Section 296(2) of the Penal Code; that there was no proper identification and failing to consider how the appellant went to the alleged scene of crime; the prosecution evidence was extremely contradictory on material facts; the appellant was framed and implicated by Solomon Kemboi (PW3); the trial magistrate applied the wrong procedure in law in conducting the defence hearing to the prejudice of the appellant; the appellant's defence evidence was not considered at all; giving their opinions purporting to alter, correct, change and interpret the evidence of the prosecution witnesses to suit their pre-conceived stand on the outcome of the appeal before them; that the judgment of the trial court was illegal and defective; and in enhancing and meting the appellant a manifestly excessive sentence not commensurate with the circumstances of the case.

Submissions by Counsel

10. In the appellant's written submissions, filed by learned counsel, Mr. Miyienda & Company Advocates, it was submitted that although the complainant, Shadrack Ekume Namuyenga (PW2), Solomon Kemboi, (PW3), Omulama Fredrick Anduati (PW4) and Nick Khamadi (PW5) were at the alleged place of attack, they did not all place the appellant at the scene as having robbed the complainant; the appellant did not steal or use any violence on the complainant; no prosecution evidence was led to show who tied PW2. Counsel argued that the charge sheet did not disclose the time of the offence and the incident did not happen at two different places at the same time; it was very clear that the appellant was not found with any of the stolen items as it was the appellant's co-accused (the 2nd accused) who was



found with the sack; and it was unprocedural for the court to allow the 2nd accused to cross-examine the appellant while they were jointly charged.

11. It was further submitted that the first appellate court did not consider that the appellant had stated in his defence that he had dropped off PW3 on his bodaboda (motorbike) but PW3 refused to pay him and they engaged in a scuffle which attracted other people who then beat him up. He maintained that he did not go to where the complainant lived but rather dropped PW3 at a place known as Kamobo. He questioned why his co-accused was freed despite being found to have committed the offence of robbery with violence.
12. The appellant concluded by stating that the irregularity in sentencing by the trial court could not be cured by Section 382 of the Criminal Procedure Code as it occasioned a failure of justice by exposing the appellant to double jeopardy. He maintained that there was no robbery and that he was not placed at the scene. The appellant urged that the appeal be allowed, conviction quashed and the sentence set aside.
13. Learned counsel for the respondent, James Massissa submitted that it was evident that the appellant was found at the scene of crime as he tried to escape while armed with a kitchen knife and carrying a sack containing the allegedly stolen items; all witnesses' testimony showed that the appellant used actual violence on the complainant by hitting him on the limbs with a metal rod after tying his hands with a manila rope and blindfolding him; and that PW2, PW3, PW4 and PW5 positively identified the appellant as the assailant and the person found in possession of the stolen items.
14. Counsel submitted that the issue of the scene of the crime was considered and the trial court found that the testimony of PW4 as corroborated by other witnesses was credible enough to erase any doubt as regards the presence of the appellant at the scene of crime. Further, the ingredients of robbery with violence were proved as provided for under Sections 295 and 296(2) of the Penal Code and the High Court rightly upheld the appellant's conviction.
15. It was counsel's further submission that the two courts below were unanimous that the appellant was well identified as the perpetrator of the offence; the complainant was able to identify the appellant and knew him by name when PW5 removed his blindfold at the scene. The respondent conceded that it is not provided in law for a co-accused to cross-examine a co-accused; the Criminal Procedure Code does not provide for an accused person to be placed under police supervision after completion of the sentence served; and the conceded were an oversight on the part of the trial court and did not occasion any injustice to the appellant.
16. Lastly, counsel submitted that the sentence by the trial court of 14 years' imprisonment holds in law just like the enhancement to life imprisonment by the High Court; and that the appellant was properly warned about sentence enhancement but nevertheless opted to proceed with the appeal. Counsel urged that the conviction and sentence by the High Court be upheld as the prosecution had proved its case beyond reasonable doubt.

Determination

17. This is a second appeal and as such we are limited to consideration of matters of law only. Accordingly, we are generally bound by concurrent findings of fact by the two courts below departing therefrom only in the rarest of cases where they are not based on any evidence or proceed from a misapprehension of the evidence or are plainly untenable. See *v Republic* [1982] KLR 219 and Section 361 of the Criminal Procedure Code.
18. We have carefully perused the record, considered the impugned judgment, submissions by counsel, the authorities cited and the law. The main issues for determination are whether the offence of robbery



with violence was proved beyond reasonable doubt against the appellant; whether the appellant was properly identified; whether the doctrine of recent possession was applicable; whether the appellant's defence was sufficient to dislodge the prosecution case; and whether we should interfere with the sentence.

19. Under Section 296(2) of the Penal Code and in the case of *Oluoch v Republic* [1985] KLR the law outlines the three circumstances which need to be proven in order to sustain a conviction for an offence of robbery with violence, and the prosecution need only prove one. These circumstances are that:

“The offender is armed with any dangerous or offensive weapon or instrument; the offender is in the company of one or more person or persons; or at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.” [Emphasis supplied].

20. From the evidence on record, the appellant was armed with dangerous and offensive weapons namely that he was holding a kitchen knife, when he tried to flee the scene and had hit the complainant with a metal bar on the limbs; the appellant was in the company of four or five other people as testified by the complainant and PW4; the appellant was also able to name his accomplice who he was later charged with; and the complainant was found blindfolded with his hands tied to his back and further testified to having been beaten with a metal bar on the right hand finger and right leg below the knee and threatened with violence if he raised alarm.

21. As regards identification, from the record the appellant was apprehended in the complainant's house while he tried to flee and once the blindfold was removed, the complainant was able to identify the appellant by name and where he hailed from. A sack of some of the stolen items was also found at the scene in possession of the appellant's accomplice whose contents the complainant was able to identify as his.

The Investigating Officer found no reason to dust for fingerprints as the appellant had been apprehended at the scene and taken directly to the Police Station. The complainant was therefore able to identify the appellant through recognition and the other witnesses never left the appellant's side until he was handed over to the Police. It follows therefore that we uphold that the appellant was properly identified through recognition which was sufficient. We rely on the case of *Reuben, Taabu Anjononi & 2 Others v Republic* [1980] eKLR where Madan J.A stated as follows:

“This, however, was a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

22. Though the appellant denied being in possession of the sack containing some of the stolen items, no reason was advanced why the sack was at the scene where he was suspected to have robbed the complainant soon after the robbery. We have not found a plausible explanation to the contrary from the record on how the appellant and his accomplices came to be in possession of the stolen items.



In *Isaac Ng'ang'a Kabiga alias Peter Ng'ang'a Kabiga v Republic* [2006] eKLR this Court outlined the elements necessary to establish recent possession as follows:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof:

- (i). that the property was found with the suspect;
- (ii). that the property is positively the property of the complainant;
- (iii). that the property was stolen from the complainant; iv). that the property was recently stolen from the complainant.

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

23. We note from the record that the appellant was frog-matched to the Police Station with the sack of stolen items which items were positively identified and claimed by the complainant as his. The stolen items had recently been stolen from the complainant during a robbery and the time taken between the robbery and recovery of the goods, the nature of the items in issue and the time taken to investigate did not negate the doctrine of recent possession in this case. In the circumstances, recent possession was demonstrated beyond reasonable doubt by the prosecution.
24. The appellant in his defence stated that he had dropped off PW3 on his bodaboda (motor-bike) but PW3 refused to pay him and they engaged in a scuffle which attracted other people who then beat the appellant up; and that he never went to where the complainant lived but rather dropped PW3 at Kamobo. The appellant questioned why his co-accused was freed despite being found to have committed the offence of robbery. He also argued that the time of the alleged offence given by the complainant was 5:30 pm which was contradicted by other witnesses. The appellant did not give a reasonable explanation regarding how he found himself in the complainant's house holding a kitchen knife or how he and his accomplice came into possession of the sack full of stolen items or what he was doing there. We therefore find that the appellant's defence was not sufficient to dislodge the prosecution case in the circumstances.
25. From the foregoing, we are satisfied that the prosecution case against the appellant was overwhelmingly credible and proved beyond any reasonable doubt. We also find that the High Court properly directed itself in dismissing the appeal on conviction. We find no reason to interfere with the concurrent findings of the two courts below as regards conviction. The appellant's appeal against conviction therefore fails.
26. Regarding sentence, under the Penal Code, the offence of robbery with violence attracts a death sentence. The appellant was sentenced to 14 years' imprisonment by the trial court. This sentence was later enhanced by the High Court to death sentence as provided for under Section 354 of the Criminal Procedure Code. The appellant now seeks to have the sentence reduced. It is trite and mandatory that a notice or warning of enhancement of sentence must be given to an appellant who is thereby given an opportunity or choice to make his submission on the illegality of the sentence or to withdraw the appeal under Section 364(2) of the Criminal Procedure Code. It is clear from the record that on 27th February, 2014, the appellant was properly warned of the possibility of enhancement of the sentence



and he opted to proceed to argue the appeal and a judgment date was issued. In *George Morara Achoki V Republic* [2014] eKLR this Court stated as follows:

“...an appellant must be informed at the earliest opportunity, at the commencement of the hearing of his appeal, that there is a real danger that should the appeal be heard and fail a lesser sentence could be enhanced by the High Court in terms of the said Section 354 of the Criminal Procedure Code.”

27. For the foregoing reasons, the appeal against conviction is dismissed. However, the appeal against sentence is allowed. The sentence of fourteen (14) years imprisonment imposed by the trial court is upheld to take effect from 10th March, 2011 when he was sentenced.

28. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

