



**Khisa & another v Republic (Criminal Appeal 43 of 2018)
[2021] KECA 141 (KLR) (19 November 2021) (Judgment)**

Neutral citation: [2021] KECA 141 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 43 OF 2018
RN NAMBUYE, HM OKWENGU & S OLE KANTAI, JJA
NOVEMBER 19, 2021**

BETWEEN

JOHN BARASA KHISA 1ST APPELLANT

BENARD NYONGESA SIRENGO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the Judgment, Conviction, and Sentence of the High Court of Kenya at Eldoret (Azangalala & Mshila, JJ.) dated 31st January, 2013 in HC.CR. A NO. 129 OF 2019)

JUDGMENT

1. This is a second appeal originating from the judgment of the Chief Magistrate's court at Eldoret in which the appellants, John Barasa Khisa and Bernard Nyongesa Sirengo (1st and 2nd appellants), were tried and convicted of both the main offence of robbery with violence contrary to section 296(2) of the Penal Code, and the alternative charge of handling stolen goods contrary to section 322(2) of the [Penal Code](#). They were each sentenced to death in regard to the robbery charge, and five years' imprisonment in regard to the alternative charge.
2. Their appeals to the High Court (Azangalala & Mshila, JJ), were dismissed in regard to conviction but allowed in regard to sentence, and the sentence of death in regard to each appellant for the robbery charge was substituted with one of life imprisonment, and the sentence in regard to the handling charge for each appellant ordered to be held in abeyance.
3. In the appeal before us, the two appellants have each filed grounds of appeal. Mr. Angu Kitigin who appeared for the two appellants filed written submissions, and also made oral submissions. The appellants have mainly raised 3 issues. First is the issue of identification, in which they contend that there was variance between the names in the charge sheet and the arraignment in court, and that the identification parades held were irregular as the provisions of Chapter 46 of the Police Force Standing



Orders were not complied with. Secondly, the appellants contended that their conviction was based on uncorroborated evidence, as the purported exhibits alleged to have been recovered from the 1st appellant, were according to evidence of the arresting officer and the investigating officer, recovered from different persons. Further, that there was crucial evidence that was not adduced regarding the recovery of the motorcycle and the sale of the motorcycle. Finally, the Court was urged to invoke its discretion on the issue of sentence and give the appellants an opportunity to return back to the community.

4. Ms. Patricia Kirui, a prosecuting counsel who appeared for the respondent filed written submissions opposing the appeal and also made oral submissions. In regard to the issue of identification, she maintained that the appellants were properly identified and that the Police Force Standing Orders were properly followed. She stated that the identification parades were conducted just a week after the robbery incident when the memories of the witnesses were still fresh, and that the identifying witness had observed the appellants for a long time, and was able to give a vivid description, and to distinguish the body features of each appellant.
5. In regard to recent possession, Ms. Kirui relying on *David Mugo Kimunge vs Republic* [2015] eKLR, stated that there was ample evidence that the appellants were found in possession of a stolen motorcycle and the 2nd appellant had the keys to the stolen motorcycle, and therefore, the offence of handling stolen property was proved without doubt. Counsel submitted that under section 361 of the *Criminal Procedure Code*, the Court cannot interfere with the sentence that was imposed by the High Court. She therefore urged the Court to dismiss the appeal.
6. This appeal being a second appeal, our mandate is as stated by this Court in *Karingo v Republic* [1982] KLR 213:

“..A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did (*Reuben Karari s/o Karanja v Republic*(1950) 17 EACA 146).”
7. In order to put the issues in this matter in proper perspective, we deem it necessary to restate the evidence as adduced against the appellants in the trial court. Johnstone Alela Nasibala (Johnstone) was on the material evening transporting passengers using a motorcycle that had been hired to him by one Marshiano Wakesho Lang’o (Marshiano). The motorcycle which was make TVS Max of 1000cc did not have any number plates. At around 6.30 p.m., Johnstone picked two passengers whom he was to take to Munyonyi area. However, while they were on the way, the passengers attacked Johnstone, and he lost control of the motorcycle. The two passengers then took Johnstone into a forest and threatened to stab him with a knife. They searched him and robbed him of his driver’s license, voters card, identity Card and Kshs. 900, in addition to the motorcycle. Johnstone reported the matter to Marshiano and together they reported the matter at Lumakanda police station.
8. The next day, at about 10.00 a.m., APC Isaac Biwott received information acting on which he arrested the two appellants. Upon being searched, a driving license and an Identity card in the name of Johnstone were recovered from the 1st appellant, while motorcycle keys were recovered from the jacket of the 2nd appellant. Upon interrogation, the 2nd appellant led the officers to a home where a motorcycle make TVS Max 1000cc was recovered. The matter was referred to Lumakanda police station where Johnstone identified the identity card and the driving license as his. The motorcycle was also identified by Marshiano as his. On 1st July, 2008 acting Inspector James Githinji carried out two identification parades, each involving one of the appellants. The appellants were each positively identified during the respective parades by the identifying witness who was Johnstone



9. In their defence, both the appellants gave statements in which they each denied having stolen the motorcycle, and claimed that nothing was recovered from them.
10. In his judgment the trial magistrate found that the accused persons were positively identified as the passengers whom Johnstone carried and who had robbed him. The trial magistrate was satisfied that the recovery of Johnstone's driving licence and personal documents from the 1st appellant confirmed that he was at the scene of the robbery and that the recovery of the motorcycle keys from the 2nd appellant and the fact that 2nd appellant led officers to where the motorcycle was recovered confirmed that the appellants were the ones who committed the robbery. He was satisfied that the offence of robbery with violence was established as the appellants threatened to harm Johnstone and immobilized him by using a rope.
11. In their judgment the learned Judges of the High Court were satisfied that the evidence revealed that the circumstances were favourable for proper identification and that Johnstone who identified the appellants had ample time to observe the appellants for a while and was able to identify them at the identification parade. The learned judges found that the 1st appellant was in possession of Johnstone's documents that had been recently stolen from him and that the 2nd appellant was in possession of the keys to the stolen motorcycle.
12. In *Kariuki Njiru & 7 others v R*. Criminal Appeal No. 6 of 2001 this Court stated as follows:

“The law on identification is well settled and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully and should only be accepted and acted upon if the Court is satisfied that the identification is positive and free from the possibility of error.”
13. The evidence relating to the identification of the appellants was quite clear. Johnstone who had had ample time to see them before he took them on as passengers, was able to identify them during the identification parade. Moreover, the evidence of identification of the appellants did not stand alone. There was additional evidence of recovery of Johnstone's stolen documents from the 1st appellant and recovery of the key to the stolen motorcycle from the 2nd appellant just a day after the robbery. In addition, the 2nd appellant led the police to the recovery of the stolen motorcycle. It is therefore clear that the evidence against the two appellants was overwhelming and that their conviction for the offence of robbery with violence, was sound.
14. We note that the charge of handling stolen property was an alternative charge. The appellants, having been convicted of the main charge of robbery with violence involving the motorcycle, it was not open to the trial court to convict the appellants of the alternative charge of handling the same motor cycle as it was clear that the 2nd appellant handled the motor cycle while hiding it in the course of stealing it. The charge of Handling stolen property under section 322(2) of the Penal Code only applies where the handling of the Property has taken place “otherwise than in the course of the theft” that is in circumstances that are different from the robbery or the theft. The learned judges of the High Court therefore erred in failing to quash the appellants' conviction on the charge of handling stolen property.
15. On sentence, the learned Judges of the High Court reduced the death sentence that was imposed on the appellants to life imprisonment. In the spirit of the Supreme Court decision in *Francis Kariko Muruatetu & Anor v Republic & Others* [2017] eKLR, we reduce the sentence imposed by the High Court on each of the appellant for the offence of robbery with violence, to 20 years' imprisonment.
16. The upshot of the above, is that we uphold the conviction of each of the appellants in regard to the charge of robbery with violence, but reduce each of their sentences to 20 years' imprisonment. We



quash the conviction of the appellants in regard to the charge of handling stolen property under section 322(2) of the Penal Code and set aside the sentences of 5 years' imprisonment, that was imposed upon each appellant.

Those shall be the orders of the Court.

DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is an true copy of the original

Signed

DEPUTY REGISTRAR

