Ngeno v Republic (Criminal Appeal E025 of 2021)
[2025] KEHC 5327 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5327 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E025 OF 2021

JK NG'ARNG'AR, J

APRIL 30, 2025

BETWEEN

COSMAS NGENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Criminal Case Number E205 of 2020 by Hon. K. Kibelion in the Principal Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant alongside another not brought before the trial court was charged with various counts. On the first count, he was charged with robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The particulars of this offence were that on 12th December 2020 at Nyangores area in Bomet County, jointly with another not before court, while armed with dangerous weapons namely sword and rungu robbed Philip Bett off his motor vehicle Nissan matatu registration number KCC 901V valued at Kshs 2,000,000/=, a mobile phone make Tecno Spark 3 valued at Kshs 18,000/= and cash money valued at Kshs 7,000/=, all valued at Kshs 2,025,000/= the property of the said Philip Bett.

2. On the first count, he was charged with robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The particulars of this offence were that on 12th December 2020 at Nyangores area in Bomet County, jointly with another not before court, while armed with dangerous weapons namely sword and rungu robbed Anita Chepkirui off her mobile phone make OPPO of IMEI Number 866 508 049 803 674/66 valued at Kshs 15,000/= the property of the said Anita Chepkirui.

3. On the third count, he was charged with abducting with intent to confine contrary to section 259 of the *Penal Code*. The particulars of this offence were that on 12th December 2020 at Nyangores area

in Bomet County, jointly with another not before court, with intent to cause Anita Chepkirui to be secret, wrongfully confined through abduction the said Anita Chepkirui.

4. On the fourth count, he was charged with assault causing actual bodily harm contrary to section 251 of the *Penal Code*. The particulars of this offence were that on 12th December 2020 at Nyangores area in Bomet County, jointly with another not before court, assaulted Peter Kibet Langat thereby occasioning him actual bodily harm.

5. The trial court found that the Prosecution had failed to prove counts 5 and 6 and as a result, they are not the subjects of this Appeal.

6. The Appellant pleaded not guilty to the counts before the trial court and a full hearing was conducted. The prosecution called six (6) witnesses in support of its case., while the Appellant gave unsworn testimony and did not call any witness in aid of his defence.

7. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

8. At the conclusion of the trial, the Appellant was convicted of the first count of robbery with violence and sentenced to serve life imprisonment. In relation to counts 2, 3 and 4, the trial court held the respective sentences in abeyance.

9. Being dissatisfied with the Judgment dated 29th July 2021, the Appellant, Cosmas Ngeno appealed to this court on the following grounds reproduced verbatim: -

    i. That the learned trial Magistrate erred in law and fact in admitting manipulated, ill minded and fabricated evidence thereby shifting the burden of proof to the Appellant.

    ii. That the learned trial Magistrate erred in law and fact in not considering mitigating circumstances and factors before reaching a determination.

    iii. That the learned trial Magistrate erred in law and fact by issuing a death sentence which was unlawful, inhuman and illegal.

    iv. That the learned trial Magistrate erred in law and fact by failing to observe that all the charges were related to family affairs and were based on a grudge.

    v. That the learned trial Magistrate erred in law and fact by failing to consider his plausible defence.

10. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh and come to my own conclusion. See Kiilu & Another vs Republic (2005)1 KLR 174.

11. I hereby procced to summarise the Prosecution's and Respondent's case in the trial court as well as their respective written submissions in the present Appeal.

The Prosecution's Case

12. It was the Prosecution's case that on the material day, he violently robbed Philip Bett (PW2) off his motor vehicle, mobile phone and cash and further robbed Anita Chepkirui (PW1) off her mobile phone. Philip Bett (PW2) stated that he was attacked by the Appellant and others while dropping Anita Chepkirui (PW1) at Nyangores. PW2 stated that the attackers demanded that Anita (PW1) alight the motor vehicle, they grabbed his neck and when Anita did not alight, the Appellant got into the motor vehicle and drove away.

13. Anita Chepkirui (PW1) testified that the Appellant later stopped the vehicle and dragged her out of the vehicle by her hair and took her towards Nyangores river. PW1 further testified that the Appellant took her mobile phone and threatened to kill her. It was PW1's testimony that the Appellant forced her to walk alongside him that material night and kept her throughout the night against her will.

14. It was the Prosecution's further case that the Appellant assaulted Peter Langat (PW4). PW4 testified that on the material night, the Appellant hit him with a jembe stick on his head and he fainted. Geoffrey Kirui (PW5) testified that PW4's injuries were caused by a blunt object.

15. In its written submissions dated 14th February 2025, the Prosecution submitted that they proved the 1st and 2nd count of robbery with violence. That the Appellant was in the company of more than one person and was also armed with a knife and stick which constituted dangerous weapons. The Respondent further submitted that the Appellant and others not before court held PW2 by his neck and further kidnapped PW1. That the Appellant stole PW2's motor vehicle and PW1 and PW2's mobile phones. It relied on Johana Ndungu v Republic [1996] KECA 187 (KLR) and Dima Denge Dima & Others v Republic [2013] KECA 480 (KLR).

16. It was the Respondent's submission that they proved the third count of abduction with intent to confine. That the manner in which PW1 was whisked out of the vehicle by the Appellant and taken to a house near the river while wielding a knife was prima facie evidence of kidnapping as it was against PW1's will.

17. On count 4 of assault causing actual bodily harm, the Respondent submitted that the Appellant hit PW4 on his head and the same was witnessed by PW3. That the clinical officer (PW5) testified that the injuries were caused by a blunt object and he produced the P3 Form and treatment notes that corroborated his testimony. It was the Respondent's submission that they proved this charge.

18. The Respondent submitted that this court should not interfere with the sentence as it was lawful. They relied on Abdallah v Republic [2024] KECA 1108 (KLR).

The Appellant's Case

19. The Appellant denied committing the offence. In his testimony, the Appellant gave a long chronology of events of how he sought forgiveness from his wife's (Anita's sister) family through traditional means. The Appellant stated that he was directed to pay a fine of Kshs 6,000/= and one goat. In his testimony and long chronology, the Appellant stated that he had not fully paid up the money as directed and that was the source of his problems.

20. It was the Appellant's testimony that Peter Langat (PW4) and Anita Chepkirui (PW1) threatened him with dire consequences if he did not finish paying the money. It was his further testimony that he was set up as he could not do such acts to his in-laws.

21. The Appellant testified that the passengers in the subject motor vehicle did not record their statements and that the investigating officer (PW6) did not dust the motor vehicle for finger prints. He further testified that when he was arrested and placed in the cells, he was told that he knew the people who conned the Governor.

22. In his written submissions dated 22nd January 2025, the Appellant submitted that the Prosecution did not prove the count of robbery with violence. That the Prosecution failed to prove that there were other assailants other than Walter Bill who was acquitted and as a result, the 1st and 2nd counts fail.

23. It was the Appellant's submission that there were gaps in the Prosecution's case and that the Appellant's conviction was not safe and prayed that he be set at liberty.

24. In regards to the sentence, the Appellant submitted that the sentence was harsh.

25. I have gone through and given due consideration to the trial court's proceedings, the home-made grounds of appeal filed on 19th August 2021, the Appellant's written submissions dated 22nd January 2025 and the Respondent's written submissions dated 11th February 2025. The following issues arise for my determination: -

I. Whether the Prosecution proved its case beyond reasonable doubt.

II. Whether the Defence casts doubt on the Prosecution case.

III. Whether the sentence was harsh and excessive.

I. Whether the Prosecution proved its case beyond reasonable doubt

26. Under this heading, I shall cover both count 1 and 2. The Appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code*. Section 295 of the *Penal Code* defines robbery as: -

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

27. Section 296 of the *Penal Code* states as follows: -

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with 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. (Emphasis mine)

28. The Court of Appeal in the case of Johana Ndungu v Republic [1996] KECA 187 (KLR) set down the ingredients of robbery with violence by stating thus: -

> "In order to appreciate properly as to what acts constitutes an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the *Penal Code*. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:
>
> 1. If the offender is armed with any dangerous or offensive weapon or instrument, or
> 2. If he is in company with one or more other person or persons, or
> 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

29. More recently, Mrima J. in Jeremiah Oloo Odira v Republic [2018] KEHC 2195 (KLR) elaborated on the offence of robbery with violence as follows: -

> "Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

i. The offender is armed with any dangerous or offensive weapon or instrument, or

ii. The offender is in the company of one or more other person or persons, or

iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person"

30. The elements of robbery with violence are disjunctive and not conjunctive. This was explained by the Court of Appeal in Dima Denge Dima & Others v Republic [2013] KECA 480 (KLR) where it held: -

> "…….the elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found (sic!) an offence of robbery with violence……." (Emphasis mine)

31. Philip Bett (PW2) testified that on the material day, he was driving motor vehicle registration number KCC 901V (matatu) from Nairobi to Bomet. That Anita Chepkirui (PW1) was to alight at Longisa and another customer was to alight at Nyangores river. He further testified that when he stopped to drop off PW1, he saw a group of people emerging and they stated that they were police officers enforcing the curfew. That this group of people shouted that PW1 should alight from the motor vehicle.

32. It was PW2's testimony that one of the group members held him by his neck and the Appellant had a knife on his hand and he removed cash from PW2's pocket totalling Kshs 7,000/=. That the Appellant got into the motor vehicle and drove off. It was PW2's further testimony that he had a mobile phone, make tecno spark 4 in the motor vehicle and the same was stolen.

33. When PW2 was cross examined, he reiterated his testimony that the Appellant robbed him off his motor vehicle and drove it off. He further reiterated that the Appellant robbed him off his money and mobile phone and further stated that the motor vehicle was recovered at Sweet Waters Hotel.

34. Anita Chepkirui (PW1) testified that after being dropped in Longisa, he noticed the Appellant among other people coming towards her and shouting her name saying that he was going to kill her that night. That she boarded the motor vehicle and the Appellant got in and drove the motor vehicle and that along the way the Appellant threatened to dump PW1 and the other passengers into Nyangores river.

35. It was PW1's testimony that when the Appellant stopped the motor vehicle, he pulled her out of the vehicle by her hair and threatened to kill her and took her mobile phone, make Oppo A5. That the Appellant took her to a home where he took a knife and threatened to kill her again and her brother should he be arrested. It was PW1's testimony that she knew the Appellant as he was

her sister's boyfriend. PW1's testimony remained uncontroverted during cross examination and she further testified that the Appellant was found in possession of the knife when he was arrested in her presence.

36. No. 90923 PC Patrick Nyaoke (PW6) testified that he was the co-investigating officer in this case. He testified that when Philip Bett PW2 reported that his motor vehicle had been stolen and that Anita Chepkirui (PW1) had been kidnapped. He further testified that they recovered the motor vehicle as Sweet Waters Hotel and he took pictures which he produced in the trial court as P. Exh 6a. That PW1 had also reported that his mobile phone had been stolen.

37. It was PW6's testimony that after booking the motor vehicle at the Police Station, they proceeded to look for Anita (PW1). It was his further testimony that they traced the Appellant to his home in Chelsa area and when the Appellant saw the Police Officers, he escaped to his neighbour's house. That the Appellant then drew a sword and threatened to kill everybody. PW6 testified that they overpowered him and arrested him and found him in possession of Anita's Oppo phone. PW6 produced the Oppo phone and its receipt in the trial court as P. Exh 1a and 1b respectively. He further produced the sword as P. Exh 4.

38. When PW6 was cross examined, he reiterated that they recovered the motor vehicle in a dark area and the vehicle was not in its designated parking spot. He further reiterated that they arrested in Chelsa and that he had a knife which he used to threaten everyone. In essence, PW6's testimony was uncontroverted upon cross examination.

39. In regards to the Oppo mobile phone (P. Exh 1a), the Appellant did not challenge the production or veracity of the receipt (P. Exh 1b). I have looked at the receipt and it indicated that the recovered Oppo mobile phone (P. Exh 1a)) belonged to Anita Chepkirui (PW1). I am satisfied by this evidence and it is my finding that the Prosecution proved ownership of the said mobile phone.

40. In regards to Philip Bett's (PW2), there was no evidence to indicate that PW2 owned the mobile phone, make tecno spark 4 which he alleged was stolen by the Appellant. In regards to the motor vehicle, the investigating officer (PW6) produced photographs (P. Exh 6a) which showed the recovered motor vehicle. Anita Chepkirui (PW1) and Philip Bett (PW2) both testified that the said motor vehicle was in the possession of PW2 from Nairobi but the Appellant unlawfully took possession of the motor vehicle and drove it off towards Nyangores river. In the circumstances thereof, I am satisfied that the motor vehicle was in PW2's possession before they were attacked.

41. In regards to identification, it is my view that the Appellant was identified as the perpetrator of the offence of robbery with violence. Anita Chepkirui (PW1) stated that the Appellant was her sister's boyfriend and was well known to her and she saw him board the motor vehicle and drove it off. This testimony was corroborated by Philip Bett (PW2). The investigating officer (PW6) testified that he arrested the Appellant in his home in the company of PW1. This testimony was corroborated by PW1

42. More damning was the fact that the Appellant admitted in his testimony that he knew Anita Chepkirui's (PW1) family. In total, this was a case of recognition and there was no chance of mistaken identity and I am satisfied that the Appellant was placed in the scene of the crime by PW1 and PW2 and was positively identified as the perpetrator of the offence.

43. Flowing from the above, I am satisfied that the Prosecution sufficiently proved the elements of the offence of robbery with violence as contained in section 296 (2) of the *Penal Code*. The Prosecution was able to prove that the attack was carried out by more than one person, that the Appellant was armed with a knife which he used to threaten PW1 and PW2 and used violence by grabbing Philip Bett (PW1) by his neck and further by dragging Anita Chepkirui (PW2) by her hair and constantly

threatening to kill her. The Prosecution also successfully proved that the Appellant robbed PW1 of his motor vehicle and PW2 off her mobile phone. It is my finding therefore that the Prosecution having satisfied the ingredients necessary to sustain the charge of robbery with violence, proved its case against the Appellant beyond reasonable doubt.

44. The Appellant was also charged with the offence of abducting with the intent to confine contrary to section 259 of the *Penal Code*. Section 259 of the *Penal Code* provides: -

Any person who kidnaps or abducts any person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years.

45. Section 256 of the *Penal Code* defined abduction as: -

Any person who by force compels, or by any deceitful means induces, any person to go from any place is said to abduct that person.

46. I concur with Githinji J. in Wright Kinyatta v Republic [2021] KEHC 4285 (KLR) where he held: -

> " The ingredients of the offence include kidnapping or abducting a person with intent to cause that person to be secretly and wrongfully confined. However, my reading of Section 256 indicates in my opinion, that the key ingredient in kidnapping and abduction is the forceful compelling of an individual or using of deceitful means to induce a person to go from any place." (Emphasis mine)

47. Anita Chepkirui (PW1) testified that the Appellant drove off with the motor vehicle she was in and when they reached Nyangores river, he removed a knife and grabbed her by her hair threatening to kill her. PW1 further testified that the Appellant took her to a home where they found a boy and a girl who were not identified during the trial and that they stayed in this home until 4 am where they left for his house. It was Pw1's testimony that she was forced to walk with the Appellant the whole night and that the Appellant was later arrested in his home and in her presence. PW1's testimony was uncontroverted upon cross examination.

48. From the above, I am satisfied that the Prosecution proved the ingredient of forceful compelling. They successfully showed that the Appellant used force and threats in abducting Anita Chepkirui (PW1) and further that it was against PW1's will. I find that this charge was proved beyond reasonable doubt.

49. The Appellant was also charged with assault causing actual bodily harm contrary to section 251 of the *Penal Code*. Section 251 of the *Penal Code* provides: -

Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.

50. In Manyengo v Republic [2024] KEHC 3017 (KLR), the court held: -

> " Thus, the essential elements of the offence assault causing actual bodily harm are;
>
> i.Assaulting the complainant or victim,
>
> ii.Occasioning actual bodily harm (Also see Ndaa v Republic [1984] KLR
>
> In R v Chan-Fook, [1994] 2 ALL ER 557 Lord Hobhouse LJ said of the expression "actual bodily harm," should be given its ordinary meaning: -
>
> "We consider that the same is true of the phrase "actual bodily harm." These are three words of the English language that receive no elaboration and in the ordinary course should not receive any. The word "harm" is a synonym for injury. The word "actual" indicates that the

injury (although there is no need for it to be permanent) should not be so trivial as to be wholly insignificant."

It must be proved that the assault occasioned or caused the bodily harm. Bodily harm has its ordinary meaning and includes any hurt calculated to interfere with the health or comfort of the victim, such hurt need not be permanent, but must be more than transient and trifling....."

51. Peter Langat (PW4) testified that he was PW1's father and that on the material day, he testified that as PW1 arrived, the Appellant hit him on his head and shoulder using a jembe stick. PW4 further testified that when he was hit on his head, he lost consciousness and fainted and when he came to it he went to report to Bomet Police Station where he was issued with a P3 Form and referred to Bomet Dispensary. When PW4 was cross examined, he restated that it was the Appellant who hit him.

52. Jennifer Langat (PW3) testified as PW1's mother and she testified that on the material day as PW1 arrived, she saw the Appellant hitting her husband (PW4) severally with a jembe handle. When PW3 was cross examined, she restated that it was the Appellant who hit PW4. The investigating officer (PW6) produced the jembe stick in the trial court as P. Exh 6 and its production was not challenged by the Appellant.

53. Geoffrey Kirui (PW5) testified that he was a clinician in Bomet Dispensary and that on the material day he examined PW4 and found that he had bruises on his head, had a swollen face, shoulder and left leg and was weak. PW5 further testified that the injuries were caused by a blunt object. He produced a P3 Form and treatment notes as P. Exh 7a and 7b respectively. I have looked at the P3 Form and the treatment notes and their content corroborate PW5's testimony.

54. From the above, I am satisfied that the Appellant assaulted Peter Langat (PW4) and caused him harm as evidenced by PW5's testimony, the P3 Form and the treatment notes. It is therefore my finding that the Prosecution proved this charge beyond reasonable doubt.

55. In total, I do find that the Prosecution successfully proved the offences of robbery with violence, abducting with intent to confine and assault causing actual bodily harm.

II. Whether the Defence casts doubt on the prosecution case

56. I have already set out the defence of the Appellant earlier in this Judgment. I have considered the defence carefully and I have noted that the Appellant's defence was a narration of his problems with Anita's (PW1) family in regard to payment of the balance of reconciliation money. I have also noted that the Appellant did not bring up this issue when he cross examined, PW1, PW4 and PW5 who were all members of one family. In my view, it was an afterthought and the allegation of being framed remained unfounded and consequently dismissed by this court. The Appellant did not address the events of the material day at all. In my view, the Appellant's defence was shallow, weak and did not hold any value. The Appellant's defence did not shake the Prosecution's case at all.

III. Whether the sentence was harsh and excessive

57. Sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. In Bernard Kimani Gacheru v Republic [2002] KECA 94 (KLR), the Court of Appeal stated that: -

"It is now settled law, following several authorities by this court and the high court, that sentence is a matter that rests in the discretion of the trial court. Similarly, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with

> sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist".

58. The penal section for the offence of robbery with violence is found in Section 296 (2) of the *Penal Code* which provides: -

> If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with 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.

59. As earlier stated, the Appellant was sentenced to death. The Appellant submitted that the sentence was harsh and inhuman and asked this court to interfere with it. There has been discourse about the validity of the death sentence. For starters the death sentence under section 204 of the *Penal Code* was declared unconstitutional. For clarity, this applied to murder cases only. The death sentence remains a valid and legal sentence and it is to be applied should the circumstances deem fit. The Supreme Court of Kenya in Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) [2021] KESC 31 (KLR) clarified thus: -

> "The mandatory nature of the death sentence as provided for under section 204 of the *Penal Code* is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under article 26(3) of *the Constitution*."

60. Having considered the circumstances of this case, it is my view that the death sentence was harsh and I am minded to interfere with the sentence and I hereby vacate the life sentence and substitute it with 40 years' imprisonment.

61. Regarding the offence of abducting with intent to confine, the penalty as earlier stated was seven (7) years. Having considered the circumstances of the case, I hereby sentence the Appellant to 3 years imprisonment.

62. Regarding the offence of assault causing actual bodily harm, the penalty as earlier stated was five (5) years. Having considered the circumstances of the case, I hereby sentence the Appellant to 2 years imprisonment.

63. In the final analysis, the Appellant's Appeal succeeds as the death sentence has been vacated and substituted with a 40-year prison sentence. For avoidance of doubt, I uphold the trial court conviction on counts I, II, III and IV.

64. In the end, the Appellant is hereby sentenced 40 years imprisonment for count I, 3 years imprisonment for count II and 2 years imprisonment for count III. The sentences shall run concurrently from the 15th December, 2020 when the Appellant took plea and placed in custody.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL, 2025.

.....

J.K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of Mr. Njeru for the Respondent/ State, Mr. Kadet for the Appellant. Siele/Susan (Court Assistant).