



REPUBLIC OF KENYA



**Siasa v Republic (Criminal Appeal E079 of 2021)
[2024] KEHC 4374 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E079 OF 2021**

A. ONG'INJO, J

APRIL 25, 2024

BETWEEN

ALI HASSAN GWADU ALIAS SIASA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the decision of Hon. R. M. AMWAYI (SRM),
on 4th August 2021 in Mombasa Chief Magistrate's Court Criminal
Case No. 350 of 2015, Republic v Ali Hassan Gwadu alias Siasa)*

JUDGMENT

Background

1. The Appellant, ALI HASSAN GWADU alias SIASA, was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.
2. The Particulars of the offence are that ALI HASSAN GWADU alias SIASA on the 13th day of October 2014 at Ushindi area of Likoni Sub-County within Mombasa County being armed with a dangerous weapon namely a panga jointly with others not before court robbed ANSET MUTHOKA cash 2,000, two mobile phones make Nokia C1 and Nokia C2 valued at Kshs. 12,000 and at the time of robbery used violence to the said ANSET MUTHOKA.
3. The Appellant was also charged with a second count of grievous harm contrary to Section 234 of the Penal Code.
4. The appellant was found guilty and convicted for the offence of robbery with violence and sentenced to serve thirty (30) years imprisonment.
5. The appellant being aggrieved by the conviction and sentence, he preferred the appeal herein on the following amended grounds of appeal filed on 25th September 2023: -



1. That the learned trial court magistrate erred in law and fact by convicting and sentencing me the appellant without proper finding that the offence of robbery with violence was not proved beyond reasonable doubt.
 2. That the learned trial court magistrate erred in law and fact by convicting me the appellant without proper finding that there was identification of the appellant at the scene of crime.
 3. That the learned trial court magistrate erred in law and fact by failing to assess properly whether the light at the scene was sufficient enough for the complainant to clearly identify his attackers.
 4. That the learned trial court magistrate erred in law and fact by failing to find that the evidence of PW1, PW2 and PW3 was not corroborated in the material circumstances.
 5. That the learned trial court magistrate erred in law and fact by discounting and not considering in detail the defense evidence.
 6. That the learned trial court magistrate erred in law and fact by giving a harsh and excessive sentence.
6. The Appellant prayed that the appeal be allowed, conviction quashed and sentence set aside.

Prosecution's Case

7. The Prosecution's case was that the Complainant had left his house at 4.00 am on 13th October 2014 to go to work at Nyali Health Care in Likoni when he met the Appellants and 2 others who attacked and injured him with a panga. The Complainant raised alarm and neighbours responded and he was taken to Mombasa Hospital. A report was made in Likoni Police Station and P3 Form issued and duly filled. The Complainant said he knew the Appellant who had previously robbed him twice. He said the incident happened at 5.00 am and that there was light. PW1 said he lost 2 phones. He said the Appellant was arrested two months later while on the run and his accomplice was shot dead. PW1 said that a part from identifying the Appellant physically, he also identified/recognized his voice.
8. PW2, Inspector Fredrick Juma said that on 14.10.2014 at around 1925 hours while he was at Likoni Police Station, a lady by the name Rose reported that her husband had been attacked and was in a bad state. PW2 launched investigations and visited the Complainant at Mombasa Hospital but found he could not speak. Later, a statement was recorded before PW1 was discharged. That on 22.2.2015 while the Complainant was at Nyali Children Hospital, he saw the Appellant and identified him as one of those who attacked him. He alerted G4S guards who managed to arrest the Appellant and he was escorted to Likoni Police Station.
9. PW3, Rose Mwendwa Musau testified that the Complainant was her husband. She said that on 13.10.2014 at 4.30 am, she prepared her husband to go to work. That just when she had opened for him the gate and went back into the compound, she heard him scream. That on rushing out, she found the husband had been attacked by robbers. That when she rushed to the scene, the robbers threw stones at her. She said they were 3 robbers and one was armed with a panga which he used to cut the Complainant on the head. PW3 said there was security light which enabled her identify the Appellant who was known to her. That before the Complainant was taken to Nyali Hospital Likoni, she went and made a report at Likoni Police Station. That the Complainant thereafter transferred to Mombasa Hospital where he was admitted.
10. PW3 said that as a result of the attack, the Complainant lost one eye and that he later succumbed to the injuries inflicted during the robbery. She said the Appellant was known to her and she identified him as one of the attackers. She said that the stolen items were never recovered. PW3 said she even knew



the Appellant's home and he knew his nickname as Siasa. She said it was the accused who was armed with a panga and he cut the Complainant on the hand 3 times. She said there was electricity light and it was also in the morning. She said she also knew the Appellant's voice.

Defence Case

11. The Appellant was placed on defence upon the Prosecution calling the evidence of 3 witnesses. The Appellant gave sworn evidence and said that he was a bodaboda operator. He said he knew the Complainant very well and he knew his daughter. He said the Complainant's daughter used to send him to brief for her shop items. That the Complainant's retail shop was broken into and he alleged it was the Appellant. That he told the Complainant's daughter he did not break into the shop. He said the Complainant's daughter declined to report the matter. The Appellant denied having attacked the Complainant.
12. The Appellant said that in 22.2.2015 he had gone to work when 2 passengers requested that he takes them to hospital. That when the 2 passengers alighted and left but on return with a 3rd person they started beating him. He said the Complainant had indicated they wanted to have the case withdrawn but his parents refused.
13. This appeal herein was canvassed by way of written submissions.

Appellant's Written Submissions

14. The Appellant's submissions were filed on 25.9.2023. He submitted that the element of stealing in the offence of robbery with violence had not been proved by the prosecution and he ought not to have been convicted with violence under Section 296 (2) of the Penal Code.
15. The Appellant further argued that the Complainant did not give particulars of the phones he alleged were stolen and he did not produce proof that he owned the phones. The Appellant also argued that the Trial Magistrate had no basis upon which to conclude that the Complainant's phones were stolen without proof of ownership and particulars of the phones.
16. The Appellant's contention was that PW2's testimony that the Complainant's phones were stolen during the robbery was speculations and the Complainant did not say he had been robbed. The Appellant also contended that the Complainant may have mistaken his identity and that he was arrested and charged in relation to 2 earlier thefts which the Complainant alleged he committed.
17. The Appellant argued that it was alleged that source of light at the scene was electricity but its intensity was not stated and the court did not have any way of assessing whether the lighting at scene was sufficient to identify and/or recognize the robbers. The Appellant argued that the Complainant and PW3 did not give description of the attackers and the Trial Magistrate ought to have inquired whether they were able to identify or recognize the assailants.
18. It was submitted that the Trial Magistrate having found the 2nd count was not proved should not have found the Appellant guilty in Count I and yet there was no evidence and particulars of the items stolen. It was argued that the evidence of the prosecution witnesses was not proved beyond reasonable doubt and the appeal should be allowed. The Appellant argued that his defence was truthful and the prosecution did not challenge it.
19. As regards the sentence, the Appellant contended that the Trial Magistrate did not consider his age and did not pass a sentence that was proportionate to the offence. He relied on the holding in the case of *Reyes v the Queen* (2002) 2AC 235. He also supported his position with *Criminal Appeal No. 129 of 2007, Hamisi Abdul Faraj v Republic* where it was held that the principle of proportionality needs to



be embedded in the sentencing policy. He further relied on the case of Japhet Juma Henzo v Republic, HCCR No. 96 of 2007 at Mombasa where a death sentence was set aside and instead the Appellant sentenced to 10 years effective from date of his arraignment in court.

20. The Appellant begged the court that his sentence should be reduced to the least severe sentence if possible.
21. The Respondents did not file submissions.

Analysis and Determination

22. This being the first appellate court, it is guided by the principles in David Njuguna Wairimu v Republic [2010] eKLR where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

23. After considering the grounds of appeal, records of the trial court and the submissions, issues for determination are: -
 1. Whether the offence of robbery was proved to the required standard
 2. Whether there was proper identification of the Appellant
 3. Whether the Prosecution evidence was properly corroborated
 4. Whether the Appellant’s defence was considered by the Trial Magistrate
 5. Whether the sentence was harsh and excessive.

Whether the offence of robbery was proved to the required standard

24. Section 296 (2) of the Penal Code 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.

25. The Complainant testified that he was confronted by the Appellant and 3 of his accomplice and they cut him on the head. He raised alarm and his wife and his neighbours responded and he was taken to Mombasa Hospital where he was admitted for one month while undergoing treatment. The Complainant and his wife said that they identified the attackers who pelted the wife of the Complainant with stones. The Complainant testified that he lost 2 phones during the attack and they had not been traced. The fact that the 2 phones were not recovered cannot reduce the gravity of the offence of robbery with violence. The fact that there was more than one person who attacked the Complainant was sufficient to find that a robbery with violence had been committed. The



Complainant said that the Appellant was with 3 others, they were armed with a panga, they cut him on the head and he sustained injuries, and they also robbed him of his 2 phones.

26. The Appellant's defence that he had never robbed the Complainant is a mere denial as he does not even recall the date he alleged the Complainant's shop was broken into.

Whether there was proper identification of the Appellant

27. The Complainant and his wife did recognize the Appellant as they knew him prior to the date of the offence. They said they were able to recognise him because of light from the nearby houses as well as from his voice. As a result, when the Complainant saw him, he alerted G4S security guards who apprehended the Appellant and he was charged with the offence of robbery with violence. I do find no reason to unsettle the conviction. There was no possibility of mistaken identity.

Whether the Prosecution evidence was properly corroborated

28. The issue of whether there was corroboration was raised by the Appellant but he did not point out in his submissions which part of the Prosecution's evidence was not corroborated.

Whether the Appellant's defence was considered by the Trial Magistrate

29. The Trial Magistrate considered the Appellant's defence exhaustively at page 8 of the judgment and said that the Appellant confirmed that he was known to the Complainant very well and that there was no valid reason as to why the Complainant would have implicated him if he did not commit the offence. The Trial Magistrate also found that the allegation that Appellant had been found stealing from the Complainant's shop was an afterthought as he did not give the date when the theft took place and he did not call anybody to confirm the said allegation. It was found that the Appellant's defence did not in any way exonerate him from the offence. This court finds that it was clear the defence was exhaustively considered.

Whether the sentence was harsh and excessive

30. On the issue of sentence, I have seen the Trial Magistrate considered the age of the Appellant as well as contents of Pre-Sentence Report before passing the sentence of 30 years. However, in consideration of the value of the items stolen from the Complainant, I do find that a term of 20 years imprisonment would be proportionate to the offence committed. The Appellant was in custody from 24.2.2015 to 29.9.2016 when he was released on bond. The sentence of 20 years will therefore factor in the period in remand namely 1 years 7 months and 29 days pursuant to Section 333(2) of the Criminal Procedure Code. 14 days right of appeal explained.

Dated, signed and delivered in Open Court/online through MS TEAMS,

This 25th day of **April 2024**

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Etropia- Court Assistant

Mr. Ngiri for the Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO



JUDGE

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