Case Number:	Criminal Appeal 5 of 2015
Date Delivered:	16 Dec 2016
Case Class:	Criminal
Court:	High Court at Kajiado
Case Action:	Judgment
Judge:	Reuben Nyambati Nyakundi
Citation:	Alfred Peter Pius & another v Republic [2016] eKLR
Advocates:	Mr. Akula Senior Prosecution Counsel - present
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. M.O. Okuche Principal Magistrate
County:	Kajiado
Docket Number:	-
History Docket Number:	Criminal Case No. 911 of 2013
Case Outcome:	Appeals dismissed
History County:	Kajiado
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

The information contained in the above segment is not part of the judicial opinion delivered by the Court. The metadata has been prepared by Kenya Law as a guide in understanding the subject of the judicial opinion. Kenya Law makes no warranties as to the comprehensiveness or accuracy of the information.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL APPEAL NO. 5 OF 2015

ALFRED PETER PIUS

EDWARD PAUL TESHA..APPELLANTS

Versus

REPUBLIC..RESPONDENT

(Being an appeal from original conviction and sentence of the Chief Magistrate's Court at Kajiado in Criminal Case No. 911 of 2013 in a judgement delivered on 5/12/2015 by Hon. M.O. Okuche (PM)

JUDGEMENT

ALFRED PETER PIUS and **EDWARD PAUL TESHA** herein referred as the 1st appellant have appealed to this court against the judgement of lower court at Kajiado in which they were found guilty of robbery with violence contrary to section 296 (2) of the Penal Code convicted and sentenced to suffer death.

Brief Background:

The background of the appeal is that the appellant herein were indicted with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The brief facts giving rise to the offence are that on the 28/10/2013 at 3.00 pm at Kiwanja Ndege in Loitokitok District in Kajiado County, while armed with a panga and a rungu robbed James Mutua Muteti of a motorcycle registration KMDC 360C Skygo the property of Sarah Wanjiku Njoroge valued at Ksh.72,000, mobile phone make Techno valued Ksh.3000 a pair of shoes valued Ksh.500 and cash Ksh.800 and immediately before or after such robbery used actual violence by cutting the said James Mutua Muteti with a panga.

Aggrieved by the conviction and sentence the appellants lodged an appeal each on the amended memorandum of appeal raising the same issues as follows:

1. That the learned trial magistrate erred in law and facts in relying on identification evidence by the complainant whereas the circumstances of identification were not favourable for positive.

2. That the learned trial magistrate erred in law and facts in convicting the appellants whereas the particulars of the charge were incurable defective.

3. That the learned trial magistrate erred in law and facts in putting reliance on insufficient and incredible evidence given by prosecution.

4. That the learned trial magistrate erred in law and facts by failing to appreciate that the prosecution had

failed to prove its case to the standard required in law that is, prove beyond reasonable doubt.

5. That the learned trial magistrate erred in law and facts by failing to find that critical witnesses were never called by prosecution thus the case remained unproved.

6. That the learned trial magistrate misdirected himself in law in that he shifted the onus of proof to the appellants contrary to the law.

7. That the learned trial magistrate erred in law and facts by failing to take in account and or consider and or failed to give reason why the appellants alibi defence was disregarded contrary to the law.

8. That the learned trial magistrate erred in law and facts by failing to find that the appellants constitutional right to a fair hearing enshrined in Article 50 (1) (2) of the Constitution was flouted and violated.

On the strength of these grounds, the appellants prayed that the appeal be allowed, their conviction and sentence of death set aside. The appellants together with the memorandum filed written submissions and highlighted the same before court during the hearing of the appeal. Mr. Akula Senior Prosecution Counsel opposed the appeal in his written arguments and submissions in reply to the appeal.

This being the first appellate court, the court is duty bound to re-evaluate the evidence adduced at the trial and to draw its own conclusions, bearing in mind that it has not had the advantage of seeing and hearing the witnesses. See **S.M. Ruwala v Republic [1975] EA 576, Okeno v Republic [1972] EA 32, Njoroge v Republic [1987] KLR 19, Peters v Sunday Post [1958] EA 424**.

Prosecution Evidence at the Trial:

PW1 JAMES MUTUA MUTETI stated that on 28/10/13 he was operating a motorcycle registration KMDC 360C make Skygo as an employee of PW2 Sarah Wanjiku Njoroge. He picked a passenger who contracted him at a fare of Ksh.80 and they set off using Loitokitok – Airstrip Road. The appellants stopped the motorcycle on arrival so that he could be paid and drop off the passenger. Upon arrival PW1 was confronted by the passenger and two men who suddenly emerged armed with panga and rungu. In the struggle they attacked PW1 robbed him of PW2's motorcycle and inflicted physical injuries before they speedily drove away with the motorcycle. The appellants also robbed him of his shoes, mobile phone and cash 800. PW1 confirmed that he knew the deceased one of the attackers who passed on and the appellants as he met them at the scene of the crime and at the hospital.

PW2 SERAH WANJIKU NJOROGE testified that he was the owner of the subject motorcycle which was being driven by (PW1) as bodaboda for hire on the material day 28/10/2013 within Loitokitok township. She also confirmed receiving information on the robbery and an attack against PW1 who was later admitted at Loitokitok Hospital for treatment on the injuries sustained during the attack.

PW3 DR. STEPHEN MUTISO testified on behalf of his colleague a Mr. Opiyo who earlier saw (PW1) and filled the p3 confirming the nature of injuries suffered. According to the testimony of PW3, the complainant (PW1) on examination was found to have sustained cut wound on the head measuring 6 cm long. PW3 further testified in respect of a postmortem conducted on the body of a deceased person identified as Vincent Mandashia. On examination during the postmortem PW3 told the trial court that the deceased had sustained multiple injuries to the head, nose, ear, eye, jaw and wrist. He opined the cause of death as severe head injury.

PW4 IP MUNGA MBWANA testified that he was the one tasked with the investigations of the incident of robbery which occurred on 28/10/2013 involving PW1 and the appellants. In his testimony PW4 confirmed that the complainant (PW1) was robbed of motorcycle KMDC 360C belonging to PW2. He further stated that during the robbery the robbers were confronted by a mob of people who surrounded them and started to lynch them for robbing PW1 of the motorcycle. The police from Loitokitok including PW4 rushed to the scene they rescued the appellants from the mob and escorted them to the hospital. In the course of the treatment the third suspect died while undergoing treatment. He produced the receipt to confirm ownership of the motorcycle. The motorcycle and receipt were admitted in evidence as exhibit 2 and 3. According to PW4 testimony the three suspects were attacked when they had already taken away the motorcycle from the complainant.

The Appellants' Defence:

The appellants were placed on their defence. Each elected to give unsworn statement. The first appellant denied the offence as alleged by the prosecution. It was his defence that on the material day he went about his duties as a casual labourer and never was he at the scene of the robbery. The appellant alluded an attack by five men whose motive he did not know. The 2nd appellant also gave unsworn testimony denying the offence of robbery and that he participated in robbing the complainant on 28/10/2013.

The Appellants' Submissions:

At the hearing of this appeal the appellants filed written submissions which they relied on. They stated that the evidence by the prosecution witness PW1 and PW4 fell short of establishing the nexus on arrest and recovery of the stolen property. The appellants drew the attention of the court that the complainant was not able to recognize the attackers as they are said to have fled the scene. The one source of evidence upon which the case depended according to the appellants was the testimony of PW1. The appellants contended that the complainant never gave any descriptions of his assailants to the members of the public. The reliance on the evidence of the boda boda riders who attacked them was therefore erroneous and mistaken. For this proposition on recognition appellants relied on the case of ***Suleiman Kamau Nyambura v Republic [2015] KLR, Maitanyi v Republic [1986] KLR 201, Francis Kariuki Njiru v Republic [2001] KLR.***

The appellants' next point is that the doctrine of recent possession was not established beyond reasonable doubt. In their submissions the appellant disputed that the ownership of the motor cycle was proved as required by law. There was no log book produced and the three receipts exhibited were not admissible under section 7 and 8 of the Traffic Act as evidence to prove ownership. On this issue they relied on the case of ***Erick Otieno Arum v Republic [2006] KLR***.

There is also the other aspect the appellants submitted on regarding the failure by the prosecution to call members of the public who initially attacked and arrested them before the police came to their rescue. The appellants relied on the case of ***Bukenya v Uganda Cr. Appeal No. 68 of 1972***. It was further the appellant's complaint that the trial magistrate did not consider his attached alibi defence. Appellant on this ground cited the case of ***Kimotho Kiarie v Republic [1984] KLR.***

The final point raised by the appellants was that their constitutional rights under Article 49 (f) of the Constitution were violated. In support of this submission appellant relied on the case of ***Albanus Mwanzia Mutua v Republic [2006] KLR***. The appellants' further contention was that the prosecution evidence did not establish the case beyond reasonable doubt to warrant conviction and sentence as arrived at by the trial court. Both of them urged this court to set aside the conviction and sentence of

death reached at by the trial court without conclusive evidence implicating any one of them with the offence of robbery.

The Respondent Submissions:

Mr. Akula a senior prosecution counsel for the state in reply opposed the appeal stating that the appellants were positively identified by PW1. Their encounter after the robbery took a turn when other boda boda operators on receipt of information of the robbery confronted them. The appellants who were at the time driving the subject motorcycle KMDC 306C were overpowered by the mob and placed under arrest. There was no doubt that the appellants were rescued by the police and the stolen property recovered from them jointly. According to Mr. Akula this completes the chain of events which commenced on 28/10/2013 till when the appellants were arrested. Mr. Akula further submitted that the appellants at the time were armed with dangerous weapons panga and rungus which they used to inflict injuries to PW1. The injuries were confirmed by PW3 who produced the p3 as an exhibit. In this case it was Mr. Akula's contention that the prosecution established the ingredients of the offence of robbery under section 296 (2) of the Penal Code. The defence offered by the appellants did not do controvert the prosecution case and can best be described as an afterthought. In support of the respondent case Mr. Akula cited the following authorities: ***Maitanyi v Republic [2013] eKLR, Elizabeth Gitiri Gachanja & 7 Others v Republic [2011] eKLR Cr. Appeal No. 51 of 2004, Nganga Kahiga v Republic Cr. Appeal No. 272 of 2005 KLR 198.*** Mr. Akula contended that based on the legal principles in the cited cases the appellants appeal has no merit and the same should be dismissed and the judgement of the trial magistrate confirmed.

Issues for Determination:

I have evaluated the evidence on record the submissions by the appellants and Mr. Akula for the respondent. The appellants amended memorandum of appeal and the grounds herein weighed alongside the duly filed written submissions exchanged by the parties.

On consideration of the matter the appellants' memorandum of appeal can be condensed to two major issues capable of disposing off the appeal framed as follows:

(1) Whether the prosecution proved the case beyond reasonable doubt to warrant this court to confirm the lower court judgement on conviction and sentence of the appellants.

(2) Whether the learned trial magistrate misdirected himself on fact and law on his evaluation of evidence and did not consider the appellant's alibi in their detailed particularization of their whereabouts on the day of the robbery, in which the rejection led to a miscarriage of justice.

A rescital of authorities of how the courts have interpreted section 296 (2) is of relevance to this appeal. The appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. Under the said section, it has also been one of the sections litigated by our courts due to its complexity occasioned by the drafters of the Penal Code. The challenges of interpretation as what constitutes an offence under section 296 (1) and section 296 (2) of the Penal Code has occupied the judges who for sometimes now including the Court of Appeal before promulgation of the constitution 2010 was the apex court in the land.

The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of ***Oluoch v Republic [1985] KLR*** where it was held:

"Robbery with violence is committed in the following circumstances:

(1) The offender is armed with any dangerous and offensive weapon or instrument.

(2) The offender is in company with one or more person or persons; or

(3) 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 mine) - The use of the word OR in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296 (2) of the Penal Code*. See also *Ganzi v Republic [2005] 1KLR 52*. *Simon Materu Mumalu v Republic [2007] eKLR the Court of Appeal pronounced itself to the provisions of section 296 (2) of the Penal Code:

"The ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part of where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296 (2) of the Penal Code. It is there ingredients which must to be explained to such accused person so as to enable him know the offence he is facing and prepare the case. These ingredients are not in section 295 which creates the offence of robbery.

In short section 296 (2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment……"

In ***Johana Ndungu v Republic Cr. Appeal No. 116 of 1995*** the Court of Appeal addressed itself to the issues surrounding the provisions of section 296 (2) of the Penal Code in the following manner:

"In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the subsection in conjunction with section 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 aforesaid ingredients constituting robbery are, pre-supplied in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the subsection:

(1) If the offender is armed with any dangerous or offensive weapon or instrument; or

(2) It 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.

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact needed time (sic) of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the

manner aforedescribed, then he is guilty of the offence under subsection 2 and it is mandatory for the court to convict him. In the same manner in the second set of circumstances if it shown and accepted by the court that at the time of robbery the offender is in company with one or more person or persons, then the offence under subsection (2) is proved and a conviction there under must follow:

The court is not required to look for the presence of either of the other two set of circumstances. With regard to the third set of circumstances there is no reaction of the offender being armed or being in company with others. The court is not required to look for the presence of either or these two ingredients. In the case of *Joseph Onyango Owuor & Cliff Ochieng Oduor v Republic [2017] eKLR Cr. Appeal 353 of 2008* the Court of Appeal further stated as follows in application of section 296 (2) of the Penal Code:

"Mr Musumba submitted that unless the aforequoted sub-section (section 296) is read with section 295 of the Penal Code, then reliance on section 296 (2) above without more will not disclose the commission of an offence. Section 295 of the Penal Code defined the offence of robbery. Section 296 (1) and 296 (2) of the Penal Code I have a common marginal note, namely punishment of robbery in this country marginal notes as a general rule read together with the section by the ejusden (sic) generis rule, section 296 (1) and section 296 (2) have to be read together. Section 296 (1) above provides that a person who commits robbery is liable to imprisonment for fourteen years, so that when dealing with the offence as referring to the aggravated circumstances of the offence, or the robbery for under section 296 (1) of the Penal Code."

In this appeal the prosecution tendered evidence by PW1 and PW4 to prove that the appellants on 20/10/2013 were part of a gang of three armed with rungus and pangas who attacked the complainant (PW1). One killed by a mob during the time of arrest. The complainant (PW1) was admitted at Loitokitok Hospital where he underwent medical examination and treatment. PW1 narrated to the trial court how he sustained injuries to the head. This was confirmed by PW3 the medical doctor who produced the p3 as exhibit 1. The testimony by PW1 and PW3 confirms that the complainant was actually beaten and wounded before and during the robbery.

Having reviewed the evidence and applicable law I am satisfied that the trial magistrate rightly convicted the appellants with the offence of robbery with violence. In the same manner the appellants challenged the prosecution evidence on identification with regard to identification. I will rely in the Court of Appeal Case of ***Muiruri & 2 Others v Republic [2002] 1KLR 274***. The Court of Appeal discussing the value of dock identification stated as follows:

"It is believed that because an accused sits in the dock while witnesses give evidence in a criminal case against him, undue attention is drawn towards him. His presence there may in certain cases prompt a witness to point him out as the person he identified at the scene of the crime even though he might not be sure of that fact. It is also believed that the accused's presence in the dock might suggest to a witness that he is expected to identify him as the person who committed the act complained of.

But the holding in Gabriel Njoroge Case [1982 – 88] 1KAR 1134 appears to be too broadly touched. We do not think it can be said that all dock identification is worthless if that were to be the case then decisions like Abdalla Bin Wendo v Republic [1953] 20 EACA 166, Roria v Republic [1967] EA 583 and Charles Maitanyi v Republic [1986] 2 KAR 76 among others, which over the years have been accepted as correctly stating the law concerning the testimony of a single

witness on identification will have no place in our jurisprudence.

In those cases courts have emphazed the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to find a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that on the facts and circumstances of the case the evidence must be true and prior thereto the court duly warns itself of the possible danger of mistaken identification."

Applying these principles to this appeal it should be pointed out that according to PW1 the attack and robbery took place at 3.00 pm in broad day-light. PW1 had the opportunity to view the appellants before the attack in good light. There was no chance of mistaken identity. Furthermore this was corroborated by the doctrine of recent possession. The complainant's explanation about the motorcycle was overwhelming and the police officers evidence was rightly accepted by the trial court.

The appellants invited the court attention that there was no clear description of the stolen motorcycle by the complainant (PW1) and PW2. On the issue of possession the appellants had made attempt to dispute the receipts as a form of proof of ownership of motorcycle alleging fabrication of evidence. The motorcycle stolen from PW1 was recovered a few minutes after the robbery. This answers the vital question relating to the appellants' possession of the complainant's property. The possession was not just recent it followed the robbery.

What is the irresistible inference to be drawn from the evidence" I find guidance in the case of ***Gideon M. Koyiet v Republic [2013] eKLR*** where the Court of Appeal held on the doctrine of recent possession thus:

(a) The property must have been found with the suspect.

(b) The property must positively identified as the property of the complainant.

(c) The property must be proved to have been recently stolen from the complainant.

Once the prosecution present evidence on possession, the burden to disapprove shifts to the appellants. In Paul ***Mwita Robi v Republic Cr. Appeal 200 of 2008*** the Court of Appeal said:

"Thus while the law is that generally in criminal trials the prosecution has the burden of proving the case against the accused throughout and that burden does not shift to the accused, however in a case where one is found in possession of a recently stolen property like in this case, the evidence burden shifts to him to explain his possession. That explanation only needs to be plausible but he needs to put it forward for the court's consideration."

From the record PW1 gave evidence on how he was hired by a customer from Loitokitok Airstrip. The person who hired the motorcycle turned over to be one of the robbers though he was killed by a mob in the course of arrest. It emerged that their colleague now deceased lured PW1 to the scene of the crime. The motorcycle was forcibly taken away from PW1. The registered owner (PW2) positively identified the motorcycle by way of receipts of purchase. The evidence by PW1 and PW2 on ownership and possession was not controverted by the appellant defence at the trial. This coupled with the fact that the attack took place in broad day light constitute sufficient evidence to convict the appellants of the offence of robbery with violence. In the instant case the appellants offered no explanation whatsoever to justify possession of the motorcycle found with them. Their defence of alibi is inherently improbable and

renders it not credit worthy. I have no doubt whatsoever that the appellants alibi was not true. There is sufficient evidence to draw an inference that the appellants committed the offence of which they were arraigned before the trial court.

Ground 3 by the appellants deals with an alibi defence. The appellants in their testimony before court stated that they hail from Tanzania. Each of them was categorical that they usually come to Kenya to seek casual labour. This same occasion each one of them confirmed in their defence that they found themselves on Kenya side of the border. Even with an alibi defence the onus to proof the case facing the appellants always lies with the prosecution. After studying the prosecution case I am persuaded that the testimony of PW1 and PW4 positively identifies the appellants as being in Kenya on 28/10/2013 at 3.00 pm. The appellants were arrested in possession of a motorcycle stolen from the complainant barely thirty minutes from the time of robbery. The circumstances alluded to by the appellants raises no reasonable suspicion to wither away the prosecution which tendered sufficient evidence placing each one of them at the scene of the crime.

The appellants raised the issue on alibi defence to counter the case against each one of them as having participated in the robbery. What essentially the appellant alluded was that they were not at the scene where the alleged offence took place. It is trite law that an alibi defence raises a specific defence and the appellants who put forward an alibi as an answer to the charge does not in law assume any burden of proving that answer. It is sufficient that an alibi defence raises some doubt in the mind of the trial court in the manner which renders it credible. The proper test on this issue was discussed by the Court of Appeal for Eastern African in the case of *Ahmed bin Abdul Hafid [1934] 1EACA 76* where the court held interalia:

"That in a proper case the court may in testing a defence of alibi and in weighing it with other evidence to establish whether the accused person's guilt from the prosecution perspective was proved beyond reasonable doubt taking into account the nature of an alibi defence."

In this regard the prosecution witnesses gave cogent evidence as to the arrest of the appellants in broad day light. The appellants did not raise the issue of alibi defence at any stage during cross-examination of the witnesses at the trial. The appellants raised raised the defence of alibi by way of unsworn statement which did not accord the prosecution a chance to cross-examine and test its reliability. The defence weighed together with the evidence by the prosecution falls short of controverting the circumstances of the offence as set forth against the appellants. The defence of alibi is inherently improbable and renders it not creditworthy. I have no doubt whatsoever that it could not have created a reasonable suspicion before the learned trial magistrate to warrant that doubt to be resolved in favour of the appellants. My finding therefore is that the learned trial magistrate did not misdirect himself on the alibi defence. There is sufficient evidence to draw and inference that the appellants committed the offence of which they were arraigned before the trial court.

This ground of appeal therefore is lost.

Finally, the appellants submitted on the provisions of Article 49 (f) of the Constitution which provides that, ***"an accused person has a right to be brought before a court as soon as reasonably possible nut not later than twenty four hours."*** From the record the appellants were arrested on 28/10/2013 and taken to court on 6/11/2013. There is ample evidence from PW4 – the investigating officer that two appellants upon arrest had been subjected to serious harm inflicted by the mob. From the record the two appellants and another who succumbed to death from the injuries were admitted at Loitokitok Hospital on 28/10/2013 and discharged after five days. That piece of evidence by PW4 was not challenged at the trial by any of the appellants nor did the learned trial magistrate delve into the issue in any way. It is a

fact that hospitalization of the appellants occasioned the delay on the part of the police to comply with provisions of Article 49 (f) of the Constitution.

This ground of appeal lacks merit.

In a nutshell therefore the prosecution presented both direct and circumstantial evidence at the trial court against the appellants that the two of them committed the felony of robbery with violence contrary to section 296 (2) of the Penal Code which was proved beyond reasonable doubt. For these reasons I dismiss the appeals on both conviction and sentence as urged by the senior prosecution counsel for lacking merit on law and facts.

It is so ordered.

Dated, delivered in open court at Kajiado on 16th day of December, 2016.

…………………………………...

R. NYAKUNDI

JUDGE

Representation:

Appellants present in person

Mr. Akula Senior Prosecution Counsel - present

Mr. Mateli Court Assistant - present

While the design, structure and metadata of the Case Search database are licensed by Kenya Law under a Creative Commons Attribution-ShareAlike 4.0 International, the texts of the judicial opinions contained in it are in the public domain and are free from any copyright restrictions.
Read our Privacy Policy | Disclaimer