



**Wanyama v Republic (Criminal Appeal E017 of 2024)
[2024] KEHC 14651 (KLR) (25 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14651 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E017 OF 2024
JN ONYIEGO, J
NOVEMBER 25, 2024**

BETWEEN

MICHAEL BARASA WANYAMA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence of Hon. S. Mbungi (CM) delivered on 27th day of march 2024 in criminal case No. E022 of 2023 Garissa CM's court)

JUDGMENT

1. The appellant herein was charged with the offence of robbery with violence contrary to Section 295 as read with section 296 (2) of the Penal Code. Particulars of the offence were that on 25.12.2022, at around 2000hrs, at Municipality area in Garissa Township within Garissa County, jointly with others not before court, while armed with dangerous weapons namely knives and swords robbed off Khadija Hussein Farah her handbag containing Kes.2050/-, a purse and a perfume and immediately before and during the time of such robbery killed the said Khadija Hussein Farah.
2. He also faced an alternative charge of handling stolen property contrary to section 322(1)(2) of the Penal Code. Particulars were that on 25.12.2022, at around 2000hrs, at Municipality area in Garissa Township within Garissa County, otherwise than in the course of robbery dishonestly retained one handbag brown with black spots containing Kes. 2050/-, purse and a perfume.
3. The appellant pleaded not guilty to the said charge and the prosecution called seven (7) witnesses to support its case.
4. By a judgment delivered on 06.03.2024, the trial court convicted and consequently sentenced the appellant to death.



5. Being aggrieved by the said determination, he filed a petition of appeal dated 28.03.2024 citing the following grounds:
 - i. That the learned trial magistrate erred in law and fact by failing to provide the appellant the assistance of an advocate despite noting that the offence herein carries a heavy penalty.
 - ii. That the learned trial magistrate erred in law and fact by convicting him notwithstanding the fact that the prosecution did not prove its case beyond any reasonable doubt.
 - iii. That the learned trial magistrate erred in matters of law and fact by failing to consider his defense.
 - iv. That the learned trial magistrate erred in law and fact by not invoking section 332(2) of the Criminal Procedure Code.
6. The court directed that the appeal be canvassed by way of written submissions.
7. The appellant in his submissions dated 19.09.2024, urged that the court erred by not providing the appellant an advocate even after noting that the appellant faced a serious charge. That by allowing the proceedings to continue yet being alive to the fact that the appellant was ignorant of his rights led to substantial injustice. Counsel relied on the case of *Katana & Another vs R, Court of Appeal No. 8 of 2019*, where the court underscored the need to have a standard practice in every criminal trial for the accused person to be informed at the onset, of his right to legal representation.
8. On sentence, it was submitted that the sentence by the trial court was not only harsh but also not sensitive to the aspect of fair trial which includes mitigation during sentencing. That the trial magistrate did not consider the fact that the appellant was a first offender so as to mete out a sentence commensurate to the offence. To that end, support was drawn from the case of *Edwin Otieno Odhiambo v R, Criminal Appeal No. 359 of 2006* where the Court of Appeal held that on matters of sentencing, if a court fails to take into account mitigating circumstances, the chances of not coming up with an appropriate sentence are enhanced.
9. The court was further referred to the case of *Gechu vs Republic [2024] 749 KLR*, where Gikonyo J was of the view that courts have since appreciated the fact that death penalty is no longer mandatory hence an error when the trial magistrate condemned the appellant to suffer death. In the same breadth, it was also urged that the court should be mindful of the time the appellant spent in custody during the hearing of this matter as the same was his constitutional entitlement.
10. The learned prosecutor in his oral submissions opposed the appeal by merely restating the prosecution evidence. I have considered the grounds of appeal and submissions together with cited authorities.
11. This being a first appeal, this court is expected to review and analyse the evidence afresh in order to form an independent opinion and draw its own conclusions bearing in mind that it did not have the benefit of seeing and observing the witnesses. [See *Kiilu & Another v Republic [2005] 1 KLR, 174*].
12. PW1, Ali Abdalla, a businessman and husband to Khadija Hussein Farah, the deceased herein testified that on 25.12.2022 at about 7.30pm, he was at his business premises when the deceased joined him and told him that as he closed the hotel, she wished to go purchase some items from the supermarket. She thus left with one Hassan Abdullahi and Abdul Musi.
13. He stated that, after about 30 minutes, he went to Warma to pick the deceased who came out along with the two boys and so, they decided to offer Hassan a lift as Abdul chose to use a matatu. Upon dropping Hassan near his plot, they continued with their journey. Upon reaching the ENG gate, they



- saw a bodaboda parked near their plot. There was a rider who stood there and so, he parked their vehicle at the gate and the wife proceeded to alight as he remained with their young son who wanted to be driven around.
14. As the deceased entered through the small gate, he excused himself to go relieve himself before he could drive their son around. No sooner had he entered the compound than he heard screams from inside the compound. Upon responding to the screams, he met someone running out carrying his deceased wife's handbag and so, he started chasing him around the compound till he managed to arrest him.
 15. At this point, he heard the neighbours saying that the deceased had been stabbed. Together with others, they rushed the deceased to the hospital and thereafter took the appellant to the police station. The deceased was stabbed on the chest, right thighs and on the right hand. That in as much as the deceased was attended to, she later passed on.
 16. PW2, Ali Faridi, a son to the deceased recalled that on the fateful night, he was in his room when he heard her mother scream and so, he went out to find out what was happening. That he found her saying that her bag had been taken away and further, she had been stabbed. He thus joined his father in pursuing the appellant as two other men who were within the compound scaled the wall and escaped.
 17. He stated that his mother was rushed to the hospital but unfortunately, she passed on. He further stated that he pushed into their compound the motor bike that the appellant had claimed to be his and later presented the same to the officers. On cross examination, he stated that in as much as the appellant did not have a weapon, he was the one carrying the deceased's bag.
 18. PW3, Aisha Muse Musa recalled that on the day in question, she was in her house when she heard screams and upon getting out of the house, she heard the deceased say that her porch and money had been stolen. Meanwhile, PW1 and PW2 were chasing someone in the compound and finally, they managed to arrest him. Khadija was thereafter rushed to the hospital but unfortunately, she passed on. She confirmed that the person who was arrested by pw1 and pw2 was the appellant.
 19. PW4, Aden Hassan, a taxi driver stated that he knew the appellant as his employee having employed him to operate his motor cycle. It was his evidence that the motor cycle registration number KMFM 258X was his. He claimed that he heard that the appellant was arrested in relation to the case before the court.
 20. PW5, Bushara Abdi Aden, a general surgeon at Garissa County Referral hospital stated that on 26.12.2022, he conducted post mortem on the body of the deceased after having been identified by PW1. According to the Dr., there was a stab wound measuring 6cm in length on the upper abdomen (right), another wound on the left abdomen and also a cut wound on the right hand. According to him, the cause of death was excessive bleeding from the wound caused by a sharp object.
 21. PW6, Yussuf Salat Chale, a medical doctor testified that on 25.12.2022 at 8.00 p.m., he received a call from the manager of Medina Hospital telling him to rush to the venue and attend a patient who had been admitted with a stab wound in the stomach. Upon rushing there, he found the patient whose intestines were out of the stomach and so, he attended her by operating her. Thereafter, he took her to the general ward as the patient initially responded well to the treatment.
 22. PW7, I am No. 75975 PC Joseph Motanya, the investigating officer generally reiterated the evidence of the other prosecution witnesses. He further stated that on 26.12.2022, he received a call from a colleague that they needed to visit a scene of crime but before they could go there, they went to Medina hospital where they found the deceased. While there, they were told that the deceased had been attacked by three men who robbed her of her brown handbag. They saw the body of the deceased and specifically the abdomen wound exiting on her left ribs. He thus commenced his investigations which led to the



recovery of the motor cycle KMFM 258S which was allegedly used by the appellant in committing the offence. The photos of the motor cycle were taken, the scene was photographed and the appellant interrogated.

23. It was his evidence that the appellant upon interrogation confessed that previously, he met the two men suspects in this case on 25.12.2022 at the bodaboda stage when he dropped them at the scene of crime. Additionally, on 30.12.2022, the appellant was interrogated again when he changed the story that he had met the two men twice, on 23.12.2022, and 25.12.2022 at the bodaboda stage. That he took them to Naivas area, and several places including Ijara, 21 km from his usual stage but he could not mention the names of his accomplices. On cross examination, he stated that the deceased's bag was recovered from the appellant who had been hired to eliminate the deceased due to business rivalry.
24. The court placed the appellant on his defence upon finding that the prosecution established a prima facie case against the appellant to warrant him be placed on his defence.
25. DW1, Michael Baraza Wanyama, a bodaboda operator denied committing the offence. He claimed that on the very date, he was at his usual stage when clients approached him and hired his boda boda services. That on their way, they found a white stationary probox. That the two customers he had knocked the windows of the car. When the windows were lowered down, the two talked with a mzee who was inside. After sometime, they proceeded with their journey.
26. After a while, the same white probox approached and a lady alighted and entered into the house where the two boys had previously entered as he waited for them. After a while, he heard some noise coming from the said house and so they rushed there. It was then that they learnt that a lady had been stabbed. That the two boys scaled the wall and ran away. On cross examination, he stated that he was a bodaboda rider and that he was innocent. That he stood out of the gate when the other boys were inside the house as he did not know what was going on.
27. DW2, Joseph Mukwana Wasika testified that the appellant was his relative and he knew him as a bodaboda operator and a man of good character.
28. I have considered the record of appeal herein, grounds of appeal and submissions by both parties: Issues that arise for determination are;
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether the appellant was entitled to free legal representation by the state.
 - iii. Whether the sentence of death was manifestly harsh, inhuman and excessive considering the overall circumstances of the case.
29. The appellant was charged with the offence of robbery with violence which is provided for under the Section 296(2) of the Penal Code as follows:

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.



30. The Court of Appeal in Criminal Appeal No. 300 of 2007, *Dima Denge & Others vs Republic* (2013) eKLR, stated as follows:

“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 an offence of robbery with violence.

31. In *Johana Ndungu vs Republic* [1996] eKLR, the Court stated thus:

“In order to appreciate properly as to what acts constitute 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.

32. From the evidence of pw1 husband to the deceased, on the material day he together with his wife closed their hotel business at 7.30 pm. They then left in company of two guys known as Hassan Abudullahi and Abdul Musa. On the way, they let Abdul take a matatu as they gave Hassan a lift and dropped him at his plot. They then proceeded to their plot where they found a motorcycle parked outside the plot with a rider standing next. That as the deceased left for the house, he remained in the car with their young son whom he wanted to drive around. However, he decided to follow the deceased with the intention of relieving himself.

33. As he was entering in the compound, he heard his wife screaming that she had been stabbed and her bag stolen. As he responded, he allegedly saw accused running towards the gate and upon confronting him, the appellant ran back into the compound and eventually he managed to arrest him with the help of his other son (pw2) who was in the house but responded to the mother’s screams.

34. The key question is, was the appellant the rider pw1 had seen standing next to the boda boda before he followed his wife to relieve himself? If the appellant was the rider pw1 saw standing next to the boda boda parked outside the plot or compound where the incident took place immediately pw1 decided to enter the compound, then the appellant could not have been the perpetrator of the robbery in question. This is because, pw1 did not tell us whether the appellant ever entered the compound ahead of him.

35. The story given by pw1 appears to corroborate the appellant’s defence that he was the rider standing next to his motor cycle outside the plot where the deceased and pw1 were staying and that he merely dropped his two customers there after pw1 had engaged with them in a conversation while on the way to that very plot.



36. Pw2 stated that after arresting the appellant, he pushed the appellant's boda boda into their compound. This bit of evidence lends credence to the fact that the appellant may have been the rider of that motor cycle hence the rider pw1 saw outside their plot immediately before the incident occurred. If the appellant was the rider pw1 saw, and pw1 entered the compound immediately his wife entered the same compound, then, the appellant could not have entered the said compound ahead of pw1 without pw1 noticing.
37. For some reason, the prosecution did not interrogate pw1's evidence to confirm whether the motorcycle rider he saw standing outside their plot next to a Motorcycle was the appellant or somebody else. In the circumstances of this case, there is reasonable doubt created by the testimony of the appellant as compared with the testimony of pw1. Although pw1, pw2 and pw3 stated that the appellant was arrested within the compound and stolen items from the deceased recovered, the evidence of pw1 is doubtful. The defence raised by the appellant when compared with the evidence of pw1 tends to support on a higher degree the defence case hence raising reasonable doubt on the prosecution case.
38. It is trite that in a criminal case where there is reasonable doubt created by an accused person, credit must be given to the accused. From the testimony of pw1 who is the key witness, he does not strike me as a credible and consistent witness. His evidence was somehow contradictory.
39. In the case of *Ndungu Kimanji v Republic* [1979] KLR 282 it was held that;
- “The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”
40. It is trite law that in a criminal case, the burden of proof always lies with the prosecution hence the prosecution had a duty to prove that the rider pw1 saw next to the bodaboda was not the one he purportedly arrested. See *Sekitoleko versus Uganda* [1976] EA53 where the court held that:
- “As a general rule of law the burden on the prosecution of proving the guilt of a prisoner beyond reasonable doubt never shifts whether the defence set up is an alibi or something else”
41. From the defence herein, there is reasonable ground to believe that the accused was possibly outside the compound when the robbery took place inside the plot. There is no evidence to suggest that the appellant had prior knowledge that the customers who hired him had plans to commit a robbery. In my view the appellant may have been a victim of circumstances hence the benefit of doubt goes to his benefit.
42. As to failure to be informed and be provided with legal assistance, Article 50(1)(h) provides for an accused person to be assigned an advocate by the state at state expense if substantial injustice would otherwise result, and to be informed of his right promptly.
43. In *David Njoroge Macharia -vs- Republic* criminal appeal No. 497 of 2007 it was held that;
- “Under the new Constitution, state funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis



added). Substantial injustice is not defined under *the Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where “substantial injustice would otherwise result”, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.”

44. However, the requirement is not couched in mandatory terms hence an omission not to inform the accused of those rights is not fatal. See *Moses Gitonga Kimani v Republic (Criminal Appeal 69 of 2013)* [2015] KECA 940 (KLR) (26 February 2015) (Judgment) where the court held that;

“Under the current Constitution an accused person is entitled to legal representation at the State’s expense where substantial injustice would otherwise arise in the absence of such legal representation. As noted in the David Njoroge Macharia case *the Constitution* does not set out what constitutes substantial injustice. Chapter 18 (transitional & consequential provisions) of the current Constitution places an obligation on Parliament to enact legislation which would ensure realization of an accused person’s right to a fair trial under Article 50 of *the Constitution* within four years of the promulgation of *the Constitution*. It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State’s expense. While appreciating that the framers of *the Constitution* intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation.”

45. Having held as above, the ground on legal representation fails as in my opinion it is not mandatory.
46. In a nut shell, and based on the analysis of evidence above, I am satisfied that the appeal herein is merited and the same is upheld. Consequently, the conviction herein is quashed and the sentence thereof set aside. The appellant shall be set free forthwith unless otherwise lawfully held.

ROA 14 Days

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 25TH DAY OF NOVEMBER 2024.

J. N. ONYIEGO
JUDGE

