



**Sadam v Republic (Criminal Appeal E054 of 2023)
[2024] KEHC 10366 (KLR) (23 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT LODWAR
CRIMINAL APPEAL E054 OF 2023
RN NYAKUNDI, J
AUGUST 23, 2024**

BETWEEN

WAYNE SADAM APPELLANT

AND

REPUBLIC RESPONDENT

*((Being an appeal from the judgment of Hon. C.A. Mayamba;
HSC in Kakuma law court Cr. Case No. E009 of 2022))*

JUDGMENT

1. Wayne Sadam was charged with robbery with violence contrary to Section 295 as read with section 296(2) of the Penal Code. The particulars are that on the 2nd of January, 2022 at around 1900 hours at Kakuma refugee camp in Turkana West Sub County within Turkana County, jointly with other not before court, robbed Francine Ndaviyenurukiye of one mobile phone make infinix hot 5 valued at Kshs. 10,700 at the time of such robbery used actual violence to the said Francine Ndaviyenurukiye.
2. The Appellant underwent a full trial and after the prosecution discharged its burden of proof, he was convicted and sentenced to 20 years in prison.
3. Dissatisfied with the conviction and sentence, the appellant filed the instant appeal, in which he relies on the following grounds:
 - a. That the learned trial magistrate erred in law and in facts by failing to observe that none of the prosecution witnesses identified the accused in the instant case.
 - b. That the learned trial magistrate erred in law and facts by convicting the appellant without any of the stolen exhibits being availed before court.



- c. That the learned trial magistrate erred in law and in facts by failing to consider the accused person's defence

Appellants' submissions

4. The Appellant proceeded to submit on each of the grounds relied on. He started by submitting that the prosecution witnesses did not identify him as the accused person because none of them mentioned any light around the scene of crime. On this he cited the case of Maitanyi versus Republic (1986) KLR and the case of Marube & Another versus Republic (1986). He further submitted that the investigation officer did not conduct any identification parade, which as a result has caused an injustice.
5. As to whether any exhibit was brought before the court, he submitted in the negative. He argued that for anyone to be convicted or arrested, there should be an exhibit because the present case is a serious one. He stated that no items were recovered alongside the accused.
6. Finally, the appellant submitted that his defence was not considered and that the trial magistrate took advantage of the fact that he was a lay person. He submitted that the role of the trial court is to look into all the evidence presented and weigh it against the invited. He invited the court to look at the record and come up with a fair determination.

Analysis And Determination

7. As a first appellate court, my duty is to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32. I am however conscious of the fact that this court did not see witnesses testify and give due consideration for that.
8. I have gone through the record and considered the grounds of appeal, the evidence adduced and the submissions filed. The sole issue I should establish is whether the prosecution proved its case to the required standard.
9. The offence of robbery with violence is contained in Sections 295 and 296(2) of the Penal Code as follows:

“295. 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.

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- (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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”



10. Further, In *Jeremiah Oloo Odira v Republic* [2018] eKLR the Learned Judge encapsulated the aforementioned sections and 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” See *Olouch v Republic* (1985) KLR)

11. The prosecution established the offence of robbery with violence with the fact that the complainant was assaulted prior to the theft. According to the prosecution, at the time of robbery, the appellant together with others used physical violence. The complainant’s version was that she was attacked by three people with the accused being amongst them. It was her testimony that the accused grabbed her by the neck and was assaulting her while his mates emptied her pockets before running away with her phone. She hanged on the accused who was dragging her towards the lagga, as she screamed and was rescued leading to the arrest of the accused person herein. To this end, the trial court concluded that the aspect of assault prior to robbery was established. The trial court noted that the presence of a dangerous weapon is just a component of a robbery with violence and failure to have any is not fatal to the case. The court further noted that in the instant case, the assailant used physical violence.
12. To corroborate the complainant’s testimony, PW4 stated that his colleague examined the complainant who had been brought for treatment with complaints of assault by unknown people. She had neck pains and tenderness. He also noted that the complainant had tenderness and pain at the back on extension. That the injuries were two days old and formed the degree of harm.
13. Having considered the aforementioned testimonies, I am persuaded that there was use of physical violence and the same was confirmed by PW4, who examined the complainant.
14. The element of identification is another key component of the offence of robbery with violence. PW1 stated that at around 7PM she was sent by her father to get his phone from charging. It was on her way home and could see their house when she met three boys in front of her. She stated that one of them hit her with human fists as he held her by the neck. It was her testimony that the other two ransacked her pockets of which they picked the phone and ran away. She stated that she continued struggling with the one who was holding her. She stated that she rightly grabbed his belt as she screamed. She stated that there was a woman who came by and asked her to help but she ran away. It was her testimony that the accused was dragging her away towards the lagga when her mother arrived and grabbed him. She stated that at that time, the accused insisted that they leave him as he would go and bring back the mobile phone. She stated that people converged and the accused was asked of his tribe of which he insisted that he was from Dinka Community before changing to Nuer. It was her testimony that



- the accused at first insisted that he was staying at Kakuma 1 before changing to Hong Kong. It was her testimony that she was injured on the face as he was hitting her with human blows. She was referred to the hospital and was issued with a P3 form. It was her testimony that her father's phone was infinix. She stated that it was her first time meeting the accused herein.
15. PW2 stated that she was at home having sent her daughter to fetch a mobile phone. It was her testimony that she saw another woman who rushed to inform her that her daughter had been attacked by 3 men. The lady was called Agnes. It was her testimony that she rushed only to find the accused who was dragging her daughter who was holding him tightly. She stated that the accused claimed that he was from Dinka tribe before changing to Nuer. It was her testimony that she sent her daughter to call security officers and GSU. He was arrested by GSU officers who brought the accused to Kakuma police station. She stated that the mobile phone was make Infinix valued at Kshs. 10,700 as per the receipt.
 16. PW3 also gave her testimony to prove the prosecution's case. It was her testimony that she was at home when she heard noise and went out. It was her testimony that she saw two people running away with something like a torch light. She stated that she stood by the fence. She stated that she saw a boy and a girl with the latter claiming her phone had been stolen. It was her testimony that the complainant was claiming that she had gotten hold of one of them. She stated that the complainant sent her to call her mother as her phone had been stolen. It was her testimony that she called the mother who came to the scene as she went back to her house.
 17. PW5 stated that he was on duty when he was handed this case to investigate. It was his testimony that the complainant was bale to arrest the accused herein as she screamed for help which made members of the public to rush to her rescue. He stated that the accused was interrogated and was willing to lead them to the other two who were at large to get the phone. It was his testimony that the accused even tried to escape from the police but was arrested and charged before the court. He tendered the receipt of the mobile phone as PEX2.
 18. In the trial court's analysis in which I find not fault. The court acknowledged that the said incident happened at night at around 7PM, which clearly virtual identification would be impaired but in the instant case, the complainant managed to cling to the accused by grabbing his belt despite the beatings until she was rescued.
 19. Putting it into perspective, the circumstances reveal a case where the complainant was robbed by three men where one of them violently handled the complainant to give room for the others to empty her pockets. The complainant in turn decided to tightly grab the appellant despite receiving blows on his face. She did this long enough for the public and even the police to come to her rescue. PW2, PW3 and PW5 confirmed this position. The appellant in his defence which he believes was not considered stated that he was trying to be a good Samaritan and help the girl who was crying with claims to have had her phone snatched away. He admitted in his testimony that he was found at the scene by the complainant's mother. PW5 testified that when the accused was interrogated, he was willing to lead them to the other two who were at large to get the phone. Even worse, PW5 told the court that the appellant tried to escape from the police custody but was arrested and charged before the court. All these facts lead to one conclusion. The appellant was positively identified as the assailant and was properly convicted at the trial court. I therefore make a finding that the trial court correctly analyzed the evidence before it and made a safe conviction.
 20. As to the defence advanced by the appellant at the trial court, I agree with the trial court that it is unreasonable for one to claim to be helping another by hitting him/her with blows on the face.



21. I have had the occasion to peruse the record as well as the comprehensive judgment of the trial court and I wholly agree with the findings of the trial court that the elements of robbery with violence were properly established and as such the conviction was proper.
22. The upshot of this analysis is that the appeal on conviction is upheld.

Sentence

23. The Penal Code prescribes a death sentence for the offence of robbery with violence. I am alive to the decision in Muruatetu together with the objectives of sentencing as per the Judiciary sentencing policy guidelines. Courts are urged to take various factors into consideration when sentencing such as retribution, deterrence, rehabilitation, restorative justice, community protection, denunciation, reconciliation and reintegration. Additionally, the other mitigating circumstances to be considered are the age of the offender, being a first offender, character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaption of the offender and any other relevant factor.
24. Having read through the judgment of the trial court, I am of the considered view that all these factors were considered in arriving at a sentence of 20 years imprisonment. The sentence is hereby upheld and the sentence shall run from the date of conviction i.e. 7.7.2022.
25. It is so ordered

DATED AND SIGNED AT ELDORET THIS 23RD DAY OF AUGUST , 2024

In the Presence of

Mr. Kakoi for the State

Accused

R. NYAKUNDI

JUDGE

