



**Ambuni v Republic (Criminal Appeal E034 of 2023)  
[2024] KEHC 13346 (KLR) (28 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13346 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL E034 OF 2023  
JN KAMAU, J  
OCTOBER 28, 2024**

**BETWEEN**

**DAUDI AMBUNI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon R. M. Ndombi (SRM) delivered at Vihiga in Senior Principal Magistrate's Court in Criminal Case No 828 of 2019 on 4th May 2022)*

**JUDGMENT**

**Introduction**

1. The Appellant herein was charged jointly with four (4) others with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya) and gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act*.
2. He was tried by the Learned Trial Magistrate, Hon R. M. Ndombi (SRM) who discharged him under Section 215 of the Criminal Procedure Code on the offence of gang rape. He was, however, convicted and sentenced to thirty (30) years imprisonment for the offence of robbery with violence.
3. Being dissatisfied with the said Judgement, on 24<sup>th</sup> November 2023, he lodged the Appeal herein. The same was dated 20<sup>th</sup> November 2023. He set out six (6) grounds of appeal.
4. His Written Submissions were dated 6<sup>th</sup> March 2024 and filed on 8<sup>th</sup> March 2024 while those of the Respondent were dated and filed on 25<sup>th</sup> March 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.



## Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Petition of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
  - a. Whether or not the Prosecution proved its case beyond reasonable doubt; and
  - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court dealt with the said issues under the following distinct and separate heads.

### I. Proof Of Prosecution Case

9. Grounds of Appeal Nos (1), (2), (3), (4) and (6) of the Petition of Appeal were dealt under this head.
10. The Appellant submitted that there were gaps in his identification as he claimed that the offence was committed in darkness. He pointed out that PN (hereinafter referred to as "PW 1(sic)")'s testimony was based on suspicion and that the identification parade was not free from error as it did not follow the safeguards of Chapter 46 of the force standing orders.
11. He contended that her evidence on the lighting at the scene of crime did not meet the threshold regarding the intensity, proximity, allocation and the relation privy to the perpetrators. He asserted that the nature of light adduced did not show how he was identified as the alleged attack was sudden and occurred at night when the visibility was poor hence there was no ample opportunity to aid identification. He added that the only fact that linked him to the offence was that he was found in the house where the stolen items were recovered. He argued that he was not found in possession of any stolen item and hence his arrest was based on distorted and far-fetched suspicion.
12. He blamed the Trial Court for having disregarded his defence of alibi and contended that the principle of burden of proof always rested with the Prosecution and that there was never a burden on him to disprove the charge. In this regard, he invoked Sections 107, 108, 109 and 110 of the *Evidence Act* and relied on the case of *Kioko vs Republic* (1983) KLR 289 where it was held that the law did not require the accused to prove his innocence and that it was only in a few exceptional cases where an accused was burdened with proof. He was emphatic that the standard of proof ought to be beyond reasonable doubt.
13. On its part, the Respondent submitted that the Appellant was positively identified by PW 1(sic) who testified that she saw him guarding her mother, JNO (hereinafter referred to as "PW 2"), with his Co-accused persons with the help of the electricity light. It added that in her cross-examination PW 1(sic) pointed out that she knew the Appellant from Luanda and PW 2 stated that the Appellant pushed her against a wall during the attack.



14. It was emphatic that the assailants robbed PW 1(sic) and PW 2 twice, on 23<sup>rd</sup> and 24<sup>th</sup> of May 2019 and that they were all arrested on 24<sup>th</sup> May 2019 at their Co-Accused's house where the stolen items were recovered. It added that an identification parade was carried out by Inspector Andrew Chege (hereinafter referred to as "PW 5") and the Appellant was positively identified.
15. It was its case that all the elements of the offence of robbery with violence had been established by the Trial Court as the offenders were eight (8) in number, armed with dangerous weapons, raped PW 1 (sic) and robbed her and PW 2 of their personal belongings which were recovered from the Appellant's Co-Accused person's house and where all of them were arrested and positively identified by PW 1 (sic) and PW 2.
16. It further submitted that the Appellant's defence was simply a denial and did not dislodge the Prosecution's case since he had been identified and linked to the offence by participating in the robbery.
17. A perusal of the proceedings of the lower court showed that on 23<sup>rd</sup> May 2019, at midnight, PW 1(sic) and PW 2 testified that they were asleep when they had a loud bang at the door. PW 2 stated that when she switched on the light of the one (1) bedroomed, they saw several men standing before them. PW 1(sic) said that she was able to see the faces of her attackers as the electric light was on. She told the Trial Court that at some point, her attackers blindfolded her but removed the piece of cloth and she saw their faces.
18. Inspector Andrew Chege (hereinafter referred to as "PW 5") carried out an identification parade and both PW 1(sic) and PW 2 identified the Appellant as having been part of the gang that broke into their house to rob them on two (2) occasions being on 23<sup>rd</sup> May 2019 at 12.00 midnight and 24<sup>th</sup> May 2019 at 4.00am.
19. In her cross-examination, PW 1 (sic) confirmed that she knew the Appellant as Daudi from Luanda and had seen him during the attack. PW 2 testified that she identified the Appellant by face and description of clothing. She added that it was the Appellant who pushed her to the wall when his Co-accused persons were raping PW 1 (sic).
20. The lighting conditions in the one-bedroomed house were conducive for positive identification. The attackers interacted with PW 1(sic) and PW 2 for quite some time. That was sufficient for PW 1(sic) and PW 2 not to have been mistaken about his face.
21. In addition, the Appellant was not a stranger to both PW 1(sic) and PW 2 as they hailed from the same area at [Particulars Withheld]. PW 1 (sic) referred to him as Daudi and she knew him physically. She testified that he was the one who was going round the house collecting goods and that he was the one who was guarding PW 2 not to scream.
22. PW 2 testified that he was the one who was carrying out good from her house. She stated that she identified him in the Identification Parade. She also stated that he was the one who pushed her to the wall as his Co-Accused persons were raping PW 1 (sic).
23. It was therefore clear from the evidence that was adduced by the Prosecution that PW 1 (sic) and PW 2 positively identified the Appellant as having been one of the attackers on the two (2) material nights. His argument that he was only arrested at the house where stolen items were recovered therefore fell on the wayside.
24. The fact that several items that were stolen from PW 1's(sic) and PW 2's house were found in his Co-Accused's house squarely placed him as one of the perpetrators on that material night.



25. Turning to the issue of whether or not the Prosecution demonstrated the elements of the offence of robbery with violence herein, Section 295 of the Penal Code stipulates that the elements of robbery with violence are :-
  - a. That the offender is armed with any dangerous weapon or offensive weapon or instrument;
  - b. That the offender is in the company of one or more persons;
  - c. That 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.
26. PW 1(sic) confirmed having seen the Appellant's Co-accused persons namely, Bouston and Alex armed with knives. Her evidence was that they held her neck and she started struggling with them. As a result, they injured her cheek and neck. The Clinical Officer, Paul Muturi Mbuoo (hereinafter referred to as "PW 1") tendered in evidence the Post Rape Care (PRC) Form and P3 Form which showed that PW 1(sic) sustained injuries during the atrocious attacks by the Appellant and his Co-accused persons.
27. It was evident from the evidence of both PW 1(sic) and PW 2 that the Appellant was in the company of others during the attacks. There was robbery. Indeed, PW 2 testified that the Appellant and his Co-accused persons robbed them of their bags, sheets, duvets, plastic chair, sugar and curtains and ran off.
28. Her further evidence was that he and his Co-accused persons took sufurias, jiko, clothes, three (3) curtains and PW 1's (sic) clothes, Kshs 190/= and bags during the second attack. She stated that their attackers were armed with pangas, knives, metal rods and torches. Her evidence was corroborated by that of PW 1(sic) and that of No 111246 PC Dismas Kibet (hereinafter referred to as "PW 3") and No 73329 Sgt Jared Atoni (hereinafter referred to as "PW 4").
29. PW 4 tendered in evidence assorted clothes, photo album, NHIF card, Exercise Book Chama, Sisco Phone (black), Death Certificate, Birth Certificate for PW 1, Bus fare receipt, Bag (white and black), inventory and receipt for the Sisco phone which were recovered from the said A's house.
30. It was clear from the aforesaid evidence that the Appellant was in the company of his Co-accused persons, they were armed with a sharp object and that during, immediately before and after the offence they wounded PW 1(sic). They placed a panga on PW 2's neck as they raped PW 1 (sic) and robbed them of the items that were recovered from the Appellant's Co-accused person's house.
31. The chain of events was unbroken. The Trial Court thus proceeded correctly when it found that all the ingredients of proving the offence of robbery with violence had been satisfied and hence convicted him accordingly. His evidence in defence did not outweigh the inference of guilt on his part.
32. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3), (4) and (6) of the Petition of Appeal were not merited and the same be and are hereby dismissed.

## **II. Sentencing**

33. Ground of Appeal No (5) of the Petition of Appeal was dealt with under this head.
34. The Appellant did not submit on this issue. The Respondent submitted that the sentence was lawful and should be upheld.
35. Notably, the Appellant was found guilty of the offence of robbery with violence.



36. Section 295 of the Penal Code states that:-

“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.”

37. Further, Section 296 (1) and (2) of the Penal Code provides 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.

38. The Trial Court sentenced the Appellant to thirty (30) years imprisonment, for the offence of robbery with violence.

39. In view of the atrocity that was meted on PW 1 and PW 2 herein, bearing in mind that the offence of robbery with violence was committed on two (2) consecutive days, the crimes smacked of pure malice and impunity. This court found and held that this was one of the instances that the sentence ought to be higher than what was meted upon the Appellant. However, in view of this court’s discretion on sentencing, it left the sentence of thirty (30) years imprisonment undisturbed.

40. Going further, this court was mandated to consider the period that the Appellant spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

41. The said Section 333(2) of the Criminal Procedure Code provides that:-

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).

42. Further, the Judiciary Sentencing Policy Guidelines provide that:-

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

43. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.



44. The Accused person was arrested on 24<sup>th</sup> May 2019. He was sentenced on 13<sup>th</sup> June 2022. He therefore spent about three (3) years nineteen (19) days in custody during trial. A perusal of the lower court proceedings indicated that the Trial Court did not take into consideration the said period while sentencing the Appellant. This was a period that therefore ought to be taken into consideration while computing his sentence.

### **Disposition**

45. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated 20<sup>th</sup> November 2023 and lodged on 24<sup>th</sup> November 2023 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and is hereby upheld as they were both safe.

46. For the avoidance of doubt, the period from 24<sup>th</sup> May 2019 until 12<sup>th</sup> June 2022 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

47. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 28<sup>TH</sup> DAY OF OCTOBER 2024**

**J. KAMAU**

**JUDGE**

