



**Isack & 2 others v Republic (Criminal Appeal E007 of 2022)
[2023] KEHC 1652 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 1652 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CRIMINAL APPEAL E007 OF 2022
JN NJAGI, J
JANUARY 19, 2023**

BETWEEN

ABDIKADIR ISACK 1ST APPELLANT

YASSIR SIRINGO 2ND APPELLANT

RAMADHAN ABDI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the original conviction and sentence by Hon. Simon Arome, SRM,
Marsabit Principal Magistrate's Court Criminal Case No.E371 of 2021 delivered on 7/7/22)*

JUDGMENT

1. The appellants herein were convicted for the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#) and each was sentenced to serve 10 years imprisonment. The particulars of the offence were that on the June 22, 2021 at Shauri Yako village in Saku Sub-County within Marsabit County, jointly with another not before court while armed with dangerous weapons namely knives and a panga robbed Cyprian Mweteri of his motorcycle Reg No KMTTC 570J valued at KShs 115,000/=.
2. The appellants were aggrieved by the conviction and the sentence and filed the instant appeal. The grounds of appeal are:
 - 1) That the learned trial magistrate erred in both matters of law and facts by failing to note that there was contradiction and inconsistency in the evidence tendered by the prosecution witnesses.
 - 2) That the trial court erred in matters of both law and facts by failing to note that PW2 and PW4 failed to tell the court the light they used to identify the appellants herein at the scene of the alleged robbery.



Submissions

3. The appeal was canvassed by way of written submissions. The appellants submitted that the complainant told the court that he was robbed at night. That though the said witness and his friend Charles Bundi, PW2, testified that they identified the appellants in the course of the robbery, they did not tell the court the source of light that enabled them to identify the appellants. The appellants relied on the decision in the case of *Maitanyi v Republic* [1986] KLR 198 where the Court of Appeal held that:

It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect.

4. The appellants faulted the trial court for failing to consider that there were discrepancies in the evidence adduced by the prosecution witnesses. That PW2 told the court that the 1st and 2nd appellants were each armed with a rungu. That this evidence was contradicted by the complainant in the case, Cyprian Mwetere PW4, who said that the 2nd appellant was armed with a long knife. It was submitted that the contradiction in the evidence of the prosecution witnesses made the conviction unsafe.
5. It was submitted that there was no cogent and compelling evidence to support the conviction. That the evidence fell short of the standard of proof required in a criminal trial. The appellants urged the court to quash the conviction and set aside the sentence.
6. The state through the Senior Principal Prosecution Counsel, Mr W Ochieng, submitted that the prosecution did prove all the ingredients of the offence of robbery with violence beyond all reasonable doubt. That the three appellants were identified by the complainant, PW4 and Charles Bundi PW2. That PW2 knew the appellants by name as they were people he used to interact with in his work as a boda boda rider. That the evidence of the witness was one of recognition which is more reliable. That he saw the people twice, conversed with them for a while and was involved with their arrest. That identification of the appellants was unshakable.
7. It was submitted that both the complainant PW4 and Bundi PW2 were categorical that at the time of the robbery, the 1st appellant was armed with a long panga while the 2nd and 3rd appellants were armed with rungu. Therefore, that the element of violence and that of the appellants having been armed was proved beyond reasonable doubt.
8. The state submitted that PW2 and PW3 spotted the 1st appellant riding the motor cycle stolen from the complainant and marshalled a chase party of fellow boda boda riders that led to the arrest of the 3rd appellant and recovery of the motor cycle stolen from PW2. That the 1st appellant did not explain how he was found with the motor cycle stolen from the complainant.
9. It was submitted that the defences of the appellants were mere denials and that the trial court was right in dismissing them. That the sentence meted on the appellants was fair considering that robbery with violence is a capital offence with a possible death sentence.

Analysis and Determination

10. This being a first appeal the duty of the court is to analyse and to re-evaluate afresh the evidence adduced at the lower court and draw its own conclusions while bearing in mind that the trial court had the advantage of seeing and hearing the witnesses testify — see *Okeno v Republic* [1972] EA 32.
11. The complainant in this case was Cyprian Mwetere who was PW4 in the case. The case for the prosecution was that the complainant was a boda boda rider in Marsbit town. That on the material



day he was called by a fellow boda boda rider, Charles Bundi, PW3 who told him that his motor cycle had been stolen by a gang of people.

He asked him to escort him to the police station to make a report. He did so. That while they were on the way home from the police station they were ambushed by a gang of 4 people at Shauri Yako village. They were armed with knives and rungas. Among the people he identified the 2nd and 3rd appellants. He fled and was chased by two of the people. He left them with the motor cycle. He went and reported at the police station. On a later day he saw the 1st appellant with his stolen motor cycle. The appellant threatened them with a panga. They chased him up to Dakabaricha village where he dropped the motor cycle in a plot and entered into a house within the plot. They found the motor cycle stolen from Charles Bundi PW2 in the plot. They called the police. The three appellants were arrested in the plot.

12. It was the evidence of Charles Bundi PW2 that he was at the material time a boda boda rider. That on the material day at 9pm he was at Stella boda boda stage when he was confronted by a gang of over 5 people. They asked him to take them to a certain place. He suspected that they were up to no good and he declined. The 1st appellant removed a panga from his jacket and attempted to cut him on the left shoulder. He dodged the slash and ran into Stella's hospital for cover. The appellants switched on his motor cycle by use of wires and rode away with it. He called Cyprian PW4 to escort him to the police station to make a report. They went and reported.

On the way home, they were ambushed by the same gang as they turned into PW2's plot at Shauri Yako village. They removed pangas and rungas. He and Cyprian fled. The people rode away in Cyprian's motor cycle. On the following day PW2 was at KCB Bank when he saw the 1st appellant riding Cyprian's stolen motor cycle.

He informed other motor cycle riders. They gave chase to the 1st appellant up to a certain plot where he abandoned the motor cycle.

The 1st and 3rd appellant were arrested in the plot. They found his, PW2's, stolen motor cycle in the said plot. The 2nd appellant was arrested in another place. PW2 identified the three of them to have been among the people who had robbed him of his motor cycle.

13. Sgt Makambo PW3 testified that on the 23/6/2021 he went and arrested the 2nd appellant at Kiwanja Ndege village over another case. That as the 2nd appellant was leading them to Dakabaricha village they were passed by the 1st appellant riding a motor cycle registration NKMCF 570J at high speed. The 3rd appellant was a passenger on the said motor cycle. The same was being chased by other motor cycles. The 1st appellant was arrested by members of the public. The 3rd appellant locked himself in a house. They tear gassed the house and the 3rd appellant came out.
14. PC Rugut PW5 investigated the case and charged the appellants with the case that was before the trial court.
15. When put to their defence the Appellants denied to have committed the offence charged.
16. In his judgment the trial magistrate stated as follows:

“The complainant in this case testified that on 22nd June 2021 at about 9:00a.m he was at Stella motorcycle stage when Abdikadiri, Siringo and Ramadhan and some other person he did not know arrived and alighted where he parked his motor cycle registration NKMEN 871D. They requested him to take them somewhere. He volunteered to give them Kshs 500, 000. The first accused removed a panga and tried to cut his left shoulder. He dodged the panga and run towards Stella Hospital. The accused person took his motorcycle and connected the wires and drove off.



He proceeded to Marsabit Police Station and reported. He stated on his way back with Cyprian he met five persons at Shauri Yako. They knocked Cyprian's motorcycle and removed rungs and pangas. He saw and confirmed they were the persons who had taken his motor cycle at Stellas. Cyprian released his motor cycle and ran away. The five persons took away Cyprian's motor cycle. He identified the three accused using the security light at Stella Hospital gate. He also identified the three at the junction to his house, specifically the first accused. He was able to identify the 2nd and 3rd accused because he saw them twice. They even spoke for a while at Stella's stage when they tried to force him to take them somewhere they did not disclose. The 3rd and 2nd persons had a rungu each and 1st accused had a panga. The complainant has given a very cogent and concise account of the events of that day. He remained unshaken under cross examination by the accused. The circumstances were optimal for a positive identification.

More importantly the accused and complainant had a conversation for some time at Stella motor cycle stage. PW2 testified that he recognized the 1st accused having taken him previously. The attackers were unmasked. All these are circumstances favour a positive identification. The complainant spotted the accused days later and pointed him out to the boda boda riders and the police who then arrested him.

Therefore, there is evidence of recognition which was held in the case of *Anjononi & other v Republic* [1980] KLR to be

"more satisfactory, more assuring, and more reliable than the identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

In this case the complainant was identifying a person whom he was able to recognize thus reducing further the risk of a mistaken identity. Am satisfied the identification was water tight.

In the case of Mohammed Ali v Republic [2013] eKLR, the court held that;

the use of the word or in the 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*.

In this case the complainant said that he was accosted by a group of five men—this fulfils ingredient(b). The complainant testified that the 1st accused was armed with a panga while the 2nd and 3rd accused were armed with rungu which were used to threaten the complainant—this fulfils ingredient (a). PW2 stated the 1st accused lifted up the panga to cut him but he dodged and run away leaving his motor cycle. This satisfies ingredient N3 the use of violence at or immediately before or immediately after the time of the robbery. The three ingredients of robbery with violence under section 296(2) have sufficiently been proved. The three accused persons are convicted under section 215 of the CPC".

17. I have quoted the judgment at length to show that the learned trial magistrate convicted the appellants for robbing Charles Bundi (PW2) of his motor cycle. It is the said Charles Bundi that the magistrate referred to as the complainant in his judgment. However, the charges that were before the court against the appellants were robbery on Cyprian Mweteri (PW4) of a motor cycle registration number KMFC 570J. It is therefore Cyprian Mweteri who was the complainant in the case. There is no time in his judgment that the magistrate considered the evidence that the appellants robbed Cyprian Mweteri



of his motor vehicle. The magistrate instead addressed himself to the robbery against Charles Bundi which is not the charge that the appellants were facing before the learned magistrate. It is then clear that the reasons given for the conviction of the appellants related to a different offence and not the one the appellants were facing. The appellants were as a result convicted for an offence that they were not charged with nor tried of. Failure to consider the evidence adduced against the appellants and convicting them of an offence for which they were not tried of amounted to a miscarriage of justice and thus a mistrial.

18. The *Black's Law Dictionary* (9th Edition) defines a mistrial as:

a trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings."

19. The trial magistrate failed to consider the evidence that was adduced against the appellants and instead convicted them for an offence for which they were not charged with. I therefore declare that the trial was a mistrial and a nullity. There is no ground for me to consider the merits of the appeal as the reasons given by the trial court involved a different offence. The only option is for me to nullify the whole trial which I hereby do. The conviction against the appellants is in the premises quashed and the sentence set aside.

20. The question is whether I should order a re-trial. The principles upon which a re-trial may be ordered were stated by the Court of Appeal in *Muiruri v Republic* [2003] KLR 552 that:

Generally whether a retrial should be ordered or not must depend on the circumstances of the case. It will only be made where the interest of justice requires it and if it is unlikely to cause injustice to the appellant. Other factors include illegalities or defects in the original trial, length of time having elapsed since the arrest and arraignment of the appellant; whether the mistakes leading to the quashing of the contáction were entirely the prosecution making or not. "

21. It is the trial magistrate who is to blame for the mistrial in this case. The appellants were charged in June 2021. They have been in custody for one-and-a half years. The appellants were facing an offence of robbery with violence which is a serious offence. In my view the appellants will not suffer any prejudice if they are re-tried of the offence. I therefore order that the appellants be re-tried of the offence before another magistrate of competent jurisdiction other than Hon. Simon Arome. The appellants to be produced before the Principal Magistrate, Marsabit for fresh plea on the January 25, 2023.

DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF JANUARY 2023.

J. N. NJAGI

JUDGE

In the presence of:

Mr Ochieng for Respondent

Appellants — Present in person at Marsabit Law Courts

Court Assistant -Abdow

14 days R/A.

