



REPUBLIC OF KENYA



**KENYA LAW**  
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**Koech v Republic (Criminal Appeal E028 of 2021)  
[2023] KEHC 1357 (KLR) (21 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1357 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CRIMINAL APPEAL E028 OF 2021  
TM MATHEKA, J  
FEBRUARY 21, 2023**

**BETWEEN**

**EDWARD CHERUIYOT KOECH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. On September 22, 2021 the appellant Edward Cheruiyot Koech who was charged with Robbery with Violence Contrary to Section 296 (2) of the *Penal Code*. It was alleged that on the 12<sup>th</sup> day of December 214 at Olenguruone Village in Kuresoi District within Nakuru County jointly with others not before court robbed Jonathan Kirui Ksh 20,000/= and two mobile phone Nokia and Techno valued at Ksh 10,000/=
2. He was found guilty and sentenced to life imprisonment.
3. He was aggrieved by both the conviction and sentence and he lodged this appeal dated September 27, 2021.
4. He set out the following grounds of appeal.
  1. That the learned magistrate erred in law and fact by relying on a contrived P3 form (P Exhibit 1) which was filled one year after the purported attack on the alleged victim (PW1).
  2. That the learned magistrate erred both in law and fact by according undue weight to evidence of the prosecution.
  3. That the learned magistrate erred both in law and fact by, disregarding the fact that the appellant was not positively identified by all the prosecution witnesses save for PW1 who solely implicated the appellant in the alleged offence in his evidence which was tendered



approximately 4 years after the alleged assault and which evidence varied significantly with the statement which the PW1 had given to the police immediately after the alleged assault.

4. That the learned magistrate erred in law and fact by disregarding the appellant's defense.
  5. That the learned magistrate erred both in law and fact by convicting the appellant harshly which it is conspicuous that the prosecution's case was full of glaring gaps, inconsistencies, contradictions, uncorroborated evidence and the same was not proved beyond reasonable doubt.
  6. That the learned magistrate erred both in law and in fact in shifting the onus of proof on the appellant.
  7. That the learned magistrate erred both in law and fact by convicting the appellant against the weight of evidence tendered which pointed at the 1<sup>st</sup> accused person namely Geoffrey Korir Kipngetich as the sole perpetrator of the alleged offence.
  8. That the learned magistrate erred both in law and in fact by harshly sentencing the appellant without considering the mitigation adduced by the appellant.
5. The appeal was disposed off by way of Written Submissions. The Appellant was represented by Mr Bore, the state by Ms Murunga.
  6. The appellant took a plea on May 18, 2015, and pleaded not guilty. The case for the prosecution was set out by the complainant, Jonathan Kipkorir Kirui.
  7. He told the court that on June 12, 2014 around 9.00p.m. he was coming from his bar, on reaching his home, he parked his motor vehicle approximately 20 metres away from the home.
  8. When he got out of the car, he heard footsteps, and thought it was a dog. He had a torch, and on putting it on, he saw a person's legs coming towards him hurriedly. On pointing the torch to the face of the approaching person, he saw that the person's face was covered with a piece of cloth. The person was armed with a *rungu* which had a metal nut embedded in it, locally referred to as "nut". This person attacked him with the nut. The complainant blocked with his right hand, the blow injured his little finger at right hand. He said there were several blows which he also blocked, the third blow he was able to snatch the *rungu*, but he was now bleeding profusely, and his blood also stained his attackers.
  9. By that time his torch had fallen down. He said it is then he saw the accused, coming from behind the attacker armed with a *rungu*. He said he identified him by the torch light of the torch which had fallen on the ground, because it reflected on the accused's face. He said he saw that the accused had a sharp panga. He said he was able to push the 1<sup>st</sup> attacker whom he described as Geoffrey, who fell on Koech (the accused). Geoffrey held on to the complainant's head, and was also hitting the complainant as he tried to escape. He tried to remove the coat and it was at this time that the accused cut him on the right hand. The coat fell. The Complainant said that the accused knew him as a cattle trader and was aware of a deal the complainant had made that day where he had sold a cow at Kshs 140,000/=. He said he screamed but by the time a crowd formed, the accused and his accomplice had run away. He said they disappeared with his coat and took Kshs 80,000/= from his coat pocket, which coat they abandoned in the bush. He said he found Ksh 20,000/= in his trouser pocket. He also said that he was confused and recorded at the police statement that Ksh 80,000/= was stolen. He said his phone make Nokia was also stolen and recovered in Muchorwe
  10. (After his testimony the prosecution sought to amend the charge sheet). (The record does not show the amended charge though PW1 was stepped down and recalled to continue with his testimony).



11. The complainant continued his testimony where he said that Ksh 20,000/= and two of his phones were stolen, a Samsung and Nokia cell phone valued at Ksh 20,000 – Ksh 30,000.
12. He said he took himself to hospital at Olenguruone where he was treated. He testified that he went to drink alcohol and produced a 1,000 note alcohol, which was blood stained. That it was one Geoffrey Kiprotich alias Medam who produced that the Kshs 1,000 note, but he later escaped. He also testified that it was this same Geoffrey who called the police and said reported that one Koech had committed the offence. He said he later gave out a blood sample. He identified the P3, and the government analyst report.
13. He said his money was never recovered. That his cell phone was recovered in Muchorwe but at the time he was testifying he had misplaced the same.
14. On cross-examination by Mr Tengekyon for the accused, he said that the accused was arrested because he the complainant had seen him at the scene, and that Geoffrey had mentioned him. He said police told him to look for Koech. He said he knew Koech well because they used to work together; that he knew Koech well, knew his home, that he saw Koech cut him with a panga. He said when police recorded his statement he told them he did not know who had attacked him. He said he did not know the name of his attacker. He said he told the police he did not know the name of his attackers.
15. He alleged that the accused sent elders to him seeking for forgiveness. He said he did not mention the accused in his statement because he was sick. He said he was also awaiting investigations. He added that the accused was mentioned by Geoffrey.
16. PW2 was Sharon Chepkurui. Her testimony was that she was a bar attendant at Olenguruone. On December 12, 2014 she was working at Buffalo Club. Around 9:00 p.m. she attended to 2 people who sat in one of the private rooms. They requested for alcoholic drinks. She noticed that one of them had a blood stained jacket. She informed her boss one Hellen Massit who told her to ask them to pay. That person gave her a Ksh 1,000/= note that she noted was also blood stained. She gave her boss the Ksh 1000 and her boss returned change of Ksh 350/=.
17. The next day her boss told her that the Ksh 1000/= note had been taken by the police. She testified that she was later called to Olenguruone Police Station by an officer by the name Kitheka. He asked her whether she could identify the person who had given her the blood stained note. While there a person was removed from the cells and she identified him. She said she did not know the accused who was in court but she identified the person who had given her the money.
18. PW3 Charles Kipngetch Rotich testified that he was employed by one Jonathan Kirui and his Kapchorwa Bar. On the material date, he counted the sales for the day of Ksh 20,000/= and gave to his employer. It is then that one Geoffrey a boda boda rider known to him, came and demanded to be sold alcohol. PW3 refused to sell him alcohol because he knew his behavior while drunk. Geoffrey proceeded to insult PW1, threatening to cut him with the knife tied to his waist. He spent about 10 minutes throwing insults at PW1 then left. Soon thereafter PW1 left. PW3 said 30 minutes later, a neighbour of PW1 came to tell him that PW1 had been injured and was in hospital. PW3 went to see him. He found he had a cut on the head, and hand, and PW1 told him that he was attacked in town and robbed of his phones and Ksh 20,000/=. PW3 told the court that he had only seen the accused in court. He said Geoffrey was not in court. He said PW1 told him that he was attacked by the person who had argued with him in the bar.
19. PW4 Jackline Kirui was the clinical officer who produced the P3 form. She said the complainant arrived at Olenguruone hospital around 9.30 pm on December 12, 2014 and reported having been injured by



people he did not know on the hand and head. The injuries were at that time about 1-hour old. P3 was filed on May 9, 2015.

20. PW5 No xxxx PC K Kitheka Charles said he received report on December 12, 2014 at about 10.00 pm that a man had been attacked, injured and robbed at Mzalendo Village. He and Sgt. Atandi proceeded to the scene, then the hospital where complainant told them he was attacked by 3 men whom he knew well. They assaulted him and robbed him of Ksh 20,000/= and 2 phones Nokia and Samsung.
21. The following day he got the information from PW2 about the blood stained customer with a blood stained jacket. He took the note and the blood samples from complainant to government analyst. On the May 13, 2015, assisted by the complainant he arrested Geoffrey Korir at Keringet. On May 12, 2015 the complainant identified Edward Koech, and they proceeded to have him arrested. He said the complainant said he knew the 2 accused; one was his employee the other a neighbour.
22. The prosecution closed its case and accused was found to have a case to answer. The court described him as the 2<sup>nd</sup> accused
23. In his defence the appellant told the court.

“I am a trader of Olenguruone Kapchorwa village (Reminded of charges) at the alleged date I was at home Kapchorwa doing cow’s trade. That night I heard screams from direction of Mzee Jonathan Kirui and I was inside. I got outside and the screams went silent. The following day around 10.00 am I went to the center where I went to

work and I heard two people talk about it and were, Samuel Chebitet, Joseph Ruto, Bernard Rono. We went to Mzee Jonathan (the complainant) where the four of us with my fellow traders and we found him with many bandages and the wife allowed us in as we wanted to pass our sympathy as we used to work with the complainant.

After talking shortly police telephoned him and he left. We stayed there with other neighbour before we left. After 6 months, I was surprised to be charged with an offence here since I did not commit the offence. Even to date I do not know why I was charged with the offence in court. I still transact with the complainant and do business with him. I have never disagreed with him and he is a neighbour around 1km away. The charges are false. I do not know Geoffrey Kirui.”

24. The learned trial magistrate after hearing both the prosecution and the defence found that the charge against the appellant was proved and convicted him accordingly.
25. The parties agreed to proceed by way of Written Submissions which they highlighted.
26. Mr Bore appeared for the appellant. He pointed out the learned trial magistrate misconstrued the facts; one, that the complainant gave evidence that was highly contradictory on the ingredients of the offence. The complainant told me he has sold cattle, made Ksh 140,000/=, that the accused person knew this and that is how he robbed him. However, his own employee told the court that the complainant collected proceeds of sales from this bar business of Ksh 20,000/= that night and had a quarrel with one Geoffrey. That when he went to see him in the hospital, he said he had been robbed of Kshs 20,000/= and his 2 phones by the person he had quarreled with in the bar and that person was Geoffrey. He said that his phones were recovered, yet police said none were recovered. The learned trial magistrate did not recall that the charges against the 1<sup>st</sup> accused were withdrawn, leaving only the appellant to stand trial. That the evidence given by the prosecution witnesses clearly pointed to the accused against whom the charges were withdrawn.



27. On identification, he submitted that PW2 was called to station, and a person was called from the cells. She identified that person as the person who had given her the blood stained note. That person was not the appellant.
28. Further that no DNA evidence was produced. The complainant did not identify the appellants.
29. Ms Murunga appeared for the state. It was their position that the appellant was properly identified by the complainant as he was known to him since they did the same business. That the complainant was robbed of his money and phones and injuries caused to him. Hence the charge was proved against the appellant and the sentence meted against him was well deserved,
30. I have carefully considered the submissions by both counsel. This being a 1<sup>st</sup> appeal the court is required to review the evidence and draw its own conclusions. The issue then, is did the prosecution prove its case beyond a reasonable doubt to warrant the conviction and sentence?
31. An analysis of the evidence must keep in mind the required combination of the ingredients of Section 296 (2) of the *Penal Code*; the act of theft from the person by more than one person, armed with dangerous weapon, who injured, or threatened to injure the victim.
32. On the fact of being robbed; the complainant's testimony of being robbed is not credible. He began by saying that the money he was robbed of was Ksh 80,000/= out of Ksh 140,000/= which he said were proceeds of selling a cow. That he was accusing the appellant herein because the appellant was aware of that deal on the date of the offence and he knew that the complainant had that money.
33. These facts changed when he said he had forgotten what had happened. He said he had been robbed of Ksh 80,000/= and found that he had Ksh 20,000/= in his pocket.
34. This testimony read together with that of PW3, his employee, who said that he gave the employer Ksh 20,000/= from the proceeds of the bar sales, creates doubt as to whether the complainant was robbed. This witness testified that on the night of the attack he visited the complainant in hospital. The complainant told him that he had been robbed of his two mobile phones and the Ksh 20000 he had just collected from the bar. It is also on record that at the hospital on the same night he told the doctor he did not know the persons who attacked him yet when the police came he told them that he knew the three men who had attacked him.
35. With respect to the identification it is on record that the offence happened at night. The complainant gave a detailed description of the scene and the manner in which it happened. A consideration of the same: it is not credible that the complainant would be able to identify a person in that kind of light and in those circumstances. It is also clear that the complainant's testimony as to who assaulted him is contradictory to the extent that it is unbelievable
36. The other evidence by the prosecution witnesses does not support his version of what happened. When he went to hospital he said he was attacked by people he did not know, that was same night. He told the police he was assaulted by three men, he did not name or describe them. There is no evidence that he gave any names/descriptions and when he recorded his statement, he simply says he said he did not name the attackers.
37. The evidence that is glaring in the face of the learned trial court is that one Geoffrey had a confrontation with the PW1 30 minutes before he was attacked. That the complainant told his employee that it was this Geoffrey who had attacked and robbed him shortly after the incident had happened. This is the same person was identified by PW2 as the one who had blood stained clothes and money, and by PW3 as the



one who argued with complainant. No other witness mentioned the appellant herein as having been seen anywhere with the complainant, neither did the complainant name him on the 1<sup>st</sup> instance.

38. The accused statement of defence that he was charged 6 months after the alleged offence was not controverted by the state. The fact that they were neighbours with the complainant and were doing the same business was testified to by the complainant hence all along the appellant was at home. His being charged was not supported by any evidence long after the real culprit had absconded.
39. I find therefore that it is correct that the learned trial magistrate misapprehended the facts of the case and did not analyse the evidence otherwise she would have arrived at a different conclusion.
40. I find therefore that the appeal has merit. The same is allowed. The conviction is quashed. The sentence is set aside and the appellant is to be set at liberty unless otherwise legally held.
41. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF FEBRUARY 2023.**

**MUMBUA T MATHEKA**

**JUDGE**

**CA Edna**

For state Ms. Murunga

For appellant Bore

