



**Murigi & 2 others v Republic (Criminal Appeal 36, 35 & 38 of 2019
(Consolidated)) [2023] KEHC 3011 (KLR) (29 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 36, 35 & 38 OF 2019 (CONSOLIDATED)
SC CHIRCHIR, J
MARCH 29, 2023**

BETWEEN

DAVID KAMANDE MURIGI ALIAS MKORINO 1ST APPELLANT

SOLOMON NGÁNGÁ KINYUA 2ND APPELLANT

STANELY NGUGI WAITHAKA KINGÓNGÓ 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal arising out of conviction and sentence of judgment of
Senior Principal Magistrate Court at Kigumo in Criminal Case No.
1302 of 2017 delivered by Hon. A. Mwangi (PM) on 10th July 2019)*

JUDGMENT

1. The Appellants were charged with the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#). It is alleged that on May 22, 2017 at Mithika Village, in Kandara Sub-county within Muranga County, the four accused jointly with others not before court while armed with dangerous weapons namely, pistols, pangas, knives and metal bars robbed Andrew Rebiro Kangátu of cash of Ksh. 400,000, a TECHNO mobile phone valued at kshs11,000, a Nokia C2 Mobile phone valued at Kshs7,500/- and a Nokia 1105 mobile valued at ksh.4000/= all valued at ksh. 422,500 /= and immediately before the time of such robbery fatally injured one Samuel Njuguna Mugo.
2. They were convicted and sentenced to life imprisonment. This appeal is against the conviction and sentence.



Grounds of Appeal

3. The Appellants have set out several grounds of appeal which I have consolidated and summarized as follows:
 1. That the Appellants were not properly identified
 2. That the conduct of the identification parade violated the National police service standing orders.
 3. That the prosecution failed to summon a crucial witness
 4. That the respective defences were ignored by the Trial court
 5. That the prosecution's case was not proved beyond reasonable doubt.

1st Appellant's Submission

4. It is the 1st Appellant submission that the circumstance under which the offence was committed did not allow proper identification, that the identification parade was not conducted according to the guidelines set out in National police service standing orders.

He further submits that the case was poorly investigated and there was no evidence produced to link the Appellant to the offence. It is also his submission that the trial court disregarded his unsworn evidence. Finally, it is submitted that the offence of robbery with violence was not proved beyond reasonable doubt.

2nd Appellant's Submission

5. It is the 2nd Appellant submissions that he was not assigned an advocate contrary to the provisions of article 50(2) of the *Constitution*. He further submits that the identification parade did not comply with the National Police Service standing orders. That the prosecution's case was full of inconsistencies, contradictions and contained material defects; that there was no evidence connecting him to the crime; that his defence was not considered and finally that the prosecution did not prove its case beyond reasonable doubt.

3rd Appellant's submissions

6. It is the 3rd Appellant's submissions that he was not identified at the identification parade. He further submits that the evidence led never linked him to the offence. That one crucial witness was not summoned to testify. He further submits that the prosecution failed to produce the Safaricom data to prove that he was linked to the theft of the Mobile phones. He further submits that the trial court failed to take into consideration his defence; that contrary to the prosecution assertion, there was no evidence that one Mary Kiptoo was his wife. And finally he was not found with any stolen property.

Respondent's submission

7. It is Respondent's submission that the charge was proved beyond reasonable doubt as all the ingredients of robbery with violence was proved. On the identification, the Respondent submits that there was enough light on the scene to allow for positive identification. On the identification parade the Respondent states that it was not the only evidence that the learned magistrate relied on to identify the appellants. On the alleged failure to call crucial witness, the Respondent has relied on section 143



of the *Evidence Act* and submitted that it is only required to summon such number of witness as are sufficient to prove their case beyond reasonable doubt.

8. On whether there were any material contradictions on the prosecution's case the respondent has urged the court to find that the discrepancies and contradictions if any, were not prejudicial to the Appellant's case.

On their Appellant's defences the Respondent's submission is that they were mere denials, and none of them called witnesses to back them up.

Finally on sentencing, it is submitted that the trial court did not act on any wrong principle or overlooked any material factor.

Determination.

9. I have considered the rival submissions and the authorities relied on and have perused the record of appeal. The duty of this court as the first appellate court is to look at the evidence afresh, do its own evaluation and arrive at its own finding (see *Oneko v Republic* (1972) EA 32

10. In my view the following issues need to be determined.

1. Whether the appellants were positively identified.
2. Whether the identification parade was properly conducted
3. Whether the prosecution failed to call crucial witness
4. Whether the trial court failed to consider the Appellants' defences
5. Whether the prosecution's case was full of contradictions and inconsistencies and whether the case was proved beyond reasonable doubt.

Whether the appellants were properly identified.

11. On identification, the Appellants have raised several aspects of identification. They have submitted that from the evidence of the complainants, it can be deduced that they were ordered to lie down on the sides of the vehicle and not in front, and therefore the headlights could not have provided enough light for identification; That there was only one security light (which was hit and broken by one of the assailants). It was further submitted by the Appellants that since the victims testified that they were lying down but managed to look up and saw the faces of the attackers, the encounter was too brief to allow for proper identification. Further it is submitted that there was no description given to the police on the appearances of the attackers. It is further argued that PW2 was too shocked and could not have been in a state of mind that would afford her the ability to identify the attackers.

12. Guidelines on identification are well enunciated in the case of *R v Turnbull* (1976) 3 All ER 549 cited with approval in the case of *Daniel Obanya Mangoli & ano v Republic* (2017)eKLR.

The court stated as follows: "the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to make. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people?"

13. The Appellants were identified by 3 of the prosecution witnesses, namely PW1, PW2 and PW3. PW1 and PW2 were the victims of the attack. They told the court that the car headlights were on and so were the security lights and hence there was enough light to see and identify the assailants. On cross examination PW1 told the court that the security light was from "Philips high performance". PW2



further told the court that the 2nd appellant held a gun to her head as he talked to her. He told her that if she screams “like she did the last time”, he would shoot her.

PW1 told the court he was told to lie down but was able to look up and saw one of the attackers

PW3 was inside the compound at the rear part of the house. He was attracted by the commotion and a scream. He came around and saw PW1 being hit. PW1 fell down and he saw one of the assailants stepping on PW1’s head. PW3 started pleading with the attacker to spare his brother’s (PW1’s) life. The assailant addressed him by his name. “Kirumi”, and told him he will be shot if he kept on disturbing him.

The assailant put the gun near PW3’s ears and shot twice in the air. He described the “man with a gun” as having “a beard and big hair” ; that the assailant(with the gun) had not covered his head. He had never seen him before. He identified “the man with a gun” in court as the 2nd Appellant.

14. PW1, PW2 and PW3’s evidence was consistent in that there was sufficient light to identify the attackers as the car lights and the security lights were on. It was PW3 evidence that one of the attackers later went and destroyed one of the security lights but he had already seen them. PW2 and PW3 were consistent in that the man with the gun was the 2nd Appellant. This assailant seemed to have had prior knowledge of his victims. PW2 told the court that the 2nd appellant told her not to scream. “Like last time” and addressed PW3 as “Kirumi” .The evidence of PW1, PW2 and PW 3 were consistent on the account of lighting on the surroundings. The Appellant’s argument that the victims were thrown on the side as opposed to the front part of the vehicle is based on mere speculation. It was admitted by PW3 that a security light was destroyed but the witness told the court that he had already seen the attacker before the same attacker destroyed the security light. PW1 told the court that the security lights were of a powerful nature. This contention was not questioned at cross- examination.

I am satisfied there was enough light to allow for identification.

15. What about the amount of time the witnesses had the assailants under their observation? The assailants must have taken sometime to subdue their victims and to ransack their belongings. At cross examination, PW2 told the court that he first sighted the 2nd appellant as he broke the car window, while holding a gun. He then went on to demand for her items. Then there was sudden intrusion by PW3 and the same man who had the gun had to turn his attention to the “the intruder.” The assailant put his gun next to the ear of the witness and shot in the Air. He addressed witness. The observation of the 2nd Appellant by this witness therefore must have been at a very close range. There was another intrusion by a person who came running through the gate, the gun man turned and shot him. This was Samuel Njuguna Mugo, who was fatally wounded during the incident.

From the three witnesses’ accounts there was a lot that happened within that time, which must have given ample time to each of these witnesses to identify the assailants.

16. On the description, PW3 stated that the man holding the gun was “short and with a beard”. In any event in the case of *Francis Kariuki Njiru & others vs Republic* (2001)eKLR, the court was of the view that failure to provide a description is not necessarily fatal to the prosecution case. Each set of prevailing circumstances must be looked at individually. The circumstances, in my view, allowed for sufficient time to allow for proper identification.

Whether the identification parade was properly carried out

17. The procedures on identification parades are set out in chapter 42 paragraph 7 of the National Police Service standing orders. Some of the guideline relevant to the issues raised in this case include:



- a. That the accused has a right to an Advocate or another representative
 - b. The number of people in the parade should not be less than 8
 - c. The people in the parade should be of similar build, height , age and appearance
 - d. The witness should not be allowed to see the suspect before the parade.
18. The appellants have argued that the use of the same line –up for picking out the 1st and 2nd Appellant’s violated the police standing orders as the 1st and 2nd Appellants are of different body- built. They also submit that using the same line up for the two separate parades compromised the integrity of the parade. Further, the 2nd Appellant’s argues, PW2 must have been shown his photograph prior to identification parade. The Appellant further submits that the parade was not made up of 8 people and the people in the lineup were not of similar age, height or general appearance.
 19. Although the 2nd Appellant argues that his photograph must have been shown to PW1 and PW2 prior to the parade, there is no evidence to support this allegation. He has not told the court at what point his photograph could have been shown to the witnesses.
 20. On whether they were in the parade with people of fairly similar built and appearance. PW5 told the court he tried his best to ensure that the required standard was met.
 21. I have looked at the identification parade forms (Exhibits 6 and 7) and considered the evidence of PW6 and I do not find any violation of the National Police standing procedures. It is my finding that the identification parade complied with the police orders.

Whether the prosecution failed to call a crucial witness

22. It is the 3rd Appellant submission that the prosecution failed to summon one Mary Kiptoo to explain to the court on how she came into possession of one of the cell phones. Mary Kiptoo features in the evidence of PW6 and PW 8. The investigating officer through the mobile service provider, safaricom, traced one of the stolen mobile phones to the then 4th accused, one Clement. Clement alleged that the phone was given to him by the 3rd Appellant. The said clement led the officers to the 3rd Appellant’s house in Withethie and found Mary Kiptoo, who alleged she was the wife of the 3rd Appellant. Mary told the officers that the phone indeed belonged to the 3rd Appellant who was then in ithaga. she took the officers to Ithaga. The 3rd Appellant was found and arrested. The safaricom data showed that the first telephone line to be used in the particular phone after it had been stolen was No.0791613048. The number was registered to mary kiptoo but the sim card for the said phone was found in the custody of the 3rd Appellant. Thus the 3rd Appellant was found to have been the first person to have used the phone Nokia 105 which had been stolen from the complainants. Mary was not found with the phone. The then 4th Accused also told the investigations officer that the phone was given to him by the 3rd Appellant in this case. When the investigation officer was questioned at cross examination as to why Mary was not called, he told the court that in the course of investigations she stopped cooperating. He further told the court that the 3rd Appellant and the said Mary had told the investigations officers that they were husband and wife.
23. I have no reason to doubt PW6 and PW8 in this regard. It follows that the moment Mary withheld her cooperation, she could not be compelled, as she is not a compellable witness owing to her marital relationship to the 3rd Appellant. There would have been no need for the investigations officer to summon a witness who would not be compelled to testify.



24. Section 124 of the Evidence Act requires the prosecution to only call such number of witnesses as may be sufficient to prove their case beyond reasonable doubt. The discretion on calling witnesses is also the exclusive to the prosecution.

Failure to summon Mary was not fatal to the prosecution's case.

Whether the doctrine of recent possession was established.

25. In the case of R vs Republic cited with approval in *Stephen Njenga vs Republic*, Nakuru Criminal Appeal No. 175 of 2003) it was held: "If it is proved that premises have been broken into, and certain property has been stolen from the premises and that very shortly afterwards, a man is found in possession of the property, that is certainly evidence from which the jury can infer that he is the housebreaker or shop breaker".
26. It was the 3rd Appellant's submission that he was not connected to the crime; That he was not identified on the scene or on the parade held. He submits that it was therefore erroneous for the court to have convicted him.
27. The then 4th accused told the court that he was arrested by police and he took the police to the people he had given him the phone. The then 4th accused had therefore given an explanation on how he came to be in possession of the phone, the 3rd Appellant on the other hand gave no explanation.

It was upon the 3rd Appellant to explain how he ended up with the phone. The onus was on him. It is also instructive that in his unsworn statement he never responded directly to the issue of why he was in possession of the sim card of the telephone line that was the first to be used on the stolen phone.

I find that the doctrine of recent possession was established and the 3rd Appellant was rightly fully convicted.

Whether the defence evidence was ignored

28. All the Appellants gave unsworn statements. A reading of the judgment of the lower court shows that, contrary to the assertion by the Appellants, the court considered their statements. In the said statements that none of the Appellants directly responded to the accusation raised against them. I have also taken note of the fact that each Appellant, stated that they were elsewhere on the day of the robbery but none availed any witness to back up their claims.

Were there any contradictions and inconsistencies in the prosecution's case, and was the case proved beyond reasonable doubt?

29. The ingredients of the charge of robbery with violence is contained in section 295 as read with 296(2) of the penal code. The ingredients have been reiterated in many past decisions. In the case of *Jeremiah Oloo Odira v Republic* (2018) eKLR cited by the Respondent, any of the following circumstances must be present:

- a. The offender must be armed with any dangerous or offensive weapon or instrument or;
- b. The offender is in the company of one or more persons or;
- c. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence on any person.

The prosecution is only required to prove one of the above ingredients



30. In the present case, there is evidence that the assailants were armed with a metal bar and a gun. The Appellants, according to PW1, PW2 and PW3 were in each other's company. Finally, one Samuel Njuguna Mugo was short death by one of the assailants.

I find that all the ingredients of the offence were present and the charge was proved beyond reasonable doubt

Sentence

31. The appellants were sentenced to life imprisonment, against the prescribed sentence of Death. I have also noted that the sentence is not challenged on this Appeal and therefore there is no need to address myself to it.

ORDERS:

32 The Appeal is unmerited, it is hereby dismissed

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 29TH DAY OF MARCH, 2023

S. CHIRCHIR

JUDGE

In the presence of ;

CA- Susan

1st Appellant- present

2nd Appellant – present

3rd Appellant- present

Ms Muriu for the Respondent.

