**Kamau & another v Republic (Criminal Appeal 73 of 2020)**
**[2023] KEHC 2825 (KLR) (Crim) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2825 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL**

**CRIMINAL APPEAL 73 OF 2020**

**DO OGEMBO, J**

**MARCH 27, 2023**

**BETWEEN**

**MICHAEL MUNENE KAMAU ..... 1ST APPELLANT**

**MESHACK MWENDA MBALUKA ..... 2ND APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the conviction and sentence arising from Criminal Case No. 975 of 2018 at the Principal Magistrate's court at Milimani, Hon. H. Okwani, PM and Judgment delivered on 22.10.2019)***

## JUDGMENT

1. The 2 appellants Michael Munene Kamau and Meshack Mwendwa Mbaluka were jointly charged before the lower court with the offence of Robbery with Violence contrary to section 296(2) of the *Penal Code*. That on May 27, 2018 at around 21:00 Hours along Luthuli Avenue in Nairobi within Nairobi County, jointly with others not before court. They robbed Mark Nyaoni Nyaburi of his mobile phone make X-Tigi Imei Number 3519xxxxxxxx/xx valued at Kshs.10,000/= and cash Ksh. 11,000 all valued at Ksh.21,000/= and immediately before the time of such robbery, threatened to use violence against the said Mark Nyaoni Nyaburi.

2. The 2nd appellant, faced an alternative charge of handling stolen goods contrary to section 322(1)(2) of the *Penal Code*. That on 27.5.2018, at the junction of Luthuli Avenue and River Road in Nairobi, within Nairobi county, otherwise than in the course of stealing, he dishonestly retained 1 mobile phone make X-Tigi imei number 3519xxxxxxx/xx, having reason to believe it to be stolen property.

3. After a full hearing, the appellants, in s judgment delivered on October 10, 2019, were both convicted on the main charge. On March 10, 2020, they were both sentenced to serve 20 years imprisonment. Feeling aggrieved, they have appealed to this court.

   The 1st appellant has raised the following grounds of appeal

   1. That the learned trial magistrate erred in law and fact by convicting the appellant on the identification evidence of the complaint without proper finding that there was no evidence that he gave of the descriptions of the appellant to the police immediately after the incident had occurred.

   2. That the learned trial magistrate erred in law and in fact by failing to observe that the credibility of the complainant's evidence was doubted and questionable hence not worth to have been relied on.

   3. That the learned trial magistrate erred in law and in fact by convicting the appellant in reliance on the evidence of the complainant without proper finding that the same was dock hence worthless.

   4. That the learned trial magistrate erred in both law and facts by shifting the burden of proof to the appellant.

   5. That the learned trial magistrate erred in law and fact by convicting the appellant in the doctrine of recent possession of a phone which was not proved.

   6. That the learned trial magistrate erred in law and facts by failing to give the defence of the appellant adequate consideration and further failed to comply to the provisions of section 169 of the *Criminal Procedure Code*.

4. The 2nd appellant, on the other hand, filed grounds of appeal (amended) as follows:

   1. That the trial court erred in law and fact in failing to consider that the charges as laid down were defective thus defective charge sheet.

   2. That the trial court erred in law and fact by failing to interrogate the evidence of PW1, 2 and 3 and 4 which was incredible.

   3. That the trial court failed to reevaluate the evidence of single witness on identification and dismissed the necessity of identification parade.

   4. That the trial court lost direction after being influenced by the adduced evidence and breached the appellant's right to fair trial underarticle 50(2) of the *Constitution* of Kenya.

   5. That the trial court further lost discretion while convicting the appellant by disregarding the plarseible defence of the appellant which was not displaced by the prosecution as per section 212 of the *Criminal Procedure Code*.

5. Both the appellants have pleaded that their appeals be allowed, their convictions quashed and sentences set aside.

6. This appeal was canvassed by way of written submissions. The submissions were as follows:

7. The submissions of the 1st appellant, Michael Munene Kamau, were that he was not positively identified in view of the prevailing circumstances i.e that it was in a dark room. That no identification parade was ever conducted. He relied on *Maitanyi v Republic* 1986 KLR, 198, that

1. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available, conditions and whether the witness was able to make a true impression and description.

2. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered before the decision is made.

3. That failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

8. He further relied on *Simiyu & another v Republic* [2005]KLR 192, and *Wilson Sitoya & another v Republic* [2009]eKLR.

9. It was further submitted that the court relied on a faulty doctrine of recent possession. He relied on the case of *Isaac Nganga Kahiga v Republic* [2006]eKLR, in which application of the doctrine is ordered as:

i) By establishing that the property was found with the suspect.

ii) By establishing that the property was positively identified as the property of the complainant.

iii) By establishing that the property was recently stolen from the complainant.

10. The appellant contended that whereas PW1 and PW2 allegedly recovered the stolen phone from the appellants, they failed to conduct a proper search and recovery in accordance with the police standing orders. He also challenged the evidence produced regarding the M-PESA transactions, while relying on *Emmanuel Mwadine v Republic* [2016]eKLR and *Julius Karisa Charo v Republic*, where the Court of Appeal, held that police officers should restrict themselves only to the production of police abstracts and other non-technical documents. Also *Alex Ngoko v Republic* H/B, Criminal 13 of 2014.)

11. The appellant also relied on the cases of *Bukenya & others v Uganda*,and *Daniel Kibiegon Ng'eno v Republic* [2018]eKLR, that the prosecution is under a duty to call all necessary witnesses and that in case of failure to do so, that court may infer that the evidence of the uncalled witness would have tended to be adverse to the prosecution. He cited the failure to call the Safaricom mobile communication officer.

12. The appellant has also submitted that the court disregarded his cogent defence.

13. The 2nd appellant, Meshack Mwenda Mbaluka, on his side submitted that the complainants' norm appeared as 3 different names, and also the dates of the offence as recorded in the proceedings. That the evidence of PW1 created a doubt as to when he was robbed or when the money was sent to him by his mother. He also challenged the evidence of PW3 on identification since it was dark in the room. Relying on *Wamunga v Republic* [1989]KLR 424, he challenged the circumstances of the visual identification. And the fact that no identification parade was conducted.

14. The appellant also pointed out certain irregularities which occurred during the trial. He gave the examples of the case proceeding before the court could confirm service of witness statements. He also submitted that the court failed to consider his defence. He pleaded that his appeal be allowed.

15. The state opposed this appeal. In the submissions filed, it was submitted that the prosecution managed to prove the following ingredients beyond any reasonable doubt:

a) Proof of the ingredients of the offence.

b) Positive identification of the assailants

c) Doctrines of recent possession.

16. That the ingredients of the offence were proved since the attackers were more than 1 and violence was also used during the incident. On identification, the prosecution relied on the evidence of the complainant to prove the same.

17. And on the doctrines of recent possession, counsel relied on *Nyandika Orwerwe v Republic* [2014]eKLR,and *Gideon Meitekai Koyiet v Republic Republic* [2013]eKLR, in which the 3 ingredients already seen above were upheld. That 1st appellant was found with the phone of the complainant stolen from the robbery within a very short time and the appellant failed to offer any reasonable explanation as to how he got to have the victims phone. And that 2nd appellant also failed to explain how Kshs,1000 was transferred to his phone from the victims phone during the incident. This transaction places him at the scene.

18. On witnesses not called, counsel relied on section 143 of *Evidence Act*, that prosecution may call any number of witnesses to its case. Further, that the court duly considered the defence of the appellant. Learned counsel otherwise pleaded that the sentences of the appellants be enhanced to life sentence in accordance with the law. The court was urged to dismiss this appeal.

19. These are the submissions the parties made in support of and against this appeal. The jurisdiction of this court over this matter as a 1st appellate court is well settled. In *David Njuguna Kariuki v Republic* [2010]eKLR, the Court of Appeal held:

20. The duty of the 1st appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion."

21. This court is therefore mandated to reconsider the whole evidence on record and to determined on the same.

22. From the proceedings of the lower court, PW1 PC Danied Bokan testified that on 27.5.2018, he had been on patrol with his colleagues PC Kiilo and PC Okello along Luthuli Avenue at about 9:00Am, when they met 5 young men whom they asked to introduce themselves. That the men started running away making them pursue them. They managed to arrest 2 of the men as they tried to enter Rico club. That on searching them, they recovered 4 phones from which they failed to prove ownership of. They duly arrested the men and handed them over. In court, he identified 1X-Tigi phone recovered (MFI-1). That later one Mark Nyadori Nyaboti, a complainant of a robbery identifies the phone to be his. That it was 1st appellant who had the phones. That when the 1st appellant gave pin numbers of the other phones, same were handed over to him.

23. PW2 was PC Gabriel Kiilo. He had been on patrol with PW1. He confirmed that after the men they met failed to stop, they gave chase and arrested 2 of the men as they tried to enter club Rico. The 2 are the appellants before court. That after the 2 opened the other phones, they failed to open the pin of 1 X-Tigi phone. The 2 were duly arrested. He confirmed that he recovered the phone from 1st appellant. And PW3 Mark Nyaundi, recalled that on 27.5.2018 at 9:00am, he was in his house when he received a call to pick a log book of a motor cycle opposite Jack and Jill. He heeded and got the caller. The caller took him to a room in a lodging and 3 other people joined the room. That the 3 men demanded Kshs.300,000/= from him. That one of the men proceeded to take his 10,000/= as they beat him demanding for the 300,000/=. That in the process, he called his mother who sent him Ksh.1,000/= in his phone which he did. He later got the phone at central police station. He identified the M-PESA

statement of his line showing that on 27.3.2018 at 6:24pm a sum of Ksh.1,000/= was sent to number 0715xxxxxx, registered in the name of Meshack Ndegwa Mbaluka.

24. He answered that the building had light but the room was dark though it was not night. That the attack was during daylight and he could see. He otherwise confirmed that no parade was held for him. That there was a window and he was able to see the appellants.

25. And Corporal Charles Liru was PW4. His testimony was that on 28.5.2018, PW1 and PW2 brought the 2 appellants to him at Central police station. He took the statements and the exhibits including the phones, motor cycle sale agreement, inventory and M-PESA statement.

26. The 1st appellant gave a sworn defence in which he stated that on 27.5.2018, he left home and headed to Rongai, reaching at about 11:00AM. That he was back in town at 11:00PM. When we met 2 police officers who asked him for his ID card. He was then arrested and taken to central police station. He went on to say that he had personal differences with the OCS of the station, and that he was charged with an offence he did not know. He denied the time shown on the OB of 21:55 hours and stated he was then still in Rongai.

27. 2nd appellant also gave a sworn defence. His evidence was that he resides in Likoni, Mombasa. That on May 27, 2018 he had been at a musical launch at Kangundo when at about 8:00pm, 2 police officers stopped him and asked for his Identity card. He was then arrested and later charged in court.

28. This case is of robbery with violence contrary to section 296(2) of the *Penal Code*. This section read;

> "If the offender is armed with any dangerous or offensive weapon or instruments 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."

The above provisions confirm the ingredients of this offence. The ingredients are:-

i) That the offender is armed with any dangerous or offensive weapon or instrument.

ii) That he is in company with one or more other person or persons,

iii) That at or immediately after the time of such robbery, he wounds, beats, strikes or uses any other personal violence to any person.

29. And there are a plethora of court decision confirming the above position. Prominent amongst which is the Court of Appeal decision in *Oluoch v Republic* [1985]KLR.

30. From the record of the proceedings, the case of the prosecution was based on the evidence of PW3, Mark Nyaundi, the complainant, specifically that when he was taken by the caller to the room, in the lodging 3 other people joined in and demanded Kshs.300,000/= from him. That one of the men proceeded to take from him Kshs.10,000/= as they beat him demanding for the Kshs.300,000/=. That after calling his mother, a sum of Kshs.1000/= was sent to his phone which was forcefully taken away. That he later found his phone at the central police station and that the MPESA statement of his phone line showed that on 27.3.2018 at about 6:24pm, a sum of Kshs.1000/= was sent to number 0715-xxxxxx, registered in the name of Meshack Mwenda Mbaluka.

31. The evidence of this witness is relevant in as far as the above ingredients of the offence of robbery with violence is concerned. It confirms that at least 4 men were involved in the attack. It further confirms that actual force was used on him as the perpetrators demanded the sum of Kshs.300,000/= from him. The evidence of the witness further confirmed that indeed he was robbed of his cash, Kshs.10,000/=,

his X-Tigi phone from which a further Kshs. 1000/= was unlawfully withdrawn. There is therefore no doubt that the prosecution herein only proved the elements of the offence of robbery with violence.

32. The issue, therefore that remains for determination by this court is whether the 2 appellants before the court were amongst the gang of 4 men who robbed the complainant. On this issue, the prosecution availed several witnesses. In the evidence of PW3, after the incident, he was released and he went home. That the incident took place in the morning at about 9:00am, in a room where he could see the 2 appellants whom he had otherwise not seen before.

33. The evidence of PW1 PC Daniel Bokan and that of PW2 PC Gabriel Kiio are also material in this respect. These 2 witnesses testified that as they were on patrol at about 9:00am, they met 5 young men who on being asked to identify themselves, started running away. This was along Luthuli Avenue, the same vicinity in which PW3 was robbed at around the same time. That they managed to arrest 2 of the men, the 2 appellants, as they tried to enter Rico Club. That 4 phones were recovered from the 2 appellants. They failed to prove ownership of the 4 phones. That PW3 later identified one of the phones as his phone which had been robbed from him that same morning in the same vicinity. The witnesses confirmed that it was 1st appellant who had the phone.

34. And the evidence of PW4, Corporal Charles Liru, corroborated the evidence of PW3 that the MPESA statement (Exh-3) confirmed that the sum of Kshs.1000/= was sent from the phone line of the complainant to that of 0715-xxxxxx, of 1st appellant.

35. The evidence above can only lead to several undeniable conclusions. That both appellants were part of the gang who robbed the complainant. That both PW1 and PW2 must have come across and confronted the 2 appellants and the others not before court soon after they had robbed the complainant. By their conduct, i.e of starting to run away when asked to identify themselves, the 2 appellants must have had the common intention of robbing the complainant. That the phone of the complainant who had just been robbed from him shortly a while ago was recovered from the 1st appellant. He must have taken it during the recent robbery. And finally the fact that the sum of Kshs.1000/= had even been transferred from the phone of the complainant to that of 1st appellant, proves beyond any doubt that the appellants are the ones who robbed the complainant on 27.5.2018.

36. 1st appellant gave sworn defence in which he dealt on how he was arrested allegedly after failing to provide his Identity card and the fact that he had been away in Rongai in the morning of that day with respect, the appellant had no defence at all to the allegations levelled against him by the prosecution witnesses who placed him squarely at the scene of the crime and also in recent possession of the stolen phone of the complainant. I find the defence of 1st appellant to be a mere denial and dismiss the same.

37. The 2nd appellant, also gave a sworn testimony in which he testified on how he was arrested and the fact that he was only charged in court after he failed to give the arresting officers the money they demaned. It is noted that PW1 and PW2 were both arresting officers. At no time during cross examination did the appellant raise this issue with the witnesses. The fact that the appellant had to wait till his defence to raise this issue convinces this court that the defence of the appellant was an afterthought and unbelievable. I find no merit in the defence of the 2nd appellant and I dismiss the same.

38. It is incumbent upon the prosecution to prove the guilt of an accused person beyond any reasonable doubt. In this case, I am convinced that the prosecution discharged this burden as required by the law.

39. Section 296(2) of the *Penal Code* provides for death sentence for the offence of robbery with violence. In this case, the 2 appellants are sentenced to serve 20 years imprisonment each. I find this sentence legal and proper.

40. The sum total is that the appeals of the 2 appellants lacking in any merit are dismissed wholly.

**D. O. OGEMBO**

**JUDGE**

**27TH MARCH, 2023**

**Court:**

Judgment read out in open court (on line) in presence of the 1st appellant (Shimo la Tewa) and 2nd Appelant (Kamiti), and Ms. Chege for the state.**

**D. O. OGEMBO**

**JUDGE**

**27TH MARCH, 2023**