



REPUBLIC OF KENYA



KENYA LAW
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**Jane v Republic (Criminal Appeal E016 of 2021)
[2023] KEHC 22937 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22937 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E016 OF 2021
LM NJUGUNA, J
SEPTEMBER 29, 2023**

BETWEEN

BRIAN MACHARIA JANE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. L.W. Kabaria (PM) in the Principal Magistrate's Court at Gichugu Criminal case No. 1662 of 2018 delivered on 09th August 2021)

JUDGMENT

1. By an undated petition of appeal the appellant seeks that the appeal be allowed, conviction be quashed, sentence set aside and the appellant be set at liberty. The appeal is premised on the grounds that:
 - a. There was no parade conducted;
 - b. The inventory form was not signed by the accused;
 - c. The trial magistrate did not consider his defense;
 - d. The complainant did not prove that the exhibits before the court belonged to him;
 - e. The trial magistrate relied on identification only, which lacked merit.
2. The appellant faced 2 counts of robbery with violence, contrary to section 295 as read together with section 296(2) of the *Penal Code*. The particulars of the 1st count were that on 26th December 2018 at PI Center in Kirinyaga East Subcounty in Kirinyaga County, the appellant, jointly with others not before court, robbed Felix Mwenda of his mobile phone make Infinix X572, Tecno W5 all valued at Kshs. 18,000/= and immediately after the time of such robbery, threatened to use actual violence against Felix Mwenda. The appellant was acquitted of this count at trial.



3. The particulars of the 2nd count were that on 26th December 2018 at PI trading Center in Kirinyaga East Subcounty in Kirinyaga County, the appellant, jointly with others not before court, robbed Kennedy Kimani of his mobile phones make Infinix X467 valued at Kshs. 15,000/= and immediately after the time of such robbery, threatened to use actual violence against Kennedy Kimani. The appellant was convicted and sentenced on this count.
4. The appellant pleaded not guilty and a plea of not guilty was duly entered. The prosecution called three witnesses in support of its case.
5. PW1, Kennedy Kimani stated that he was in the company of his friends on the morning of 26th December 2018 between 1am and 2am and they were heading home from Palm Dew hotel. That they met the appellant who was within a crowd of about 12 people. That the people attacked them, beat them up and made away with their mobile phones. That he reported the incident to the police station and recorded a statement on 26th December 2018. That he sustained bruises on the face and neck. It was his evidence that he knew the appellant before that incident, and at the time of the incident, there was enough light for him to be able to positively identify the appellant. That when the police officers accosted the appellant at his house, the phones that were stolen on the night of the incident were recovered and the appellant was positively identified. On cross examination, he recounted the testimony and added that the person who led the police to the appellant's house is not known to PW1. That there are street lights at the place where the incident occurred.
6. PW2, a police officer at Kianyaga Police Station stated that on 26th December 2018 at around 10am, two young men went and reported that they had been attacked on their way home and their phones had been stolen. That later in the day, he received a tip-off that the appellant was at his friend's house and they went together with a fellow officer and the 2 claimants. That the appellant led them to his house where the stolen phones were found at the house which had been raided and the appellant was arrested. On cross-examination, the appellant raised the defense of alibi to which PW2 responded by stating that the issue of the appellant having travelled to Nairobi was unknown to him (PW2) and the appellant was not arrested at the stage. That the appellant was identified to the police officers by his co-accused. He also denied that him and the complainants were acquaintances. He stated that he was not familiar with the place where the incident occurred and could not confirm or deny whether there were street lights. He denied the allegation that the police officers had planted the phones at the scene in order to implicate the appellant.
7. PW3 was a police officer at Kianyaga Police station and he was in the company of PW2 during the investigations. He stated that following reporting of the incident, the complainants showed the police officers the house where the appellant and his co-accused were at the time. That the appellant led the police to his house and 2 of the 3 lost phones were found. That he visited the scene at around 9PM during the night patrol and was satisfied that the appellants and the other co-accused were positively identified because there were street lights at the scene. That an identification parade was not conducted because the complainants could identify the accused persons before arrests were made. That an inventory of the lost phones recovered at the house of the appellant, was made.
8. Upon the close of the prosecution's case, the accused persons were placed on their defense after the trial court found that they both had a case to answer.
9. DW1 was the appellant who stated that on the night of the alleged incident, he was at Palm Dew night club when a fight ensued and everyone was forced to leave. That on his way home, he found 2 groups of people fighting. That he joined the group fighting against another group of young men called 'Gaza'. That police officers were called to the scene and the crowd was dispersed. That he later went to his friend's house where he spent the night and had breakfast with his friend the next morning. That the



police officers went to where he was, accompanied by 6 men and they said that they had found some stolen phones in his house. That the complainant asked for Ksh. 150,000/= for them to do away with the case but he did not have the money. That later he learned that he had been charged with robbery with violence. On cross examination, he stated that he knew PW1 and even bought miraa from him severally. That he is the one who asked for the money.

10. DW2 was the one who carried DW1 on his motor cycle on the night of the incident but couldn't take him all the way home because it was at night. On cross-examination he stated that he gave the appellant a lift sometime between 2:30am and 3am. That he knew the appellant from seeing him at the shopping center but they only became friends after he gave him the lift.
11. The parties were directed to file their written submissions and they both complied.
12. The appellant submitted that he was not subjected to an identification parade and yet he was allegedly identified from a crowd of about 10-12 people. That PW2 stated that he wasn't sure whether the place of the alleged incident had street lights or not. That none of the prosecution witnesses could place the appellant at the scene of the crime. He relied on the cases of *Gitbinji vs. Republic* (1970) EA and *Peter Mwangi Mungai vs. Republic* (2002) eKLR in making his case that he should have been acquitted as there is no evidence connecting him to the crime. He submitted that when the police officers took him to his house (which he hadn't slept, in the previous night) he was left outside and they went inside where they allegedly found the stolen phones. That the injuries allegedly sustained by PW1 were not corroborated by medical evidence. That at the time of the incident, the appellant's phone was being held by one Felix Mwenda who neither attended court as a witness, nor as a complainant. That the police allegedly found many other phones and sim cards in the house of the appellant but they only took the 2 phones and left the others, which is questionable especially because there was no inventory produced in evidence. He further submitted that the elements of the charge of robbery with violence have not been satisfied and the sentence meted out to him is excessive. He cited the case of *James Kariuki Wagana Vs. Republic* (2017) eKLR and *Francis Karioko Muruatetu & another Vs. Republic* (2017) eKLR.
13. On his part, the respondent submitted that the appellant had been satisfactorily identified and relied on the case of *Wamunga vs Republic* (1989) eKLR on identification of the appellant. The respondent conceded that indeed failure by Felix Mwenda to testify failed to link the stolen phone to the complainant because he is the one who is alleged to have been having the phone at the time of the robbery. It was their submission that the absence of an inventory does not negate the fact that items were stolen and produced as exhibits. That neither of the complainants could confirm that the recovered phones belonged to them. That the second complainant Felix Mwenda could have shed more light on the contradictions regarding identification of the appellant.
14. From the foregoing, it is my view that the issue for determination is whether the offence was proved beyond reasonable doubt.
15. Under Sections 295 and 296(2) of the Penal Code, the offence of robbery with violence is characterized by 3 elements, namely:
 - a. The offender is armed with a dangerous and offensive weapon or instrument; or
 - b. The offender is in company of one or more person or persons; or
 - c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person (see the case of *Oluoch vs. Republic* (1985) eKLR).



16. These sections provide as follows:

“295. 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.

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(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

17. In this case, I shall test these elements of the crime against the evidence produced before the court. PW1 stated that on the night of the incident he was in the company of others when they were attacked by the appellant among others in a crowd of about 10 people. That in the process, he sustained bruises on the face and neck. That the incident was reported to the police. I do note that the injuries sustained were not reported as there was no P3 form produced as evidence. PW1 went on to say that his phone was stolen but the said phone was in the custody of Felix Mwenda, who, though named as a complainant, did not testify as a prosecution witness. PW1 stated that he was able to identify the appellant because he had seen him at Gathoge before the incident. If that was the case, there was no evidentiary value for an identification parade. In the case of *Republic Vs Valentine Maloba & 2 others* (2021) eKLR it was held:

“Identification parades are not conducted in respect of people who are recognized but in respect of strangers, whom witnesses claim that given a chance, they can be able to identify the perpetrator.”

18. The appellant’s account of the events is that he joined a group of people who were fighting against another group of young men identified by the name ‘gaza’, at the time of the reported incident. From this, it is my view that the appellant surely was at the scene of the crime in the company of others. However, there is no evidence showing that the appellant and his companions were armed with dangerous and offensive weapons or instruments.

19. The appellant has also raised the issue of identification of the stole items, while highlighting absence of an inventory by the arresting officers. The police inventory would have helped in identification of the exhibits as part of evidence. From the evidence, it is true that the stolen phones were recovered from the house of the appellant and the complainant s were present to positively identify the items, regardless of whether the items were recorded in an inventory which was signed or otherwise. The absence of an inventory is not prejudicial to the appellant’s case. This has been stated by courts in previous cases. In the case of *Leonard Odhiambo Ouma and Another vs. Republic* (2011) eKLR the Court of Appeal discussed the effect of failure to prepare an inventory on recovery and observed as follows:-

“Failure to compile an inventory as contended in ground 5, is in our view a procedural step which in the circumstances, did not prejudice the Appellants in any way and for this reason, the omission did not vitiate the trial. We find no substance in this ground as well.”



Also, in the case of *Stephen Kimani Robe and Others Vs. Republic* (2013) eKLR that such failure:

“The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence.”

20. Having stated the above, it is my view that the offence of robbery with violence has not been proved beyond reasonable doubt. However, a lesser offence has been proved through the evidence produced. I am still convinced that the phones were stolen but not in the province of robbery with violence. Therefore, I am guided by the provisions of Section 179 of the *Criminal Procedure Code* which provides as follows:

“(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.”

21. In my view, the evidence herein is sufficient to prove the offence of robbery contrary to Section 295 as read together with Section 296(1) of the Penal Code, which provide as follows:

“295 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.

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(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

22. I take this view because it has been proved that the appellant was in the company of others who together attacked the complainants. It is on record that the complainant sustained injuries but there is no evidence to show that the appellant was armed with dangerous weapons. Secondly, even though Felix Mwenda did not testify, PW1’s phone was recovered from the appellant’s house. This brings into focus the doctrine of recent possession. The complainant positively identified the phone as his and when he put his password, it worked. The appellant did not explain how the phone came to be in his house.

23. In the upshot, I find and order that the conviction for robbery with violence is hereby quashed and sentence set aside. In its place, I hereby substitute the offence of robbery with violence contrary to Sections 295 and 296(2) of the Penal Code, with the offence of robbery under Section 295 as read together with Section 296(1) of the Penal Code. Consequently, the death sentence is hereby set aside and substituted with a sentence of 7 years imprisonment to run from the date of sentence imposed by the trial court.

24. It is so ordered.



DELIVERED, DATED AND SIGNED AT KERUGOYA THIS 29TH DAY OF SEPTEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent

