



REPUBLIC OF KENYA



KENYA LAW
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**Njeri v Republic (Criminal Appeal 42 of 2020)
[2023] KEHC 25926 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25926 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL 42 OF 2020
PM MULWA, J
NOVEMBER 29, 2023**

BETWEEN

MICHAEL MBUGUA NJERI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the conviction and sentence in Gatundu Cr. Case No. 1040 of 2018)

JUDGMENT

1. Michael Mbugua Njeri, the Appellant herein, was jointly with another charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. The particulars of the offence were that on the night of 16th and 17th July 2018 at Mitero Village, in Gatundu North sub-county, within Kiambu County with others not before the court while being armed with dangerous weapons namely pangas and axes they robbed Margaret Wambui Ndungu of her motor vehicle registration number KBN xxxB Toyota Probox, Kshs 21,000/= cash, Kshs 66,000/= from m-pesa, 2 generators, 1,000/= cash, 1 sack of maize, 1 sack of beans, 15 bags of coffee, 1 tv set, 1 Samsung mobile phone, 5 pairs of suits and assorted house utensils valued at 1,000,000/=.
2. Having been gone through a full trial, the trial court acquitted the 2nd accused person, convicted the appellant of the offence of robbery with violence and sentenced him to serve 15 years imprisonment.
3. Aggrieved by the conviction and sentence the appellant has filed the instant appeal by a petition of appeal dated 31st July 2020 citing the following grounds:
 - i. The learned trial magistrate erred in law and in fact in convicting and sentencing the appellant while the evidence adduced was scanty and/or insufficient thereby arriving at a wrong decision.
 - ii. That the learned trial magistrate erred in law and in fact in convicting and sentencing the appellant without considering the appellant's defence thereby arriving at a wrong decision.



- iii. The learned trial magistrate erred in law and in fact in convicting and sentencing the appellant on evidence which was contradictory thereby arriving at a wrong decision.
 - iv. The learned trial magistrate erred in law and in fact in importing extraneous matters in the judgment which matter was not part of the evidence thereby arriving at a wrong decision.
4. The appeal was canvassed by way of written submissions

Appellants submissions

5. In his submissions filed on 14th July 2023, the appellant argues that the prosecution failed to establish the key ingredients of the offence of robbery as set out under section 296(2) of the [Penal Code](#). He stated the prosecution failed to adduce the weapons namely the axe and pangas involved in the robbery as alleged by Pw1. That there was no tangible evidence tendered to show the appellant upon his arrest was found with any dangerous or offensive weapon or instrument.
6. The appellant denies being in the company of the assailants during the raid. According to him, Pw1 alleged the 2 accused persons were unknown to her. He averred that the prosecution failed to adduce evidence to prove that the complainant was wounded immediately after the robbery.
7. The appellant further argued that the prosecution failed to positively identify the appellant as the perpetrator as Pw3 and Pw4 did not positively identify him. That Pw4 assumed the appellant withdrew the money from her m-pesa shop on the 17th July 2018, whereas the m-pesa message with which the money was withdrawn read Margaret Wanjiru. This was proof that he was not the perpetrator. He averred the prosecution failed to demonstrate a connection that places him at the scene of the raid and at the m-pesa shop as no CCTV footage was adduced before the trial court.
8. According to the appellant Pw4 did not describe the appellant in her statement and she only identified him after his photographs were taken and shown to her, which was a clear violation of the rules on the identification parade. He asked the court to consider the complainant's evidence with caution and cites the case of *Bogore Moses and Anor v Ugandan supreme Court CR/App no.1 of 1997*.
9. It was the appellant's contention that there was no direct cogent, convincing identification evidence to place him at the locus in quo and that the identification was purely a dock identification.
10. The appellant submitted that he was not arrested for the commission of the present offence but rather implicated by the prosecution due to the long, lasting grudge that existed between him and one Cpl Simon Kagiri, and there lacked credible investigations by the prosecution.
11. In conclusion the appellant averred the trial court failed to consider his unsworn statement and meted a harsh and excessive sentence in the absence of aggravating circumstances. He urged the court to set aside the conviction and sentence.

Respondent's submissions

12. In opposing the appeal, the prosecution averred the learned trial magistrate did not err in convicting and sentencing the appellant as the key ingredients of the offence of robbery with violence were proved. That the prosecution had proved that indeed a robbery took place and the complainant reported the matter to the police station and was issued with an OB no. 2 and 4 of 17th July 2018 which were adduced in court as exhibits. Further that the evidence of Pw1, Pw2, and Pw3 was very corroborative and the Evidence of Pw1 was well supported by her m-pesa statement which confirmed at the day of the robbery she had money in her m-pesa which was without her consent or authority transferred to other persons.



13. As to the identification of assailants, counsel submitted that the prosecution was able to prove that the appellant presented himself before pw4 and withdrew some money at the m-pesa shop with the assistance of Pw4 after a lengthy engagement the appellant, and that the said evidence was not challenged at the trial court.
14. Further counsel submitted the investigating officer was able to prove the appellant used the mobile number 0714xxxxxx registered in the name of Margaret Wanjiru and phone number 0713xxxxxx registered in the name of Lucas Mburu. It is averred the appellant failed to demonstrate how he came to be in possession of the mobile phone number belonging to the complainant.
15. On the ingredient of if the assailant were armed or more than one, the prosecution avers that evidence of Pw1, Pw2 and Pw3 proved the assailants were more than one.
16. Counsel submitted the trial court conviction and sentence of 15 years was proper noting that under Section 296 of the Penal Code the penalty for robbery with violence is death. That the sentence is lenient and called upon the court to dismiss the appeal and uphold the trial court's conviction and sentence.

Analysis and determination

17. This being the first appellate court, my duty is well spelt out, namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court (*Okeno v Republic* [1972] EA 32).
18. I will first briefly analyse the trial court evidence;
19. Pw1 - Margaret Wambui Ndungu testified on how on the material night hooded and armed men went to her home and ordered her to give out her mobile phone and pin, the car keys and the gate keys. She narrated how the assailants went to the store took 15 sacks of coffee, one sack of maize, and a sack of beans. She avers the assailants also took her late husband's clothes, television set, money, cooking pots and other valuables in the house. She stated that she was not able to identify the assailants at the scene.
20. Pw2 - Yvonne Wambui Ndungu testified that the attackers who were carrying pangas and axes stormed in while they were in the outer kitchen. They were forced back to the house and made to lie down. When they screamed and the robbers covered them with duvets and proceeded towards her grandmother (Pw1's) room and eventually the robbers carried foodstuffs, utensils and many households using her uncle's vehicle.
21. Pw3 - Sylvia Njeri testimony to a large extent mirrored that of Pw2. She, as well as Pw2 did not see the faces of the assailants.
22. Pw4 - Magdalene Wambui Maina testified on 17th July 2018 while at work a customer went to her m-pesa shop to withdraw money but did not have an ID card. She declined to transact for him but the customer requested that he send the money to her phone so that she could assist with the withdrawal. She agreed and when the money was sent to her, the sender's name was Margaret Wanjiku. Upon enquiring why, the name appearing was that of a woman and the customer responded it was that of his wife and that their vehicle had stalled near the Blue post hotel and money was needed.
23. She identified the 1st accused (the appellant herein) as the customer who approached her for a withdrawal. She told the court that at the time of the transaction, the 1st accused was not hooded and that they spoke for long and she was able to identify him. She testified that the CCTV at the work premises stored information for only 14 days.



24. In cross-examination Pw4 confirmed that at first she was remanded in the police cells for three days as the police conducted investigations, and later she went to the police station to identify the 1st accused who she had told the police had a mark.
25. Pw5 testified that he knew “Clue” alias Michael Mbugua Njeri who was a relative (cousin to wife). He stated he did not know of any dispute between the 1st accused and Corporal Kagiri.
26. Pw6 - Peter Mbatha of Digital Forensics Cybercrime unit was tasked with extracting messages and ascertain whether the mobile numbers 07142xxxxxx, and 0713xxxxxx were paired to the phone between 1st July 2018 to 18th July 2018. He prepared a report in which he stated he was not able to extract any information as that falls within the ambit of Safaricom. He however found the sim card and it was paired with ICCD no. 8925402102408xxxxxxxxxx and IMEI No.639021xxxxxxxx.
27. Pw7 IP Nicodemus Kyale, the officer in charge anti-crime Gatundu police station stated that he conducted the identification parade on 24/8/18 and that it was done in accordance with the law and he produced the Id parade Form as exhibit 7.
28. Pw8 - PC Leyclif Odhiambo testified he was one of the officers who recovered an abandoned car at Githurai 44 - Toyota Probox Probox KBN xxx silver and grey in colour, which they towed to Kiamumbi Police Station.
29. Pw9 - Cpl Caleb Natani gave a chronology of the events that happened on the night of the robbery and the subsequent arrest of the 1st accused. He stated that the 2nd accused was arrested on the account that his phone was linked to that of the 1st accused.
30. DW1 - Michael Mbugua Njeri (1st accused) narrated his previous arrest for the offence of an attempt to commit a felony.
31. Dw2 - John Gathirwa (2nd accused) testified about his arrest and the encounter of his home search on 28th September 2018. He told the court he was framed and the police requested him to give a bribe of Kshs 100,000/= which he failed to and that is when he was charged with the offence of robbery with violence.
32. The trial court in its judgment found the prosecution had proved the offence of robbery with violence against the 1st accused person and convicted him. The court found there was no evidence linking the 2nd accused to the crime and he was acquitted.
33. Having considered the grounds of appeal, submissions thereon and evidence adduced before the trial court, I find the paramount issue for determination is whether the prosecution proved the offence of robbery with violence against the appellant beyond reasonable doubt.
34. Sections 295 and 296(2) of the [Penal Code](#) which define and provide for the offence of robbery are 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.

296(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.”

35. It is clear from the above provisions that robbery is committed when a person steals something capable of being stolen. For the offence of robbery with violence to be proved the prosecution must prove the following:
- i. the offender was armed with a dangerous weapon,
 - ii. the offender was in the company of one or more persons
 - iii. the offender at or immediately before or immediately after the time of robbery wounds, beats, strikes or uses any other personal violence to any person.
36. Pw1, Pw2, and Pw3 gave a recollection of what unfolded on the night of the incident. From their testimony, it was clear the complainant was attacked by a gang of robbers who were armed with dangerous weapons namely pangas and axes and they stole valuable goods from the house. Despite the fact that Pw1, Pw2 and Pw3 did not get to see the assailants' faces the appellant was connected to the incident for having transacted with the complainant's phone on the night of the incident. The said phone had been stolen during the robbery. It was also evident through the complainant's statement that the appellant transferred money to himself using his pseudo accounts in the name of Lucas Muiruri Kshs 6,000 and Margaret Wanjiku Githunguri Kshs 60,000 which transaction was done on the night of the robbery.
37. I find the trial court was proper in holding that a robbery actually happened.
38. The appellant was positively identified by Pw4 who told the court that the appellant transacted with the Margaret Wanjiku Githunguri's phone under the guise that the phone belonged to his wife. When he went to withdraw money from the m-pesa shop he had no ID and Pw4 engaged him for some time before she agreed to do the transaction.
39. I wholly agree with the trial magistrate when she stated in her judgment that
- “it is my finding that the witness having transacted with the 1st accused (appellant) and having had the time to interrogate him on his identity card and the names that appeared in the M-pesa message, had sufficient opportunity to be able to positively identify the 1st accused and she in fact did identify him.”
40. The appellant challenges the way the identification parade was conducted. The trial court found that Pw4 having interacted with the appellant she could clearly identify him at the identification parade. And that the appellant misunderstood the whole concept of the identification parade.
41. In *R v Turnbull & Others* (1976) 3 ALL ER 549 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 be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone



whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

42. In this case the communication between the appellant and Pw4 took place during the day and pw4 engaged the appellant for some time when discussing about the m-pesa transaction.
 43. It is my finding that the appellant was properly identified by Pw4. The identification parade form indicates the appellant did indeed agree to the manner in which the parade was conducted.
 44. The appellant in his defence alleges bad blood with the police and that is why he was put behind bars and accused of the crime of robbery with violence. I find this to be an afterthought and does not hold water.
 45. It is this court’s finding that the trial court, in making its determination considered the appellant’s defence which it found that without any explanation by the appellant, it was a clear indication he was among the assailants. I do agree with the trial magistrate.
 46. Having analysed the evidence before the trial court, it is my finding that the prosecution proved the key ingredients of the offence of robbery with violence, the appellant was in the company of more than one person and were armed with crude weapons.
 47. The law prescribes a death sentence for the offence of robbery with violence, the trial magistrate exercised her discretion and sentenced the appellant to 15 years imprisonment. Since there was no injury occasioned during the commission of the offence, the level of robbery did not amount to a heinous crime warranting a death sentence.
 48. The grounds of the appeal herein must fail. Consequentially the appeal on conviction and sentence fails.
 49. I accordingly find no reason to interfere with the sentence meted upon the appellant by the trial court. The appeal is dismissed.
- It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 29TH DAY OF NOVEMBER 2023.

P.M. MULWA

JUDGE

In the presence of:

Duale/Kinyua – Court assistants

Appellant - present virtually from Kamiti Maximum

Mr. Gacharia - for the Respondent

