



**Ngare alias Kivuti Nyaki & another v Republic (Criminal Appeal E015 & E016 of 2023
(Consolidated)) [2023] KEHC 25625 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25625 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E015 & E016 OF 2023 (CONSOLIDATED)
LM NJUGUNA, J
NOVEMBER 22, 2023**

BETWEEN

DANIEL NYAGA NGARE ALIAS KIVUTI NYAKI 1ST APPELLANT

RAMIKE NDUNGU NGIGI ALIAS NDOCHA/CORPORAL 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from the decision of Hon. S.K. Ngii (PM) in the Principal Magistrate's
Court at Siakga Criminal Case No. E385 of 2021 delivered on 31 st March 2023)*

JUDGMENT

1. The appellants were jointly charged with two counts; the first being Robbery with violence contrary to Section 295 as read together with Section 296(2) of the *Penal Code*. Particulars of the offence are that on 17th May 2021 at Kwamurindi village in Mbeere South Sub-county within Embu County, the appellants, jointly with another not before court, while armed with dangerous weapons namely an axe-saw and metal rod, robbed Charity Ndiga Nyaga of her cash Kshs. 171,000/= and during the time of the robbery, threatened to use actual violence to the said Charity Ndiga Nyaga.
2. The 2nd count was the charge of grievous harm contrary to Section 234 of the Penal Code, whose particulars were that on 17th May 2021 at Kwamurindi village in Mbeere South Sub- County within Embu County, the appellants, jointly with another, unlawfully did grievous harm to Boniface Leshornai.
3. After the hearing, the court found all the appellants guilty of both counts and sentenced them to 15 years imprisonment on the first count and 7 years imprisonment on the 2nd count, the sentences running concurrently. Being dissatisfied with the decision of the trial court, the appellants have brought this appeal seeking orders that the convictions be quashed, sentences be set aside and they be set at



liberty. In the case of the 1st appellant, the grounds of appeal are that the learned magistrate erred in law and fact by:

- a. Finding that the appellant was involved or had common intention with others to commit the alleged offences;
- b. Failing to find that the prosecution evidence was full of contradictions thereby the offences were not proved beyond reasonable doubt;
- c. Disregarding the appellant's defense without giving cogent reasons;
- d. Failing to note that the evidence on record does not support the finding and judgment of the court;
- e. Convicting and sentencing the appellant without considering that the presentencing report showed that he was innocent;
- f. Sentencing the appellant to 15 years imprisonment without considering the exceptional circumstances; and
- g. Failing to note that no identification parade was conducted to prove the identity of the perpetrators.

4. In the case of the 2nd appellant, the grounds of appeal were as follows:

- a. That the appellant's right under Article 50(2) of *the Constitution* was breached as he was not provided with an advocate by the state in the case of robbery with violence;
- b. That the trial magistrate erred in law and fact by finding that the prosecution had proved the offence of robbery with violence beyond reasonable doubt;
- c. That the trial magistrate erred in law and fact by failing to find that the prosecution witnesses were untrustworthy due to the contradictions in the evidence;
- d. That there was no proper identification of the 2nd appellant
- e. That no identification parade or voice identification was conducted at the trial;
- f. That the trial magistrate erred in law and fact by failing to find that given the circumstances of the case, it was difficult to identify the 2nd appellant; and
- g. That the trial magistrate erred in law and fact by failing to consider the 2nd appellant's plausible defense even though the same was not rebutted according to section 309 of the Criminal Procedure Code.

5. At the trial, PW1, Charity Ndiga Nyaga stated that she runs a bar and an M-Pesa shop and the appellants were her customers. She stated that on the night of the incident, she was sleeping in her house when at around 2.00a.m, she was awoken by noises outside and alarms by PW2. That the appellants entered her house through cutting part of the room and they were armed with an axe. That they forced her to give them money or else they kill her children. She narrated that they forcefully took Kshs. 171,000/= from her. That she called the police and informed them of the occurrence. That she found the watchman, who had raised alarm, in a neighboring farm, having been injured on the head and they rushed him to Kiritiri Health Center for first aid and then to Embu Level 5 Hospital. That the appellants were tracked down and arrested and some of her properties were recovered. On cross-examination, she stated that she knew all the appellants well and she identified them to the police.



6. PW2, Boniface Leshornai, stated that on the night of the incident, he was patrolling the compound following a blackout, when he saw the appellants herein in the company of another person. That the 1st appellant ordered that he should be shot at and the 1st appellant hacked him with an axe on his head and face. That he heard some glasses being broken and then he lost consciousness. That he was admitted to Embu Level 5 Hospital for nine days. On cross-examination, he stated that he knew the appellants because they were neighbors and that he also saw them because he had a spotlight.
7. PW3 Teresia Mbatha, a neighbor of PW1 testified that she noticed some of PW1's household items at the place where one of the accused persons at the trial had rented a house. That she told the police and PW1 about the metallic chair and bench that had been stolen and PW1 positively identified them.
8. PW4, P.C. Geoffrey Simiyu of Kiritiri Police Station was assigned the case and he managed to arrest the other accused person (who chose not to appeal) and recovered the stolen items. He stated that PW1 positively identified the items as hers.
9. PW5, I.P. Nicholas Muthengi of Kiritiri Police Station, testified that on the night of the incident, he received a call from PW1 informing her of an ongoing robbery. That he and his colleague went to the home of PW1 and found her outside. He stated that the robbers had entered the house through the roof and had made away with Kshs. 171,000/=. That PW2 who had seen the robbers, was nowhere to be found until a few hours later when PW1 found him having sustained serious head injuries. That he spoke to PW2 as he underwent treatment at Embu Level 5 Hospital.
10. PW6, Cpl. Henry Kiboma of DCI Embu County stated that he accompanied the investigating officer to the crime scene where he took photographs and produced them as evidence. He also produced a certificate of photographic prints.
11. PW7, Susan Marui, a clinical officer at Kiritiri Health Center produced a P3 form which was prepared by Christine Njagi who was on maternity leave. According to the P3, PW2 suffered multiple cut wounds on the head and a deep cut on the forehead for which he was treated. She also produced x-ray films and discharge summary and medical notes as evidence. On cross-examination, she stated that the injuries sustained by PW2 were capable of affecting his thinking which may be the reason why he said he did not know his assailants.
12. PW8, Sgt. Paul Seda formerly of Kiritiri police station, was the investigating officer of the case. He stated that he was assigned this case after PW5 had already gone to the scene but the robbers had already left. That when he visited the scene, he found the roof and ceiling of the house had been cut and a ladder was also found at the scene, which he believed the robbers used to access the house. That he was informed about PW2 who had been taken to hospital for treatment and he went to take his statement. That he also recorded statements from other witnesses and managed to recover two stolen items which were produced as evidence. On cross-examination, he stated that the appellants were clearly identified by PW2 before they attacked him.
13. At the close of the prosecution's case, the court made a finding that a prima facie case had been established and the appellants were put to their defense.
14. DW3 (the 1st appellant herein) gave an unsown statement saying that on the day of the alleged incident, he was at Kwa Murindi market where he met two acquaintances and they went to PW1's bar where he bought them alcohol. That after they left the bar, PW1's husband told him that PW1's bar was raided at night. That he was later charged with the offence of robbery with violence to his surprise. He intimated that there is a grudge between him and PW1 and that she wants to put him in jail so that she can take his land.



15. DW2 (the 2nd appellant) gave sworn testimony stating that it is suspect how PW1 did not know his name yet they were neighbors. That PW2 had fraudulently obtained her current business from his mother. That the scar which PW2 allegedly used to identify him was inflicted on him in 2016 and that it was not PW2 who hit him, he produced P3 form as evidence. That on the day of the incident, he went to Kerugoya to visit his grandparents and on his way back he passed by Kiritiri Police Station where he had gone to follow up on his CSO sentence from Siakago Law Courts. That he was arrested and remanded for robbery.
16. DW4 Juliana Mbuko, grandmother of the 2nd appellant was present in court when DW2 was testifying. She stated that DW2 indeed visited her and brought her two miraa stems. That DW2 stayed at her place from 15th to 18th June 2021.
17. In this appeal, the court directed the parties to file their written submissions and they all complied.
18. The 1st appellant relied on the cases of *Akoyo Okemba & Others Vs. Republic* (2014) eKLR and *Joseph Njuguna Maura & 2 Others Vs. Republic* (2013) eKLR and reminded this court of its role as an appellate court to reexamine the evidence. It was his submission that the prosecution was tasked with proving the offences beyond reasonable doubt and its elements as set out in the cases of *Johana Ndungu Vs. Republic* (1996) eKLR and *Dima Denge & Others Vs. Republic* (2013) eKLR. He stated that apart from PW2, none of the other witnesses saw him at the scene of the crime and that the complainant only stated that he heard his voice. That it was not enough for PW2 to say that he identified him using the light from a spotlight, which according to him, did not produce enough light to identify someone.
19. He referred to the 2nd Edition *Black's Law Dictionary* for the meaning of the word identification and the effect of inaccurate identification as stated in the case of *Hassan Abdallah Mohammed Vs. Republic* (2017) eKLR. That identification of an accused person is usually guided by the credibility of the witness and the court's ability to believe his testimony and the circumstances at the time of the crime which would make the witness to remember what he saw. He relied on the case of *Toroke Vs. Republic* Nairobi C.A. No. 204 of 1987 and added that the testimony of PW2 was not sufficient to identify him.
20. He also relied on the cases of *Wamunga Vs. Republic* (1989) eKLR, *Nzaro v. Republic* (1991) KAR 212 and *Kiarie Vs. Republic* (1984) KLR 739 where the general sentiment by the courts was that where identification is done at night, the same must be watertight and if it is only one witness able to identify the accused person, then the court must proceed cautiously. As regards the 2nd count, he stated that according to PW7, PW2 was assailed by persons who were not known to him yet PW2 stated that the appellants were known to him. He relied on the case of *Ndegwa Vs. Republic* (1985) eKLR and *Republic Vs. Kipkering Arap Koske & Another* (1946) 16 EACA 135, and urged the court to allow the appeal as the elements of the offences were not proved beyond reasonable doubt.
21. The 2nd appellant submitted that his right to fair trial was infringed when he was denied legal representation at the trial yet the Chief Justice had given directions on this. He also decried the fact that PW2 did not directly tell the police that he had seen him at the scene. That PW1 said that she knew all the accused persons who were her neighbors and customers but failed to link them to the crime. He cited the cases of *Moses Munyua Vs. Republic* Criminal Appeal No. 63 of 1987 and *Njibia Vs. Republic* (1986) eKLR for his argument that the prosecution's evidence on his identification is flawed and incomplete and therefore should not be relied on by the courts. It was also his case that his alibi defense was not challenged by the prosecution and yet the court did not consider it.
22. The respondent submitted that according to Article 50(2) of *the Constitution* and the case of *William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) Vs Republic* (Criminal Appeal 49 of 2020) [2022] KECA 23 (KLR), the accused person's need for representation cannot be overstated.



That the 2nd appellant raised the issue on page 11 of the proceedings and the same was addressed by the trial court but he proceeded without counsel, therefore his right was not denied. It stated that on the 1st count, the prosecution proved the elements of the crime. It relied on the case of *Oluoch Vs. Republic* (1985) KLR 549 (unreported) and stated that even though PW1 did not see him at the scene, PW2 placed him at the scene. On the 2nd count, it relied on the case of *Pius Mutua Mbuvi Vs. Republic* (2021) eKLR and argued that following the events of the fateful night, PW2 sustained injuries that were categorized as grievous harm.

23. As to the appellants' allegations that the prosecution's testimony was full of contradictions, reliance was placed on the case of *MTG Vs. Republic* (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) where the court held that contradictions may be overlooked when they do not affect the substance of the case. The respondent relied on the cases of *Elijah Mithamo Mutahi & Another Vs Republic* [2009] eKLR and *Reuben Taabu Anjononi & 2 Others Vs. Republic* (1980) eKLR for the argument that the appellants were clearly identified given the circumstances of the case. It also stated that the trial court considered the defense and mitigation of the appellants at trial. Reliance was placed on the case of *Bernard Kimani Gacheru Vs. Republic* (2002) eKLR.
24. From all the grounds of appeal, in my view, the issues for determination are as follows;
- a. Whether the offence was proved beyond reasonable doubt;
 - b. Whether the evidence was contradictory; and
 - c. Whether the court considered the appellants' defenses.
25. On the issue of whether the offence was proved beyond reasonable doubt, I wish to discuss the elements of the crime itself as provided for under Section 296(2) of the Penal Code. It provides:
- “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.”
26. In the case of *Charles Mwai Kimani Vs Republic* [2022] eKLR the court cited the case of *Jeremiah Oloo Odira Vs Republic* [2018] eKLR where the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:
- “Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.
- On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -
- i. The offender is armed with any dangerous or offensive weapon or instrument,
or
 - ii. The offender is in the company of one or more other person or persons, or



- iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person”

27. If any of these elements is proved to the required standard, the appellants will be found guilty, given the wording of the provision. This was the position of the court in the case of *Republic Vs. Dima Denge & Others* (2013) eKLR where the court stated:

“The elements of the offence under Section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction. This was considered at length by this Court in *Johana Ndungu Vs. Republic* Criminal Appeal No. 116 of 1995 (unreported);

“In order to appreciate properly as to what acts constitute an offence under Section 296 (2) one must consider the sub-section in conjunction with Section 295 of the Penal Code. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or properly at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.”

28. PW1 testified that on the night of the incident, she heard the intruders entering her house through the roof and they threatened to kill her children if she failed to open her bedroom door. She stated that they were armed with an axe when they entered her house. PW2 was assaulted from the incident and he testified that he was patrolling the compound following the sniffer dog, when he saw the appellants in the company of another person who was not arraigned. That he hit the 2nd appellant after he ordered that he (PW2) be shot at, and the 1st appellant hacked him with an axe severally.
29. The appellants are reported to have also gotten away with Kshs. 171,000/=. The testimonies of PW1 and PW2 places the appellants at the scene of the crime. To me, these acts constitute theft accompanied by threats to violence and violence itself, before and after the theft. In my view, the offences of robbery with violence and causing grievous harm have been proved beyond reasonable doubt.
30. On the question of whether the evidence was contradictory and inconsistent to the detriment of the appellants, it is important to examine what kind of inconsistencies and their effect. The 1st appellant stated that PW2 did not correctly identify him as the circumstances under which he allegedly saw the appellants were unsatisfactory. Even if this was a contradiction, PW1 also stated that she saw them, therefore corroborating the testimony of PW2. There may be discrepancies as to the description of the events but none of these contradictions or inconsistencies are substantial as to affect the outcome arrived at by the learned magistrate.
31. The testimony still proves that the appellants were at the scene of the crime on that night. The charges were also read to the appellants and they pleaded not guilty, having understood the details of the same. They participated in the trial and cross-examined witnesses. In the case of *Erick Onyango Ondeng' Vs. Republic* [2014] eKLR the Court of Appeal cited with authority the Ugandan case of *Twehangane Alfred Vs. Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 where it was held:

“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor



contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”

32. From my perusal of the judgment of the trial magistrate, I note that at pages 57-58 of the record of appeal, the trial magistrate did consider the testimonies of the appellants. He also factored in the defenses in his analysis and determination. In this judgment, I have also re-evaluated the defenses of the appellants at trial and in my view, they did not raise reasonable doubt. On the one hand, it is the role of the prosecution to prove its case beyond reasonable doubt in criminal cases. On the other hand, the role of the defense is to punch holes in the prosecution’s case in such a way that reasonable doubt is created in the mind of the court as to the guilt of the accused person. In the case of *Pius Arap Maina Vs. Republic* (2013) eKLR, the court noted that;

“It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution’s case raising material doubts must be in favour of the accused.”

The learned trial magistrate found that the prosecution had proved its case beyond reasonable doubt. In my view, the appellants did not do enough to create reasonable doubt through their evidence. I agree with the findings of the trial magistrate.

33. In the end, having considered the pleadings and submissions herein, and the relevant caselaw, I find that the appeal is devoid of merit as to conviction and sentence on both counts, the trial court having already exercised its discretion on the latter.

34. The appeal is hereby dismissed.

35. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF NOVEMBER, 2023.

L. NJUGUNA

JUDGE

.....for the Appellants

.....for the Respondent

