



**Mbotu v Republic (Criminal Appeal E011 of 2022)
[2023] KEHC 26729 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 26729 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CRIMINAL APPEAL E011 OF 2022
DK KEMEL, J
DECEMBER 20, 2023**

BETWEEN

MOSES KINGORI MBOTO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the conviction and Sentence of Hon B. Mararo
(PM) in Nanyuki CM S.O No E023 of 2021 delivered on 16th May, 2022)*

JUDGMENT

1. The appellant was charged with an offence of rape contrary to section 3(1)(a) and (b) as read with 3(3) of the *Sexual offences act*. The particulars were that on the night of 14th and 15th of April, 2021 in Laikipia East Sub county within Laikipia County, intentionally and unlawfully caused his penis to penetrate the vagina of LMM. He also faced an alternative count of committing an indecent act with an adult contrary to section 11(1) of the said Act in that on the same dates and at the same place, he intentionally and unlawfully touched the vagina of LMM .
2. The appellant also faced a second count of an offence of robbery with violence contrary to section 296(2) of the *Penal Code*. It was alleged that on the night of 14th and April 15, 2021 in Laikipia East Sub-County within Laikipia being armed with a dangerous weapon namely a knife robbed LMM of her mobile phone make X-TIGI S.27 valued at Kshs 1,500 and cash Kshs 1,500 and at the time of such robbery threatened to use actual violence to the said LMM .
3. The appellant also faced an alternative charge of handling stolen property contrary to section 322(1) as read with 322(2) of the *Penal Code*. It was alleged that on the April 15, 2021 in Laikipia East Sub-County within Laikipia County otherwise than in the course of stealing, dishonestly retained one mobile phone make X-TIGI S27 valued at Kes 1500/- knowing or having reason to believe it to be stolen goods.



4. The appellant denied the charges and the matter proceeded to hearing.
5. PW-1 was the complainant. She stated that she woke up at 11. 30 pm and found a person inside her bedroom. That she only saw the back of the intruder who demanded money from her. That the intruder covered her face and told her to keep quiet. That the intruder took Kshs 1,000/-. The intruder proceeded to another room and drunk milk after raping her. When she checked after he had left, she noticed her phone was also missing. That the intruder had a solar light which he used to illuminate the room. In the morning, she borrowed a phone from her neighbor and alerted her son. That she later went to the police station and identified the assailant as her friend's child. On cross-examination, she stated that she had known the appellant since his childhood. She added that she had shone her torch on the appellant's face at a distance of one metre away and that the appellant immediately covered her face. That she identified him at an identification parade.
6. PW-2, Geoffrey Mwaniki testified that he received a call from the complainant's grandson. That he proceeded to the scene with a friend called Moses. Later that day, the appellant came and told them that he would buy them some alcohol. The appellant also had a phone make X-TIGI which he was selling. He reported to community policing. The appellant was then arrested with the phone which was identified by a lady. They took the appellant to Umande Police Station. On cross-examination, he stated that the appellant had offered to buy him and another guy beer and offered a certain mobile phone for sale and which a certain recognized to belong to the complainant.
7. PW-3 Moses Maina Macharia stated that he heard the complainant had been raped. Later while at Migingo trading center in the company of PW-2, the appellant offered to sell PW-2 a phone make X-TIGI. They became suspicious and arrested the appellant and escorted him to the police.
8. PW-4, Sack Guyo a clinician at Nanyuki Teaching and referral hospital produced a P3 form as well as a PRC form for the complainant. That upon examining the complainant, he noted inflammation of the vaginal walls with creamy discharge. That the hymen was broken and the vulva was swollen.
9. PW-5 Simion Weru Julius, a community manager at Ruai village stated that upon receiving report of breaking into the complainant's house. He visited the scene and found two wooden planks broken on the wall. The complainant informed him that she had been robbed of money, phone and also raped. Later that day, PW-2 called him and informed him of somebody who was selling a phone. They reported the appellant to Umande Police Station.
10. PW-6 No. 236780n IP Mayepi of Umande Police station conducted the identification parade on 15/1/2021 comprising of 12 members. That the complainant positively identified him by touching his shoulder on two instances while the appellant was standing in two different positions.
11. PW-7 No. 49711 Sgt Ngare received the identification diary and photographs which he produced into evidence.
12. PW-8 IP Joy Waweru was the investigating officer in the matter. She conducted investigations and after recording statements of witnesses she charged the appellant with the offences. She produced the recovered exhibits. On cross-examination, she stated that the complainant had not given the name of the appellant at the time of reporting the incident.
13. The trial court subsequently found the appellant had a case to answer and put him on his defence. He elected to give unsworn evidence. He stated that he took two beers from Geoffrey Mwangi and offered his phone as security. That the said Geoffrey instead offered to buy the phone and went to bring the money. That when he took long, he went outside and met him in the company of Moses Maina and Simon Weru. That they arrested him alleging the phone looked like the complainant's. He challenged



that the complainant had known him for 20 years. He also stated that the complainant had initially stated she had not known the intruder as it was dark.

14. Subsequently, the court convicted the appellant on both counts and sentenced him to 10 years imprisonment in the first count and death on the second count. The appellant appealed against both the conviction and sentence raising the following amended grounds;
 - a. The learned trial magistrate erred by convicting the appellant when the offences were not proved beyond reasonable doubt.
 - b. The learned trial magistrate erred by convicting and sentencing the appellant on defective charges for duplicity.
 - c. The learned trial magistrate erred by convicting the appellant on evidence full of contradiction, inconsistencies and un-procedurally investigated.
 - d. The learned trial magistrate erred by convicting the appellant on identification and identification parade that was flawed.
 - e. The learned trial magistrate erred by misapprehending and misapplying the doctrine of recent possession without genuine documentary evidence to prove ownership by the complainant of the mobile phone.
 - f. The learned trial magistrate erred by quashing the appellant's defence without giving good reasons.
 - g. The mandatory minimum and maximum sentence of death was harsh, excessive and unconstitutional.
15. The appeal was disposed of by way of written submissions. The same are on record and have been considered.

Analysis and determination.

16. In a first appeal, the duty of the court is as was stated in *Mark Oiruri Mose v R* (2013) eKLR thus;

....the court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
17. Having perused the record, the trial court convicted the appellant of the offence of rape and that of robbery with violence and held the sentence on rape in abeyance.
18. From my analysis of the record, I am of the view that the following issues will adequately dispose of this matter;
 - a. Whether the offence of rape was established.
 - b. Whether the offence of robbery with violence was established.
 - c. Whether the appellant was positively identified.
 - d. Whether the sentence handed down was harsh and excessive in the circumstances.



19. In a charge of rape, the essential ingredients the prosecution ought to establish were stated in *Republic v Oyer* [1985] KLR 353 where the Court of Appeal held that;
- “ 1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.
 2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.
 3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact.”
20. The complainant stated that while sleeping in her house at night, she was awoken by a stranger in her room who had stepped on her blanket. That the said intruder threatened her by telling her to shut up (“*Nyamaza*”). That the said intruder asked her for sex and proceeded to rape her while threatening her that there were other people outside.
21. The above clearly negates consent as the penetration was done under duress and thus falls within the definition of rape under section 3 of the *Sexual offences Act*.
22. The medical evidence adduced by PW-4, the clinical officer was that the complainant had an inflamed vaginal wall and had creamy discharge as well as swollen vulva. He produced the P3 and PRC forms as exhibits. This clearly shows that the complainant was indeed raped.
23. On the issue of whether the offence of robbery was established, the ingredients of the offence were stated in *Oluoch v Republic* [1985] KLR where it was held:
- “Robbery with violence is committed in any of the following circumstances:
- The offender is armed with any dangerous and offensive weapon or instrument; or
- The offender is in company with one or more person or persons; or
- 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
- ”
24. The complainant stated in her evidence that the intruder had a knife and warned her to keep quiet and covered her face with a blanket. That she was also warned from screaming. She testified that the intruder took her phone and cash Kshs 1, 500/- from blue blue bag and in the pillow as well as her phone. The intruder also told her that there were other people outside if she resisted.
25. From my evaluation of the evidence on record, I am satisfied that the person who entered the complainant’s house that night had a knife and indeed took the money and the phone. The evidence points that the complainant was apprehensive of being harmed by the knife in the hands of the intruder given that the complainant was of advanced age and completely helpless in the hands of the stranger.
26. The trial magistrate in arriving at the conviction relied on the doctrine of recent possession that the appellant could not explain from whom he bought the phone. The prosecution on the other



hand produced the purchase box and the unique code (IMEI) which conclusively settled the issue of ownership of the phone in favour of the complainant.

27. In the circumstances of the case herein, I find that the prosecution adduced sufficient evidence to warrant the finding by the trial court that the complainant was indeed robbed.
28. On the issue of identity, the complainant stated when she shone her light on the stranger, she could only see his back as he was seated and didn't see his face. She described him as black. She narrated that she identified the appellant at the identification parade as her friend's child and had known him since he was child.
29. The appellant challenged this ingredient in his defence by stating that the complainant had not identified him at the time of the offence and only identified him after arrest. That the complainant had initially maintained that her house had been broken into by someone she did not know.
30. On my part, I have perused the evidence on record which shows that the complainant did not identify the appellant by name at the time of making the report. She just gave a description of the person as black.
31. After the appellant's arrest, the police conducted an identification parade and the identification parade form produced as Pexh 11 shows that the appellant stood in three different positions. In the first two instances, the appellant was positively identified and when he was removed from the parade, she did not identify the suspect and that she enquired about the whereabouts of the suspect that she had just identified.
32. Another fact worth noting is that the appellant was arrested with a phone the complainant alleged had been stolen. The prosecution adduced evidence that positively showed the phone belonged to the complainant and that the court found as such.
33. The doctrine of recent possession was expounded in *Paul Mwita Robi v Republic* KSM Criminal Appeal No. 200 of 2008, the Court of Appeal held that;

Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* chapter 80, the accused has to discharge that burden.
34. In the instant case, the complainant's phone having been found in the appellant's possession, there was duty on him to explain how he came by the phone. I am of the finding that the appellant did not discharge this burden sufficiently. The assertion that the phone was his was an afterthought and ought to be rejected.
35. I therefore find that the elements of robbery with violence were established to the required standard.
36. On sentence, the trial court handed down a death penalty on the second count and held the sentence on the first count in abeyance. The appellant deems this sentence harsh.
37. The penalty for rape as provided for under section 3 of the *Sexual Offences Act* is a minimum of 10 years which can be enhanced to life. The penalty for robbery with violence is death. The court in this case handed down- a death sentence.
38. I have reviewed authorities on the sentences courts have been passing and I am persuaded by the decision in *James Kariuki Wagana v Republic* [2018] eKLR, where Ngugi J (as he then was) observed that while the penalty of death is the maximum penalty for both murder and robbery with violence,



the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He held that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he “unnecessarily injure the complainant during the robbery” and was not armed during the robbery. He therefore reduced the appellant’s sentence of death to imprisonment for fifteen years, from the date of conviction.

39. I have considered the circumstances of the case herein and the legal provisions prescribing the offence. I have also considered the [Sentencing Policy Guidelines](#) as well as the settled legal principle that sentencing is a prerogative of the trial court.
40. Upon reviewing the evidence, I find that the death penalty is harsh and excessive in the circumstances. The appellant is entitled to a second chance for him to amend his ways. I am also alive to the trauma caused to the complainant as well and I am of the view that a prison term of 10 years for the offence of rape and 35 years for the offence of robbery with violence would suffice.
41. In the end, I find the conviction to be safe and in tandem with the evidence on record and I will not interfere with it. The sentence is hereby set aside and substituted therewith a prison term of 10 years for the first count and 35 years for the second count. Both sentences to run concurrently from the date of arrest namely 15/4/2021.

Orders accordingly.

DELIVERED AT BUNGOMA (VIRTUALLY) THIS 20TH DAY OF DECEMBER 2023

D. KEMEI

JUDGE

In the presence of :

Moses K. Mbotto Appellant

Kimaru for Respondent

Savuni Court Assistant

