



REPUBLIC OF KENYA



KENYA LAW
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**Muteti v Republic (Criminal Appeal E024 of 2020)
[2022] KEHC 3186 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 3186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E024 OF 2020**

**GMA DULU, J
JUNE 28, 2022**

BETWEEN

PETER MULINGE MUTETI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. Sagero in Makueni Chief Magistrate's Court CMCR Case No.65 of 2020 pronounced on 8th October, 2020.)

JUDGMENT

1. The appellant was charged in the magistrate's court with robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of offence were that on 8th March 2020 at Itumbule Village, Ukia Location in Makueni County jointly with another not before court robbed Issac Muthini Mutuku Kshs.1,500/= and at or immediately before the time of such robbery, used actual violence to the said Issac Muthini Mutuku.
2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to ten (10) years imprisonment.
3. Aggrieved by the conviction and sentence of the trial court, the appellant has come to this court on appeal and relied on grounds of appeal which he consolidated to one ground ... "Whether or not the prosecution proved its case beyond any reasonable doubt".
4. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant and those filed by the Director of Public Prosecutions.
5. This being a first appeal, I have to start by reminding myself that I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences, but bear in



mind that I did not have the opportunity to see witnesses testify to determine their demeanor – see *Okeno v Republic* [1972] E.A 32.

6. From the submissions on both sides, the major contests on appeal are first whether: the appellant was identified as being at the scene. Secondly, whether the alleged offence was proved.
7. With regard to positive identification, the incident occurred at night. Thus the connection of the appellant to the alleged offence herein being grounded on identification or recognition, the case of *Wamunga v Republic* [1988] KLR 426 is relevant. In the case the Court of Appeal had this to say –

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it a basis of conviction.”
8. In the present case, both the complainant Pw1 Isaac Muthini Mutuku and the appellant knew each other well before. Both agreed in evidence on this. However, the incident occurred at night that is 8:00pm, and Pw1 said that it was dark. Pw1 however said that the appellant talked during the incident and he knew his voice before and recognized it. Pw1 also said that there was electric light outside a building about 50 meters away and thus he recognized the appellant as one of the two assailants. On his part in his defence, the appellant said that he met and talked to the complained Pw1 that night at 8:00pm, but that the encounter was not a robbery incident.
9. In my view, from the evidence on record, both from the prosecution and the defence of the appellant, it was established that the appellant and the complainant met that night, at the alleged time and place. I find that the prosecution proved beyond any reasonable doubt that the appellant was with the complainant at the alleged time and place. He was thus positively identified to the required standard.
10. Did the prosecution prove beyond any reasonable doubt that the appellant robbed the complainant (Pw1) as alleged? Pw1 the complainant said that he was robbed. The appellant on the other hand, said that the meeting between the two was to do with sale of bhang by Pw1. The appellant suggests also that there was a scuffle, but only between him and the complainant, and denied the presence of any other person at the scene.
11. In my view, though the complainant Pw1 Isaac Muthini Mutuku and his mother Pw2 Francisca Kasisi Katio, insisted that Kshs.1,500/= was robbed from the complainant, such robbery was not proved. This is because, though there is an alleged co-culprit, he was not arrested and charged in court though he was said to have been in the locality during trial. Secondly, the appellant maintained throughout cross-examination that he did not know that other person, which defence in the present case was not shaken and is believable.
12. In my view therefore, from the evidence on record, it was not proved by the prosecution beyond any reasonable doubt that the complainant was robbed of his Kshs.1,500/= school fees. In my view, what was proved by the prosecution against the appellant was assault causing actual bodily harm contrary to section 251 of the *Penal Code*, as the findings in the medical (P3 form) report, was that the injury suffered by Pw1 was harm.
13. I will thus quash the conviction for robbery with violence, and substitute it with a conviction for assault causing actual bodily harm contrary to section 251 of the *Penal Code*, and will sentence the appellant accordingly.
14. Consequently, and for the above reasons, I quash the conviction for robbery with violence and set aside the sentence of 10 years imprisonment imposed by the trial court.



15. In the place of conviction and sentence of the trial court, I substitute and enter a conviction against the appellant for assault causing actual bodily harm contrary to section 251 of the *Penal Code*, and order that the appellant be and is hereby sentenced to serve three (3) years imprisonment from the date he was sentenced by the trial court.

It is so ordered.

DELIVERED, SIGNED & DATED THIS 28TH DAY OF JUNE, 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE

