



**Okello v Republic (Criminal Appeal E026 of 2021)
[2022] KEHC 12785 (KLR) (31 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 12785 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E026 OF 2021
JM MATIVO, J
AUGUST 31, 2022**

BETWEEN

DANIEL SANYA OKELLO APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against conviction and sentence in Criminal case number 856 of 2019, Wundanyi, R v Daniel Sanya Akello delivered by Hon D Wagechi on April 8, 2020)

JUDGMENT

1. This is an appeal against the conviction and sentence imposed upon the appellant in Criminal case No 856 of 2019, Voi, Republic v Daniel Sanya Akello in which the appellant was charged, tried and convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code and sentenced to serve 15 years imprisonment.
2. It was alleged that on August 18, 2018, at around 8.30 am at Mwisho wa Lami of Mwachabo location in Mwatate Sub- County within Taita Taveta County while armed with offensive weapon namely a knife, he robbed Paul Mombo Mwachia of his motor vehicle registration number KNEL 862 D Make TVS valued at Kshs 150,000/= and immediately before or immediately after the time of such robbery, he threatened to use actual violence to the said Paul Mombo Mwachia.
3. The appellant also faced others counts namely: - (i) arson contrary to section 332(a) of the Penal Code; (ii) threatening to kill contrary to section 223 (1) of the Penal Code; and (ii) house breaking contrary to section 304(1) and stealing contrary to section 279 (b) of the Penal Code. However, the said charges were withdrawn on 10th July 2019.
4. This case was initially heard at Wundanyi Senior Principal Magistrates Court. Four prosecution witnesses testified but the trial Magistrate was transferred to another station. On July 30, 2019, the file was placed before E M Nyakundi RM who held that he had no jurisdiction to handle the matter.



He directed that the matter be forwarded to Voi law courts for further directions. But on August 6, 2019, Hon Wagenchi PM, directed that the file be returned to Wundanyi stating that ordinarily, cases should be tried before courts within the local jurisdiction where the offence was committed. However, on August 13, 2019, E M Nyakundi RM again stated that he had no jurisdiction and he transferred the file back to Voi law courts. On September 17, 2019, Wagechi PM directed that the matter proceeds from where it had reached.

5. The principles to be kept in mind by a first appellate court while dealing with appeals are:
 - a. There is no limitation on the part of the appellate court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
 - b. The first appellate court can also review the trial court's conclusion with respect to both facts and law.
 - c. It is the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
 - d. When the trial court has breached provisions of the constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.
6. The crux of the prosecution case was that the accused violently robbed the complainant; that at the time of the robbery he was armed with a knife. The defence case rested on their sworn evidence and one witness. The essence of his defence is that he did not commit the offence.
7. PW1, the complainant Mr Paul Mwacha Mombo, a motor cycle operator testified that on August 18, 2018 at about 8.30am the complainant asked him to take him to Bukunyi area and on arrival he alighted and entered into a house and told him he had been sent to town to buy eggs, so he took him to Mwatate town and after a short while he came without the eggs and told him it has been a while since he rode a motor cycle so he allowed him to ride carry him as a passenger. At Bukunyi, the appellant requested him to take him to visit his girlfriend, but he refused demanding to be paid first. He said at this point he produced a knife and held it on his throat and ordered him to surrender the motor cycle or else he will kill him. Afraid, he alighted and the appellant took off towards Mwatate town. He said the registration number of the motor cycle as KMEL 862 D. He identified the motor cycle and the appellant in court. On cross-examination he said that he described to the police the person who robbed him.
8. PW2, Jimmy Safari Charo, an employee of Watu Credit Limited, department of GBS tracking department testified that on August 18, 2018 at about 11 am they received an emergency call from a one Jonathan Babu Mdamu, whom they had given a motor cycle registration number KMDL 862 D on hire purchase. Using a tracking devise, they noticed the vehicle was approaching Maungu towards Mackninon road heading towards Mombasa direction. The motor cycle was intercepted at Mariakani. He said among the team which intercepted the motor cycle was a one Jared Oroko, a police officer. The rider was arrested and taken to Mariakani police station and the motor cycle was taken to Mwatate police station. He said the riders copy of identity card and a knife were sent to him via WhatasApp. The appellant's name as per his identity card is Daniel Sanya Akello. He showed the court the tracking devise and stated that the motor cycle was valued at Kshs 100,000/=.
9. PW3, No 79886 CPL Jared Aroko attached to Mombasa County police headquarters was the arresting officer. He said using an application on his phone, he intercepted the motor cycle at Mariakani, arrested



- the appellant and took him to Mariakani police station together with the motor cycle. He recovered a knife from the appellant which he identified in court together with the motor cycle. He also identified the appellant in court. However, this witness died before completing his evidence, so the prosecution successfully applied to call another witness who was a co-arresting officer.
10. PC Fumwa Rayton, the co-arresting officer testified that he carried CPL Oroko on the motor bike who had a phone with a tracking application and after the motor cyclist refused to stop, they chased him and caught up with him and blocked his way. He said appellant jumped off and ran away but he was chased and arrested. He positively identified him. He said he saw CPL Oroko remove a knife from the appellant's wrist. They arrested and escorted him to Mariakani police station where he was held. He identified the appellant, the motor cycle and the tracking report in court.
 11. PW4, No 110846, PC Mudibo John Terry attached to Mwatate police station was the investigating officer. He testified that an identification parade was conducted on August 28, 2018 by inspector Christine Masaro in which the appellant was positively identified by the complainant in an identification parade of 8 people. He said the appellant signed the identification parade forms which means he was satisfied with the manner the parade was conducted. He produced the identification parade forms, the tracking report, the motor cycle's log book, the knife and the motor cycle. He recorded the witnesses' statements and charged the appellant.
 12. On September 12, 2019, D Wangwchi PM ordered that the case proceeds from where it had reached and PW4 was cross-examined by the appellant.
 13. Upon considering the prosecution evidence, the trial magistrate concluded that the accused person had a case to answer and put him on his defence. He elected to give sworn defence.
 14. In his sworn defence, the appellant stated that on August 18, 2018 at around 8.40 pm he was at Mwatatwe town when he met a one PW1 who was his close friend and he promised to take him to Kitivo near Mwatate town. He said the complainant promised that he would take him to the place where he could buy eggs. He said that at Mwatate he saw a one Barnabas Mwanjeve, his ex-father-in-law who had threatened to have him arrested. He said his ex-father-in-law pointed a rungu at him, so, he decided to escape. He stated that he thought the complainant could understand him and accept Kshs 1,000/= as reimbursement, so he went to visit a one Caleb at Mariakani who had promise to procure a job for him but he was intercepted on the way by two people who introduced themselves as police officers. They arrested him and subsequently, he was charged in court. He said he had a grudge with the owner of the motor bike. He denied that he had a knife. He said he was arrested on his way to report to the police.
 15. The appellant called a one Baranbas Mwajembe as his witness. He stated that on August 18, 2018 at around 8.15 am he received a call from a one Haji who told him that the appellant had been spotted at Mwatate, but they learned that he had been arrested with a stolen motor cycle. On cross-examination, he said that he was following him because he had torched his house after quarrelling with his wife.
 16. In her judgment, the trial Magistrate was satisfied that the ingredients of the offence of robbery with violence, namely that he was armed with a dangerous weapon or offensive weapon and that he used violence at or immediately after the time of the robbery; that the appellant was positively identified. (Citing *Charles O Maitunyi v Republic* and *Wamunga v Republic*). Also, the learned Magistrate was satisfied that the doctrine of recent possession was proved (citing *Republic v Kowkyk* cited in *Antony Mutua Nzuki v Republic*, *Isaac Nganga Kahinga alias Peter Ng'ang'a Kahiga v Republic* and *Erick Otieno Arum v Republic* and *Malingi v Republic*). The magistrate also considered the appellant's defence and she was satisfied that it did not dislodge the prosecution evidence. She was also satisfied



- that the appellant was accorded a fair trial. She convicted the appellant and sentenced him to serve 15 years imprisonment.
17. The appellant seeks to upset the conviction and sentence on grounds that he was not properly convicted, that the evidence was full of contradictions, that the trial magistrate relied on the testimony of a single witness, that the trial magistrate erred in dismissing his defence.
 18. In his submissions, the appellant did not argue his grounds of appeal. Instead, he stated that he has been remorseful and pleaded that he be given another chance.
 19. On his part, the respondent's counsel urged the court to dismiss the appeal against sentence and to uphold the sentence.
 20. I will first address the question whether the ingredients of the offence of robbery with violence were proved. The Court of Appeal in *Johana Ndungu v Republic* listed the ingredients of the offence or robbery with violence as follows: -
 - i. If the offender is armed with any dangerous weapon or instrument; or
 - ii. If he is in the company of one or more other person or persons, or;
 - iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.
 21. Proof of any one of the above ingredients is enough to sustain a conviction under section 296(2) of the *Penal Code*. The appellant was alone. He was armed with a knife. He threatened to use it and fearing for his life, the complainant let go the motor bike. The other element is identification. From the evidence adduced in court, identification is not in question.
 22. The crime of robbery involves (1) the taking of the property of another (2) from his or her person or in their presence (3) by violence, intimidation or threat (4) with the intent to deprive them of it permanently. Robbery is thus distinct from the crime of larceny in two important ways. First, the theft occurs through the use of force and intimidation. A perpetrator is not required to use significant force, or extreme threats, in order to commit a robbery. All that is required is the amount of violence or fear necessary to cause the victim to give up his or her possessions. This may vary based on the value of the possession and the victim. For instance, less violence may be required to rob an elderly woman of her possessions than would be required to intimidate a strong young man. It is also important to note that the violence must occur as part of the theft in order for the crime to rise to the level of robbery.
 23. A second distinction of robbery is that the crime must occur in the victim's presence. This is because violence or threat of harm requires the presence of the victim. If the victim is unavailable, the elements of a robbery cannot be completed. While larceny requires that the possessions that are stolen belonged to someone else, they can be taken in secret or while the owner is unavailable. Robbery can only be charged if the victim personally experienced the crime.
 24. Where a perpetrator does not harm a victim, but merely threatens the victim with harm, several additional requirements must be met in order to show that a robbery occurred. Threats during a theft only rise to the level of robbery if they are imminent threats that include a threat of death, bodily injury, or destruction of the victim's home. Additionally, the victim must have an actual and reasonable fear based on the threats. In the instant case, the appellant held a knife at the complainant's neck. To me, this constitutes imminent threat. I find and hold that the elements of robbery with violence were proved.
 25. As for sentence, I note that the appellant was sentenced to serve 15 years imprisonment. The appellant says he has learnt a lesson after being in jail for 4 years. I have considered his plea that he has learnt



a lesson. I have also considered the level of violence and the seriousness of the offence. Taking the foregoing into account, I find no reason to interfere with the conviction. However, I reduce the sentence to 5 years imprisonment. In computing the said prison term, the period the appellant was in custody pending trial and the period he has been in prison shall be considered.

Right of appeal 14 days

SIGNED AND DATED AT VOI THIS 29TH DAY AUGUST, 2022

JOHN M MATIVO

JUDGE

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 31ST DAY AUGUST, 2022

STEPHEN GITHINJI

JUDGE

