Makori v Republic (Criminal Appeal E023 of 2023)
[2025] KEHC 1532 (KLR) (18 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1532 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E023 OF 2023

PN GICHOHI, J

FEBRUARY 18, 2025

BETWEEN

KEVIN MOSOTI MAKORI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against both conviction and sentence by Hon. Z. J. Nyakundi (SPM) in Molo Chief Magistrates Court Criminal Case Number 1164 of 2020 delivered on the 10th day of May, 2023)

JUDGMENT

1. The background of this Appeal is that Kevin Mosoti Makori (herein referred to as the Appellant) was charged with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*. The particulars were that on the 21st day of June 2020 at Legetio area Rongai Sub-County within Nakuru County jointly with others not before the court while armed with dangerous weapon namely an axe robbed MKB of mobile phone make Nokia (Flap), san disk mp3, blue tooth speaker make JBL, one camera make Kodak, one Bic gas lighter and some whisky all valued at Kshs. 75,000/= and immediately before the time of such robbery used personal violence on the said MKB.

2. He faced an an alternative charge of handling stolen property contrary to Section 322 (2) of the *Penal Code*. The particulars were that on the 24th day of June 2020 at Molo Line village Rongai Sub-County within Nakuru County, otherwise than in the course of stealing retained one Blue tooth speaker make JBL, one camera make Kodak, one Bic gas lighter and ¾ Dalmore whisky knowing or having reason to believe them to be stolen property.

3. After hearing the Respondent's five (5) witnesses and the Appellant's defence, the trial court convicted the Appellant of the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* and sentenced him to death on 10th May 2023.

4. Dissatisfied by that judgment, the Appellant preferred this Appeal on the five (5) grounds as per the Amended Grounds of Appeal dated 15th October 2024 which are hereby summarised as follows: -

    1. That the learned trial Magistrate erred in law and in facts when he relied on evidence which was not corroborated.

    2. That the learned trial Magistrate erred in law and in facts when convicting him to suffer death when he failed to note that the investigations in this case were poorly conducted and there was no evidence to implicate him with the alleged offence.

    3. That the learned trial Magistrate erred in law and in facts by failing to appreciate that crucial witnesses were not availed in court.

    4. That the learned trial Magistrate erred in law and in facts by failing to appreciate that the evidence adduced by the prosecution did not entirely discharge the prosecution's burden of proving its case beyond any reasonable doubt as provided by law.

    5. That the learned trial Magistrate erred in law and in facts by failing to appreciate that the death sentence was declared unconstitutional.

5. The Appellant therefore urged this Court to allow the Appeal, quash conviction and set aside sentence and set him at liberty.

Submissions

6. While combining grounds 1,2,3 and 4 above, the Appellant submitted that the police violated the provisions of Section 24 (e) of the *National Police Service Act* by failing to take photographs of the Appellant with the alleged exhibits; to call critical witnesses to testify and; to conduct identification parade. He questioned the P3 Form for being obtained from a private hospital instead of a government hospital.

7. While appreciating Section 143 of the *Evidence Act*, the Appellant submitted that failure to call the Appellant's late mother Mary Kwamboka, his brother Vincent Makori and the Assistant Chief Moses Rotich to corroborate PW5's evidence on recovery of exhibits and that the Appellant signed the inventory in their presence was prejudicial to the Appellant.

8. In the circumstances, he submitted that failure by the Respondent to call the said witnesses could be taken to mean that their evidence would have been averse to the Respondent's case. In support, he cited the case of Bukenya and another vs Uganda (1972) EA 549 where the Court of Appeal held that: -

    > "The prosecution is duty bound to make available all witnesses necessary to establish the truth even if the evidence may be inconsistent to its case otherwise failure to do so may in appropriate case lead to an inference that the evidence of the uncalled witnesses would have been adverse to the prosecution."

9. Further, he submitted that at the time of his arrest, he was not found with physical possession of any item and therefore, the Respondent failed to prove nexus between his arrest and the alleged offence.

10. On identification, he cited the case of Republic v Turnbul and others (1976) 3 All ER 549 and submitted that there was no evidence tendered in regard to the nature of lighting, the details of time the complainant spent while observing the Appellant on the material night and therefore, the prevailing circumstances did not warrant the finding on identification by recognition relied on by the trial court.

11. He further submitted that the complainant never gave description of the Appellant in the first report and that there was no evidence on how the Appellant came to be arrested.

12. In the circumstances, he submitted that in regard to identification, the evidence tendered by the Respondent was insufficient, inconsistent and created gaps and therefore, the nature of the arrest was inconsistent with the alleged guilt.

13. He contended that the alleged confession dated 21/3/2017 allegedly obtained by PW9 being PEX 14 by one Matundura leading to recovery of ammunitions buried in a farm was taken contrary to the law and therefore, the objection raised in regard to its production was justified.

14. On sentence (ground 5) , he submitted that the reason he was sentenced to death was that the trial court indicated that its hands were tied. Citing Supreme Court directions on the Muruatetu case in Petitions No. 15 & 16 of 2015 [2022] eKLR that mandatory death sentence was in regard to murder cases only, the Appellant submitted that he could not fault the trial court for making reference to those directions in arriving at the sentence herein.

15. However, the Appellant cited the case of James Kariuki Wagana v Republic [2018] e KLR where High Court substituted the death sentence with a sentence of 15 years imprisonment and submitted that the amount of force deployed by the attacker in the instant case to acquire the alleged items from the victim was minimal and therefore, it did not call for a harsh sentence.

16. On his part, the Respondent filed detailed submissions on 22nd July 2024 in response to the Appeal and based his arguments on ingredients of the offence of robbery as set out by the Court of Appeal in Oluoch v Republic [1985] KLR. Further, he relied on the case of Dima Ndenge Dima v Republic Criminal Appeal no 300 of 2007 where it was held that the three elements of the offence are to be read disjunctively and that one element is sufficient to prove the offence of robbery with violence.

17. On whether the Respondent's evidence was corroborated, it was submitted that the complainant was all alone in the house when the robbery took place and that other witnesses came after the Appellant had left and, in any event, it is trite law that the court can rely on the testimony of one witness to make a conclusion that a crime was committed.

18. Flowing from there, it was submitted that in regard to the Respondent's failure to call two witnesses, the Respondent had discretion as to who to call to support their case and that in any event, the Appellant would have called them in support of his case.

19. On identification, the Respondent submitted that though it was dark and the Appellant had covered his face making it difficult for the complainant to physically see the attacker's face, she recognised the Appellant's voice having spoken to him earlier at her farm and telling her that he was a Forest Officer.

20. It was therefore submitted that in those circumstances, there was no need for an identification parade considering that the complainant's items were recovered from the Appellant's house and the Appellant signed the inventory.

21. While citing the case of Ahamad Abolfathi Mohammed and another v Republic [2018] eKLR, it was submitted that it is not always that the guilt of an accused person can be proved by direct evidence as in some cases, circumstantial evidence can validly implicate an accused person.

22. Further, reliance was placed on the case of Sawe v Republic [2003] eKLR where the Court of Appeal held that in order to justify on circumstantial evidence, the inference of guilt must be to the exclusion of any other reasonable hypothesis of innocence.

23. In this case, it was submitted that the events of that day connected the Appellant to the robbery and no other person was implicated and therefore, no doubts were cast to make the trial court to hold otherwise.

24. Regarding doctrine of recent possession, the Respondent cited the case of Athuman Salim v Republic [2016]eKLR where the Court of Appeal held that:- “The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to to offer any reasonable explanation as to how he came to be in possession of that property, a presumption of that fact arises that the is either the thief or the receiver.”

25. Consequently, the Respondent submitted that though the Appellant put up a defence denying involvement in the robbery arguing that he was arrested at home over another robbery case which he cited as Criminal Case No. 1153 of 2020 and that he came to see the exhibits in court, his entire defence did not shake the Respondent’s case as he did not put an alibi defence that he was elsewhere on that date.

26. On sentence, it was submitted that considering the changes in jurisprudence, the Respondent had no objection to review of the death sentence but urged this Court to consider the aggravating circumstances of the said offence; the prevalence of cases of robbery with violence and that the Appellant was not remorseful of his actions. The Respondent therefore prayed for a deterrent sentence.

Analysis and determination

27. This being a first appeal, this court’s duty is to re-examine all the evidence before the trial court afresh, analyse it and arrive at its own conclusions bearing in mind that this court did not see or hear the witnesses testifying. – See Okeno v. R [1972] EA 32.

28. In doing so, this Court also bears in mind the issues that have arisen in the rounds of appeal and the submissions by both parties. These are condensed into two broad issues for determination as follows: -

    1. Whether the Respondent proved its case against the Appellant beyond any reasonable doubt.

    2. Whether the sentence imposed on the Appellants should be interfered with.

29. To start with, and in order to answer to the first issue, the Court will be considering whether the three ingredients of the offence herein were proved. As rightly submitted herein, the said elements under Section 296 of the *Penal Code* are: -

> “ (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
>
> (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 before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.” [emphasis added]

30. Further, the Court of Appeal in Oluoch v Republic (supra) emphasised (Obiter) that: -

> “ Robbery with violence is committed in any of the following circumstances:
>
> (a) The offender is armed with any dangerous and offensive weapon or instrument; or

(b) The offender is in company of one or more other persons; or

(c) 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."

31. In order to prove its case, the Respondent called five (5) witnesses. It was the complainant's (PW1) evidence that she was alone in her house. There was no one in the compound. She was asleep when a man entered at 2.00 am. The solar lights were off. The man had a torch. She could not see his face as he wore a hat /cap over his face.

32. He asked her for money (dollars) but she responded that she had no money. He asked her to open the cupboards. He ransacked it throwing out all items as he looked for money. He then took phones, tape recorder, speakers, drinks, a small speaker and put them in a bag.

33. He asked her to open the safe but she told him that she could not do it as she did not have the key. He kept hitting her with an axe. He took her to the living room, opened one of the bottles and drunk. He put the rest in the basket. He was drunk and stinking and all this time, he was telling her that he would kill her.

34. He asked her to take of her clothes so that he could have sexual intercourse with her and give her kids. She declined and dared him to kill her instead. He hit her on the face, around the mouth and both arms. She was bleeding. She blew the whistle to attract her watchman named Peter and who stayed at the yard but not in her one-acre compound. He arrived and alerted her son in law named Tony (PW2). The attacker had broken into her house through the kitchen. He used her own axe to hit her using its blunt side. She was taken to hospital and admitted for one day.

35. She reported the matter at Rongai Police Station and was issued with a P3Form confirming her injuries. She was not told how the Appellant was arrested but she identified his face in court and confirmed that he was the same person she had previously met in her farm as she took a walk with her dogs.

36. She told that court that the Appellant was telling her that he was a Forest Officer checking on people who were burning charcoal. She recognized that voice when he talked to her during the night robbery.

37. She also identified the items recovered from him as some of the property stolen from her on the material night. In cross examination, the complainant explained how she told the police that she could identify the attacker.

38. In his defence, the Appellant denied knowledge on anything about the night or robbery and also disputed his mother's signature on the Inventory containing list of the items recovered from him. He denied knowing the complainant. It was his defence that on 24/6/2020, he was walking in his shamba and was arrested within his compound over another case of robbery with violence being Criminal Case No. 1153 of 2020.

39. From that evidence, there is no doubt that the complainant was robbed on the material night and that the person who robbed her was armed with an offensive weapon and used violence on her. She was injured as confirmed by the P3 Form.

40. The Appellant's argument that the P3 Form was from a private hospital instead of a government hospital is irrelevant. The evidence on record established the three elements of the offence of robbery with violence as emphasised in Oluoch v Republic (supra).

41. Further, it is clear from the evidence that some of the items stolen from the complainant on the material night were recovered and she identified the same.

42. The identification of the Appellant as the attacker on the material night was solely based on the complainant's evidence. She could not see the attacker's face on the material night and therefore, it would not have been necessary for identification parade. Failure to hold one was neither material nor fatal.

43. However, the complainant identified the Appellant in the dock as the same person she had met during the walk on her farm. That is recognition of the Appellant's face in court as the person she had met before. In his defence, the Appellant denied knowledge of anything about the night of robbery. In the circumstances, two issues that arise from that evidence are on identification and recovery of the stolen items.

44. Other than the identification of the Appellant in the dock, she also stated that she recognised the Appellant's voice having spoken to her before. In Dishon Litwaka Limbambula v Republic [2003] eKLR, the Court of Appeal had this to say: -

> " Normally, evidence of voice identification is receivable and admissible in evidence and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, care would be necessary to ensure that it was the accused person's voice, the witness was familiar with it and recognized it and that the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who had said it. See Choge v Republic [1985] KLR 1."

45. In this case, there is no doubt that the attacker kept talking to the complainant during the robbery. However, the date when the complainant spoke to the Appellant as she walked in the farm is not indicated. It is not stated how long the conversation took so that she could master it as alleged and recognise it in the night of robbery. The said recognition by voice cannot be said to be free from possibility of error.

46. Though the trial court did not deal with the issue of voice recognition, the judgment reveals that the court analysed the complainant's testimony at length on the issue of identification and held as follows: -

> " ... she did not identify the person who attacked her because he had covered his face with a cap The Court further notes that the complainant was alone in the house and none of the other witnesses testified to the effect that she positively identified the accused as the person who attacked the complainant.
>
> As to whether the accused was positively identified as the person who attacked and robbed the complainant, the court holds that in the negative for the simple reason that the solar lights were off and the accused was using his own torch."

47. That above reasoning was based on facts before the court and well founded.

48. On recovery of the stolen items, the complainant told the court that she did not know how the Appellant was arrested and the police did not tell her either. She however stated that the police made some recoveries which she identified in court as her property. She identified Kodak camera, camera bag, two JBZ speakers, Gas lighter, Nokia phone, Sun disc and Dalmore alcoholic drink together with its box.

49. In cross examination, she told the court that she did not know where the items were recovered from but the police said they found them in the Appellant's home. She maintained that the items were hers and that she could avail receipts as most of the items were presents from England. She further told the court that the items were rare and the camera had photographs of her late husband.

50. PW2 was only informed by the police that the items were recovered from the Appellant's house. The Investing Officer (PW5) testified that except for the gas lighter which he recovered from the complainant's compound, he recovered all exhibits from the Appellant's home and made an inventory of the same which he produced as exhibit. The inventory (Exh. 9) is dated 24th June 2020 at about 14.30 hours and was duly signed.

51. From that evidence, the trial court invoked the doctrine of recent possession. Regarding the said doctrine, the Court of Appeal in Isaac Ng'ang'a Kahiga & another v Republic [2006] eKLR held: -

> " It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."

52. In this case the Appellant's contention on failure to have photographs of the recovered items has no effect in the circumstances herein. Such photographs were not necessary here.

53. Regarding his contention that some of the witnesses who signed the inventory were not called, it is trite law that in the absence of any provision of law to the contrary, no number of witnesses is required to prove a particular fact. The Appellant's claim that signature on the inventory did not belong to his late mother remained a mere statement that lacked any backing.

54. He did not dispute his own signature on the Inventory. Further, the case the Appellant referred to being Criminal Case No. 1153 of 2020 does not seem to have any relevance in this matter. There was no PW9 in the case before the trial court and if there was any confession in that matter, and its admissibility rejected, that issue was not pursued at trial in this case and it has no effect on it either.

55. There was no denial that the home from where the items were recovered belonged to the Appellant. Those items were identified by the complainant as having been stolen from her house at about 2.00 am on the night of 21st June 2020. They were recovered at about 14.30 hours on the 24th June 2020 which period was fairly recent from the date of robbery, considering the nature of the goods.

56. Upon giving full analysis backed by case law, the trial court held on this issue: -

> " ...in the present case, the complainant positively identified the stolen goods as her property, the items were stolen at about 2.00 am on the night of 21st June 2020 and recovered on 24th June 2020 as per the evidence of PW5, the Investigating Officer, the items were recovered from the house of the accused meaning he was in actual control of the goods, an inventory PEX 9 was signed by the accused and other witnesses , the accused did not give any explanation as to how he came to he came into possession of the stolen goods."

57. Having correctly analysed the evidence as above, the trial court was justified to find that the defence put forward by the Appellant was not merited. The conviction-based on the doctrine of recent possession was therefore sound and is upheld.

58. On sentence, the record shows that the Appellant had no previous records. In mitigation, he sought leniency. The trial court however seemed to be tied by the mandatory death sentence upon conviction for an offence of robbery with violence as provided for by the *Penal Code*

59. Death sentence has since been declared unconstitutional but it has not been declared unlawful. That sentence is still applicable in law as a maximum sentence at the discretion of the court. The Respondent herein supports a substitution of the sentence but seeks a deterrent one in the circumstances of this case.

60. This Court has considered the gravity of the offence and circumstances under which it was committed. Though a first offender and his plea for lenience, he deserves a deterrent sentence and in this case, a period of twenty- five (25) years imprisonment would serve that purpose.

61. The record shows that he was arrested on 24th June 2020, brought to court on 7th July 2020 and placed in custody. He was given a bond of Kshs. 200,000/= with a surety of similar amount with an alternative of a cash bail of Kshs. 100,000/=. That was later reviewed to a surety bond of Kshs. 150,000/=

62. It appears that the cash bail was later reviewed to Kshs. 70,000/= but there does not appear any evidence that he went out on bond. Under section 333 (2) of the *Criminal Procedure Code*, that period should be taken into account when computing the sentence.

63. In conclusion, this Court makes the following orders:-

    1. Appeal on conviction is dismissed.

    2. The death sentence set aside and substituted with a sentence of Twenty- Five (25) years imprisonment.

    3. When computing the said sentence, the period the Appellant spent in custody since his arrest on 24th June 2020 be taken into account.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 18TH DAY OF FEBRUARY, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Kevin Mosoti Makori - Appellant

Mr. Kihara for Respondent

Ruto - Court Assistant