Wambui v Republic (Criminal Appeal E032 of 2024)
[2025] KEHC 9401 (KLR) (23 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9401 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E032 OF 2024

GL NZIOKA, J

JUNE 23, 2025

BETWEEN

NEHEMIAH MWANGI WAMBUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence in MCCR 1486 of 2019 by Hon. Y. Khatambi (PM) at Naivasha Chief Magistrate's Court)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate Court at Naivasha charged vide Chief Magistrate's Criminal Case No. 1486 of 2019 in four counts with four offences.

2. In count one, he is charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code* (Cap 63) Laws of Kenya. The particulars of the charge read that on the 5th day of May, 2019 at Kinamba village in Naivasha Sub-County within Nakuru County, jointly with others not before court, robbed Linus Ndirangu Githae of an Alcatel mobile telephone valued at Kshs 4,500 the property of the said Linus Ndirangu Githae and at the time of such robbery threatened to use violence to the said Linus Ndirangu Githae.

3. In count two, he is charged with the offence of electronic fraud contrary to section 84(8) of the Kenya Information and Communication Act (Cap 411) Laws of Kenya. The particulars are that, on 5th day of May 2019 at Kinamba village in Naivasha Sub-County within Nakuru County, jointly with others not before court, with intent to defraud by use of a licensed telecommunication system namely Safaricom, transferred the sum of Kshs 1,594 from Mpesa account number XXXXXXXXXX of Linus Ndirangu Githae to Mpesa account number XXXXXXXXXX of Nehemiah Mwangi Wambui, the property of the said Linus Ndirangu Githae.

4. In the 3rd count, the appellant is charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The particulars of the charge states that on 18th day of August 2019 at Kinamba village in Naivasha Sub-County within Nakuru County, jointly with others not before court, while armed with an axe, robbed Beda Wekesa a jacket valued at Kshs 2,000 and cash Kshs 700 the property of the said Beda Wekesa and at the time of such robbery threatened to use actual violence to the said Beda Wekesa.

5. Finally, the appellant is charged in the 4th count with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The particulars of the charge are that on 18th day of August 2019 at Kinamba village in Naivasha Sub-County within Nakuru County, jointly with others not before court, robbed Peter Waweru Wanja of cash Ksh 500 and at the time of such robbery used actual violence to the said Peter Waweru Wanja.

6. The appellant pleaded not guilty to all the four offences and the case proceeded to full hearing. At the close of the prosecution case, he was placed on his defence and at the end of the entire case, the trial court vide a judgment dated 4th September, 2024 acquitted him on count 2, 3, and 4. However, he was found guilty and convicted on the first count and sentenced to serve an imprisonment term of thirty (30) years.

7. However, the appellant is aggrieved by the decision of trial court and appeals against it on the following grounds verbatim reproduced: -

    a. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the ingredients of the offence were not conclusively proved.

    b. That the learned trial magistrate erred in law and fact by convicting the appellant yet failed to find that his defence was cogent and believable.

    c. That the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that the charge sheet was defective.

    d. That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the evidence of identification by recognition of the appellant was not positively proved.

    e. That the appellant prays to be supplied with a copy of the original trial court's proceedings and its judgment.

    f. That further grounds shall be adduced at the hearing of this appeal.

    g. That the appellant wishes to be present during the hearing and determination of this appeal.

    h. That this petition is filed and annexed with an affidavit by the name.

8. Be that as it may, the appellant attached to the submissions dated 24th March, 2025 amended grounds of appeal which states as follows:

    a. That the learned Magistrate erred in law and in fact by upholding conviction and sentence of 30 years imprisonment on evidence of identification by PW1 but failed to note that the circumstances were too difficult for positive identification and there was no advance report on this identification made to the police.

    b. That the learned Magistrate erred in law and in fact in failing to note that the way in which evidence was obtained from a mobile service provider was not procedural.

c. That the learned Magistrate erred in law and in fact by convicting and sentencing the appellant to 30 years imprisonment but failed to evaluate conclusively the defence of alibi alongside the prosecution evidence.

9. The appeal was opposed by the Respondent based on the grounds of opposition dated 7th March, 2025 which states as follows:

a. The ingredients of the offence were proved.

b. The defence of the appellant was fully considered before conviction.

c. The charge sheet was not defective

d. The issue of identification.

10. Subsequently, the appeal was canvassed vide filing of submissions. The appellant submitted that he was not positively identified by any of the complainants as the conditions for identification were not conducive the offence having occurred at night and there was no light.

11. That PW1 Linus Ndirangu Githure testified that at the time he was robbed there was no light and did not hear the voice of his attacker and could not identify him, which position was acknowledge by the trial Magistrate in her judgment.

12. Similarly, PW2 Peter Waweru Wanja stated both in his examination in chief and cross examination that he was unable to see or identify the person who attacked him as it was at night.

13. The appellant relied in the case of Joseph Ngumbao Nzaro v. Republic [1991] 2 KAR 212 where the Court of Appeal stated that before the court accept visual identification as a basis for conviction, it has a duty to warn itself of the inherent dangers of such evidence and should careful consider the prevailing conditions at the time of identification and the length of time the accused was under observation in order to exclude the possibility of an error.

14. The appellant further discredited the identification parade arguing that PW1 Linus did not give a description of his attackers before the identification parade was conducted. Reliance was placed on the case of, Fredrick Ajode Ajode v Republic [2004] eKLR where the Court of Appeal stated that before an identification parade is conducted and for it to be properly conducted a witness should be able to give the description of the accused.

15. It was submitted that PW1 Linus also testified that he was able to pick out the appellant from the identification parade through the birth mark on his face contradicting his testimony that he could not identify him at the time of the attack as there was no light. That he further testified that he knew the appellant as he had his name from the Mpesa statement.

16. The appellant further submitted that the trial court erred in admitting the Mpesa statement of PW1 Linus and produced as Pexhibit (1) by PW4 No. 81946 PC Jared Mose, the Investigating officer, arguing that it was not obtained procedurally and was produced by an incompetent person.

17. That PW4 PC Mose was not an expert on the data produced as evidence as he was not in a position to help the trial court on how the data led to conclusion that the SIM Card that received the money belonged to him. Further, the prosecution should have called a Safaricom liaison officer or Crime intelligence officer to testify on the data and how it linked him to the commission of the crime.

18. Furthermore, PW4 PC Mose was not the maker of the document and could therefore not explain how the records were generated, stored and printed and nor could he vouch for their accuracy.

19. Lastly, the appellant submitted that his defence of alibi to the effect that the money he received was sent to him by a client who used to buy bhang from him, was not considered. That PW3 No. 232888 PC Alex Njuguna in cross examination stated that when they arrested him he had thirty (30) rolls of bhang. Further, no items belonging to the complainant were recovered from him when he was arrested and therefore the trial court was wrong to place him at the scene of crime without cogent reasons.

20. The appellant relied on the case of, Uganda vs Sebyala & Others [1969] EA 204 where the Court of Appeal in Uganda stated that an accused does not have to establish his alibi to be reasonably true, all he has to do is create doubt as to the strength of the prosecution case.

21. However, the respondent in response submissions dated 7th March 2025 quoted the case of Johana Ndungu v Republic [1996] KECA 187 (KLR) where the Court of Appeal laid out the ingredients of the offence of robbery with violence being that, the offender is armed with any dangerous or offensive weapon or instrument, oris in company with one or more other person or persons, or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

22. The respondent submitted that proof of any of the ingredients is enough for a conviction under section 296(2) of the *Penal Code*. That, in the present case PW1 Linus testified that he was attacked by more than three (3) people and robbed of his phone while PW2 Peter testified that he was hit on the right leg and arm and robbed of Kshs. 200. That the evidence of both PW1 and PW2 proved more than one ingredient of the offence.

23. On identification, the respondent conceded that neither PW1 Linus nor PW2 Peter were able to identify their assailants as it was dark. However, the prosecution led circumstantial evidence that money was transferred from PW1's phone to the appellant's phone on the material day of the robbery as confirmed by the production of the Mpesa statement (Pexhibit 1) which connected the appellant to the offence herein.

24. The respondent submitted that the defence of the appellant was a mere denial full of lies and not backed or corroborated by any evidence. That the evidence by PW1 and PW2 was consistent while the evidence of PW4 PC Mose corroborated the evidence of PW1 Linus as it confirmed that money was sent from PW1's phone to the appellant's phone. Further, the production of the medical report (Pexhibit 3) proved that he was injured during the robbery.

25. Finally, on whether the charge sheet was defective, the respondent cited section 134 of the *Criminal Procedure Code* (Cap 75) Laws of Kenya which states that, every information shall contain and be sufficient if it contains a statement of the specific offence which the accused is charged with together with such particulars.

26. The respondent relied on the case of Benard Ombuna v Republic [2019] eKLR where the Court of Appeal stated that the test of whether a charge sheet is defective, is whether a defect on the charge sheet prejudices the appellant to the extent he is not aware or confused as to the nature of charges preferred against him and as a result is unable to present an appropriate defence.

27. The respondent submitted that, the charge sheet provided the particulars of the offence and had sufficient information that enabled the appellant to understand the offence he was charged with and was able to cross-examine witnesses. That it did not prejudice his right to fair hearing as envisaged under Article 50 of *the Constitution* of Kenya.

28. At the conclusion of the case, I recognized that, in considering the appeal herein, the role of the first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own

conclusion taking into account the fact that this court did not have the benefit of the demeanor of the witness.

29. In that regard, the court stated in the case of Okeno vs. Republic (1972) EA 32 that;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

30. Pursuant to the afore, the appellant has been convicted and sentenced over an offence of robbery with violence. The prosecution has relied on section 295 as read with 296(2) of the *Penal Code*.

31. The provision of Section 295 states as follows:

> " A person commits robbery if they steal anything and, immediately before or after the time of stealing, use or threaten to use actual violence to any person or property to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained."

32. On the other part, the provisions of section 296(2) of the *Penal Code* states:-

> " A person is guilty of robbery with violence if, while committing robbery, they are armed with a dangerous or offensive weapon, are in the company of one or more other persons, or use violence (wounding, beating, striking, or other personal violence) against any person immediately before, during, or after the robbery. The penalty for robbery with violence is a sentence of death."

33. In the same vein, the ingredients of the offence are settled as follows:

    a. There must be a theft meaning, the taking of property with intent to permanently deprive the owner.

    b. There must be the use of threat of violence to either person or property in order to commit the offence of theft or retain the stolen property.

    c. The prosecution must prove at least one of the following aggravating factors;

        i. The offender was armed with a dangerous weapon, or

        ii. The offender was in the company of one or more other persons, or

        iii. The offender wounded, beat, struck or used other personal violence to any person during, immediately before or after the theft.

34. To revert back to this matter, the prosecution supports its case, on the 1st count vide the evidence of PW1 Linus Ndirangu Githure who testified that he was accosted on 5th May, 2019 at midnight while on his way from work. That the assailants were three in number and one held him on the neck from

behind while another who was in front of him took his phone. That they asked for his PIN number which he gave them.

35. That, subsequently, he learnt from Safaricom that Kshs 1,500 had been withdrawn from his mobile phone through fuliza and withdrawn by the holder of a telephone number 0792553308. He reported the matter to the police station.

36. The prosecution case through the evidence of PW3 No. 232888 PC Alex Njuguna, states that the appellant was arrested upon receipt of information from an informer that he was involved in various theft incidences and assaulting people from time to time. That he was escorted to Kinamba Police Station where PW4 No. 81946 PC Jared Mose investigated the case and charged him as herein stated.

37. In convicting the appellant, the trial court stated that;

> " PW 1's testimony confirms that he was attacked and robbed by 3 individuals and who inflicted injuries during the robbery. I find that PW1 and PW2 have proved that the offence of robbery with violence was committed. "

38. The trial court went on to state:

> " The next issue is positive identification of the assailant. None of the witnesses were able to identify the assailant".

39. Furthermore, the trial court stated that:

> " I have carefully considered the evidence on record and find that having found the accused of robbery with violence, the court observes that the evidence does not support the 2nd count of electronic fraud. Accused is thus acquitted of the said charge."

40. Based on the afore findings of the trial court, it is clear that PW1 Linus did not identify his assailants at the time of the offence. He stated in his evidence in chief that, at the time of the attack and robbery, there was no light. That he did not hear the voice of the attacker and could not identify him. That he only knew of the attacker because of the M-pesa statement showing his name.

41. In cross-examination, he stated that he did not give the description of the robbers as he did not know them physically. That he was not able to identify the robbers at the time of the robbery but later because he had their names. That the appellant was arrested, released and re-arrested and he identified the appellant, the 2nd time he was re-arrested because he had seen him the first time and knew him by then. That he attended an identification parade and identified the appellant between members numbers 7 and 9 as stood at number 8 and identified him by the birth mark.

42. Having considered the evidence adduced by PW1, Linus Ndirangu Githure, I find that it only established that, he was robbed on the material date in question by three people. It also established that he was not able to identify the assailants at the time of the offence. In fact, when he reported the incident, he did not give the description of the assailants. He testified that, he attended an identification parade and was able to identify the appellant as member number 8 on the parade. For reasons not known or recorded, the prosecution did not avail the evidence of that identification parade. The only logical conclusion is that the evidence was not favorable to the prosecution's case.

43. In further consideration of the said evidence, I find contradiction in that, whereas, the particulars of the charge are that, PW1 Linus Ndirangu was robbed of Alcatel phone valued at Kshs. 4,500, PW1 testified that the phone was valued at Kshs 6,000 and was Neon Ray not Alcatel. Furthermore, he

did not produce any evidence that, he owned such phone before the robbery. The ingredients of the offence herein required first and foremost the prosecution establish theft of the alleged phone before proving it was stolen in the robbery.

44. Be that, as it were, the only way the appellant was connected to the offence was the withdrawal of funds from PW1 Linus Ndirangu's cellphone to his cellphone. The trial court acquitted the appellant of that offence, basically exonerating him from the robbery incident. Having done so, the charge of the offence of robbery with violence could not stand as it was anchored on that evidence.

45. To the contrary, I find the prosecution evidence as it relates to withdrawal of funds proved more of the offence in count 2, than count 1. The Mpesa statement produced by the prosecution was proof thereof and having found the appellant's defence to the same was an afterthought and not plausible, the acquittal was not an option.

46. Consequently, I find that the prosecution failed to prove theft of the alleged phone as per the particulars of the charge, the involvement and/or identity of the appellant as the perpetrator, the use of force against the victim and/or the assailants being armed with any offensive weapon.

47. As a result, the conviction of the appellant on count 1 is not proper and I quash it and set aside the sentence imposed upon the appellant. He may be set free forthwith unless otherwise lawfully held.

DATED, DELIVERED AND SIGNED THIS 23RD DAY OF JUNE 2025

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Ms. Chepkonga for the respondent

Ms. Hannah: court assistant