Andrew v Republic (Criminal Appeal E035 of 2023)
[2025] KEHC 10478 (KLR) (16 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10478 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E035 OF 2023

JN KAMAU, J

JULY 16, 2025

BETWEEN

OUSTIN ANDREW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon R. M. Ndombi (SRM) delivered at Vihiga in Senior Principal Magistrate's Court in Criminal Case No 828 of 2019 on 4th May 2022)

JUDGMENT

Introduction

1. The Appellant herein was charged jointly with four [4] others not before this court with the offence of robbery with violence contrary to Section 296 [2] of the *Penal Code* Cap 63 [Laws of Kenya] and gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11[1] of the *Sexual Offences Act*.

2. He was tried and convicted of the offence of robbery with violence and was discharged of the offence of gang rape by the Learned Trial Magistrate, Hon R. M. Ndombi [SRM] who sentenced him to thirty [30] years imprisonment for the offence of robbery with violence.

3. Being dissatisfied with the said Judgement, on 9th November 2023, he lodged the Appeal herein. The same was dated 6th November 2023. He set out nine [9] Grounds of Appeal.

4. His Written Submissions were dated 2nd December 2024 and filed on 10th December 2024 while those of the Respondent were dated and filed on 10th September 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of Selle & Another v Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having looked at the Appellant's Petition of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

8. The court dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution Case

9. Grounds of Appeal Nos [1], [2], [3], [4], [5], [6], [7], [8], and [9] were dealt under this head.

10. The Appellant submitted that the identification parade as conducted by the police officers was fatal and unjust. He restated the evidence that was adduced by the Prosecution witnesses and argued that the police officers prepared a coached-up parade in order to conceal the reality and sacrifice him in this case. He attributed this to the fact that none of the first reports had his names as description of I [sic].

11. He asserted that it would have been in the interest of justice if the Trial Court rejected the identification parade. He asserted that admitting it led to a miscarriage of justice. He called upon this court to re-analyse, re-evaluate and weigh the evidence for the sake of justice as was held in the case of Okeno v Republic [1972] EA 372.

12. He further submitted that the light density used by the witnesses in identifying the attackers was not ascertained in the Trial Court, He argued that Philister Nyaranga [hereinafter referred to as "PW 1[sic]"] testified that she was able to see her attackers but that she was not able to demonstrate how she managed to see him. He added that PW 1 [sic] also said that she did not write his name on her statement which meant that she was not able to identify him.

13. He placed reliance on the case of Ajode v Republic [2004]eKLR 81 where it was held that the injury of the victim itself was not the only ingredient of the offence of robbery under Section 296[2] of the *Penal Code* to warrant a conviction. He asserted that he was not found with any of the items that were suspected to have been robbed from PW 1[sic] and that the claim that he put a panga around the neck of Jesca Nyaleso Osemo [hereinafter referred to as "PW 2"] should not be admitted.

14. He faulted the Trial Court for relying on evidence that was full of contradiction. He relied on the case of Karanja & Another v Republic[2004]eKLR 140 where it was held that where there was a possibility of difficulty in identification and recognition, then the court had to test each evidence with great care and to be aware of the dangers of convicting only on that evidence.

15. He further placed reliance on the cases of P.O.N v Republic[2019]eKLR and Simoni Musoke v Republic [1958] EA 71 where the common thread was that before drawing an inference of the accused's guilt from circumstantial evidence the court must be sure that there were no co-existing circumstances or factors which would weaken or destroy that inference.

16. On its part, the Respondent placed reliance on the case of Oluoch v Republic[1985]KLR where it was held that robbery was committed where the offender was armed with any dangerous and offensive weapon or instrument or the offender was 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.

17. It further relied on the case of *Dima Denge Dima & Others v Republic Criminal Appeal No 300 of 2007* [eKLR citation not given] where it was held that there were three [3] elements of the offence under Section 296[2] of the *Penal Code* and that they were to be read disjunctively but not conjunctively. It emphasised that one [1] element was sufficient to prove an offence of robbery with violence.

18. It also restated the Prosecution witnesses' evidence and submitted that the evidence had proved beyond reasonable doubt that the Appellant was armed, he was in company of four [4] others at the time of the robbery and that he used actual violence at the time of the robbery and robbed PW 1[sic]. It was emphatic that PW 1[sic] was able to identify the Appellant by stating that the room was well lit as there was an electric bulb that was on and hanged in the middle of the room. It further added that PW 1[sic] stated that she was able to identify the Appellant as he was dark and had some big swelling or growths on his face. It pointed out that the Appellant was one of the attackers who guarded her with a panga.

19. It relied on the case of Cleophas Otieno Wamunga v Republic [1989] KLR 424 where it was held that evidence of visual identification in criminal cases could bring about miscarriage of justice and that it was of visual importance that such evidence was examined carefully to minimize this danger. It further cited the case of James Tinega Omwenga v Republic[2014]eKLR where it was held that the purpose of an identification parade was to test the correctness of the identification of an accused person by a witness who did not know him prior to the incident.

20. It was emphatic that the identification parade was proper and that it confirmed that the Appellant was at the scene on the fateful night. It invited the court to note that the attack happened on two[2] consecutive nights and that the light density at the scene was sufficient for the victims to have identified the Appellant during the two [2] consecutive incidents.

21. A perusal of the proceedings of the lower court showed that on 23rd May 2019, at midnight, PW 1[sic] and PW 2 testified that they were asleep when they had a loud bang at the door. PW 2 stated that when she switched on the light of the one [1] bedroomed, they saw several men standing before them. PW 1[sic] said that she was able to see the faces of her attackers as the electric light was on. She told the Trial Court that at some point, her attackers blindfolded her but removed the piece of cloth and she saw their faces.

22. During cross-examination, PW 1[sic] stated that she could recognise the face of the Appellant despite not knowing his name. She added that he was carrying items from the house and putting them outside. PW 2 also testified that the Appellant was guarding PW 1[sic] while his Co-accused were collecting the items in the house. She added that the Appellant placed a panga on the back of her neck. On her cross-examination, she also confirmed seeing the Appellant's face using the light in the bedroom and a torch. She added that she was able to identify him by face at the scene and during the identification parade.

23. No 111246 PC Dismas Kibet [hereinafter referred to as "PW 3"] and No 73xxx SGT Jared Atoni [hereinafter referred to as "PW 4"] told the Trial Court that the Appellant and his Co-Accused were arrested in one of the Co-accused's house.

24. Inspector Andrew Chege [hereinafter referred to as "PW 5"] carried out an identification parade and both PW 1[sic] and PW 2 identified the Appellant by touching him as having been part of the gang that broke into their house twice to rob them being on 23rd May 2019 at 12.00 midnight and 24th May 2019 at 4.00am. He added that the Appellant said that he was not agreeable to the identification parade because he suspected the witnesses saw him leaving the cell. He stated that the Appellant, however, signed the Identification Parade Report.

25. The lighting conditions in the one-bedroomed house were conducive for positive identification. At one point the Appellant's Co-accused threatened to kill PW 1[sic] because she had recognised him but another Co-accused retorted that it was not necessary to kill as there would be more things to steal. That was sufficient time for PW 1[sic] and PW 2 not to have been mistaken about his face.

26. In addition, the Appellant was not a stranger to both PW 1[sic] and PW 2 as they hailed from the same area and PW 2 testified that he used to see their faces at the hotel where she used to work. PW 1 stated that he knew many of the attackers as they hailed from where PW 2 hailed from. It was therefore clear from the evidence that was adduced by the Prosecution that PW 1 [sic] and PW 2 positively identified the Appellant as having been one of the attackers on the two [2] material nights. His argument that the Prosecution needed to adduce other evidence to corroborate his identification therefore fell on the wayside.

27. The fact that several items that were stolen from PW 1's[sic] and PW 2's house and the Appellant was found in his Co-Accused's house squarely placed him as one of the perpetrators on those material nights.

28. Turning to the issue of whether or not the Prosecution demonstrated the elements of the offence of robbery with violence herein, Section 295 of the *Penal Code* stipulates that the elements of robbery with violence are :-

    a. That the offender is armed with any dangerous weapon or offensive weapon or instrument;

    b. That the offender is in the company of one or more persons;

    c. That 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.

29. PW 1[sic] confirmed having seen the Appellant's Co-Accused armed with knives. Her evidence was that they held her neck and she started struggling with them. As a result, they injured her cheek and neck. The Clinical Officer, Paul Muturi Mbuoo [hereinafter referred to as "PW 1"] tendered in evidence the Post Rape Care [PRC] Form and P3 Form which showed that PW 1[sic] sustained injuries during the atrocious attacks by the Appellant and his co-accused persons.

30. It was evident from the evidence of both PW 1[sic] and PW 2 that the Appellant was in the company of others during the attacks. There was robbery. Indeed, PW 2 testified that the Appellant and his Co-Accused persons robbed them of their bags, sheets, duvets, plastic chair, sugar and curtains and ran off.

31. Her further evidence was that he and his Co-Accused persons took sufurias, jiko, clothes, three [3] curtains and PW 1's [sic] clothes, Kshs 190/= and bags during the second attack. She stated that their attackers were armed with pangas, knives, metal rods and torches. Her evidence was corroborated by that of PW 1[sic] and that of PW 4 and PW 5.

32. PW 4 tendered in evidence assorted clothes, photo album, NHIF card, Exercise Book Chama, Sisco Phone [black], Death Certificate, Birth Certificate for PW 1, Bus fare receipt, Bag [white and black], inventory and receipt for the Sisco phone which were recovered from the Appellant's co-accused's house.

33. It was clear from the aforesaid evidence that the Appellant was in the company of his Co-Accused persons. They were armed with a sharp object and that during, immediately before and after the offence they wounded PW 1[sic]. They placed a panga on PW 2's neck as they raped PW 1 [sic] and robbed them of the items that were recovered from the Appellant's Co-accused person's house.

34. The chain of events was unbroken. The Trial Court thus proceeded correctly when it found that all the ingredients of proving the offence of robbery with violence had been satisfied and hence convicted him accordingly.

35. In the premises foregoing, Grounds of Appeal Nos [1], [2], [3], [4], [5], [6], [7], [8], and [9] of the Petition of Appeal were not merited and the same be and are hereby dismissed.

II. Sentencing

36. The Appellant did not raise any ground of appeal on this issue but submitted on the same. The Respondent did not submit on the issue of sentencing. This court found it prudent to determine the issue for completeness of record.

37. The Appellant blamed the Trial Court for not holding that the sentence should run from the day of arrest. He invoked Section 333[2] of the *Criminal Procedure Code* Cap 75 [Laws of Kenya] and placed reliance on the case of Ahmad Abolfathi Mohammed & Another v Republic[2018]eKLR where it was held that courts must include the period already spent in custody in the sentences meted out to accused persons.

38. Notably, the Appellant was found guilty of the offence of robbery with violence. Section 295 of the *Penal Code* states that:-

> " Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."

39. Further, Section 296 [1] and [2] of the *Penal Code* provides as follows:-

    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.

40. The Trial Court sentenced the Appellant to thirty [30] years imprisonment. In the mind of this court, the Trial Court was lenient as it had the option of sentencing him to death.

41. In view of the atrocity that was meted on PW 1[sic] and PW 2 herein, this court found and held that this was one of the instances that the sentence ought to be higher than what was meted upon the Appellant. However, in view of this court's discretion on sentencing, it left the sentence of thirty [30] years imprisonment, undisturbed.

42. Going further, this court was mandated to consider the period the Appellant spent in remand while his trial was on going in line with Section 333[2] of the *Criminal Procedure Code* Cap 75 [Laws of Kenya].

43. The said Section 333[2] of the *Criminal Procedure Code* provides that:-

> " Subject to the provisions of section 38 of the *Penal Code* [cap 63] every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code
>
> Provided that where the person sentenced under subsection [1] has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" [emphasis court].

44. Further, the Judiciary Sentencing Policy Guidelines provide that:-

> " The proviso to section 333 [2] of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

45. The requirement under Section 333[2] of the *Criminal Procedure Code* was restated by the Court of Appeal in Ahamad Abolfathi Mohammed & Another v Republic [Supra].

46. Notably, the Charge Sheet herein indicated that the Appellant was arrested on 24th May 2019. He was sentenced on 13th June 2022. A perusal of the lower court proceedings indicated that the Trial Court did not take into consideration the said period while sentencing the Appellant. This was a period that therefore ought to be taken into consideration while computing his sentence.

Disposition

47. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated 6th November 2023 and lodged on 9th November 2023, was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and is hereby upheld as they were both safe.

48. For the avoidance of doubt, the period from 24th May 2019 until 12th June 2022 be and is hereby taken into account while computing his sentence in line with Section 333[2] of the *Criminal Procedure Code* Cap 75 [Laws of Kenya].

49. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 16TH DAY OF JULY 2025.

J. KAMAU

JUDGE