Makori & another v Republic (Criminal Appeal E016 of 2024)
[2025] KEHC 10381 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10381 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E016 OF 2024

WA OKWANY, J

JULY 3, 2025

BETWEEN

VINCENT OSANO MAKORI ..... 1ST APPELLANT

ERICK MOSE ONGUSO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Sentence at the Chief Magistrate's Court in Nyamira in CMCCR No. 383 of 2020 delivered by Hon. M.C. Nyigei, Principal Magistrate delivered on 27th July 2022)

JUDGMENT

1. The Appellants herein were 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 were that on the night of 3rd and 4th January 2020 at Nyambaria village, Magombo location in Manga Sub-County within Nyamira County, jointly with others not before the court, while armed with offensive weapons namely; metal bars, robbed Momanyi Musa Orina of two mobile phones make Samsung and Nokia 1661, three gas cylinders, assorted clothing, assorted foodstuff and assorted utensils all valued at Kshs. 140,800/= and at the time of such robbery used actual violence to the said Momanyi Musa Orina.

2. The Appellants were also charged with the alternative offence of Handling stolen goods contrary to Section 322 (1) (2) of the *Penal Code*. The particulars of the charge were that on the night of 11th January 2020 at Gekano village, Magombo location in Manga Sub-County within Nyamira County, otherwise than in the course of stealing, the Appellants dishonestly retained Mobile Phone Make Nokia 1661 IMEI No. xxx knowing or having reasons to believe it to be stolen goods.

3. The Appellants pleaded not guilty to the charges and a trial was conducted in which the prosecution called a total of six (6) witnesses as follows: -

The Prosecution's Case

4. PW1, Nimrod Mainye Nchogu, was asleep in his house on the night of 3rd/4th January 2020when at about 2.30 a.m., when he received a call from one Julius Momanyi who requested his assistance to escort the complainant Musa Orina (PW2) to Kisii Referral Hospital. While on their way to the hospital, he noted that the complainant was bleeding from the face. The complainant was treated and discharged after which PW1 accompanied him back to his home where he noted that there were blood stains all over the house and that the complainant's bedroom door had been crushed with a huge stone. PW2 informed him that 2 young men wearing face masks had attacked him and robbed him of 2 mobile phones, 5 keys and other household items. He noted that the complainant had cut wounds on the forehead and wrists.

5. PW2, Momanyi Musa Orina, the complainant, a 71-year-old farmer testified that he was sleeping in his house on the night in question when he heard a loud bang on the door. He saw two masked men enter his house. They hit him with a panga on the left hand, head and left shoulder. The intruders robbed him of 2 phones and a set of house keys. He raised an alarm and the robbers escaped but he later discovered that they had also taken 20 litres of cooking oil, 4kgs of baking flour, 3 gas cylinders and maize flour. Neighbours responded to his alarm and rushed to his aid by escorting him to the hospital for treatment. He was not able to recover any of his stolen items but stated that the police tracked his phone and found it with some suspects.

6. PW3, No. xxx Cpl. Peres Wambua, visited the scene of robbery and noted that the attackers gained entry through the veranda. She stated that the Appellants were arrested on 17th April 2020 after data records from Safaricom linked them to the stolen Nokia phone which was never recovered.

7. PW4, James Edward Ouma Makobi a law enforcement liaison officer at Safaricom received a request from the DCI Manga to obtain call records for IMEI No. xxx from 26th December 2019 to 24th March 2020. He retrieved and printed call records from 26th December 2019 to 11th January 2020, and submitted it to the Investigating Officer. He produced the Safaricom call data (P.Exh1) and Electronic Certificate (P.Exh3).

8. PW5, No. xxx P.C. Onyango Charlotte, received the call data records linking the Appellants to the robbery. She testified that 2nd Appellant used the stolen phone from 10th January 2020 at 0513Hrs and that one Charles Ariga later used it at Gekano on 11th January 2020 at 7.10 p.m. She added that they managed to trace the said Charles Ariga who informed her that his son, the 1st Appellant herein, had used his National Identity card to register the SIM card that was used in the phone. They arrested the Appellants but were unable to recover the stolen phones.

9. PW6, Daniel Nyameino, was the Clinician who examined the complainant. He noted that the complainant had a healed scar on the left side of his head left scapula and left hand. He estimated the age of the injuries to be 3 months old and categorized the degree of injury as harm. He produced the P3 Form (P.Exh2) and Treatment Notes.

10. At the close of the Prosecution's case, the trial court found that the Appellants had a case to answer under Section 210 of the *Criminal Procedure Code*. They were consequently placed on their defence under Section 211 of the *Criminal Procedure Code*. They both elected to tender sworn testimonies and and did not call any witnesses.

The Defence Case

11. DW1, Vincent Osano Makori (the 1st Appellant) testified that he was at his home on 17th April 2020 when the area Assistant Chief and police officers came and asked him to accompany them to the Police Station. The police officers conducted a search at his home and did not recover anything connecting him to the robbery. He noted that the complainant did not identify his assailants and that Charles Ariga was not called as a witness to shed light on the circumstances under which his identity card was used to register the phone SIM card.

12. DW2, Erick Mose Onguso (the 2nd Appellant) testified that Assistant Chief came to his house on 16th April 2020 and asked him to present himself at Magombo Police Post where he was informed of the offence. He stated that he was not involved in the robbery and insisted that the case was based on mere allegations. He denied the claim that he was involved in the robbery.

13. At the close of the case, the trial court found that the Prosecution had proved its case against the Appellants beyond reasonable doubt. The Appellants were consequently convicted on the charge of robbery with violence and sentenced to serve (30) years' imprisonment.

The Appeal

14. Aggrieved by the trial court's decision on conviction and sentence, the Appellants filed a homemade Petition of Appeal dated 16th April 2024 wherein they listed the following grounds of appeal: -

    1. That the trial court erred in law and in fact in convicting the Appellants relying (sic) on circumstantial evidence that pointed guilty (sic) to other persons as the perpetrator (sic) the 1st Accused's name does not appear in the Safaricom data.

    2. That the trial court erred in law and in fact in convicting the Appellants relying (sic) on the doctrine of recent possession whereby PW2 did not conclusively prove the ownership of the alleged Nokia phone 1661. He never claimed in his statement/testimony that he is the one who gave out the IMEI Number relied on by the Prosecution to produce the data nor claimed to know it. There are many Nokia 1661 hence giving the Nokia Number 1661 did not prove ownership. Similarly the IMEI number did not prove ownership.

    3. That the trial court erred in law and in fact in relying on the evidence of Safaricom data that was not rubber stamped, certified nor signed. Burden of proof lies on the Prosecution, 107 *Evidence Act* Cap 80 Laws of Kenya. Hence the question of not cross-examining about it succumbs under Section 107 of the *Evidence Act* (sic). Prosecution is obliged to discharge its duty.

    4. That the trial court erred in law and in fact in convicting the Appellants herein relying on a duplex charge sheet pursuant to the authority of Mwaura vs. Republic which is binding.

    5. That the trial court erred in law and in fact in convicting the accused relying on circumstantial evidence as cited in Abanga alias Onyango vs. Republic, Criminal Appeal No. 32 od 1990.

    6. The trial court erred in law and in fact in readily applying Section 4 of the *Evidence Act* whereas the circumstantial evidence relied on had been displaced by the circumstances.

7. That the trial court erred in law and in fact in not appreciating the Appellant's defence.

8. That the trial court erred in law in not making a finding that the Appellants' sentence should run from the date of arrest pursuant to Section 333(2) of the *Criminal Procedure Code*, 381 of the *Penal Code* and 5.1.22 of the Sentencing Policy Guidelines.

15. The Appellants urged this court to quash the conviction and set aside the sentence by the trial court.

16. The Appeal was canvassed by way of written submissions which I have considered.

The Appellants' submissions

17. The 1st Appellant submitted that the trial court relied on unsubstantiated circumstantial evidence to convict him as his name was not listed in the call data from the telephone service provider. He noted that the call data showed that the national identity card number of one Charles Ariga was used in the stolen mobile phone. He relied on the decision in Terer vs. Republic (1952) All ER 480 (sic), Musoke vs. Republic (1958) EA 715 and Dhallay Singh vs. Republic Criminal Appeal No. 10 of 1997 for the argument that if there are co-existing circumstances which would weaken the inference of guilt, the courts must find that the charge was not proved to the required standard.

18. The 1st Appellant submitted that the Investigating Officer's testimony had no probative value. He noted that the Investigating Officer claimed that his father, one Charles Ariga, whose name appeared on the call records, informed him that the 1st Appellant had used his Identity card to register the SIM card that was used in the alleged stolen phone. He also argued that not only was the said Charles not called as a witness but that the doctrine of recent possession was also not applicable in the case as he was not found in possession of the said phone.

19. The 1st Appellant's case was that the sentence passed by the trial court was manifestly harsh. Reference was made to the case of Willy Joel Makundo vs. Republic (2019) eKLR where the Appellant, who was convicted for a similar offence was sentenced to 7 years' imprisonment.

20. The 2nd Appellant noted that the complainant did not testify on his phones IMEI Number or that he had given the said number to the Investigating Officer. He argued that there was therefore no way of establishing if the complainant owned the phone in question or how the Investigating Officer obtained the said IMEI number.

21. He further submitted that his conviction was not safe since the alleged stolen phones were never recovered from him or at all, and further, that the complainant did not prove that he owned the said phones.

The Respondent's Submissions

22. Mr. Chirchir, Learned Prosecution Counsel, conceded to the Appeal and submitted that there was no evidence of identification of the Appellants as the perpetrators of the offence since the attackers were said to have worn face masks at the time of the robbery. He noted that the stolen mobile phones were not recovered and added that the manner in which the IMEI number used in the call data analysis was obtained left a lot to be desired.

23. He further noted that the person whose name appeared on the call logs, one Charles Ariga, was not called to testify yet his evidence was crucial to the Prosecution's case. He urged this court to quash the conviction and set aside the sentence.

Analysis and Determination

24. I have carefully considered the record of appeal and the parties' submissions. I find that the main issue for determination is whether the Prosecution proved its case against the Appellants beyond reasonable doubt.

25. The duty of a first appellate court was restated in the case of Njoroge vs. Republic (1987) KLR 19 at P. 22:4 where the Court of Appeal held thus: -

> " As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of the first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya V. R(1957) EA 336, Ruwalla V. R (1957) EA 570)."

26. Sections 295 and 296 of the *Penal Code* stipulate as follows on the offence of robbery with violence: -

> 295. Definition of robbery
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> 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.
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> 296. Punishment of robbery
>
> 1. .....
>
> 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

27. The ingredients of the offence of robbery with violence were outlined in the case of Johana Ndungu vs. Republic CRA. 116/1995, [1996] eKLR where the by the Court of Appeal held as follows: -

> " In order to appreciate properly as to what acts, constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the *Penal Code*. The essential ingredient of robbery under Section 295 is 'use of or threat to use' actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore -described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved, will constitute the offence under the subsection:
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> i. If the offender is armed with any dangerous or offensive weapon or instrument; or
>
> ii. If he is in company with one or more other person or persons; or
>
> iii. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

28. In *Dima Denge & Others vs. Republic (2013) eKLR, Criminal Appeal No. 300 of 2007*, the Court of Appeal held that the elements under Section 296 (2) of the Penal code are to be considered disjunctively, which means that any of them would be sufficient to prove the charge. The Court stated thus: -

> " The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

29. In the instant case, it was not disputed that the complainant was attacked on the night of 3rd January 2020 and that he sustained injuries in the said attack. The complainant's testimony was corroborated by the testimony of PW1 who escorted him to hospital and PW3 who visited the scene of crime on the same day of the attack. The complainant's treatment records were also produced at the hearing. PW2 reported that a number of items, including two mobile phones, had been stolen during the robbery. I am satisfied that the elements of the offence of robbery with violence were proved to the required standard.

30. My above findings notwithstanding, the prosecution was still required to tender evidence linking the Appellants to the offence in question. This is to say that identification of the perpetrators of the offence in question is an important element of the offence of robbery with violence. The complainant testified as follows on the circumstances of his attack: -

> " ....I heard people in my house. They had used a big stone inside a sack to open my bedroom door. The noise woke me up as the door fell and I saw two men enter. The lights were off. The men shone their torches on me and told me to sit down. They had worn masks on their faces. The masks covered their entire faces..."

31. From the above extract of the complainant's testimony, it is clear that the he was not able to identify any of his assailants as their faces were covered in masks. It is therefore clear that the only evidence that linked the Appellants to the offence was circumstantial evidence. In Ahamad Abolfathi Mohammed and Another vs. Republic [2018] eKLR the Court of Appeal held thus: -

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
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> > 'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.'"

32. It is trite that, in order to sustain a conviction, based on circumstantial evidence, there must be no other possibilities of co-existing circumstances which may weaken the Prosecution's evidence that links an

accused to a crime. In Moses Kabue Karuoya vs. Republic [2016] eKLR Mativo, J. (as he then was) held thus: -

> " The evidence used to prove guilt is classified as either direct or circumstantial. Direct evidence, is a statement about a fact constituting a disputed material proposition of a rule of law, while circumstantial evidence is testimony about a fact or facts from which the disputed material proposition may be inferred. .....Both direct and circumstantial evidence are to be considered, but to bring a verdict of guilty based entirely or substantially upon circumstantial evidence, it is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the circumstances. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty. This follows from the requirement that guilt must be established." (Emphasis added)

33. In this case, I find that the Prosecution did not tender any cogent evidence to demonstrate that the complainant's alleged stolen Nokia mobile phone had the unique identifying number being IMEI No. xxx. I find that even though PW5 stated that the victim gave them the IMEI numbers for the two mobile phones, this evidence did not come from the victim's own testimony who merely stated that the police officers later tracked his phones and found them with some suspects.

34. It is my finding that it was not proved, beyond any shadow of doubt, that the said IMEI Number quoted before the trial court was in respect to the victim's alleged stolen mobile phone. I also find that the manner in which the IMEI numbers were obtained was not clear in establishing its link to the call data extracted from the telephone company.

35. It is my finding that the circumstantial evidence adduced herein left a lot to be desired and was not sufficient to point to the guilt of the Appellants beyond reasonable doubt.

36. My further finding is that the mere fact that there was suspicion in the manner in which the Appellants may have allegedly operated the allege stolen phone, was not sufficient to prove a charge beyond reasonable doubt. I am guided by the decision in the case of Sawe vs. Rep [2003] KLR 364 where the Court of Appeal held that: -

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypotheses than that of his guilt; circumstantial evidence can be a basis of a conviction only if there is no other existing circumstances weakening the chain of circumstances relied on; the burden of proving facts which justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence is on the prosecution. This burden always remains with the prosecution and never shifts to the accused; Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

37. It was also noteworthy that even though the call data showed that one Charles Ariga, the 1st Appellant's father, had registered a SIM card that was allegedly used in the stolen phone, the said Ariga, though a material witness, was not called to testify. In Oloro and Daltanyi vs. Reginam [1956] 23 23 EACA 49, it was held as follows concerning crucial witnesses: -

> " Prosecution have a duty to call material witnesses. If they fail, the presumption is that if the evidence had been called that evidence would have been unfavourable to prosecution."

38. I find that the failure, by the Prosecution, to call the evidence of Charles Ariga, whose name appeared on the call records, to prove the assertion that the 1st Appellant had registered a line using his National Identity Card, leads to an inference that his evidence would have been adverse to the prosecution's case. It is my view that he was a crucial witness whose testimony could have buttressed the Investigating Officer's evidence and filled the gaps that were highlighted by the 1st Appellant.

39. From the totality of the evidence in this case, I find that the Prosecution did not adequately discharge its burden of proof. Consequently, I quash the convictions by the trial court and set aside the sentences. I direct that the Appellants shall be released from custody forthwith unless they are otherwise lawfully held.

40. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 3RD DAY OF JULY 2025.

W. A. OKWANY

JUDGE