



**Marita & another v Republic (Criminal Appeal 007 & 006 of 2023
(Consolidated)) [2024] KEHC 1925 (KLR) (1 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 1925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 007 & 006 OF 2023 (CONSOLIDATED)**

**HI ONG'UDI, J
MARCH 1, 2024**

BETWEEN

FRANCIS NYAIRO MARITA 1ST APPELLANT

CHARLES NYAMAMBA MAOCHA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(being an appeal from the Judgment of Hon. P.C Biwot (PM) delivered on 15th February 2023
in Ogembo Principal Magistrate's Criminal (Sexual Offences) Case No. MCCR E1655 of 2021)*

JUDGMENT

1. The appellants were charged with the offence of robbery with violence under section 295 as read with section 296(2) of the *Penal Code*. The particulars of the offence were that on the 29th day of July 2021 at Bosoti sub-location in Kenyanya sub-county within Kisii county robbed Faith Engineer a woofler, laptop, iron box, laptop charger and assorted clothes all valued at Kshs. 350,000/= and during such robbery injured Faith Engineer. They faced an alternative charge of handling stolen goods contrary to section 322(1) (2) of the *Penal Code*.
2. They denied the charges and the case proceeded to full hearing, with the prosecution calling a total of four (4) witnesses. The 1st appellant made a sworn statement of defence while the 2nd appellant made an unsworn statement of defence. They did not call any witness. Both were found guilty and convicted on the main count. The 1st appellant was sentenced to life imprisonment while the 2nd appellant was sentenced to 20 years' imprisonment.
3. The 1st appellant filed his petition of appeal on 27th February 2023 raising the following grounds:



- i. That, the trial magistrate faulted both in law and facts when erroneously based conviction on the purported evidence of recognition yet same was shrouded with irregularities which lessened its significance as evidence to be relied upon by the court of law.
- ii. That, the trial magistrate faulted both in law and facts when maliciously based conviction on the purported identification by recognition yet the same were not free from the possibility of error given to the fact that the same were observed at evening hours where the complainant alleges that she saw the appellant along the fence and later she came to realize that the appellant was a casual labourer at a neighbour's place where the accuracy and authenticity was questionable and highly doubted.
- iii. That, the trial magistrate erred in law and fact by failing to appreciate that the appellant was not issued with the first report upon making a lot of efforts before the trial court, which could have indicated that the complainant had lodged a case of robbery with violence when and at what time.
- iv. That, the trial magistrate erred in law and fact by failing to appreciate that the action taken on the basis of the current case of Robbery was that initially he was charged with handling stolen properties and was placed on probation for 1 year *vide* criminal case file No.1401 of 2021 at magistrate court at Ogembo and nowhere was it indicated that the appellant was to be charged with the offence of robbery with violence.
- v. That, the trial magistrate erred in law and fact by failing to find that the complainant did not lodge a complaint of robbery with violence for this was a fiction only to ruin his reputation.
- vi. That, the trial magistrate erred in law and fact by failing to find that it was fatal for the initial report and the statements of the prosecution eye witnesses to lack the details and description of the attackers and yet the complainant had stated that she was able to recognize the attackers and that after she came from hospital it is when she realized that the appellant was working nearby.
- vii. That, the trial magistrate erred in law and fact by failing to find that the circumstances at the alleged time of robbery were not conducive to allow proper identification of the alleged attackers.
- viii. That, the trial magistrate erred in law and fact by failing to find that it was fatal for the police not to have prepared an inventory report on the alleged stolen properties allegedly recovered from the appellant, and also for the initial report of arrest of Appellant not to have indicated the recovery of the said stolen items.
- ix. That, the trial magistrate erred in law and fact by failing to consider the defense evidence and to find it more credible and in particular consistent with the initial report of Robbery with violence.
- x. That, the trial magistrate erred in law and fact by failing to find that the prosecution witnesses were not credible witnesses, as the entire evidence was full of glaring contradictions and discrepancies.
- xi. That, the trial magistrate erred in law and fact in finding that the prosecution had proved the charge of robbery with violence beyond any reasonable doubt and yet the same was not proved.
- xii. That, the trial magistrate erred in law and fact by passing a harsh sentence under the circumstances.



4. The 2nd appellant filed his petition of appeal on 27th February 2023 raising the following grounds:
- i. That, he did not plead guilty to the charges leveled against him by the hon. Court and maintain, the same
 - ii. That, the trial magistrate erred in law and fact in finding that the prosecution had proved the charge of robbery with violence beyond any reasonable doubt and yet the same was not proved.
 - iii. That, the trial magistrate misdirected himself by basing conviction on mere allegation of recognition which could not have been used by the court to only base a harsh sentence yet the same evidence was not significant to be relied upon.
 - iv. That, the trial magistrate erred in law and fact by failing to find that the circumstances at the alleged time of robbery were not conducive to allow proper identification of the alleged attackers.
 - v. That, the trial magistrate equally faulted in both law and fact by failing to note that the inventory record of the purported stolen properties was not brought to court which is a gross violation of the Evidence Act.
 - vi. That, the trial magistrate erred in law and fact by failing to find out the appellant herein was not caught with any of the stolen items nor nothing was there to link the appellant with the said robbery.
 - vii. That, the trial magistrate erred in law and fact by failing to find that the prosecution witnesses were not credible witnesses, as the entire evidence was full of glaring contradictions and discrepancies.
 - viii. That, the trial magistrate erred in law and fact by passing a harsh sentence under the circumstances of mere fabrications.
5. The Appeal was canvassed by written submissions.

The Appellants submissions

6. The appellants filed joint submissions on 15th November 2023. In the said submissions, they raised one issue for determination by this court which is whether the prosecution proved its case beyond reasonable doubt. They submitted that PW1 and PW4 contradicted each other in their statements by failing to tell exactly when the complainant was attacked. They placed reliance on the case of R v Silas Magongo [2017] eKLR where the court held as follows;
- “...In criminal justice system, there is no duty on the accused to prove anything on the allegations of criminal native filed by the state in a court of law. That burden of proof on accused guilty tests solely on the prosecution side...”
- Having failed to adduce watertight evidence against the appellant the trial court magistrate could not convict the appellant on contradictory evidence.”
7. The appellants submitted further that no finger dusting was done on the metal rod that was allegedly used to hit the complainant to prove that indeed the appellants were the ones who used it. They added that PW1 did not pinpoint the appellants’ as the persons who stole her property.
8. They submitted that the investigating officer testified that PW1 was admitted for 10 days while PW5 testified that she was admitted on 30th July 2021 and discharged on 1st August 2021. It was therefore



not clear who was telling the court the truth as the said evidence raised contradictions. They placed reliance on the Nigerian Court of Appeal case of *David Ojeabou v Federal Republic of Nigeria* [2014] LPELR -22555 (CA) which cited with approval the case of *Cyrus Maina Gakuru v Republic*, Criminal Appeal No. 58 of 2014, where the court held as follows:

“Now contradictions mean lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops of, or contains a little more than what the other piece of evidence says or contains.

9. They argued that the exhibits the 2nd appellant was found in possession of were not the same exhibits brought to court rendering the allegation before this court null and void. They added that the 1st appellant upon arrest was found with a laptop (Accer make) and a phone (Tecno Spark) and those were not the things stolen from Pw1’s house. Therefore, they did not know where the HP laptop and Sumsung phone brought before the court originated from yet the 2nd appellant was not found in possession of any stolen property.
10. At the conclusion of their submissions they contended that the 1st appellant’s right was violated having been sentenced to life imprisonment. They placed reliance on the case of *Julius Kitsao Manyeso v Republic* Criminal Appeal No. 12 of 2021, where the Court of Appeal held that life imprisonment was unconstitutional. They urged the court to allow the appeal and quash both the life imprisonment and 20-year sentence. In the alternative, that the said sentences be reviewed or reduced.

The Respondent’s submissions

11. The respondent’s submissions are dated 23rd October 2023 having been filed by prosecution counsel Mr. Justus Ochengo. Counsel opposed the appeal on several grounds, the first being that there was over whelming evidence against the 1st appellant. Second, that identification by recognition was proper without any error. Third, that the 1st appellant was found in possession of a laptop, phone and laptop charger belonging to the complainant. In addition, that the 1st appellant failed to call one Francis Ometa Ombasa as a witness in support of his case yet he alleged that he had given him the said items.
12. The fourth ground was that the prosecution had proved that the complainant had been attacked and injured during the time her items were stolen. Fifth, that the 2nd appellant received the initial report and the court noted that he had been issued with the same. Sixth, that a plea of guilty to a charge of being in possession of stolen property was not a bar to the charge of robbery with violence of the same items where there was sufficient evidence to prove the charge.
13. Counsel on the seventh ground submitted that robbery with violence attracts a maximum penalty of a death sentence and therefore the life imprisonment was reasonable. On the last two grounds counsel submitted that the defence tendered never shook the prosecution’s case. He urged the court to dismiss the appeal.

Analysis and Determination

14. This is a first appeal and this Court has a duty to re-evaluate and reconsider the evidence before the trial court as well as the Judgment and arrive at its own conclusion bearing in mind that it did not see nor hear the witnesses. See *Okeno v Republic* (1972) E.A. 32; *Pandya v Republic* [1975] E.A. 336.



15. After considering the evidence on record, grounds of appeal, all submissions, cited authorities and the law I find the issues falling for determination to be as follows:
- i. Whether a charge of robbery with violence contrary to section 296(2) Penal code was established.
 - ii. Whether each of the Appellants were properly identified as the culprits.
 - iii. Whether the sentences are merited.
16. In addressing the first issue, whether a charge of robbery with violence contrary to section 296(2) *Penal code* was established, it's important to set out the ingredients constituting the said offence. In the case of *Johana Ndungu vs. Republic* CRA 116/1995 the court stated thus:

“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 *PC*. 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:

1. If the offender is armed with any dangerous or offensive weapon or instrument;
or
2. If he is in company with one or more other person or persons; or
3. 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.”

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.” (see *Dima Denge Dima & Others vs. Republic* Criminal Appeal No. 300 of 2007).”

17. The evidence of an attack having occurred was given by the complainant (PW1) and (PW3) Alice Momanyi). PW3 found the complainant lying down unconscious and bleeding from the head and face. This was on 30th July, 2021 at 10.30am. PW1 explained that she had been hit on the head with a metal rod. She later discovered that her laptop, phone, hooper and iron box had been stolen from her house. PW3 went to the house on the request of Jared (PW1's husband) since he was not able to reach her on phone. The last witness who is shown as PW5 Francis Matete Onyango is a clinical officer. He testified on behalf of a colleague Francis Omeya. He produced the treatment notes EXB1a, Discharge summary EXB1b. CT scan EXB 1c, and the P3 from EXB2. It was his evidence that PW1 was injured on 29th July, 2021, admitted on 30th July, 2021 and discharged on 11th August 2021, further that the injuries were five (5) weeks old when she was examined on 4th September, 2021 as per the P3 form EXB 2.
18. Further evidence by PW1 was that he was attacked by two (2) people. One person entered the house while the other remained at the gate. Upon this analysis this court is satisfied that the following elements of the offence of robbery with violence were established by the prosecution evidence namely: There was theft, of the complainant's items namely wooper, laptop, iron box, 4 mobile phones, laptop charger, assorted clothes PW1 was injured before the said robbery by the attacker who was armed with a metal rod (EXB 4) The attackers were more than one.



19. The critical issue is whether the appellants were identified as the robbers. PW1 testified that the offence took place on 29th July, 2021 at 3.00pm at her home. She saw the 1st appellant whom she referred to as “Nyairo” jump over her fence. He met her at her door, then a conversation started and he hit her on the head. She then saw the 2nd appellant who had worked for them before at the gate. He identified him by voice and he saw him well.
20. Both appellants have challenged their identification. PW4 the investigating officer, stated that the complainant was discharged after ten (10) days and this is confirmed by the discharge summary document (EXB 1(b)). Meanwhile the 1st appellant were arrested for being in possession of stolen property *vide* Ogembo Criminal Case No. MCCR E140/2021. He admitted the charge and was convicted and placed on probation. The stolen items were kept at Nyangusu police station.
21. On 3rd September, 2021 the appellants were again arrested by members of the public and taken to Kenya police station. It was then noted that the stolen items complained of by PW1 were similar to what the 1st appellant was talking about and which items were at Nyangwesu police station. They sent for the said items.
22. The laptops and phones were identified by PW1 and her husband. The said husband Jared was able to open up the said gadgets by use of their passwords. That’s how the gadgets EXB3a, 3b and 3c were identified to belong to the couple.
23. It is true an identification parade is used to seal a number of loopholes on issues of identification. In *John Mwangi V Republic* [2014] eKLR the Court of Appeal stressed the importance of conducting identification parades and held that:
 15. identification parades are meant to test the correctness of a witness’s identification of a suspect see this court’s decision in John Kamau Wamata Vs Republic Criminal Appeal No. 68 & 69 of 2008”.
24. This element on an identification parade does apply to the 2nd appellant only. The reason is that PW1 was not clear in her evidence how she was able to see him. She told the court he had remained at the gate. What kind of gate was this? How far was the gate from where she was? Did she ever talk to the 2nd appellant while he was at the gate? Did she give his name to the police? She is not the one who identified the 2nd appellant to members of the public before his arrest. According to PW4 he charged the 2nd appellant because the 1st appellant implicated him but the 2nd appellant denied committing the offence. The only thing that could have saved PW4’s decision to charge the 2nd appellant would have been an identification parade which was never conducted. He will therefore escape.
25. Though the same would have applied to the 1st appellant his case is different because he had been found in possession of stolen items which were later identified as belonging to PW1 and her husband. The same are among the items that were stolen from PW1 during the robbery case complained of. It is therefore the possession of these stolen items that squarely links him to this offence with no room for escape.
26. Upon conviction the 1st appellant was sentenced to life imprisonment. After considering all the circumstances including the serious injury to PW1, the partial recovery of the stolen items and the 1½ years he spent in remand custody, I am satisfied of the need to interfere with the sentence.
27. The upshot is that the Appeal partially succeeds and I hereby make the following orders



1. 1st Appellant Appeal against conviction is disallowed. Conviction is confirmed. Life imprisonment sentence is set aside and substituted with eighteen (18) years imprisonment from 6th September, 2021 when he was sent to remand prison.
2. 2nd Appellant Appeal allowed. Conviction quashed and sentence set aside To be released unless otherwise lawfully held under a separate warrant.

28. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1ST DAY OF MARCH, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

