



**Momanyi v Republic (Criminal Appeal 20 (E016) of 2022)
[2024] KEHC 4267 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CRIMINAL APPEAL 20 (E016) OF 2022
PN GICHOHI, J
APRIL 11, 2024**

BETWEEN

JOEL ONYIEGO MOMANYI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from the conviction and sentence Hon. Paul Biwott, Senior Principal Magistrate dated and delivered on 22nd of September 2022 in the original Ogembo PMCR. No. 2280 of 2018)

JUDGMENT

1. Before this Court, the Appellant, Joel Onyiego Momanyi has challenged the judgment by the trial magistrate both conviction and sentence in Criminal Case No. 2280 of 2018.
2. He had been charged and convicted of the offence of robbery with violence contrary to 296 of the *Penal Code*. The particulars were that on 21st day of September 2018 at around 2200 hrs. at Amakara Sub-location in Gucha South Sub- County within Kisii County, jointly with others not before court robbed John Keha Kshs. 3,000/=, a mobile phone make Techno CE 109 valued at Kshs. 9,000/= and ignition keys for motor vehicle registration number KCA 924 G Mitsubishi all valued at Kshs. 13,000/= and in the process he robbery and immediately before or immediately after the time of such robbery he assaulted the said John Keha by stabbing him twice on the left side of the stomach and on the head using a sharp object.
3. He was subsequently sentenced on 22/09/2022 to 12 years imprisonment and being dissatisfied, he appealed to this Court on 05/10/2022 vide a Petition of Appeal dated 04/10/2022 on 10 grounds which can be summarized as follows:-
 1. The learned Magistrate erred in law in finding that the



Appellant herein was culpable notwithstanding clear indication that the appellant was not associated with the offence(s) committed.

2. The learned Magistrate erred in law and in fact in finding and holding that the prosecution had proved its case beyond the requisite standards, despite that the evidence tendered by the prosecution was riddled with material contradictions connoting a frame up on the Appellant.
 3. The Learned Magistrate shifted the burden of proof upon the appellant and thereby requiring the appellant to prove his innocence contrary and in contravention of established criminal principle that the burden of proof rests upon prosecution and same does not shift.
 4. The learned Magistrate erred in law and in fact by disregarding defense evidence.
 5. The sentence meted out is manifestly excessive, harsh and/or punitive.
4. 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 .
 5. Pursuant to the above, the summary of the entire evidence before the trial court was as here below. In regard to the prosecution case, six witnesses testified.
 6. PW1 was John Keha Matori (herein referred to as the complainant). He told the court that he left Darma Springs Club at 10.00 pm and headed to his house within the Club. The house was locked. He called the Appellant who was the watchman and inside the guard house. The Appellant responded saying “I am needed” and proceeded to open his door.
 7. The complainant was surprised as he had lived there for six months. He turned to face the Appellant. The Appellant hit him on the right side of the head. He hit him a second time but on the left side of the head. The complainant fainted and when he regained consciousness, he noted more injuries on his body. He was pulled on the floor. He opened his eyes and held the hand that was pulling him and he “head bolted” the person and he let the complainant go. He identified that person as the Appellant. The complainant then saw some other people ran away.
 8. He rushed to AP Etago where he reported and while there, he realised that he did not have the keys to his Mitsubishi FH registration number KCA 924G, his Techno mobile phone and Kshs. 3000/= . He was bleeding and fainted while at AP Etago. He found himself at Millenium health facility from where he was referred to Kisii Teaching and Referral Hospital. He had been injured on the head , left side of the stomach and right hand.
 9. He explained that he had eaten with the Appellant on the night the Appellant attacked him. There were security lights at the corridor and the light was sufficient for one to see.
 10. In cross examination, he told the court that he was at Darma Springs Club from 8.00 pm alone but there were other people. He left the Club at midnight leaving other people in the Club. He had taken four (4) half- liter bottles of Kenya Cane. He further explained that he lived there whenever he had gone to work. He knew the Appellant as he (Appellant) even used to cook whenever the complainant came with chicken from home.
 11. PW2 Elizabeth Atieno was the wife to the complainant. She testified that they lived in Magena. She received a call from an unknown person that the complainant had been injured. While in company of her nephew, she rushed to millennium clinic and found the complainant. He had stitches on the head and the stomach. She reported the matter at Etago Police Station.



12. PW3 Lucas Muhoro Morara was asleep when he received a call that the complainant had been injured at Etago. He went to Etago and found him at a private clinic.
13. PW4 Mary Kerubo went to Darmas Springs Bar and Restaurant on 22/09/2018 at 2.00 pm and found the manager Jephias Oriango and a male visitor. The visitor told her that his brother had booked a room at the Restaurant and had fought with another person and was admitted at Kisii Hospital. He therefore asked to be shown the room where his brother had slept so that he could pick the car keys and drive off the vehicle.
14. The Manager briefed PW4 confirming the events as narrated. She called the Appellant and they got the car keys from the store and she handed them over to the visitor. The Appellant was later charged with this offence.
15. PW5 Godfrey Monyoro, a clinical officer at Etago Hospital testified that he filled the P3 Form on 24/09/2018 for the complainant who had a history of having been assaulted 21/09/2018 by a person known to him and had been treated at a private hospital in Etago. The complainant had a wound on the head and a cut on the left abdomen inflicted by a sharp object. His clothes were soaked with blood. They did abdomen scan and PW5 classified the degree of injury as harm.
16. PW6 No.66139 Cpl Alex Gitonga of Etago Police Station who took over investigations in year 2022 when the matter was already in court. He testified that the complainant's wife by the name Elizabeth had reported to the police in 2018 that her husband had been stabbed twice in the stomach and robbed of his phone, Kshs. 3,000/- and car keys at a bar where he had booked a room. The complainant was in hospital and photos were taken. The police also visited the scene and recovered the stolen phone and car keys from the Appellant. The photographs of the recovered items were also taken.
17. In his unsworn statement in defence, the Appellant termed the charges as false. He testified that he worked in the Club and that the complainant had slept there for two days. That on the material date, he went to the guest rooms upstairs at 9.30 pm and found the complainant in company of two ladies. He opened the door for him and went back to his seat.
18. A lady came and he heard screams in the bar. The barman ejected the drunk girl from the bar. In the process, he saw the complainant at the gate. The Appellant asked the complainant why he was doing watchman work. It is then that he attacked the Appellant. The Appellant reported the matter to police and went for treatment. He was later arrested and charged.
19. This appeal was canvassed by way of written submissions. Mr. Maroko for the Appellant submitted that there were no records to show that the complainant stayed at the club for that period. That the owner of the club could similarly not ascertain the duration that the complainant had stayed at the club.
20. Further, he submitted that the time the incident occurred was not clear since the complainant testified that he left the club at 10.00 pm and that is the time the incident occurred. However, during cross examination, he told the court that he left at midnight.
21. He further submitted that during cross examination, the complainant confirmed that he had taken four half litre bottles of Kenya Cane. That in the circumstances and in that state of mind, it is very possible that the complainant was the assailant when he went to the gate where the Appellant was manning. While maintaining that there were several people at the time the complainant was allegedly attacked, counsel submitted from the evidence by PW4 raises the assumption that the complainant fought with another reveller not before the court and not the Appellant.



22. Further, he submitted from the evidence, it was the complainant who went in search of the watchman, not the other way round and therefore, the Appellant could not have anticipated this visit and armed himself in preparation to rob the complainant.
23. Counsel submitted that no evidence was adduced to indicate that the store was the Appellant's house or that he had control or access to store from where the car keys were recovered. Further, counsel submitted that in his drunken state, the complainant only realised at the Police Station that he did not have his keys, phone and money. That in the circumstances, it cannot be ascertained whether the same were robbed of him, dropped accidentally or simply misplaced.
24. Further, Counsel took issue that according to PW6, CPL Gitonga, it was the complainant's wife (PW2) who reported the crime and not the complainant. That on cross-examination, PW6 further told the court that it was from the police records that he got information that the phone and keys were found on the Appellant. Counsel therefore submitted that the investigating officer ought to have been called to clarify the contradiction as to where the keys and phone were found. Citing the case of *Republic Vs Cliff Macharia Njeri* [2017] eKLR, Counsel submitted that failure to call the investigating Officer in this case was fatal.
25. Counsel submitted that failure to investigate as to who the other person was, and in the absence of any evidence corroborating an extremely drunk complainant's narrative, relying on the said evidence to issue a conviction would render the same unsafe.
26. He submitted that there was a possibility that there were eye witnesses but they were not called as they would have pointed fingers at the complainant as the author of his own misfortune. In conclusion, he urged that the conviction be quashed, the sentence set aside and the Appellant set at liberty unless otherwise lawfully held.
27. In rebuttal, the Respondent, through learned Prosecution Counsel Justus Ochengo cited the case of *Jeremiah Oloo Odira v Republic* [2018] eKLR and submitted that the prosecution had established the elements of a charge of robbery with violence in that the complainant had clear recollection that he was attacked leading to the injuries. That the evidence was corroborated by P3 Form, CT scan and treatment notes, and that in the process of that attack, he was robbed his keys, phone and money.
28. Further, he submitted that there were security lights with sufficient light for positive identification. That this was case of recognition and therefore, there was no mistaken identity. He further submitted that the Appellant was found in possession of the keys and phone that were in possession of the complainant at the time he was robbed but the Appellant did not give explanation as to how he came into possession of the said property. That in his defence, the Appellant placed himself at the scene of the robbery.
29. Lastly, he submitted that the maximum provided for by law of death penalty and therefore a sentence of 12 years that was meted on the Appellant was reasonable. He urged the Court to find the conviction and sentence proper and therefore proceed to dismiss the Appeal.
30. After considering the evidence before the trial court and the submissions by parties, the broad issues for determination are:
 1. Whether the prosecution proved its case against the appellant beyond any reasonable doubt.
 2. Whether the sentence imposed on the Appellant should be interfered with.



31. On the first issue, Court of Appeal in *Mkendesbwa v Republic* [2002] 1 KLR 461, stated :-
- “In criminal cases, the burden is always on the prosecution to establish the guilt of the accused beyond reasonable doubt and generally the accused assumes no legal burden of establishing his innocence. However, in certain limited cases the law places a burden on the accused to explain matters which are peculiarly within his own personal knowledge.”
32. In order to prove its case, the Respondent had to establish the ingredients of the offence of robbery with violence as provided for under Section 296 of the *Penal Coded* in the following terms:-
- “(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]
33. From the above provision, the Respondent had to prove any of the above ingredients. In doing so however, Section 143 of the *Evidence Act* is borne in mind as it provides that :-
- “No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”
34. It is also settled law that suspicion alone, however strong, cannot form basis of inferring guilt of the accused person.
35. Bearing these principles in mind, there is no doubt that the Complainant injured on the material night at Darmas Springs Club and that those injuries were not self-inflicted. The issue therefore is whether it is the appellant and others not before the Court who inflicted those injuries.
36. On the issue of identity, there is no doubt that the incident occurred at night. The defence has raised the issue of contradiction as to the time the complainant arrived at the gate. The complainant’s evidence in chief was it was 10.00 pm while in cross examination, he gave the time as midnight. Not all manner of discrepancies can affect a case. For a contradiction to be fatal, it must relate to the totality of evidence and must be substantial.
37. The only eye witness to the attack was the Complainant in this case. It was not the first time that the Appellant was seeing the complainant whether the complainant stayed there for six months whenever he had work in the area as stated by the complainant or only two days as alleged by the Appellant. He maintained his evidence even on cross examination. He even knew the Appellant’s voice as he lived with him all the while.
38. This was therefore evidence of recognition. Regarding such identification, the Court of Appeal in *Cleophas Otieno Wamunga v Republic*[1989]eKLR had this to say:-
- “It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial Court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”



39. It is not disputed that the Appellant was on duty at the premises when the complainant arrived. It is clear that when the complainant called out to the Appellant to open, he responded. According to the complainant, the Appellant responded saying “I am needed”.
40. That is when the complainant turned and the Appellant hit him twice on the head and the complainant fell down unconscious. It is then that he opened his eyes and held the hand pulling and “head bolted” the person and the person let the complainant go. He identified that person as the Appellant. The others ran away.
41. The Appellant’s line of defence is that he saw the complainant at the gate. He asked the complainant why he was doing watchman work. It is then that he attacked the Appellant injuring him. It is not clear what watchman work the Appellant was accusing the complainant of doing. This line of defence is not plausible. From the totality of evidence, it cannot not be inferred that it is the complainant who approached and attacked the Appellant as submitted by his counsel.
42. Further, the amount of alcohol that the complainant admitted to have taken that night is undisputed. According to counsel for the Appellant , the complainant was extremely drunk and therefore, his evidence required corroboration. There is however no to show state of that drunkenness so as to interfere with identification.
43. Although the attack occurred at night, there was sufficient security light to enable the complainant see, recognise and identify the Appellant as one of the attackers. There was no possibility of error. It is clear that the complainant was attacked by the Appellant and others not before the court.
44. Regarding exhibits, the evidence is that the complainant realized at AP station Etago where he had rushed to that he did not have the keys to his Mitsubishi FH registration number KCA 924G, his Techno mobile phone and Kshs. 3000/= . They were in his possession during the attack. The money was not recovered but the car keys and the phone were recovered. According to PW6, the police records showed that the phone and the keys were recovered for the Appellant.
45. When someone claiming to be a brother to the complainant came looking for the car keys to drive the vehicle out, Mary Kerubo Makori (PW4), while in the presence of the room manager called the Appellant and they got the keys from the store. In his judgment , the trial magistrate found that the keys and the phone were later traced to the accused in the club’s store. This Court finds that proper analysis of the evidence tendered was undertaken leading that finding.
46. In the circumstances herein, failure to call the officer who investigated this case was not fatal to the Prosecution’s case. The conviction was sound and is hereby upheld.
47. Lastly, is the issue in regard to the sentence imposed by the trial court which the Appellant termed as excessive, harsh and/ or punitive. However, it is settled law that sentencing is within the discretion of the trial court and that the Appellate Court will not easily interfere with the that discretion unless the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle.
48. Further, even if the Appellate Court feels that the sentence is heavy and that it might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist (See [Bernard Kimani Gacheru v Republic](#) [2002] eKLR).
49. The trial court record shows that the Appellant was a first offender. In mitigation, he sought to be pardoned saying he was an orphan , a single parent with children after his wife ran away. That he was remorseful.



50. While sentencing, the trial magistrate held:-

“Mitigation and 1st offender recorded. I find the accused remorseful, His victim however sustained serious injuries. He deserves no mercy . I am however touched by the reasoning in *Muruatetu case* decision. Death sentence was taken away as unconstitutional. I sentence accused with the authority in mind, to serve 12 years imprisonment. Right of Appeal 14 days.”

51. It is clear that the trial magistrate had in mind the *Muruatetu case*. However, the P3 form revealed that the degree of injury was harm. Being a first offender and considering the mitigation, and the circumstances under which the offence was committed, a report from the Probation Officer have been necessary but was not called for. In the prevailing circumstances, it was rather harsh for the trial magistrate to use the phrase that the Appellant “deserved no mercy” when passing that sentence. A lesser custodial sentence would have sufficed in the circumstances.

52. From the court record, the Appellant was 26/09/2018 and took plea the following day. He was released on bond on 08/10/2018. However, Section 333 (2) of the *Criminal Procedure Code* was not put in consideration while passing the sentence.

53. In conclusion, the Appeal partially succeeds and the Court makes the following orders:-

1. The Appeal against conviction is dismissed.
2. The sentence of 12 years is set aside and substituted with a sentence of Eight (8) years imprisonment.
3. The period the Appellant spent in custody, that is from 26/09/2018 to 08/10/2018 be taken into account in computing the Eight (8) years imprisonment.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 11TH DAY OF APRIL, 2024

PATRICIA GICHOHI

JUDGE

In the presence of:

Mr. Maroko for Appellant

Mr. Kihara for Respondent

Yego / Aphline- Court Assistant

