



REPUBLIC OF KENYA



**Langat v Republic (Criminal Appeal E015 of 2023)
[2024] KEHC 4406 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E015 OF 2023**

GL NZIOKA, J

MAY 2, 2024

BETWEEN

ALEX KIPKONGA LANGAT APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of Hon Y. M. Barasa Principal Magistrate (PM) delivered on 4th April, 2023 vide Naivasha Chief Magistrate's criminal case No. E554 of 2020)

JUDGMENT

1. The appellant was charged vide Chief Magistrate's Criminal Case No. 30 of 2020 at Naivasha with the offences 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 28th November, 2020 in Naivasha sub-County within Nakuru County, while armed with dangerous weapons namely a knife robbed MWM of a mobile phone make Tecno Spark 4 valued at Kshs. 11,000 and cash of Kshs. 150, and immediately before and after the time of the said robbery threatened to use actual violence to the said MWM.
2. The charge was read to the appellant and he pleaded not guilty and the case proceeded to full hearing. The prosecution case is that, on the 27th August 2020, PW1 MWM (herein "the complainant") was called by the appellant who told her that, he was looking for a "maid" and the complainant confirmed that she was available. On 28th June 2020, the appellant called her at 3:00am, and again at 5:00am, when they met and as they were walking on, the appellant showed her his card and then called the wife to avail keys.
3. However, he suddenly turned against the complainant and drew a knife at her. That he snatched her Tecno Spark 4 phone and Kshs. 150. He then raped her. That, he threatened to take her children for sacrifice if she reported him. The complainant reported to the brother who advised her to report



- the matter to the police station and she did. On 25th December 2020, the complainant spotted the appellant, notified the brother and he was arrested and after investigation he was charged accordingly.
4. At the close of the prosecution case the trial court ruled the appellant had a case to answer and pleaded her on his defence. He denied the offence and testified that, on 25th December 2020, he was at Maai Mahiu late in the evening as he had missed a vehicle to Nairobi due to Covid – 19 pandemic curfew. That as he was looking for a place to sleep, she saw four people, the complainant approached him, took off his mask, and phone. That she him of stealing her phone and money. As a result a crowd gathered and frisked him, took his phone, money, and cap and handed over to the police and was charged accordingly.
 5. At the close of the entire case, the trial court delivered its judgment on 4th April 2023, wherein the appellant was found guilty, convicted and sentenced to life imprisonment.
 6. However, he has appealed against the decision of the trial court on the grounds: -
 - 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 of robbery with violence as defined under section 296 (2) of the Penal Code were not conclusively proved.
 - b. That, the learned trial magistrate erred in law and fact by convicting the appellant by evidence of a single witness PW1 which was not corroborated and the court failed to give a warning on the reliance of this evidence. Thus, identification remained not proved.
 - c. That, the learned trial magistrate erred in law and fact when he convicted the appellant yet failed to find that recognition could not be proved without the complainant recording any physical features or any evidence of recognition in his first report dated OB No. 09/27/11/2020 at Maai Mahiu Police Station and failed to note that there were no exhibits that connected the appellant with the offence in question.
 - d. That, the appellant's defence of alibi was not considered.
 - e. That, I pray to be supplied with a copy of the original trial court's proceedings and its judgement.
 - f. That, further grounds shall be adduced at the hearing or this appeal.
 7. The appeal was opposed vide respondent's grounds of opposition dated 21st November 2022 wherein the respondent states: -
 - a. That the appellant was positively identified by the complainant and her brother as the person who violently robbed the complainant of her phone and money on the 28th November 2020 at Maai Mahiu town.
 - b. That during the said robbery the appellant used force and violence to rob off the complainant.
 - c. That the complainant later on met the appellant and positively identified him as the person who robbed her off and with the help of her brother and members of the public, they arrested the appellant and escorted him to Maai Mahiu Police Station and made a report thereof.
 - d. That there was no need of identification parade, since the complainant is the one who arrested the appellant and surrendered him to the police as the man who violently robbed her of her phone and money.



- e. That the court heard all the witnesses and considered the appellants defence and dismissed the same.
 - f. That the appellant was sentenced to life imprisonment for the commission of the said offence. We urge the court to uphold the said sentence.
8. The appeal was disposed off vide filing of submissions. The appellant in submission filed on 21st August 2023 argued that, the charge sheet was defect for being duplex for being charged under section 295 as read with section 296 (2) of the [Penal Code](#).
 9. The appellant submitted that, section 295 relates to general robbery while, section 296 (2) contains the ingredients of the offence of robbery with violence, and that both provisions provide for different punishments. Further, the charge sheet failed to include “jointly with others not before the court” which made the offence a simple theft That, in the circumstance he did not know which offence he was charged with and the defence to offer.
 10. The appellant submitted that, the ingredients of the offence of robbery with violence were not conclusively proved. That, the P3 form in support of the complainant’s evidence was never produced in court and therefore he should have been charged under section 296 (1) of the [Penal Code](#).
 11. The appellant further submitted that, the prosecution case was riddled with material discrepancies and inconsistencies with regards to identification. That, the complainant alleged that she was alone at the scene of the crime and at the same time claimed to have met the appellant at club Smile, a public place. Further, the complainant alleged that she had communicated with the appellant previously but did not report the matter to the police.
 12. Furthermore, the appellant was arrested six (6) months after the alleged offence, however, the complainant had not given a description of her attacker to the police. He relied on the case of; [Matianyi v R](#) (1986) KLR 198 where the court stated that if a complainant had a strong impression of the features of the assailant, the complainant will be able to give some description.
 13. The appellant faulted the trial Magistrate for relying on the evidence of a single witness without warning himself on the dangers of doing so. He relied on the case of [Cleophas Otieno Wamunga v Republic](#) Cr. App No. 20 of 1982 where the Court of Appeal stated that the evidence of visual identification must be examined carefully to minimize the danger of relying wholly or to a great extent the correctness of one or more identification of the accused.
 14. Furthermore, there was no circumstantial evidence to support the evidence of the complainant taking into account that the period of six (6) month from the time the alleged offence occurred to the time of his arrest could have affect the memory of the complainant.
 15. Finally, the appellant submitted that, the sentence of life imprisonment meted out by the trial court was the mandatory sentence and therefore deprived the trial court of the legitimate exercise of its discretion to mete out another sentence and in the process violated his right to a fair trial under Article 50 of the [Constitution](#) of Kenya, and was further in breach of sections 216 an 329 of the [Criminal Procedure Code](#).
 16. However, the respondent in submissions dated 31st July 2023 argued that, the prosecution proved its case beyond reasonable doubt. That, in the case of; [Oluoch v Republic](#) (1985) KLR the court laid out the ingredients of the offence of robbery with violence being that; the offender is armed with a dangerous an offensive weapon, or is in the company of one or more persons, or at or immediately before or after the time of robbery wounds, beats, strikes or uses personal violence to any person.



17. It was submitted that, the appellant was armed with a dangerous weapon, a knife, and robbed the complainant of her mobile phone Tecno Spark 4 valued at Kshs. 11,000 and cash amount of Kshs. 150. That, after the robbery the appellant raped the complainant. Further, the complainant produced the receipt for her phone in court.
18. The respondent also submitted that, the complainant identified the appellant as they met in a well-lit area and was able to see him well. Furthermore, the complainant arrested the appellant and took him to the police station.
19. Reliance was placed on the case of; *Charles Mwai Kimani v Republic* (2022) eKLR where the court held that the appellant was seen robbing the victim and was positively identified by witnesses and dismissed the appeal.
20. The respondent also submitted that, the trial court in its judgment warned itself on the dangers of relying on the evidence of a single witness and held that it was satisfied that the offence was committed.
21. Lastly, the respondent submitted that, the appellant presented a defence of alibi in his defence hearing but was dismissed by the trial court as being an afterthought, and held that the prosecution had proved its case to the required standard. The respondent urged the court to uphold the sentence imposed by the trial court.
22. I have considered the appeal in the light of the materials placed before the court and noting that the role of the 1st appellate court as held by the Court of Appeal in the case of; *Okeno v. Republic* (1972) EA 32, is to re-evaluate the evidence afresh and arrive at its own conclusion, noting that it did not benefit from the demeanour of the witnesses.
23. In that matter, the court stated as follows: -

“An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) 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”
24. In the instant matter the offence of robbery with violence which the appellant was charged with is provided for under section 296(2) of the *penal code* which states: -

“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 use any other personal violence to any person, he shall be sentenced to death.”
25. Pursuant to the aforesaid, the ingredients of the offence are thus settled that there must be evidence of; the theft, number of assailants, whether the appellant was armed with a dangerous weapon, and whether the appellant injured or threatened the complainant.



26. In that regard, the elements of robbery with violence which were set out in the case of; *Oluoch –v- Republic* [1985] KLR 549 by the Court of Appeal as follows:

“Robbery with Violence is committed in any of the following circumstances:

- (a) The offender is armed with any dangerous and offensive weapon or instrument; or
- (b) The offender is in company with one or more other person or persons; or
- (c) 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”

27. Further, in the case of; *Daniel Muthoni Marimi v Republic* [2013] eKLR where the Court of Appeal stated that proof of any of the three elements of the offence of robbery with violence is enough to sustain a conviction under section 296(2) of the Penal code.

28. As a result the prosecution had to prove that, when the appellant committed the offence he was in the company of one or more persons. In this matter the complainant stated that the appellant was alone when he committed the offence therefore that element of the offence was not proved.

29. The second element requires proof that the offender was armed with a dangerous weapon. The evidence of the complainant’s is that, the appellant was armed with a knife. If that evidence is taken as stated, then the element of a dangerous weapon is proved. The other element requires proof of threat or harm to the victim. The complainant testified that the complainant threatened to take her children to sacrifice if she reported the matter. There is however no evidence of physical harm to the complainant. If again the complainant evidence is to be considered, then the element of threat to harm her would have been proved.

30. However, two key questions arise. Was the complainant robbed? If so by who? Was it the appellant? In that regard the complainant’s evidence is that she was robbed of a mobile phone, Tecno Spark 4, valued at Kshs. 11,000, and money of Kshs. 150. However during her evidence in chief she did not produce any evidence of possession of the phone. She simply stated:-

“ He then turned on me with a knife and snatched my Techno Spark 4 and Kshs 150. He took my money and the phone and raped me”

31. The prosecution did not make any effort to establish the existence of the phone and the money before it was stolen. Similarly, when PW2 JN, the complainant’s brother, testified he did not adduce evidence in relation to the existence of the phone and money before it was stolen. He merely stated that, the complainant told him her phone Techno Spark 4 had been stolen worth Kshs. 11,000 and Kshs. 150.

32. It suffices to note that during cross-examination PW2 Njenga stated that he was the one who bought the phone and that the receipt was in his name. It suffices to note that the prosecution merely rehashed the same evidence in re-examination by the witness repeating that the mobile phone was Tecno and he was the one who bought it.

33. PW3 No. 5989850 PC Mike Maganje who investigated the matter, did not allude to the ownership of the stole phone and money. He did not inform the court whether he ever sought for the receipt to



prove the phone was bought and later stolen or whether he even requested PW2 Njenga who bought the phone to give him a receipt. In cross-examination, the investigating officer stated: -

“I asked for a receipt of the phone later on. She did not have the receipt when first report was recorded”

He rested his evidence there and the prosecutor did not pursue it in the re-examination.

34. Pursuant to the aforesaid there is no conclusive evidence that the phone and the money stolen were in the complainant’s possession before the theft. They may or may not, which creates doubt to the benefit of the appellant.
35. Furthermore, the only evidence as to how the offence was committed was led by the complainant. The alleged stolen items were not recovered. The trial court noted that, there was no independent evidence to corroborate the complainant evidence but held that, there was adequate light at the scene as such the complainant was able to identify the appellant and that the trial court found no reason for her to have framed the appellant.
36. However, the burden of proof in criminal case is quite high. It is beyond reasonable doubt. If the complainant stated that, the scene was lit, the prosecution needs to establish the intensity of the light, the duration of the incident and the distance between the appellant and complainant as the offence took place. Furthermore, the complainant evidence would have been corroborated by the scene visiting officer and/or investigating officer. The investigating officer did not even visit the scene to corroborate the complainant’s evidence on how well the same was lit.
37. Further, and most fundamental is the evidence of the complainant that, prior to meeting the appellant, they had communicated on phone. That, the appellant had inquired from one Lucy as to where the complainant was before they met. That indeed Lucy called the complainant and he spoke to the complainant on Lucy’s phone. That, the complainant spoke to the appellant who introduced himself as a police officer. That, the complainant gave him her phone number and the appellant called her twice on 28th June 2020 at 3.00am and 5.00am and they met at 5.00am. The questions that arise are
 - a. Why didn’t the prosecution call Lucy to confirm if the appellant asked her to call the complainant.
 - b. Why didn’t the prosecution avail evidence from the cell phone service providers of the appellant’s and complainant’s phone to corroborate or otherwise the evidence of the complainant
38. In my considered opinion the absence of the afore evidence rendered the prosecution case weak and inadequate. The investigating officer investigated the case poorly and/or casually. Any offence as serious as herein calls for serious investigation. A life imprisonment meted out, cannot be over a casually investigated matter. It is a heavy sentence.
39. The upshot of the aforesaid is that, the prosecution did not prove the charge beyond reasonable doubt and I quash the appellant’s conviction.
40. As regards sentence it is my considered opinion the sentence provided for robbery with violence is death. The life imprisonment was unlawful. I set aside but even then it falls by the road side upon the questioning of the conviction.
41. It is so ordered

DATED, DELIVERED AND SIGNED THIS 2ND DAY OF MAY, 2024



GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

Mr. Abwajo for the respondent

Ms. Ogutu: Court Assistant

