



REPUBLIC OF KENYA



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**Omurwa v Republic (Criminal Appeal E015 of 2022)
[2024] KEHC 6530 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6530 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E015 OF 2022
WA OKWANY, J
MAY 23, 2024**

BETWEEN

BERNARD NYARIENGA OMURWA ALIAS MATACHO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment and Sentence in the Chief
Magistrate's Court at Nyamira, Criminal Case No. 789 of 2020
delivered by Hon. M. Nyigei, Principal Magistrate on 22nd May 2022)*

JUDGMENT

1. The Appellant was charged with the offence of Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the Penal Code, Cap 63 Laws of Kenya. The particulars of the charge were that on 18th January 2020, at Nyamwanga Sub-Location in Manga Sub-County within Nyamira County, jointly with others not before court, robbed Grace Nyanchama Orechi of Kshs. 2,750/= and Techno Mobile phone make T312 of IMEI No. 35967008xxxxxxx/xx worth Kshs. 2,000/= all valued at Kshs. 4,750/= and that during the time of such robbery, used actual violence to the said Grace Nyanchama Orechi.
2. The Appellant denied the charge and the matter proceeded to a full trial where the Prosecution called a total of 7 witnesses as follows: -
3. PW1, Grace Nyanchama Orechi, was on the night of 18th January 2022 at her house in the company of her husband, James Orechi (PW2) and their cousin one Angelica Kwamboka when 3 men stormed into her sitting room. One of the attackers cut her with a slasher on the forehead, left hand, shoulder blade, nose and mouth. PW1 lost consciousness and was rushed to the hospital for treatment. The attackers took her mobile phone valued at Kshs. 2000 and money (4,750/=) that she had placed at the back of the phone cover. The police recovered the phone which PW1 identified at Manga Police Station. PW2



repulsed the attackers by disarming one of them before they took off leaving behind a slasher, a knife and sandals at the scene. PW2 and his wife (PW1) did not recognize any of their attackers even though their house was well lit at the time of the attack.

4. PW3, Alfred Nyakundi Nyakora, testified that he owned a barber shop where he also repaired and charged phones. He explained that he was on the morning of 20th January 2020, at his shop when the Appellant and one Dominic Nyang'au requested him to lend the Appellant some money. He claimed that he gave the Appellant Kshs. 200/= loan in exchange for a phone which the Appellant offered as security for the loan. He stated that he kept the phone for a long time as the Appellant did not come back for it and that he later decided to give the same phone to his daughter one Faith Nyakundi but that no sooner had Faith used the phone for a few days than she was arrested by the police over the claim was connected to a robbery case. PW3 explained to the police how he acquired the phone.
5. PW4, Orechi Amos Bosire, got information that his parents, PW1 and PW2 had been attacked by robbers. He visited PW1 at Oasis Hospital where she was admitted for treatment. He later went home where he found their house in disarray with broken items strewn all over the place. He noted that there were croc sandals, 2 pangas, a knife, 2 blood-stained slashers and 2 phones belonging to his aunt and father in the compound.
6. PW5, David Amwanga, testified that PW1 was treated for multiple cut wounds on the head and multiple cut wounds on both hands. He assessed the degree of injury as 'harm'. He produced the Treatment Notes (P.Exh 1 [a-c]) and the P3 Form (P.Exh2).
7. PW6 No. 254673, PC Charlton Onyango Ambaya, was the investigating officer. He recorded witness statements, visited the scene of crime, issued PW1 with the P3 Form and with the help of police officers from Kisumu, was on 28th February 2020 able to track and recover the complainant's phone make Techno T312 in the possession of Faith Nyakundi. He testified that the Appellant could not explain how he came to be in possession of the phone (P.Exh3) thus informing his decision to charge him with the offence of robbery with violence.
8. PW7, James Makobi, the Safaricom Liaison Officer based at Kisumu Regional Office received a request letter from DCI Manga for call data records from IMEI No. 3596700xxxxxxx and No. 3596700xxxxxxx which was a twin SIM phone. He processed the request and printed the data. He also generated and signed an electronic certificate. He produced the Safaricom data as P.Exh 4 (a) and (b); Electronic Evidence Certificate (P.Exh5) and the Letter from DCIO Manga dated 2/3/2020 (P.Exh6).
9. At the close of the Prosecution's case, the trial court found that the Appellant had a case to answer and placed him on his defence. The Appellant elected to give a sworn testimony and called 2 witnesses.

The Appellant's Case

10. The Appellant testified that he did not know the complainant and that he met her in court for the first time. He explained that he was on 18th January 2020 at his home for his grandmother's funeral in the company of one Lazarus. He produced a burial permit and Eulogy of his grandmother (D.Exh1 and 2) Milcah Nyaboke, who had died on 14th January 2020.
11. He denied the claim that the stolen phone was found in his possession and that he did not know Dominic Nyakundi or PW3. He stated that his SIM Card was never used in the phone that was recovered and that it was not true that he robbed the complainant.
12. DW2, Lazarus Okari, a church clerk at Getiongo Sabbath School where the Appellant's father is a 1st Elder testified that he knew the Appellant and that he was with the Appellant during the funeral of his grandmother at the time the robbery is alleged to have happened. He testified that the Appellant



gave the life history of his deceased grandmother since he lived with her. It was his testimony that he had always had an interest in the case since he knew that the Appellant did not commit the offence and that he did not recognize any of the witnesses.

Judgment and Sentence

13. At the end of the close of the case, the trial court found that the prosecution had proved its case against the Appellant beyond reasonable doubt. The trial court returned a guilty verdict against the Appellant for the offence of robbery with violence and sentenced him to serve 30 years' imprisonment.

The Appeal

14. Dissatisfied with the decision of the trial court, the Appellant filed the present Appeal through the Petition of Appeal dated 13th June 2022 in which he listed the following grounds of Appeal: -
 1. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant on the basis of inconsistent and contradictory evidence.
 2. That the Learned Trial Magistrate erred in law and fact in convicting the Appellant on evidence which did not meet the minimum threshold as required by law namely, proof beyond reasonable doubt.
 3. That the Learned Trial Magistrate failed to observe that there existed a weak link connecting the Appellant with the alleged offence.
 4. That the Learned Trial Magistrate did not adequately consider the Appellant's defence.
 5. That the Learned Trial Magistrate erred in law and fact in convicting and sentencing the Appellant on insufficient evidence.
 6. That the conviction and sentence by the Learned Trial Magistrate was unfair and unjust to the Appellant.
 7. That the Learned Trial Magistrate erred in law and facts by giving a sentence that was harsh, excessive and hard in law, given that the Appellant never committed the alleged offence.
15. The appellant seeks orders to quash the conviction and to set aside the sentence.
16. The Appeal was canvassed by way of written submissions which I have considered.

Duty of the Court

17. In *Mark Oiruri Mose vs. R* (2013) eKLR the Court of Appeal held thus on the duty of the first appellate court: -

“This Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”



Issues for Determination

18. I have considered the record of appeal and rival submissions by the parties. I find that the main issues for my determination are: -

- i. Whether the Prosecution proved the charge to the required standard.
- ii. Whether the sentence was just and legal.

i. Whether the Prosecution proved the charge to the required standard.

19. Sections 295 and 296 (2) of the Penal Code state as follows:-

295. Definition of robbery

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.

(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.

20. The Court of Appeal discussed the ingredients of the offence of robbery with violence in *Johana Ndungu vs. Republic* [1996] eKLR thus: -

“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with S.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 before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed 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 sub-section:

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.

(See also *Mugambi vs. Rep* [1980] KLR 75 and *Oluoch v Republic* [1985] KLR)



21. The Prosecution was therefore required to prove the charge of robbery with violence, by establishing any of the ingredients under section 296(2). In *Dima Denge Dima & Others v Republic*, Criminal Appeal No. 300 of 2007, it was held that: -
- “...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.”
22. The court of Appeal stated as follows when addressing the nature of evidence that can lead to a conviction in *Benson Limantees Lesimir & Ano. v Republic* Criminal Appeal No. 102 & 103 of 2002: -
- “In the circumstances, then the evidence tendered by the prosecution does not irresistibly point to the appellants to the exclusion of all others within the meaning of *R. vs Kipkering Arap Koske & Another* 16 EACA 135 where it was inter alia held that:”
- “In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”
23. The standard of proof in criminal matters is well settled. It is proof beyond reasonable doubt, which means that no room is given for question, gaps or doubts in the prosecution’s case. In *Bakare v State* (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase ‘proof beyond reasonable doubt’ and held that: -
- “Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability.”
24. Similarly, Denning J. stated as follows in *Miller v Minister of Pensions* [1947] stated: -
- “It need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is as strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence “of course it is possible, but not in the least probable.” the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
25. In the present case, PW1 testified that she saw three men enter their house and that one of them assaulted her with a slasher thereby causing her grievous injuries. PW2 also painted a vivid picture of the events of the fateful night. He stated that three men forcefully pushed open their door and entered the house, with one brandishing a slasher.
26. PW5, the Clinical Officer, corroborated the testimony of PW1 as he established that she sustained multiple cuts on her scalp and hands. His opinion was that the injuries were caused by a sharp object. He classified the injuries as ‘harm’.



27. I have perused the P3 Form (P.Exh 2) and the Treatment Notes (P.Exh 1 a-c). I note that PW1 was treated at Manga Sub-District hospital, Care and Cure Doctor's Plaza and Oasis Specialist Hospital in Kisii.
28. It is my finding that that the Prosecution established that PW1 and PW2 were attacked by people who broke into their house on the fateful night and that PW1 suffered grievous injuries as a result thereof. The element of violence was therefore proved.
29. Turning to the limb of stealing, PW1 testified that her mobile phone and money (Kshs. 4,750/=) were stolen during the attack. PW4 gave the particulars of PW1's mobile phone Techno T312 IMEI No. 359760086548283 to the police officers.
30. PW6, the Investigating Officer testified that tracked the phone and found it at Mokwerero, Manga sub-county in the possession of one Faith Nyakundi.
31. PW1 and PW3 identified the said mobile phone (P.Exh 3) before the trial Court. PW3 testified that the Appellant gave him the phone as security for a loan of Kshs. 250/=.
32. It is worth noting that the eyewitnesses to the offence testified that they were not able to recognize any of their attackers on the night in question. The only evidence linking the Appellant to the offence was the testimony of PW3 who alleged that the Appellant gave him the alleged stolen phone as security for a loan.
33. In its judgment, however, the trial court found that the ingredients of the offence of robbery with violence had been proved because the Appellant had been sufficiently connected to the phone that was stolen from PW1. This means that in the entire prosecution's case, the only evidence linking the Appellant to the offence is the alleged stolen phone.
34. The trial court relied on the doctrine of recent possession and rendered itself as follows: -

“The doctrine of recent possession entitles the court to draw an inference of guilt where an accused person is found in possession of recently stolen property in unexplained circumstances..... once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. The burden is evidential only and does not relieve the prosecution from proving its case to the required standard.”
35. The question which arises is whether, in the circumstances of this case, one can say that the doctrine of recent possession is applicable to the case and was proved as against the Appellant. The answer to the above question is to the negative. I find that the circumstances under which the complainant's phone was allegedly recovered in the possession of the daughter of PW3 raises more lingering questions than answers. I say so because the evidence on record reveals that the said phone was not only not found in the possession of the Appellant but that it was found in the custody of PW3's daughter, one Faith Nyakundi, who was neither called as a prosecution witness nor included in the case as the Appellant's co-accused. It is instructive to note that the said phone was not found in the Appellant's possession.
36. I find guidance in the decision in *Athuman Salim Athuman v Republic* [2016] eKLR, where the Court of Appeal discussed the doctrine of recent possession as follows: -

“The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. (See *MALINGI V. REPUBLIC* (1989) KLR 225 H.C and *HASSAN V. REPUBLIC*



(2005) 2 KLR 151). The circumstances under which the doctrine will apply were considered in ISAAC NG'ANG'A KAHIGA ALIAS PETER NG'ANG'A KAHIGA V. REPUBLIC, CR. APP. NO. 272 of 2005, where this Court stated: -

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other.”

37. Having noted that the Appellant was not found in possession of the complainant's phone, I find that the trial court erred in finding that the doctrine of recent possession was applicable to the Appellant in this case. I further find that the explanation offered by PW3 on the circumstances under which the Appellant allegedly gave him the phone, as security for a loan of Kshs. 200/= was neither plausible nor credible. I say so because while PW3 claimed that the Appellant was in the company of one Dominic at the time he was given the phone, the said Dominic was not called as a witness to corroborate his testimony. No reasonable explanation was given for the failure to present the said Dominic as a prosecution witness.
38. Furthermore, PW3 did not tender any tangible evidence to prove that he owned a barber shop or that he was engaged in the business of phone repairs or money lending so as to confirm his claim that he was innocently dealing with the Appellant as a legitimate money lender as he had alleged. This court is at a loss as to why the trial court accepted the explanation given by PW3 wholesale despite the glaring unanswered questions on the nature of his business and the fact that he gave his daughter a phone he was offered as security for a loan and whose source he did not know. My view is that the explanation offered by PW3 was not adding up, to say the least.
39. Courts have taken the position that failure to call crucial witnesses may be construed to mean that the said witnesses would have given evidence that is adverse to the prosecution's case. The case of *Bukenya & Others v Uganda* [1972] E.A. 549 is a leading authority on this issue. In the said case, the East African Court of Appeal held that: -
- i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.
 - ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.
 - iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.”
40. In the said case of *Bukenya & Others v Uganda* (supra), the court was categorical that while the prosecution is not expected to call a superfluity of witnesses, the adverse inference will only be made if the evidence, by the prosecution, is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.
41. In the instant case, I find that the evidence presented by the prosecution was barely adequate to prove that the Appellant actually committed the offence of robbery with violence. It is my finding that the failure to call, as witnesses, one Faith, in whose custody the phone was allegedly found and Dominic,



who was allegedly in the Appellant's company at the time he gave the phone to PW3 dealt a fatal blow to the prosecution's case from which it could not recover.

42. It did not also escape the attention of this court that while the prosecution witnesses claimed that certain items such as a bloody slasher, sandals and knife were recovered at the scene of the crime, none of the said items were presented in court as exhibits so as to corroborate the evidence on robbery.
43. My take is that while it was not in doubt that a heinous crime was committed against the complainant and her family, the role of the court is to ensure that the prosecution proves, beyond reasonable doubt, that the accused person presented before it committed the crime in question. Needless to say, the manner in which the investigations were conducted in this case leaves a lot to be desired. I find that the gaps in the prosecution's case, that I have highlighted in this judgment, lead me to the conclusion that the case against the Appellant was not proved to the required standards.
44. Consequently, I find that the instant appeal is merited and I therefore allow it. I hereby quash the conviction and set aside the sentence passed by the trial court. I direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.
45. It is so ordered.

JUDGEMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 23RD DAY OF MAY 2024.

W. A. OKWANY

JUDGE

