



**Otieno v Republic (Criminal Appeal 34 of 2023)
[2024] KEHC 5110 (KLR) (13 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5110 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 34 OF 2023
DR KAVEDZA, J
MAY 13, 2024**

BETWEEN

SIMON MANGO OTIENO ALIAS RICHARD SIMIYU OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered on 23rd March 2022 at Kibera Chief Magistrate's Court Criminal Case no. 1689 of 2017 Republic vs Simon Mango Otieno alias Richard Simiyu Otieno)

JUDGMENT

1. The appellant jointly with another not before this court was charged with two counts of 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. In the alternative, he was charged with the offence of handling stolen goods contrary to section 322(2) of the *Penal Code*. After a full trial, he was convicted on both counts and the alternative charge and sentenced to twenty (20) years' imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his petition of appeal and submissions, the appellant raised three grounds. He challenged the totality of the prosecution's evidence against which he was convicted. He contended that he was not properly identified by the prosecution witnesses. He further contended that his defence was not considered by the trial court.
3. In response, the respondent filed grounds of opposition dated 18th March 2024. The grounds raised were that the appeal was misconceived and unsubstantiated. The appeal is an abuse of the court process as the prosecution proved its case beyond reasonable doubt. The appeal lacks merit and should be dismissed.



4. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32).
5. The prosecution called four (4) witnesses in support of their case. Peter Waweru (PW1), a taxi driver, recalled an incident on June 30, 2017, around 9:00 pm. He dropped off a customer at St. Jude Hostels near Kenya School of Law. While waiting, the customer paid him Kshs. 1000 and received Kshs. 400 change. As he re-entered his car from the left side, a stranger suddenly opened the right door, brandishing a pistol, and ordered him to move to the passenger seat or face harm. The customer screamed and fled inside as another person entered the back seat on the left side.
6. The stranger attempted to drive off but the car's engine stalled. PW1 was forced to remove the cutout or face violence. Seeing an opportunity when the stranger was distracted, PW1 fled into a nearby compound, closing the gate behind him. Later, he discovered that the assailants had left, finding the ignition key still in the car.
7. PW1 testified that the assailants stole his phone, the Kshs. 1000 given by the customer, and an extra Kshs. 100. He then drove to Karen police station, where he encountered security guards patrolling the area and informed them of the incident. They informed him that someone had been apprehended. Upon inspection, PW1 identified the appellant, found in the trunk, as one of the assailants. His phone was recovered from the appellant's pocket, and PW1 unlocked it in front of the officers. During cross-examination, he affirmed that the scene was well-lit, enabling him to identify the appellant.
8. Kipyegon Langat (PW2), a delivery personnel, recalled an incident on June 30, 2017, around 9:55 pm. While at the junction of Bogani and Lang'ata South Road, he stopped to make a call. Two men approached him, demanding he dismount his motorcycle, one of them wielding a pistol. PW2 complied and fled on foot. He encountered a patrol car from Ultimate Security and reported the incident to the police officers inside. They pursued the assailants, one of whom escaped while the appellant was apprehended attempting to flee with the motorcycle. PW2 identified the appellant, aided by the road's illumination, which allowed him to see the assailant's face.
9. Ephraim Ouma Mukori (PW3), a security officer stationed at Hardy, recounted an incident on June 30, 2017, at 9:30 pm. While on patrol with colleagues and police officers in vehicle registration KCK XXXX, they encountered the appellant being assaulted by members of the public for alleged robbery. They discovered the appellant in possession of a mobile phone belonging to PW1. They subsequently arrested the appellant and handed him over to the police along with the motorcycle belonging to PW2.
10. PC Philip Musyoka (PW4), an officer from Hardy Police Station, testified that on the same night, around 10:00 pm, they received a call from the OCS regarding an ongoing robbery. They proceeded to Bogani East Road and found the appellant already apprehended by members of the public, police officers, and Ultimate Security guards. PC Musyoka took custody of the phone and motorcycle recovered from the appellant and transported them to Hardy Police Station.
11. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defense, the appellant provided sworn testimony and chose not to call any witnesses. He informed the court that on June 30, 2017, around 7:00 pm, his employer contacted him regarding a gas delivery delay due to his motorcycle's breakdown. Subsequently, at approximately 9:00 pm, he delivered the gas to Judes Hostels in Hardy. Upon leaving, he discovered his motorcycle missing and opted to walk to Karen Center. About 70 meters into his walk, he heard shouts of "Thief! Thief!" behind him. Despite continuing to walk, he noticed commotion and then witnessed two individuals



boarding motorcycles and fleeing. Shortly after, he was approached by two officers who instructed him to lie down, handcuffed him, and conducted an interrogation before escorting him to Hardy police station.

12. Top of Form

13. The appeal was canvassed by way of written submissions, which have been considered. The key ingredients for a robbery with violence charge are found in section 296(2) of the Penal Code. It provides as follows-

“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”.

14. The offence of robbery with violence is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR and Oluoch v Republic [1985] KLR 549)

15. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt.

16. The evidence presented shows that PW1 was confronted by the appellant and another assailant shortly after dropping off his passenger. During the incident, they stole cash totaling Kshs. 1,100 and a Samsung J1 mobile phone valued at Kshs. 17,000. Similarly, PW2 was accosted by two assailants while making a call, and they stole his motorcycle.

17. Both PW1 and PW2 provided clear accounts of the incidents, and their testimony remained consistent under cross-examination. The area where PW1 was robbed was well-lit, enabling easy identification of the appellant. Likewise, PW2 was able to identify the appellant due to the presence of lights along the road where the robbery occurred. Additionally, PW2, PW3, and PW4 testified that the appellant was arrested immediately after robbing PW2, and the stolen items, PW1's phone, and PW2's motorcycle, were recovered from him. PW2 maintained visual contact with the appellant throughout the incident, while the second assailant fled the scene.

18. The appellant submitted that since he was not known to the complainants before the robbery incident, it was only proper that an identification parade be conducted to ascertain the identification of the assailant. He relied on the case of James Tinoga Omwenga v R Cr App. No, 143 of 2011, where the court held that in the instances where the identification of an assailant who is a stranger is not followed by the witness describing the suspect, an identification parade ought to be conducted.

19. Even so, in the circumstances of the present case, it is my considered view that an identification parade would not have been necessary because the appellant was arrested by members of the public as he attempted to flee the scene of crime. He was immediately escorted to the police station. While PW2 told the court that the appellant was arrested by the police who were in the company of security officers, it is clear from the testimonies of PW3 and PW4 that he was first arrested by members of the public but the police and security guards caught up with him immediately he was subdued by the said members of the public.



20. The question that arises is whether such an inconsistency regarding the arrest would raise doubt in the prosecution's case. It is an accepted principle that in evaluating discrepancies, contradictions, and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter. (See *Dickson EliaNsambaShapwata& Another V. The Republic*, Cr. App. No. 92 of 2007). I have evaluated the discrepancies and contradictions alleged by the appellant and further considered the testimonies of the witnesses wholly and find that the inconsistencies are so shallow that they do not go to the core of the matter so as to prejudice the right of the appellant or the credibility of the prosecution's case.
21. Based on the evidence presented, it is evident that the appellant was promptly and positively identified and apprehended following the incidents. The testimony of the prosecution's witnesses provides reliable direct evidence of visual identification against the appellant.
22. With the appellant's identity established, I proceeded to assess the remaining elements of the offense charged. Only one ingredient of the offence of robbery has been proved. The evidence presented in court indicated that during both incidents, the appellant was accompanied by an accomplice who fled the scene after the incident. This was confirmed by both PW1 and PW2, who reported being robbed by two assailants. Additionally, PW1 was robbed by the appellant who was armed with a pistol. It is the said pistol that he used to threaten to shoot PW1 with. PW 2 also told the court that the appellant's accomplice was armed with a pistol which he used to threaten him. It is therefore clear that the appellant not only had an accomplice who was not present in this court but was also armed with pistol during the commission of the two incidents.
23. The appellant argued that essential witnesses were not called to testify. Particularly, he contended that the prosecution did not call the customer who was dropped by PW1 and the watchman who was guarding the gate at the same place, both of whom were at the scene of crime. Additionally, he submitted that the arresting officer was not called to testify.
24. It is trite law that the prosecution need not call a multiplicity of witnesses to establish a fact. Section 143 of the *Evidence Act* provides that, in the absence of any requirement by the provision of law, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an adverse inference as a result of failure to call that witness (see *Bukenya and Others v Uganda* [1972] EA 549 and *Erick Onyango Odeng' v Republic* [2014] eKLR).
25. According to PW1's testimony, when the appellant and his accomplice confronted him with a pistol, both the customer he was attending to and the premises' watchman went into hiding. While they may have observed the incident, their ability to provide concrete identification of the assailants is doubtful, given their distance and concealed vantage point. However, even without their testimony, the prosecution successfully established the appellant's identification by both complainants and the subsequent recovery of stolen items from him shortly after the commission of the crime. Considering the entirety of the prosecution's case, It is my view, that their testimonies were not essential to substantiate the prosecution's claims. This argument therefore fails.
26. The appellant also argued that the trial court failed to consider his defence. In his defence, the appellant denied committing the offences and maintained his innocence. While he admitted being within the vicinity of the crime scene, he denied having robbed anyone. The trial court considered the appellant's defence and found it to be unbelievable and an afterthought. The ground therefore fails.



27. The prosecution proved beyond reasonable doubt that the appellant and his accomplice while armed with a dangerous weapon namely a pistol threatened and robbed PW 1 and PW2. This court is satisfied that the appellant's conviction on both counts of robbery with violence was proper and I affirm the conviction.
28. However, I have noted that the trial court convicted the appellant both on the two main charges and the alternative charge. In doing so, the trial court fell into error. It is trite law that a conviction cannot be made on both the main charge and the alternative charge. This position was stated by the Court of Appeal in *David Ndumba v Republic* [2013] eKLR thus:-
- “On the issue of the alternative charge, we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In *M.b.o. -v- Republic*, Criminal Appeal No. 342 OF 2008, this Court held,
- “The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge.”
29. The charge is an alternative to and not an addition to the main charge and therefore once the trial court found that the prosecution had proved the main charges of robbery with violence, the trial magistrate had no business in proceeding to convict the Appellant on the alternative. For that reason, I partially allow the appeal on conviction by setting aside the conviction on the alternative charge of the offence of handling stolen goods contrary to Section 322(2) of the *Penal Code*.
30. On sentence, the appellant was sentenced to serve twenty years imprisonment. He submitted that while the trial court during sentencing mentioned that the period spent in pre-trial custody was considered, the said period was not computed in his sentence. He urged the court to invoke section 333(2) of the *criminal procedure code* and consider the said duration.
31. Suffice to note that as the appellant was convicted on two counts of robbery with violence, separate sentences ought to have been imposed on each count. Instead, the trial magistrate fell into error by imposing a generalised 20 years imprisonment, without being specific to which count the sentence applies.
32. I note that the appellant spent close to five years in remand custody (4 years, 8 months and 24 days). As such, I set aside the sentence of twenty years imposed by the trial court and substitute it with a sentence of fifteen (15) years imprisonment on each count considering the time spent in remand custody. The substituted sentences are follows:
1. In count 1, the appellant is sentenced to serve fifteen (15) years imprisonment.
 2. In count II, the appellant is sentenced serve fifteen (15) years imprisonment.
 3. The sentences shall run concurrently from the date of conviction being 23rd March 2022.

Orders accordingly.

Judgement dated and delivered virtually this 13th day of May 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present on the platform



Ms. Tumaini for the Respondent
Nelson Court Assistant.

