



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Justus v Republic (Criminal Appeal 163 of 2023)  
[2024] KEHC 6894 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6894 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 163 OF 2023**

**DR KAVEDZA, J**

**JUNE 11, 2024**

**BETWEEN**

**PETER MBOTHA JUSTUS ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against original conviction and sentence delivered by  
Hon. R Kitwaga (R.M) ON 21st October 2022 at Kibera Chief Magistrate's  
Court Criminal Case no. 1590 of 2019 Republic vs Peter Mbotha Justus)*

**JUDGMENT**

1. The appellant was charged and after a full trial convicted for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence were that on 2<sup>nd</sup> December 2019 along Waiyaki Way in Westlands sub County within Nairobi County jointly with another not before court robbed Emmaculate Wambua one mobile phone make infinix Hot Note X551 valued at Kshs. 12,798 and during the said robbery threatened to use violence. He was sentenced to twenty years imprisonment.
2. In his petition of appeal and submissions, the appellant raised five grounds which have been coalized as follows: 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. Finally, the sentence imposed was harsh and excessive.
3. 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).



4. The prosecution called two witnesses to support their case. The first witness, Emmaculate Mwende Wambua, testified that on December 12, 2019, around 10 p.m., she was heading home from work. While waiting for a matatu at Safaricom Stage in Westlands, two individuals approached her—one from behind and the other from the front. The person behind her pulled her scarf and began strangling her, while the one in front forcefully snatched her phone and attempted to take her handbag. During the struggle, she started screaming. A motorbike rider heard her cries and approached, causing the assailants to flee. She then got on the motorbike and left the scene.
5. On their way, they spotted one of the assailants, identifiable by his Maasai kikoi. When the assailant saw Emmaculate, he ran away and jumped over a wall. A nearby taxi operator chased after him, also climbing over the wall. Accompanied by the motorbike rider, they pursued the assailant and caught him. They then took him to Parklands Police Station. Emmaculate identified him there, recognizing the kikoi he was wearing. She also mentioned that the area was well-lit, which aided in the identification. However, her stolen phone was not recovered.
6. PW2, Police Constable Moses Mbalwe, the investigation officer, testified that he was assigned to investigate the case. He stated that the suspect had already been taken into police custody, having been arrested by the complainant and other individuals. PC Mbalwe contacted the complainant and recorded her statement as well as the statement of the motorbike rider.
7. 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 defence, the suspect provided unsworn evidence, telling the court that at the time of the incident, he was at Safaricom Stage waiting for his friend. According to his account, three individuals approached him and accused him of stealing from people at the stage. They then attacked him with clubs and blows, called a motorcycle, and took him to the police station. Throughout his testimony, he maintained his innocence.
8. The appeal was canvassed by way of written submissions which have been considered. The offence of robbery with violence under section 296(2) of the *Penal Code* 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)
9. 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. The evidence on record does prove that PW 1 was stopped by unknown assailants on her way home. They strangled her with the scarf she was wearing and robbed her a mobile phone. She screamed for help resulting in the assailants fleeing. It was her evidence that she boarded a motorbike and as she left, she saw one of his attackers, whom she identified as the appellant herein. She maintained that she recognised him from the Maasai kikoi that he was wearing and the motor bike rider gave chase. A taxi driver who was also in the area chased after him when he jumped over a wall where he was eventually apprehended.
10. In his written submissions, the appellant maintained that he was not properly identified. The question is whether the court erred in convicting the appellant notwithstanding that he was not properly identified as the perpetrator or one of the perpetrators of the offence of robbery with violence as alleged in the charge.
11. Whenever an accused person challenges his identification in respect of any offence he is facing, the court needs to exercise extra care before convicting him of the offence. It must be established that the



conditions under which he was identified were conducive for proper identification. If the conditions were not conducive then the court must warn itself before convicting the accused. In the case of *Roria v. Republic* (1967) EA 583, the predecessor to this Court stated: -

“A conviction resting entirely on identity invariably causes a degree of uneasiness, and as Lord Gardner, L.C. said recently in the House of Lords in the course of a debate on section 4 of the Criminal Appeal Act 1966 of the United Kingdom which is designed to widen the power of the court to interfere with verdict: -

“There may be a case in which identity is in question, and if any innocent people are convicted today I should think that in nine cases out of ten- if there are as many as ten – it is in a question of identity.”

That danger is, of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld it is the duty of this court to satisfy itself that in all circumstances it is safe to act on such identification.”

12. The need for the court to ensure that the identification of a suspect is watertight before convicting him of the offences he is facing cannot be over emphasized. In the well-known case of *R v. Turnbull and others*, [1976] 3 All ER 549, Lord Widgery C.J. set out the requirements in the following terms: -

“Each of these appeals raises problems relating to evidence of identification in criminal cases. Such evidence can bring about miscarriage of justice and has done so in a few cases in recent years..... In our judgment the danger of miscarriages of justice occurring can be reduced if trial judges sum up to juries in the way Indicated in this judgment.

First wherever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the need for such warning and should make some remarks to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.”

13. He then went on to say in that judgment that the circumstances in which identification of each witness came to be made should all be carefully examined before a conviction can be based on such visual identification. In agreeing with the prosecution, the appellant was the perpetrator of the robbery, the trial court pointed out that PW1 positively identified the appellant because she saw him well and was able to identify him having a kikoi and he was arrested after allegedly being spotted by the appellant as she left the scene of crime.
14. From the record, however, it is noted that the kikoi allegedly used to identify the appellant was not presented as a prosecution exhibit. Furthermore, the other witnesses who arrived at the scene to assist the complainant during the robbery were not called to testify. These witnesses, namely the motorbike rider and the taxi operator who assisted in apprehending the appellant, were crucial in establishing a link between the appellant and the offence.
15. It is important to note that the offence occurred at night. Although the complainant claimed there was sufficient lighting at the scene of the attack, the record does not show that the appellant had any distinctive physical features that would make identification easy and accurate, aside from the kikoi she



used to identify him. Furthermore, the complainant had no prior interaction with the appellant, so she could not identify him by recognition. The appellant was also not found with the stolen phone, which could have linked him to the crime. Additionally, no identification parade was conducted to conclusively establish his involvement in the crime.

16. Based on the evidence presented to the court, the testimony of PW1 alone was insufficient to determine that the appellant was one of the assailants. Consequently, the appellant was not properly and positively identified.
17. In the premises, I find that the prosecution did not prove their case beyond reasonable doubt. The appellant's appeal consequently succeeds. I hereby quash the conviction of the trial court and set aside the sentence imposed. The appellant is set at liberty unless otherwise lawfully held.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF JUNE 2024**

**D. KAVEDZA**

**JUDGE**

**In the presence of:**

Appellant Present

Ms. Tumaini Wafula for the Respondent

Joy Court Assistant

