



**Molo & another v Republic (Criminal Appeal E018 of 2023)  
[2024] KEHC 7017 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7017 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CRIMINAL APPEAL E018 OF 2023  
JN ONYIEGO, J  
JUNE 13, 2024**

**BETWEEN**

**OMAR GOBU GALANO A.K.A MOLO ..... 1<sup>ST</sup> APPELLANT**

**SULEIMAN JUMA MOHAMED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement by Hon. H. Nyaberi (CM) in the Chief Magistrate's Court Criminal Case No. 164 of 2020 delivered on 19/4/2023)*

**JUDGMENT**

1. The appellants herein were jointly charged with two counts of the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars in respect to Count I were that; on 01.10.2020 at 0620hrs at Madogo location, Tana North sub county of Tana River County, jointly with another not before the court while armed with knives robbed Mourine Makena of her mobile phone make Techno Camon 15 valued at Kes. 18, 000/- and at or immediately before or immediately after the time of such robbery used actual violence to the said Mourine Makena.
2. The appellants also faced a similar charge in count II, with particulars of the offence being that on 01.10.2020 at 0620hrs at Madogo location, Tana North sub county of Tana River County, jointly with another not before the court while armed with knives robbed Mourine Samuel of her small bag, mobile phone make Infinix Hot 4 valued at Kes. 15,000/- and cash Kes. 1200/- and or immediately after the time of such robbery used actual violence to the said Mourine Samuel.
3. The prosecution in its endeavor to prove its case called 4 witnesses while the accused gave sworn testimony and did not call any witnesses.



4. Upon conclusion of the trial, the court found the appellants guilty on both counts and sentenced them to serve 25yrs imprisonment in respect to each count. Consequently, the court ordered the sentences to run consecutively.
5. Having been dissatisfied with the conviction and sentence thereof, they filed this appeal.
6. The 1<sup>st</sup> appellant cited 5 grounds as amended in his petition of appeal filed in court on 18.10.2023.
  - i. That the trial court erred in law and fact in convicting the appellant based on a trial that was procedurally unfair.
  - ii. That the trial court erred in law and in fact in convicting the appellant when the prosecution did not prove its case to the required standards.
  - iii. That the trial court erred in law and in fact in convicting the appellant when he was not identified by the prosecution witnesses.
  - iv. That the trial court erred in law and in fact in convicting the appellant by relying on hearsay evidence
  - v. That the trial court erred in law and fact by meting out a harsh sentence not commensurate to the offence charge.
7. The 2<sup>nd</sup> appellant on the other hand cited 4 amended grounds in his petition of appeal filed in court on 18.10.2023 thus stating that:
  - i. That the trial court erred in law and in fact in convicting the appellant when the prosecution did not prove its case to the required standards.
  - ii. That the trial court erred in law and in fact in convicting the appellant when the prosecution did not prove its case to the required standards.
  - iii. That the trial court erred in law and in fact in convicting the appellant when he was not identified by the prosecution witnesses.
  - iv. That the trial court erred in law and fact by meting out a harsh sentence not commensurate to the offence charge.
8. The appeal was canvassed by way of written submissions.
9. The 1<sup>st</sup> appellant in his submissions filed in court on 18.10.2023 submitted that his rights to a fair trial were infringed by the fact that he was not presented before the court within the required timelines as provided for in the constitution. That despite being a minor, he was remanded in adults' remand contrary to the stipulations of the law.
10. The appellant contended that upon bringing to the trial court's attention of his age, the trial court directed that an advocate be appointed for him. That the same notwithstanding, the said advocate was not only incompetent but also ineffective and as such, the same was akin to him remaining unrepresented. Reliance was placed in the case of *Kenga Hisa v Republic* [2020] eKLR where it was held that it was the responsibility of the court to ensure that such people who find themselves on the wrong side of the law are protected.
11. He further submitted that the prosecution did not prove its case to the required standards to warrant their conviction. In the same breadth, it was submitted that the prosecution's evidence was marred with inconsistencies which were material to the case. It was his case that the offence herein having been



- alleged to have been committed in the late hours of the day, identification was therefore not enabled to clearly place them at the scene of crime.
12. Additionally, given that it was alleged that the perpetrators wore face masks and caps, it could not authoritatively be stated that they were properly identified. It was further urged that the prosecution assumed that the alleged offence happened in the morning hours while in real sense, the same happened in the evening thus calling into question the integrity of the investigations carried out. Reliance to that end was drawn from the case of *Gikonyo Karume & Another v R* [1900] KLR where the court stated that before a court can return a verdict based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight.
  13. On sentence, it was contended that the same was not only harsh but also disproportionate with the offence allegedly committed in that no life was lost and the goods alleged to have been stolen were of modest value. In the end, it was urged that this court be pleased to quash the conviction and thereafter set aside the sentence by the trial court.
  14. The 2<sup>nd</sup> appellant also filed submissions filed in court on 18.10.2023 wherein he reiterated the submissions made by the 1<sup>st</sup> appellant. He thus urged this Honourable Court to quash his conviction and set aside the sentence by the trial court.
  15. Mr. Kihara, counsel for the respondent while relying on submissions dated 19.07.2023 opposed the appeal citing reasons that the prosecution case was proved beyond reasonable doubt and therefore, the appeal was in want of merit. That the sentence invoked by the trial court was legal and appropriate bearing in mind the circumstances of the case and therefore, the same ought to be upheld. In the end, this court was urged to dismiss the appeal and uphold the finding of the trial magistrate.
  16. As the first appellate court, I am duty bound to re-evaluate the evidence presented before the trial court and draw my own conclusions without losing sight of the fact that I neither saw nor heard the witnesses when they gave their testimonies. [ See *Okeno v Republic* [1972] E.A 32].
  17. I have perused the court record, written submissions and authorities relied upon by both parties. The broad issues arising herein are:
    - i. Whether the prosecution discharged its burden proof to the required degree
    - ii. Whether there was positive identification.
    - iii. Whether the sentence meted out was harsh in the circumstances
  18. Briefly, PW1, Maureen Makena stated that on 01.10.2020 at about 6.20 am., she was with her friend Maureen Samuel going home after swimming at Kunaso hotel. As they left the said hotel, a vehicle approached and thereafter stopped behind them. Two passengers alighted from the said vehicle. To their knowledge, they were Shash and Molo, people she knew before.
  19. That Shash went to Maureen Samuel as Molo approached her while holding a knife and demanded that they give them their mobile phones. In the process, Molo stabbed her three times on the left forearm and after a short while, Shash joined Molo in furthering the attack against her. They tore her clothes and thereafter took her phone as the rider who was waiting for the perpetrators watched over. She stated that she lost her phone Techno Camon 15 worth Kes. 18,000/- which was never recovered.
  20. They then reported at Madogo police station from where she was referred to the hospital. It was her testimony that she used to see the accused persons regularly pass at her place of work where she used to sell shoes. That they were familiar faces and she recognized their faces.



21. On cross examination, she stated that the perpetrators wore face masks as it was corona time and their eyes were clearly visible. She also stated that upon being called for an identification parade, she identified Shash (1<sup>st</sup> accused) in the first parade while in the second parade, she identified Molo (2<sup>nd</sup> accused person). She clarified that the incident happened at 6.20 p.m.
22. PW 2, Mourine Samuel testified that on the material day at 6.00 p.m, together with PW1, they were walking along the road side as they were from swimming at Kunaso Hotel. That three boys came with a motorcycle from behind and thereafter stopped in front of them as Shash attacked her while the other went to PW1. She continued that her attacker was a person well known to her as they grew up together at Madogo. That the 1<sup>st</sup> accused armed with a knife, ordered her to surrender her phone and in doing so, took her bag then emptied the contents. It was her testimony that Shash took her phone of make Infinix worth Kes. 15,000/- together with Kes. 1,200/-.
23. She recalled that Shash thereafter went to aid Molo attack PW1 with a knife as she pleaded with them to stop. That they thereafter reported the matter to the police at Madogo police station who referred them to Madogo Health Centre for PW1 to get medical attention. On cross examination, she stated that they were attacked at 6.20 p.m. and she was able to identify the assailants as they were people she knew well and further, that the brother to the 2<sup>nd</sup> accused used to be her classmate. She further confirmed identifying the assailants at the identification parade.
24. PW3, Kennedy Kiprono, a clinical officer from Madogo Health Centre testified that on 02.10.2022, he examined PW1. He stated that she presented with a history of several stab wounds on the left arm and left gluteal area. The right forehead had a cut wound near the elbow while the left forehead had a cut wound on the medial aspect. On the left gluteal aspect, there was a cut wound with an approximate age of injury being one day. He stated that the wounds were cleaned and stitched and thereafter placed on appropriate medication. He produced P3 as pex2. On cross examination, he reiterated that the object used in perpetrating the injuries was sharp.
25. PW4, No. 113799 P.C Shadrack Chirchir recalled that before taking over, the matter was being investigated by Cpl. Ng'eno who had since gone for a transfer. He reiterated the evidence of PW1 and PW2 and further added that the appellants were arrested on 04.11.2020 by police officers at Hola Police Station. That an identification parade was conducted wherein the complainants positively identified the appellants. On cross examination, he stated that the complainants recorded statements that the appellants were persons known to them.
26. The prosecution closed its case and by a ruling delivered on 25.01.2023, the accused persons were found to have a case to answer.
27. DW1, Suleiman Juma Mohamed pleaded an alibi defence as he recalled that on 29.09.2020 at about 1500hrs, he was at Madogo and due to the fact that he was a tout, two people approached him seeking to travel to Nakuru. That he gave the duo his boss's phone number and upon talking to the two, his boss directed him to accompany the duo to Nakuru where they stayed till 05.10.2020. That on their way back, the vehicle developed mechanical problems thereby prompting him to place the two visitors in a different vehicle as he remained keeping watch over his boss's vehicle. On 03.11.2020, while at his sister's place, his parents informed him that police had visited his house looking for him. He was arrested on the following day when he presented himself at the police station.
28. DW2, Omar Gobu Galano stated that he was aged 17 years and a learner at Aden Primary School. He also pleaded alibi defence stating that on the material day at 6.00 a.m, he traveled to Mombasa for a school trip and thereafter returned on 03.11.2020. Upon arriving home, his brother informed him



- that the police were looking for him. On 04.11.2020, he visited Madogo Police station where he was arrested. The appellants denied committing the offence herein.
29. It is trite that in any criminal trial, it is the duty of the prosecution to prove its case beyond reasonable doubt. The burden does not shift. In the instant case, the prosecution was under obligation to prove each and every ingredient of the offence to the required degree.
30. The Court of Appeal in the case of *Oluoch vs Republic* [1985] KLR stated that:  
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 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 ...”.
31. It therefore follows that the three elements of the offence of robbery with violence under section 296(2) of the Penal Code are, however, to be read disjunctively and not conjunctively. Thus, proof of one element beyond reasonable doubt founds an offence of robbery with violence [ See *Dima Denge Dima & Others vs Republic*, Criminal Appeal No. 300 of 2007].
32. In this case the complainants narrated how the appellants attacked them as they left Kunaso Hotel. That while armed, Shash attacked Maureen Samuel as Molo attacked PW1 demanding their mobile phones. In the process, Molo stabbed PW1 three times on the left forearm while Shash joined him in furthering attack against PW1. They tore PW1’s clothes and thereafter took her phone. PW2 in her narration, reiterated the evidence of PW1 and further stated that the appellants were persons well known to them as they were residents of Madogo area. She stated that Shash took her phone of make Infinix make worth Kes. 15,000/- together with Kes. 1,200/-.
33. PW3, the medical officer corroborated the evidence of the complainants. In the same breadth, in the P3 Form, the nature of the harm sustained by PW1 was assessed as harm.
34. Accordingly, the prosecution proved beyond reasonable doubt that;
- i. the offenders were armed with dangerous and offensive weapon or instrument;
  - ii. the offender was in company with one or more person or persons; and
  - iii. at or immediately before or immediately after the time of the robbery the offenders wounded, beat, struck or used other personal violence against the victims.
35. Nonetheless, the appellants urged that given that the incident happened late in the evening and further that it was alleged that the perpetrators were masked, identification was not favourable. The court in *Wamunga v Republic* [1989] KLR 424 at 426 had this to say:
- “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.”
36. I have interrogated the circumstances under which identification was done. It is not lost to this court that PW1 stated that the perpetrators wore masks as it was corona time and their eyes were clearly visible. She also stated that upon being called for an identification parade, she identified both the



- appellants. PW2 stated that she was able to identify the assailants as they were people she knew well and further, that the brother to the 2<sup>nd</sup> accused used to be her classmate. She further confirmed identifying the assailants at an identification parade.
37. It therefore follows that this was a case of recognition as the appellants were persons who grew up with the complainants in the same area and so, they knew them well as they even mentioned their nicknames. At 6.20pm, the lighting conditions were favourable to enable positive identification. As such, the argument that identification was not proper is hereby dismissed.
  38. It bears repeating that, the evidence adduced proved beyond reasonable doubt that, the appellants, in company with another not before the court while armed with knives robbed the complainants and also used violence on persons thereto immediately before or during or immediately after the robbery. In my view, the allegation that the prosecution did not prove its case beyond reasonable doubt does not hold water.
  39. On the claim that the 1<sup>st</sup> appellant was an underage requiring legal representation, the court made efficient strides directing that the appellant be appointed an advocate. Of importance to note is the fact that the appellant held the view that his advocate was incompetent hence denying proper legal representation. How did he measure incompetence? He was adequately represented by a qualified lawyer for free and therefore he is estopped from crying that his rights were not observed as a minor in conflict with the law.
  40. As to sentence, the appellants termed the sentence as harsh and excessive. It is noteworthy that the appellants were sentenced to 25 years' imprisonment. The offence under section 296(2) attracts a mandatory death sentence. While sentencing the appellants, the trial magistrate applied the principles in Muruatetu case. It therefore means that the appellants were sentenced to 25years imprisonment instead of the maximum sentence prescribed in law which is death.
  41. Suffice to note that the trial court fell into error by applying the dictum in Muruatetu case as the Supreme Court has since clarified that the decision addressed murder charges only.
  42. The above notwithstanding, it suffices to point out that the offences emanated from the same transaction and therefore, the same ought to have run concurrently and not consecutively as ordered by the learned magistrate.
  43. Although not argued, I noted that the trial court did not take into consideration the time spent by the appellant in lawful custody pursuant to section 333(2) of the CPC. A perusal of the record shows that the 2<sup>nd</sup> appellant upon arrest, remained in remand custody till the time of the sentence translating to a period of 2 years, 4months and 21 days spent in lawful custody.
  44. The 1<sup>st</sup> appellant on the other hand was also arrested on 04.11.2020 and remained in custody till 16.08.2022 when he was released on bail thus translating to 1 year, 7 months and 12 days spent in lawful custody.
  45. The above notwithstanding, this court has taken into consideration the mitigation on record and the appellants' age. To that end, the court holds the view that the appellants deserve an opportunity to rejoin the society and make useful their lives therein. In the circumstances therefore, I am inclined to substitute the 25-year sentences with 15year imprisonment for each count less the period spent in remand custody. The sentences to run concurrently from the date of sentence.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF JUNE 2024**

**J. N. ONYIEGO**



**JUDGE**

