



REPUBLIC OF KENYA



**Onunga v Republic (Criminal Appeal E030 of 2023)
[2024] KEHC 6750 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E030 OF 2023
RE ABURILI, J
JUNE 6, 2024**

BETWEEN

HARRISON WASONGA ONUNGA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the Judgment, conviction and sentence by the
Hon. R.M. Oanda on the 25th July 2023 in the Senior Principal
Magistrate's Court at Winam in Criminal Case No. E842 of 2021)*

JUDGMENT

Introduction

1. The appellant Harrison Wasonga Onunga was charged and convicted of the offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#) and sentenced to 15 years' imprisonment.
2. The particulars of the offence were that on the night of 4th April 2021 at around 2100hrs at Nyamasaria Market in Kisumu East sub-county within Kisumu County jointly with others not before court robbed Zachary William Nonkwe of one mobile phone make Infinix H06 valued at Kshs. 13,000 and cash Kshs. 500 during which time of such robbery wounded the said Zachary William Nonkwe.
3. The appellant was also charged on Count 2 with the offence of assault causing actual bodily harm contrary to section 251 of the [Penal Code](#) as well as the offence of handling stolen goods contrary to section 332 (1) of the [Penal Code](#) on Count 3.
4. The prosecution called a total of seven (7) witnesses in support of their case after which the appellant was placed on his defence. The appellant testified and called one witness in support of his defence.
5. The trial court after considering and weighing the evidence adduced found the appellant guilty on Count 1 of the charge of robbery with violence while acquitting him on the other charges. After



considering the appellant's mitigation as well as the fact that the appellant had been in custody for close to two years pending trial, the trial court proceeded to sentence him to serve 15 years imprisonment.

6. The appellant was aggrieved by the conviction and the sentence and lodged a petition of appeal dated 7th August 2023 filed on the even date and supplementary grounds of appeal dated 25th January 2023 that were filed on the 29th January 2024 raising the following ten grounds of appeal:
 1. That the trial court magistrate erred both in law and fact in finding that the prosecution had proved the charge of robbery with violence beyond any reasonable doubt.
 2. The learned trial magistrate erred both in law and fact by failing to appreciate that the rights of the appellant to a fair trial under Article 50 of *the constitution* was violated by failure on the part of the prosecution to recall key prosecution witnesses for further cross examination by the appellant's counsel.
 3. The learned trial magistrate erred both in law and fact by failing to consider the defense evidence and to find it more credible and in particular consistent with the evidence adduced by the prosecution witnesses, complainants in Counts 1 and 2.
 4. The learned trial magistrate erred in law and fact by failing to give reasons as to his belief in the prosecution's case and as to why the defense of the appellant was not credible and thereby occasioning a miscarriage of justice.
 5. The learned trial magistrate erred both in law and fact by ignoring the issue of mens rea on the part of the appellant to commit the offence of robbery with violence thereby occasioning a miscarriage of justice.
 6. There was no sufficient evidence availed by the prosecution that could support the findings, ruling and judgement of the trial court, the decision of the trial magistrate is against the weight of the evidence on record.
 7. The learned trial magistrate erred in fact and law by failing to afford the appellant an opportunity to mitigate by counsel before sentencing him.
 8. The sentence imposed upon the appellant is manifestly harsh and excessive taking into account the relationship that existed between the complainant and the appellant.
 9. That the trial court erred both in law and in fact in not making a finding that theft/stealing as an ingredient of the offence of Robbery was not established beyond a reasonable doubt.
 10. That the trial court erred both in law and in fact in not making a finding that the complainant intended to withdraw these charges against the appellant hence denying the appellant his right to alternative dispute resolution envisaged in Article 159 of *the Constitution*.
7. The appellant filed written submissions while the respondent made oral submissions.

The Appellant's Submissions

8. It was submitted that the trial court erred in law and in fact in not making a finding that robbery as an integral component of the offence of robbery with violence was not established beyond reasonable doubt. The appellant submitted that PW1's evidence of theft was not corroborated by any direct evidence or circumstantial evidence despite the fact that the case happened in a public place.



9. The appellant further cited the contradictions and inconsistencies in PW1's statement about the alleged theft also bred dubiety. It was further submitted that nothing relating to the exhibits was recovered in the appellant's possession.
10. It was submitted that the prosecution failed to prove the ingredients of the offence of robbery with violence beyond reasonable doubt and further that the uncontroverted defence by the appellant and his witness was not considered.
11. The appellant submitted that the prejudicial opinion by the trial magistrate played a key role in arriving at the conviction and subsequent sentencing of the appellant as it painted him a violent man who is in habitual business of assaulting people thus liable of committing the offence of robbery with violence.
12. It was submitted that the appellant was not afforded a fair trial as the prosecution failed to recall witnesses for further cross-examination by the defence counsel which amounted to a gross miscarriage of justice and a violation of the appellant's constitutional rights.
13. It was further submitted that the trial court failed to consider the complainant's appeal to withdraw the case against the appellant. Reliance was placed on the case of Dennis Wanjohi Kagiri v Republic [2016] eKLR where the accused had been charged with robbery violence, the learned judge factored the willingness of the complainant to withdraw the complainant as sufficient to raise reasonable doubt that the appellant robbed the complainant and acquitted the accused person.
14. The appellant further submitted that the sentence of 15 years imprisonment meted out by the trial court is very harsh, excessive and overly punitive in line with the weight of the evidence and circumstances of the crime in question.
15. The appellant submitted that from the evidence adduced by PW1, the incident happened in a public place and there was no intention to rob and if this happened then it was neither planned nor intended but rather induced and occasioned by a misperceived mental judgement and consequently acceptance to pay and willingness to withdraw the case reduced the alleged offence to a mere misdemeanor.

The Respondent's Submissions

16. Mr. Marete Principal Prosecution Counsel for the respondent conceded the appeal on the grounds that the conviction was not safe as the element of theft was not proved beyond reasonable doubt. He submitted that the alleged robbery took place in a public place yet there was no corroborative witness.
17. It was further submitted on behalf of the respondent that the complainant wished to withdraw the charge in the lower court yet the trial court never took cognizance of the same.

Analysis and Determination

18. Whether or not to concede an appeal is within the constitutional remit of the Director of Public Prosecutions (DPP). However, his views in that regard are not binding on the Court, which is obliged to re-evaluate the evidence and consider the merits of the appeal. The approach that the Court takes when the DPP concedes an appeal was succinctly stated in *Patrick Omukunda Omung'ala v Republic*, Cr. App No. 195 of 2012 as follows:

“While it is the right of the respondent to oppose or concede a criminal appeal, that in itself does not bind this Court. The decision of this Court turns on whether, based on the evidence on record and the law, the conclusions of the first appellate court are proper. The respondent's opposition of an appeal does not invariably lead to a dismissal of the appeal; conversely the respondent's concession of an appeal cannot lead to its automatic success.”



(See also *Godfrey Ngotho Mutiso v. Republic*, Cr. App. No. 17 of 2008 and *Norman Ambich Miero & Another v. Republic*, Cr. App. No. 279 of 2005).

19. Turning to the grounds of appeal, I agree with the appellant that the evidence presented by the prosecution was not sufficient to sustain his conviction on the charge of robbery with violence for the following reasons:
20. PW1, the complainant testified that the appellant beat him up and in the conflict, left with his jacket, Infinix H06 phone and Kshs. 13,000. This is what the trial magistrate found to have corroborated the charge brought against the appellant for the offence of robbery with violence. It was his testimony that the appellant attacked him in the presence of other people. This witness had initially testified that there were eight people who accompanied the appellant when the appellant was attacking him but later he stated that they were six in number.
21. The prosecution also called PW3, the investigating officer who was also one of the officers who arrested the appellant. He gave an inventory of the things alleged to have been recovered from the appellant. However, however none of the items he listed were those alleged to have been stolen from the complainant. In cross-examination, PW3 admitted that the appellant had claimed ownership of the items recovered from the appellant's house.
22. PW5 Sergeant Ragot Shadrack testified that he was part of the team that visited the appellant's place to arrest him. He reiterated that the inventory produced by PW3 was of the things recovered from the appellant's house.
23. The issue is whether the prosecution proved the charge of robbery with violence against the appellant beyond reasonable doubt.
24. The offence of robbery with violence is created under Sections 295 and 296(2) of the [Penal Code](#) as follows:

“295. 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.

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(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

25. In *Jeremiah Oloo Odira v Republic* [2018] eKLR, the Learned Judge condensed the aforementioned sections and elaborated on the offence of robbery with violence as follows:

“Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be



proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

- i. The offender is armed with any dangerous or offensive weapon or instrument, or
- ii. The offender is in the company of one or more other person or persons, or
- iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person”

26. Based on the evidence adduced before the trial court, it is clear that PW1, the complainant’s testimony was never corroborated by any other prosecution witness. None of the goods alleged to have been stolen by the appellant were part of the goods recovered and documented by PW3 as corroborated by PW5. This is not to say that non-recovery of the allegedly robbed goods or items is fatal to the prosecution’s case per se, but that, why would the prosecution and more so, the investigating officer, arrest the appellant with his own property and bring them to court as exhibits or items of the alleged robbery?
27. The prosecution should have adduced evidence to show that the appellant had the opportunity to dispose of the allegedly robbed property and not to simply avail items that had no relation with the alleged robbery.
28. PW3 the investigating officer conceded that the goods he documented as having been recovered from the appellant’s house were his.
29. In addition, despite the complainant testifying that the conflict with the appellant occurred in a public place, the prosecution failed to call any witnesses to corroborate PW1’s testimony. I also found that PW1’s testimony contained contradictions specifically when he initially testified that the appellant was in the company of eight other men during the attack only to shift and state that he was assaulted by six people.
30. On his part, the appellant in his testimony was very firm and consistent. He testified that he got into a fight at the Bar where he was drinking at after which the security there, PW1, came and separated the appellant and the other warring party and eventually escorted him out. It was his testimony that PW1’s phone got destroyed in the conflict and that he promised to buy for PW1 a phone but that instead, PW1 elected to have the appellant charged. The appellant’s testimony was corroborated by DW2.
31. Further, I note that on the 25.4.2023, the complainant in Count 2 of the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code informed the trial court that he wished to withdraw his complaint against the appellant and the court proceeded to withdraw the charge against the appellant. This charge did not relate to the charge of robbery with violence.
32. Taking all the aforementioned into consideration, it is my opinion that the prosecution failed to prove the elements of the offence of robbery with violence as against the appellant beyond reasonable doubt and that the Prosecution Counsel in this appeal rightly conceded the appeal.
33. That notwithstanding, I am ultimately satisfied that the prosecution failed to prove the offence of robbery with violence contrary to section 296 (2) and that therefore the conviction of the appellant



was unsafe. I allow this appeal, quash the conviction for robbery with violence against the appellant and set aside the 15 years prison term imposed on him.

34. Therefore, unless otherwise lawfully held, the appellant Harrison Wasonga Onunga is hereby set at liberty. Signal to issue to prison.

35. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 6TH DAY OF JUNE, 2024

R.E. ABURILI

JUDGE

