



**Mwasambo v Republic (Criminal Appeal E041 of 2023)  
[2024] KEHC 9943 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9943 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E041 OF 2023  
GMA DULU, J  
JULY 24, 2024**

**BETWEEN**

**SAMSON MGHANGA MWASAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Criminal Case No. 757 of 2021  
delivered by Hon. D. Wangeci (SPM) at Wundanyi Law Courts)*

**JUDGMENT**

1. The appellant was tried and convicted of robbery with violence contrary to Section 296(2) of the [Penal Code](#), the particulars of which being that on 16<sup>th</sup> February 2021 at Taita Rocks Hotel in Wundanyi Sub County within Taita Taveta County, with others not before the court, robbed Granton Mwazighe of motor vehicle registration number KBW 232Y Nissan saloon white in colour, electronic equipment, laundry equipment, food stuff and drinks all valued at (Kshs. 988,990/=) nine hundred and eighty eight thousand nine hundred and ninety the property of Taita Rocks Hotel and immediately before such robbery wounded Granton Mwazighe.
2. On conviction, he was sentenced to 30 years imprisonment.
3. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, and relied on the following amended grounds of appeal:-
  1. The learned trial Magistrate erred in law and fact in failing to appreciate that the charge sheet was bad for duplicity.
  2. The learned trial Magistrate erred in law and fact in failing to appreciate that the appellant's identification was not positive since the evidence reveals that appellant was wrongly implicated in the commission of the offence.



3. The learned trial Magistrate erred in law and fact by failing to appreciate that the prosecution did not prove its case against the appellant to the required standard of beyond reasonable doubt.
  4. That the learned trial Magistrate erred in law and fact by failing to appreciate that the entire prosecution case was founded on circumstantial evidence which was weak and could not safely sustain a conviction.
  5. The sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the appellant's mitigation and facts and circumstances unique to the case.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant, as well as the submissions filed by the Director of Public Prosecutions.
  5. This being a first appeal, I am duty bound to evaluate all the evidence on record and come to my own independent conclusions and inferences – see *Okeno v Republic* (1972) EA 32.
  6. At the hearing of the case before the trial court, the prosecution called five (5) witnesses. On his part, the appellant tendered sworn defence testimony and did not call any additional evidence.
  7. In their submissions, I note that the appellant stated that he was not identified as having been involved in the alleged robbery, and was also not found in possession of any of the allegedly stolen or robbed items from Taita Rocks Hotel Wundanyi.
  8. On the other hand, the learned Prosecuting Counsel Mr. Sirima submitted that the robbery occurred on the night of 16<sup>th</sup> February 2021 which was committed by a number of people, armed, and who injured PW1 Granton Mwazighe a watchman, who was not able to identify them as robbers because they were strangers to him and they hit him and he became unconscious, but that some days later some of the stolen items were found in the possession of the appellant. Thus under the doctrine of recent possession as explained in the case of *Kelvin Nyongesa v Republic* (2016) eKLR, the prosecution proved beyond reasonable doubt that the appellant was one of the robbers.
  9. Indeed, from the evidence on record PW1 Granton Mwazighe, a watchman at Taita Rocks Hotel was attacked and became unconscious on the night of 15<sup>th</sup>/16<sup>th</sup> February 2021. Several items were stolen from the premises, including hotel movable items and also a motor vehicle.
  10. The evidence of PW1 was however, that he did not identify or recognise any of the people who raided the hotel that night and took away the items.
  11. Though the trial Magistrate found that the appellant was found in possession of some of the stolen items, in my view the evidence of possession and identity of the items relied upon is doubtful evidence.
  12. Firstly, there is no evidence on record, that the manager of the hotel PW3 Geoffrey Mwakima positively identified the jerican and the blender produced as exhibits as belonging to that hotel. The description of the blender said to be make Sayan applications in my view was not a special description to establish that the said item belonged to the hotel. The owner of the hotel also did not testify in court to describe how the items were acquired by his/her hotel and whether they belonged to the hotel. Thus in my view, the description of these two items is not positive as regards their identity and whether they belonged to the hotel.



13. The second gap is with regard to the recovery of the said items in the house of the appellant. This relates to the evidence of PW5 PC Noah Tanui the investigating officer, whose evidence does not indicate that he went to the home with the appellant or anybody else, to the house where the items were found and recovered. Secondly, nobody was called to confirm whether the premises where the items were recovered belonged to the appellant or that he lived there. Thus, even if the items were recovered from a house, it was not proved by the prosecution that the house belonged to or was occupied by the appellant. Thus possession was not proved.
14. Thirdly, the fact of use of a mobile telephone number or receiving a telephone call, does not by itself establish criminality, unless there is evidence technically connecting that particular communication to a crime. In the present case, no technical evidence was tendered in court, to connect the appellant to the alleged crime through mobile telephone communication.
15. This being a case of circumstantial evidence, in my view, the prosecution did not prove beyond any reasonable doubt that the appellant was the robber or one of the robbers. I rely on the case of *Sawe v Republic* (2003) eKLR where the court emphasized that, such circumstantial evidence should not have any other reasonable hypothesis, other than that pointing to the accused person as the culprit, in order to sustain a conviction. The evidence on record here does not satisfy that test. The appeal will thus be allowed.
16. Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence I order that the appellant be set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED THIS 24<sup>TH</sup> DAY OF JULY 2024 IN OPEN COURT AT VOI VIRTUALLY.**

**GEORGE DULU**

**JUDGE**

In the presence of:-

Alfred/Trizah – Court Assistants

Appellant

Mr. Sirima for the State

