



REPUBLIC OF KENYA



KENYA LAW
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**Waithaka v Republic (Criminal Appeal E077 of 2022)
[2024] KEHC 8911 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8911 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL E077 OF 2022**

JM OMIDO, J

JULY 25, 2024

BETWEEN

FRANCIS MUNGAI WAITHAKA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgement, conviction and sentence of Hon.
J. Irura, Principal Magistrate delivered on 21st December, 2022)*

JUDGMENT

1. The Appellant Francis Mungai Waithaka was in the first count charged before the trial court with 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.
2. As is instructive from the charge sheet, the particulars of the offence in the first count were that on 10th day of October, 2017 in Murang'a South Subcounty within Murang'a County, jointly with others not before the court, the Appellant robbed Paul Njuguna Nyutu (hereinafter referred to as "the complainant") of a mobile phone make Samsung valued at Ksh.5,000/- and cash Ksh.23,000/-, all worth Ksh.28,000/- and immediately before the time of such robbery wounded the said complainant.
3. In the second count, the Appellant was charged with the offence of assault causing actual bodily harm contrary to Section 251 of the Penal Code, Cap 63 Laws of Kenya.
4. The prosecution alleged in the particulars of the offence to the second count that on the 11th of October, 2017 in Murang'a South Subcounty within Murang'a County, the Appellant assaulted the complainant, thereby occasioning him actual bodily harm.
5. The Appellant denied both counts following which a trial was held in which the prosecution called three witnesses and the Appellant tendered an unsworn statement in defence. Upon conclusion of the



- trial, the Appellant was convicted on both counts and sentenced serve 15 years imprisonment on the first count and 1 year imprisonment on the second count.
6. The Appellant's instant appeal is predicated on the convictions and sentences of the trial court. He has presented the following grounds of appeal vide the Petition of Appeal dated 29th December, 2022 upon which he seeks to upset the convictions and sentences:
 - a. The learned Principal Magistrate erred in law and fact by deciding that the offence of robbery with violence and assault have been proved beyond reasonable doubt while the converse was true.
 - b. The learned Principal Magistrate erred in law and fact by failing to ascertain that the particulars of the charge and the evidence tendered did not disclose an offence of robbery with violence.
 - c. The learned Principal Magistrate erred in law and fact by failing to find that no violence was meted upon the complainant and therefore there was no evidence to sustain a charge of robbery with violence and assault.
 - d. The learned Principal Magistrate erred in law and fact by failing to interrogate keenly the evidence tendered in support of the charge of robbery with violence and assault vis a vis the defence tendered by the Appellant and that the evidence tendered by the prosecution witnesses did not meet the threshold required by law.
 - e. The learned Principal Magistrate erred in law and fact by finding that the prosecution witnesses corroborated each other while the converse was true.
 - f. The learned Principal Magistrate erred in law by meting a sentence upon the Appellant which was manifestly excessive and unjust in the circumstances surrounding the case.
 7. This being a first appeal, this court has a legal duty to re-analyze, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify (see *Okeno v Republic* [1972] E.A, 32 at 36; *Pandya v Republic* [1957] EA 336; *Shantilal M. Ruwala v Republic* [1957] EA 570; and *Peter v Sunday Post* [1958] EA 424.
 8. This court must consider whether the trial court considered all the evidence, weighed it correctly and correctly applied the law or legal principles to it in arriving at its judgment in respect of both the convictions and sentences. This exercise necessarily entails a close scrutiny of the evidence of each witness within the context of the totality of evidence, and what the trial court's findings were in relation to such evidence (see *Mkirani v Republic (Criminal Appeal E010 of 2021)* [2021] KEHC 377 (KLR) (17 December 2021) (Judgment).
 9. The complainant testified before the trial court as PW1. He told the court that he worked as a hawker in Nairobi. He recalled the events of 10th November, 2017 and stated that he was in his house at Kamira village cooking and had left the door open. At about 7.00pm four men stormed and made ingress into the house and beat him up while demanding for money and his cell phone. The attackers took the money that the complainant had together with his Samsung make cell phone and left.
 10. The complainant went to bed and reported the matter to the police the next morning. Two police officers joined the complainant in looking for one of the attackers – the Appellant – at his home but did not find him there.
 11. The complainant explained that as the two officers were searching for the man in the house, he went out and met one of the men who had robbed him by the road and the man attacked the complainant



- with a panga, injuring him. The complainant screamed for help and the two police officers went to his rescue and apprehended the man, whom the complainant told the trial court was the Appellant. He was taken to Virgin Hospital for treatment.
12. The complainant further explained to the trial court that the Appellant was well known to him as he hailed from the same locality as the complainant and further stated that he had seen the Appellant severally within the locality. The other three attackers were not known to him.
 13. In his further testimony, the complainant stated that he was able to see the attackers, who had a fimbo and cut a table in the complainant's house, using light from a tin lamp that was in his house at the time of the attack. He stated that he recognized the Appellant as he was a person known to him and that the Appellant was the first one to hit the him on the head and that he raised an alarm by screaming but no one went to his aid.
 14. The complainant identified before the trial court his treatment notes from Virgin Hospital and the panga with which he stated the Appellant used to injure him.
 15. On being cross-examined, the complainant told the trial court that he worked as a hawker in Nairobi but regularly visited his home in Kamira and that at the time of the attack, he had been at Kamira home for 4 days.
 16. He stated that the robbers struck at about 7.00pm. He explained that there were three houses within the compound – one belonging to the complainant, the other to his mother and the third to his brother. He stated that at the time of the attack, neither his mother nor his brother was at home. He added that the attackers had covered their faces but he was able to know or recognize the Appellant from his voice.
 17. The complainant stated upon being further cross examined that he told the police officers when he recorded his statement that he knew the Appellant well as being one of the attackers. He denied attempting to defile a child in August 2012.
 18. The second witness that testified in the trial court in support of the prosecution case was Police Constable Henry Kinyua of Ichagaki B Police Post which was under Maragua Police Station. The officer told the court that on 11th October, 2017 at about 6.30pm, the complainant made a report to the post that he had been attacked and robbed by four men at his house in Kamira village.
 19. The complainant told the officers at the station that he was able to identify one of the robbers who had a panga, whom he named as Mungai and described a his neighbour. He reported that the robbers stole from him Ksh.23,000/- in cash and a cell phone valued at Ksh.5,000/-. He further reported that the robbers damaged his table.
 20. PW2 told the trial court that he together with his colleague Police Constable Anthony Njane and the complainant, proceeded to the Appellant's house but did not find him. His wife was at home. The two officers then went into the Appellant's house to conduct a search.
 21. PW2 stated to the court that as the officers were conducting a search in the Appellant's house, he heard screams from outside and on rushing there found that the Appellant, who was armed with a panga, had attacked the complainant and injured him by cutting him. The officers rescued the complainant, apprehended the Appellant and recovered the panga, which had blood stains.
 22. The Appellant was taken into custody at Maragua Police Station where he was processed and later taken to court for plea taking.



23. On being cross-examined, Pw2 told the trial court that the Appellant emerged from a coffee plantation while armed with a panga and attacked the complainant, injuring him.
24. The last prosecution witness that the state called in the lower court was Police Corporal Nicholas Kimeu of Maragua Police Station, who testified as PW3. The officer told the court that the complainant reported to the police that 10th October, 2017 at about 7.00pm, he met four men whom the complainant could not identify, who attacked the complainant and demanded for money from him. The men, as per the complainant's report, were armed with pangas and sticks.
25. The officer stated that the complainant told the attackers that he had money in his house and the four then took him to his house, where, out of fear the complainant gave the robbers Ksh.23,000/- and his Samsung cell phone.
26. During the robbery, the men beat up the complainant and injured him and that the injuries included a panga cut to his head.
27. PW4 stated further that the complainant made a report at Mugumo-ini AP camp. He did not state how the Appellant was arrested but merely stated that he was transferred to Maragua Police Station and the case allocated to Police Constable Cheruiyot to conduct investigations.
28. The officer produced the complainant's P3 form and treatment notes as PEx1 and PExh2 respectively.
29. When cross examined by the Appellant, PW3 stated that the complainant was treated at Rural Hospital, which he explained was also known as Maragua Hospital.
30. The prosecution closed its case at that stage and on the 6th September, 2022, the Court found that a prima facie case had been established against the Appellant and he was placed on his defence. The learned Magistrate complied with the provisions of Section 211 of the Criminal Procedure Code. The appellant elected to give sworn evidence. He did not call witnesses.
31. In his very brief sworn testimony in his defence, the Appellant told the court that he worked as a farmer and hailed from Kamira village. He denied ever committing the offences that he was charged with and stated that he was framed.
32. The court directed that the appeal proceeds by way of written submissions and both parties filed their respective submissions. I have perused the petition of appeal, the submissions by the two sides and the record in its entirety.
33. Having considered the grounds raised in the Petition of Appeal, the submissions by the parties and the lower court record, the issues for determination are whether the convictions were safe and the sentences appropriate.
34. Inevitably, this court in determining the issues stated above must first satisfy itself that the ingredients of the offences of robbery with violence and assault were proved against the Appellant in respect of the two counts, beyond reasonable doubt, as is the requirement in law.
35. The offence of robbery with violence is provided for under Section 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.



- (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.”

36. From the provisions above, 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.
37. Any of the above three findings is sufficient to convict an offender under Section 296(2) of the Penal Code.
38. With regard to the offence of assault causing actual bodily harm, Section 251 of the Penal Code provides thus:
- “ 251. Assault causing actual bodily harm
- Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour and is liable to imprisonment for five years.”
39. From the above provision, the ingredients of the offence of assault causing actual bodily harm include the offender assaulting the complainant or the victim and occasioning actual bodily harm to the complainant or victim.
40. With regard to the offence of robbery with violence, the testimony of the complainant was that he was attacked by more than one assailant, who meted physical violence upon him and robbed him of his cash and cell phone while armed with fimbos and pangas.
41. As we have seen above, the offence of robbery with violence is committed where the offenders are more than one; where they are armed with dangerous or offensive weapons; and where they use physical violence against the complainant. All the three ingredients are satisfied by the complainant’s evidence. The offence of robbery with violence was in the premises committed against the complainant.
42. What then the court should consider next is whether the Appellant was one of the robbers who attacked the complainant.
43. One of the grounds that the Appellant has raised in his submissions is that he was not identified or properly identified as one of the attackers as the offence was allegedly committed at night and the circumstances were not favourable for a proper identification.
44. It is to be noted that during his examination in chief, the complainant told the trial court that when the robbers struck, they beat him up and asked him to give them money and his cell phone, to which he obliged. He stated that he identified the Appellant and saw his face using the light that was provided from a tin lamp that was in his house. He did not describe the intensity of the light but stated that the Appellant was a person known to him hence that he recognized him as one of the robbers. He did not state how long the ordeal took.



45. When the complainant was cross examined, his narration changed. This time he told the trial court that the robbers all had covered their faces. This drastically departed from his earlier position that he saw the face of the Appellant. He further contradicted himself by stating that he identified the Appellant by recognizing his voice, which he claimed he knew well. He did not state which words the Appellant spoke or what made him to tell distinctly that it was the Appellant's voice.
46. The contradictions and discrepancies in the complainant's evidence were not explained and my view is that the same were grave as the resulting identification was not without a possibility of fault.
47. The evidence of the complainant leaves unanswered questions, to wit; Did he see the Appellants face as per his evidence in chief or were the faces of the assailants covered as per his evidence on cross-examination? Was it a case of facial recognition as per his initial testimony or one of voice recognition as per his response in cross-examination? What was the intensity of the light, if he saw the Appellant's face? What were the words spoken by the Appellant, if the complainant heard and recognized his voice?
48. The contradictions, in view of my observations and the foregoing unanswered questions cannot in the circumstances be said to be minor but grave. The only outcome I can deduce from his evidence is that there was no or no proper identification of the Appellant as one of the robbers.
49. To that, I will fault the learned trial Magistrate for reaching the finding that the Appellant was properly identified by the complainant.
50. In the result, as the Appellant was not identified or properly identified as one of the robbers, the conviction was not safe, and cannot stand as the evidence of identification against him was not sufficient and/or foolproof.
51. With regard to the offence of assault causing actual bodily harm, the complainant told the court that the Appellant attacked him with a panga and cut him on the head when the complainant took police officers to the Appellant's house. PW2 stated that he went to the rescue of the complainant when he heard screams and managed, with the help of his colleague, to apprehend the Appellant and recover the panga.
52. A P3 form and treatment notes that were issued to the complainant were produced as exhibits. The two documents corroborate the evidence of the complainant and PW2 that the former sustained the injuries. The P3 form indicates that his shirt was bloodstained and that he sustained a cut wound on the right cheek near the ear, caused by a sharp object.
53. The Appellant did not offer any evidence to counter or controvert that of the prosecution regarding the assault. It is then my finding that the prosecution proved beyond reasonable doubt that the Appellant assaulted the complainant causing him actual bodily harm. To that, the trial court reached the proper finding and the conviction on the second count stands.
54. Under Section 333(2) of the Criminal Procedure Code, the court was under an obligation to consider and take into account the period during which the Appellant remained in custody when sentencing him. The Court of Appeal in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] held that:

“Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody.

It is not enough for the court to merely state that it has taken into account the period already spent in custody...”



55. According to The Judiciary Sentencing Policy Guidelines:

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

56. Be that as it may, I note that the Appellant has already served the sentence of one year imprisonment on the count of assault causing actual bodily harm.

57. For the reasons that I have stated above, I am inclined to allow the appeal in part, which I hereby do to the extent that I quash the conviction on count 1 – the charge of robbery with violence – and set aside the sentence of imprisonment of 15 years.

58. In respect of the conviction on count 2, the appeal is dismissed. However, regarding the sentence on count 2, as the Appellant has already served the sentence of one 1 year, I order that he be set at liberty forthwith unless he is otherwise lawfully detained.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 25TH DAY OF JULY, 2024.

JOE M. OMIDO

JUDGE

Appellant: Present, virtually.

Prosecution Counsel: Ms. Gakumu.

Defence Counsel: Mr. P.M. Njoroge.

Court Assistant: Ms. Njoroge.

