



**Lucy & another v Republic (Criminal Appeal E013 & E015 of 2022
(Consolidated)) [2024] KEHC 9971 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 9971 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E013 & E015 OF 2022 (CONSOLIDATED)**

**RM MWONGO, J
AUGUST 2, 2024**

BETWEEN

DENNIS MUNENE LUCY 1ST APPELLANT

BRIAN KINYUA WAWIRA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment dated 1st July, 2020 by
Hon. L.W. Kabaria (PM) in PMCR.C No. 342 of 2020 Gichugu)*

JUDGMENT

1. The Appellants were charged for the Offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. The particulars of the offence are that on 10th October, 2020 at Kutus township within Kirinyaga County, the appellants jointly with others not before the court, robbed a mobile phone make Tecno valued at Kshs 10,000 and cash of Kshs 700 the property of Simon Kinyua Nyaga and immediately before the time of such robbery injured him.
2. The appellants denied the charge and full trial followed. The prosecution assembled 4 Witnesses. At the close of the trial the 1st accused was acquitted. The 2nd accused, Dennis Munene and 3rd accused Brian Kinyua Wawira were found guilty and consequently convicted and sentenced to suffer death on 15th July, 2022.
3. Dissatisfied, the appellants filed this appeal premised on the grounds that:
 - i. The Prosecution case was riddled with inconsistencies and contradictions.
 - ii. They were not positively identified.
 - iii. The trial court relied on the evidence of one witness.



- iv. The Prosecution failed to prove its case beyond reasonable doubt.
 - v. Their defence was ignored.
4. This being a first appeal court is obliged to evaluate all the evidence on record, and make its own conclusions. In so doing, it must keep in mind that it did not have the benefit of hearing or seeing the witnesses itself.

Prosecution case

5. The evidence on record was adduced through five prosecution witnesses and the defence.
6. PW-1 John Mungai Gichuki testified that he was a driver employed by Pekimo Bakers. He arrived at his place of work on the 10th October 2020 and was informed by his colleague that one of his salesmen while on his way to work. He had been injured and lost his phone with a company book.
7. He further testified that they visited the scene with his manager, Njoroge, and a colleague Shadrack. They found some of the items scattered on the ground. As he tried to pick them up, he was hit on the head by a person who suddenly emerged from nowhere. He lost consciousness, when he regained his consciousness, he noticed the vehicle going backwards. The attacker followed him but was stopped by people who called the assailant “Brownie”. That is when he went back to the factory arriving at around midnight. He found that the manager and Shadrack had also escaped.
8. He stated that the person who beat him was John Nyaga and he was another person called ‘Brownie’. He pointed to John Nyaga in the dock.
9. Upon cross-examination, he confirmed that he did not see the 2nd & 3rd accused persons at the scene of the crime.
10. PW-2 Clement Njoroge Mwangi testified that he was the manager of Pekimo Bakers. He said that on 10th October, 2020 at about midnight, he was on duty when he received information about Shadrack having been attacked. Acting quickly and in the company of his colleague, they rushed to the scene aboard the company Lorry Isuzu NKR 613M with PW-1 John Mungai Gichuki being the driver, and Shadrack, who had been attacked, directing them.
11. PW2 added that as they approached the scene, which was about 500 metres from their bakery in Kutus, they found items scattered. As they started picking them, a man emerged from the bush and hit the driver John Mungai Gichuki, on the head. In a short order another assailant entered the Motor Vehicle and started reversing it. That they reported the matter to the Kutus Police Station.
12. He stated that he was escorted back to the scene in the company of a Police Officer and his colleague. They found a young man carrying a rungu who PW-1 John Mungai Gichuki quickly recognized as one of the attackers and he was arrested by the Police.
13. In cross - examination, PW2 he stated that Shadrack did not tell him who beat him; That he did not see the 1st or 2nd appellants at the scene, nor did he know them.
14. PW-3 Simon Kinyua Nyaga worked with KPLC. He testified that he knew the appellants/accused persons well as they grew up in the same locality. He narrated that on the night of 10th October, 2020 after he parked at the Safaricom booster near Kirima Bar, he walked home through a back street. He was accosted by the same persons, namely, Dennis Munene Lucy and Brian Kinyua Wawira, and they stole Kshs 7000/-. He lost his mobile phone too.



15. He added that as he struggled with the three attackers, he moved towards the light. Aided by the nearby light, he was able to clearly see the attackers and even called the appellant by name. He was hit by them on the left eye and right knee after he called out the 3rd accused who had been squatting on the side of the road.
16. In cross-examination, he said he knew the 1st Appellant very well, and saw him attack him. He told the police so. However, whilst he recorded his statement the day he was injured, the statement did not indicate that fact. He admitted there was a dispute between him and the 1st Appellant.
17. PW-4 No 60525 Corporal Allaso Aden testified that on the 10th October 2020, he was called by a colleague after being informed of the hijacking of a Motor Vehicle belonging to Pekimo Bakers. They rushed to the scene where two of the attackers escaped but he managed to arrest one John Kaguuru. Two others, who were arrested by the members of public were brought to the Station and were identified by PW-1 and Simon who had been attacked. No identification parade was conducted.
18. In cross-examination by the 2nd Accused (2nd Appellant), he said he knew the 2nd Appellant very well, and reported to the police after the attack. He said he was very pained to be attacked by someone like the 2nd Appellant whom he knew well. He denied having any dispute with the 2nd Appellant.
19. He produced the receipt of the mobile phone as PExb. 1
20. In cross-examination, PW4 could not confirm he found the 1st Appellant at the scene. He assumed that the 1st Appellant beat the 1st complainant and then were on to hijack 2nd complainant. He stated in cross-examination by the 2nd Appellant: “you are Denno aren’t you, don’t think we don’t know you. We know you are the leader of the gang called Wesame”. No evidence was tendered of this allegation.
21. PW4 confirmed that the 1st Appellant was arrested by members of the public. That he was the arresting officer then he became investigating officer. He stated without providing investigating evidence, that: “Simon was attacked first, then the vehicle was hijacked by the three of you.”
22. In cross-examination by the 2nd Appellant, PW4 re-stated that he was the investigating officer and investigated the appellants as members of the gang Wesame who were terrorizing residents. There was no evidence of the gang’s connection with the appellants.
23. PW-5 Gaston Odhiambo Owino was the clinical officer who treated, both PW-1 John Mungai Gichuki Simon Kinyua Nyaga and filled their P3 forms. The former had been attacked earlier. PW5 classified the injuries to as harm. He gave the approximate age of the injuries of 1st complainant to be 12 hours. He produced the P3 for 1st complainant as PExb 10 and treatment notes as PEx2. For the 2nd complainant he produced the P3 as PExb 3 and treatment notes as PEXb 4.
24. DW2- Dennis Munene Lucy in his defence testified that he was not involved in the crime. He was arrested on 13th October, 2020 on the way to his house. The police officers were from Kutus Patrol Base. He was later charged with robbery.
25. DW3 Brian Kinyua Wawira (2nd Appellant) testified that he works as a painter. He was out of work on the material day. He met the complainant with three men, who was arrested and took him to the police station. Later, they searched his house and did not find anything. He was taken to Kianyaga Police Station.
26. The parties filed submissions as directed by the court.



Appellants submissions

27. On identification the appellants submit that PW-3 was not able to identify his assailants. In his first report to the police, he stated that he was not able to identify his attackers. Further he did not give a description of his attackers at any time. They assert that PW3 had only a fleeting moment to observe his assailants using light whose intensity and brightness was not proved. Reliance is placed on the case of *Joseph Ngumbao Nzoro v. Republic* [1991] 2 KLR 212, where it was stated:
- “Before accepting visual identification as a basis for a conviction, the court had the duty to warn itself of the inherent danger of such evidence. A careful direction regarding the conditions prevailing at the time of identification and the length of time the witness had the accused under observation together with the need to exclude the possibility of error was essential.”
28. On the investigations they assert that these were not done properly and that the arresting officer was also the investigating officer. All his evidence was based on hearsay, filled with inconsistencies.
29. The appellants further impugn the Judgment rejecting their defence without cogent reasons. They assert that the prosecution was not able to rebut the evidence of the defence. In addition, they complain that the trial magistrate erred in imposing a mandatory death sentence on the appellants. The death sentence is inhumane and an infringement of the fundamental rights of an individual.

Respondent Submissions

30. On identification, the prosecution submits that the evidence of PW-3 Simon Kinyua Nyaga was clear. He testified that he was accosted by the Appellant Brian Kinyua Wawira on 10th October, 2020 in the company of Dennis Munene Lucy. They stole Kshs.7,000/= from him.
31. PW3 further stated that he was brought up in the same locality with the two appellants who were also recognized by PW-1 John Mungai. However, the evidence of PW1 shows he knew the 1st Accused, who was acquitted, and not the two appellants.
32. On the issue of whether the prosecution failed to prove its case beyond reasonable doubt, the state submits that from the evidence adduced, the appellants were placed at the scene of crime and they have not demonstrated how the prosecution failed.
33. On whether the Appellant’s defence was ignored, the prosecution submits that the appellants did not deny having been at the scene on the 10th October, 2020. Further, they did not deny knowledge of the complainants only stating that they were arrested on the 13th of October 2020 and taken to the police by four people who they later realized were Police Officers. The state relied on the case of *Republic v Dima Denge Dima & Others* [2013] eKLR.
34. The Prosecution submits that it was able to prove that the appellants were the perpetrators who accosted the complainants while armed with dangerous weapons which they used to assault them.

Analysis and Determination

35. The offence of robbery with violence is contained in 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.

296(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. The elements of robbery with violence are well restated in the Court of Appeal case of Oluoch v Republic [1985] KLR where it was held:

“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
.....”

37. In Republic v Dima Denge Dima & Others [2013] eKLR the Court of Appeal held:

“The elements of the offence under Section 296(2) are three in number and they are read not conjunctively, but disjunctively. One element is sufficient to found an offence of Robbery with Violence.”

38. PW3 testified that on the night of 10th October, 2020 he was accosted by the two appellants namely, Dennis Munene Lucy and Brian Kinyua Wawira and they stole Kshs. 7000/-. He lost his mobile phone too. He stated that being aided by a nearby light, he was able to clearly see them and even called the 1st appellant by name. He was hit by them on the left eye and right knee after he called out the 3rd accused who was squatting on the side of the road.

39. The first thing to note from the evidence is that there were two alleged incidents; the alleged hijacking of a vehicle and the robbing of Simon Kinyua Nyaga. The evidence of first incident has not been connected through evidence to the second incident, despite the investigating officer’s presumption as to the connection.

40. The only eye witness evidence of the robbery of the complainant PW3 Simon Nyaga, was that of himself. The two appellants were convicted on his evidence of identification by recognition.

41. The investigating officer (PW4) testified that the 1st and 2nd Appellants were arrested and brought to the police by members of the public; and that PW3 identified them. He confirmed that reports of the incidents had been reported the previous day and the complainants were issued with P3 forms.

42. The appellants impugn the police investigations as prejudicial on the ground that the arresting officer was also the investigating officer.



43. My observation on the evidence of the investigating officer is as follows; It is true he was also the arresting officer. In his evidence he appeared to take a casual and prejudicial position regarding the role of the 1st appellant when he stated:

“.....you are Denno aren't you; don't think we don't know you. We know you are the leader of that gang called Wesame. Denno, we know you”

He had a pre-conceived attitude that the 1st Appellant was a criminal and thus did not take seriously the impartiality necessary for investigative role.

44. With regard to the evidence of their identification by PW3 Simon Nyaga, it is clear from his (PW3) cross-examination that when confronted with the fact that his statement indicated he did not know his assailants, he did not respond other than stating that he had told the police he recognized his two assailants.

45. As there was no identification parade, full reliance was placed on the recognition by PW3. Whilst PW3 indicated that there was a security light about twenty metres away and a large floodlight about 150 metres away, there was no mention of the intensity of the light at the actual scene, including shadows or other barriers...

46. The appellants submit that PW3 was not able to identify his assailants since in his first report to the police, he stated that he was not able to identify his attackers. He did not give a description of his attackers to the police. This critical point was not taken into account by the learned trial magistrate despite citing the case of *Hassan Abdallah Mohammed v Republic* [2017] eKLR, where it was stated that:

“Visual identification in criminal cases can cause miscarriage of justice and should be carefully tested. 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 favorable and free from possibility of error before it can safely make it the basis of a conviction.”

47. The learned trial magistrate cautioned herself and stated she had considered the evidence of identification. The circumstances were that the incident occurred at night at about 2.00 pm, when PW3 was walking on the back street when he was attacked. Whilst the question of available light is considered, no indication is given as to how long an opportunity PW3 had to observe his assailants. Further no consideration was given to the fact that PW3 did not name his attackers or describe them in his initial report or statement.

48. PW3 said he was grabbed by the legs, by one person among a large gang. As he struggled to get away, two other assailants accosted him and he struggled with all three, as others approached. He moved towards the light then his phone fell. He said he told the fellow who picked it (1st Appellant) not to go with it, then he was hit with a stone. He kept telling the 1st Appellant not go to with his phone, then he was hit on the head and run away.

49. It seems incredible that in the midst of a robbery where a large gang have accosted someone, that person's main concern would be to tell them not to take his phone. That aside, it appears that the incident took just a few minutes. He said it took him 20 minutes to go and report at the Police Station, the delay arising because he had to look for his documents. Hence it is clear there was a very



limited opportunity he had for recognition. This aspect needed to be far more carefully scrutinized by the learned magistrate before extending a guilty verdict. I am not satisfied that adequate caution was attributed to the identification evidence by the learned magistrate.

50. That there was no other eye witness to corroborate this identification evidence is, in my view, further ground for extreme caution on its acceptability. An identification parade should have been held to ascertain the issue of identification.
51. More importantly, the statement recorded by PW3 written at 2.58 pm (according to his P3 form) clearly seems to have indicated that his assailants were unknown. This is despite his oral testimony asserting that he knew both assailants/appellants.
52. The other concern that is evident and which affects identification is the Doctor's evidence. PW3 reported at the police station that very night and was issued with a P3 form. He took the P3 form to Kirinyaga Hospital that same night. The doctor, PW5 Gaston Odhiambo Owino, testified that he treated PW3 on 10.10.2020. He produced PExb 3 and the treatment notes as PExb 4. The P3 form was filled on 13.10.2020 and stamped on that date. This date, 13.10.2020, was the same date the appellants were arrested by the police, a striking coincidence that does not aid probity.
53. Uncannily, the injuries of PW3 in Section B 2 of the P3 form are stated to be aged approximately three (3) days. There is no explanation in the testimony given for this age discrepancy on the injuries. If PW3 was treated on 10.10.2020, his injuries could not have been three days old. This discrepancy is unexplained. In particular, given that the same doctor attended to both PW3 and PW1, yet PW1's, P3 form indicates the injuries as being aged:

“In concurrence with 10.10.2020 at around 0030 hours”

The P3 report for PW1 was signed on 10.10.2020.

54. A final concern in this case is that the evidence of the dispute between the 1st Appellant and the complainant, PW3, was not dealt with adequately by the learned trial magistrate. Both PW3 and the 1st Appellant admit that they knew each other and there was a dispute between them. When cross-examined on this dispute, the 1st Appellant said the two had differed on the same plot.
55. Given the discrepancy on the age of the injuries, the failure by PW3 to state the names of his assailants and the prejudicial approach of the investigating officer, the benefit of the doubt ought to have been given to the accused persons.
56. In light of the foregoing, given that conviction was based on the evidence of a single witness corroborated by scanty medical evidence and inept or partial; police investigations, I am not able to allow the unsafe conviction to stand.

Disposition

57. Ultimately, for the reasons herein, the appeal succeeds and the judgment of the lower court is hereby set aside.
58. Both appellants are hereby acquitted and shall be set at liberty forthwith unless otherwise lawfully held.

DATED AT KERUGOYA THIS 2ND DAY OF AUGUST, 2024

R. MWONGO



JUDGE

Delivered in the presence of:

1. Appellant 1
2. Appellant 2 Present at Nyeri Maximum
3. Mamba for the State
4. Court Assistant, Murage

