



**Katuu v Republic (Criminal Appeal E053 of 2021)
[2024] KEHC 13636 (KLR) (24 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 13636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E053 OF 2021
SN MUTUKU, J
SEPTEMBER 24, 2024**

BETWEEN

SIMON MUIA KATUU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Judgment and Sentence of Hon. J. N. Nthuku, delivered on the 14th December, 2021 at the Principal Magistrate's Court in Loitotok Criminal Case No. 63 of 2020)

JUDGMENT

Background

1. Simon Muia Katuu, the Appellant, was charged before the Principal Magistrate's Court at Loitotok with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. The particulars of the offence are that on the 29th March 2020 at Musangailu River along Ilasit Entarara Road in Kajiado South Sub-County, Kajiado County jointly with others not before the court while armed with clubs robbed Francis Muriuki Maina of two mobile phones make Huawei Ipad and Itel all valued at Kshs 19,000 and at the time of the said robbery he intentionally and unlawfully injured Francis Muriuki Maina.
2. The Appellant was charged with a second count of attempted robbery contrary with section 297(1) as read with section 297(2) of the *Penal Code*. The particulars are that on 29th March 2020 at the same place as in count one (1) while armed with clubs and sisal ropes with others not before the court they attempted to rob Francis Muriuki Maina of Motor vehicle registration number KAL xxxx Mitsubishi Canter valued at Kshs 2,000,000 the property of Stanley Irungu Ndumu and at the time of the said robbery they beat and injured Francis Muriuki Maina.
3. The Appellant was tried, convicted of the two counts and sentenced to serve life imprisonment in count one (1) and seven (7) years imprisonment in count two (2) both sentences to run concurrently.



He is aggrieved by the conviction and sentence and has come to this court on appeal. He has raised the following grounds in his amended Petition of Appeal filed on 5th October 2023:

- i. The trial magistrate erred in fact and in law by finding that the prosecution had established the ingredients of robbery with violence and attempted robbery beyond reasonable doubt.
 - ii. The trial magistrate erred in law and in fact by finding that the identification parade was satisfactorily safe to convict the Appellant for the charges of robbery with violence and attempted robbery.
 - iii. The learned magistrate misdirected herself and erred in law and in fact by allowing evidence of an identification parade where the accused person had been unrepresented and had not been informed of his rights during the identification parade.
 - iv. The trial court erred in law and in fact by not appreciating that the injuries suffered by the complainant could not be attributed to the Appellant in light of the prosecution evidence and more so the medical evidence.
 - v. The learned magistrate erred in law and in fact by failing to find that the prosecution evidence had glaring discrepancies and could not warrant conviction of the Appellant.
 - vi. That the learned trial magistrate erred in law and in fact in awarding the Appellant harsh and excessive sentence by failing to consider the circumstances of the case and overlooking the material facts.
4. The Appellant prays that the appeal be allowed and that the conviction and sentenced be set aside or varies as the court may find fit.
5. The Appeal was canvassed through written submissions. The Appellants submissions are dated 17th January 2024. He has submitted on the following issues:

Whether the prosecution has established the ingredients of robbery with violence beyond reasonable doubt.

6. The Appellant relied on *Hamisi Said v Republic* [2020] eKLR where it was held that:
- “The ingredients of the offence of robbery with violence are the evidence of the theft, the number of assailants, the assailants having been armed with a dangerous weapon(s) and the visiting of violence upon the complainant”
7. The Appellant submitted the trial court misapprehended the evidence of the prosecution and failed to appreciate that there was no prove of any dangerous or offensive weapon used and that the complainant was left with the broker after the Appellant and the other people escaped and that the Appellant was not involved in the robbery or assaulting the complainant. He submitted that the allegations by the complainant that his phones were stolen was not substantiated and therefore not proved.
- The trial court failed to find that the prosecution evidence had glaring discrepancies
8. The Appellant submitted that the evidence of the complainant shows that the robbery took place at 10.00pm when Tipilit Ole Teiya (PW6) testified that he heard screams from the complainant at 7.30pm and he called the police who arrived to take the complainant at 9.00pm. He submitted that the complainant said he had been tied with ropes and again that he fought with the broker which according to the Appellant could not have happened with the complainant tied up.



9. The Appellant submitted that the evidence of PW1 who said the members of the parade were 10 in number contradicted that of PW3 who said there were 9 people and that the identification report showed that there were 8 people.

Whether the identification parade was satisfactorily safe to warrant a conviction of the Appellant.

10. It was submitted that the identification of the Appellant was done by the complainant which was not corroborated. The Appellant relied on *Silas Amadi Dbikas v Republic* [2020] eKLR and submitted that PW7 who testified that it was the Appellant who had hired the complainant to go to Loitoktok to ferry maize did not participate in the identification parade. He further submitted that the identification parade was not conducted in compliance with the Police Standing Orders. He relied on *Simon Ndirangu Maina & another v Republic* [2011] eKLR.

Whether the sentence meted out against the Appellant was harsh

11. It was submitted that the sentence was against the evidence tendered as there was no evidence supporting the offence of robbery with violence.
12. I have not seen any submissions by the prosecution. On 30th April 2024 when I fixed the matter for judgment, Ms Kivali appeared for the prosecution was inaudible.

Analysis and determination

13. I have read the entire record of the trial court and reminded cautioned myself that as the first appellate court I must read, consider, evaluate and analyze the entire evidence adduced at the trial court afresh always mindful that I did not observe the witnesses testify to determine their demeanor.
14. The evidence is straight forward. Francis Muriuki Maina (PW1), a transporter and driver of motor vehicle registration number KAL xxxx belonging to Stanley Ndungu (PW2), received a call from Wang'ondy (PW7) on 26th March 2020 who informed him that he had found a customer who wanted maize transported from Loitoktok. Wang'ondy gave Muriuki the telephone number of the customer. Muriuki talked to the customer who confirmed that he wanted maize transported from Loitoktok.
15. Wang'ondy took the customer to Muriuki on 28th March 2020. There was a man and a woman. The man is the Appellant in this case. The woman was named as Mercy. Her whereabouts was not given. Muriuki and the Appellant negotiated the price of transporting maize and it agreed at Kshs 16,000. Muriuki was given Kshs 5000 to fuel the lorry and they started the journey to Loitoktok. They were stopped by the police at Emali due to curfew hours but were allowed to continue with their journey. They were stopped a second time at a police roadblock. They were advised to spend the night at Simba Cement.
16. They continued with the journey the following morning on 29th March 2024. They travelled past Loitoktok to Rombo. They could not continue with the journey because it had rained heavily and they decided to spend the night at Rombo. The Appellant rented a room for Muriuki. The following morning they met 4 men one on a motorbike. Muriuki was told to drive to the place where maize was. On the way, he was told to turn the motor vehicle back because it would get stuck. One person told him to alight from the vehicle and check the road. When he got out, he was hit from behind. He fell down. The men demanded the keys to the vehicle and money from him. One of the men went to ignite the vehicle but he failed to ignite.
17. Muriuki was told to ignite it, but he refused. He was tied up with ropes and beaten up. The men started arguing among themselves and left Muriuki with the broker. Muriuki attacked the man and



- they fought. He managed to escape and went to the home of Tipilit Ole Teiya (PW6) seeking help. He was injured. According to PW6 he heard a man screaming as he ran seeking help and he opened the gate for the man. PW6 said that the man, Muriuki, did not have any clothes and he told him that he had been robbed. PW6 gave him clothes and painkiller. He also called the police who came and picked Muriuki. The police also towed Muriuki's vehicle to the Police Station. Muriuki was treated for his wounds.
18. The Appellant was arrested on 18th April 2020 while travelling to Nairobi in a Matatu. PC Bernard Onderi (PW8) was one of the officers manning a police road block. Following the description given to him by the SGT Oserere from Illasit Police Station, PC Onderi and his colleagues from Emali Police Post mounted a roadblock. They stopped several motor vehicles and a matatu. Inside the matatu where they found a person fitting the description given to them. His identity card had the name of the suspect. That person is the Appellant. He was arrested.
 19. According to the evidence of SGT Humphrey Oserere, the circumstances surrounding the arrest of the Appellant were that another robbery at Entarara was reported at Illasit Police Station on 17th April 2020. The reportee gave the police the telephone number of the person who had hired the motor vehicle from Taveta to Entarara. The telephone number given was 0713742930. Through PC Quinto Odere of DCI Headquarters attached to Safaricom, this telephone number was traced to the Appellant who was the registered subscriber. For the purposes of this Appeal, the location of the phone was traced from Nairobi on 28th March 2020 to Emali junction, to Loitokitok, to Rombo, to Entarara and back to Nairobi on 30th March 2020.
 20. The trial court analyzed this evidence and considered the same. The court was satisfied that the prosecution has proved the charges of robbery with violence and attempted robbery beyond reasonable doubt. The trial court convicted the Appellant and sentenced him to life imprisonment and seven years imprisonment respectively. The sentences are to run concurrently.
 21. I have noted that all the grounds of appeal, except the last ground, question the evidence of the prosecution that it was not sufficient to prove the charges beyond reasonable doubt. The Appellant blames the trial magistrate for finding that all the ingredients of the offences proved beyond reasonable doubt. He questions the manner the identification parade was conducted. He claims that there are discrepancies in evidence and that the sentence is harsh.
 22. I have considered all the evidence and the defence of the Appellant. Evidence is clear that the Appellant and a woman identified by Wang'ondou (PW7) as Mercy hired Francis Muriuki from Nairobi on 28th March 2020 the pretext that they had maize to be ferried from Loitokitok. They travelled together from Nairobi. They spent the night at Simba. They travelled the following day on 29th March 2020 to Rombo past Loitokitok. On the way they were joined by other four (4) people. Thereafter, Francis Muriuki was attacked by the group. It is clear from the evidence of Francis that the attack happened when all the six people were present, the five men and one woman.
 23. The relevant part of the evidence of Francis Muriuki is captured as follows:

“.....We proceeded and found a man on a motorbike and 3 other men and they said that where the maize was. The lady alighted. In total there were 5 men and one (1) lady. They told me to turn because the motor vehicle will get stuck. One of the men told me to alight and see if the road was okay. I alighted to check. I was hit from behind and I fell. They demanded for the keys and money. They tied me with ropes and beat me up. One of the boys went to drive the motor vehicle but it had a cut off. They demanded I ignite the same but I refused.



They started arguing among themselves. They beat me up. They went and I was left with the broker. I attacked him and fought with him then ran to a home and explained.”

24. That evidence is clear to me that there were 6 people when the robbery took place. Francis Muriuki was assaulted in the course of that robbery. The evidence of Tipilit (PW6) and Lydia Kidale (PW5), the clinical officer confirmed that Francis has injuries. PW6 told the court that Francis was screaming as he ran towards PW6’s home saying “mniokoe”, help me. He was without clothes and had blood stains and he told PW6 that he had been robbed. PW6 gave him clothes and Panadol for pain and called the police. PW5 confirmed that Francis had painful eye, chest pains and pain on both thighs. The degree of injury was classified as harm.

25. The offence of robbery with violence is described under section 296 (2) of the [Penal Code](#) as follows:

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

26. The Court of Appeal in [Jackson Oluoch & another v Republic](#) [1984] eKLR, had this to say on the ingredients of robbery with violence:

“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”

27. These ingredients are to be considered disjunctively and proof of one of the three elements is sufficient to find an accused guilty of the offence of robbery with violence. This means that if the prosecution proves beyond reasonable doubt that the offender was armed with any dangerous and offensive weapon or instrument, the offence of robbery with violence is proved. If the prosecution proves beyond reasonable doubt that the offender was in company with one or more person or persons, the offence is proved and likewise, if the prosecution proves beyond reasonable doubt that 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, the offence of robbery with violence is proved.

28. In [Dima Denge Dima & Others vs Republic](#), Criminal Appeal No. 300 of 2007, the Court stated stressed this point when it stated as follows:

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

29. I have considered the evidence before me. I am satisfied that the Appellant was properly identified by PW1, Francis Muriuki. In [Maitanyi Vs. Republic](#) (1986) KLR 198 at 200 the court stated that:

“Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is known that the



conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error”.

30. In this Appeal, conditions favouring a correct identification were not difficult. The Appellant spent two days with Francis Muriuki. I am satisfied that he had all the time to see the Appellant to positively identify him. Even without the identification parade, the evidence of the prosecution is sufficient to prove the identity of the Appellant as the person who hired the services of Francis Muriuki and travelled with him and a woman called Mercy all the way from Nairobi to Loitoktok where they were joined by four other people.
31. I have considered the evidence on identification and I note that the Appellant, through his legal counsel did not cross examine IP Abdullahi Aden about the issues he is raising in this Appeal in respect to the identification parade.
32. On the ingredients of the offence, I am satisfied that the Appellant was with the company of other 5 persons when they beat up and robbed PW1. All the elements of the offence are present. There were more than one person and they used physical violence on PW1. It is therefore not true that the ingredients of the offence were not proved beyond reasonable doubt. On my own analysis and consideration, the offence of robbery with violence has been proved beyond reasonable doubt.
33. I am also persuaded that the Appellant together with the other persons named in this Appeal attempted to steal the motor vehicle KAL xxxx from PW1. This attempt failed after the lorry failed to ignite.
34. I have considered the issue of harsh sentence. The penalty under section 296(2) of the *Penal Code* is death. The Appellant was sentenced to life imprisonment for the offence of robbery with violence. I have no reason to disturb that sentence.

DATED, SIGNED AND DELIVERED THIS 24TH SEPTEMBER 2024.

S. N. MUTUKU

JUDGE

