



Maroo & 2 others v Republic (Criminal Appeal E030, E031 & E032 of 2023 (Consolidated)) [2024] KEHC 11254 (KLR) (24 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11254 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E030, E031 & E032 OF 2023 (CONSOLIDATED)
GMA DULU, J
SEPTEMBER 24, 2024**

BETWEEN

IBRAHIM KANAKE MAROO 1ST APPELLANT

EDWARD MUTURIA JUSTUS 2ND APPELLANT

ANDREW MUTHURI M'KIRICHU 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence in Criminal Case No. E1451 of 2021 delivered by Hon. C. K. Kitbinji (PM) at Voi Law Courts)

JUDGMENT

1. The three appellants Ibrahim Kanake Maroo, Edward Muturia Justus, and Andrew Muthuri M'kirichu were charged in the Magistrate's court with robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. In the trial court, Andrew Muthuri M'kirichu was 1st accused, Ibrahim Kanake Maroo was 2nd accused, and Edward Muturia Justus was 3rd accused.
2. The particulars of the offence were that on the night of 28th and 29th August 2021 at Izeera Ranch along Mombasa – Nairobi Highway in Voi Sub-County within Taita Taveta County, jointly with others not before court robbed Mohamed Suleiman Samoli a motor vehicle Mitsubishi lorry registration number KCY 921V loaded with 420 bags of 25kg rice valued at Kshs. 3,240,000/= the property of Abdirazak Mohamed Yakub and one mobile phone Infinix Hot 5 valued at Kshs. 15,000/= the property of Mohamed Suleiman Samoli, all valued at Kshs. 3,255,000/= and during such robbery used actual violence and killed Mohamed Suleiman Samoli.
3. In addition, the 3rd accused person at the trial Edward Muturia Justus, was charged with a second count of handling stolen goods contrary to Section 322(1)(2) of the Penal Code, the particulars of which



being that on 7th September 2021 at Mariakani in Kilifi County, otherwise than in the course of stealing, dishonestly received or retained a mobile phone Infinix Hot 5 IMEI No. 356-847-096-087-766/74 knowing or having reason to believe it to be stolen goods.

4. They all denied the charges. After a full trial, they were each convicted of the offence of robbery with violence and sentenced to life imprisonment. Edward Muturia Justus, was found not guilty of the second count of handling stolen goods, and was thus acquitted of that offence.
5. Dissatisfied with the conviction and sentence for the offence of robbery with violence, each of the three appellants filed his separate appeal to this court, which appeals were heard together as they arose from the same trial, conviction and sentence.
6. The grounds of appeal can be summarised as follows:-
 1. That the charge was incurably defective contrary to Section 214 and 134 of the Criminal Procedure Code which is not curable under Section 382.
 2. That the trial Magistrate erred in convicting Edward Muturi Justus for count two of handling stolen goods contrary to Section 322(1)(2) of the Penal Code.
 3. That the learned Magistrate erred in law and facts by failing to appreciate that the circumstantial evidence under the doctrine of recent possession could be explained on other hypothesis other than the guilt of the appellants.
 4. That the learned trial Magistrate further erred in failing to appreciate that the 3rd accused (Edward Muturi Justus) evidence was also circumstantial evidence and not proved and which can in any case only affect the maker.
 5. The trial Magistrate erred in failing to appreciate that the alleged nexus between Ibrahim Kanake and Rose Kaliuntu was not proved.
 6. The learned Magistrate erred in shifting the burden of proof on the appellants while the burden of proof squarely lay or vested on the prosecution and thus failed to incorporate the provisions of Article 50(2)(1) of *the Constitution* occasioning a serious dereliction of justice.
 7. The learned trial Magistrate failed to appreciate that the lorry loaded with 420 bags of 25kgs rice was never stolen in the first instance.
 8. The sentence imposed was harsh and excessive since it failed to consider the appellant's mitigation and the facts and circumstances unique to the case.
 9. The three appeals were canvassed through written submissions. In this regard, I have perused and considered the submissions filed by each of the three (3) appellants as well as the submissions filed by the Director of Public Prosecutions.
 10. I note that in the written submissions, the learned Prosecuting Counsel Mr. Sirima for the Director of Public Prosecutions conceded to the appeal of Edward Muturia Justus, but opposed the appeals of the other two appellants.
 11. This being a first appeal, I have to start by reminding myself that I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno v Republic* [1972] EA 32.



12. In determining the three appeals also, I have to bear in mind that the burden was squarely on the prosecution to prove the case against each of the three appellants. This legal burden is codified under Section 107, 108 and 109 of the Evidence Act (Cap.80).
13. This being a criminal matter, the standard of proof was beyond any reasonable doubt.
14. I note that the appellants have raised both technical and substantive grounds of appeal. I will deal with the technical grounds first.
15. The appellants contend that the charge is duplex having referred to both Section 295 as well as Section 296(2) of the Penal Code. In this regard, Ibrahim Kanake specifically relied on what was stated in the case of Simon Materu Muniaku v Republic [2007] eKLR and the case of Joseph Onyango Owuor & Another v Republic [2010] eKLR.
16. The Director of Public Prosecutions has in their submissions only relied to Section 296(2) of the Penal Code, but has not addressed the issue of duplicity.
17. In my view, though it would be preferable for the charge to refer to only Section 296(2) of the Penal Code, the citing of Section 295 of the Penal Code in the charge sheet, which defines the offence of robbery generally did not prejudice the appellants in conducting their defence, as the particulars of the offence in the charge were clear and it was obvious that the alleged offence fell under the definition of robbery with violence in Section 296(2) which was also cited. Thus in my view, the requirements of fair hearing under Article 50(2) of the Constitution were not violated herein as no prejudice was caused to any of the appellants in their defences. I dismiss that ground.
18. The other technical ground is on the weight to be given to the evidence of Edward Muturia Justus against the other appellants.
19. Indeed, Edward Muturia Justus mentioned the other two appellants as having sold to him the mobile phone. He was treated as an accused person, so was technically an accomplice. In my view, an accomplice evidence is admissible, though its weight has to be considered carefully to determine whether or not it is truthful or merely self serving. In the present case, in my view, since Edward Muturia Justus does not seek to dissociate himself from the alleged phone, but merely explained how he came to be in its possession, his evidence is admissible, against the other two appellants, though its weight will depend on other supporting evidence and circumstances which will support its credibility.
20. The other technical point is with regard to the connection or relationship between Ibrahim Kanake Maroo and Rose Kailuma said to be his mother. In my view, the evidence on this relationship was wanting as nobody from the office of Registrar of Persons, or other relevant person, was called by the prosecution to testify on this relationship and no reason was given by the prosecution for that default. The alleged relationship thus remained unsubstantiated, and hearsay evidence, and also could not pass the test of Section 77 of the Evidence Act. The relationship between Ibrahim Maroo and Rose Kailuma was thus not proved.
21. Coming now to the adequacy of evidence, I note that this is a case exclusively grounded on circumstantial evidence. As was stated by the Court of Appeal in the case of Sawe v Republic [2003] eKLR, to sustain a case based on circumstantial evidence, there should be no other reasonable hypothesis or inference to be drawn from the evidence on record, other than the guilt of the accused. Mere suspicion, however strong, cannot be sufficient to sustain a conviction in a criminal case.



22. Coming back to our case, this is a case where the deceased was found in the fateful lorry lying behind the driver's seat on the side of Mombasa – Nairobi highway. The lorry doors were locked and had to be broken open by people who were not the police. No dusting was done on the vehicle, to connect anybody to the incident.
23. The evidence of the prosecution against the appellants on record, was the change of hands or handling and movement from one place to another of the mobile phone of the deceased which had double sim cards. The three appellants were said to have handled the said mobile phone. Except for Edward Muturia Justus, the other two appellants denied handling the phone.
24. In my view, with the evidence of the police officers on record, two of whom were licenced experts in mobile phone technology that is PW4 PC Ian Nahashon Mulamba and PW6 PC Boniface Mutinye; as well as the investigating officer PW8 Cpl. Michael Kokani, who traced and recovered the mobile phone of the deceased which led to the arrest of three people who handled the said phone, it cannot be said that there was no nexus between the three people charged and the said mobile phone.
25. In my view, this was certainly a case of recent possession of the mobile phone, as the said possession of the phone was within a span of less than one month. Thus the burden shifted to each of the appellants to tender an explanation on the allegation levelled against them with regard to that phone.
26. Though Andrew Muthuri and Ibrahim Kanake Maroo denied possession or handling the mobile phone and involvement in the subject robbery, in my view, what Edward Muturia Justus stated in evidence about their selling the mobile phone to him, was believable. Thus, just like the trial Magistrate, I find that the prosecution proved their case against Andrew Muthuri and Ibrahim Kanake Maroo, that they handled the mobile phone. Thus under the doctrine of recent possession the inference is that they were involved in the incident resulting in the death of the deceased herein as they did not offer an explanation. They were thus proved to be culprits.
27. With regard to Edward Muturia Justus, I agree with the Prosecuting Counsel that he was not connected to the incident near Maungu (Mombasa – Nairobi highway) where the death or robbery occurred. He only handled or was sold the phone at Mariakani. He was thus not proved to be one of the robbers beyond any reasonable doubt. I will thus acquit him.
28. Was theft or robbery proved? This is yet another technical point raised on appeal, that the lorry and cargo of rice were found intact and not stolen. The appellant thus argue that no robbery was proved. Indeed, the lorry and cargo therein were found intact on the side of the highway. However, in my view, movement of an item even for a short distance with the intention of depriving the owner of that item amounts to theft, and if forceful amounts to robbery. In the present case, the taking of the deceased's mobile phone amounted to robbery. The fact that the dead lorry driver was thrown to the back of the driver's seat also proves that indeed, the lorry was forcefully taken control of and driven for some distance by others. I find that an act of robbery with violence was proved, against two of the appellants.
29. With regard to sentence, only Andrew Muthuri M'kirichu has raised the ground of severity and harshness of sentence. In my view, the sentence imposed by the trial court was very lenient as the mandatory statutory sentence was death. I will however, not enhance the sentence as the prosecution has not asked for enhancement of sentence.



30. Consequently and for the above reasons, I dismiss the appeal filed by Ibrahim Kanake Maroo and Andrew Muthuri M'kirichu. I uphold both the conviction and sentence imposed on each of the two. Right of appeal explained.
31. I allow the appeal of Edward Muturia Justus, and quash his conviction and set aside the sentence imposed upon him. I order that Edward Muturia Justus be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF SEPTEMBER 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

All three (3) appellants

Mr. Sirima for the State

