



**Kipsengen v Republic (Criminal Appeal E059 of 2023)  
[2024] KEHC 15882 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 15882 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL E059 OF 2023  
REA OUGO, J  
OCTOBER 3, 2024**

**BETWEEN**

**MIKA KIPSENGEN ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From original Conviction and Sentence in Sirisia  
PMCCRC No.E187 of 2022 delivered by R.K Langat)*

**JUDGMENT**

1. The appellant was charged 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 were that on 11<sup>th</sup> May 2022 at 0100 hrs in Chepkube village in Cheptais sub-county within Bungoma county being armed with a panga robbed one mobile phone make Huawei black, Power Bank make Samsung the property of Phylis Imoni valued at Kshs 20,000/-, immediately after such robbery he cut Phylis Imoni on her left hand with a panga.
2. The prosecution availed 4 witnesses and the appellant testified as Dw1 in his defence. The trial court in his judgment convicted the appellant of the offence of robbery with violence and sentenced him to serve 20 years imprisonment.
3. The appellant dissatisfied with the finding of the court has filed this instant appeal on the following grounds:
  1. That the trial magistrate grossly erred in both law and facts to convict the appellant on contradictory, uncorroborated evidence which meant that the witnesses were not credible.
  2. That the witness mistaken over the identification of the attacker circumstances and the scene of the crime were not favourable for the positive identification.



3. That the subordinate court denied the appellant the fundamental rights and freedom enshrined in the Bill of Rights as per article 50(2).
  4. That the appellant is praying for another chance to exercise article 50(2) of *the Constitution* 2010 by retrial of his case.
  5. That I pray that I will adduce more grounds after having been furnished with copy of court proceedings.
4. This being a first appellate court, I am obliged to analyse and evaluate all the evidence adduced before the lower court afresh and draw my own conclusions, bearing in mind that I neither saw nor heard any of the witnesses testify (see *Okeno vs. Republic* [1972] EA 32).
  5. Phylis Imoni (Pw1) testified that she is from Chepkube and is a businesswoman. She recalled that 10/5/2022 she and her 3 children were in her house at around 1:00 a.m. That night, she was attacked by people who cut the wire off the veranda and opened the door with a cloth hanger. She woke up and the appellant hit her on the left side arm with a panga. He took her Huawei phone and Samsung power bank. They started struggling and he cut her left hand with a panga. They struggled into the sitting room where the electricity was on and Pw1 removed the appellant's mask. Pw1 realised it was the appellant, a person she used to see. He wore jeans trousers that had the letter 'P' and a red sweater. Pw1 held on to the red jumper as the appellant ran away through the exit he had created. The appellant also left behind a torch and brown open shoes. A mask that was cut from the red jumper was found outside. The neighbours responded to their distress call but the appellant had run away. Pw1 identified the appellant at the stage and he was arrested.
  6. EC (Pw2) testified that she is 15 years old and in form 3 at [Particulars Withheld] Secondary School. On the material day at 1:00 a.m. she heard her mother Pw1 cry for help, she woke up her siblings and they went to the sitting room. She found her mother struggling with a person who had worn a mask. Pw1 pulled the mask and saw the appellant. Pw2 testified that she recognized the appellant as he was a bodaboda rider. He ran away leaving Pw1 holding his red sweater.
  7. Esborn Sambo (Pw3), a clinical officer at Cheptais sub-county hospital produced into evidence the P3 prepared by her colleague Rose Watoro. Pw3 testified that he was conversant with the handwriting of his colleague as he had worked with her since 2020. Pw1 went to the facility on 11/5/2022 with a history of assault. She was examined and it was noted that Pw1 had a swollen left shoulder and swelling on the left area with a fresh wound. Her injury was classified as harm and antibiotics and painkillers were administered.
  8. No. 11622 PC Mela Joso Willington (Pw4) testified that on 11/5/2022 at 9:00 a.m. Pw1 came to the station and reported that she was attacked in her house the previous night. The appellant took her phone. She removed the mask he had and identified him as Micah. Pw4 asked her to get treatment. When Pw1 was from the hospital, she spotted the appellant and called the OCS. The OCS called Pw4 and went to the scene to arrest the appellant.
  9. In his defence, the appellant testified that he was arrested at the stage and was surprised to be informed that he was involved in the accident at night. The appellant denied committing the offence and was placed in the police cells. On cross-examination, he testified that he knew Pw2.
  10. The appeal was canvassed by way of written submissions. The appellant submits that the evidence from the prosecution witnesses was contradictory. Pw4 testified that the appellant was wearing a black hood contrary to the testimony of Pw1. On the injury sustained, the appellant argues that Pw1 and Pw2 testified that she was cut on the left hand and elbow respectively. Pw3 noted that there was swelling on



the left area with a fresh wound while Pw4 testified that Pw1 was hit with a panga on the neck and leg. There was no corroborated evidence that the weapon was a panga.

11. It was further submitted that a major ingredient of the offence of robbery with violence was not proved, that is, the fact of the theft. Pw2 did not testify that she saw the appellant steal the phone and power bank. Pw1 did not produce any documents showing ownership of items alleged to have been stolen. Pw4 only testified to the loss of the phone but not the power bank. The complainant assessed the items as worth Kshs 23,000/- while the charge sheet estimates them as worth Kshs 23,000/-.
12. On identification, it was submitted that Pw1 identified the attacker as 'Micah' but did not give the name of her attacker in the police report. The appellant also faults the trial magistrate for finding that Pw1 testified that the assailant was a bodaboda operator as the same was not the testimony of Pw1. He also submits that there was no explanation as to why the sitting room lights were left on.
13. The respondent in their submissions maintain that the conviction is well founded. The duration of the offence, the source of light and Pw1 pulling off the appellant's mask all justify the conviction arrived at by the learned trial magistrate. On the variance in the injuries sustained by the complainant, the respondent submits that the same was not significant to warrant an acquittal.
14. The respondent submits that identification was by recognition and the appellant was identified after being unmasked. Pw1 and Pw2 testified that there was light from electricity. The respondent submits that the appellant has not demonstrated a violation of any rights under Article 50(2) of the Constitution.

### **Analysis and Determination**

15. I have considered the evidence on record and the submissions by the appellants and the main question before the court is whether the prosecution proved its case to the required standard.
16. The Court of Appeal in the case of Oluoch v Republic, [1985] KLR 549 set out the ingredients of the offence of robbery with violence where it was held:

“Robbery with violence is committed in any of the following circumstances.

- (i) The offender is armed with any dangerous and offensive weapon or instrument; or
- (ii) The offender is in company with one or more person or persons; or
- (iii) 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  
.....”

17. The main evidence against the appellant was that of Pw1 and Pw2 who testified that they saw the appellant. In Wamunga vs. Republic [1989] KLR 424 the court held as follows:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of mere identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification”.

18. The testimony of Pw1 is that at 1:00 while sleeping in her bedroom, she was hit on the left side arm with a panga and the assailant took her Huawei phone and Samsung Power Bank. Pw1 testified that there



was no light in the bedroom. Pw1 struggled with the assailant to her sitting room where the electric lights were on. She saw that he wore a mask, red jumper/sweater and a pair of jeans trouser. While struggling with the assailant in the sitting room, Pw's daughter Pw2 entered the sitting room.

19. Pw1 pulled the mask off and both Pw1 and Pw2 saw the appellant. Pw1 testified that she knew the appellant was Mika. Pw4 who was the police officer where the offence was reported corroborated Pw1's testimony as he told court that Pw1 recognized the assailant as Mika. Pw2 also recognized the appellant who was well known to her as a boda boda rider. The identification of the appellant was that of recognition where the source of light was not questionable. The appellant was therefore positively identified.
20. Having re-evaluated the evidence of Pw1 and Pw2 the trial magistrate was correct to hold that the appellant was armed with a dangerous weapon being a panga and that the appellant at the robbery wounded Pw1. Pw1 testified that the appellant hit her left side arm with a panga and cut her left hand. Pw2 testified that her mother was cut on the left elbow. Pw3 produced the P3 form which noted that Pw1 had a painful left arm with a fresh wound. The testimony of Pw1, Pw2 and Pw3 show that the appellant was injured on the left upper limb, that is, the left arm.
21. Pw1 testified that the appellant took her Huawei phone and Samsung Power Bank. Pw4 also testified that Pw1 made a report at the police station that the items had been stolen in a robbery with violence incident. In my view there was no need for the production of receipts as alluded to by the appellant.
22. I have noted the discrepancies highlighted by the appellant. First Pw4 described the hoodie/jumper as black while Pw1 and Pw2 testified that it was red. Pw4 also testified that Pw1 was hit on the neck and leg contrary to the evidence of Pw1, Pw2 and Pw3. The Court of Appeal in *John Nyaga Njuki & 4 others v Republic*, [2002] eKLR where it was stated:

“But what is important is whether the discrepancies are of such a nature as would create a doubt as to the guilt of the accused. If so, then the prosecution would not have discharged the burden squarely on it to prove the case beyond any reasonable doubt. However, where discrepancies in the evidence do not affect an otherwise proved case against the accused, a court is entitled to overlook those discrepancies and proceed to convict the accused.”
23. In this case, the discrepancies highlighted by the appellant are in my view minor as they arose from the testimony of Pw4 who was not a direct witness. The elements of the offence were proved and the minor contradictions do not go to the root of the matter.
24. The appellant's ground on Article 50 of *the Constitution* is vague as he did not specify the particular provision of Article 50 under which he wants a retrial. He did not submit the same in his written submissions. The proceedings before the lower were in line with the provisions of Article 50 on a fair trial.
25. After giving due consideration to the circumstances in which the offence was committed, I am persuaded that the 20-year sentence meted by the trial court was appropriate. The appeal is dismissed. Right of appeal explained to the appellant.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 3<sup>RD</sup> DAY OF OCTOBER 2024**

**R.E. OUGO**

**JUDGE**

In the presence of:



Appellant - Mika Kipsenjen – Present in person

Miss Mwaniki -For the Respondent

Wilkister -C/A

