



REPUBLIC OF KENYA



**KENYA LAW**  
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**BKT v Republic (Criminal Appeal 21 of 2019)  
[2023] KEHC 862 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 862 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CRIMINAL APPEAL 21 OF 2019  
AN ONGERI, J  
FEBRUARY 10, 2023**

**BETWEEN**

**BKT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(BEING AN APPEAL FROM THE CONVICTION AND  
SENTENCE OF HON. B. R. KIPYEGON (SRM) IN KERICHO  
CRIMINAL CASE NO.420 OF 2018 DELIVERED ON 18/7/2019)***

**JUDGMENT**

1. The Appellant was convicted with Robbery with Violence Contrary to Section 296 (2) of the [Penal Code](#) and he was sentenced to 30 years imprisonment on July 18, 2019.
2. The particulars of the charge were that on December 4, 2018 in Belgut within Kericho County, the Appellant robbed one ICB of a mobile phone make Itel worth Kshs 4,500/= and cash Kshs 3,000/= and at the time of such robbery, applied actual violence against the said ICB.
3. The Prosecution evidence in summary was that the complainant, ICB hired GK's Motorcycle to take her to her home from Kapsoit Centre at 1 am on November 4, 2018.
4. The Complainant said the rider (PW 2) GK whom she knew as a man from her home decided to carry the Appellant whom the complainant knew as 'under 18' since he did not have fare home.
5. On the way home, the Appellant told the rider to stop since he wanted to go for a short call and when the rider pulled aside, the Appellant pulled the Complainant from the Motorcycle and started pulling her inner clothing out but he failed when she grabbed his private parts.



6. The Complainant said the Appellant put his hand in her pocket and took her black ITEL phone and KShs 3,000/= before he jumped on the Motorcycle and rode away. The rider returned and took her home. She reported the matter to the police the following day and she was issued with a P3.
7. PW 2 confirmed the incident. He said when he rode away, the appellant jumped on the Motorcycle. He knew the Appellant as his school mate.
8. PW 3 Kipkoech Keino, a Clinical Officer at Sosiot Health Centre examined the Complainant and found she had injuries on the left eye, back and arm.
9. The Appellant said in his defence that the complainant always had differences with him and further he had been accused severally of theft from the Complainant's place and he had severally been threatened with imprisonment.
10. The Trial Court found that the prosecution had proved the charge of robbery with violence to the required standard and sentenced the Appellant to 30 years imprisonment.
11. The Appellant has appealed to this Court on the following grounds;
  - i. That, the learned trial magistrate erred in law and fact by relying on the evidence of PW 1, which testimony was not corroborative.
  - ii. That, the learned trial magistrate erred in law and fact by relying on exhibits which were not well proven by the prosecution.
  - iii. That, the learned trial magistrate erred in law and fact by relying on the evidence of recognition.
  - iv. That, the learned trial magistrate erred in law and fact by failing to find that the charge sheet was fatally defective and as such could not safely sustain a conviction.
  - v. That, the learned trial magistrate erred in law and fact by failing to find that the evidence adduced does not support a charge of robbery with violence contrary to the provisions of section 296 (2) of the Penal Code.
  - vi. That, the sentence imposed was not only extremely harsh but also excessive since it was not informed by the unique facts and circumstances of the offence or the antecedents of the accused person.
12. The parties filed written submissions which I have considered.
13. The Appellant in his submissions outlined the ingredients of the offence of robbery with violence as set out in section 296 (2) of the Penal Code, Cap 63. The Appellant contended that the evidence adduced during trial did not support a charge under section 296 (2) of the Penal Code, Cap 63.
14. The Appellant reiterated that, the evidence on record did not demonstrate that he was armed with a dangerous weapon and neither was he in the company of two or more others, as such the charge did not satisfy the provisions of section 296 (2) of the Penal Code, Cap 63 thus rendering the charge defective.
15. The Appellant further contended that the evidence on record could support a charge under section 296 (1) of the Penal Code, CAP 63 which states as follows; '(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years'
16. The Appellant in his submissions asserted that his defence was not considered. The Appellant further asserted that it was not the duty of the Appellant to produce or adduce corroborating evidence in his defence rather it was the duty of the prosecution to prove their case against the Appellant beyond



reasonable doubt and to rebut any matters raised by the defence subject to section 309 of the Criminal Procedure Code, CAP 75, a duty the prosecution did not discharge.

17. The Respondent reiterated that PW 1 (the Complainant's) testimony was corroborated by PW 2 who was an eye witness of the incident and PW 3 a clinical officer who produced the p3 form as prosecution exhibit no 3.
18. The Respondent reiterated that the phone and cash were not recovered, therefore these were not produced as exhibits in court.
19. The Respondent in its submissions, reaffirmed the fact the Trial Court relied on the evidence of recognition. PW 1 testified that she hails from the same area as the Appellant and always sold him alcohol, on the material day she recognized him using the light emanating from the motorbike's headlights. The Respondent relied on Anjonini & Ors v Republic 1980 eKLR whereby the court held that evidence of recognition of a suspect is more assuring and reliable than that of identification of a stranger.
20. This being a first Appeal, the duty of the 1<sup>st</sup> Appellate Court is to re-evaluate the evidence and to arrive at its own conclusion whether to support the findings of the Trial Court while bearing in mind that the Trial Court had the opportunity to examine the witnesses.
21. In Okeno v Republic [1972] EA 32 where the Court of Appeal set out the duties of a first appellate court as follows: 'An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA (336)) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M Ruwala Vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958] EA 424.'
22. Similarly, in Kiilu & Another v Republic [2005]1 KLR 174, the Court of Appeal stated thus;
  - ' (i) An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
  - (ii) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.'
23. The issues for determination in this appeal are as follows;
  - i. Whether the prosecution proved its case to the required standard.
  - ii. Whether the sentence was excessive.



24. On the issue as to whether the prosecution proved its case to the required standard, the ingredients of robbery with violence contrary to section 296 (2) of the Penal Code CAP 63 are as follows;
- i. That the offender is armed with a dangerous or offensive weapon or instrument; or
  - ii. That the offender is in the company of one or more persons; or
  - iii. That immediately before or after the time of such robbery, the offender wounds, beats or strikes the victim or used other personal violence.
25. I find that the Trial Court addressed its mind to these elements and found that any one of the three ingredients was sufficient to prove the charge of robbery with violence.
26. In the case of *Dima Denge Dima & Others v Republic, Criminal Appeal No 300 of 2007*, the court 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.'
27. Further, in *Jeremiah Oloo Odira v Republic [2018] eKLR* the learned Judge encapsulated the aforementioned sections of the law and elaborated on the offence of robbery with violence as follows: 'Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.
- On the other hand, 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'
28. There is evidence that the appellant unleashed violence on the Complainant and even attempted to rape her. PW 3 a clinical officer confirmed that the Complainant sustained injuries on her left eye, back and arm.
29. I find that identification of the Appellant is key in a robbery with violence case, the Complainant knew the appellant as 'under 18'. The evidence of the Complainant was further corroborated by that of PW 2, the rider of the Motorcycle who was asked by the Appellant to pull aside under the pretext that the Appellant wanted to answer a call of nature and he witnessed the incident.
30. The Appellant's defence that he was framed is untrue since there were eye witnesses to the incident.
31. On the issue as to whether the sentence was excessive, I find that the appellant ought to have been sentenced to death given the nature and gravity of the offence herein. However, the Trial Court took into account the Supreme Court decision in the case of Francis Karioko Muruatetu on the unconstitutional nature of mandatory sentences and sentenced the Appellant to 30 years imprisonment.
32. I find that the sentence is well deserved. The Trial Court noted in the judgment that this was a case of robbery with violence and attempted rape.



33. I find that the conviction herein is secure and sentence lawful.

34. I dismiss the Appeal and uphold both the conviction and sentence.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**A. N. ONGERI**

**JUDGE**

