



**Chacha v Republic (Criminal Appeal E076 of 2022)  
[2023] KEHC 969 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 969 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CRIMINAL APPEAL E076 OF 2022  
RPV WENDOH, J  
FEBRUARY 9, 2023**

**BETWEEN**

**JOHN MWITA CHACHA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal arising from the conviction and sentence by Hon.  
M. O. Obiero, Senior Principal Magistrate in Kehancha Principal  
Magistrate's Sexual Offence Case No. E282 of 2022 delivered on 21/12/2020)*

**JUDGMENT**

1. John Mwita Chacha (appellant) has filed this appeal challenging the judgment of Senior Principal Magistrate Court, Kehancha. The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#).
2. The particulars of the charge were that on April 15, 2022, at Tagare village Kuria West Sub County, Migori County, with others not before the court, robbed Faith Boke and Hellen Chacha of a glass table, one solar make sunking, two plastic chairs, tecno mobile phone, cash 500/= all worth 24,200/= the property of Mercy Ghati and at the time of the said robbery, threatened to use actual violence on both complainants.
3. In the alternative, the appellant faced a charge of handling stolen property contrary to section 322 (1) & (2) of the [Penal Code](#), in that on April 16, 2022, at Mabera village Kuria West, otherwise than in the course of stealing, dishonestly retained one solar panel (sunking) one glass table and two plastic chairs knowing or having reason to believe that they were stolen or unlawfully obtained. The appellant was convicted on the main charge on July 26, 2022, and was sentenced to suffer death.
4. Being dissatisfied with the said judgment he filed this appeal based on the following grounds:-



1. That the prosecution failed to call key witnesses;
  2. That the offence of robbery with violence was not proved to the required standard;
  3. That the court failed to consider the appellant's defence;
  4. That the death sentence was harsh and excessive.
5. The appellant filed his submissions in which he argued that the prosecution failed to call crucial witnesses like Hellen. He relied on the case of *Peter Gitau Munene v Republic HCCRA 364 of 2006* Nairobi where the court made an adverse inference against the prosecution for failing to call a crucial witness.
  6. As to whether the offence was proved, the appellant submitted that the prosecution failed to prove that any violence was visited against the complainant; that PW1 talked of only one intruder yet the court found that the appellant was in company of others; that the complainant's knew the perpetrator as Anne's father and it was important that she be called to clarify when she saw him rob them. The applicant relied on the case of *Michael Kinuthia Muturi v Republic Criminal Appeal No 51 of 2002* (Nairobi) where the Court of Appeal held that failure to call certain witnesses when the evidence is insufficient to sustain a conviction, an adverse inference may be inferred by the court. The appellant also urged that PW1 mentioned a person by name Fred who knew the assailant but the said friend was not called as a witness.
  7. The other ground advanced is that the court failed to consider the appellants relationship with Mercy Ghati who became jealous when he married another wife; that it was a family dispute and they should have been allowed to resolve it at home.
  8. As to the defence, the appellant submitted that he was convicted because of weakness of his defence and yet he should have been given the benefit of doubt. It was also the appellant's submission that the death sentence is unconstitutional and should be set aside. The respondent did not file any submissions in response.
  9. This is a first appeal and it behoves this court to re-examine all the evidence that was tendered before the trial court, analyse it and arrive at its own conclusions. This court has to however bear in mind that it did not have the opportunity to see or hear the witnesses testify. I am guided by the decision of *Okeno v Republic (1971) EA 32*.
  10. In the case before the trial court, a total of three witnesses were called in support of the prosecution case. PW1 FB aged 15 years testified that on April 15, 2022 about 8:00p.m, while in company of Hellen and Fred Robi, at the aunt's place, they slept. About 11:00p.m she heard people talking outside saying that Kamana should open the door. She peeped through a gap in the door. There was moonlight and she saw a panga glittering. She started to cry and the person told her to open or he would enter forcefully. The person hit the door and she opened; that the person entered, picked the glass table, plastic chairs, phone, 500/= from a bag and that there was light from a D-Light battery; that she locked the door after he left; that the aunt returned at 6:00a.m from church and reported to police. She later saw the appellant with the police and that she was able to identify him because he wore the same clothes. She identified the 2 chairs, solar panel and glass table that had been recovered. She denied having known the appellant before but he claimed that he was Ann's father.
  11. PW2 Mercy Ghati is an aunt to PW1. She testified that she left PW1 and Hellen in the house about 8:00p.m and went to church only to return at 6:00 a.m to find her property stolen; that Hellen told her that it was Ann's father who stole the items whom she used to see in the estate. She reported to the village elder and police station at Mabera; that when at police station, Robi called to tell her that



- he had arrested somebody with some items and they went to where he was and found the table, chairs and solar panel but not the phone and money. She found the appellant had been arrested.
12. PW3 PC Joash Ocharo of Mabera police post recalled that on April 16, 2022, about 8:00a.m, PW2 reported that her house was broken into and her property stolen. When preparing to go, PW2 received a call that somebody had been intercepted at Ngisuru with the stolen items; that they went to PW2's home and the appellant was brought to her home by members of public with a solar panel, table and 2 chairs which PW2 identified as hers. PW3 identified the appellant as the suspect.
  13. In his sworn defence, the appellant stated that the complainant is his wife and on April 15, 2022 at 11:00p.m he went to the house and took the solar panel, plastic chairs and table and told the children to tell the mother; that he told the children that he would return the chairs in the morning. He further stated that there were people planning to steal the items and he did not have a bad intention in taking the items; that when returning the chairs; he met police who arrested him. I have considered the evidence on record and the grounds of appeal.
  14. There is no dispute that PW2's household items were taken away by the appellant on the night of April 15, 2022. The appellant admitted that fact. The question of identification does not arise.
  15. In his defence, the appellant claimed that he was the complainant's husband. I presume that the complainant is PW2, the owner of the stolen goods. That allegation was made for the first time during the defence. PW1 and PW2 testified and at no time in cross examination; did the appellant allege that PW2 was his wife or that he came to pick the said seats. Both PW1 and PW2 denied knowing the appellant. The allegation of being PW2's husband came as an afterthought and it is my view that the defence is not true.
  16. In the defence, at first the appellant claimed that he took away the items from PW2's house because somebody was planning to come steal them. However, he forgot what he had stated in the evidence in chief and contradicted himself when in cross examination he said that he had visitors and wanted to use the items and he would return them next day. The contradictory defence in itself is evidence that the appellant was not truthful.
  17. To prove an offence of robbery with violence, contrary to section 296 (2) of the [Penal Code](#), the prosecution has to establish one of the following ingredients:-
    1. If the offender is armed with any dangerous or offensive weapon or instrument or;
    2. If he is in company with one or more that person or persons or;
    3. If at or immediately before or after the time of robbery, he wounds, beats, strikes or uses any other violence to any person.
  18. See *Oluoch v Republic (1985) KLR* and the case of [Jobana Ndungu v Republic Criminal Appeal 116 of 1995](#).
  19. In the instant case, PW1 said that when she peeped outside, she saw something glittering like a panga. She did not however tell the court whether the appellant entered the house with the panga. It cannot be therefore confirmed that the appellant was armed with any weapon when he entered the house. There is also no evidence that the appellant was in company of any other person.
  20. PW1 did not allege that any violence was visited on her or the children who were in the house. Save for the appellant hitting the door, no violence was visited on any of the children in the house.



21. For the above reasons, I find that the prosecution did not establish either of the three ingredients necessary to prove an offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#) and for that reason I will acquit the appellant of offence and set aside the sentence.
22. There is however, overwhelming evidence that the appellant forcefully entered and stole from PW2's house in her absence. He did not have the complainant's consent to take away her property. The appellant admitted to taking the recovered properties. Other properties allegedly stolen were not recovered. In my view, the accused committed an offence of stealing contrary to section 275 of the [Penal Code](#). Under section 275 of the [Penal Code](#), the maximum sentence upon conviction, is three years imprisonment. Because of the aggravating circumstances of this offence, in that the appellant forced the door open at 11:00p.m. and stole, I will consider a severe custodial sentence. I hereby sentence the appellant to serve two years imprisonment. The sentence will take effect from the date the appellant was sentenced on July 26, 2022.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**R WENDOH**

**JUDGE**

**Judgment delivered in the presence of**

Mr Maatwa, for the State.

appellant present in person.

**Evelyne Nyauke** – Court Assistant

