



REPUBLIC OF KENYA



**Ngumu v Republic (Criminal Appeal 20 of 2018)
[2023] KEHC 652 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 652 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL 20 OF 2018
RM MWONGO, J
FEBRUARY 2, 2023**

BETWEEN

STEPHEN WARUI NGUMU ACCUSED

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the Judgment dated 13th day of March 2018
by Hon E.H. Keago SPM, in Baricho SPMCR Case No. 202 of 2017)*

JUDGMENT

Background

1. The appellant was charged and convicted for the offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#). The particulars were that on February 13, 2017 at Kimuri village in Mwea West, within Kirinyaga county, he robbed Serah Wambura Munene of Kshs 29,000/= and immediately before or immediately thereafter used actual violence upon Serah Wambura Munene.
2. The appellant was also charged and convicted in count II for the offence of being in possession of cannabis contrary to section 3(1) as read with section 3(2) of the [Narcotic and Psychotropic Substances Act](#) No 4 of 1994. The particulars were that on February 14, 2017 at Kimuri village in Mwea West sub-county within Kirinyaga county, he was found in possession of cannabis, to wit 10 stones, valued at Ksh 2,000/= which was not in form of medical preparation.
3. Under count I the appellant was sentenced to hang as provided under law. In count II the appellant was fined Ksh 200,000/= or in default 10 years imprisonment. The second sentence was held in abeyance pending execution of the first sentence.
4. Dissatisfied, the appellant has appealed against both conviction and sentence. He filed a seventeen paragraph amended petition of appeal; the grounds of which are summarised as follows:



- a) That the trial court wrongly relied on evidence of identification or recognition when positive circumstances for such were not in existence.
- b) That the evidence relied on by the trial court was:
 - insufficient and incredible.
 - contradictory, inconsistent and uncorroborated.
 - hearsay.
 - against a finding of guilt.
- c) That the charges were not proved beyond reasonable doubts.
- d) That the trial court did not analyse the evidence, draw the correct inference including adverse inference, or consider the defence put forward.
- e) That the trial court erred in not according the appellant a fair hearing by using kiswahili language which he was not conversant with.

The Facts, Analysis and Determination

5. The role of this court on a first appeal is to re-consider and re-evaluate all the evidence adduced at the trial court and to come to its own conclusions, note that this court did not have the benefit of seeing and hearing the witnesses who testified, and will be disregarding the conclusions of the trial magistrate, see *Okeno v R* (1972) EA 32.
6. The brief facts of this case are as follows: on February 15, 2017 the complainant Serah Wambura Munene (PW1) was breastfeeding her baby in her bedroom at about 9.30 pm. Suddenly she saw light in the table room and a masked intruder emerged, came to her bedroom, and demanded cash. He was dressed in a mask and jacket and had two metal rods. He threatened to kill her if she did not hand over cash. Then he hit her on the head twice and removed a knife threatening her with it. The intruder grabbed her clothes bag and took 29,000/= whilst demanding for more. He held her by the waist and pulled her towards the outside to the rear of the toilet. He also threatened to rape her.
7. Whilst they were still there, her husband arrived home and called for her. The intruder refused to let her go. So, she grabbed him by the collar and screamed. The intruder reacted by stabbing her on her hands. Alerted, her husband came and they all began wrestling. The intruder's jacket and mask came off as the struggle intensified. She screamed loudly and people came to the scene. Later she went to hospital and reported to police.
8. PW1 identified the P3 form as MFI-1. She also identified a red handled knife (MFI - 2) which the intruder used to stab her, and ten (10) stones of cannabis which the accused was arrested with.
9. PW2 Josphat Mwere Kibuchi, the complainant's husband, testified that he got home at about midnight on February 13, 2017 and found the door to his house open. He called his wife, but she did not respond. Then he heard her scream from behind the toilet, and he ran there. He found a man holding her as they struggled, and he got into the melee, holding the intruder by his jacket. It came off together with his mask, and then the intruder slipped out and ran away.
10. Since his wife was injured, PW2 placed her on his motorcycle and took her to hospital. He stated that he saw the intruder's face when the mask came off as his face was close by. There was moonlight so he was able to recognise the intruder, he said.



11. The next day PW2 and his wife went to the chief office's and they all went to the accused's house where they found him asleep. They also found the jacket which was black, and a knife inside. PW2 identified the jacket as MFI-1. They did not find the mask, but he identified the knife found there as the one the intruder used to stab his wife. They also recovered two metal rods in the accused's room (MFI - (a) and (b).
12. The Assistant chief, Julius Waweru Gatere, testified as PW3. He stated that on December 14, 2017 at about 10.00 am PW1 came to see him and reported the incident. He stated that the complainant was not able to recognise the accused but that her husband was. Together with his in-charge, the complainant, and PW2, they all went to the accused's home. They asked to conduct a search and found a pen knife tied with a handkerchief with blood stains; they found a black hood-stained jacket; 10 stones of cannabis (MFI -1) metal rods and other items. They did not find the mask which had been left at the complainant's house.
13. PW4, John Mwangi was a clinical officer at Sagana sub-county hospital who testified to the injuries suffered by the complainant. He examined her and filled the P3 form which was produced as P Exhibit 1.
14. The investigating officer PC Joseph Kisau, testified as PW5. He pieced together the evidence of all the witnesses. He explained that the complainant and her husband PW2 were able to identify the accused by the help of a torch which the accused had and light from the motorcycle. They arrested the accused with the help of the assistant chief, PW3.
15. In his defence, the accused/appellant gave sworn testimony. He said he was a miraa vendor; was sick at home on February 13, 2017; and that the headman and nyumba kumi elders came to his house and asked him where he was at night. He said he had been at home sick. They then arrested him, searched him and his house then they all went to the chief's office where he was locked up. Later, the complainant came with items in paper bags, and he was taken to Sagana police station; there he was locked up for assault.
16. He, the accused, further stated that in 2015, he and the complainant used to do business together selling oranges, whilst as he sold miraa; That the complainant's husband had alleged that he, the accused, was moving around with the complainant which was not true. He said that his wife left him because of that allegation. He did not see the complainant again until 2017 when she accused him of robbing her.
17. I now analyse the facts in light of the issues raised in the grounds of appeal.

Identification

18. This was the main issue in the appeal and the appellant submitted at length on it. The appellant criticised the trial court for relying improperly on the evidence availed as to the identification of the accused. Counsel cited the following authorities in this regard:
 - a) *Hassan Makatswa Kwoba & another v R* [2019] eKLR where it was held that:

“Identification is a crucial ingredient to satisfy the offence of robbery with violence.”
 - b) *Wamununga v R* [1984] KLR where it was held that:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is carefully examined to minimise this danger”.



- c) Authorities relied on the Court of Appeal in *Francis Muchiri Joseph* [2014] eKLR namely: *Lesaran v R* 1983 KLR 183 which approved Lord Widgery's statement in *R v Turnbull* (1976), 3 AUER 551 that the quality of identification evidence is critical, if the quality is good the danger of mistaken identification is lessened and that:

“Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made”.

19. The learned trial magistrate was well aware of the subtleties of identification and recognition. She dealt with this issue at pages 11 and 12 of her judgment, but she did not warn herself of the dangers of identification evidence and the quality of the circumstances of identification. She noted that “the evidence before the court is one of recognition” and cited *Anjononi v R* [1989] KLR 59. She found that both PW1 and PW2 said the accused was known to them before the incident, and that PW2 was able to recognise the accused after his mask came off. On the strength of such identification, she found that the accused had committed the offence.
20. My assessment of the identification evidence of PW1 and PW2 is as follows. PW1 in evidence in chief said twice that:

“the suspect was identified by my husband”; and that

“the incident happened in darkness. He (accused) had a torch”.

In cross-examination she said:

“There was light from the table room by the torch”

This suggests that the room was otherwise not well lit, a fact that the trial court missed.

She added:

“I was able to recognise you after the mask came out”

And:

“You were identified by my husband. I was able to identify you whilst outside the toilet.”

21. From the above, the conclusion one draw is that PW1 was in darkness and the little light came from the torch. The evidence is not clear that the torch was pointed to the accused's face, particularly in light of the fact that it was the accused who allegedly had the torch.
22. After she was recalled, PW1 said in cross-examination;
- “It's my husband who was able to recognise you.
...You entered the house from the roof. You had two metal rods and a torch.....”
- Later she said:
- “It's my husband who was able to identify you.....
There was no light when my husband recognised you.”



23. I cannot see how the evidence of PW1 on identification confirms identification of the accused as the perpetrator. All that it does, is to generate doubt of her own identification of the accused, and increases the likelihood that she totally relied on her husband for identification of the accused.
24. This view is underpinned by the evidence of PW3, the assistant chief, who said that the,
“complainant was not able to recognise the accused as he had a mask....”
“It’s the husband of the complainant who recognised the accused”
25. As for identification of the accused by PW2, his evidence was as follows:
“I was able to recognise the intruder when the jacket came out. He was someone known to me before. I saw him by the face and his [was] close to me. There was some moonlight which enabled me to identify the accused..... There was some light from the moonlight”
In cross-examination PW2 said:
“I was able to recognise you after the mask came out.....
I was able to recognise you before you escaped”
26. The evidence of PW2 was that he recognised the accused as they struggled and the mask came off and he saw the accused’s face. His recognition was aided by the moonlight. There is no mention of the torch, and there is no indication of where or in what circumstances PW2 had met and known the accused before. Accordingly, I find that the evidence of identification by PW2 is uncertain and unverifiable and is unsafe to rely upon.
27. It was the responsibility of the prosecution to lead concrete evidence on the identification of the accused beyond reasonable doubt. He did not. In the circumstances, I am unable to uphold the finding of the trial magistrate that the accused was properly identified beyond reasonable doubt, less so recognised.
28. The appellants other ground include that the prosecution did not prove the offences beyond reasonable doubt. He cited several examples, which I discuss hereunder.
29. The learned trial magistrate in concluding that an act of robbery with violence took place, determined that the accused was found in possession of a pen knife, black jacket and two metal rods which were found by the assistant chief. The appellant was also convicted for possession of the plant material cannabis. The accused denied having been found with any of these items altogether.
30. The appellant submitted that there were no warrants to search the accused’s house; that there is no evidence of the persons who conducted the search noting that members of nyumba kumi were allegedly involved; that no record of the items found in the alleged search was properly kept; and that it was not indicated where any of these items was specifically found and how they were handled after being found.
31. PW1 stated that the search was done and a jacket was found with a knife inside, and two metal rods were found in the house, and that the police also found 10 stones of cannabis. It is not clear which house was searched. PW2 said that he saw the knife at the house of the accused and that the mask was not found, whilst at the same time saying that the jacket and mask fell off the accused when he was involved in the struggle at the victim’s house. The appellant properly queries how it is that the items that remained at the victim’s house were not found in the search and produced in court. Those are credible concerns by the appellant.



32. Further it is not clear who actually conducted the search: whether it was the area chief and his team, or the police who allegedly found the cannabis during the search.
33. PW3 the assistant chief, testified that that he went to the accused's house with a team of nyumba kumi members. They conducted a search and found a pen knife tied with a handkerchief which had blood stains; they also found a black jacket with blood stains; 10 stones of cannabis, 10 padlocks 3 pairs of gumboots and metal rods. This contradicts the evidence of the investigating officer.
34. PW3 then testified that on finding those items:
"I arrested and alerted the area chief and took the suspect to Sagana police station".
- In cross-examination PW3 said the search was done in the accused's house; that they recovered two jackets only one of which was produced in court; that the mask was not recovered from the scene of the incident; that the jacket and mask had remained at the scene of the robbery.
35. This evidence of the alleged search and of the items found appears quite incredible. According to PW3, the assistant chief, it was conducted by him and nyumba kumi members and not the police. No photographs were taken of the items and no chain of custody was maintained.
36. On the basis of all the above, it cannot be said that a proper search was conducted and a proper record kept of when and where the alleged items were found, and how they were held in safe custody. It was unsafe, in my view for the trial court to rely on this evidence of the search to underpin the conviction on robbery or on possession of cannabis on this evidence.
37. Ultimately, and for all the foregoing reasons, I find that the appeal succeeds and the conviction and sentence on both robbery with violence and possession of cannabis are hereby set aside.
38. The accused shall be set at liberty forthwith unless otherwise lawfully held.

DATED AT KERUGOYA THIS 2ND DAY OF FEBRUARY, 2023

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R. MWONGO

JUDGE

In the presence of:

1. Mamba - for state
2. Hamba - for Applicant
3. Applicant - Present at Nyeri Prison
- 4. Court Assistant - Murage**

