



**Kinyanjui v Republic (Criminal Appeal 49 of 2019)
[2023] KEHC 2628 (KLR) (Crim) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2628 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL 49 OF 2019
JM BWONWONG'A, J
MARCH 7, 2023**

BETWEEN

MALICK MUIGAI KINYANJUI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the conviction and sentence delivered on 16th November 2018 by Hon. S. Jalang'o, S.R.M, in Makadara Chief Magistrate's Court in Criminal Case No. 1050 of 2016 Republic vs Malick Muigai Kinyanjui & Another)

JUDGMENT

1. The appellant and another not before the lower court was convicted and sentenced to fifty years imprisonment for the offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#) (Cap 63) Laws of Kenya.
2. Being dissatisfied with the conviction and sentence, he filed an appeal. In his petition of appeal, he raised six grounds.
3. The main grounds raised are as follows. That the learned trial magistrate erred in law when entering a conviction on a defective charge sheet; the evidence relied on was contradictory and insufficient to warrant a conviction and the learned trial magistrate erred in dismissing the appellant's defence.
4. As this is the appellant's first appeal, the role of this appellate court is well settled. It was held in the case of *Okeno vs Republic* [1972] EA 32 and further in the Court of Appeal case of [Mark Oruri Mose vs R](#) [2013] e-KLR, that this court is duty-bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always



bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and give allowance for that.

5. Doreen Achieng (PW 1) testified that on April 7, 2016 at around 4.30 pm while heading to work was confronted by three young men at Kariobangi roundabout. One snatched her bag, the second threatened to stab her and the third took away her phone. The three ran towards Dandora Phase I and she chased after them screaming. She told the court that she did not manage to catch up to them, but after a few moments she heard gunshots. She ran towards the location and on arrival, she found police officers in civilian clothes who had arrested the three men.
6. She told the court that she was able to recover her phone and handbag. She identified the appellant as the one who was armed with a knife. It was her testimony that the appellant was also found in possession of her phone. Further, the appellant had torn her blouse and had stabbed her on her hand during the incident.
7. No xxxx PC Francis Kaulu of Kariobangi Police Station, testified that on April 7, 2016, he was on duty and in the company of CPL Wamuyu and PC Kalulu. While on patrol around Kariobangi roundabout, he heard a woman screaming and saw three men running towards Dandora and they intercepted them.
8. He narrated that the lady who was screaming was shouting ‘thieves’ ‘thieves’. They conducted a search on them and recovered a Samsung phone, which was recovered from the appellant, and a knife was recovered from the other assailant was not before the lower court. The complainant’s clothes had been torn. At the scene, the complainant positively identified the assailants. They proceeded to arrest the three assailants.
9. No xxxx PC Gerevasio Kalulu of Kariobangi Police station, testified that on April 7, 2016 he was on patrol with CPL Wambugu and PC Kaulu around Kariobangi roundabout. They had heard screams from a lady. They saw a group of three young men running towards Dandora. He told the court that they ordered them to stop but they defied the order. They pursued them and managed to arrest them. They conducted a search on them and recovered a Samsung phone from the appellant and a knife from the other accused persons.
10. The complainant introduced herself as Achieng and told the police that the three assailants had threatened her with a knife and stole from her. Her blouse was torn in the ensuing scuffle. She identified the three assailants as the perpetrators and recovered her phone which had been taken from her handbag.
11. No xxxx Richard Ratemo (PW 4) told the court that his colleague PC Koiya, who was investigating the matter was unwell and testified on his behalf. PW 4 testified as follows. That on April 7, 2016 at around 5.00 pm, the arresting police officers, the complainant and the assailants arrived at Kariobangi Police station. The complainant alleged that the suspects who were armed with a knife had robbed her. She was assisted by the police officers, who arrested them after she screamed. They recovered the stolen items from the suspects being a phone. Her blouse was also torn during the incident. The suspects had been found in possession of the knife used to threaten her. The complainant was able to positively identify the appellant and the other accused.
12. After the close of the prosecution’s case, the trial court found that the appellant had a case to answer and he was put on his defence. In his defence he made an unsworn statement. He did not call any witnesses in his defence.
13. In his defence the appellant testified as follows. He testified that he is a resident of Ruai and on the material day he was heading to work. Since he did not have fare, he passed through Kariobangi where he met police officers, who arrested him. He was interrogated at the station and his co-accused, who had



also been arrested were brought to the station. He told the court that he did not know her. It was his testimony that no identification parade was done to confirm that he was the perpetrator of the offence. He denied committing the offence.

Analysis and Determination

14. In ground 1 the appellant challenged the charge sheet for being defective. However, no submissions were filed by the appellant despite leave being granted to do so. In the charge sheet, the appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*. The particulars of the offence are that on 7th day of April 2016 at around 1700 hrs at Kariobangi roundabout stage in Kariobangi North Estate within Nairobi County, jointly with another not before the court while armed with a dangerous weapon namely a knife robbed Doreen Achieng' Manyasa of her mobile phone make Samsung Galaxy and a handbag all valued at Kshs 8,300 and at the time of such robbery threatened to use actual violence against the said Doreen Achieng Manyasa.
15. I have considered the charge sheet and the particulars thereof. I find that the charge sheet is not defective in any way. The ground of appeal therefore fails and is hereby dismissed for lacking in merit
16. In ground 2 the appellant challenged the totality of the prosecution's case against him. He submitted that the evidence relied on was contradictory and insufficient to warrant a conviction. The respondent submitted that the elements of the offence of robbery with violence had been established. These are that the appellant was positively identified. The appellant used force in committing the robbery as the victim was stabbed with a knife that was recovered. In addition, the victim also identified her phone that had been stolen and recovered from the appellant and his accomplices.
17. Section 296 (2) of the *Penal Code* (Cap 63) Laws of Kenya provides that:

"296 If the offender is armed with any dangerous or offensive weapon or instrument,
(2) or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."
18. What constitutes the offence of robbery with violence was well captured in the case of *Olouch vs Republic* [1985] KLR where the Court of Appeal stated as follows: -

“...Robbery with violence is committed in any of the following circumstances:
The offender is armed with any dangerous and offensive weapon or instrument; or
The offender is in the company with one or more person or persons; or
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.”
19. In the case of *Dima Denge Dima & Others vs Republic*, Criminal Appeal No 300 of 2007, the court observed that:

“...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.”



20. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt.
21. The evidence on record proves that PW 1 was attacked on April 7, 2016 at around 5 00 pm at Kariobangi roundabout. From the evidence of PW 1, PW 2 and PW 3 who were at the scene of crime, it is established that one of the robbers was the appellant. It was the evidence of PW 1 that the appellant was the one holding the knife and threatened to stab her if she did not co-operate.
22. After they had stolen from her, PW 1 ran after them screaming and shouting, which caught the attention of PW 2 and PW 3, who were nearby. According to PW 2 and PW 3 they heard a lady screaming and saw three young men running towards them. They managed to stop them and did a search on them. They recovered the stolen phone. The victim also arrived at the scene and positively identified the appellant and his accomplices.
23. From the material placed before the court, PW 1 was very clear on the facts of the incident. On proof of ownership of the said items, I have noted that PW 1 produced a receipt to confirm the ownership of the phone. She also identified the blouse she was wearing, which had been torn and the handbag. It was sufficiently established that those were the items stolen from PW 1.
24. The next issue is whether force was used to rob her. It was the testimony of PW 1 that the assailants were armed with a knife and threatened to stab her. She told the court that her blouse was torn in the process, and she was stabbed on the hand. PW 4 produced the knife that had been recovered from the appellant and was allegedly used in the incident. Although a P3 form was not produced to prove the injuries occasioned on the complainant, this court is satisfied that the prosecution proved that the appellant and his accomplices threatened to injure the complainant.
25. In ground 3 the appellant faulted the trial court for failing to consider the defence evidence. In his defence the appellant denied committing the offence. I find that the defence of the appellant was considered and found to be unbelievable. The ground fails and is hereby dismissed for lacking in merit.
26. After re-assessing the entire evidence, I find that the case against the appellant was proved beyond reasonable doubt. The appellant's appeal on conviction fails and is hereby dismissed.
27. I find that the sentence imposed was manifestly excessive in view of the fact the stolen goods were recovered. I am therefore entitled to interfere with the sentencing discretion of the trial court. I therefore reduce the sentence imposed to twenty years' imprisonment, which sentence will begin to run from the date of conviction.

JUDGEMENT SIGNED, DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF MARCH 2023.

J M BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua court assistant

The appellant in person.

Mr. Oduor for the respondent

