



REPUBLIC OF KENYA



**Kinuthia v Republic (Criminal Appeal 21 of 2020)
[2023] KEHC 1529 (KLR) (1 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1529 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 21 OF 2020
HK CHEMITEI, J
MARCH 1, 2023**

BETWEEN

JOHN NGANGA KINUTHIA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgement of Hon. Kalo (CM) dated 21st
May 2020 in Criminal Case No. 644 Of 2018 and 2955 Of 2013)*

JUDGMENT

1. The appellant was charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on the 11th day of May 2013 at [Particulars Withheld] area in Nakuru north sub county within Nakuru county jointly with others not before court while armed with dangerous weapons namely pistol and pangas ,the accused robbed AKW of kshs570 ,assorted clothes, assorted shoes ,three suit cases ,two mobile phones make Samsung and forme ,one tv set make Samsung ,one cassette make Sony ,two sub woofers and iron box all valued at kshs,126,180 and before or immediately after the time of such robbery used actual violence against the said AKW.
2. The second count was Rape contrary to section 3(1), (a) ,(b) as read with section 3(3) of the Sexual Offences Act No 3 of 2006.The particulars of the offence were that on the 11th day of May 2013 at [Particulars Withheld] area in Nakuru north sub county within Nakuru area intentionally and unlawfully inserted his genital organ namely penis into the genital organ namely vagina of AKW which caused penetration .
3. The alternative charge was Indecent Act with an Adult contrary to section 11(a) of the Sexual Offences Act No,3 of 2006. The particulars of the charge were that on the 11th day of May 2013 at [Particulars Withheld] area in Nakuru north sub county within Nakuru county unlawfully and intentionally



committed an indecent act with an adult namely AKW by touching her private namely vagina by using his genital organs namely penis.

4. The third count was Being in possession of imitation firearm contrary to section 34(1) of the [Firearms Act](#). The particulars were that on the 11th day of May 2013 at [Particulars Withheld] area in Nakuru north sub county within Nakuru county jointly with others not before court was found in possession of imitation firearm (homemade gun) without a firearm certificate.
5. The appellant was convicted in all the charges and sentenced to serve imprisonment of 20 years ,35 years and 2 years respectively in each of the counts. The sentences were to run concurrently.
6. Being dissatisfied with the said conviction and sentence he has filed this appeal citing several grounds. It is worth noting that initially the appellant and others had been charged with the same offences under Criminal Case No 2955 of 2013 Nakuru. The witnesses in that matter testified but due to the absconding by the appellants and his co accused the same was withdrawn under section 87(a) of the [Criminal Procedure Code](#).
7. While at it the appellant was apprehended and fresh but similar charges brought against him vide Criminal Case no 644 of 2018 where by consent of both parties the evidence in case No 2955 of 2013 was adopted as part of the respondent's evidence.
8. The court when this matter was mentioned for directions ordered the same to be determined by way of written submissions which the parties complied.
9. One of the grounds raised by the appellant is the non-compliance of section 200 of the [Criminal Procedure Code](#) by the trial court. According to the appellant the trial court (Hon Kalo) took over the case without the above compliance which caused miscarriage of justice. He relied on the case of [Ndegwa v Rep.](#) (1985) KLR 535
10. The other ground is that the trial court failed to call crucial witnesses and he relied on the famous case of [Bukonya v. Uganda](#) (1972) EA 549. That the court failed to call the investigating officer to come and explain how he investigated the offences.
11. On the third ground he submitted that his defence remain unshaken and truthful. He relied on the case of [Victor Mwendwa Mulinge v Rep.](#) (2004)
12. The fourth ground was that the evidence tendered was full of contradictions, inconsistencies and falsehood. He submitted that the complainant because of the nature of the incident and being assaulted could not identify the attackers as she was stressed. That she could not identify the robbers as her face had been covered.
13. Based on the above reasons he prayed that the appeal be allowed, the sentence and conviction be set aside.
14. The learned state counsel opposed the appeal and supported the findings by the trial court. He submitted that all the grounds of identification had been complied with as per the identification parade conducted on September 1, 2013 which was never challenged.
15. He further submitted that this was not a case based on circumstantial evidence but on direct evidence as the appellant was identified and the stolen items recovered from his hideout.
16. He also denied that the evidence as presented was contradictory or at all. He said that all the ingredients of the offences were proved beyond any shadow of doubt as found by the trial court.



17. On the issue of arrest, the respondent submitted that with the aid of technology the appellant was arrested with the complainant's items including the mobile phone which were produced as evidence.

Analysis and determination.

18. The duty of the court at this appellate level is to re-evaluate the evidence afresh and arrive at an independent finding noting that it did not have the ability to see the witnesses and their demeanour. See *Okeno v Rep* 1972 EA 32
19. A global reading of the evidence as presented by the respondent in my view clearly placed the appellant at the scene. This conclusion is based on the fact that the witnesses including the complainant spent about one hour with the assailants in her home. There was evidence that there was electricity which was the source of the light. The assailants were unable to switch it off.
20. At the same time there was nothing to suggest that the assailants had worn anything to conceal their identity. They proceeded to harass the complainant and her family all while knowing that the lights were on. In the premises this court agrees with the trial court that the question of identity was well covered.
21. More importantly the evidence of parade identification was not impugned. The appellant fully participated and his cross examination could not shake the prosecution's case or at all.
22. The mobile phone belonging to the complainant was traced to the appellant. With the aid from the Safaricom provider the police were able to arrest the appellant with it. The inventory taken in the appellant's home included other items as well as the said phone.
23. It was also at the home of the appellant where the homemade gun was recovered. The evidence from the ballistic expert clearly showed that it was an imitation.
24. The elements of the offence were clearly established. It is clear that the offender was armed with a dangerous weapons which in this case included pangas and the homemade gun; he was in the company of others, and used violence against the complainant. (See *Oluoch v Republic* (1985) KLR.)
25. On issue regarding rape, this court is satisfied with the complainant's evidence. She was consistent in her testimony. Though the assailant later covered her face she insisted that she was able to see him prior to the incident. This of course can be deduced from the fact that she spent some time with them at the living room before being forcefully taken to the bedroom where she was sexually molested.
26. It is also not lost that all the while the electricity light was on and she could see and hear what they were saying.
27. The issue of non-compliance with section 200 of the *Criminal Procedure Code* is a non-issue in my view. Looking at the record, it was basically Honourable Kalo who handled the matter to its logical conclusion. The other matter was simply brought in to aid in the evidence, that is case no.2955 of 2013.
28. The appellants defence despite sounding plausible did not oust the respondent's case. The same could not stand the cross examination by the respondent. It was a mere afterthought. In any case he did not have the receipts or any evidence that what were recovered in his house belonged to him and no one else.
29. For the above reasons, this court has stated much to show that this appeal is not meritorious. The action of robbing and raping the complainant was despicable. The fact that the initial suit had to be withdrawn after the appellant had absconded lends credence to the guilt he carried all along.
30. The appeal is otherwise dismissed.



DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 1ST DAY OF MARCH 2023.

H. K. CHEMITEL.

JUDGE.

