Mugedo v Republic (Criminal Appeal E001 of 2021)
[2023] KEHC 2629 (KLR) (24 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2629 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E001 OF 2021

WM MUSYOKA, J

MARCH 24, 2023

BETWEEN

WYCLIFFE MUGEDO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgment and decree of Hon. ML Nabibya, Senior Resident Magistrate, in Hamisi SRMCCRC No. 6887 of 2012 (SO No. 50 of 2017), of 28th September 2018 and 11th December 2018, respectively)

JUDGMENT

1. The appellant, Wycliffe Mugedo alias Philip Ongai, had been charged before the primary court, on 2 counts, of the offence of robbery with violence, contrary to section 296(2) of the *Penal Code*, Cap 63, Laws of Kenya, and of gang rape, contrary to section 10 of the *Sexual Offences Act*, No. 3 of 2006, Laws of Kenya. The particulars of the robbery with violence charge were that on the night of 30th day of September 2017, at [Particulars Withheld] village, Hamisi Sub-County within Vihiga County, jointly with others not before court, while armed with ofensive weapons, to wit pangas and swords, he robbed Benard Mwangu, of Kshs. 2, 000.00 cash and an Itel mobile phone valued at Kshs. 3, 000.00, and, during the time of the robbery, threatened to use actual violence on the said Benard Mwangu. The gang rape charge alleged that on the said night and at the said place, he, in association with others, not before the court, he intentionally and unlawfully caused his penis to penetrate the vagina of one MKW, a woman aged 24 years, without her consent. The alternative charge was to that for gang rape, and it alleged that on the said night and at the said place, he, in association with others not before court, intentionally touched the vagina of MKW, with his penis, against her will. The appellant denied the charges, on 24th November 2017, and a trial ensued, where 8 witnesses testified.

2. The complainant for the robbery with violence charge, PW1, Benard Mwangu, a farmer, testified that he was sleeping at his house, on the night of September 30, 2017 and October 1, 2017, when

he suddenly realized that there were people inside his house, who he had not heard get in. They had torches, and were armed with pangas, iron bars and whips. They took his phone, and asked for his MPesa PIN, which he shared with them, and they took his national identification card from a box in his house. His hands were tied. They then took the complainant in the sexual offences charge, MKW, round the house, and demanded money from her, and he asked her to give them, and she gave them Kshs 2, 000.00. She was then brought back to the bedroom, where they undressed her, and took her to a separate room, where she was raped. She was subsequently brought back to the bedroom, and covered with blankets, after which the invaders began to take household items, and left. PW1 began to scream as they left, and they dropped some items. They left with his phone and national identity card. They reported the matter at the Muhudu AP police post, and were referred to Cheptulu Police Station, where they were referred to Mukumu Mission Hospital. They later visited Serem Police Station, where they were issued with a P3 form. He said that when he later replaced his phone number, he established that Kshs 5, 000.00 had been transferred from his MPesa account, to one Philip Ongai. He stated that he did not identify anyone at the scene, as it was dark, and that he had not seen either of the intruders prior to the attack. He said that an identification parade was not conducted. He said that the MPesa statement linked the appellant to the offence. He said that he had not produced documents to prove ownership of the stolen phone.

3. PW2, MK, was the spouse of PW1. She testified that in the night of September 30, 2017 and October 1, 2017, she and PW1 were woken up by people, who tied the hands of PW1 with a rope. They took his phone, and demanded his MPesa PIN. When they realized that it had a balance of Kshs. 5, 000.00, they said that it was little, and demanded for more. She said that she was raped by 3 of them in turns along a corridor. After she gave them the money, they took her into the house and she was raped again, by a different set of men. She said that she was raped by a total of 7 men. They brought PW1 to witness as the seventh man raped her, during which they demanded money, and he directed them to where the money was. They screamed as the invaders left, and they dropped some items. She was given first aid at Muhudu dispensary, and treatment at the Mukumu Mission Hospital. They made a report at Muhudu AP camp, and the matter was referred to the Cheptulu police post, who issued her with a P3 form, which was filled by medical personnel at Serem. She identified or recognized 2 of the attackers, by their faces. She did not know their names, for they were from a different area. She said that the 2 were not in court. She informed the court that one of the suspects was lynched at a Chief's meeting at Cheptech, by members of the public.

4. PW3, Fredrick Endege Chegulwa, testified on how he and his wife were attacked at their home on October 15, 2017, at around 8.00 PM, by persons who claimed to be police officers, who accused him of selling bhang. They were forced to the ground, and a knife was put on their neck. Their house was ransacked, and items stolen. A neighbour heard the commotion, and came to enquire what was happening. When she realized that a robbery was underway, she ran away, and the attackers chased after her. PW3 and his wife ran after the neighbour, while at the same time raising alarm. They later reported at Mudete Police Station. His national identity card was recovered. He said that he did not identify any of his assailants.

5. PW4, Koskei Eric, was a clinician, at Ibali Health Centre, who attended to PW2. She had injuries on both her thighs, which he described as painful and tender. Her labia majora was swollen and tender, and she had a white discharge. High vaginal swab showed epithelial and sperm cells.

6. PW5 was a police constable, Romana Oduor, number 85266, attached to the office of directorate of criminal investigations at Hamisi. She was the investigating officer. Her investigations revealed that money had been transferred from the MPesa account of PW1, to the MPesa account of Philip Ongai. She stated that after getting and analyzing Safaricom call data, she got a suspect who led her to another

suspect. On November 22, 2017, the suspect led her to the house of the other suspect, where they found him sleeping. A search was done in his house, where she found 5 national identity cards, 4 mobile phones and other items. The said suspect did not provide ownership details of the said phones. She stated that the suspect was then using a Techno phone, which had received the money from the MPesa account of PW1. One of the national identity cards was that of PW3. They also recovered the national identity card of the appellant, from his person, at the police station, as they were placing him in the cells. She stated that Philip Ongai was at large.

7. PW6 was a Police Constable, Samuel Maina, number 89921, attached to Serem Police Station. He was in the team of police officers who went to the house of the appellant, and recovered the national identity cards from him, and he could not explain why he had them. Bhang was also found on him. He said that they arrested the appellant, at his rented house at Cheptulu. The appellant was said to have informed the police that he stayed with another man, who was then not present. PW7, Boniface Ambani, was a nursing officer based at Tiriki, who had attended to PW2, on the night of September 30, 2017 and October 1, 2017.

8. PW8, James Makobi, a security officer from Safaricom, was the last prosecution witness. He testified that he had been asked, on October 30, 2017, for call data, by Hamisi DCI, in respect 2 telephone numbers, belonging to Philip Ongai and PW1, respectively. He testified that, from the data, it showed that on October 1, 2017, Kshs 4, 900.00 was withdrawn from the MPesa account of PW1, by Philip Ongai, to his own MPesa account. He indicated that he did not investigate the identity of the numbers inserted into the phones, apart from that of PW1 and Philip Ongai.

9. The appellant was put on his defence. He made a sworn statement. He testified on how Philp Ongai approached him on November 19, 2017, and requested to use his phone, as his did not have power, and he let him use it. He did not return the phone to him. He was arrested on November 22, 2017, and it was alleged that Philip Ongai's phone had received money, from a source that Philip Ongai did not know. A parade was conducted, but the complainant did not pick anyone. PW5 asked for a bribe, as PW1 had not identified anyone, so that the investigating officer could let them off the hook. Philip Ongai raised the bribe, the appellant could not raise the amount demanded, so he was charged. He said that he could not recall where he was on September 30, 2017.

10. In its judgment, the trial court found the appellant guilty on the 2 main counts, on the basis that he was found in possession of the phone, which had been used at one time to withdraw money from the MPesa account of PW1. The court considered that the appellant had also been found in possession of national identity cards belonging to other individuals, including Philip Ongai, and he could not give an explanation as to why he had possession of them.

11. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that the evidence recorded was not sufficient to sustain convictions for robbery with violence and gang rape; the doctrine of recent possession was wrongly applied; the appellant was a minor and his age was not ascertained, and he was erroneously sentenced; the charge was incurably defective; section 211 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, was not complied with; the prosecution case was riddled with contradictions and inconsistencies; there was misjoinder of charges; the evidence was obtained illegally and unconstitutionally; and the evidence, by PW5 and PW8, offended the *Evidence Act*, Cap 80, Laws of Kenya.

12. Directions were given on March 8, 2022, for disposal of the appeal, by way of written submissions, to be highlighted. The appellant filed his written submissions on June 20, 2022, dated June 17, 2022. The respondent alleged, on September 19, 2022, that they had filed written submissions, but I have not seen any on the record before me. Both parties agreed, on September 19, 2022, that I could go

ahead and prepare judgment, based on the material on record, without the necessity of highlighting the written submissions.

13. In his written submissions, the appellant argued on 8 grounds, covering inadequacy of the evidence, misapplication of the doctrine of recent possession, inconsistencies in the evidence, proof of gang rape, failure to comply with section 211 of the Criminal Procedure Code, failure to prove the age of the appellant, defects of the charge, misjoinder of counts, evidence acquired illegally or unconstitutionally, and the evidence of some of the witnesses being in contravention of the *Evidence Act*.

14. On the insufficiency of evidence to establish robbery with violence, it is argued that all the ingredients of the offence of robbery with violence were not established. Section 296(2) of the *Penal Code*, *Charles Maina Wamai v Republic* [2003] KLR 279 [2003] eKLR (Gicheru CJ, Kwach & Owuor JJA) and William Musyoka, Criminal Law, LawAfrica, 2016, are cited to identify the said ingredients. It is submitted that the complainants, PW1 and PW2, did not identify their assailants, and, therefore, the ingredients of the offence of robbery with violence were not established.

15. I do not quite understand the submission above. The ingredients of the offence of robbery with violence are properly identified in the written submissions, based on the authorities cited. There are 3 elements: that the assailant or assailants are armed with dangerous or offensive weapons; or the assailant is in the company of others; or immediately before or during or after the robbery or stealing the assailant or assailants assault or beat or strike or use personal violence to the victim. The offence is established when one of the 3 elements is proved. The issue is not whether the victims of the robbery identify the assailants, but rather whether any of the 3 elements are established. The fact that the complainants do not identify their assailants does not mean that the offence is not established. According to their testimonies, the assailants were more than 1, they were armed with dangerous weapons, but they used no personal violence on their victims. The testimonies were consistent on all material particulars. Clearly, 2 of the elements for robbery with violence were established. The offence of robbery was committed on the complainants. The issue that the appellant should be raising, is not whether the offence was established, but rather whether he was positively identified as one of the perpetrators. Whether the offence was established generally or whether it was established against the person charged are 2 different things. It is possible to establish the offence, but fail to connect the person charged with the offence. Such would not be the same as saying that the ingredients of the offence were not established, instead the submission should be that the ingredients of the offence were not established against the accused.

16. The other submission, on the first ground, is with relation to the application of the doctrine of recent possession. This doctrine applies in connection with possession of recently stolen goods. See *Wamavuno v Uganda* [2001] 2 EA 608 (Odoki CJ, Oder, Tsekooko, Mulenga & Kanyeihamba, JJSC). In the instant case, the possession that the trial court used, to apply the doctrine, was not of an item stolen from the complainants. It was about a phone that was allegedly used to effect transfer of money from the MPesa account of PW1 to that of another. The phone in question was not stolen property, or at least it was not stolen from the complainants, and there was no evidence that it was stolen from anyone. The possession, therefore, was not of recently stolen property, and, consequently, the doctrine of recent possession of stolen property did not apply, and was wrongly applied. See *Eric Otieno Arum v Republic* [2006] eKLR (Tunoi, O'Kubasu & Onyango-Otieno JJA). The phone was only, allegedly, used to steal money, which did not make the phone itself stolen property.

17. The other element argued or submitted on under the first ground relates to inconsistencies and contradictions in the evidence. Although the appellant raises the issue, and cites the decision in *Twehangane Alfred v Uganda* [2003] UGCA 6 (Mukasa-Kikonyogo DCJ, Engwau & Byamugisha JJA), on how courts ought to handle inconsistencies and contradictions, he cites no instances of any

inconsistencies and contradictions in the instant matter. The duty was on him, as appellant, and the maker of the allegations, to establish them. I shall leave the matter at that.

18. The second ground is about proof of gang rape. The submission is made in vague terms. The appellant identifies the ingredients for the offence, as set out in section 10 of the *Sexual Offences Act*, and enumerated in *Daniel Kaberu v Republic* [2021] eKLR (Gikonyo J), and appears to concede that the ingredients were established, to the extent that PW1 and PW2 testified that PW2 was raped by several men in turns. He appears to make the case that it was not proved that the appellant was party to the gang rape, for PW1 and PW2 did not identify him as one of the perpetrators. Going by that, it would appear that there was no positive evidence that the appellant committed the offence. Of course, the conviction of the appellant, of robbery with violence, was founded on circumstantial evidence, based on the doctrine of possession of recently stolen property, and, if it is established that the conviction founded on the circumstantial evidence was proper, then it would follow that those found to have been involved in the robbery, who were established to have committed gang rape, in the course of the robbery, would be equally guilty of the gang rape. PW2 testified that she was raped by 10 men, 3 initially and 7 subsequently.

19. The third ground is about failure to adhere to section 211 of the *Criminal Procedure Code*. The submission is that upon being found to have a case to answer, the trial court did not explain the charge afresh to the appellant, and did not inform him of his rights at defence hearing. The record is clear, that section 211 of the *Criminal Procedure Code* was not complied with. However, the appellant was represented by an Advocate, which obviated the need for the trial court to read and explain the charge to him afresh, and to state his rights at defence hearing. His Advocate knew those rights, and he was his legal adviser for the purposes of the trial , and it would be duplicitous to have the trial court do that which was the duty of defence Counsel. The appellant was represented at the defence hearing by an Advocate. Indeed, after the trial court ruled that he had a case to answer, the Advocate addressed the court, and stated to the court the substance of section 211 of the *Criminal Procedure Code*. It would have been superfluous for the court to go on to state the same things to the appellant. The ruling on case to answer was delivered on June 20, 2018, and, shortly after that, Mr Mukabi, the Advocate for the appellant, stated:

> "Accused will give a sworn statement, one witness, accused will be called."

The trial court, thereafter, fixed the matter for defence hearing, and the appellant testified on September 3, 2018, led in examination-in-chief by Mr Mukabi. The appellant has not demonstrated that he was prejudiced in any way, by the failure by the trial court to advert to section 211, which was in fact no failure at all, in view of what I have stated above. Section 211 is not to be applied mechanically, for where an accused person is represented by an Advocate, it would be the duty of the Advocate to advise on such issues, and there would be no obligation on the trial court to comply with section 211, when the Advocate clearly indicates that he is aware of the requirements of section 211, and informs the court of what the defence would do in terms of section 211. The trial court should only go through the mechanics of section 211, where the accused person is not represented by an Advocate or his Advocate does not appear to know what is required of him, as Advocate, under section 211.

20. The fourth ground is about failure to prove the age of the appellant. He argues, on appeal, that he was underage, and he should have been tried as such, and dealt with as such, for the purposes of sentence. He submits that he was treated as an adult, both for the purposes of the trial and sentence, which denied him the rights and safeguards that accrue to a child under the *Children Act*, No 8 of 2001, Laws of Kenya.

21. The charge sheet, on the basis of which the appellant was tried, treated him as an adult, for under approximate age is indicated as adult. Plea was taken on November 24, 2017, and at that event the appellant did not raise the issue of his age. He was represented by an Advocate, Mr. Mukabi, from February 6, 2018, when the oral hearings commenced, until November 28, 2018, when Mr. Wekesa, holding brief for Mr Mukabi, made a statement on mitigation on his behalf. The issue of his being underage was not raised by himself or his Advocate at any stage of the proceedings. When Mr. Wekesa addressed the court on mitigation, he told the court that the appellant was 27 years old. He said:

> "In mitigation, the accused is remorseful, he is a subject just 27 years old."

He made reference to a report by a doctor, presented by the investigating officer, but he was not specific on which report he had in mind. I have carefully perused the record before me, and I have not come across any document by a medical officer of health, on the assessment of the age of the appellant. When the appellant testified on September 3, 2018, he said he was the holder a national identity card number xxxxxxxxx. Although it is not indicated when the same was issued, I take judicial notice of the fact that national identity cards are issued to adults, that is to young persons upon attaining the age of majority. When he was cross-examined on that date by the prosecutor, he stated that he could not recall his birth date. I am not persuaded that anything turns on this ground. The trial court would be obliged to investigate the age of an accused person, where such person appears to be a minor, or where the issue is raised by the prosecution or the Advocate for the accused or the accused himself. The fact that the trial court did not raise the issue during trial, or even at conclusion, could be indicative that the appellant did not appear to be underage. Similarly, the fact that neither the prosecution nor the defence raised the matter, is indicative of the fact that it was not an issue.

22. The fifth ground is about the charge being defective. The appellant has cited Patrick Kiage, *Essentials of Criminal Procedure in Kenya*, LawAfrica, 2012, on what amounts to a defective charge, and how criminal charges ought to be framed, essentially that the same ought to charge an offence that is known in law. I have read and re-read the count on robbery with violence, and I am not persuaded that the same was defective. The appellant appears to submitting that the evidence tendered did not prove the charge that he faced. That does not make the charge defective. That would be a case of the evidence adduced not meeting the threshold to establish the offence charged.

23. The sixth ground is on misjoinder of counts. The case by the appellant is that the robbery with violence charge ought not to have been charged together with the sexual offences. He cites Patrick Kiage, *The Essentials of Criminal Procedure in Kenya*, LawAfrica, 2012, where it is written that joinder is permissible where the offences charged are founded on the same facts or form part of a series of offences of the same or similar character. The argument, of course, is that the sexual offences relate to morality and are against the person, while robbery with violence is an offence against property, and ought not be charged together. What the appellant ignores is the portion of that writing, which refers to offences founded on the same facts. By the same facts is meant that the offences are committed in the same transaction or series, which would mean that they would be founded on the same facts. In the instant case, the gang rape happened alongside the robbery, and, therefore, it was committed in the same transaction with the robbery, and for purposes of proof, it was founded on similar facts, as to when it happened, where it happened, and the persons involved. There was, therefore, no misjoinder of counts or charges, for the 2 sets of offences, although very distinct, in terms of the rape not being related to the robbery, as it had nothing to do with the theft, were committed in the same transaction, and the evidence required to prove them was more or less similar.

24. The seventh ground is that the court relied on illegally and unconstitutionally obtained evidence. The ground is not properly articulated in the written submissions. The appellant does not make any effort

to demonstrate the illegality or unconstitutionality of the evidence alleged. All he appears to be saying is that there was a lacuna or gap in the evidence. His case is that the evidence collected, after a "suspect" led the detective to another "suspect," meaning the appellant, was illegal and unconstitutional. The appellant has a duty to demonstrate that that evidence was obtained in an illegal manner or in violation of the *Constitution of Kenya*, and he has woefully fallen short.

25. The eighth ground is the report of the government analyst and that from Safaricom on data, and it is submitted that the same were not produced by experts. The appellant cites sections 33 and 77 of the *Evidence Act*. The report by the government analyst is by a State official, and, under section 77 of the *Evidence Act*, it can be produced by the investigating officer, for the court can, under section 77(2), presume that the signature on it is genuine, and the person who signed it held the office and the qualifications which he professed to hold at the time when he signed it. That would be the case where the production of the document is not objected to by the defence, in terms of it being produced by a person other than its maker. When PW5 produced the report in question, Mr. Mukabi for the appellant, was present. He did not object to PW5 giving evidence on it, and he did not object to him producing the report, and he even went ahead to pose questions to the witness in cross-examination. There would be no basis to raise objection on appeal, when there was a chance to raise the same at trial. The same applies to the document that PW8 produced. Mr. Mukabi was present. He did not object or raise any issue on the competence of PW8 to testify on the document, and did not object to him producing it. He even went ahead to cross-examine him on it. It is now too late. Section 77(3) of the *Evidence Act* gives discretion to the trial court to summon such expert maker of the report for the purpose of being examined by the court. it is not mandatory, therefore, that where a report by an expert is placed before the court, the expert maker must be availed for examination. He should be availed where the parties desire it, or where the court considers it necessary, in the case the parties do not desire it. In this case the parties did not express desire to have the expert testify, and the court did not find it necessary to examine the expert maker on the contents of the reports or documents. The appellant has also submitted on production of electronic evidence. He has not demonstrated that there was any evidence of that nature that was placed before the court, without following the right procedures. None of the material presented by PW5 and PW8 were subject to section 106B of the *Evidence Act*, and the decision, in *Republic v Barisa Wayu Mataguda* [2011] eKLR (Odero J), is of no application.

26. The conviction of the appellant is founded on circumstantial evidence, based on the misapplied doctrine of recent possession of stolen items. The prosecution presented a case, to effect that, after the phone was stolen from PW1, the money in his MPesa account was transferred to the MPesa account of Philip Ongai. The only link between the appellant and the offences is the fact that the phone handset that was used for the purposes of that money transfer was traced to him. The telephone line was not his, but was registered in the name of Philip Ongai. There was no evidence that the handset was used on October 1, 2012 for the purposes of that transfer. In his defence, the appellant explained that Philp Ongai came to him on November 19, 2017, saying that his phone was out of power, and he asked him for his, he gave it to him, and the said Philip Ongai went away with the appellant's phone, and left his behind. It was the obligation of the prosecution to pursue that line, that another person had also handled the phone that the appellant was found in possession of, and that person was alleged to be the MPesa account holder, to which the money from the MPesa account of PW1 was transferred. The appellant testified that that person had been arrested together with him, but he was later released. When PW5, the investigating officer, testified, he stated that a suspect led him to the appellant, but he did not disclose who that suspect was. It would appear that the appellant was arrested primarily because he was in possession of several national identity cards and phones, and he could not render an account for that possession. Yet, there was no evidence to show whether those cards and the phones had anything to do with the charge that he faced. Although the trial court made a finding, that one of

the national identity cards belonged to Philip Ongai, that finding was not supported by the evidence on record, for PW5 did not say that, among the cards he found with the appellant, one belonged to Philip Ongai. I agree with the appellant, that the first suspect should have been Philip Ongai, for it was his phone number that was used to transfer money from the MPesa account of PW1, for without his number or SIM card, the handset that the appellant had could not transact. Philip Ongai is the person that the prosecution should have charged. There was a gap in the evidence, or a break in the chain, that the prosecution should have filled. That gap raised a doubt that ought to have been resolved in favour of the appellant. The involvement of the appellant in the matter, if at all, was too remote. He ought to have been acquitted. Secondly, there was evidence, from PW8, that the handset was handled by several other persons within the intervening period, no investigations were carried out into the handling of the handset by those other individuals. Thirdly, the explanation by the appellant, in his defence statement, fills the gap that the prosecution had left in its case, as to the connection between his handset, and the SIM card of Philip Ongai. I also find that it was erroneous to refer to the appellant by the alias Philip Ongai, for the appellant and the said Philip Ongai were different individuals. The prosecution admitted as much. PW5, the investigating officer, told the court that Philip Ongai was at large. There could be credence to the allegation, by the appellant, that Philip Ongai was let off the hook, and allowed to go scot free, after he paid a bribe, and he, the appellant, became the "fall guy," because he did not have the money to bribe.

27. Overall, it is my finding, and holding, that the appeal herein has merit, for the reasons given above. I accordingly allow the appeal, quash the conviction, and set aside the sentence imposed on the appellant, Wycliffe Mugedo. He shall be set free, unless he is otherwise lawfully held.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT VIHIGA THIS 24th DAY OF March, 2023.

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Mr. AL Mshindi, instructed by Simba Law Associates, Advocates for the appellant.

Mr. Chigiti, instructed by the Director of Public Prosecutions, for the respondent.