



REPUBLIC OF KENYA



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**Mbengua & another v Republic (Criminal Appeal 048 of 2018)
[2023] KEHC 2069 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2069 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 048 OF 2018
F WANGARI, J
MARCH 17, 2023**

BETWEEN

MAKAU MBENGUA 1ST APPELLANT

ALEX MUSEMBI MWANZIA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence of Hon.
M. Murage (C.M) in Kitui Criminal Case No. 37 of 2013)*

JUDGMENT

Background

1. The appellants were charged with the offense of Robbery with violence contrary to section 296 (2) of the [Penal Code](#). Particulars of offence were on February 2, 2013 at about 00.30am at Mukameni Sub-location, Mbusyani in Kitui County, jointly with others not before court while armed with offensive weapons namely, axes, pangas and torches robbed Kamba Mutunga, 1 panga, Safaricom scratch cards for Kshs 10 (not clear) worth Kshs 800, all valued at Kshs 1,100 and or at immediately before or immediately after the time of such robbery, threatened to use actual violence to the, said Kamba Mutunga.
2. In the alternative, the appellants were charged with an alternative charge of Handling stolen goods contrary to section 322 (2) of the Penal Code. Particulars of offence were on February 2, 2013. At 11.00am, otherwise than in the course of stealing, dishonestly retained Safaricom scratch card for Kshs 10 worth Kshs 100 all valued at property of Kamba Mutunga, knowing or having reasons to believe the goods, the property of the said Mutunga (sic).



3. The appellants were convicted of the main charge of the offence of robbery with violence and they were both sentenced to death.
4. This being the first appellate court, I am guided by the principles as set in the case of *Ganpat v State of Haryana*¹, as cited by *Mativo J in Makau v Republic*² as hereunder;
 - a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
 - b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
 - c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
 - d. When the trial Court has breached provisions of the Constitution or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.
5. Also in *Okeno v Republic*³ and *Kiilu & ano V Republic*⁴, the court is required to review the evidence on record and come to a conclusion as to whether or not to uphold the conviction bearing in mind that the court did not hear or see the witness in order to assess their demeanor.

Summary of evidence

6. The prosecution's case was first heard before Hon AS Lesootia SRM where three (3) prosecution witnesses were heard. Thereafter they accused persons stated that they had no faith in the court. In the interest of justice, the honourable magistrate recused himself from hearing the matter and directed that the matter be heard by a different court. The file was placed before Hon M Murage CM, where the matter started afresh, proceeded for hearing and final determination made.
7. After considering the entire evidence on record, the honorable magistrate found the appellants guilty of the main charge of robbery with violence and they sentenced to death.

Grounds of appeal

8. Being dissatisfied with the conviction and the sentence, both appellant separately lodged their appeals. The appeals were thereafter consolidated. Both appellants relied on grounds which are summarized as hereunder;
 - a. The trial magistrate erred in matters of law and fact by failing to consider that the prosecution's evidence could not warrant a conviction

¹ [*Ganpat v State of Haryana \(2010\) 12 SCC 59*](#)

² [*Makau v Republic \(Criminal Appeal E015 of 2021\) \[2022\] KEHC 179 \(KLR\) \(14 March 2022\) \(Judgment\)*](#)

³ *Okeno v Republic (1972) EA 32*

⁴ *Kiilu & ano v Republic (2005) 1KLR 174*



- b. The trial magistrate erred in matters of law and facts by failing to consider the defence evidence and the submissions filed
- c. The trial magistrate erred in matters of law and facts in failing to consider that no identification parade was conducted

Both appellants filed their written submissions. The state stated that they were to file their submissions. As at the time of writing the judgment, the submissions had not been filed.

Appellant's submissions

9. The 1st appellant filed a detailed written submission which I have considered. In summary, the appellant stated that the identification done could not be relied on as it was unclear and uncertain and no identification parade was done. The appellant submitted that they were not in possession of the recovered items and nothing could link them with the offence. The doctrine of recent possession could also not link the appellants with the offence. The appellant also submitted that the circumstantial evidence against them did not meet the required threshold. The prosecution failed to prove its case beyond reasonable doubt.
10. The 2nd appellant were similar to those of the 1st appellant as they covered the same grounds.

Summary of the prosecution's evidence

11. On February 2, 2013, Kamba Mutunga, (PW 1) the complainant, was at home together with her cousin's wife Catherine Nduku (PW4) who was her shopkeeper. At around 00.30 am, she was woken up by the voice of Mwanzia Kalechi (PW 5) calling asking her to open the door. Kamba heard Mwanzia was being instructed by somebody else on what to say. Mwanzia had earlier been woken up by men who had entered his room and ordered him to go tell Kamba to open the door for them. The men were armed with axes and pangas. When Kamba failed to open the door, they attempted to break into the door. They however managed to break the window and they gained access to the house. In the meantime, Kamba got out of her bedroom and closed the door from outside.
12. Catherine had heard the commotion and she woke up and went to the sitting room. She could hear the robbers try to break into the house. Kamba joined her in the sitting room before going to hide in Catherine's room. The robber who had now gained access to the house asked Catherine where Kamba was. She directed them into her room. The robber tried to break into the door, and that is when Kamba decided to open the door. She was hit on the thigh by one of the robbers. They demanded Kshs 30,000 from her. She gave them her handbag as she did not have money. She said out of the light from the torch, she was able to identify the 1st appellant who was a neighbour and had previously stolen from her. Though the robber had a mask, she said she was able to see the eyes as the mask loosely fit.
13. After ransacking the house, the robbers robbed Kshs 800 which was the sales proceeds of the day ad safaricom scratch cards. They then left. Catherine said she did not recognize any of the robbers as they had masks. Mwanzia said he was able to identify the 2nd appellant because he was the short one. The thereafter called for help. Lawrence Mwanzia (PW 3) Assistant chief, Kasyoka Kimuli (PW 6) were among the people who responded to the distress call. Since it was raining, they were able to trace the shoeprints which indicated that they came from the neighbouring home. They followed the shoe prints up to Kavisuni area. That is when they met a person who informed him that he had seen the robbers board a motor vehicle. It was around 9 am at the time.
14. Ephantus Mwangi (PW 8 though indicated as PW 7) and Casmwel Ogutu (PW 9 though indicated as PW 8) were the arresting officers. They testified that they received word that there were suspected



robbers who had boarded a vehicle. They lay ambush and put a road block. When the suspect vehicle approached, they ordered the driver to stop, have all the passengers alight. That is when the two appellants were arrested. They said they followed the description given by the informer to identify the robbers. The appellants were handed over to the police. David Maina (PW 7) gave evidence that the complainant was able to identify the appellants as the people who violently robbed her. He produced as exhibits, the items recovered at the time of the arrest.

15. In defence, the 1st appellant said he was arrested at a road block, on his way to his daughter's school. He denied having any luggage at the time. He said the other passengers in the vehicle were released. The 2nd appellant and himself were arrested. He said the luggage with the items recovered had not been claimed by any passenger in the vehicle. On his part, the 2nd appellant said he was on his way home when the vehicle he was in was stopped at a road block. The officers at the road block forced him to take a luggage that was in the car. He said he had no luggage. The 1st appellant and himself were arrested. That is when they were informed that they had been involved in a robbery. It is while at the station that a lady came and identified the 1st appellant as one of the robbers.

Issues for determination

16. The paramount issue for determination is whether the elements of the offence of robbery with violence were proved beyond reasonable doubt. The issues therefore arising from this appeal are;
- a. Whether the elements of the offence of robbery with violence were proved
 - b. In the alternative, whether the offence of
 - c. Whether the defence raises reasonable doubts

Elements of the offence of robbery of violence

17. The offence of robbery with violence is contained in Sections 295 of the Penal Code provides as follows;

' Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery'.

Section 296(2) of the Penal Code provides as follows;

' If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.'

18. In the case of *Jeremiah Oloo Odira v Republic [2018] eKLR*, it was held as follows:

' Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.



19. In *Paul Katana Njuguna v Republic (2016) eKLR*, it was held that for an offence robbery with violence to exist, the following ingredients must be proved;
- a. The offender is armed with any dangerous and offensive weapon or instrument; or
 - b. The offender is in the company of one or more persons; or
 - c. At or immediately after the time of such robbery, the offender wounds, beats strike or uses other personal violence to any person.

Proof of either one of the ingredients is sufficient.

20. From the evidence of the prosecution witnesses, it is a fact that on February 2, 2013, the complainant (PW 1), was robbed of her properties. The said robbery incidence was witnessed by her cousin's wife (PW 4) and a minor who lived with her, one Mwanzi (PW 5). In the cause of the robbery, the robbers used actual violence against the complainant and PW 5. The robbers were also said to have been armed with offensive weapons i.e axes and pangas. It is therefore safe to find that the elements of the offence of robbery with violence were met.

Identification

21. It was now the duty of the prosecution to put the appellants into the scene of crime. On identification of the robbers, the complainant stated as follows;

' When he was emptying the bag, there were two men with torches and the light shone on him as he entered the bag. The person who had pushed me and had an axe, I could see him properly. I saw part of his face around the eyes. The mask was partially covering him. When I looked at him, I recognized him. He is married to my neighbour's daughter he is Makau, the 1st accused'.

22. The complainant testified that she did not tell anyone that she had recognized the 1st accused, now the 1st appellant. She was said to later identify the 1st appellant at the police station after they were arrested. The evidence of the complaint was the only one that identified the 1st appellant at the scene of crime. Catherine (PW 4) in her evidence in chief said there was no light at the time. She did not know the robbers since they wore black masks. However, on cross examination, she said that it was the 1st appellant who took the money and scratch cards from her.

23. Mwanzia (PW 5) said that he did not see the robbers, but he said he saw the 2nd appellant since he was the short one. However, his evidence on identification as conflicting. He stated as hereunder;

' I saw the accused 2. He was the short one. I did not go to Kisasi police. I recorded statements at home. I did not see accused 2. They were the same heights. I had not seen them before. Accused 2 is the one who held me on that night. They had torches. There was moonlight'

24. Further on identification, the arresting officers PW 8 and PW 9 testified that they received information from an informer about the robbers who had boarded a vehicle. They said they were given the description of the robbers by the informer. Nothing more is said of the informer or what description he gave of the robbers. The investigating officer did not shed more light on this. No identification parade was carried out.



25. In *Donald Atiema Sipendi v R (2019) eKLR*, Mativo J stated;

‘The positive identification of an accused is an essential element of any offence. It is a fundamental part of a criminal process eye witness testimony directly linking the accused to the commission of the offence is likely the most significant evidence of the prosecution’

26. From the above, it is my considered view that the issues of identification and placing the appellants to the scene of crime is significant as this would link the appellants with the commission of the crime. The identification of the appellants at the scene of crime and the evidence of identification that led the arresting officers to identify the appellants is in doubt. With no sufficient evidence placing the appellants at the scene of crime, the charges of robbery with violence therefore cannot stand.

27. The appellants were also charged with an alternative charge of handling stolen properties. the question is whether the appellant is guilty of the offence of handling stolen property contrary to section 322 of the Penal Code.

Section 322 which defines the offence of handling stolen property as follows:

- (1) ‘A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.
- (2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

28. The issue is whether the ingredients of the offence were met. In the case of *Tembere v Republic (1990) eKLR*, the said ingredients were summarized as follows: -

‘ One of the important elements of the charge of handling is that the accused must know or have reason to believe that the goods were stolen. Another vital element of the charge of handling is that the accused must dishonestly receive or retain etc.’

29. From the evidence of the arresting officers, Ephantus PW8 said that a black bag was recovered from the 1st appellant. Nothing was recovered from the 2nd appellant. Ogutu PW9 said that ‘one had a black mask, catapult and credit for phone’. however, from the cross examination by the 2nd appellant, he said that he was found with nothing. One can therefore deduce that the items were recovered from the 1st appellant. The I.O, PW 7 said that a few items including scratch cards were recovered. The witness did not specify from whom the items were recovered from. The complainant said the scratch cards were in the bag that was recovered from the appellants.

30. In order to proof the offence of handling stolen goods, it must be shown that the appellant had possession of the stolen items, and that he must have known or believed that the good were stolen. The evidence on possession of the recovered items was quite casual as witnessed in the above paragraph. The recovery of the items from the appellants having been in doubt, the issue of now handling stolen goods cannot arise. I find that also in the alternative charge, the prosecution failed to proof their case beyond reasonable doubt.

31. I find that through the evidence on record, it was not safe to convict the appellants on the main charge of robbery with violence. The evidence on record is also not sufficient to support the alternative charge of handling stolen goods. For these reasons, I allow the appeal, quash the conviction and set aside the sentence. The appellants be set free and they be released from custody unless lawfully held.



DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH, 2023

.....

F. WANGARI

JUDGE

In the presence of;

Pauline Mwaniki S.C for the State

Both Appellants, present

