



REPUBLIC OF KENYA



KENYA LAW
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**Mbengua v Republic (Criminal Appeal 025 of 2019)
[2023] KEHC 2073 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2073 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL 025 OF 2019
F WANGARI, J
MARCH 17, 2023**

BETWEEN

MAKAU MBENGUA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence of Hon.
J. Munguti (P.M) in Kitui Criminal Case No. 52 of 2013)*

JUDGMENT

Background

1. The appellant was charged with 2 counts of the offense of robbery with violence contrary to section 296 (2) of the *Penal Code*. In count I, he was charged with his co-accused who appealed separately and the appeal already determined. Particulars of offence were on November 29, 2012 at Kalundu market in Kitui County, while armed with dangerous weapons namely, axes, pangas and rungus robbed Eunice Kanini Musembi, of cash Kshs 1,000/=, one mobile phone make Samsung valued at Kshs 3,500/= and at or immediately after the time of such robbery threatened to use actual violence to the said Eunice Kanini Musembi.
2. In count II, he was charged with his co-accused who appealed separately and the appeal already determined. Particulars of offence were on November 29, 2012 at Kalundu market in Kitui County, while armed with dangerous weapons namely, axes, pangas and rungus robbed Kyalo Kilonzi, of cash Kshs 3,000/=, one mobile phone make LG valued at Kshs 3,000/= and at or immediately after the time of such robbery threatened to use actual violence to the said Kyalo Kilonzi. The appellant was also charged with the offence of gang rape in count III, but he was acquitted by the trial court.
3. The appellant was convicted in both charges of the offence of robbery with violence and was sentenced to serve 25 years imprisonment on each count. The sentences were to run concurrently. Being



dissatisfied by the decision of the magistrate's court, the appellant lodged this appeal against the conviction and the sentence.

4. This being the first appellate court, I am guided by the principles as set in the case of *Ganpat v State of Haryan*, as cited by Mativo J in *Makau v Republic* 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 *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* and *Kiilu & ano v Republic*, 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.

Grounds of appeal

6. The appellants relied on grounds of appeal which are summarized as hereunder;
 - a. The trial magistrate erred in matters of law and fact by failing to consider that the prosecution's witnesses did not identify him
 - b. The trial magistrate erred in matters of law and facts by failing to consider the phone was recovered from his wife who was not availed in court.
 - c. The trial magistrate erred in matters of law and facts in failing to consider that the prosecution did not prove its case to the required standard of proof
7. The appellants filed his written submissions. As at the time of writing the judgment, the submissions by the state had not been filed.

Appellant's submissions

8. The appellant filed a detailed written submission which I have considered. In summary, the appellant stated that the prosecution failed to prove the elements of identification. He extensively submitted on the issue of identification. He also stated that the prosecution gave conflicting evidence. He prayed that this appeal be allowed.

Summary of the prosecution's evidence

9. Eunice Kanini Musembi, PW 1 and the complainant in count I, gave evidence that on the material date, she was asleep in her house when she was wakened up by a voice telling her to open the door. When she opened 4 men came inside. They had covered their faces and it was impossible to identify



them. They robbed her of her cash and her Samsung phone. She was also gang raped by the robbers. She was not cross examined.

10. Kyalo Kilonzi, PW 2 and the complainant in count II, gave similar evidence to that of PW 1 who was his neighbour. In his case, the robbers broke into the house before he opened the door for them. The robbers robbed him his cash and LG phone. He did not identify the robbers as they had covered their faces.
11. Paul Mutune Musumba PW 3, bought an LG phone from the appellant's co-accused who was well known to him. He was in the company of the appellant. He gifted the phone to his wife. The wife was later arrested on allegations that she had in her possession a stolen phone. That is when she led the police to her husband, PW 3, who also led the police to the arrest of the appellant's co-accused.
12. Cpl. Rachael Muindi, PW 4 and the investigating officer gave evidence how the incidence of the robbery and gang rape was reported to them. She and her colleagues visited the scene of crime. She later got information from PW 1 that her phones had been stolen. Phone tracking was done and it showed that one of PW1's stolen phone was being used by a woman. They were able to track her down and she said she had been given the phone by her husband (PW 3), who later led the police to the appellant's co-accused.
13. She further gave evidence that the phone belonging to PW 2 was traced to the appellant's former wife. She implicated the appellant as the person who gave her the phone. At the time of the recovery, the appellant was in custody over another criminal case against him. The wife was not called as a witness
14. Kennedy Kioko, PW 5 was a clinical officer who produced the treatment notes, PRC for and P3 form in respect to the complainant in Count I. After the close of the prosecution's case, the appellant was put on his defence.

Summary of defence evidence

15. In his defence, the appellant stated that he was never identified by any of the complainants. He was arrested on his way to his daughter's school. He denied committing the offence.

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

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 November 29, 2012, the complainants PW 1 and PW 2 were violently robbed of her cash and phones. None of the complaints identified the robbers as they had covered their faces. However, they were able to identify their stolen phones which had been recovered. The appellant was said to be in the company of his co-accused when the phone belonging to PW 1 was sold to PW 3. The appellant was also said to have gifted to his ex-wife, the phone stolen from PW 2.

Identification

21. 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’

22. 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 appellant with the commission of the crime. None of the complainants identified the appellant at the scene of crime. The fact that PW 3 gave evidence that the appellant was in the company of his co-accused at the time he bought the phone, does not automatically implicate the appellant with the commission of the offence of robbery. The prosecution must link the appellant to the commission of the crime.

23. On the evidence that the phone stolen from PW 2 was found in possession of the ex-wife to he accused, it was the duty of the prosecution to proof the doctrine of recent possession. The said ex-wife to the appellant was not called as a witness, and neither was any evidence that would link the accused with the phone. The evidence in that regard remains as hearsay, and is not admissible.



24. I find that through the evidence on record, it was not safe to convict the appellant on the charge of robbery with violence in both counts as he was not identified at the scene, and recent possession was not proved against him. For this reason, I allow the appeal, quash the conviction and set aside the sentence. The appellant be set free and he be released from custody unless lawfully held.

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

F. WANGARI, JUDGE

Pauline Mwaniki S.C for the State

Appellant present

Guyo, Court Assistant

