



**Ngugi v Republic (Criminal Appeal E010 of 2022)
[2023] KEHC 18560 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18560 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E010 OF 2022
SM GITHINJI, J
JUNE 12, 2023**

BETWEEN

SYLVESTER NJAGI NGUGI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Ms Mutua for the State

- 1 Sylvester Njagi Ngugi was charged in the lower court with the offence of Robbery with violence contrary to section 295 as read with section 296 (2) of the [Penal Code](#).
- 2 The particulars of the offence being that on the December 7, 2015 at about 7.30am at Sky Energy Petrol Station in Mariakani area in Kaloleni Sub-County within Kilifi County, the appellant jointly with others not before court while armed with dangerous weapons namely a pistol, robbed off (1) Amos Omondi Odenyo a mobile phone make LG valued at 5,200/=, Nokia 110 valued at 2,000/= (2) Richard Onyango Odero a mobile phone make Samsung C233 valued at Kshs 7,650/= and cash of 30,800/= being cash sales from the filling station and his own cash of 550/=, (3) Chimela Ndegwa Munga a mobile phone make Techno valued at Kshs 1,800/=, cash of Kshs 1,000/= and during the time of such robbery used actual violence to the said Amos Omondi, Richard Onyango and Chimela Ndegwa Munga.
- 3 The prosecution case is that on September 1, 2015 Pw -1 in this case leased his motor bike Registration number xxxx, chasis No xxxx to one Joshua Okotu. According to the said lease, the motor bike was to be used to ferry passengers within Mariakani Township between 9.00Pm and 6.00am. It was to be



- returned to Pw-1 every Friday at sunset and picked on Saturday at Sunset. The lease was to be renewed on weekly basis.
- 4 On December 7, 2015 Pw-2 was on night duty at Sky Energy Petrol Station in Mariakani. At 7.00am he had not reported off duty. He was with Pw 3, Pw 4 and Pw-5. Pw -4 was their supervisor. According to Pw-2 the appellant had been to the said petrol station before and asked whether he could fuel at night. On this particular morning he went and asked for oil. He was led to the lubricant shop which was also an office for Pw-4. Two other or three persons joined him. Pw -3, Pw-4 and Pw-5 were forced to lie down. One of the assailants had a firearm (pistol). They lied down. The assailants demanded for the safe key. They took money and phones which were on the table in the office. One phone was an LG and the other a Nokia both for Pw-4. They took 1,500 from Pw-3. The safe keys were not handed to them. Pw-2 became suspicious and went to find out what was happening in the office. He found his colleagues lying down. He immediately closed the door from outside and raised alarm.
 - 5 The assailants escaped through another door. A motor bike got to the scene, Registration No xxxx. They tried to get onto it but it fell down. They escaped on foot. Members of the public had arrived to assist. They hurled stones at them. They subdued one as they pursued the rest. The one subdued is the appellant herein. He had some of the stolen items.
 - 6 Mariakani Police Station is just about 100 meters from Sky Energy Petrol Station. The police officers were attracted to the scene by members of the public who were shouting. Pw-7 blew a whistle to alert other police officers within the station. He visited the scene in company of IP Oyagi. There was an arrested suspect who was being beaten. They rescued him. There were two motorbikes at the petrol station Registration No xxxx and xxxx. At the scene they collected a bullet cartridge and one bullet head. They as well recovered three phones. The appellant alleged one was his. One worker identified another as his.
 - 7 The appellant was taken to the police station. The spent cartridge and bullet head were taken to Pw-6 for examination. The Ballistic expert examined them and found that they were a spent cartridge of a bullet and a live ammunition of 9mm x 19mm, capable of being fired from a pistol.
 - 8 The witnesses, save for Pw-6, stated that the appellant was among the assailants and is the suspect who was arrested at the scene.
 - 9 The appellant in his defence stated that he is a mason in Meru. In 2015 he was called by a customer namely Jedida and asked to meet her at Mariakani Town. She was a police officer at Mariakani Police Station. He went and she directed him to meet her at the police canteen. When she reported off duty, they went to her house. She changed and requested they go for food. He left his bag in her house within the police line. Thereafter they went for dinner. She chose the design of the house she wanted. They then spent the night in a hotel. In the morning they went to where she wanted the house constructed. As the two took tea, a man appeared and questioned as to where the two had spent the night. The man claimed the accused was the cause of the differences he was experiencing with his wife. The man assaulted him and injured his hand. Jedida screamed. Police officers got to the scene. He was arrested and locked in cells. The person who had assaulted him is Timothy Mwangi.
 - 10 On 7th, the date of the alleged offence, he was already in the custody of the police.
 - 11 The trial court evaluated the evidence and found that the offence of robbery with violence was not proved by the prosecution beyond reasonable doubt as evidence of what was exactly stolen and recovered was wanting. The court however found the offence of attempted robbery with violence proved and convicted the appellant of the same, it being a lesser offence than that of robbery with violence. He was sentenced to serve 7 years in prison.



- 12 Dissatisfied with the said conviction and sentence the appellant appealed to this court on the grounds that; -
1. Nothing was recovered from him of the alleged stolen items.
 2. The lesser offence he was convicted of was not proved beyond reasonable doubt.
 3. The period spent in remand was not weighed in the sentence.
- 13 The appeal was canvassed by way of written submissions. Both parties filed their submissions. I have considered the charge, the evidence, defence, judgment, sentence, grounds of appeal and submissions. A thorough evaluation of the prosecution case reveals disturbing lacunas which raises doubt on it's credibility.
- 14 Pw-1 who is the alleged motor bike owner who had leased it to one Joshua Okoth, produce a lease agreement dated September 1, 2015. The said lease was to be renewed every week. The evidence of renewal was not availed to show on December 7, 2015 it is the said Joshua Okoth who had the motor bike. The said Joshua Okoth though a suspect and his particulars were known, was not arrested and arraigned in court. According to Pw-7, the investigating officer, there was another motor bike involved of which was equally recovered at the scene, Registration No xxxx. Other witnesses do not reveal of it and it is not clear of the role it played in the alleged robbery with violence.
- 15 Pw-2 an eye witness stated the accused herein had gone to the petrol station earlier and asked whether he could fuel at night. No other eye witness indicates to had seen him earlier as claimed by Pw-2. Pw-2 also disclosed that the appellant upon arrest had some of the stolen items. He does not disclose which ones, and belonging to who and is questionable whether he really witnessed the alleged recovery.
- 16 Pw-3 on his part stated he had not seen the accused before then. Though in his evidence in chief he had not disclosed he lost anything, on cross-examination he alleged he lost 1,500/=.
- 17 Pw 4 alleged one of the assailants had a pistol. He did not disclose which one. He also stated that when members of the public arrived the assailant were chased which implies they could have been chased out of the petrol station. The one apprehended had the stolen money. He does not disclose how much was stolen and from who, and how much was recovered. Though no witness in their evidence in chief said heard fired shots, Pw-4 stated of it on cross-examination. Even the police officer never claimed to have heard sound of a fired shot and the police station is just 100 metres away from the scene.
- 18 Pw-5 had not seen the accused before then. He also alleged one of the assailants had a pistol but did not disclose which one. In re-examination he alleged his mobile phone was recovered. He never gave details of how it was taken and recovered.
- 19 The investigating officer alleged there were two motorbikes involved. He recovered them as well as one bullet cartridge and a bullet head. He also recovered three phones. Appellant said one of them was his. Details are not given of which belonged to who, and the 3rd one was for who. He also did not disclose of any money recovery.
- 20 The accused raised a serious defence or allegation that on December 7, 2015, the alleged date of the offence he had already been arrested and was in police custody. Though the charge sheet shows he was apprehended on December 7, 2015, the proceedings shows he was first in court on December 5, 2015. However, the handwritten proceedings does not clearly show whether it was on 5th or 8th, given the



way the number (5 or 8) is written. In my endeavor to establish the truth I have checked on which day December 5, 2015 was and have confirmed from the calendar of that year that it was a Saturday. He could not have therefore been taken to court on a Saturday. 8th was on a Tuesday which should be the correct date of which he was taken to court. His claim that on 7th of December he was in police custody was just a personal effort to take undue advantage of a typographical mistake or error in the typed proceedings.

- 21 The appellant all along had implied on cross-examination that he was mistakenly arrested as an innocent passerby near the petrol station. His defence that he was fixed for sleeping with a married police officer called Jedida was therefore an afterthought and cannot be correct. However, the sole bearer of the burden of proof in criminal matters is the prosecution which has to establish the guilt of an accused person beyond reasonable doubt. The evidence by the prosecution witnesses is scanty and in want of necessary details. No witness described in details what each of the assailant did in the alleged robbery with evidence. There was no information of description of any assailant by how they were dressed, physique and the role they played in the incident. All witnesses did a dock identification of the appellant as no identification parade was conducted. It's also not clear on how he was arrested while all the rest managed to escape and where exactly he was arrested. The trial court rightly doubted the evidence of recovery of stolen items and it's not clear on what basis the court trusted the rest of the evidence from the very same witnesses. Where the court discredits part of the evidence by a witness and find part of it credible, it must be disclosed clearly on which grounds, as a witness who tells a lie in court is generally entirely unreliable. Having weighed to entire evidence, I do find that there is no credible evidence that connects the appellant to the offence. He could have mistakenly arrested near the scene as he had earlier alleged, but being a lay person to matters of law made up a case in his defence thinking it would sell better than the real case. He cannot be penalized for that as the onus of proof does not shift to him at any given stage of the trial. The trial court should have accorded him the benefit of doubt in the case and acquitted him. I do accord him of it in accordance to the law.
- 22 The appeal therefore succeeds. The conviction and sentence are quashed. He is set free unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 12TH DAY OF JUNE, 2023

.....

S.M.GITHINJI

JUDGE

In the Presence of; -

The Appellant in Person

Ms Mutua for the Prosecution

