



REPUBLIC OF KENYA



**Muli alias Ouko v Republic (Criminal Appeal E071 of 2021)
[2023] KEHC 24234 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 24234 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E071 OF 2021
GMA DULU, J
OCTOBER 16, 2023**

BETWEEN

MOHAMMED SHARIF MULI ALIAS OUKO APPELLANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence in Criminal Case No. 225 of 2017 at Makindu Law Court delivered on 3rd February 2021 by Hon. J. O. Mangori (PM))

JUDGMENT

1. The appellant was charged in the Magistrate's court at Makindu with robbery with violence contrary to Section 296 (2) of the *Penal Code*. The particulars of offence were that on the night of 15th and 16th March 2013 at Shauri Moyo village in Makindu Location within Makueni County jointly with others not before the court while being armed with offensive weapon namely a panga robbed Christopher Tama Mbulo of his Nokia mobile phone model 2310 and cash Kshs. 3,050 all valued at Kshs. 7,250/= the property of the said Christopher Tama Mbulo and at or immediately before or immediately after such robbery threatened to use actual violence to the said Christopher Tama Mbulo.
2. Under Count II he was also charged with robbery with violence contrary to Section 296(2) of the *Penal Code* the particulars of which being that on the same night and at the same place while armed with an offensive weapon namely a panga robbed Zakia Wanjiku Kibwana of her Nokia phone valued at Kshs. 2,800/= and at or immediately before or immediately after such robbery, threatened to use actual violence to the said Zakia Wanjiku Kibwana.
3. He denied both charges. After a full trial, he was convicted as charged, and sentenced to twenty (20) years imprisonment on each of the two counts, the sentences to run concurrently, thus a total of 20 years imprisonment.



4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following amended grounds of appeal:-
 1. The learned Magistrate erred in law and fact by convicting him by relying on identification evidence which was mere (allegation).
 2. The learned Magistrate erred in both law and fact by convicting him by relying on hearsay and fabricated stories from witnesses.
 3. The learned trial Magistrate erred both in law and fact by convicting him on evidence which was full of contradictions and inconsistencies.
5. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions. I have to acknowledge here that both sides relied upon decided court cases.
6. This being a first appeal, I have to start by reminding myself that I am duty bound to evaluate all the evidence on record afresh, and come to my own independent conclusions and inferences see *Okeno v Republic* (1972) EA 32.
7. In proving their case, the prosecution called four (4) witnesses. The appellant on his part tendered unsworn defence testimony and did not call any additional evidence.
8. This being a criminal case, the burden was on the prosecution to prove all the ingredients of each of the two offences beyond any reasonable doubt – see Section 107 of the *Evidence Act* (Cap.80), and the case of *Sawe v Republic* (2003) eKLR.
9. The elements of the offence of robbery with violence are contained in the provisions of Section 295 of the Penal Code and 296(2) of the same *Act* which states as follows:-
 295. 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 a felony termed robbery.
 - 296
 - (2) 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 the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.
10. The evidence that connects the appellant to the two robbery offences for which he was charged and convicted is that of the complainants in the respective offences that is PW1 Christopher Tama Mbulo for Count I, and PW2 Zakia Wanjiku Kibwana with respect to Count II.
11. The incident occurred at night, after 2a.m thus it was mandatory for the court to warn itself of the need to critically look at the evidence of identification to ensure that there was no possibility of mistaken identity of the alleged culprit, in this case the appellant. This requirement was clearly stated in the case of *Wamunga v Republic* (1989) KLR 424 at 426 wherein the Court of Appeal stated as follows:-

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the



circumstances of identification were favourable and free from the possibility of error before it can safely make it a basis of a conviction.”

12. Having myself re-evaluated the evidence of PW1 and PW2, I note that though there was initially a variance of the date of occurrence of the incident in the evidence of PW1 who was later recalled and clarified the position, the appellant was put squarely at the scene together with two others.
13. The evidence on record is that PW1 and PW2 knew the appellant before, thus this was a case of recognition rather than identification. Though it was dark, the other two companions of the appellant flashed a torch and PW1 saw the appellant in the light of the torch.
14. The appellant also talked at the scene, thus his identity cannot be said not to be positive.
15. Thus his defence that he was implicated because of a pre-existing business competition dispute with PW2 cannot hold water.
16. Thus like the trial Magistrate, I find that the appellant was at the scene of incident with two others.
17. However, did the prosecution prove that he committed the robbery? In my view from the evidence on record, the appellant did not act in complicity with the other two, and thus cannot be said to have committed the robbery.
18. My above finding is grounded on the evidence of PW1 who stated as follows:-

“The accused tried to dissuade his colleagues from robbing us but he was ordered to shut up, lie down too. One of the men took my Nokia 2310 phone and Kshs. 3,050/= from my pocket. They then ordered us to stand and walk away without looking backwards. They warned us not to say what had happened. They robbed Zakia of her phone and other things.....”
19. In my view therefore, from the evidence of PW1, the appellant though at the scene, dissociated himself from the robbery and did not participate in it. It cannot thus be said that the prosecution proved beyond any reasonable doubt that the appellant participated in the alleged robbery of PW1 and PW2.
20. On the above account alone, I will allow the appeal quash the conviction and set aside the sentence.
21. Consequently, I allow the appeal and quash the conviction for the two charges and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF OCTOBER 2023 AT VOI VIRTUALLY.

GEORGE DULU

JUDGE

In the presence of:-

Alfred – Court Assistant

Appellant

Mr. Kazungu for State

