



**Makokha v Republic (Criminal Appeal E035 of 2021)
[2024] KEHC 14536 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E035 OF 2021
TW OUYA, J
NOVEMBER 20, 2024**

BETWEEN

JAMES JUMA MAKOKHA APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against both conviction and sentence of 30 years –
imprisonment in Criminal in Criminal CASE No 933 of 2017, at
Kiambu, by Hon. Omodho, (SRM); dated and delivered on 28/5/2020)*

JUDGMENT

Background

1. This Appeal emanates from Judgement delivered on 25th May, 2020 by Hon.G. Omodho in Kiambu CMCC No 933 of 2017 convicting the 4th Accused, the Appellant herein of the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#).
2. The accused persons were jointly charged with two counts one of Robbery with Violence contrary to Section 295 as read with Section 296 (2) of the [Penal Code](#). The charge sheet was later amended to include an alternative charge of handling stolen property contrary to section 322(2) of the [Penal Code](#). However, they were only placed to defend Count 1 of the Charge Sheet while the 4th accused was also placed to defend the alternate charge of handling stolen property contrary to section 322 (2) of the [Penal Code](#).
3. The particulars of count 1 aware that on 25th May 2027 at about 10.30 pm at Kiamumbi within Kiambu County jointly with another not before the court while armed with dangerous weapons namely pistol, crude weapons namely knives, clubs and machetes robbed Stanely Karuri Gakure one mobile phone make Samsung make J7 Supreme IMEI S.NO 35477208xxxxxx valued at Kshs 28,000/



= and cash of Kshs 10,000/= all valued at Kshs 38,000/= and immediately at the time of such robbery used actual violence to the said Stanley Karuri Gakure.

4. The particulars Count II were that 25th June 2017 at Mukuru Kwa Njenga slums at Makadara Sub County in Nairobi within Nairobi County, otherwise then in the cause of stealing dishonesty retained one mobile phone make Samsung J7 Supreme IMEI S.NO 335477208xxxxxx the property of Stanley Kauri Gakure.
5. The matter proceeded to full trial where the prosecution called a total of 4 witnesses after which the accused were placed on their defence. The accused called 2 witnesses in their defence and closed their defence case.
6. The court having considered and analyzed evidence availed before it and submissions by parties, arrived at the decision that the prosecution had proved its case beyond reasonable doubt against the Appellant (4th accused) while acquitting the 1st, 2nd and 3rd accused under Section 215 of the Penal Code for lack of sufficient evidence.
7. The trial court subsequently sentenced the 4th Accused to 30 years which was discounted to 27 years imprisonment. The Appellant being dissatisfied with the trial court finding, filed the instant appeal against conviction and sentence.

The Appeal

8. The appellant filed a memorandum of appeal on 27th May 2021 but later filed an amended grounds of appeal filed on 4th August 2021 which grounds he has relied upon as hereunder:
 - i. That, the learned trial Magistrate erred in matters of law and facts in concluding that the circumstances that the alleged scene of robbery were conducive for the complainant PW1 single identifying witness to positively identify the appellant while the trial court failed to warn itself of the danger of relying on that evidence.
 - ii. That, the learned trial magistrate further erred in matters of law and facts while basing the Appellant's conviction in reliance with the adduced evidence of the whole set of prosecution witnesses without considering their credibility which occurred while also the information in particulars of the charge sheet were defective.
 - iii. That, the learned trial magistrate lost direction in evidence and rejected the appellant's defence without putting into consideration that the same was not displaced by the prosecution side as section 212 of the Criminal Procedure Code cap 75 laws of Kenya while further article 50(h) of the Constitution was violated.
9. Based on the above, it is the Appellant's prayer that his appeal may succeed in its entirety, conviction quashed and sentence set aside.

Submissions

10. The court directed that the appeal be canvassed by way of submissions by both parties. When the parties were last in court on 15th July 2024, the Appellant had complied by filing submissions while Counsel for the state informed court that he had filed submissions but it was not in the Court file. He was therefore directed to file the same on the CTS. At the time of writing this judgement, there was neither a hard copy of the respondent submissions on the court file nor a soft copy on the CTS. The Court therefore relied on the record of appeal together with the Appellant's submissions. The grounds raised in the memorandum of appeal revolved around three issues namely:



- i. Whether it was safe for the trial court to rely on the evidence of a single identifying witness
 - ii. Whether it was safe for the trial court to rely on the prosecution evidence without considering the credibility of the prosecution witnesses
 - iii. Whether the trial court erred by rejecting the Appellant's defence
11. Upon submissions the, the appellant has raised several issues: That he was illegally detained in police custody without the benefit of a counsel. That the charges were grossly defective because of material discrepancies. That the charge of robbery with violence was wrongly joined with simple robbery under section 295 of the Penal Code and that the main charge for which he was convicted was framed as robbery with violence contrary to section 295 as read with 296 of the Penal Code leading to wrongful conviction. He argued further that the particulars of evidence as stated in the charge sheet were inconsistent with the evidence that was adduced. For instance, he illustrated that the complainant was attacked at 9.00 pm as opposed to 22.30hrs. He also had issue with the IMEI serial number of the phone and stated that its value was Kshs 28,000 as opposed to Kshs 35,000.
 12. On identification, he argued that he was not satisfactorily visually identified stating that the conviction was based on the uncorroborated evidence of a single identifying witness. He argued that the prosecution evidence was contradictory in that PW1 mentioned two identification parades with 15 and 20 members respectively where he identified the 2nd accused but later identified the Appellant (4th Accused). That the evidence of PW1 and PW3 was contradictory because they cited 30th May and 7th June respectively as the date of the identification parade. That the court relied on unfounded evidence to convict him.
 13. The appellant argues also that the prosecution case was not proved to the required standard in that ingredients of aggravated robbery were not proved. He states that the presence of offensive and/or dangerous weapons was not established. He also states that use and or threat of violence was not proved as there was no evidence that the pistol was used to hit the complainant's wife.
 14. The Appellant invoked the doctrine of recent possession stating that it was not established and that the alleged recovered phone did not place him at the scene of crime.
 15. Lastly, the Appellant argues that the trial court in convicting him on the basis that there was no independent witness to corroborate his defence case, meaning that the burden of proof was shifted to the Appellant. He maintains that his defence remains unrebutted by the prosecution as provided under section 212 and 309 of the CPC. It is also the Appellant's argument that the trial court did not give reasons as to why it believed the complaint but disregarded the Appellant's defence. He quips that the trial court illegally imposed extraneous evidence which was not canvassed or established by finding that the security lights were very bright yet this was not established.
 16. To this extent, this court has considered the Record of Appeal as well as submissions by the Appellant. It is worthy to note that this appeal was handled under the Judiciary Rapid Results Initiative. Having addressed myself on the above, it is trite that the duty of this court as a first appellate Court is to re-evaluate the evidence adduced before the trial Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See *Selle and another v Associated Motor Boat Co. Ltd and others* (1968) EA 123 and *Ephantus Mwangi and another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.
 17. The burden of proof in criminal cases is always beyond reasonable doubt and that burden always lies on the prosecution to prove its case to the extent that even when the accused fails to raise a defence, the evidence remains unchallenged.



18. The prosecution called four witnesses PW1 being the key witness who narrated how he and his wife were accosted by a group of six men at around 9pm, in the night as they entered their home from work. That they were both assaulted and threatened by the gang. That one of the assailants, later identified as the Appellant had pistol which he used to threaten and to assault them. That they both screamed for help and neighbors came to their rescue and the gang fled. That the neighbors found at the gate, a live Ceska bullet which was recovered by the police. That in the process, he lost Kshs 10,000 and his Samsung phone which he later identified at the police station. He pointed out in cross examination that he interacted with the 4th accused repeatedly who was not masked during the incident, had introduced the gang as “wakora” and made threats pointing a pistol at him if they failed to cooperate. He pointed out that he readily identified the 4th accused because he was not masked and the place was well lit with fluorescent bulbs, two at the gate and one at the entrance of two houses. He later participated in the identification parade and identified the 4th accused whom he described as having been armed with a gun, most talkative and appeared to be the commander of the gang.
19. PW2 CPL Gabriel Rotich attached to DCI Kiambu learned of the robbery incident that night and led investigations where they arrested 2nd accused who led them to the 1st and 3rd accused who also led them to the 4th accused who availed himself and was arrested after being lured by the first three. That at the house of the 1st and 3rd accused they recovered assorted goods. A Samsung phone which was later produced as exhibit was recovered from the 4th accused from his trouser pocket upon his arrest. That a Ceska bullet caliber 9mm was recovered at the scene produced as exhibit 3. He also organized for an identification parade where the 4th accused was identified.
20. PW3 IP Alloyce Onyango also attached to DCI Kiambu was tasked to organize for the 4th accused the ID parade on 7th June 2017 where the 4th accused was identified.
21. PW4 Rashid Ibrahim attached to Kiamumbi Police post testified that while at the station on 25th May 2017 at around 9.30pm he received a distress call of robbery at Juba Road Kiamumbi area. That they proceeded to the scene and confirmed that the robbery had taken place and recovered a bullet ceska 9mm at the scene which was handed over to the IO. That the complainant also reported lost cash and a phone.
22. At the close of the prosecution case the four accused were placed on their defence. DW1 Samuel Muchiri Njeri (1st accused) testified that he was arrested on 3rd June 2017, presented at Kiambu police station and later charged with the offence of robbery. That he was neither identified or mentioned by any witness.
23. DW2(4th Accused) the Appellant testified that he was arrested on 4th June 2017 while in the course of his business of collection of scrap metal while he was on a boda boda. He was stopped by police officers, searched, taken to his house but no recoveries were made. That he was later arrested and charged with the offence. That he was identified at the identification parade by a stranger and he maintains that he is innocent.
24. The offence for which the Appellant was convicted is robbery with violence contrary to section 296(2) of the *Penal Code*. As was stated in the case of *Johanna Ndung'u v Republic*, Criminal Appeal No 116 of 2005, (unreported) sets out the ingredients which must be proved are:
 - i. If the offender is armed with any dangerous or offensive weapon or instrument, or;
 - ii. If he is in the company of one or more other person or persons, or;



- iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.
- so that proof of one ingredient is sufficient to sustain a conviction under Section 296 (2) of the *Penal Code*.
25. Under the same section, the punishment for robbery is:
- i. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
 - ii. 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 before 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
26. It is also crucial that for a case of robbery with violence the assailant must be positively identified as was held in the case of *Oluoch v Republic* (1985) KLR 549 as an extra caution, it is crucial in a criminal trial that the requirement to prove in addition to there being one of the set out the ingredients of robbery with violence is the need to positively identify the assailant/s in question.
27. Having stated the above, this court will proceed to evaluate the prosecution evidence to ascertain whether the required standard of proof was attained. It is not in doubt that the incident of robbery occurred on the night of 25.7.2017 at around 9pm where PW1 and his wife were attacked by a gang of six men at their compound, were assaulted, threatened and cash and a Sumsung phone stolen as was narrated by PW1 and corroborated by PW2 and PW4.
28. The issues at hand are therefore, who were the attackers and what did they do? I will start by stating the actus reus which comprises the actions giving rise to the offence of robbery with violence. From the evidence adduced, other than the complainant being robbed of his phone and cash of Kshs 10,000, the attackers were six in number, they were armed with a pistol leaving behind a live bullet which was recovered, used threats and actual violence upon PW1 and his wife.
29. The mobile phone make Samsung J7 IMEI 35477208xxxxxx was later recovered from the appellant and produced as exhibit 1 by PW2 during the trial. A Ceska bullet 9mm was also recovered from the scene and produced as exhibit 3 by PW2 during the trial.
30. From the above, it is clear that the Appellant was in the company of more than one other persons, who were armed with a dangerous weapon to wit, a pistol, threatened the victims and used actual violence, which meets the threshold for robbery with violence as provided in section 296(2) of the *Penal Code*.
31. The next question to tackle is who were the attackers which leads to the issue of identification. PW1 testified that he was able to identify the Appellant 4th Accused at the ID parade. He stated categorically that the Appellant was not masked and there was sufficient lighting at the scene during the incident which he described as fluorescent bulbs, two at the gate and one at the entrance of two houses. He also pointed out in cross examination that he interacted with the Appellant repeatedly who introduced the gang as “wakora” pointing a pistol at him and later at his wife threatening to shoot if they failed to cooperate. That the appellant appeared to be the commander of the gang as he was issuing the commands. The witness described the appellant as tall, had a big head and with sharp eyes.
32. The identification of the Appellant is corroborated by the fact that he was found in possession the complainant’s phone shortly after the incident which places him at the scene of the crime. This demystifies the allegation that the court relied on the evidence of a single identifying witness.



33. The particulars of the parade are corroborated by PW3 who conducted the ID parade on 7th June 2017 pursuant to instructions by PW2 who was the Investigating Officers. The parade was held behind the report office where the 4th Accused was identified by touching. The witness stated that he had no knowledge of any threats to the 4th accused/ Appellant who participated willingly and signed the form in approval. The parade form was produced as exhibit 2. This court takes cognizance that it had no opportunity to see and hear the witnesses testify including perusal of exhibits which advantage the trial court had. PW3 who conducted the ID parade and produced the ID parade form as exhibit 2 was categorical that the parade was conducted on 7th June 2017. The court also takes cognizance that the trial took place in 2019 two years after the incident and the witnesses may confuse dates in the absence of a refresher.
34. Other than the identification of the 4th Accused, he was also found in possession of the stolen mobile phone of the complainant in his pocket in the same night of the incident upon his arrest. PW2 narrated how the 1st, 2nd and 3rd accused assisted in the arrest of the 4th accused by luring him that there was a job and he showed up at the roadside only to be arrested with the stolen Samsung phone in his pocket. The doctrine of recent possession cannot be farfetched in this scenario where the Appellant is placed the scene of crime.
35. The Court of Appeal summarized the essential elements of the doctrine of recent possession in *Eric Otieno Arum v Republic*, CA E054 of 2023 where the court stated that
- “In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must have been positively proved. In other words, there must be conclusive proof that the property firstly, was found with the suspect, secondly is positively the property of the complainant, and lastly that the property was stolen from the complainant.”
- In the instant case
- The prosecution established the fact of theft and the fact of recent possession by the accused of the stolen goods to wit, the complainant’s phone then, in the absence of any evidence to explain how the accused obtained possession and based on the circumstances the convicted the appellant.
36. Concerning the time of the incident, PW1 testified that it was around 9 pm after he came from work. Pw2 stated that he picked the information about the incident on radio communication about 11pm while PW4 testified that while on duty at Kiamumbi police station, they got a distress call of robbery Juba Sreet within the same area at about 9.30pm. I do not find the discrepancy of around 10.30 pm mentioned in the charge sheet too far from the incident because all of them are an estimation.
37. On variance between charge and evidence, and amendment of charge, section 214 (2) of the *Criminal Procedure Code* provides:
- Variance between the charge and evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.
38. The charge sheet states several types of crude weapons including a pistol whereas in evidence, the witness was categorical about the 4th Accused being armed with a pistol but in the end, it was a live Ceska bullet that was recovered at the scene. The legal threshold under section 296(2) is the presence



of two or more other people or possession of crude weapon(s) or threat and /or use of violence. The presence of any or all of them qualifies. As such I am satisfied that the threshold for the conviction under the offence for robbery with violence was met.

39. On finding on evidence when reversible by reason of error or omission in charge or other proceedings the Criminal Procedure Code provides under section 382 that:

“Subject to the provisions here before contained, no finding, sentence or order passed by a court of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgement or other proceedings before or during the trial or in any inquiry or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice.

Provided that in determining whether an error, omission, or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

In this regard, the contention by the Appellant that the details in the charge sheet were at variance with the evidence that obtained cannot stand. In any case the trial court finding did not occasion any injustice.

40. I concur with the trial court that actual violence was not proved to the required standard because none of the parties produced a p3 form or a medical report to prove any injuries. However, that does not take away the presence of all the other elements including the pistol which was evidenced by the testimony of the key witness and the recovery of a live bullet Ceska 9mm calibre at the scene which was produced as exhibit 2.
41. In criminal cases, the case of R v Turnbull [1977] QB 224 (CA) provides that whenever the case against an accused depends wholly or substantially on the correctness of an identification of the accused that the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting. My analysis of the trial court judgement is that the court did not entirely rely on the identification by the witness but additionally, relied on the fact that the appellant was found in possession of the complainant’s phone soon after the incident which placed him at the scene of crime. Besides, the identification process was watertight leaving no room for doubt that the appellant was positively identified by the witness including the role that he played during the incident.
42. Based on the above this court finds that the evidence adduced was beyond reasonable doubt and that the conviction of the offence of robbery with violence contrary to section 296(2) was safe. This court hereby upholds the judgement of the trial court delivered on 25th May 2020.
43. Upon conviction under the above stated section, the trial Court sentence of 30 years discounted to 27 years was in line with the provision of the law, Article 165(3)(a) of the Constitution, the Supreme court finding in Muruatetu Case No 15 of 2015 and the Sentence Policy Guidelines. The Sentence of 27 years imprisonment is therefore upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF NOVEMBER, 2024

HON. T. W. OUYA

JUDGE

ROA 14 days.

The Appellant Mr. James Juma Makokha



N/A for the State /Respondents

Court Assistant: Martin

