



**Mwaniki v Republic (Criminal Appeal E045 of 2024)
[2024] KEHC 14466 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14466 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E045 OF 2024
LM NJUGUNA, J
NOVEMBER 20, 2024**

BETWEEN

CHARLES KITHAKA MWANIKI APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising from the decision of Hon. S.K. Ngii (PM) in the Principal Magistrate's Court at Siakago Criminal Case No. E991 of 2022 delivered on 16th April 2024)

JUDGMENT

1. The appellant filed a petition of appeal dated 07th May 2024 seeking for orders that the appeal be allowed, the conviction be quashed, the sentence imposed be set aside and the appellant be set at liberty. The appeal is premised on the following grounds:
 1. That the learned trial magistrate erred in law and fact by disregarding the appellant's defense without giving cogent reasons, which defense was plausible and impeached the prosecution's case;
 2. That the learned trial magistrate erred in law and fact by failing to consider the appellant's mitigation that he was a first offender;
 3. That the learned trial magistrate erred in law and fact by basing the conviction on the uncorroborated and contradictory testimony of the complainant;
 4. That the learned trial magistrate erred in law and fact by convicting the appellant based on evidence that was marred with inconsistencies, contradictions and doubts; and
 5. That the learned trial magistrate erred in law and fact when he failed to scrutinize the credibility and integrity of the prosecution witnesses.



2. The appellant was charged with the offence of robbery with violence contrary to 296(2) of the Penal Code. The particulars of the offence are that on 26th September 2022 at Kageri area in Mbeere North sub-county within Embu County, the appellant, jointly with others not before court, while armed with crude weapons namely panga and an axe, robbed a motor vehicle KBV 838P make NZE and a mobile phone make Oppo, the property of Faith Njoki Makenge, all valued at Kshs.664,000/= and immediately after the time of such robbery, wounded the said Faith Njoki Makenge.
3. The appellant pleaded not guilty to this charge and the plea was duly entered. The matter went to full hearing.
4. PW1 was the complainant who stated that on the night of the incident at around 3:40AM, she was in her house when the appellant and others broke in. That the appellant was not wearing a mask unlike the others. That the appellant hit her with a piece of wood and demanded money from her. She told him that she is a widow and did not have any money and so they took her phone and car keys. She showed them the way out of the house and they took the car and abandoned it at Kiringa without the key.
5. She testified that she was too shocked to make any phone call but later on, her brother took her to hospital and they reported the incident to the police. That 2 months after that, she was called by the police to identify the suspects through an identification parade and she identified the appellant easily since he was not wearing a mask that night. On cross-examination, she stated that the robbers accessed her house through a window by cutting the grills. That the chief visited the scene with the police and the motor vehicle was taken to Karurumo Police post using the spare key that she had.
6. PW2 was John Mwaniki Makenge, retired chief, Riundu sub-location who stated that a village elder called him to inform him that PW1, his sister, had been attacked by robbers. That he went to her house and she explained to him what had happened. PW1 was in a state of shock and had an injury on her head and they took her to hospital. He stated that the OCS visited the scene and took photographs. Later, one person named Kennedy informed PW1 that her motor vehicle had been spotted at Kiringa Market and they went with the police and recovered the vehicle and drove it to Karurumo Police Station.
7. PW3 was C/P Ann Kamama Samandi who testified that she conducted the identification parade where the appellant was identified. She produced the Identification parade form and stated that the appellant was satisfied with the manner in which the parade was conducted.
8. PW4 was John Mwangi of Mbeere District Hospital who stated that he treated PW1 who presented with a minor cut wound and bruises on the head and her occipital region was swollen and tender. That the weapon used was blunt and he classified the degree of injury as harm. He produced the P3 form as evidence.
9. PW5 was PC Thomas Kiplimo who stated that he was assigned to investigate the case when PW1 reported it. That PW1 had been robbed by the appellant and others and she was able to identify two of them. The suspects were apprehended and charged with the offence. On cross-examination, he stated that he did not visit the crime scene but other officers did. That the woman who was found with the stolen phone was released as she had told the police that she had found the phone at her farm and she gave it to her child to use.
10. At the close of the prosecution's case, the court found that the appellant had a case to answer and thus placed him on his defense.
11. DW1, the appellant, stated that he is a businessman and he buys fruits and sells them in Mombasa. That he started buying the fruits on 24th September 2022 and finished on 26th September 2022 at 5PM. That he released his handyman and went home where he stayed the whole night. He denied being at



- the crime scene or being involved in the alleged incident. On cross-examination, he stated that it was his first time to deny his involvement in the crime. That PW1 identified him through an identification parade and that she did not have a reason to implicate him.
12. DW2 was Loise Njeri Wanjiru, the appellant's wife, who stated that on the day of the incident, the appellant went to finalize harvesting fruits by himself even though she had gone with him the 2 previous days. On cross-examination, she stated that the appellant left home at around 8PM.
 13. DW3 was Beatrice Ngai Mati who stated that the appellant had been helping her to harvest fruits for 3 days starting 24th September 2022 and the night of 25th September, the appellant slept at home. On cross-examination, she stated that she could not account for the appellant's whereabouts on the night of the incident.
 14. After close of the defense case, the trial court considered the evidence and found the appellant guilty and it convicted him. The appellant was sentenced to 20 years imprisonment.
 15. The appeal herein was canvassed by way of written submissions.
 16. The appellant submitted that by the time the identification parade was being conducted, their photos had been doing rounds in the media and so it was easy to implicate him. That the appellant was alleged to have been in communication with the other suspects but no call data was produced to prove this. That the prosecution did not produce photographs of the allegedly stolen motor vehicle as evidence nor was the allegedly stolen phone produced as evidence. He argued that the conviction is not safe as there is the possibility of error. He relied on the trial court's judgment where the court admitted that the investigating officer's evidence was little on the subject. He urged the court to reconsider the evidence before the court and make its own findings as was stated in the case of *Okeno v. Republic* (1972) EA 32.
 17. In its submissions, the respondent placed reliance on section 296(2) of the Penal Code and the cases of *Paul Njoroge Ndungu v Republic* [2021] KEHC 1052 (KLR) and *Dima Denge Dima & Others vs Republic*, Criminal Appeal No. 300 of 2007 and stated that it is enough to convict if one of the 3 elements of the offence are proved. That the appellant was positively identified as the perpetrator because he was not wearing a mask like his counterparts. It relied on the case of *Philip Nzaka Watu v Republic* [2016] KECA 696 (KLR) for its argument that whatever contradictions in the case are not material to discredit the prosecution's case.
 18. That the court analyzed the evidence on identification of the appellant and was satisfied that the appellant was properly identified by the complainant. That the alibi defense was raised too late in the day and it did not hold water. On the issue of sentence, the respondent relied on the case of *Bernard Gacheru v. Republic* (2002) eKLR and stated that the sentence meted out by the trial court is based on correct principles of the law and the appellant has not given this court reasons to review it.
 19. From the grounds of appeal and the submissions made, in my view, the issues for determination are as follows;
 1. Whether the offence was proved beyond reasonable doubt;
 2. Whether the sentence should be reviewed.
 20. It is the role of this appellate court to re-examine the evidence to reach its finding. This was stated in the case of *Kiilu & Another vs. Republic* [2005]1 KLR 174, where the Court of Appeal held:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the



evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

21. On the issue of whether the offence was proved beyond reasonable doubt, I wish to discuss the elements of the crime itself as provided for under section 296(2) of the Penal Code. It provides:

"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."

22. In the case of Charles Mwai Kimani v Republic [2022] eKLR the court cited the case of Jeremiah Oloo Odira v Republic [2018] eKLR where the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence 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.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

- i. The offender is armed with any dangerous or offensive weapon or instrument, or
- ii. The offender is in the company of one or more other person or persons, or
- iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person"

23. If any of these elements is proved to the required standard, the appellant will be found culpable, given the wording of the relevant provision. This was the position of the court in the case of Republic v. Dima Denge & Others (2013) eKLR where the court stated:

"The elements of the offence under Section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction. This was considered at length by this Court in Johana Ndungu v. Republic Criminal Appeal No. 116 of 1995 (unreported);

"In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or properly at or immediately after to further in any manner the act of stealing. Therefore,



the existence of the afore-described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.””

24. PW1 testified that on the night of the incident, she was listening to the radio when suddenly power went off and she heard sounds of someone trying to remove the window grill. Soon, she heard voices of people inside the house and she saw the appellant who was not wearing a mask. That the appellant hit PW1 with a piece of wood and then demanded for money from her. She told him that she did not have any money and he demanded for her phone and car keys. The stolen car and phone were later recovered. PW1 identified the appellant that night and through an identification parade conducted by PW3.
25. From her testimony, PW3 stated that the identification parade was conducted according to the law and the appellant was satisfied with the process. In this appeal, the appellant contests that he was properly identified and he argued that the trial court relied on the testimony of one witness. It is my view that the testimony is credible. In the case of *Joseph Ngumbau Nzalo vs. Republic* [1991] 2 KLR pg 212, the Court of Appeal observed thus:

“A careful direction regarding the condition prevailing at the time of identification and the length of time for which the witnesses had the accused person under observation, together with the need to exclude the possibility of error was essential.”
26. All these circumstances considered wholesomely prove that the appellant committed the offence while in the company of others. In his defense, the appellant stated that he was at home on the night of the incident but DW2, his wife stated that the appellant left home at 8PM and she couldn't account for his whereabouts. The trial court considered the testimony of the defense too, before convicting the appellant. In addition, PW2 testified that the stolen motor vehicle was recovered at a local market, having been abandoned. The overwhelming evidence shows that the appellant was involved in committing the offence.
27. There may have been inconsistencies in the testimony but the same do not go to the root of the charge and the testimony. In the case of *Erick Onyango Ondeng' v. Republic* [2014] eKLR the Court of Appeal cited with authority the Ugandan case of *Twehangane Alfred v. Uganda*, Crim. App. No 139 of 2001, [2003] UGCA, 6 where it was held:

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”
28. As to whether the sentence should be set aside, having convicted the appellant, the trial court sentenced him to 20 years imprisonment which is a departure from the mandatory death sentence prescribed in law. The trial court was guided by the Supreme Court decision in *Francis Karioko Muruatetu & Another v. Republic* (2017) eKLR (Muruatetu 1). In this case, the trial court already departed from the death sentence having exercised much leniency. It is my view that this court has not been given sufficient reasons to reduce that sentence any further below the prescribed death sentence.
29. Therefore, I find that the appeal lacks merit and the same is hereby dismissed.
30. It is so ordered.



DELIVERED, DATED AND SIGNED AT EMBU THIS 20TH DAY OF NOVEMBER, 2024.

L. NJUGUNA

JUDGE

