



**Mutinda alias Mrefu v Republic (Criminal Appeal E046 of 2021)  
[2024] KEHC 14241 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14241 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CRIMINAL APPEAL E046 OF 2021  
RK LIMO, J  
NOVEMBER 14, 2024**

**BETWEEN**

**PAUL MUTINDA ALIAS MREFU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant herein Paul Mutinda alias Mrefu was charged together with 2 other persons with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code.
2. The particulars of the charge were that on 30th July 2016 at B.L.I area in Kitui Township within Kitui county jointly the appellant jointly with others not before court being armed with dangerous weapons namely Panga, robbed Evans Onyaro off his mobile phone make Tecno – N7 IMEI No. 35865xxxx – 53xxx, one black bag with assorted clothes, one brown bag with laptop make Lenovo, one brown wallet with Kshs. 25,000/=, ID Card No. 107xxxxxx, one NHIF card, one power bank make Sanger and one KMTC cash book all valued at Kshs. 80,000/= and immediately at the time of such robbery wounded the said Evans Onyaro (the complainant).
3. The appellant and his 2 accused also faced an alternative count of handling stolen good contrary to Section 322 (2) of the Penal Code but the alternative count is not relevant to this appeal because he was found guilty of the principal charge.
4. The appellant who was the 1<sup>st</sup> accused at the trial was found guilty of the main charge and convicted. He was sentenced to suffer death on 8<sup>th</sup> December 2021. His two co-accused were acquitted after the trial court found no evidence to convict them.
5. A brief summary of the prosecution’s case at the trial indicates that the complainant in the case Evans Oyaró (PW2) an accountant at KMTC Kitui and a resident of BLI estate within Kitui Township was attached on 30<sup>th</sup> July 2016 at around 3.00 am outside his gate as he was heading to Kisumu for college



- games. He testified that he was hit with a sharp object on his head and as he tried to defend himself using his hand, the hand was hit and broken in the process. He stated that he lost consciousness as he screamed for help and felt someone removing his jacket.
6. He stated he regained his consciousness at the hospital. He recalled that the scene of the attack was well lit and identified the appellant as one of the attackers because of his unique hairstyle.
  7. He stated that he lost 2 bags, clothes, cash, a laptop, track suits, books, t-shirts, mobile phone, wallet containing Kshs. 25,000/=, a power bank and laptop.
  8. He stated that he reported the case at Kitui Police station on 14<sup>th</sup> August 2016 upon being discharged from Hospital and recalled that his uncle namely Elcana Mogire, a police officer (PW3) called him and told him that some of his stolen items had been recovered.
  9. He identified the following items at the trial namely;
    - i. A mobile phone later tendered as Ex 4
    - ii. Receipt for the said phone PEX 5
    - iii. Power bank PEX 6
    - iv. Wallet
    - v. Mouse for the laptop
    - vi. Phone charger
    - vii. Black bag
    - viii. Green track
    - ix. Black wallet
    - x. Blood stained T-shirt
    - xi. Laptop receipt
  10. Peter Wambua Muthengi (PW1) a Clinical Officer testified and confirmed that the complainant suffered head injuries on the head and broken limbs. He tendered P3 form as PEX1. He also tendered CT scan from Nairobi West Hospital and x-ray films as EX 2 and 3 x-ray films as P EX 3(a) (b) (c) & (d).
  11. Sgt Elkana Mogire (PW3) testified on the material date at around 3.30am he heard screams and when he rushed to find out, he realized that the victim was his nephew, the complainant in the case. He stated that he assisted the complainant by controlling the bleeding before rushing him to hospital for medical attention.
  12. He stated that later the complainant's phone was tracked and traced to Mutomo where, together with CPL Japhet Kitia went and arrested a suspect (Benson Kimanzi – 2<sup>nd</sup> accused in the case). He stated that the suspect led them to the house of the appellant where they recovered a green track suit, a bag, khaki trouser, a lap top mouse, power bank and Samsung charger. He tendered the mobile phone recovered as PEX 4, power bank as PEX2, Assorted clothes PEX 22 and inventory of things recovered as PEX 23, a receipt for Tecno mobile phone PEX26.
  13. The officer stated that the appellant was shot in another robbery incident after the robbery of the complainant. His evidence was that the 2<sup>nd</sup> accused led them to where the appellant lived from they



- recovered stolen items belonging to the appellant. He also stated that they recovered a blood stained Panga.
14. He further clarified that members of the public led them to the house of 3<sup>rd</sup> accused from whom they recovered power bank which was tucked in his trouser and from which he was charging his phone. The witness stated that the members of public knew accused 3 as the person who took the appellant to the house he was renting. He clarified that the blood stained Panga was recovered from the house of accused 3.
  15. The trial court evaluated the evidence tendered and found that the complainant positively identified the appellant at the scene because the lighting at the scene was sufficient for positive identification. The trial court further found that PW3 recovered the stolen items from the appellant's house and the appellant did not deny the fact. The court found that the items were positively identified and linked to the appellant and because they were recovered a few days after the robbery incident. The appellant was found guilty as charged. He was convicted as observed above and sentenced to death.
  16. The appellant felt aggrieved and filed this appeal raising the following grounds namely;
    - i. That the prosecution's case was not proved beyond doubt.
    - ii. That the case was never investigated.
    - iii. That the trial court erred by convicting him against the weight of evidence.
    - iv. The basis of conviction was inconsistent with evidence tendered which he claims were contradictory.
    - v. That identification was not proved.
    - vi. That his defence was ignored.
    - vii. That the trial magistrate erred by shifting the burden of proof to him.
    - viii. That his name was never given in the initial report at the police and no identification parade was conducted.
    - ix. That the tendency was manifestly excessive.
  17. In his written submissions, the appellant has raised new grounds in what he terms amended grounds albeit without leave of this court. The same are incompetent and improper because the appellant ought to have sought leave pursuant to Section 350(b) of the Criminal Procedure Code before raising the new grounds.
  18. He submits that the prosecution's case relied on the evidence of 3 witnesses and contends that none witnessed the commission of the offence.
  19. He submits that the complainant was taken to hospital while unconscious and therefore could not have identified his attackers. He submits that the appellant did not know him and could not have identified him because he was hit on the head as he locked his gave.
  20. He submits that the allegations that he was found with stolen items was not true because they traced to Benson Muthoka who was co-accused. He faults the police for colluding with the said Benson Muthoka to fix him.



21. He submits that there was no prove that he sold the stolen phone to the 2<sup>nd</sup> accused (Benson Muthoka). He submits that he could have been responsible if he was the one leading the police to his house. He submits that there was no evidence from the landlord to prove that he was the tenant in house No. 7.
22. He submits that Benson Muthoka implicated him so that he could get his freedom and has urged this court to make that inference.
23. He submits that the prosecution failed to link him with the offence. He contends that the doctrine of recent possession did not apply to his case because he alleges to have been absent when the stolen items were recovered.
24. On sentence he submits that the death sentence was too excessive and contrary to Article 25(e) of *the Constitution*. He submits that he was entitled to benefit from less severe sentence.
25. This court has carefully considered this appeal and the grounds advanced through written submission. The respondent for the record did not file any rival submissions to oppose this appeal. That notwithstanding, I am inclined to determine it on the merits.
26. The role of this court as a first appellate court is to re-evaluate the evidence tendered during trial and draw own conclusions noting that unlike the trial court I do not have the benefit of having seen the witnesses testify first hand. I will therefore give due consideration to that fact.
27. This appeal raises two related issues for determination namely;
  - i. Whether the appellant was positively identified.
  - ii. Whether the prosecution's case was proved against the appellant beyond reasonable doubt.
28.
  - (i) Whether the appellant was positively identified  
The appellant has submitted that the complainant was suddenly and viciously attacked and had no time to identify his attackers because he fell unconscious after the attack.
29. This court has considered the evidence in regard to identification and finds that the trial court in its judgment delivered on this issue at length. There is no dispute that the complainant was attacked outside his gate at around 3.00am. He told the trial court that the gate was well lit by street lights and that the houses next to the gate also had security lights on. He stated the robbers were 3 and "he could see clearly" that one had plaited his hair. Apparently the appellant had shaved and plaited his hair in a box style and that is what made him stand out from the attackers.
30. It is true that the complainant did not know the appellant and no ID parade was conducted by the police after the complainant was discharged from hospital. That could have helped in adding weight on the positive identification of the appellant. I am not however, persuaded by the appellant's contention that because the complainant became unconscious as a result of the vicious attack he could not recognize who had attached him. It is possible that before he fell unconscious, he had sufficient time to see who was attacking him. He stated that he even tried to defend himself using his hands but the hand was broken in the process. He was in a position to see who was attacking him and the images of the people who attacked could have remained even after falling unconscious.
31. This court has seen a photograph of the appellant and his co-accused which PW3 said was recovered in the house of the appellant. Though the photograph was not properly marked, the snap shows that the appellant spotted the very same hairstyle that helped the complainant identify him. The description



given by the complainant (PW1) in his testimony shows a striking similarity to the appearance of the appellant in the snap.

32. The more significant aspect of positive identification of the appellant was the recovery of stolen items in his possession in house No. 7. This element relates to the 2<sup>nd</sup> issue for determination.

33.

(ii) Whether the prosecution's case was proved beyond reasonable doubt.

The appellant submits that the prosecution's case was not well investigated and though to some extent that is true, this court finds that the evidence tendered by the prosecution in regard to the appellant was weighty could not be disregarded. There was of course need to carry out ID parade because the complainant did not know his attackers. The Panga recovered from the house of accused 3 was never taken for forensic analysis and not produced.

The police led by PW3 however, did a commendable job of tracing the complainant's mobile phone which provided crucial leads that led to the arrest of the appellant and his accomplices. Though the Investigating Officer could have done better by availing an expert witness from service provider (Safaricom) to give reliable and admissible evidence regarding the movement and use of the complainant's phone, I still find that the evidence tendered was sufficient to show that the doctrine of recent possession applied.

34. The prosecution's case on this doctrine relied on the evidence of PW2 and PW3. PW3 testified that he was able to track the complainant stolen phone to the 2<sup>nd</sup> accused (Benson Muthoka Kimanzi) at Mutomo.

35. He stated that accused 2 told him that he purchased the phone from the appellant and led him to where the appellant lived which was House No. 7. It is there that most of the stolen items were recovered. PW3 was able to identify a green track trouser as belonging to the complainant who was his nephew and stated that he had stayed with his nephew for 3 years and hence the familiarity with the clothes. The recovered mobile phone was positively identified by the complainant and was tendered as PEX 4. The other recovered items to wit the green track suit (PEX 10), black bag (PEX 10), laptop mouse and other assorted items were all positively identified by the complainant in his evidence.

36. The recovered items were recovered from the house occupied by the appellant just 2 weeks after the robbery incident. In his written defence, the appellant did not deny that he was a tenant in House No. 7 in Mutomo. He also did not offer any explanation on how he came into possession of the stolen items.

37. The 2<sup>nd</sup> accused Benson Muthoka in his defence corroborated the evidence of PW3. He stated that the appellant sold him the stolen phone and when the police went to him upon tracking the stolen phone, he co-operated and led the police to where the appellant lived (House No. 7) and it is there that the other stolen items were recovered. The 2<sup>nd</sup> accused provided a positive link between the stolen phone (PEX4) and other items to the appellant. The doctrine of recent possession applied positively and on that fact alone I find that the conviction of the appellant was safe.

38. There was evidence that the appellant had been shot in a subsequent robbery incident but that fact was simply a coincidence. When police were pursuing leads from the stolen phone and eventually recovering it, it just happened that the previous day another victim had been robbed and one of the attackers shot happened to be the appellant. That is why he was already in custody when the recovery of stolen items was done.



39. This court is not persuaded that his defence was disregarded. His unsworn defence was brief and only related to the subsequent robbery incident where he was shot and arrested. He offered no explanation on how he came into possession of stolen items 2 weeks after they were robbed from the complainant.

40. This court finds that the prosecution's case against the appellant was proved to the required standard. The trial court was correct to render conviction based on the evidence tendered. I have re-evaluated the evidence as shown above and I have come to the same conclusion.

In the premises this court finds no merit in this appeal on conviction.

41. On sentence, this court finds that going by Supreme Court in the case of Muruatetu 3, the trial court's hands were tied by statute. In any event, the appellant says that the death sentence has since been commuted to life sentence.

In the premises this court finds no merit in this appeal. The same is disallowed. The conviction and sentence are upheld.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

