



REPUBLIC OF KENYA



KENYA LAW
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**Ouma v Republic (Criminal Appeal E034 of 2024)
[2024] KEHC 13964 (KLR) (12 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E034 OF 2024
KW KIARIE, J
NOVEMBER 12, 2024**

BETWEEN

TIMON OKINYI OUMA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal Case No. E268 of 2022 of the Chief Magistrate's Court at Homa Bay by Hon. J.S. Wesonga – Principal Magistrate)

JUDGMENT

1. Timon Okinyi Ouma, the appellant herein, was convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code.
2. The particulars were that on the 2nd day of February 2016, at Mbita Township, Gembe West Location, in Mbita sub-county of Homa Bay County, jointly with another not before the court while armed with metals, robbed Gilbert Onyango Gor, three cameras, a pair of binoculars, one red bag, two mobile phones and two shaving machines and immediately before the time of the said robbery, killed the said Gilbert Onyango Gor.
3. The appellant was convicted and sentenced to forty years imprisonment. He was aggrieved and filed this appeal. J.O. Magolo represented him, advocate. He raised the following grounds of appeal:
 - a. That the learned trial magistrate erred in law fact in proceeding with a trial on the basis of a charge which is defective.
 - b. That the learned trial magistrate erred in law and fact in finding that the offence charged had been proved, yet there was no eye witness.
 - c. That the learned trial magistrate erred in law and fact in failing to note that there was no evidence showing the time or period the alleged theft (if any) may have taken place.



- d. That the trial magistrate erred in both law and fact, convicting the appellant relying on the doctrine of recent possession without considering that the prosecution witnesses offered inconsistent statements on the items alleged to have been stolen and found in the appellant's possession.
 - e. That the trial magistrate erred both in law and fact in finding that the burden and standard of proof were not discharged and the prosecution case was not proved beyond reasonable doubt as provided under the law, thereby rendering the conviction unsafe and could not be supported having regard to the evidence.
 - f. The trial magistrate erred in law and fact by convicting the appellant without considering that no weapon was presented as evidence to the court linking the accused person with the offence.
 - g. That the trial magistrate erred in law and fact in holding that the prosecution had proved the alleged stolen items belonged to the deceased when only one receipt was tendered to show/prove ownership of a camera that was not found to own the 2nd day of February 2016.
 - h. That the learned trial magistrate erred in law and fact in failing to make a finding and in inference about the failure to call the only witness said to be the star witness and eye witness even after time had been given to call him.
 - i. That the trial magistrate erred in law and fact by failing to find that the arrest and the search conducted on the appellant were in disregard of law and prejudicial to the rights of the appellant, and therefore of no legal effect and any evidence said to be inadmissible.
 - j. That the trial magistrate misdirected himself on law and fact when he failed to see the contradictions and discrepancies in the prosecution case, especially in linking the appellate to the attack.
 - k. That the sentence was manifestly excessive considering the age of the appellant, time taken in custody, and all the relevant facts.
4. The state opposed the appeal.
 5. As a first appellate court, I have thoroughly analyzed and evaluated all the evidence presented in the lower court. It is important to note that I did not see or hear any witnesses. In my evaluation, I will be guided by the influential case of Okeno vs Republic [1972] EA 32.
 6. Though it was contended that the charge was defective, it was not pointed out what the defect was. Upon my perusal of the charge, I find no defect. The appeal cannot turn on this ground.
 7. The appellant and another were employees of the deceased at his Mbita petrol station. On the 2nd day of February 2016, when Fredrick Otike Agenga (PW2), the appellant informed him that the deceased had left earlier with his friends. The appellant informed him he had an interview at Kisii. On the following day, he worked until 11 a.m. and left ostensibly for the interview. He did not return until he was arrested.
 8. After the appellant was arrested in Sirare at the Kenya-Tanzania border, some items of the deceased were recovered in his house. He led the police to where a safe had been discarded.
 9. in his defence, the appellant contended that he only worked for the deceased for three months in the year 2015.



10. The contention of the appellant that he worked for the deceased from March to May 2015 was displaced by the evidence on record. The evidence of Fredrick Otike Agenga (PW2) indicated that he was on duty on the 2nd day of February 2016 and part of the 3rd of February 2016 when he worked up to 11 a.m. This evidence and some other evidence on record left no doubt that his defence was not true.
11. The appellant's conduct after leaving his workplace was suspect. He had to be tricked by his accomplice to be arrested.
12. Although it was submitted that no inventory was made after recovering the deceased's items from the appellant's house, no explanation was tendered by the appellant as to how the items of the deceased found their way to his house. This was after contending that he worked for the deceased for only three months in 2015. Though he had no burden of proof, the prosecution had discharged their evidential burden.
13. Sergeant Michael Nyamboki (PW7) testified that after the arrest of the appellant and his accomplice, they led them to Caltex Petrol Station in Mbita and pointed out a hole filled with building materials. They recovered the deceased's safe from therein. The Court of Appeal in the case of *Court in Karukenya & 4 Others vs Republic*[1987] KLR458 held that the evidence of an accused that leads to the recovery of an exhibit is admissible.
14. Other than the evidence of recovery, the other evidence against the appellant is circumstantial. In the case of *Mohamed & 3 Others vs Republic* [2005]1KLR 722, Osiemo Judge restated what is circumstantial evidence as follows:

Circumstantial evidence means evidence that tends to prove a fact indirectly by proving other events or circumstances which afford a basis for reasonable inference of the occurrence of the fact at issue. The circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved.
15. After analyzing the evidence on record, I am satisfied that the learned trial magistrate's judgment was based on watertight evidence. The appeal lacks merit, and the same is dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 12TH DAY OF NOVEMBER 2024.

KIARIE WAWERU KIARIE

JUDGE

