



**Mohamed & 4 others v Republic (Criminal Appeal E002 of 2023)
[2024] KEHC 15906 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E002 OF 2023
DR KAVEDZA, J
DECEMBER 17, 2024**

BETWEEN

**YUSUF MOHAMED 1ST APPELLANT
SAID TWALIB ABDUL 2ND APPELLANT
JAFER ISMAIL 3RD APPELLANT
HARON SONOZ 4TH APPELLANT
ABDALLA KHASSIM 5TH APPELLANT**

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. E. Riany (S.R.M) on 4th September 2023 at Kibera Chief Magistrate's Court Criminal Case no. E128 of 2022 Republic vs Yusuf Mohamed and 13 others)

JUDGMENT

1. The appellants were charged with ten counts of the offence of robbery with violence contrary to section 295 as read with 296(2) of the Penal Code, and one count of the offense of resisting a police officer contrary to section 254(b) of the Penal Code. The appellants herein were each convicted for the offence of robbery with violence and sentenced to serve thirty (30) years imprisonment.
2. Being aggrieved, they filed the present appeal, challenging the totality of the prosecution's evidence against which they were convicted, stating that they failed to prove their case beyond reasonable doubt. They contended that the complainants failed to verify the identity of their alleged assailants. The sentence imposed was harsh and excessive. They urged the court to quash the conviction and set aside the sentence.



3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32).
4. The prosecution called five (5) witnesses in support of their case. PW1, Police Constable Tony, attached to Kibera Police Station at the material time, testified that on 13th January 2022, the Officer Commanding Station (OCS) received a report that gang members were harassing and terrorising members of the public attending a funeral. Acting on this report, PW1, along with PW2 and PW5, proceeded to the scene and arrested several suspects.
5. Their initial operation at Makina roundabout resulted in the arrest of nine suspects. During this arrest, they recovered a panga (machete) and two mobile phones. Subsequently, they arrested an additional five suspects at a house in Lindi, where three more mobile phones were seized. At the police station, the complainants identified their respective phones and provided receipts as proof of ownership.
6. PW2, Police Constable William Ayungi, corroborated the testimony of PW1. He elaborated that during the first arrest, they recovered various weapons, including pangas, metal rods, and a hammer, along with a Tecno mobile phone and a Huawei mobile phone. During the subsequent arrest of the second group of suspects, they recovered three phones: two Tecno phones and one Infinix phone. The suspects were unable to provide proof of ownership of these phones. The first appellant, in particular, claimed ownership of the Infinix phone but failed to substantiate this claim.
7. PW3, Police Constable David Kelong, recalled that during the initial arrest, approximately 200 young individuals were present at the scene. Due to the large crowd, he could not ascertain whether the recovered items had been discarded by the arrested appellants or by other youths in the vicinity.
8. PW4, Cynthia Kwamboka Moraa, testified that on 13th January 2022, at around 2:00 p.m., she was confronted by a group of approximately 25 to 31 young males wielding pangas and metal rods. They accosted her and her companions, threatening harm unless they surrendered their possessions. Under duress, PW4 handed over her Tecno mobile phone and Kshs. 500. She was unable to identify the attackers' faces because they wore caps. During cross-examination, she confirmed that no identification parade had been conducted. She later identified her phone at the police station.
9. PW5, Police Constable Mohammed Abdi, testified that he participated in the operation alongside PW1 and PW2. He confirmed that during the first arrest at Makina roundabout, they apprehended nine suspects and seized weapons, including pangas, metal rods, and a hammer. Additionally, they recovered two mobile phones. He further testified that during the second arrest in Lindi, they apprehended five suspects and recovered three more mobile phones.
10. PW6, Corporal Oreu Ngererechi, the investigating officer, testified that he oversaw the investigation and confirmed the arrests made by PW1, PW2, and PW5. He produced receipts provided by the complainants, which verified the ownership of the recovered mobile phones. He stated that the first group of nine suspects was arrested in the afternoon at Makina roundabout, while the second group of five suspects was arrested later in a house in Lindi. This second arrest was based on a tip-off from members of the public. One of the complainant's phones was recovered during this operation.
11. During cross-examination, PW6 explained that the complainants did not appear in court due to alleged threats and fear for their safety. He reiterated that the arrests and recoveries were consistent with the reports received and the evidence collected.



12. In their respective defences, the appellants gave sworn evidence. The first appellant testified that he was arrested in a pub after police officers invaded the premises. The second appellant testified that he was arrested on 21st January 2022 at 1 am while asleep at home. Zena Saidi the grandmother corroborated this evidence together with the Twalib Abdul Omar the father. The 3rd appellant testified that he was arrested at home with the 4th appellant Abdalla Khasim when they were arrested as they slept. He stated that on the day of the incident, he was at school. The 4th appellant also testified that he was at home during his arrest so was the 5th appellant. They all maintained their innocence.
13. The key ingredients for a robbery with violence charge are found in section 296(2) of the Penal Code. It provides as follows-

“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”.
14. As regards the offence of robbery with violence, the issues for consideration by this court are whether the appellants were positively identified and whether the prosecution did prove its case beyond reasonable doubt.
15. The prosecution’s case for robbery with violence is supported by multiple witness accounts; however, critical gaps weaken its overall strength.
16. PW1 (PC Tony), PW2 (PC William Ayungi), and PW5 (PC Mohammed Abdi) provide consistent evidence regarding the arrests of the suspects, the recovery of weapons (pangas, metal rods, and a hammer), and mobile phones. The arrests occurred at Makina roundabout and later in a house in Lindi. While the physical evidence suggests the suspects were armed, which is an essential element of robbery with violence under section 296(2) of the Penal Code, the connection between the suspects and the crime is tenuous due to identification issues.
17. PW4 (Cynthia Kwamboka Moraa), the complainant, testified that she was robbed under threat of violence by a group of young men wielding weapons. However, her inability to identify the assailants due to their caps, coupled with the lack of an identification parade, severely undermines her testimony. Identification is crucial in linking the suspects to the offence, and this failure creates reasonable doubt.
18. PW3 (PC David Kelong) further weakens the case by noting the presence of approximately 200 young individuals at the scene. This raises the possibility that the weapons and mobile phones could have been discarded by others in the crowd, making it unclear whether the arrested suspects were indeed the culprits.
19. PW6 (Corporal Oreu Ngerechei), the investigating officer, corroborated the sequence of arrests and recoveries, but his admission that the complainants failed to appear in court due to fear adds another layer of weakness. The absence of the complainants for cross-examination deprives the defence of an opportunity to challenge the identification of the recovered items.
20. The defence provided sworn testimony and alibis, asserting that the appellants were arrested in different locations or while asleep at home. These alibis were supported by family members, introducing further doubt.
21. In conclusion, while the prosecution presented evidence of weapons, stolen items, and arrests, the lack of positive identification, the ambiguity arising from the large crowd, and the absence of complainants



in court significantly undermined the case. These deficiencies create substantial doubt as to whether the appellants committed the offence of robbery with violence.

22. However, the fact that the appellants could not be properly identified does not mean that a crime was not committed. Section 179 of the Criminal Procedure Code empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The application of Section 179 was given by the Court of Appeal in the case of Rashid Mwinyi Nguisya and Another vs Republic [1997] eKLR which it was held: -

“In short this means that apart from recognizing that Section 179 sets out the principle of law applicable in a trial with respect to conviction for offences other than those charged, and that this general principle shall apply as such notwithstanding that Sections 180 to 190 deal with special cases in a trial.....Section 179 of the Criminal Procedure Code cannot be in derogation of the appellate powers of the High Court contained in Section 354(3) (a) of the same code.”

23. In my view, therefore, the issue of substituting an offence with the one for which the evidence is established is not an obvious case. The offence substituted must be cognate and minor to the offence that an accused was initially charged with.

24. The principles for application of the doctrine of recent possession are well known, and were set out in Arum v. R (2006) 1 KLR 233 as follows:

1. The property was found on the suspect;
2. The property was positively identified by the complainant;
3. The property was stolen from the complainant; and
4. The property was recently stolen from the complainant.”

25. The principle is that if recently stolen goods are found in possession of an accused who cannot explain his possession, there is a presumption that the person is the thief or handler of the stolen goods. In Chaama Hassan Hasa v. Republic (1976) KLR 6, 10, the Court (Trevelyan & Hancox, JJ.) put the matter as follows:

“[W]hat is generally referred to as the doctrine of recent possession, often expressed in this way: that where an accused person has been found in possession of property very recently stolen, in the absence of an explanation by him to account for his possession, a presumption arises that he was either the thief or a handler by way of receiving (though not by way of retaining). However, this doctrine does not apply to all cases. What has been laid down is that, where it is proved that property has been stolen and very soon after the stealing the accused has been found in possession of it, it is open to the tribunal of fact to find him guilty of stealing, or of handling it by way of receiving: see R v Seymour (1954) 38 Cr App Rep. 68;

26. It was the prosecution’s evidence that the appellants were arrested in a house where the complainant’s phone which had been stolen was recovered. The said phone was found in their possession and the complainant proved its ownership.



27. Although the appellants were not charged with the offence of handling stolen property the ingredients were outlined as hereunder in *Mungai v. Republic*, (2006) 2 KLR 262 as follows:

Under section 322(1) of the Penal Code (cap 63), a person handles stolen goods if (otherwise than in the course of stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.

28. In their respective defences, the appellants did not offer an explanation as to their possession of the stolen phone, the court may in accordance the court may properly infer guilty knowledge that the complainant's phone had been stolen. The appellants' respective alibi defences are in view of the overwhelming evidence of the prosecution witnesses who placed the phone in possession of the appellants who were arrested in a house together in Lindi is not acceptable, and must be dismissed.

29. The court, therefore, finds that the appellants had handled the phone otherwise than in the process of stealing knowing it to be stolen.

30. Pursuant to section 179 of the Criminal Procedure Code, I would, accordingly, find the appellants guilty of the offence of handling stolen property contrary to section 322 (2) of the Penal Code.

31. The appellants' conviction for the offence of robbery contrary to section 296(2) of the Penal Code is quashed and substituted with a conviction for the offence of handling stolen property contrary to section 322 (2) of the Penal Code, and for which the appellants are each sentenced to serve an imprisonment term for six years.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF DECEMBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant present

Mburugu for the Respondent

Achode Court Assistant

