Kathurima v Republic (Criminal Appeal E024 of 2024)
[2025] KEHC 14510 (KLR) (16 October 2025) (Judgment)

Neutral citation: [2025] KEHC 14510 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E024 OF 2024

AK NDUNG'U, J

OCTOBER 16, 2025

BETWEEN

DENNIS KATHURIMA ALIAS KAMAA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from Original Conviction and Sentence dated 08/04/2024 in Nanyuki CM Criminal Case No E168 of 2023– V. Masivo, SRM)

JUDGMENT

1. The Appellant, Dennis Kathurima Alias Kamaa (1st accused during trial) was convicted after trial of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars were that on the 31/01/2023 at Timau township, Buuri West Subcounty, Meru County jointly with another not before court robbed Newton Kimathi mobile phone make Infinix Hot valued at Kshs.18,000/-, cash Kshs.400/- and at the time of such robbery used actual violence against the said Newton Kimathi. On 08/04/2024, he was sentenced to ten (10) years imprisonment.
2. The Appellant was dissatisfied with the conviction and the sentence hence his appeal to this court. He filed a petition of appeal on 18/04/2024 challenging the conviction and the sentence on the following grounds;
    i. The learned magistrate erred by failing to note that the prosecution did not prove the case beyond reasonable doubt.
    ii. The learned magistrate failed to note that there was no identification parade that was conducted to positively identify him.
    iii. The learned magistrate failed to note that he was not placed at the scene of crime as the complainant gave conflicting testimony.

iv. The learned magistrate failed to appreciate that the case was full of contradictions, inconsistencies and disparities.

v. The learned magistrate failed to note that he was not found in possession of the said phone as PW3 said the phone was given to her by one Njoki, PW4 who got it from the 2nd accused.

vi. The learned magistrate erred quashing his alibi defence without cogent reasons and which was corroborated by DW3.

vii. The learned magistrate erred by failing to note that the sentence was manifestly harsh and exorbitant.

3. The appeal was canvassed by way of written submissions. He argued that the trial court rejected the complainant's evidence on identification at the scene due to contradictions. That PW1's evidence on his assault and theft of his phone and money left a lot to be desired as there were unfilled gaps that dented his credibility. He did not mention loss of money as he testified that he was so drunk to remember whether he had any cash and if he could not remember whether he had any cash, it cannot be said that he was sober enough to identify his attackers. That the question was whether he was robbed or was it a ploy to get his phone back after he willingly left it with the bartender following an unpaid bill. That there were inconsistencies as PW1 testified that he was robbed by 4-5 people whereas PW5 testified that PW1 reported that he was robbed by three people. The attack was on 01/02/2023 whereas the investigating officer testified that the matter was minuted to him on 31/01/2023 and he said on cross examination that he was not present when the matter was reported.

4. That PW5 confirmed that PW1 did not avail a purchase receipt for the phone. The P3 form was filled on 03/02/2023 raising a question why PW1 took 3 days after being issued with a P3 form. Further, there were no injuries observed apart from tenderness on the knee which could mean a drunken fall. That PW5 testified that PW1 led them to Spice bar where he identified Kamau alias Kamaa whereas PW3, the bartender did not testify that PW1 led the police to his arrest and did not state that he was arrested inside the bar raising the questions as to where he was arrested. That PW1 did not prove ownership of the phone as no ownership receipt was produced. Further, it was not clear how he was tied up to the phone that was taken from the pocket of PW4.

5. He submitted that PW1 produced a fake receipt hence the doctrine of recent possession could not apply as the prosecution failed to prove the real owner. There was evidence that the phone was retrieved from accused 2 and circumstantial evidence failed to prove that he was a guilty receiver or the person who stole the phone. Additionally, the prosecution failed to prove element of common intention between him and 2nd accused as the fact that they were familiar to each other did not create any nexus to link them as joint perpetrators. That the phone was recovered from accused 2 who could not explain why he was found with it. PW3 did not mention him and PW4 mentioned him as an afterthought during cross examination. That PW5 said he arrested him at Spice bar whereas PW3 said that PW5 was with the Appellant. PW3 did not state that he was arrested at the bar nor that he was present when the phone was handed over to her on 02/02/2023. She did not witness him being in company of accused 2 on the night she received the phone nor did she witness his arrest at the same place.

6. He submitted that his alibi defence was termed as an afterthought by the trial court raising a question at what stage in the trial was he supposed to raise his defence of alibi except as provided under Section 211 of the Criminal Procedure Code. That it was at this stage that he was offered a chance to raise his defence of alibi hence, the prosecution ought to have rebutted his defence by calling evidence failure to which his defence went unchallenged and the trial court absolved the prosecution of its legal burden.

Further, the trial court erred in dismissing his defence as an afterthought for raising it at the stage it should have been raised.

7. Regarding sentence, he submitted that though seemingly lenient, it was premised on mere suspicion and was not supported by concrete evidence.

8. In rejoinder, the Respondent's counsel submitted that all elements of robbery with violence were proved. That there could be no error in recognition as PW1 testified that he recognised him and referred to him as Kamaa among the four men that took his cap and even asked him to return his cap which shows that PW1 was well familiar with the Appellant and there would be no possibility of error in identification as this was a case of identification by recognition. Further, the doctrine of recent possession was applicable as the Appellant is the one who led the police to recovery of the stolen phone three days after the robbery. Addressing alleged contradictions in the prosecution's case, she submitted that PW1 was clear where and when he was robbed and by who and clearly stated that he was working on the night of 31/01/2023 and on 01/02/2023, he was robbed by the Appellant and his counterparts. That his report that he was attacked by 3 men but testified differently can be attributed to the confusion that comes with the horror of an attack. Further, the alleged inconsistencies are peripheral because they did not erode the fact that PW1 was robbed and he recognised the Appellant as one of the people who robbed him.

9. With respect to the Appellant's defence, she submitted that the Appellant could not even name the car wash where he worked or even the clothes he wore that day. DW3, his witness could also not name the car wash or the clothes the Appellant wore that day. Additionally, the defence was raised at the defence stage as he did not put it across the prosecution's witnesses that he was in his house on the material date. Therefore, his defence was an afterthought and did not dent the prosecution's case.

10. With respect to sentence, she submitted that sentence is a discretion of the trial court which cannot be interfered with unless the sentence was excessive, imposed injudiciously, or that the sentence was harsh, or that the court considered extrinsic factors to sentence or omitted to consider material factors. That the trial court was well within its discretionary powers to impose the ten year sentence and there was no misdirection in terms of sentencing and neither has any other plausible reasons been advanced to warrant interference with the sentence.

11. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See Okeno v Republic [1972] EA 32.

12. I have had occasion to consider the evidence adduce at trial. In that endeavor, I have taken cognizance that i neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had regard to the submissions made and case law cited. I have applied my mind to the applicable statutory provisions and legal principles developed over time.

13. The case before the trial court was that on 31/01/2024 after work, PW1 went to Timau where he took alcohol and on the following day while walking through a corridor, he met four young men who took his cap. He followed them to a bar. He had spotted Kamau (Appellant) among the four. He spoke to the Appellant and asked them to return his cap. He paid for their liquor and left with his cap. It was about 6:00am. They followed him, attacked and assaulted him with slaps and kicks on his head and ribs and they took his phone. It was a group of 4-5 people. He reported and he went to hospital for treatment. He testified that when they were arrested, they produced his phone which was Infinix 48. He identified the Appellant and his co-accused as among the attackers who attacked him.

14. On cross examination, he testified that Kamaa was the Appellant's alias name and that he only recognised the Appellant and his co-accused. That he bargained to buy them liquor in exchange of his cap and he paid Ksh.100. That they jointly attacked him so he could not tell who took his phone. That he could not recall if he had cash as he was drunk. He could not tell who kicked him or threw him on the ground as they suddenly attacked him. He maintained that he was not confused on the identity of the Appellant and his co-accused.

15. On re-examination, he testified that the Appellant was a resident in Timau. He was not very drunk as it was morning and was ready for work hence he was able to know what happened.

16. PW2, a clinical officer produced the P3 form as Pexhibit1. He testified that the history was assault by known people at Timau market with a piece of timber. He had headache, chest pain and tenderness on the knee joint and the age of injury was 3 days. The probable weapon was blunt and the degree of injury was harm.

17. On cross examination, he testified that he examined the complainant and that the joint tenderness must have been caused by an object.

18. PW3 testified that she was a waiter at Spice Club and she reported to work on 02/02/2023 at about 9:00am where she found Munyuru (2nd accused) lying on the seat in company of Njoki. Njoki picked Munyuru's phone from his pocket and gave it to her for safe keeping and Munyuru was to pick it when he sobers up. It was a black Infinix 40 and she placed it at the display until 03/02/2023 when the police went there with the Appellant, a customer. The Appellant asked that she produce the phone that she received from Njoki and she handed over the phone to the police. She was informed that the phone had been stolen. Munyuri went there demanding for the phone and she alerted the police and he was arrested. She identified the Appellant as Kamaa.

19. She testified on cross examination that she did not know how Munyiri got the phone and she did not confirm whether it was functional. That the accused were her customers and she had no grudge with them and she only kept the phone for safe keeping.

20. PW4 testified that on 02/02/2023, she went to Spice club with Murimo. They fell asleep and when she woke up, she took his phone and handed it over to the waiter for safe keeping and asked her to give it to Murimo when he woke up. She had seen someone who appeared as a thief. That she had previously seen Murimo with the said phone. She identified the phone in court and also identified the Appellant as he was also in the club.

21. On cross examination, she testified that she went to the club with the Appellant and the 2nd accused. They were alone. She denied that the Appellant was her boyfriend and had broken up hence the evidence. That she had initially seen the Appellant with the phone for some time.

22. PW5, the investigating officer testified that on 31/01/2023, he found that he had been minuted this case to investigate. The complainant reported that he was attacked by three persons who robbed him an Infinix phone and cash money and he issued him with a P3 form. The complainant led them to Spice bar where he identified Kamau alias Kamaa and they arrested him but he denied committing the offence. Later on, while in custody, he asked for him and he led them to Spice bar to PW3 as the person who received the phone. They named the 2nd accused who was arrested. That the complainant identified his phone which he produced as Pexhibit2. He identified the Appellant as Kamaa.

23. On cross examination, he testified that the complainant was attacked at 6:00am and he was not present when he reported so he could not testify on his status when he was reporting. That he named three attackers and gave the name of one of them as Kamaa but could not tell the names of the other three.

The complainant did not avail the purchase receipt for the phone. That the receipt he had availed was for another phone. The phone was not recovered from the accused and the money was recovered.

24. The Appellant in his sworn testimony testified that he was a casual labourer and on the material day, he was at his house and at 8:00am, he left home and went to work at a car wash. He testified that the complainant was a total stranger and denied committing the offence.

25. He testified on cross examination that he was at home with his friend Lawrence Kubania. That he could not recall his dressing on the material day. That he arrived at the car wash at 8:20am and he was in charge. The car wash was adjacent to the police station. Nobody could confirm his arrival at the car wash. The car wash had no name. He maintained that the complainant was a stranger and he had never disagreed with him. He had stayed with housemate for about 2 years and he left him preparing to leave.

26. DW3, Lawrence Mubani Kinoti testified that on 31/01/2023, he was living with the Appellant in Timau town and on the said date, he spent the night in the house. The Appellant arrived in the previous evening at 9:00pm and he left in the morning of 31/01/2023 at 8:00am.

27. On cross examination, he testified that he had stayed with the Appellant for 3 months and he witnessed him leave at 8:00am. He could not recall his dressing. That he would normally leave the house at 8:00am to the car wash. He did not know the name of the car wash.

28. That was the totality of the evidence before the trial court.

29. Section 296(2) of the Penal Code 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."

30. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of Oluoch –Vs – Republic [1985] KLR where it was held:

> " Robbery with violence is committed in any of the following circumstances:
>
> a. The offender is armed with any dangerous and offensive weapon or instrument; or
>
> b. The offender is in company with one or more person or persons; or
>
> c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ....."

31. The use of the word or in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. The prosecution duty was therefore to establish any of the above ingredients and to show the court that the Appellant robbed the deceased.

32. The complainant testified how he was attacked by a group of young men who assaulted him and took his phone. He testified that the Appellant and his co-accused were amongst his attackers. He also identified Infinix 48 as the phone that was taken from him. The fact of his attack was confirmed by PW3 who produced a P3 form. He described the nature of injuries as harm.

33. PW5, the investigating officer testified that the complainant took them to Spice bar where the Appellant was arrested and after his arrest, the Appellant led the police to the recovery of the mobile phone at Spice bar from PW3, the waiter. PW3 told the court that she was given the phone by PW4 for safe keeping. PW4 had taken the phone from 2nd accused as he was drunk and when the 2nd accused went to request for the phone from PW3, she alerted the police and he was arrested.

34. The trial court while convicting the Appellant found that the doctrine of recent possession was applicable. Before a court can rely on doctrine of recent possession, certain factors need to be proved as was held in Isaac Ng'anga Kahiga alias Peter Ng'anga Kahiga V R, Nyeri Criminal Appeal No 272 of 2005 where the court stated thus:

> " It is trite that before a court of law can rely on the doctrine of recent possession as a basis of convict in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses".

35. The first thing I would like to consider is whether ownership was positively proved. In the above case, a complainant must positively identify the ownership of the recovered item.

36. The accused persons did not claim ownership of the phone and the trial court stated so. However, a scrutiny of the charge sheet shows that the complainant was robbed his phone make Infinix Hot. The complainant identified the phone in court and testified that it was Infinix 48. PW3 testified that the phone that was handed over to her by PW4 was black Infinix 40 and she identified the phone in court. PW4 testified that it was an Infinix phone and PW5 testified that the phone recovered from Spice bar was the phone before the court which the complainant positively identified as his phone. PW5 further testified on cross examination that the complainant did not avail purchase receipt for the phone since the receipt that he had availed was for another phone.

37. As seen earlier, ownership must be positively proved. In this case, there is a contradiction as to the phone model as the charge sheet indicated that the phone was an Infinix Hot, PW1 testified that it was Infinix 48, PW3 testified that it was a black Infinix 40, PW4 said it was an Infinix phone and the investigating officer just identified the phone in court. No purchase receipt was produced as the investigating officer confirmed that the receipt they had been given by the complainant was for another phone. No other identifying marks or details were availed. The investigating officer testified that the complainant positively identified his phone but did not state how the complainant identified the phone as his.

38. Flowing from the above, there was no proof of ownership due to contradictions on the phone model and lack of documentary evidence to prove ownership. I am fortified in this finding by the holding of the court of appeal the court in Abdi Yusuf Maalim v Republic [2015] eKLR where the court held that;

> " We have, on our part, looked at the record most carefully and must agree with Mr. Ngumbau learned counsel for the appellant that the elements pre-condition to proof of recent possession were not satisfied. That is so because none of the two courts below

endeavoured to have the phone positively identified as the one stolen from the complainant. No identifying mark on the phone or even the serial number allegedly on a receipt was shown to the trial court as proof of identity of the stolen phone. That receipt allegedly given to the complainant when he bought the phone was never mentioned by the complainant in his evidence. Its production by the investigating officer without concretely relating it to the serial numbers on the phone was evidence of no probative evidence value. It is our finding in these circumstances therefore, that the phone not having been positively identified to be that recently stolen from the complainant, the doctrine of recent possession could not safely be relied upon to form the basis of a conviction."

39. Muchemi J in Michael Wamwongo Karongo v Republic [2013] eKLR also held that;

> " The property in issue must be placed in the ownership of the complainant. PW1 only identified the phone by showing a scratch on the screen. He did not produce a receipt or even test the phone as to the contents of its directory or other features specifically developed by him during the time he used the phone. In our view, the scratch alone was not sufficient proof of ownership given the fact that there were many phones of the same make and model as the one recovered."

40. The complainant did not endeavour to give any identifying marks. The investigating officer failed to inform the court how the complainant positively identified his phone. Based on this, and contradictions noted earlier, it cannot be said that ownership was positively proved.

41. That finding goes to the root of the charge and in my view casts serious doubts as to whether the complainant was robbed and what ws robbed from him.

42. I hasten to add that it is not legal requirement that goods or property of whatever nature robbed of someone must be recovered and identified for a conviction to lie. Far from it. But in the scenario like in the instant case where an exhibit is said to be recovered and is not properly identified as belonging to the complainant and ownership proved, this introduces doubts in the minds of the court as to whether the robbery took place in the first place.

43. I am of the persuasion that had the trial court addressed the issue of the discrepancies in the evidence surrounding the exhibit (recovered phone), it would have reached a different finding. The cumulative effect of the above is that in my re-evaluation of the evidence the charge against the Appellant was not proved beyond reasonable doubt.

44. With the result that the appeal has merit and is allowed. I quash the conviction and set aside the sentence and substitute thereof an order of acquittal. The Appellant is to be set at liberty forthwith unless otherwise lawfully held under another warrant.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF OCTOBER 2025.

A.K. NDUNG'U

JUDGE