REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. E005 OF 2024

DOMINIC KIOKO SANI…….....APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in Criminal Case No. E289 of 2023 of the Chief Magistrate's Court at Makueni by Hon. P.N. Gesora – Chief Magistrate)

JUDGMENT

1. Dominic Kioko Sani, the appellant herein, was convicted of robbery with violence contrary to section 296 (1) as read with section 296(2) of the Penal Code.
2. The particulars were that on the 17th day of June 2023, at about 22:00 hours, at Kiluluini market, Kathonzweni sub-county within Makueni County, jointly with others not before the court, robbed Faith Mwikali of Kshs. 7,000, and immediately before the time of the said robbery, they beat the said Faith Mwikali.
3. The appellant was sentenced to fifteen years' imprisonment. He was aggrieved and filed this appeal in person. He raised the following grounds of appeal:
    a) The prosecution's case is replete with monumental inconsistencies and contradictions which would have attracted an acquittal verdict.
    b) The trial court erred both in law and fact by failing to conduct a holistic scrutiny of the whole evidence on record to base its conviction and sentence
4. The state opposed the appeal through Victor Kazungu, learned counsel, who argued that it lacked merit.

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. According to the charge, the incident that led to this case took place at around 10 p.m. The complainant testified that she was with two other people when the appellant and another individual attacked and robbed her of her money. The exact location of the incident was not clearly established from the evidence. However, based on the testimonies of the three main witnesses, it is safe to conclude that it occurred along the way, as the complainant ran and hid in some bushes after the attack.

    a. When the circumstances in which a purported recognition is made are unfavourable, care must be taken to ensure that no mistake is made in identification. The learned magistrate ought to have heeded the directions of Lord Widgery C.J. in the case of **R. vs Turnbull and Others [1976] 3 All ER 549,** where he stated as follows:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be make. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

7. Faith Mwikali (PW1) testified that as she was going home, she had her torch on and that there was moonlight. Ordinarily, when there is bright moonlight, there is no need for an extra source of light to assist with illumination. The first conclusion to make is that even if we assume there was moonlight, as testified by this witness, it was not bright.
8. Josephat Muoo Muove (PW2), who was in the company of the complainant, did not testify to any moonlight. He only mentioned a torch that helped him identify the appellant and his companion. Felix Muthusi (PW3) did not mention any source of light.
9. The prosecution ought to have elicited how the light from the torch assisted in the recognition of the appellant. If the attack was as sudden as evidence would suggest, then, apart from the duration, these witnesses had their attackers under observation; we needed evidence of the intensity of the light. This was not done.
10. Apparently, the earlier interactions with the appellant at the bar may have caused him to be suspected. The Court of Appeal in the case of **Sawe vs Republic [2003] KLR 354** held as follows:

    Suspicion, however strong, cannot provide the basis for inferring guilt, which must be proved by evidence beyond reasonable doubt.
11. In the circumstances of this case, the appellant's conviction was unsafe. The conviction is quashed, and the sentence is set aside. The appellant is set at liberty unless otherwise lawfully held.

Delivered and signed at Makueni, this 22nd day of October 2025

KIARIE WAWERU KIARIE

JUDGE