Wanyonyi v Republic (Criminal Appeal 91 of 2018)
[2025] KEHC 16090 (KLR) (28 October 2025) (Judgment)

Neutral citation: [2025] KEHC 16090 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 91 OF 2018

REA OUGO, J

OCTOBER 28, 2025

BETWEEN

JOSEPHAT KARANJA WANYONYI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the Hon. T.M. Mwangi Webuye SPMCCRC No 1139 of 2015 dated 1st September 2017)

JUDGMENT

1. The appellant was charged with two counts before the subordinate court:

   Count I: Robbery with violence contrary to section 296(2) of the Penal Code

   Particulars: on 10th November 2015 at the National estate in Webuye town in Bungoma East sub-county within Bungoma County jointly with another not before court while armed with dangerous weapons, namely a panga, knives, robbed CNA off Kshs 15,000/Tv make Amco, 1 radio, one mobile phone make Itel, 1 black DVD and Gtv decoder all valued at Kshs 43,600/- and immediately before the time of such robbery threatened to use actual violence.

   Count II: Rape contrary to section 3(1) (a) (b) (3) of the *Sexual Offences Act* No 3 of 2006.

   Particulars: on 10th November 2015 at the National estate in Webuye town in Bungoma East sub-county within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of CNA without her consent.

2. The appellant was also charged with an alternative charge of committing an indecent act contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006.

3. The appellant was convicted and sentenced to 27 years' imprisonment on each count, with the sentences to run concurrently.

4. The appellant submitted his petition of appeal along with supplementary grounds. The grounds cited in the petition include his plea of not guilty, the omission of his testimony from consideration, the complainant's failure to provide images or the names of her attackers, circumstances that prevented identification, and the fact that he was identified only by the complainant. He also contends that he was not linked to the offence and that the prosecution did not provide an inventory of the items collected.

5. The appellant challenged the trial magistrate's decision for the following reasons:

    1. That the trial court erred in law and fact in convicting the appellant, relying on the evidence of exhibits without making a finding that the inventory or the recovered exhibits were not produced exhibits in court, and there was no independent corroboration from the scene of recovery.

    2. That the trial court erred in law and fact by invoking the doctrine of recent possession to infer guilt on the appellant.

    3. That the trial court erred in law and fact in not weighing the contradictions, discrepancies and inconsistencies in the prosecution's case that were inconsequential to the conviction.

    4. That the trial court erred in law and in fact in appreciating the evidence of identification of a single eyewitness under difficult conditions, uncorroborated.

    5. That the trial court erred in law in not appreciating the appellant’s defence.

    6. That the sentence of 27 years imprisonment concurrently can further be reduced pursuant to section 26 (2) of the penal code on plea and discretion.

6. In support of the appeal, the appellant submits that the prosecution, having not proved that the exhibits were found in his possession, failed to make an inventory and provide independent corroboration from the scene of recovery. (See Litzur Teper v The Queen 1952 2 HC.48).

7. The alleged complainant's pliers and bag were not part of the stolen items described in the charge sheet. In Evans Masese Mose v Republic [19550 EACA 484], the court stated that when the property in the charge or information was not described, such omission was fatal to the entire charge and the subsequent conviction and sentence. Therefore, they had no basis to apply the doctrine of recent possession on the appellant.

8. Regarding the contradictory evidence, the appellant argues that it was unclear whether the complainant met the suspect at the door or heard them after they had entered the bedroom. It was also not certain whether the light source was from the switch inside the house or the torch used by the robbers. Although Pw2 testified that there were two torches, she did not specify whether they were shone at the same time.

9. The appellant contends that the complainant wrote her statement after her arrest and the recovery of the exhibits; therefore, her description was made after she had seen the appellant. The appellant cited the case of Michael Nyongesa & another v Republic [2015] KECA 355 (KLR), where the court stated:

> “ 22. In this appeal, the robbery took place at about 9.30p.m. In the two incidents of the robbery, the victims were attacked by a gang of more than fifteen robbers and the only source of light was from torches that were held by the robbers.

23. There is no evidence that any torch light was beamed directly on the faces of the appellants, although PW 2 said that they were spotting torches on each other. What PW 1 stated is that the torch light was reflecting against the mud walls that are not painted. PW 1 stated:

> "The wall is not painted, it is just mud wall. ... All the attackers had torches. And they were spotting the wall and the image comes back and I identified them."
>
> It is doubtful whether in the circumstances of this case, that reflection, if at all, could enable a robbery victim who was lying down to see his or her assailants.

24. As was held in Kiarie V Republic (supra), it is possible for a witness to be honest but mistaken and for a number of witnesses to be all mistaken. The fact that four prosecution witnesses alleged to have recognized the appellants out of the more than ten people that attacked and robbed them does not necessarily mean that the four were not mistaken. In our view therefore, there were no favourable circumstances for a positive identification."

10. Pw3 and Pw5 testified that the appellant was a habitual crook and of bad character, which goes to show the appellant was framed. The appellant requested that the court reduce his sentence.

11. The prosecution, in their submission, argues that recognition was proved. The complainant had a conversation with the assailants and noted one was short while the other one was tall. She further testified that the tall one had red lips. The factors to be considered with respect to recognition were set out in R v Turnbull & Others (1976) ALL ER 549. The complainant testified that the assailants were armed with pangas and knives and raped her. The crude weapons were recovered from the appellant and produced in court.

12. The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. (See Eric Otieno Arum v Republic KSM CA Criminal Appeal No 85 of 2005 [2006] eKLR.) The prosecution recovered red pliers, which the complainant identified as hers. She was also able to identify a panga, knives and a jacket worn by the appellant.

13. On the sentence, the prosecution criticised the trial court for failing to consider that the offence of robbery with violence carries a mandatory death penalty. Therefore, they seek an enhancement of the sentence.

Analysis and Determination

14. On the first appeal, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. (See Jonas Akuno O'kubasu v Republic [2000] eKLR).

15. CNE (Pw1) testified that she heard a knock at the bedroom door and proceeded to investigate. She met two people at the door, one holding a panga while the other holding a knife. Both assailants had torches. Her phone torch was on, but they quickly took her phone. One of the assailants was short, while the other one was tall. Pw1 testified that she took time to study their appearance as they spent 1 hour in her house. They told Pw1 that they had come for money, and Pw1 told them that she had none. The appellant then looked inside her bag and took Kshs 10,000/- which was meant for her school fee,

and Kshs 500 for household use. In the sitting room, they had removed a flat-screen TV and DVD player. They then led her to the bedroom where the short man forced her onto the bed, removed his trousers and forcefully had sex with her. He forced her to undress before raping her. The short man told the appellant he had finished and that it was his turn. The appellant removed his trousers and had sex with her. They then remembered that the TV and DVD did not have the remote, and they embarked on searching for it. They found the remote and found it in her husband's suitcase. They found a hammer and pliers under the bed and took them.

16. As they left, they warned Pw1 not to scream. Pw1 then retrieved her other phone and asked her neighbour for help. She also called her husband. She went to the hospital for treatment. The following day at 7:00 a.m., she made the report to Webuye Police Station. She testified that she could identify the appellant as he was tall with lips that looked burnt. After one week, she was asked to identify the robbers and went to the police station and identified the appellant during the identification parade. She identified the pliers that were taken from her house, the clothes worn by the appellant during the incident and the weapons they had used. On cross-examination, she testified that the only item that was hers was the pliers. She testified that she identified the appellant by the mouth, lips and height. The appellant used the light from the torch to look for items in her house, and using the light she saw the appellant.

17. Dr Edward Vilembwa (Pw2) testified that he worked at Webuye County Hospital and filled the P3 form of the complainant. She had hymenal tears with laceration of the external genitalia, which is evidence of multiple forcible penetration. They took some discharge to the lab, and it revealed pus cells and spermatozoa. Pw2 concluded that there was a gang rape.

18. PC Peter Mukuna (Pw3) testified that he was at the report office on 11/11/2015. At 7:00 a.m. He testified that the complainant reported that two people armed with a knife and a panga forced entry into her house and stole her property. She was also raped. She told him that the appellant was tall with burnt lips, wearing a thick black and white coat. On 17th November 2015, they proceeded to the house where they believed individuals matching the given description resided. They found pliers, 2 knives, a panga, 2 iron bars, a jacket and trousers. He then arrested the appellant.

19. Chief Inspector Nyangaresi BIbao, No. 233XXXX, (Pw4) conducted the identification parade. He took 12 people of the same size as the appellant and asked the appellant to choose his position. The witness was in a separate room. She then came into the parade and touched the appellant's shoulder and did not say anything.

20. The investigating officer, No.368XXXX PC Charkles Atte (Pw5), testified that the appellant and another not before the court broke into and entered the complainant's house with weapons. They took her money and property and raped her. From the torchlight, she saw the assailants. On cross-examination, he testified that the complainant had given the appellant's description to help track him down.

21. In his defence, the appellant testified that he had a long-standing grudge with police officer Niko arising from differences involving a woman named N. The appellant refused to be his lover, and she had him arrested. They took his household goods, namely: radio, phone and chicken. He was taken to the station, and an identification parade was conducted. The appellant testified that he was not satisfied with the manner in which it was conducted. On 10/11/2015, Niko arrested him after he sold land.

22. I have considered the grounds of appeal and the supplementary grounds of appeal, and the issues raised by the appeal are as follows:

    a. Whether the appellant was identified as the perpetrator

b. Whether the doctrine of recent possession was applicable

c. Whether the sentence meted was appropriate

23. It is common ground that the only eyewitness is Pw1. In the case of Abdalla Bin Wendo & Ano. vs R. [1953] 20 EACA 2066, the Court of Appeal reiterated that a conviction can be founded on the testimony of a single identifying witness. However, such evidence has to be tested with great care, especially when the conditions favouring the correct identification are difficult

24. Pw1 recalled that the appellant was tall with red lips that looked burnt and wore a jacket that had white stripes and long jeans. She testified that the appellant and the other assailants had their torches on as they searched the house, and she was able to see them. She gave the appellant's description to Pw3 at the report office in Webuye police station. It is Pw1's description of the appellant that prompted his arrest.

25. Pw1 testified that the appellant took Kshs 10,000/- and an additional Kshs 500/- from her bag. They also took her TV, DVD player, remote, decoder, phone, gamboots, a hammer and pliers.

26. In my view, Pw1's detailed description of the appellant demonstrates that she clearly saw the appellant. She was able to describe his physical features. Her ability to observe how the assailants searched the house further indicates that the light from the two torches provided adequate lighting.

27. Section 296(2) of the Penal Code sets out the key ingredients that constitute robbery with violence; three such ingredients being that;

i. the offender is in the company with one or more other person or persons;

ii. the offender is armed with a dangerous or offensive weapon or instrument;

iii. the offender uses or threatens to use actual violence to any person immediately before or immediately after the time of the robbery.

28. The complainant's evidence was that she was attacked by two people who were armed with a panga and knives. They threatened her and raped her. After an identification parade conducted by Pw4, she was able to identify the appellant positively.

29. She also identified the pangas and knives retrieved by Pw3 after arresting the appellant as those used by the assailants. The appellant argued that there was no inventory of the items retrieved from his house, and this was prejudicial to the prosecution's case. However, failure to prepare an inventory does not negate the physical existence of the exhibits. In Stephen Kunani Robe and Others v Republic [2013] eKLR where the court stated that:

> " The purpose of an inventory is to keep record of exhibits recovered during investigations. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence."

30. Pw1 identified the pangas and knives as the ones she saw with the assailants. She was also able to identify the appellant's white striped jacket and trousers. Pw1's evidence placed the appellant at the scene of the crime. Although the trial court relied on the doctrine of recent possession, this was not necessary as the evidence placed the appellant in the complainant's home. The appellant was positively identified by Pw1 as the perpetrator of the crimes.

31. On the second count, having found that Pw1 positively identified the appellant, Pw2 testified that after he examined the complainant, he established that she had been raped. Laboratory tests revealed the

presence of spermatozoa in her genitalia. Pw1 was clear in her testimony that the appellant removed his trousers and forcibly had sex with her.

32. The appellant in his defence stated that he had a dispute with a police officer named Niko, however, this was not brought out in his cross-examination and in my view was an afterthought.

33. On the sentence meted, the prosecution has filed a notice of enhancement of sentence and urged the court to sentence the appellant to life imprisonment. The appellant, however, seeks a less severe sentence. In Mbugua & 9 others v Attorney General & 3 others [2025] KEHC 1248 (KLR), the court held that:

> " Having taken into consideration the above factors, this court was of the considered view that Sections 296(2) and 297(2) of the Penal Code under which the Petitioners herein were charged and convicted, in so far as they did not allow the possibility of differentiation of the gravity of the offences in a graduated manner in terms of severity or attenuation, and the failure to give an opportunity for the consideration of the circumstances of the offender, those Sections were deficient as they did not give those administering the justice system unfettered discretion to mete out proportionate sentences depending on the gravity of the offence."

34. In Bernard Kimani v Republic [2000] eKLR, the court stated that:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist ."

35. The offence of robbery with violence is serious. However, the trial court considered the circumstances in which the offence was committed, the sentencing guidelines, and the pre-sentence report. Therefore, I see no reason to interfere with the trial court's discretion.

36. Consequently, I find that the appeal has no merit and the same is dismissed.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF OCTOBER 2025

R.E. OUGO

JUDGE

In the presence of:

Josephat Karanja. Wanyonyi - Appellant

Miss Matere -For the Respondent

Wilkister - C/A