



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. E110 OF 2024

STEPHEN SHEM ANGULU
APPELLANT

VERSUS

REPUBLIC (ODPP)
RESPONDENT

**(Being an appeal from the Judgement by Hon. E. Wasike (PM) in
Butere Criminal Case No. E234 of 2020 delivered on 17th July 2023)**

JUDGEMENT

1. The Appellant was charged, tried, convicted, and sentenced to serve 25 years' imprisonment for robbery with violence, contrary to section 295 as read with section 296 (2) of the Penal Code. The particulars of the said offence were that on the 30th day of May 2020 at around 1500 hours at Ebage village in Butere sub-county within

Kakamega County, the Appellant robbed Doreen Omwaya Malika of a mobile phone, make Neon Ray, black in colour, valued at Kshs 8,000, and at or immediately after the time of such robbery, strangled the said Doreen Omwaya Malika using his hands.

2. Being aggrieved by the said conviction and sentence, the Appellant filed a petition of appeal in which he listed six grounds of appeal as follows:-

- (a) That the trial court erred in law and in facts in failing to make a finding that the ingredients of the offence were not proved beyond a reasonable doubt, hence the case not proved beyond a reasonable standard.*
- (b) That the trial court erred in law and in fact in not weighing the conflicting evidences in the prosecution case that were inconsequential to conviction.*
- (c) That the trial court erred in law and in fact in relying on a flawed evidence of identification under difficult condition and not corroborated by a properly conducted identification parade.*
- (d) That the trial court erred in law in breaching the appellant's constitutional rights to a fair trial.*

(e) *That the trial court erred in law and in fact in not ordering the appellant's sentence to be computed from the time of his arrest pursuant to Section 333 (2) CPC, paragraph 5.1.21 SPGs revised 2023.*

(f) *That the trial court erred in law and in fact in failing to appreciate the appellant's defence that overwhelmed the prosecution.*

3. The prosecution called four witnesses. The complainant, PW1, was a 16-year-old female who testified that she lives in the Tuti area of Butere. On 30 May 2020, at 3 pm, she was sent to the market by her aunt to withdraw money from her M-Pesa account. The aunt gave her a mobile phone, a Neon-Ray, which is black in colour. It was PW1's case that, as she was about to reach the shops, she met a young man wearing white trousers with black stripes. She passed him, but he followed her, took her phone, then fled into some maize plantation. PW1 said that she followed the thief as he ran and started screaming and that she reached him and grabbed the phone, but he pushed her to the ground and removed a nylon paper and applied something like bang on her face while sitting on her, then

choked her. He then took the phone and ran away. The witness stated that she remained on the ground for two minutes and then went to her aunt, informing her of what had happened.

4. It was PW1's testimony that her aunt, who had seen the culprit running away, screamed and called on people to intercept him. PW1 said that she later lost consciousness and woke up in the hospital to find the police present. She stated that she had never met the Appellant prior to that date. Her evidence was that the accused must have broken the phone because it was not broken when he took it. She identified the mobile phone and the Appellant on the dock. She also identified her treatment notes from Butera District Hospital and the P3 form.
5. When cross-examined by the Appellant, PW1 told him that he was standing by some shops alone and that she had passed through the shortcut, when he followed her. She stated that she was 100% certain it was the Appellant who stole from her.
6. She said she could identify the Appellant because of his clothes and that she also saw his face well. She said that

although the Appellant choked her and almost killed her, no one saw him doing that to her. She stated that she identified the Appellant after regaining consciousness.

7. PW2 was Mary Andalo, who testified that on 30th May 2020, at around 3 pm, she gave her niece PW1 her phone so she could go and withdraw some money for her. She said that the phone was a Neon Ray model. She stated that after some time a young man with white trousers and a windbreaker ran past her. She did not think anything of it, but after two minutes, she heard screams. It was PW1 who came to her with dirty clothes and who described the clothes of her assailant, which matched the young man's clothes. According to her, the young man had not gone far, so she screamed, and Rafael responded by calling his friend, who lives in the direction the young man was heading. She said that they started following the young man, but PW1 fell. She continued running and could not find the young man who had stolen the phone, as he had hidden himself in a sugarcane plantation. However, when Rafael mentioned he could track the phone, the thief ran

out of the sugarcane field, and because of their screams, members of the public apprehended him.

8. According to PW2, the phone was found in the Appellant's right trouser pocket. He had removed the battery, which was in his left trouser pocket. He was subjected to mob justice, but the phone had already been damaged by that time, as the battery had been bent. PW2 continued to testify that they went back to PW1, who was unconscious and foaming from the mouth, with scratch marks on her back. They took her to the hospital and thereafter, the police were called. The police took all of them, including the Appellant, to the hospital, and the police took the phone, which the witness identified in court.
9. PW2 said the phone's serial number matches the one outside its box. She said that she retrieved the box from home after the police had requested it. The black box, whose serial number matched the phone's, was marked for identification. PW2 stated that she had never met the thief prior to that date. She identified the Appellant as the said thief. When cross-examined, she stated that many people were with her as they searched for the Appellant.

She said they joined her after she explained the reason she was screaming. She reiterated that she had seen the Appellant well and that he had hidden in the sugarcane plantation, then run into some maize plantation and she saw him being pulled out. Her phone was with him. She said that she first saw him when he ran past her, and it was only after PW1 arrived and informed her what had happened that she started following the Appellant. She denied ever planting the phone on the Appellant. She said that members of the public beat up the Appellant, so someone named Saidi called the police in order to save his life. She identified the Appellant as the thief.

10. PW3 was Wilfred Egesa, a clinical officer at Shisitsui Health Center, but formerly of Butere County Hospital. He produced the medical documents in respect of PW1, who was said to have been assaulted by a person whom she was not very familiar with, after which she was robbed of her phone. PW3 said that on examination, PW1 had pains in her neck with impaired neck movements, and that she complained that she had been strangled. She received the necessary treatment, and the P3 form was completed on

2nd June 2020. The witness produced the P3 form and the treatment documents.

11. PW4 was PC Charles Serem of Butere Police Station and the Investigating Officer in the case, having taken over from PC Collins, who had since been transferred to Nairobi County. He narrated that on 30th May 2022, the complainant went to the station and reported that the Appellant had attacked her and robbed her of her mobile phone as she was heading to Butere Lower Market. According to him, the victim screamed for help, and well-wishers came to her rescue. The Appellant was subjected to mob justice, and the mobile phone was recovered. The Appellant was escorted to the hospital, where he received treatment, and subsequently taken to the police station, where he was charged. The complainant was issued with a P3 form and referred to a hospital where she was examined and treated. PW4 produced the mobile phone and its box as exhibits.
12. Cross-examined by the Appellant, PW4 said that he was speaking the truth and that the complainant reported how the incident occurred. He stated that the mobile phone

was recovered and the investigations had been completed by the time he took over the matter.

13. In his defence, the Appellant gave a sworn statement. He stated that he is a casual labourer and a resident of Shibembe. He testified that on the material date, he was walking within the Butere Center when a lady approached him from behind and started shouting that he was a thief. He said that he started running but was pursued by members of the public who arrested him and subjected him to mob justice. He was then escorted to Butere District Hospital, where he was examined and treated, and escorted to Butere Police Station. The following day, the complainant's mother went armed with a phone and handed it to the Investigating Officer. Then, he was taken to another office, where he was forced to confess to the offence, but he declined, as he had not committed it.
14. When cross-examined by the prosecution, he said that before the case, he had no personal differences with the complainant and her mother and did not know why they implicated him. He stated that he had not seen the mobile phone in question and that the Investigating Officer had

attempted to coerce him into confessing to the offence, but he declined. According to him, the mobile phone was never recovered from his pocket.

15. The appeal was canvassed through written submissions.

Appellant's Submissions

16. The Appellant submitted that the trial court erred in law and infact in relying on the identification of a single minor witness which was flawed, mistaken and uncorroborated. He contended that the time within which the offence occurred was too short and that the maize plantation impeded observation such that the conditions were not favourable for positive identification of a stranger. According to the Appellant, the Complainant did not give a description of her attacker before she lost consciousness. He challenged the trial court's findings on the basis that he was arrested by members of the public on the road yet PW2 had said that he had gone into a maize plantation. He faulted the prosecution for subjecting him to dock identification and relied on the case of **Gabriel K. Njoroge v. Republic [1982-1988] 1 KAR 1134.**

17. The Appellant further submitted that the prosecution did not prove recent possession. Relying on **Erick Otieno v. Republic [2006] eKLR**, he urged that he was searched by the people that subjected him to mob justice thereby violating his constitutional rights. It was his argument that the trial court erred in not making a finding that the search was not acceptable in law pursuant to Article 31 of the Constitution and Section 25, 26 and 29 of the Criminal Procedure Code. Noting that the people who recovered the phone were not police officers, he pointed that the admission of the evidence should have been ruled out by the court as stated by the Court of Appeal in **Hamisi v. Director of Public Prosecutions [1952] AC 694**.
18. It was the Appellant's submissions that PW2 did not positively identify the phone as belonging to her and failure to produce receipts or registration of the simcard that the phone had been using meant that PW2 failed to prove beyond reasonable doubt that the phone was hers.
19. The Appellant insisted that the prosecution's evidence required expert evidence from communication liason

officers and in absence of such evidence, his defence overwhelmed the prosecution's assertion.

20. The Appellant further asserted that the trial court erred in not making a finding that the ingredients of robbery with violence under Section 296 (2) of the Penal Code had not been proved as the evidence was that the assailant snatched the phone and ran away and had not planned to use force save for the fact that the Complainant followed him and challenged him. He relied on the case of **Erick Kimtai & Another Criminal Case No. E017 of 2022** and postulated that *mens rea* had not been proven.
21. Finally, the Appellant submitted that the trial court erred in denying him the least prescribed sentence prescribed by law under Article 25 (c), and 50 (2) (p) of the Constitution or applying Section 333 (2) of the Criminal Procedure Code as he had been arrested on 30th May 2020 and sentenced on 17th June 2023 and his sentence ought to have run from the day of its pronouncement.

Respondent's Submissions

22. On its part, the Respondent submitted that the ingredients of robbery with violence contrary to Section 295 as read

- with Section 296 (2) had been properly proven. Relying on the case of **Oluoch v. Republic [1985] KLR 549**, the Respondent averred that the proof of any ingredients of robbery with violence is sufficient to sustain a conviction.
23. The Respondent submitted that the Appellant was properly identified as the offence occurred in broad daylight and PW1 had a good opportunity to have a good look at the Appellant as he strangled her. Further, the Appellant was arrested by members of the public on the same day as he was fleeing the scene and found with the stolen phone.
24. It was further argued by the prosecution that there was proof that the Appellant used violence as was evidenced by the injury sustained by the Complainant.
25. The Respondent submitted that the sentence imposed was proper as sentence is a matter of discretion of the trial court. However, it conceded that the trial court ought to have complied with the provisions of Section 333 (2) of the Criminal Procedure Code.
26. This being a first appeal, the court's duty is as laid down in **Okeno v. Republic [1972] EA**, and that is to review and

re-analyze the evidence afresh with a view to making its own independent finding while bearing in mind, however, that unlike the trial court, it did not have the privilege of observing and hearing the witnesses as they gave evidence firsthand.

27. The elements that the prosecution is required to prove in a case of robbery with violence contrary to section 295 as read with section 296 of the Penal Code were well set out in the case of **John Kariuki Gikonyo v. Republic [2019] KECA 1016 (KLR)** when the court of appeal stated as follows:-

“The ingredients for the offence of robbery with violence contrary to section 296 (2) of the Penal Code were set out in Johanna Ndung’u vs Republic-Criminal Appeal No 116 of 2005 (unreported) as follows:-

a) if the offender is armed with any dangerous or offensive weapon or instrument, or;

b) if he is in the company with one or more other person or persons, or;

c) if at or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person.

See also **Oluoch v. Republic [1985] KLR** and **Johana Ndungu v. Republic [1996] eKLR**

28. It has been held that proof of any one of the ingredients of robbery with violence is enough to sustain a conviction. However, the evidential standard for proof of the ingredients of the offence must be cogent and consistent, save for minor flaws, which are curable under Section 382 of the Criminal Procedure Code.

29. In **Dima Denge & others v. Republic [2013] KECA 480 (KLR)**, the Court of Appeal held that:-

“The elements of the offence under Section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction. This was considered at length by this Court in JOHANA NDUNGU Vs. REPUBLIC Criminal Appeal No. 116 of 1995 (unreported;)

“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.”

- 1. If the offender is armed with any dangerous or offensive weapon or instrument, or***
- 2. If he is in company with one or more other person or persons, or***
- 3. If, at or immediately before or immediately after the time of the robbery, he wounds beats, strikes or uses any other violence to any person.***

Analyzing the first set of circumstances the essential ingredient apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in Section 295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.”

See also **Joseph Kateria Kahinga & 11 others v. Attorney General [2016] eKLR.**

30. Looking at the evidence of PW1, the same was in tandem with the particulars of the charge, save that it was PW1's evidence that the Appellant was not armed with any offensive weapon and was not in the company of any other person. The Appellant acted alone and used physical violence on PW1 even as he robbed her of the mobile phone.

31. On the issue of identification, the incident happened in broad daylight at about 3 p.m., and PW1 had sufficient opportunity to have a good look at the Appellant as he strangled her and as she followed after him. Contrary to the Appellant's submissions, identification was not made by a single witness, as PW1, who had seen her attacker well, promptly described him to her aunt. She was even able to describe the clothes he was wearing at the time of the attack. It is because of those clothes that she was able to identify the attacker to her aunt, and as a consequence thereof, the Appellant was arrested the same day by members of the public as he tried to flee the scene.

32. In the case of **Zakaria Mugo Macharia v. Republic, [2007] KEHC 3263 (KLR)**, the court stated as follows:-

In the case of **KOTIA VS REPUBLIC CRIMINAL APPEAL NO. 191 OF 2003, (unreported)** it was held:-

“...Where a robber is arrested after a robbery by a person or a group other than the one chasing him, it cannot be assumed that he is the person who had robbed unless there was evidence of identification...”

33. It is important to note that the identification of the Appellant in this case occurred shortly after the offence. He was tracked down based on the description of the clothes he was wearing, and because he was arrested at the *locus in quo*, upon apprehension, he was found in possession of the stolen phone, which the owner immediately identified. There was consistent and credible evidence by PW1 and PW2 that the stolen phone belonged to PW2 and that the Appellant was the one who had snatched it from PW1.
34. Even if the court were to find that the evidence of identification was by a single witness, it is noted that the particular witness, PW1 was a 16 year old. She was not of tender age. She saw her attacker and even had the presence of mind to follow him in an effort to recover the phone. She screamed when he ran. she had sufficient opportunity to internalize the attacker's clothings and must have seen his face when he strangled her. She was able to describe him to PW2 who in turn described him to the responders. In my view, the identification was flawless. I am guided by the case of **Jackson Kinuthia**

Kungu & others v. Republic [2011] KECA 108 (KLR)

where the Court of Appeal agreed with the superior court's finding that a single witness identification of a suspect was proper and stated as follows:-

“In our own view, David was attacked in broad day light at 1.30 p.m. The robbers were only two and there was no evidence that many people were passing by along the road where he was walking after leaving the shop. We see no reason why he should have been doubted when he was the person who later, on his own volition identified, the appellant...”

35. Regarding the doctrine of recent possession, it was the prosecution's evidence that the Appellant was caught red-handed with the phone in his pocket.
36. On the Appellant's assertion that PW2 did not identify the phone as hers, there was no suggestion that the box which PW2 produced and which bore the same serial number as the phone, did not in fact belong to PW2 or that it had no link to the stolen phone. It is common knowledge that mobile phones are sold when packaged in

- a box which bears the serial number of the phone and where one does not have the IMEI number off head, it is the number on the box that is used to trace the phone.
37. Even though PW2 did not produce a receipt to prove that the phone belonged to her, she produced its box. Section 119 of the Evidence Act provides that:-
- “The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”**
38. The court is guided by the aforesaid provision of the law and presumes that after PW2 had purchased the phone, she retained its box in her possession. The failure to produce the phone, the registration of the sim card, nor forensic evidence did not vitiate the prosecution’s case.
39. The Appellant’s contention that the recovered phone should not have been admitted in evidence as it was recovered illegally also needs to be addressed. The Appellant was charged after a citizen’s arrest. A citizen’s arrest is lawful where a private citizen witnesses a crime

being committed or has reasonable cause to believe that a person has committed a cognizable offence or that someone is on the brink of committing an offence. Section 34 of the Criminal Procedure Code provides that:-

“(1) A private person may arrest any person who in his view commits a cognizable offence, or whom he reasonably suspects of having committed a felony.

(2) Persons found committing an offence involving injury to property may be arrested without a warrant by the owner of the property or his servants or persons authorized by him.”

40. Upon arresting a suspect pursuant to Section 3 of the Criminal Procedure Code, the citizen is supposed to hand over the suspect to the police for further investigations.
41. In the course of arresting the Appellant, members of the public found him with the stolen phone in his pocket and the Appellant contends that the recovery of the phone from him was illegal.
42. The general rule on the admissibility of evidence is that all evidence is admissible if relevant to the case at hand no matter how it was obtained. See **Karum S/o Kaniu v.**

Republic [1955] AC 197. Where the illegally obtained evidence is determined to be prejudicial to the accused, the same ought to be rejected. See **Republic v. Sang [1980] AC 402.**

43. With the advent of the new Constitution of Kenya (2010), the position is that by dint of Articles 31 and 50 (4) of the Constitution there is emerging jurisprudence that illegally obtained evidence is only admissible if it does not render a trial unfair or is detrimental to justice. In the South African case of **Gumede v S (800/2015) [2016] ZASCA 148**, the Constitutional court rendered itself as follows:-

“[23] This court in S v Tandwa [7] made it clear that s 35(5) does not provide for automatic exclusion of unconstitutionality obtained evidence. In this regard it had this to say:

....

“[116] Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that

would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.

[117] In determining whether the trial is rendered unfair, courts must take into account competing social interests. The court's discretion must be exercised "by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to accused persons". Relevant factors include the severity of the rights violation and the degree of prejudice, weighted against the public policy

interest in bringing criminals to book. Rights violations are severe when they stem from the deliberate conduct of the police or are flagrant in nature. There is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused. Rights violation are not severe, and the resulting trial not unfair, if the police conduct was objectively reasonable and neither deliberate nor fragrant...”

44. Closer home, the Constitution guarantees every person the right to privacy under Article 31 which states:-

**“Every person has the right to privacy, which includes the right not to have—(a)their person, home or property searched;
(b)their possessions seized;
(c)information relating to their family or private affairs unnecessarily required or revealed; or
(d)the privacy of their communications infringed.”**

45. Be that as it may, it has been held that in criminal cases, it is the trial court that has the discretion to determine

whether or not to exclude illegally obtained evidence. In **Philomena Mbeti Mwilu v. Director of Public Prosecutions and 3 others; Stanley Muluvi Kiima (Interested Party) International Commission of Jurists Kenya Chapter (Amicus Curiae) [2019] KEHC 11366 (KLR)** the court stated:-

“310. The Kenyan position on the rule that there is no automatic exclusion of illegally obtained evidence is thus shared in other jurisdictions. In our view, the determination of the question whether to exclude illegally obtained evidence on the basis that it will render the trial unfair is a matter within the jurisdiction of the trial court.”

46. That said, where public safety outweighs individual rights and liberties, and where one is objectively and reasonably apprehended while committing the offence of stealing, the stolen objects recovered from a search of his pockets are admissible in evidence. To hold otherwise would give criminals a field day as no thief, even if caught red handed, would ever be convicted notwithstanding the recovery of the stolen items from him. Ultimately, I find

that the trial court did not err in admitting the phone into evidence.

47. On the element of violence, PW1 narrated how the Appellant strangled her, and her evidence was corroborated by that of PW2 and PW3. PW3 confirmed that PW1 had neck pains and difficulty moving her neck when he examined her. The act of strangling someone is an act of violence against a person that fits within the ingredients of the offence of robbery with violence.
48. An analysis of the evidence reveals no material contradictions in this case that would otherwise vitiate the prosecution's case. The defence that the Appellant preferred was implausible, sounded like an afterthought and did not dislodge the prosecution's case. He did not tender an explanation as to why he would take off in a run when accused of being a thief if he believed that he was innocent. He could have confronted his accuser boldly.
49. Regarding the issue as to whether the elements of robbery with violence under Section 296 (2) was proved, the evidence tendered was that the Appellant was unarmed and acted alone. Initially, he snatched the

phone from PW1 and it is only when she chased him and caught up with him that he applied violence on her. In **Thomas Odhiambo Agao v. Republic [2016] KECA 182 (KLR)**, the Court of Appeal held that a robbery committed under similar circumstances in which the offender held the victim by the neck constituted simple robbery.

50. Looking at the evidence, only one aggravating factor was proven; that of inflicting personal violence on the victim after the robbery. Further, the stolen phone was recovered, albeit with a damaged battery.

51. Taking into account the totality of the evidence, I find that the offence that was proven to have been committed by the Appellant is simple robbery under Section 296 (1) of the Penal Code which provides:-

“Any person who commits the felony of robbery is liable to imprisonment for fourteen years.”

52. In the end, I allow the appeal and quash the conviction of robbery with violence contrary to Section 296 (2). I substitute it with a conviction for the offence of robbery

with violence contrary to Section 296 (1) of the Penal Code.

53. I have taken into account the Appellant's mitigation before the trial court. He pleaded for leniency and stated that he comes from a poor background and his wife and children are wholly dependent on him. I set aside the original sentence of 25 years and substitute it with a sentence of 10 years. The sentence shall run from 20th May 2020 when the Appellant was first placed in custody.

Dated, Signed and Delivered at Kakamega this 17th day of November 2025.

**A. C. BETT
JUDGE**

In the presence of:

Appellant present virtually in person at Kisumu Maximum

Ms. Chala for the Respondent

Court Assistant: Polycap