Mathenge v Republic (Criminal Appeal E065 of 2024)
[2026] KEHC 1252 (KLR) (5 February 2026) (Judgment)

Neutral citation: [2026] KEHC 1252 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E065 OF 2024

JM NANG'EA, J

FEBRUARY 5, 2026

BETWEEN

GEORGE NDUNG'U MATHENGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This Appeal is against the Appellant's conviction and sentence in the lower court for violent Robbery Contrary to Section 296 (2) of the Penal Code. He was charged in the first count that on 12th August 2021at Nyanda Primary School, Mau Summit Division, in Kuresoi Sub County of Nakuru County while armed with dangerous weapons namely, a pistol and panga, he robbed Peter Chodo Achila ("the Complainant") of his mobile Phone Make Itel valued at Kshs. 10,000/= and Kshs. 20,000/= in cash.

2. The Appellant had also been charged with gang rape and breaking into a building contrary to section 10 of the *Sexual Offences Act* and section 307 of the Penal Code respectively, but he was acquitted of the charges.

3. The Appellant had denied the offences. After full hearing of the case, he was convicted of the robbery charge pursuant to the provisions of section 215 of the Criminal Procedure Code, by Judgment delivered on 24th August 2023, and sentenced to life imprisonment.

Grounds of Appeal.

4. The Appellant relies on undated Grounds of Appeal attached to Petition of Appeal herein. The grounds may be condensed into four broad grounds to wit;

    i. That the learned trial magistrate erred in law and fact by convicting the Appellant against the weight of evidence;

ii. That the learned trial magistrate erred in law and fact by failing to take cognizance of the fact that the Appellant had been detained in police custody beyond the 24-hours constitutional limit;

iii. That the learned trial magistrate erred in law and fact by failing to note that the provisions of section 200(i)(b) of the Criminal Procedure Code was not explained to the Appellant.

And

iv. That the learned trial magistrate erred in law and fact by meting out a life sentence which is unconstitutional, harsh or excessive in the obtaining circumstances.

The Prosecution Evidence.

5. The Complainant testified that on the material date at 1:30 a.m. while at home, he heard his father asking his step-mother called Wanjiru to open the door. Suddenly, their door was forced open and the Complainant's father was pushed in by strangers. They were ordered to lie down under guard as other attackers went to break into Nyanda Primary School nearby. The two men guarding them allegedly raped the Complainant's wife outside of the house. One of the attackers also assaulted the Complainant using a metal bar and his grandmother restrained him. He could see the assailant well since he had a torch. The second intruder also had a torch.

6. After a while, the strangers are said to have left after stealing the Complainant's Itel phone and Kshs. 2,000/= in cash. They had tied up their victims with pieces of clothes before fleeing. The incident was reported to the area chief, village elder and the police.

7. According to the Complainant, he saw one of the attackers some days later and informed his father and police officers from Mau Summit Police Station. He later heard of arrest of one of the suspects who he identified the Appellant herein as among the robbers.

8. PW2 is the Complainant's wife. She confirmed the Complainant's testimony as to what transpired at their home that night. PW2 added that she was able to identify the Appellant from his voice as one of two assailants who raped her. The Appellant had ordered her to lie down before raping her.

9. The Complainant's step mother (PW3) also reiterated the evidence of her stepson and PW2. She recognized the Appellant, her cousin, as one of the robbers. Earlier the previous day, the Appellant had transported her and her husband home on his motorcycle. The Appellant was one of the attackers who guarded them in the house.

10. A teacher of Nyanda Primary School (PW4) also testified. She had reported for duty early that morning to learn of breaking into the school. A photocopier and computer were stolen.

11. Another prosecution witness is the Complainant's grandmother (PW5) who was also present during the raid. She confirmed the attack and testified that she recognized the Appellant as among the attackers. The witness also told the court that the Appellant had transported her son home the previous day. According to her, the Appellant regularly transport her son on his motor cycle.

12. PW8 (Investigating Officer) confirmed receipt of the complaint at the Directorate of Criminal Investigations (Kuresoi). He and other officers proceeded to the scene on the same date and met PW2. Two days later, the Complainant saw one of the suspects who was arrested by officers from Mau Summit Police Station, and he was charged. According to the Investigating Officer, they were told that the Complainant was a watchman of a school that was also broken into that night. The Witness produced a Certificate of Acceptance of the stolen computer and photocopier that the Government

supplied to the said school called Nyanda Primary School, as evidence that the property was in the school at the time of the raid.

The Defence Case.

13. The Appellant made an unsworn statement in his defence. He confirmed that the Complainant was his customer as he regularly transported him on his boda boda motorcycle. They were also drinking friends. The previous evening at 3:00 p.m. he had dropped off the Complainant at his home while drunk. A few days later, he was arrested over alleged robbery. He denied committing the offence saying that the Complainant only suspected him because he used to transport him. The Appellant added that the stolen property was not found in his possession.

Analysis and Determination.

14. The learned trial magistrate was satisfied on the evidence adduced before him that the Appellant was guilty of the charge of violent robbery of the Complainant and accordingly convicted and sentenced him as shown above. The trial court was convinced by the evidence of the Complainant, PW2, PW3 and PW5 to the effect that they identified or recognized the Appellant as one of the attackers. It was observed that all these witnesses saw the Appellant flashing a torch whose light enabled them identify him. The trial court further noted that the identification or recognition evidence is more so credible considering that the Appellant was well known to PW3 as his cousin as well as to PW5. The learned trial magistrate was therefore satisfied that all the elements of robbery with violence within the meaning of section 297(2) of the Penal Code were established by the prosecution.

15. The Prosecution and Defence Counsel filed submissions which I have perused against the Record of Appeal. As a first appellate court, I have the duty of reviewing the evidence presented before the lower court and make my own independent conclusions on both issues of fact and law while bearing in mind that I did not watch the demeanour of witnesses (see the Case of Okeno vs Republic (1972) EA 32 and Pandya vs Republic (1957) EA 336).

16. The main issue for determination is whether the Complainant and the alleged victims of the robbery properly identified or recognized the Appellant to have been among their attackers. It is not contested that the offence of violent robbery as charged before the lower court was committed, save that the Appellant only denies complicity.

17. It is observed that the incident took place at night but the Complainant and the other victims of the attack, nevertheless, insist that they recognized the Appellant. They claim that a torch shone by the Appellant further aided him in their identification or recognition. The trial court was told that the Complainant knew the Appellant as a relative who had even dropped him off at his home the previous day.

18. In James Okello vs Republic (2022) eKLR it was observed that sometimes a witness may be mistaken even on identification or recognition of close relatives or friends if the conditions are unfavourable. The same observation was made in Kiarie vs Republic (1984) KLR 739 cited in reliance by the Appellant.

19. As per the evidence, the incident took place at night . The Complainant told the court that torches in possession of the robbers assisted in his recognition of the Appellant. It is not, however, shown at who or in which direction vis-a-vis the Appellant the torch was shone. As per the judicial determination in the case of Warunga vs Republic (1989) KLR 424, the trial court is required to satisfy itself that the circumstances of identification of the Appellant as the offender were favourable and free from possibility of error. The intensity of any light used for the identification and the position of the light

relative to the suspect also need to be interrogated by the court (also see case law in Wandanyi vs Republic (1986)KLR 1998).

20. As rightly submitted by the Appellant citing the case of Maitanyi vs Republic (1986) KLR 198, reliability of lighting enabling identification or recognition is therefore critical. Each case is, however, to be considered according to its own facts and circumstances.

21. Section 143 of the *Evidence Act* provides that "no particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact". It is indeed underscored that the evidence of a single witness may be sufficient to prove guilt (see case law in Julius Kalewa Mutunga vs Republic and a Ugandan Court of Appeal case of Okwang Peter vs Uganda and Benjamin Mbugua Gitau eKLR vs Republic (2011) among several other superior courts' decisions). Evidence is not counted but rather it is weighed and therefore the evidence of one witness may be sufficient to convict depending on the strength or credibility of that evidence. It is, however, noted that the prosecution evidence herein as to identification or recognition of the assailants was by more than one witness.

22. The court was not told how long the incident took for it to gauge if the Complainant and the other victims of the robbery had sufficient time to identify or recognize the assailants. It is further doubtful that the witnesses recognized the Appellant as the evidence does not show that they gave his name or any other relevant information about him to the Police. The circumstances leading to the arrest of the Appellant do not also corroborate the prosecution witnesses' evidence of his identification or recognition. The Arresting officers were not called to testify and explain how they came to apprehend the Appellant. Their evidence would have shown whether or not the victims of the robbery knew those who raided their home. Furthermore, there is no other evidence linking the Appellant to the crime seeing none of the stolen items are shown to have been traced to him. The evidence of Complainant, PW2 , PW3 and PW5 is not therefore credible enough.

Determination.

23. Clearly, therefore, the learned trial magistrate did not properly analyze the evidence to ensure that the Appellant's conviction was without error. The police investigations were also wanting. I find that his conviction was unsafe in the circumstances.

24. Owing to this finding, it is unnecessary to comment about the Appellant's alleged detention in police custody contrary to *the constitution*, or the sentence meted out by the trial court. If the Appellant wants redress for any violation of his rights guaranteed under *the constitution*'s Bill of Rights, he is at liberty to institute appropriate proceedings.

25. The Appeal is in premises allowed. The trial court's Judgement convicting and sentencing the Appellant is set aside and substituted with Judgement acquitting him of the offence of robbery with violence contrary to section 297(2) of the Penal Code as charged, pursuant to the provisions of section 215 of the Criminal Procedure Code. The Appellant set at liberty unless he is otherwise lawfully held.

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF FEBRUARY, 2026.

J. M. NANG'EA, JUDGE.

In the presence of:

Mr Wakasyaka for the Director of Public Prosecutions.

Appellant.

Court Assistant (Jeniffer)