REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. E014 OF 2024

JOSEPH NDENDERI THITIRI

---------- APPELLANT

-VERSUS-

REPUBLIC

RESPONDENT

(Being an Appeal from the Judgment and Sentence delivered by Hon. W. Rading (PM) on 27th March 2024 and 17th April 2024 in Naivasha CMCCR No. E787 of 2021)

JUDGMENT

Background

1. The Appellant herein, **Joseph Ndenderi Thitiri**, was jointly charged alongside a co-accused, with two counts of Robbery with Violence contrary to Section 296(2) of the Penal Code. The charges arose from an incident that occurred on 23rd April 2021 at Hilltop Longonot within Naivasha Sub-County, Nakuru County.
2. It was alleged that the Appellant and others not before the court, while armed with pangas and rungus, robbed PW1 (Duncan Gichiri) of a Tecno mobile phone, cash withdrawn from his M-Pesa account, and other personal effects, and

robbed PW3 (Daniel Rimui) of cash and personal belongings. In both counts, it was alleged that actual violence was used against the complainants immediately before or during the robbery.

3. The Appellant denied the charges. After a full trial in which seven prosecution witnesses testified, the trial court found both accused persons guilty and sentenced them to 18 years' imprisonment, reduced to 15 years after factoring in time spent in custody.

4. Aggrieved by the decision, the Appellant lodged this appeal challenging both the conviction and sentence.

The Prosecution Case

5. The prosecution's case was that on the material evening at about 7.30 p.m., PW1 and PW3 were travelling in a lorry (KCX 632U) towards Mai Mahiu when a Probox vehicle (KCK 108T) allegedly rammed into their lorry at a place known as Hilltop.

6. Upon alighting to inspect the damage, they were ambushed by several people, alleged to be between six and eight in number, armed with pangas and rungus. The complainants were assaulted and forced to surrender money and personal effects. PW1 testified that his M-Pesa and M-Shwari accounts were accessed and money withdrawn after he was compelled to provide his personal identification number (PIN).

7. PW2, the lorry owner, arrived at the scene shortly after the incident and found his driver and turnboy injured. He observed a Probox vehicle off the road and a lady (co-accused) at the scene.

8. PW3 corroborated PW1's account regarding the assault and robbery. He stated that lighting from motor vehicle headlights enabled him to see the attackers.

9. PW5, another driver who stopped at the scene, testified that he saw several men assaulting the complainants and that he was slapped with a panga. He identified the Appellant in court but confirmed that no identification parade had been conducted.

10. PW4, a clinician, produced P3 Forms confirming that the complainants sustained injuries classified as harm.

11. PW6, the Investigating Officer, testified that the Probox and lorry were recovered at the scene where a panga and rungu were also found. M-Pesa statements were produced showing withdrawals on the material night. She confirmed that no identification parade was conducted and that the Appellant was arrested in Limuru several months later.

12. PW7, a scenes of crime officer, produced photographs of the vehicles that were taken the following day.

The Defence Case

13. When placed on their defence, the 1st Accused (co-accused) testified that she had merely been given a lift in the Probox and denied participating in the robbery.

14. The Appellant (DW2) raised an alibi defence, stating that he was arrested months later in connection with another matter and was subsequently linked to the present case. He denied involvement in the crime and contended that he was only identified in court (dock identification). He emphasized that no identification parade was conducted and that no witness gave prior description linking him to the offence.

Grounds of Appeal

15. The Appellant challenged the conviction on the following grounds: -

a) *T**hat the learned trial magistrate erred in both law and fact in failing to find that the Prosecution did not prove their case to the required standard.***

b) That there was a possibility of mistaken identity.

c) That there were contradictory testimonies.

d) ***That the court did not consider his plausible defence of alibi.***

16. The Respondent filed Grounds of Opposition dated 12th February 2025 in which it listed the following grounds: -

(1) That the Prosecution's case was proved to the required standard of beyond reasonable doubt.

(2) That the identification of the Appellant at the scene was proper and free from error.

(3) That the Appellant was positively identified at the scene by PW1 and PW3 as there was lighting emanating from the Appellant's torch and that from PW5's motor vehicle headlights.

(4) That the trial magistrate warned himself as to the dangers of relying in identification evidence under difficult circumstances and in particular paragraph 49 of the trial court judgment.

(5) That the Prosecution evidence was cogent, consistent and credible and even if there were inconsistencies, they did not all amount to rendering the Prosecution case as falling below the standard of proof.

(6) *That the Appellant's alibi defence was considered by the trial court as the same was considered an afterthought and mere denials.*

17. The Appeal was canvassed by way of written submissions, which I have considered.

18. As the first appellate court, this court is obligated to re-evaluate and reconsider the evidence afresh and draw its own independent conclusions while bearing in mind

that it did not have the advantage of seeing and hearing the witnesses testify. This duty was succinctly stated by the Court of Appeal in ***John Oketch Abongo vs. Republic*** **[2000] eKLR** where the Court held:

> ***"The duty of a first appellate court in regard to the evidence and facts is now settled in law. It is required to subject the evidence to fresh and independent analysis and, in appropriate circumstances, even to make its own independent findings and conclusions. In doing so however, the first appellate court must bear in mind that it has only the record and has not enjoyed the advantage of seeing and observing witnesses under testimony."***

19. Guided by the foregoing principle, this Court has carefully reconsidered the entire evidence on record, the judgment of the trial court, the grounds of appeal, and the submissions by both parties. I find that the following issues fall for my determination.

a) ***Whether the offence of robbery with violence was proved beyond reasonable doubt;***
b) ***Whether the Appellant was positively and reliably identified as one of the perpetrators;***
c) ***Whether the Appellant's alibi defence was properly considered;***
d) ***Whether the conviction was safe.***

Analysis and Determination

20. The offence of robbery with violence is established under **Section 296(2) of the Penal Code**, which provides as follows:

> **296. Punishment of robbery**
> (2) **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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.**

21. In ***Johana Ndungu vs. Republic,*** **Cr. App. No. 116 of 1995** the Court of Appeal stated:

> ***"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 s. 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 s. 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."

22. Robbery was also defined in ***Moneni Ngumbao Mangi vs. Republic*, Cr. App No. 141 of 2005** as follows:

"The word "robbed" is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain the stolen property."

23. On whether robbery was proved, PW1 alleged loss of a Tecno phone, Kshs. 17,000 cash and withdrawals from M-Pesa. Examination of M-Pesa statements showed withdrawals totalling Kshs. 45,000 on the material date.

24. However, no evidence was presented to demonstrate that the Appellant or his alleged accomplices withdrew the money. PW6 stated that the withdrawals were made from several agents but admitted she neither visited the agents nor secured their attendance.

25. None of the M-Pesa agents were called to testify despite being material witnesses. In ***Oloro and Daltanyi vs. Reginam*** **[1956] 23 EACA**, it was held:

> ***"Prosecution have a duty to call material witnesses. If they fail, the presumption is that if the evidence had been called that evidence would have been unfavourable to prosecution."***

26. I find that failure to call the M-Pesa agents created doubt as to who withdrew the money. The evidence that was presented therefore created suspicion only. In ***Sawe vs. Republic*** **[2003] KLR 364**, the Court held that suspicion however strong cannot found the basis of a conviction.

27. I note that there were also material inconsistencies such as while PW2 claimed loss of Kshs. 2,000. the charge sheet stated Kshs. 400. PW1, on the other hand, testified to loss of Kshs. 17,000 cash not contained in the charge sheet

28. I find that these inconsistencies cast doubt on whether a robbery occurred.

29. Reliability of witnesses must meet the standard stated in ***Ndungu Kimanyi vs. Republic*** **[1979] KLR 282** where it was held that:

> ***"The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or***

raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

30. In the instant case, I find that even though it is likely that a scuffle occurred, the prosecution did not establish robbery with certainty.

31. Turning to identification evidence, I note that the incident occurred at night when it was dark and in drizzling conditions. The Appellant was a stranger to the witnesses. In the circumstances of this case, the court was required to treat identification evidence with caution. In ***Kiarie vs. Republic*** **(1984) KLR 739** it was held:

"Identification/recognition at night must be absolutely watertight to justify conviction."

32. The guiding principles on identification were set out in the landmark case of ***R vs. Turnbull*** **[1977] QB 224** as follows:

"(1). How long did the witnesses have the accused under their observation?
(2). What was the distance between the witnesses and the accused person?
(3). What was the lighting situation?
(4). Was the observation impeded in any way, as for example, by passing traffic or press of

the people?

(5). Had the witnesses ever seen the accused person?

(6). If the witnesses knew the accused prior to the current transaction, how often?

(7). If the witnesses had seen the accused only occasionally prior to the current transaction, did the witness have any specific reason for remembering the accused?

(8). How long elapsed between the original observation and the subsequent identification to the police?

(9). Was there any material discrepancy between the description of the accused given to the Police by the witnesses when first seen by them and his actual appearance?"

33. In the present case, it was alleged that the sources of light were headlights and torches. No evidence was however tendered on their quality or position. PW7 testified that the scene was too dark to photograph at night thereby raising doubt as to whether witnesses could reliably identify attackers. It is also instructive to note that no description of the Appellant was ever given to police.

34. Turning to the issue of conduct of identification parade, I note that no such parade was conducted. In ***Samuel Kilonzo Musau vs. Republic*** **[2014] eKLR**, the Court stated:

"…the identification parade is not a scientific test and cannot be treated as one. Instead, it is merely the best practical method of achieving an identification without confrontation."

35. The court of Appeal stated as follows on dock identification in ***Samuel Kilonzo Musau vs. Republic*** **[2014] eKLR**:

"The purpose of an identification parade, as explained in Kinyanjui & 2 Others v Republic (1989) KLR 60, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion." It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness's attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and

reliable, it being confirmed by the earlier out of court identification."

36. My finding is that the Appellant's dock identification done several months after the incident did not satisfy the standard of proof of identification that is expected in the criminal trial. The basis for the arrest of the Appellant was also unclear.

37. The standard of proof was stated in ***United States vs. Smith,* 267 F.3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U.S. 358, 370 (1970))**:

> ***"The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence.***
>
> ***Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On***

the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration."

Conclusion

38. In sum, I find that the prosecution evidence was riddled with inconsistencies and failed to prove that the robbery occurred, that stolen money was withdrawn by the Appellant or that the Appellant was positively identified. The prosecution therefore failed to discharge its burden of proof.

39. Consequently, the appeal succeeds and I therefore make the following final orders:

a) The conviction for robbery with violence is quashed and the sentence set aside.

b) The Appellant shall be set at liberty unless otherwise lawfully held.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 5TH DAY OF MARCH, 2026.

HON. W. A. OKWANY

JUDGE

05/03/2026

FOR APPELLANT Present

FOR RESPONDENT Miss Chepkonga for the state

COURT ASSISTANT Karani