REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. E017 & E018 OF 2024

WILSON NGUGI WAMBUI ---------- 1ST APPELLANT

SIMON WAMBUGU NDUNG'U ---------- 2ND APPELLANT

-VERSUS-

REPUBLIC

RESPONDENT

(Being an Appeal from the Judgment and Sentence delivered by Hon. Y.I. Khatambi (PM) on 16th July 2024 in Naivasha, CMCCR No. 586 of 2017)

JUDGMENT

Introduction

1. The Appellants herein, **Wilson Ngugi Wambui** and **Simon Wambugu Ndung'u**, were charged with two counts of Robbery with Violence contrary to Section 295 as read with Section 296(2) of the Penal Code.
2. The particulars of Count I alleged that on the night of 19th/20th February 2017 at about 0130hrs at County Council Estate, Naivasha, jointly with others not before court and while armed with dangerous weapons, they robbed Joseph Janda of, inter alia, motor vehicle KCJ 309V Ford Ranger (2016 model), cash, and a Huawei phone, and used physical violence immediately before the robbery.

3. Count II alleged a similar robbery against Ceciliah Njambi Wandai, of a Tecno L8 phone, handbag, and cash, with violence immediately before the robbery.

4. The 2nd Appellant faced an alternative charge of Handling Stolen Property contrary to Section 322(1)(2) of the Penal Code, relating to a Tecno L8 phone allegedly retained dishonestly on 20th April 2017.

The Trial and the Evidence

5. The prosecution called four (4) witnesses while he Appellants gave unsworn statements and called no witnesses. They were convicted on both robbery counts and sentenced to serve 30 years' imprisonment. The sentences were to run from 2nd May 2017.

Prosecution's case (in summary)

6. **PW1, Joseph Janda,** testified that on the material day, after dinner and socializing in Naivasha town, at about 1.30 a.m., while dropping PW2 home at Kanjo/County Council Estate, they were accosted by three men at the gate. One of the men threatened him with a Somali sword and cut him on the head. They were forced out of the car and separated about 20 metres away. PW1 lost his phone and cash, and the assailants drove off with his motor vehicle KCJ 309V.

7. PW1 stated that the gate area had security lights and that the ordeal lasted about 10 minutes. The vehicle was later recovered abandoned along the highway. PW1 stated that

he was later called for an Identification (ID) parade but added that the suspect declined to participate in the parade. He claimed his recovered phone had a selfie of a suspect but that the selfie was later deleted. PW1 asserted that he could identify the attacker.

8. **PW2, Cecilia Njambi Wandai,** corroborated the robbery narrative, stating that she was attacked at the gate as she attempted to open it. She was hit on the lips with a panga, robbed of her Tecno L8 phone and cash, and held about 20 metres away in a darker place for about 15 minutes. PW2 asserted that the gate had lights and that on 21st April 2017 she identified the 2nd Appellant in an ID parade. She later identified her recovered phone and said that it contained photos of the 2nd Appellant.
9. **PW3, Cpl. Kimwetich,** testified that on 20th April 2017 police officers proceeded to Limuru on information, searched houses associated with the two suspects, and recovered nothing from the searches. They however booked the suspects at Naivasha as investigations continued.
10. **PW4, PC/Inspector Francis Omuse,** testified on the report of the robbery, recovery of the abandoned vehicle, efforts to trace phones via IMEI data from the service provider (Safaricom) and that on 5th May 2017 a Tecno L8 phone that was being tracked was recovered from a suspect in custody said to be the 2nd Appellant. PW4 produced, inter alia, a receipt (P.Exh 6), Safaricom IMEI data (P.Exh 7), and a hand-over report (P.Exh 8), but stated

the phone had been returned to PW2 and was not produced as an exhibit.

(b) Defence case (summary)

11. The 1st Appellant (DW1) testified that he was a milk vendor based in Limuru, was arrested on 20th April 2017 while at/near the 2nd Appellant's home. He denied any involvement in the offence and raised an alibi that he was home in Limuru on the material night.

12. The 2nd Appellant (DW2) stated that he was a trader in Limuru, was arrested on 20th April 2017 after a search that yielded nothing. He denied involvement in the offence and raised an alibi for the material night. He asserted that the phone attributed to him was his having purchased it from a "shylock," but that he was not given time to produce a receipt.

13. At the end of the trial, judgement was delivered on 11th June 2024 in which the trial court found that the prosecution had proved its case to the required standard. The Appellants were consequently convicted for the two counts of robbery with violence and sentenced to serve 30 years' imprisonment with a rider that the sentences were to run from the date of their arrest being 2nd May 2017.

The Appeal

14. Aggrieved by the conviction and sentence, the 1st Appellant filed an appeal and later amended the Grounds of Appeal raising 5 grounds as follows: -

(1) THAT the trial court erred in enacting charges which were incurably defective contrary to Section 134, 135, 137, 200 and 214 of the CPC.

(2) THAT the trial erred in relying on incredible unreliable evidence on recognition of identification which was the only circumstantial evidence against the Appellant.

(3) THAT the trial court did not prove mens reas nor actus reus and relied on shoddy investigations which led to dereliction of justice.

(4) THAT the trial court prejudiced the Appellant with presentation of inconsistent and contradictory evidence which did not prove guilt beyond reasonable doubt.

(5) ***THAT the trial court did not give a fair trial to the Appellant and did not observe Section 7 of the CPC.***

15. The 2nd Appellant also filed an appeal vide a Petition of Appeal raising 10 grounds of appeal as follows: -

(1) THAT the learned trial magistrate erred in law and in fact by convicting the Appellant but failed to note that the ingredients of the offence were NOT conclusively proved.

(2) THAT the learned trial magistrate failed to consider the principles laid down under Section 46 of the Police Act on matters identification.

(3) THAT the identification of the Appellant was not properly done to attain a conviction in the light of the circumstances.

(4) THAT, the learned trial magistrate erred in law and fact by sentencing the Appellant to a sentence term that is not only harsh but also excessive in light of the facts and circumstances of this case.

(5) THAT, the learned trial magistrate erred in law and fact by sentencing the Appellant yet failed to find/consider his mitigating circumstances.

(6) THAT, the learned trial magistrate erred in law and fact by convicting the Appellant yet failed to find that his defence was cogent and believable.

(7) THAT the learned trial magistrate erred in law and fact by convicting the Appellant but failed to conform to the principles of doctrine of recent possession.

(8) THAT, he prayed to be supplied with a copy of the original trial court's proceedings and its judgement.

(9) THAT further grounds shall be adduced at the hearing of this appeal.

(10) ***THAT he wished to be present during the hearing and determination of this appeal.***

16. The Appeals were consolidated and canvassed by way of written submissions which I have considered.

17. The duty of a first appellate court was explained in the case of ***Pandya vs. Republic*** **(1957) EA 336** thus: -

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence."***

18. From the grounds of appeal, the record and the parties' submission, I have isolated the following issues for determination: -

a) ***Whether the charge sheet was defective.***
b) ***Whether identification of the Appellants was safe and free from error.***
c) ***Whether the doctrine of recent possession was properly applied.***
d) ***Whether the prosecution proved the offence beyond reasonable doubt.***
e) ***Whether sentence was excessive.***

Analysis and Determination

19. Section 296 (2) of the Penal Code stipulates 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 before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other**

personal violence to any person, he shall be sentenced to death.

20. The ingredients that must be proved are robbery and any of the elements under section 296(2) (see ***Oluoch vs. Republic*** **[1985] KLR** and ***Johana Ndungu vs. Republic*** **CRA. 116/1995, [1996] eKLR**).

21. On the evidence, I find it proved that PW1 and PW2 were robbed of property at the gate, and that they were attacked by three men, at least one armed with a panga/sword. The robbery element was therefore established. The appeal however turns on the identity of the perpetrators of the offence and whether the prosecution proved, beyond reasonable doubt, that these Appellants were among the attackers.

Whether the Charge Was Defective

22. The Appellants complained that the charge particulars did not accord with the evidence, including the arsenal/weapons alleged to have been used in the robbery. I reiterate that defects are assessed for prejudice. In ***Sigilani vs. Republic*** **[2004] 2 KLR 480** the Court of Appeal stated that: -

> ***"The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It***

will also enable the accused to prepare his defence."

23. Similarly, in ***Yongo vs. R*** **[1983] eKLR** it was held thus: -

"In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

i. When it does not accord with the evidence before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein;

ii. when for such reason it does not accord with the evidence given at the trial."

24. The charge cited Section 295 as read with Section 296(2) of the Penal Code. This formulation has repeatedly been upheld as proper. In ***Joseph Njuguna Mwaura & 2 others vs. Republic*** **[2013] eKLR**, the Court of Appeal addressed the argument that a charge framed under Section 295 as read with Section 296(2) of the Penal Code is duplex and held that: -

"The offence of robbery with violence is created by section 296(2) of the Penal Code. Section 295 of the Penal Code defines what constitutes robbery. It is therefore not correct to say that a charge under section 295 as read with section 296(2) is duplex. The two sections are complementary. Section 295 defines the offence

of robbery, while section 296(2) provides the circumstances under which robbery becomes aggravated and attracts the death penalty."

25. The Court further emphasized that the elements in section 296(2) are not separate offences but aggravating ingredients of the single offence of robbery with violence.

26. This decision effectively settled the earlier confusion that had arisen from decisions suggesting duplicity in such framing. I therefore find no defect in the charge sheet that could occasion prejudice.

Identification Evidence

27. Both PW1 and PW2 stated that the incident occurred at night (about 1.30–2.00 a.m.) and relied on security lighting at the gate, but also stated that they were moved about 20 metres to a darker area.

28. In ***Nzaro vs. Republic* (1991) KAR 212** and ***Kiarie vs. Republic* (1984) KLR 739**, it was held that:

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

29. Further, in ***R vs. Turnbull* [1977] QB 224**, the court gave the cautionary guide including: -

"If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of mistaken identification is lessened; but the poorer the quality, the greater the danger. … When, in the judgment of the trial judge, the

quality of the identifying evidence is poor, as for example, when it depends on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

30. Applying the above principles to this case, I agree with the Appellants that the quality of identification was not tested or made watertight. The evidence did not address with specificity the nature, intensity, and positioning of the lighting. The possibility that the lighting illuminated the vehicle path yet obscured persons outside the direct beam was not excluded.

31. The duration of the ordeal (10–15 minutes) does not, without more, guarantee reliable visual identification, particularly where parts of the interaction occurred in a darker corner and under stress.

32. In respect to the identification of the 1st Appellant, I note that PW1 said that an identification parade was planned but the suspect objected to it. This means that no parade was conducted for PW1's alleged attacker. PW1 claimed recognition via a "selfie" in the recovered Huawei phone. I however note that this was not supported by production of the phone or the alleged image in evidence.

33. In ***Gabriel Kamau Njoroge vs. Republic*** **(1982-1988) 1KAR 1134**, the court observed: -

"A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

34. I find that the purported identification of the 1st Appellant therefore remained dock identification, unsupported by a prior parade or other cogent independent evidence.

35. Additionally, PW1's evidence on complexion was inconsistent and, in any event, complexion alone is not a sufficient distinguishing description.

36. I therefore find the evidence linking the 1st Appellant to the robbery was insufficient.

37. Turning to the identification of the 2nd Appellant PW2 asserted that she identified him in an Identification parade. I however note that the parade form was only marked for identification and was not produced as an exhibit.

38. The law is clear that parade evidence is valuable only where the parade is properly conducted and proved. In ***Senga Kingoo Mwasia vs. Republic*** **[2006] KEHC 540 (KLR)** the court held: -

"In FREDRICK AJODE VS REPUBLIC, Criminal Appeal No. 87 of 2004 at Kisumu (unreported), the Court of Appeal held that before an identification parade is conducted, a witness should be asked to give the description of the

accused and the police should thereafter arrange for a fair identification parade. We find that the appellant's identification by the complainants was improper and it could not have formed the basis of a conviction. In any event, no identification parade forms were produced before the trial court as required under the law."

39. Further, in ***Njihia vs. Republic*** **[1986] KECA 38 (KLR)**, the court stated: -

"It is not difficult to arrange well-conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course, if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime."

40. In the instant case, there was no evidence to show that PW2 first gave a description to police and the parade form was not produced thereby rendering the alleged parade identification unsafe.

41. The prosecution also sought to link the 2nd Appellant to the offence through alleged recovery of PW2's Tecno L8 phone, and invoked facts resembling the doctrine of recent possession. I however note that there were material contradictions in the IMEI numbers as the IMEI on PW2's receipt differed from the IMEI in Safaricom data relied upon, the IMEI cited in the charge sheet also differed and the phone itself was not produced in evidence for scrutiny.

42. On doctrine of recent possession, the Court of Appeal in ***Malingi vs. Republic*** **[1989] KLR 225** stated: -

> ***"By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly, that the item he has in his possession has been stolen; it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items. The***

doctrine being a rebuttable presumption of facts is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole or was a guilty receiver."

43. Given the IMEI contradictions and the non-production of the phone, I find that the foundational facts for recent possession were not proved. The alternative charge of handling stolen property therefore also could not stand.

Failure to call crucial witnesses / evidential gaps

44. Several crucial witnesses were not called, including the investigating officer, parade officer, scene of crime officer, and medical personnel to support alleged injuries and treatment.

45. On evidential gaps, the Court of Appeal in ***Sawe vs. Republic* (2003) KLR 364** held: -

"Suspicion, however strong, could not provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt."

46. Similarly, on the prosecution's burden where identification is the pivot, the Court of Appeal has reiterated:

"Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends

wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification."

47. In ***Wamunga vs. Republic*** **[1989] KECA 47 (KLR)**, the Court of Appeal reiterated that where the case turns on identification/recognition, the court must be satisfied that the circumstances were favourable and free from error; and further warned that recognition can still be mistaken.

48. In this appeal, the combined effect of weak/unsupported identification, non-production of key exhibits (including the alleged recovered phone), contradictions in IMEI data, and failure to call crucial witnesses, creates reasonable doubt that must be resolved in the Appellants' favour.

49. As stated in ***Pius Arap Maina vs. Republic*** **[2013] KEHC 1762 (KLR)**: -

"It is gainsaid that the prosecution must prove a criminal charge beyond reasonable doubt. As a corollary, any evidential gaps in the prosecution's case raising material doubts must be interpreted in favour of the accused."

50. I am also guided by the classic statement on the criminal standard of proof in ***Miller vs. Minister of Pensions*** **1942 A.C.**: -

"Whereas in the latter case Lord Denning stated on this phrase of beyond reasonable doubt as

follows: "It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

51. I therefore find that although the ingredients of robbery with violence, as an offence-event, were established, the prosecution failed to prove, beyond reasonable doubt, that the Appellants were the perpetrators.

Sentence

52. Having found the convictions unsafe, I find that the issue of sentence does not arise.

Disposition

53. Having regard to the findings and observations that I have made in this judgment, I find that the convictions on the two counts of robbery with violence against the 1st and 2nd Appellants are unsafe and are hereby quashed. The sentences of 30 years' imprisonment are hereby set aside.

The Appellants shall be released from custody forthwith unless they are 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
Chepkonga for the state
COURT ASSISTANT Karani