



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
(CHERERE-J)
HCCRA E004 OF 2025

BETWEEN
EZEKIEL ANGWENYI MOKAYA APPELLANT
AND
REPUBLIC RESPONDENT

**(Being an appeal from the conviction and sentence in Nyamira
MCCR 989 of 2019 by Hon.M.Nyigei (PM) on 22nd December 2021)**

JUDGMENT

1. The Appellant, Ezekiel Angwenyi Mokaya and another who absconded were jointly charged in Nyamira MCCR 989 of 2019 with the offence of robbery contrary to section 296(2) of the Penal Code. The particulars alleged that on 29th June 2019, jointly and while armed with dangerous weapons, robbed Geoffrey Mogere Ragira and injured him during the robbery.
2. The prosecution called six (6) witnesses in support of its case. PW1, the complainant, testified that on the night of 29th June 2019 at about 9.00 p.m., two assailants forcefully pushed open the door to his room as he was locking it, causing him to fall. He stated that there was light from a solar lamp and that he recognized the assailants as Walter and the Appellant, who were his neighbours. He testified that he was physically and sexually assaulted as items including black gumboots, a solar lamp and battery, an axe, maize and four sofa cushions were stolen from his house. He later escaped through a window, reported the incident to his parents, and was taken to hospital the following

day where a P3 form was completed. He subsequently identified in court, as his, the recovered pair of gumboots, the solar lamp and battery, the axe and the maize.

3. PW2, Daniel Ragira Mogere, the complainant's father, testified that at about 10.00 p.m., his son informed him that he had been assaulted and sodomized by Walter and the Appellant. He, together with neighbours, proceeded to the suspects' homes. Walter was found at his house and arrested, while the Appellant was not found. He further stated that the complainant was taken to hospital the following day.
4. PW3, Naomi Nyaboye Asanyo, the complainant's mother, corroborated the evidence of PW2. She testified that the complainant woke them and reported that he had been attacked by Walter and the Appellant. She observed that he had a swollen face and was limping. The matter was reported, and the complainant was taken to hospital for treatment.
5. PW4, Cosmas Ondikei Bosire, the Assistant Chief, testified that upon receiving a report of robbery, he proceeded to the scene. He stated that maize grains were scattered along a path leading from the complainant's house to the Appellant's house. Upon searching the Appellant's house, he recovered a pair of gumboots, a solar lamp and battery, an axe and maize, which were handed over to the police. He did not witness the offence.
6. PW5, Conceptor Kwamboka Omboga, a clinical officer, examined the complainant and produced the treatment notes and P3 form. She testified that the complainant had swelling on the forehead and limbs and bruises around

the anal region with recent bleeding. She assessed the degree of injury as harm and formed the opinion that the injuries were consistent with physical and sexual assault.

7. PW6, Corporal Gilbert Oloo, the investigating officer who took over the file, testified that the complainant identified Walter and the Appellant as the assailants and also identified the recovered items as his.
8. Upon being placed on his defence, the Appellant gave sworn testimony and denied the offence. He stated that he was arrested while at work and was unaware of the allegations. He acknowledged that the complainant is his relative but denied being present at the scene on the material night.
9. Upon a full trial, the learned trial magistrate convicted the Appellant on the first count only and sentenced him to twenty (20) years' imprisonment. The conviction and sentence were delivered on 13th October 2022.
10. Aggrieved by both conviction and sentence, the Appellant lodged the present appeal by a Petition of Appeal on grounds:
 - (a) That the learned trial magistrate erred in law and fact by convicting the Appellant despite the prosecution having failed to conclusively prove the essential ingredients of the offence of robbery with violence beyond reasonable doubt;**
 - (b) That the trial court erred in finding that the prosecution had discharged the burden of proof, whereas the evidence on record did not meet the required standard in criminal proceedings;**

(c) That the learned trial magistrate erred in relying on evidence of identification by recognition which was not positively proved and was not free from the possibility of error;

(d) That the trial court erred in law and fact by failing to properly evaluate the Appellant's defence, which was cogent and raised reasonable doubt;

(e) That the sentence imposed was harsh and excessive in the circumstances.

11. This being a first appeal, this court is obligated to reconsider and re-evaluate the entire evidence on record and draw its own conclusions, while making due allowance for the fact that it did not have the benefit of seeing and hearing the witnesses testify. That duty was articulated in **Okeno v Republic [1972] EA 32**.

12. From the grounds of appeal and the submissions filed, the following issues arise for determination:

(a) Whether the prosecution proved the ingredients of the offence of robbery with violence beyond reasonable doubt;

(b) Whether the Appellant was positively identified as one of the perpetrators;

(c) Whether the recovery evidence established possession sufficient to sustain the conviction;

(d) Whether the Appellant's defence was duly considered;

(e) Whether the sentence was lawful and appropriate.

;

13. Section 296(2) of the Penal Code provides that a robbery becomes robbery with violence if any one of the following circumstances is proved: the offender is armed with a dangerous or offensive weapon or instrument; the offender is in the company of one or more other persons; or immediately before or immediately after the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.
14. The three ingredients are disjunctive and proof of any one of them is sufficient to bring the offence within section 296(2).
15. There was evidence on record that Complainant's goods were stolen and that violence was used during the incident. However, even after establishing theft and the use of violence, the prosecution was still under a duty to prove beyond reasonable doubt that it was the Appellant who committed the offence.
16. The conviction of the Appellant rested principally on the evidence of the complainant, who was the sole identifying witness placing the Appellant at the scene of the robbery.
17. In **Wamunga v Republic [1989] KLR 424**, the Court of Appeal emphasized the need for caution when considering identification evidence and set out factors to be examined: the length of observation, distance, lighting conditions, prior knowledge of the accused, and any special reasons for remembering the accused.
18. In the case of **Daniel Kipyegon Ng'eno vs. Republic, [2018] eKLR** the Court of Appeal reiterated that identification evidence must be scrutinized

carefully and may only be relied upon where the court is satisfied that it is positive and free from the possibility of error. The Court emphasized consideration of factors such as lighting, duration of observation, proximity, and whether the witness knew the assailant beforehand.

19. Similarly, in **Lubanga & another v Republic (Criminal Appeal 63 of 2018)** **[2026] KECA 63 (KLR) (30 January 2026) (Judgment)** the Court reaffirmed that before acting on visual identification, a court must examine the intensity and source of light, the length of time the witness had to observe the assailant, and whether the circumstances were conducive to a safe and reliable identification.

20. In the present case, the incident occurred at night. The complainant stated that there was light from a solar lamp in the house. However, no evidence was led as to the intensity of that light, its exact positioning, or whether it illuminated the Appellant's face sufficiently. The complainant testified that the light was later switched off but he did not explain how long it had remained on for him to have positively recognized the Appellant. The conditions therefore required careful scrutiny.

21. Although the complainant stated that he knew the Appellant as a neighbour, recognition must still be tested against the surrounding conditions. Upon re-evaluation of the record, and considering the circumstances prevailing at the time of the incident, I am not persuaded that the conditions under which the complainant purported to recognize the Appellant were shown to be sufficiently favourable to eliminate the possibility of error. In the absence of independent corroborative evidence, I find that the prosecution did not prove

the Appellant's identity beyond reasonable doubt.

22. The Appellant challenged the finding that the stolen goods were recovered from his house. In **Isaac Ng'ang'a Kahiga v Republic, Criminal Appeal No. 272 of 2005**, the Court of Appeal held that before relying on the doctrine of recent possession, four elements must be established: First, the property was found with the suspect; second, the property is positively the property of the complainant; third, the property was stolen from the complainant; and lastly the property was recently stolen from the complainant.
23. While the law does not require a multiplicity of witnesses, where recovery is contested and is relied upon to establish possession for purposes of invoking the doctrine of recent possession, the fact of recovery must be proved by clear and cogent evidence.
24. The evidence relating to the alleged recovery was limited to the testimony of PW4 and was expressly denied by the Appellant. Given the contested nature of that recovery and the lack of additional supporting evidence, I am not satisfied that possession was proved to the required standard so as to safely found a conviction under the doctrine of recent possession.
25. Concerning consideration of the defence, a proper analysis required the trial court to interrogate whether the identification was free from error and whether the disputed recovery was proved to the requisite standard. Whereas the defence was summarized, the foregoing analysis discloses that it was not properly evaluated against the totality of the prosecution evidence.
26. Having found the conviction unsafe, the issue of sentence does not arise for

determination.

27. For the reasons set out above, I find that the prosecution failed to prove beyond reasonable doubt that the Appellant was one of the perpetrators of the offence of robbery contrary to section 296(2) of the Penal Code. The appeal is allowed, the conviction quashed and the sentence set aside. The Appellant shall be released forthwith unless otherwise lawfully held.

**DELIVERED AT NYAMIRA THIS 12th DAY OF February
2026**

**WAMAE.T. W. CHERERE
JUDGE**

Appearances

Court Assistant - Anita

Appellant - Present

For Respondent - Mr. Chirchir (SADPP)