



REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CRIMINAL APPEAL NO. E013 OF 2025

BONIFACE WANDERI WANJIKU.....

.....APPELLANT

VERSUS

REPUBLIC.....

..RESPONDENT

JUDGMENT

1. This is an appeal from the conviction and sentence meted out by the Hon. Bosibori (Senior Resident Magistrate) in Mûkûrwe'inî SPMCCRC No. E148 of 2024 on 20.2.2025. The Appellant was sentenced to 30 years imprisonment.
2. The trial court found the Appellant guilty on the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that on 12.5.2024, at 2000hrs at Kamuchuni village, Gikondi Location in Mûkûrwe'inî subcounty of Nyeri County, the Appellant robbed Derrick Baiyi Gikunju a mobile phone make OPPO AIK valued

at Ksh. 8,000/= and immediately after the time of such robbery wounded Derrick Baiyi Gikunju.

3. The Appellant filed undated Memorandum of Appeal setting out the following grounds of appeal:

- a) That the trial court erred in both law and in fact in failing to find that the circumstances of identification of the Appellant were difficult and there was no evidence of a witness who placed the Appellant at the scene of crime.
- b) The trial court erred in both law and in fact in finding that the case was proved beyond reasonable doubt contrary to the evidence.
- c) The trial court erred in law and in fact in failing to consider inconsistencies and contradictions in the prosecution case.
- d) The trial court erred in law and in fact in failing to consider that crucial witnesses were not called.
- e) The trial court erred in law and in fact in rejecting the Appellant's sworn defence.

Evidence and proceedings

4. PW1 was Derrick Mbai Gikunju. He was 17 years and in form 3 at Giakanja Secondary School. On 12.5.2024 at 8.00 pm, he was heading home. He held his mobile phone in the hand. Two men emerged. One was riding motorcycle while other was pillion passenger. The Appellant asked him if he knew

'njia ya kwenda mahali fulani'. He did not indicate the actual place. He then pounced on him and held his neck.

5. When he tried to escape, the appellant held and pulled his hand towards the Appellant. He snatched his mobile phone and handed it to the rider. They turned the motorbike and rode away. The motorbike however stopped as it hit someone in a crowd. The rider took off but the Appellant was held by the crowd. They assisted him to escort the Appellant to the Chief's camp. He was then arrested by the police.
6. On cross examination, the incident took place around 8 pm. He had no proof of the mobile phone. He was given the phone by his sister and he saw the Appellant.
7. PW2 was Mwangi Joseph Kihato. He was a friend of PW1 and they were together earlier on 12.5.2024. He was 17 years old. He did not know the Appellant. He was 20 meters from where the motorbike was. There was light but he could not see clearly at 0800 pm. He saw PW1 being dragged. PW1 was wearing a jacket.
8. PW3 was Peter Ndegwa Methu. PW1 and PW2 were his friends. He left Kiharo with PW1 at 7.55 pm. There was street light. He was at a dark spot and could not see. He could not tell the clothes the assailants wore.
9. PW4 was John Gikunju Gichohi. PW1 was his son. PW1 wore a jacket. He did not witness the accident. The police phoned him

about the incident. PW1 suffered injuries. He saw the Appellant at the police station.

10. PW5 was Edwin Nganga, the clinical officer. PW1 had injuries on examination. He attended him 12.5.2024 consistent with friction on tarmac road.

11. PW6 was No. 215181 Senior Sergeant Adan Omar. He was the Investigating Officer. He conducted the investigations upon receipt of the report. There was a receipt dated 14.5.2022 for Ksh. 8,000/= that proved purchase of the phone. He seized clothes the Appellant had worn. Upon investigations, it became apparent that the Appellant was the suspect and he was charged with the offence before court.

12. DW1 was the Appellant. On the fateful day, he left Kamuchoni for Kiharo. It was approaching 9 pm. He met 5 persons. One person had torn clothes. The person with torn clothes pointed at him and said he had stolen his phone. He was arrested.

Analysis

13. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. The Court of Appeal for

Eastern Africa in **Pandya vs Republic [1957] EA 336** held as follows:

On a first appeal from a conviction by a Judge or magistrate sitting without a jury, the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

14. On a first appeal, the appellant is entitled to a fresh and exhaustive reevaluation of the evidence on record, with the appellate court drawing its own conclusions, while bearing in mind that it did not have the advantage of seeing and hearing the witnesses. In the case of **Okeno v Republic [1972] EA 32 at 36**, the East Africa Court of Appeal stated on the duty of the court on a first appeal:

- i. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v.

R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.

15. The first appellate court is entitled to consider the evidence in the trial court as a whole as being submitted afresh to be subjected to exhaustive examination to guide the court towards its own decision on the evidence. In **Kiilu & Another vs. Republic** [2005]1 KLR 174, the Court of Appeal stated as follows:

1. 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. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's

findings and conclusions; only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.

16. The legal burden of proof is on the prosecution and remains constant throughout. According to established principles, the burden of proof rests upon the prosecution to prove the guilt of an accused person beyond a reasonable doubt. This burden does not shift to the accused, save in a few exceptional statutory instances where the law expressly provides otherwise. According to *Halsbury's Laws of England*, 4th Edition, Volume 17, paras 13 and 14:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues.

17. Brennan J, addressed the standard of proof required in Criminal cases in the case of *Re Winship* 397 US 358 {1970}, at page 36164 that:

The accused, during a criminal prosecution, has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

18. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. Lord Denning in **Miller vs. Ministry of Pensions**, [1947] 2 ALL ER 372 had this to say:

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as 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.

19. Within these boundaries, the Court is obliged to conduct a fresh and thorough examination of the evidence, reassess the credibility of witnesses, and evaluate any conflicting testimony to reach its own independent conclusions. Throughout this exercise, the legal burden of proof remains unchanged, resting entirely on the prosecution to establish the appellant's guilt beyond reasonable doubt. Only by meticulously scrutinizing all the evidence, while adhering strictly to the statutory framework, can the Court ensure that the appellant is afforded a full and fair reevaluation of the case.

20. Reasonable doubt needs not reach certainty, but it must carry a high degree of probability. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

“What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-‘That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as 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.’”

21. PW1 and PW2 were not certain that they saw the Appellant. There was said to be street light. The Appellant pulled PW1 and snatched his phone. He handed to the person riding the motorcycle. The Appellant and the said person escaped but shortly after, they hit a person in a crowd that was nearby and had to stop. That is when the rider escaped but the Appellant was arrested and escorted to the police station.
22. On his part, the Appellant maintained he did not commit the offence. On the material day, he had indeed met a crowd of about 5 people as it was approaching 9.00 pm. Among the crowd was one person who had torn clothes and who said his phone had been stolen. He pointed at the Appellant as the robber and that was how the Appellant found himself in the mix.
23. It is not difficult to find that the trial court found the Appellant guilty when there was doubt as to whether the Appellant was indeed the person who committed the offence, or whether the offence of robbery with violence was proved at all. I say so because whereas the prosecution’s case on all its fours was that PW1 and PW2 identified the Appellant as the violent robber on the material day at 8.00 pm, the source and

intensity of identifying light was not described. Section 296(2) of the Penal Code provides as follows:-

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.

24. The appellant was not in possession of any of the stolen goods. Secondly, there was no violence used. The phone was snatched and was not found in recent possession of the appellant. The incident took place at night. The complainant minor was shaken from the incident and the accident involving the motor cycle, without use of violence. The complainant stated as follows; there was no time to identify the appellant.

25. The court did not warn itself on the danger of relying on a single witness. In the case of **Charles Mondo Olweno v Republic** [1990] KEHC 47 (KLR), this court, J.M. Khamoni, J, as he then was, stated as follows:

On the other hand even if it were held that the learned resident magistrate was right to accept the evidence of PW1 and PW2 against the appellant after he had rejected that evidence against A1, A2 and A4 and that therefore he was right to hold that the evidence of PW3 supported that of PW1 and PW2, the fact remains that the evidence of

each of these witnesses had to be subjected to the test whether his or her identification of the appellant was so positive as to remove the possibility of a mistake. That was not done and as such the learned resident magistrate erred in law.

The second test to which the evidence of PW3 should have been put was whether it could be relied upon, without any other evidence, to sustain a conviction. What obtained, from the way the learned magistrate handled the evidence in his judgment was that after the evidence of PW1 and PW2 on identification had been discredited, there remained the evidence of a single witness, PW3, to rely upon to convict the appellant. Conviction on the evidence of a single witness. Was the evidence of PW3 such that it could not but be true bearing in mind the comments I have made above about that evidence?

26. This same question was dealt with by the court of appeal in the case of **Victor Mwendwa Mulinge v Republic [2014] KECA 710 (KLR)**, where, Kihara Kariuki (Pca), Musinga & Gatembu, JJ.A) stated as follows:

More often than not, the conviction of an accused person solely on the evidence of a single identifying witness poses some uncertainty. In **MAITANYI v REPUBLIC [1986] KLR 198**, this court of appeal posited as follows regarding a single identifying witness:

1. *Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen*

the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. *When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light available conditions and whether the witness was able to make a true impression and description.*
3. *The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before decision is made.*
4. *Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction."*

27. The Appellant was a victim of circumstances and his defence was not shaken. Can his presence at the place of arrest be said to be circumstantial evidence? The appellant was walking in the street 1 hour after the alleged incident. The complainant was keen to find and latch on someone to blame. There was nothing to place the appellant as the robber. There were no circumstances that co-existed with his guilt. Circumstantial evidence and its threshold was addressed in the case of **R vs Kipkering Arap Koske [1949] 16 EACA 135**, that it must be such that it must exclude co-existing circumstances which would weaken or destroy the

inference of guilt. In Sawe vs Rep [2003] KLR 364, the Court of Appeal expressed that:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.

28. Based on the above analysis, I also find that the conviction was not supported. The appellant was convicted without proof of the offence of robbery with violence and without the appellant being the person seen robbing the appellant. The conviction is thus unsafe.

29. In the circumstances the appeal against the conviction is allowed. Having found that the conviction was unfounded and set it aside, I wish to add that there were no circumstances changing the offence to be that of robbery with violence. Given the circumstances, had I found the appellant liable, I would have proceeded under section 296(1) of the penal code and sentenced him to 8 years imprisonment since the section provides as follows:

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

30. Section 26 of the said Act provides as follows:

(1) A sentence of imprisonment for any offence shall be to imprisonment or to imprisonment with hard labour as may be required or permitted by the law under which the offence is punishable.

(2) Save as may be expressly provided by the law under which the offence concerned is punishable, a person liable to imprisonment for life or any other period may be sentenced to any shorter term.

31. This is informed by the fact that the injuries alleged in the treatment notes relate to the accident and not inflicted by the appellant. This was friction against the tarmac. There were no injuries on the neck where the appellant allegedly held him. There is however, no utility in dealing with sentence. The appeal is allowed.

Determination

32. In the circumstances I make the following orders:-

- a) The appeal on conviction and sentence is allowed. The conviction and sentence are set aside. In lieu thereof, I issue an order that the Appellant shall be set free unless otherwise lawfully held.
- b) Right of appeal 14 days.
- c) The file is closed.

DELIVERED, DATED and SIGNED at NYERI on this 4th day of May, 2026.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Appellant present

Mr. Kihara for the State

Court Assistant - Michael/Martin