



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwanyoha v Republic (Criminal Appeal 101 of 2022)  
[2024] KECA 691 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KECA 691 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL 101 OF 2022  
SG KAIRU, JW LESSIT & GV ODUNGA, JJA  
JANUARY 25, 2024**

**BETWEEN**

**MAFANIKIO HASSAN MWANYOHA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the judgment of the High Court of Kenya at Mombasa (Ongeri, J.)  
delivered on 21st February 2017 in High Court Criminal Appeal Nos. 121 & 122 of 2016)*

**JUDGMENT**

1. The appellant Mafanikio Hassan Mwanyoha, alias Fani Hussein Hassan, was charged alongside Ali Hussein Hassan, with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the offence were that on 19th August 2015 at Bougan Villa Estate within Diani Location in Msambweni District within Kwale County, jointly, while armed with a knife robbed Peter Schadwsky of one bag, one LG mobile phone, one pair of spectacles, one company identity card and five credit cards all valued at 125 euros (approximately Kshs. 14625/=) and immediately before, at, and immediately after the robbery threatened to use actual violence to the said Peter Schadwsky.
2. The appellant faced an alternative charge of handling stolen property contrary to section 322(1)(2) of the Penal Code the particulars being that on the 19<sup>th</sup> August 2015 at Diani Police Station in Kwale County, otherwise than in the case of stealing dishonestly retained one wallet, company identity card, one mobile phone make LG and five credit cards knowing or having reason to believe them to have been stolen or unlawfully obtained.
3. The appellant and his co-accused were tried before the Principal Magistrates Court at Kwale, found guilty, and convicted in a judgement delivered on 12th April 2016. They were both subsequently sentenced to suffer death. On appeal, the High Court (A. Ongeri, J.) in a judgment delivered on 21st



February 2017 upheld the conviction and sentence as against the appellant but set aside the conviction and sentence as against the appellant's co-accused. Dissatisfied, the appellant lodged the present appeal.

4. The facts, as established by the prosecution are that the complainant, PW1, a retired German pilot, was vacationing at the Kenyan Coast in Diani in August 2015. On 19<sup>th</sup> August 2015 he left his residence, Bush Villa, on foot to go visit a friend at a place he referred to as Malaika Bana. He had hardly turned the corner from his residence when he was approached by two men who enquired from him if he could exchange Euro coins for Kenya Shillings. He informed them that he had none. One of the men then got closer to him and drew a knife and placed it on his throat. Both men were in front of him. He described the one wielding a knife as tall, wearing a polo shirt with horizontal stripes while his compatriot was described as short. PW1 was carrying a small black bag which contained his mobile phone, driving licence, company Identity card and five (5) credit cards inside a black wallet and his reading glasses. The tall man demanded the bag but when PW1 hesitated, he snatched it and ran away after pushing PW1 who fell to the ground. All this time, the short gentleman stood by without uttering a word.
5. After snatching the bag, the two gentlemen ran off into the bush. PW1 rose from the ground and as he did so, he yelled and residents, described as villagers, came out. In the vicinity, there were fundi's (builders) constructing a water tower who directed PW1 and the villagers in the direction the assailants had ran off to. PW1 and the villagers pursued them in bush. Shortly thereafter, they were joined in the search by guards from Security Group Africa (SGA). After approximately 10 to 20 minutes, Police officers arrived and entered the bush and the two gentlemen were captured and arrested and placed in the police vehicle after PW1 had identified them as the men who attacked him. They were taken to Ukunda Police Station where the contents of his black bag, except the reading glasses, were recovered. PW1 explained:

“When we reached at Ukunda police station the tall man gave me my phone. It was make LG. It is this one - PMFI .1 This is the receipt -PMFI .2 The tall one was begging for mercy from me. He was telling me to pardon him. He was saying that he was sorry. He was begging for mercy as he was alighting from the police vehicle. He gave me the phone while outside. When we entered the report office, I was given my wallet.”

6. Stephen Kiarie Murungu PW2, a resident of Diani learnt of the incident from his son. He joined the search party of residents and the SGA officers in pursuit of the assailants in the bushes neighbouring his plot. He found the complainant (PW1) who informed him that he had been attacked. His left hand was bleeding. The assailants were found in the bush and arrested. In his words:

“We found 2nd accused first. He was arrested. After a brief search, we found 1st accused. We arrested him also. I did not know them. They were found in the bushes.”

They were put in the police vehicle and taken to the police station where he followed them. He stated further that at the police station, a phone was recovered from “1<sup>st</sup> accused” who had refused to disembark from the police vehicle as he was injured, and that the complainant identified the phone as his.

7. Fredrick Nyale and Samson Osoro, PW3 and PW4 respectively, were SGA officers. They were on duty in Diani on 19<sup>th</sup> August 2015. They rushed to the scene of crime after receiving an alarm from Excel Garage, a client SGA. They found PW1 at the scene who narrated to them what had happened and



gave a description of his attackers. They joined the residents in the search for the assailants in the bush. According to PW3:

“We first arrested 1st accused. Afterwards we arrested 1st accused (sic). After arresting 2<sup>nd</sup> accused we informed the police. We first put 2nd accused in our vehicle and confirmed (continued?) to search for 1st accused. A police vehicle came. They were both from Diani Police station. I accompanied them. An LG Mobile phone and credit cards which were in a black bag were recovered from 1<sup>st</sup> accused.”

8. PW4’s testimony was substantially the same as that of PW3 adding that:

“We met villagers searching the bush. We arrested the short suspect first. We put the suspect in our vehicle. After 30 minutes we arrested the 2nd suspect. We informed our office. Officers who were in the office informed the police. Police came. The suspects were beaten by members of public. We handed over the suspects to the police. We accompanied them to the police station.”

He went on to say that at the police station, the complainant’s phone and wallet with his credit cards were recovered from the 1<sup>st</sup> accused.

9. Corporal Anthony Mukunga PW5, of Diani Tourist Police was the investigating officer and the last prosecution witness. He met the complainant, a tourist, at the report office on 19<sup>th</sup> August 2015. He reported that he had been robbed by two men who were also at the station. He pointed them out to him. As they had injuries (he understood they had been beaten by members of the public) he took them to Msambweni Hospital where they were treated before returning them to the police station. On return to the police station, he was given items recovered from the appellants, which were identified by the complainant as belonging to him. He prepared an inventory and thereafter charged the appellants with the offences.
10. In his defence, the appellant stated that he stays in Ukunda and used to work as a gardener at Corius Cottage in Diani; that on 19<sup>th</sup> August 2015 he woke up early and went to work; that at 2.30 p.m., on his way home on foot, on reaching a place called Canoe area, he met four people who enquired from him where he was going, and he informed them he was going home. That when one of them tried to frisk him he resisted, and a struggle ensued, and he was hit on the back with a piece of wood. That he fainted and when he came to, he found himself in a police vehicle with three other people who had also been arrested. Kshs. 3,000 which was in his pocket, his identity card, and other documents he had were missing from his pockets, he said. He was taken to Diani Police Station with serious injuries from where he was taken for treatment at Msambweni District Hospital and thereafter returned to Diani Police Station. He stated further that the following day he was taken back to hospital and subsequently charged with the offence jointly with 2nd accused whom was a stranger to him. He denied having had possession of the complainant’s things.
11. The testimony of the 2<sup>nd</sup> accused, who was acquitted by the 1<sup>st</sup> appellate court, was that he was a camel rider and had been sent by his uncle to untie camels in a nearby bush; that he was relieving himself in the bush when he was arrested by Group 4 officers and subsequently taken to the police station before being charged with an offence he knew nothing about.
12. As already indicated, the trial court found the appellant and the 2<sup>nd</sup> accused guilty of the offence of robbery with violence but the conviction and sentence in respect of the 2<sup>nd</sup> accused was set aside by the High Court. This is the appellant’s second appeal.



13. There are three main grievances. First that the appellant was not positively identified. Second, that the conviction was wrongly based on circumstantial evidence in application of the doctrine of recent possession. Third that the sentence imposed is harsh and inappropriate.
14. Mr. Mutubia, learned counsel, appeared for the appellant.

Counsel submitted that the appellant was not positively identified as the assailant; that in this case there was no identification parade carried out; and that no eyewitness was presented to court to corroborate the complainant's evidence that the offence took place; and that the conviction is therefore unsafe based as it is on identification by a single witness. Reference was made to the case of *Roria vs. Republic* [1967] EA 583.
15. It was submitted further that the evidence linking the appellant to the robbery was purely circumstantial; that the conviction in this case was based entirely on the doctrine of recent possession; that for the doctrine of recent possession to be a basis for conviction, there must be proof that the property in question was found with the suspect; that the property is positively the property of the complainant and was stolen from the complainant; and that the property was recently stolen from the complainant. It was submitted that in this case those requirements were not met. The cases of *David Mugo Kimunge vs. Republic* [2015] eKLR and *Benjamin Ontweka Makori vs. Republic* [2018] eKLR were cited.
16. As regards the sentence, counsel relied on the case of *James Kariuki Wagana vs. Republic* [2018] eKLR and submitted that while the penalty of death is the maximum penalty prescribed for the offence of robbery with violence, the court has discretion to impose any other penalty that it deems fit and just in the circumstances; that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder; that in the present case the maximum sentence was uncalled for as no physical harm or injury was occasioned to the complainant; and further that the mitigating factors in this case were not addressed or considered.
17. Learned Senior Principal Prosecution Counsel Ms. Mutua in opposing the appeal submitted that there are concurrent findings of fact by both the trial court and the first appellate court and there is no basis for interfering with their decisions; that on the strength of the case of *Adan Muraguri Mungara vs Republic*, Cr. A. No. 347 of 2007, this court must pay homage to those concurrent findings of fact by the two courts below unless such findings are not based on evidence or are based on a perversion of the evidence or unless on the totality of the evidence no reasonable tribunal properly directing itself would arrive at such findings.
18. Counsel submitted that the trial court and the first appellate court duly and properly analyzed the evidence and correctly concluded that the conditions of identification were conducive, and that the appellant was positively identified as the perpetrator of the offence; that the conviction is based on watertight evidence adduced to prove the charge as against the appellant; and that the defence put forward by the appellant was duly considered and properly rejected.
19. It was submitted that the ingredients of the offence of robbery with violence as set out in the case of *Oluoch vs. Republic* [1985] KLR, among other decisions, were established and the charge was proved beyond reasonable doubt. Also cited was the case of *Johanna Ndungu vs. Republic*, Cr. A. No. 116 of 1995 [1996] eKLR.
20. With regard to the sentence, it was submitted that the prescribed sentence for the offence of robbery with violence is that of death; that as pronounced by the Supreme Court's decision in *Francis Karioko Muruatetu & another vs. Republic; Katiba institute & 5 others (amicus Curie)* [2021] eKLR, the



court is obliged to mete out the prescribed penalty; that the appellant was not at all remorseful in his mitigation; that the sentence in this case is lawful and should be upheld.

21. We have considered the appeal and the submissions. As correctly submitted by Mr. Mutubia, a second appeal must be confined to matters of law by dictate of Section 361(1)(a) of the Criminal Procedure Code. See *Karingo & 2 others vs. Republic* [1982] eKLR; *David Njoroge Macharia vs. Republic* [2011] eKLR. Three issues arise in this appeal. First is whether the finding by the two courts below that the appellant was positively identified is supported by evidence, especially in light of the High Court having set aside the conviction in relation to the appellant's co-accused. The second issue is whether the doctrine of recent possession was properly invoked and applied. And the third issue relates to the sentence.
22. We begin with the issue on identification. In the age old case of *Abdallah Bin Wendo v R* 20 EACA 166 at page 168 the Court of Appeal for Eastern Africa expressed that:

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule 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 correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

See also *I Cleophas Otieno Wamunga vs. Republic* [1989] eKLR.

23. In the present case, the complainant stated that he was accosted by two men, one tall and the other one short; that both men were in front of him; that one of them, the tall one, got very close to him and pulled a knife and placed it on his throat; that he concentrated on the tall one who was wearing a polo shirt with horizontal stripes. He identified the tall one in court as the 1<sup>st</sup> accused, the appellant. After villagers and the SGA officers came to his aid, he was able to give a description of his assailants to them. Evidently, his observation of his assailants was not a mere fleeting glance. He took careful note of details that he gave in court which persuaded the trial court as well as the first appellate court that indeed the appellant was the assailant. The encounter took place in broad daylight at about 11.30 a.m. The circumstances were conducive for positive identification.
24. There is the contention that the appellant's conviction is not safe because that of his co-accused was set aside by the High Court. However, the matter of the co-accused is not before us, as there is no appeal against his acquittal. That said, it is noteworthy that in page 7 of her judgment, the learned Judge of the High Court had expressed that:

“The incident occurred in broad day light and the Appellants were properly identified. I find that the conditions were conducive for proper identification. The Appellants were arrested immediately after the attack and the complainant's property recovered from the 1st appellant.” [Emphasis added]

25. Evidently, the learned Judge was at that stage satisfied that the co-accused was in the company of the present appellant but later in the judgment expressed that the co-accused was not properly identified as the complainant concentrated on the present appellant and on account of nothing having been recovered from him. The fact that the High Court entertained doubts about the guilt of the appellant's co-accused is not a basis for impeaching the identification of the present appellant.



26. Moreover, the complainant reported that his assailant snatched his bag which contained his phone and black wallet with credit cards all of which, except for his reading glasses, were in the inventory of items recovered from the appellant. In our view, the doctrine of recent possession was properly invoked to buttress the appellant's conviction. See decision of this Court in *Isaac Nganga Kahiga & another vs. Republic* [2006] eKLR. The complainant was clear what was contained in his black bag that was snatched from him. He described the contents in detail. Hardly a few hours later, many of those items were recovered from the appellant. Indeed, according to the complainant, the appellant surrendered his LG phone at the police station as he begged for forgiveness.
27. We conclude that there is no basis for this Court to interfere with the concurrent findings by the trial court that the prosecution established beyond reasonable doubt that the appellant was among the attackers of the complainant.
28. Turning to the sentence, this Court in *Robert Mutungi Muumbi vs. Republic* [2015] eKLR stated that:
- “Section 361(1)(a) of the Criminal Procedure Code restricts the right of appeal to this Court from the High Court in the exercise of its appellate jurisdiction to questions of law only and declares that severity of sentence is a question of fact. However it is appreciated under section 361(2) of the Code that this Court can set aside or vary the decision of the trial court or the first appellate court on sentence if it is a wrong decision on a question of law. Consistent with those provisions, this Court has held that save in cases where the courts below have acted on a wrong principle or have overlooked some material factors, it will not interfere with their exercise of discretion on sentencing. In *BERNARD KIMANI GACHERU V REPUBLIC*, CR APP. NO. 188 OF 2000 (NAKURU), the Court reaffirmed the principle thus:
- “It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”
29. Section 179(2) of the Criminal Procedure Code provides that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it. In that regard, Section 295 of the Penal Code provides:
- “Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”
30. There is no cogent evidence of the complainant have been physically harmed or injured beyond being threatened with the knife. The two Courts below do not appear to have considered this aspect of the



matter. The circumstances in this case are not entirely dissimilar to those in *Jessee Mwangi Theuri vs. Republic* [2016] eKLR where this Court stated:

“ [20] It is our considered view that the offence of robbery is cognate in nature, and since the two courts below did not address this aspect we would adopt the words of Spry, J. (as he then was) in *Ali Mohammed Hassani Mpanda v Republic*, [1963] EA 294, wherein he interpreted the Tanzanian equivalent of Section 179 of the Criminal Procedure Code as follows:

“Sub-section (1) envisages a process of subtraction: the court considers all the essential ingredients of the offence charged, finds one or more not to have been proved, finds that the remaining ingredients include all the essential ingredients of a minor, cognate offence (proved) and may then, in its discretion, convict of that offence.”

See also *Robert Ndecho & Another v Rex*, (1950- 51) EA 171, *Wachira s/o Njenga v Regina*, (1954) EA 398 and *Robert Mutungi Muumbi v Republic*, [2015] eKLR. Accordingly, we find and hold that the offence which commends itself to us for purposes of sentencing the appellant is that of simple robbery. We think we have said enough to show that there are compelling reasons to depart from the concurrent findings of fact by the two courts below.

(21) The upshot is, this appeal partially succeeds. We quash the conviction entered against the appellant and set aside the death sentence, and substitute therefore a conviction for the offence of robbery contrary to Section 295 as read with section 296”

31. Similarly, in the circumstances of the present case, we hold that the offence that should have commended itself to the courts below for purposes of sentencing the appellant is that of simple robbery. In *Robert Mutungi Muumbi vs. Republic* (above) this Court expressed that:

“An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted. (See *ROBERT NDECHO & ANOTHER V. REX* (1950-51) EA 171 and *WACHIRA S/O NJENGA V. REGINA* (1954) EA 398).”

32. We are therefore satisfied that we have a basis for interfering with the exercise of discretion by the High Court regarding the sentence. We set aside the death sentence and substitute therefor a sentence for a prison term of 10 years commencing from the time the appellant was arrested.

33. Save as regards sentence, the appeal fails and is otherwise dismissed. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

