



REPUBLIC OF KENYA



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**Njenga v Republic (Criminal Appeal 49 of 2017)
[2024] KECA 740 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 740 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 49 OF 2017
F TUIYOT, FA OCHIENG & WK KORIR, JJA
JUNE 21, 2024**

BETWEEN

DAVID MUGO NJENGA APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Naivasha (Hon. J. Meoli, J.) delivered and dated 17th March 2017 in HCCRA No. 71 of 2014)

JUDGMENT

1. David Mugo Njenga, the appellant, was presented before the Chief Magistrate's Court at Naivasha where he was charged with offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#). The particulars of the offence were that on 3rd February 2013 at Moi-Ndabi Primary School staff quarters, in Kongoni area of Naivasha Municipality within Nakuru County, while armed with a dangerous weapon namely a sword, the appellant robbed Irene Mbugua also known as Jane Wairimu Mbugua of cash Kshs 1,850/= and a Nokia 2626 mobile phone and at, or immediately before, or after the time of such robbery threatened to use actual violence on her. The appellant faced an alternative charge of handling stolen property contrary to section 322(2) of the [Penal Code](#). It was stated that he was found in possession of the property stolen in the main charge.
2. The appellant denied the charges and when the trial concluded, he was found guilty and sentenced to suffer death. Dissatisfied with the judgment, he lodged an appeal before the High Court against both the conviction and sentence raising six grounds. On 17th March 2017, Meoli J. affirmed the trial Court's decision by dismissing the appeal in its entirety. He is now before us on a second appeal on the grounds that the evidence of identification was inadequate; that the evidence on recovery was inconclusive; and that his defence was not considered.



3. For the prosecution, Irene Mbugua (PW1) testified that on 3rd February 2013 at around 2.00 am she was asleep in her house at the teachers' quarters at Moi-Ndabi Primary School when a stranger entered her house by digging a hole through the wall. The person who was armed with a *panga* grabbed her blanket and threatened to rape her before ordering her to give him all the money she had. She retrieved Kshs. 1, 850 in denominations of 1,000, 500, 200, 100 and 50 and gave the money to him. The intruder also took away her torch and Nokia 2626 mobile phone. She testified that she used the light from the torch to recognize the assailant. Before leaving, the man once again attempted to rape the complainant but was dissuaded by the cries of a baby. The intruder left but returned again, this time attempting to harm the complainant who took off screaming for help. She went to the shopping center where she met some people. She gave them the description of her attacker as a short young man with a thin face who was wearing a striped T-shirt. The people at the center recognized the man from the description as the appellant. When she went back to the house, the complainant found PW2 Corporal Mohamed Isaack and another police officer. After about 45 minutes the appellant was brought to the center as was the complainant's phone and a *panga*. The complainant was able to unlock her phone after feeding it with her Personal Identification Number (PIN). She also identified the phone through a mark she had inscribed on its cover. The following day, she went to the police station and witnessed the appellant being searched. Kshs. 1,850 was recovered from one of his pockets in the same denominations as the ones she had handed over to him. The complainant also testified that she had encountered the appellant on two different occasions prior to the incident.
4. PW2 on his part testified that on the material date, he was at Moi- Ndabi AP Post when at about 2.00 am he heard someone shout for help from the teachers' quarters of Moi-Ndabi Primary School. Alongside Police Constable Eliud Gichia, he proceeded to the scene where they noted a hole which had been dug to gain access to the complainant's house. The complainant narrated to them what had transpired and gave them a description of the attacker. Soon thereafter, they received a tip-off from the villagers on where the suspect was. They then proceeded to the appellant's house. The appellant was hesitant to open the door but only let them in at the behest of his father. Upon searching the house, they recovered a *panga*, a torch, and a mobile phone hidden inside the mattress. On taking the phone to the complainant, she was able to unlock it using her unique PIN. They then escorted the appellant to the police station whereupon frisking him, they recovered Kshs. 1,850.
5. Police Constable David Ndegwa (PW3) testified as the investigating officer having taken over the case from Police Constable Adeyo. His was simple as he recounted the investigations as conducted by his colleague. He also produced the bank notes, the mobile phone and the *panga* as exhibits.
6. In his defence, the appellant denied committing the offence and testified that on the material night, he was asleep in his house when police officers went and woke him up. They searched his house but recovered nothing. The officers nevertheless took away his sword which he had for domestic use. He was then arrested and escorted to the Moi-Ndabi AP Post where he spent the night and the next day, he was escorted to the police station.
7. When the appeal came up for hearing on 28th February 2024, learned counsel Mr. Sanjay appeared for the appellant while learned counsel Mr. Omutelema was for the respondent. They made brief oral submissions as highlights of the written submissions which they had filed.
8. Relying on his submissions dated 20th November 2023, Mr. Sanjay identified four points upon which he faulted the first appellate Court for upholding the conviction of the appellant by the trial Court. Firstly, counsel submitted that the trial Court misconstrued the legal standards pertinent to identification evidence. According to counsel, the circumstances subsisting during the time of the commission of the offence were not favourable for a positive identification. Counsel relied on *Peter*



- Gatiku Kariuki v. Republic* [2014] eKLR to urge that owing to the failure to indicate the source of light plus its intensity and considering the stressful nature of the event, the complainant could not have easily identified the appellant.
9. Secondly, and still attacking the foundation upon which the conviction of his client was laid, counsel referred to *Cleophas Otieno Wamunga v. Republic* [1989] eKLR in support of the proposition that it was erroneous for the learned Judge to uphold the conviction while relying on the evidence of a single witness. According to counsel, reliance on the uncorroborated testimony of a solitary witness contravened established jurisprudence and denied the appellant a fair trial.
 10. Turning to the third point upon which he challenged the conviction of the appellant, counsel submitted that the burden of proof was not discharged by the prosecution because the evidence adduced during the trial was insufficient to prove all the elements of the offence of robbery with violence. According to counsel, the evidence adduced was manifestly inadequate, replete with inconsistencies and unreliable.
 11. Fourthly, counsel submitted that the learned Judge erred by failing to subject the entire evidence to exhaustive scrutiny therefore arriving at a verdict that was manifestly unsafe. Counsel submitted that although the appellant was allegedly arrested from his house with clothes that were said to be dusty, the clothes which were suspected to be related to the crime were not collected as exhibits. Counsel submitted that production of the clothes would have assisted in the verification of the truthfulness of the complainant's testimony that the appellant was attired in a striped T-shirt. Further, that the neighbours who allegedly led the administration police officers to the house of the appellant were never called as witnesses thus denying the trial Court crucial evidence as to how the appellant was pinpointed as the attacker. Relying on *Erick Otieno Arum v. Republic* [2006] eKLR, counsel wrapped up his submissions on this sub-issue by arguing that the trial Court abdicated its duty to carefully examine and analyze the evidence adduced and instead egregiously deviated from the weight of the evidence and also failed to adequately assess the disparities in the evidence of the witnesses.
 12. Counsel finally turned to the issue of sentence and submitted that the death sentence was not only harsh but was also imposed in its mandatory nature and it should therefore be set aside. In conclusion counsel urged us to allow the appeal in its entirety.
 13. In opposition to the appeal Mr. Omutelema asserted that the offence of robbery with violence was proved against the appellant. Regarding the issue of identification, counsel urged that the two courts below properly and correctly appreciated the legal principles regarding the evidence of identification before concluding that the evidence was solid. Counsel referred to the case of *Maitanyi v. Republic* [1986] eKLR to point out the applicable legal principles in respect to evidence of identification.
 14. Counsel asserted that the appellant was linked to the offence through the doctrine of recent possession and that the appellant never tendered any explanation on how he came into possession of the complainant's phone.
 15. Finally, on the issue of sentence counsel asked us to substitute the death penalty with what he referred to as "an imprisonment term equivalent to life imprisonment."
 16. This being a second appeal, our mandate as provided by section 361(1)(a) of the *Criminal Procedure Code* is limited to dealing with questions of law. Having reviewed the record of appeal, the grounds of appeal and the submissions by counsel, we identify the key issue for our determination as whether the appellant was properly linked to the offence. If that question is answered in the affirmative, we will then consider the question as to whether the appellant has provided sufficient reason for our interference with his sentence.



17. The appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* which provides that:

“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.”

18. In linking the appellant to the offence, both the trial Court and the first appellate Court relied on the evidence of identification by PW1 and the doctrine of recent possession. The appellant, however, mainly challenges the evidence of identification arguing that the prevailing conditions were unfavourable for proper identification. The issue of identification by a single witness in a difficult environment is not being raised for the first time. It is a common argument in appeals before this Court. Addressing a similar issue in *Cleophas Otieno Wamunga v. Republic* [1989] eKLR the Court held that:

“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.”

19. The cited case was relied upon by both the trial Court and the first appellate Court in appreciating the danger of relying on the evidence of a single identifying witness to convict an accused person. We have had the benefit of reviewing the analysis by the two courts below on the question of identification and we are satisfied that they not only warned themselves of the danger of relying on the evidence of a single identifying witness but also subjected the evidence to great examination and analysis prior to giving it a stamp of approval as to the identification of the appellant at the scene. To reiterate the aiding factors, we note that the complainant had a torch and she spent a considerable amount of time with the assailant. She also stated that she had previously encountered the appellant while escorting her child to daycare and she was able to describe the appellant which led to his successful tracing and arrest. We therefore do not find any impropriety on the part of the two courts below in finding that the appellant was properly identified.

20. Other than the evidence of identification, the appellant was also linked to the offence through the application of the doctrine of recent possession. The un rebutted evidence that the appellant was found in possession of the complainant’s phone is very significant. In *Sakwa v. Republic* [2023] KECA 732 (KLR) the Court stated the conditions to be met before convicting an accused person based on the evidence of recent possession as follows:

“To aid in determining this aspect, it was necessary for the prosecution to establish that, first, the appellant was in possession of stolen items; second that upon considering all the relevant factors, the court was satisfied that the items belonged to PW1; third, that the items were stolen from PW1 during the robbery; and fourth, that the items were recently stolen. Next, the trial court was required to consider whether the appellant put forth a plausible explanation as to how he came into possession of the items. We must however appreciate, as was done by the courts in the authorities already cited, that such an explanation must not necessarily be satisfactory but should be reasonable. Therefore, where a reasonable explanation is put forth, then the doctrine of recent possession should not be invoked.”



21. Applying the stated test to the facts of this case, we find that there was no dispute that the appellant was arrested in possession of the complainant's phone. It was also established through the evidence of the complainant that the said phone had been stolen a few hours earlier. It could therefore not have changed hands. Both the complainant and PW3 sufficiently established the fact that the recovered phone belonged to the complainant as she not only unlocked it but also identified it with a mark she had inscribed on its cover. When the appellant was given an opportunity to state his part of the story, he put forth what in our view amounted to a mere denial and not a plausible explanation of how he came into possession of the complainant's phone. In the circumstances, the doctrine of recent possession was properly invoked in linking the appellant to the offence.
22. The final issue on conviction is whether the ingredients of the offence of robbery with violence were proved against the appellant. The offence of robbery with violence as legislated under section 296(2) of the *Penal Code* can only be said to have occurred where at the time of the commission of the offence the accused person was armed with a dangerous weapon, or in the company of another person or other persons, or used actual violence against any person. These ingredients are disjunctive and the proof of any one of them is sufficient to result in a conviction -see *Dima Denge Dima & others v. Republic* [2013] eKLR.
23. In this case, the appellant was armed with a sword. The appellant even tried to cut the complainant with the sword when he returned to the house for the second time. That being the case, we are satisfied that the sword was a dangerous or offensive weapon which brought the incident of theft within the definition of robbery with violence under section 296(2) of the *Penal Code*. The upshot of the foregoing analysis leads us to the inevitable conclusion that the appeal against conviction is without merit and is for dismissal.
24. Turning to the appeal against sentence, we note that the appellant has launched a dual attack on the death penalty. One of the twin grounds of assailment is that the sentence was harsh considering the circumstances of the commission of the offence. The other line of attack is that the sentence was improper for being imposed in its mandatory nature. Mr. Omutelema for the prosecution tends to agree that the death penalty ought to be vacated and substituted with a prison term which is deemed to be equivalent to a life sentence.
25. The argument that the sentence imposed by the trial Court was harsh is a line of attack that may not yield much for the appellant because severity of sentence is a matter of fact which is not amenable to the jurisdiction of this Court-see section 361(1)(a) of the *Criminal Procedure Code*. However, having gone through the sentencing proceedings, we agree with the appellant that the death sentence was passed against him in its mandatory nature. Going by the recent jurisprudence emanating from this Court on the need to reserve the death sentence and life imprisonment for heinous, odious, wicked, evil and unpardonable crimes, we are inclined to interfere with the sentence on this ground.
26. The question then is what would be the proper sentence befitting the circumstances of this case? We note from the record that the appellant was a first offender and no injury was occasioned to the victim. We also observe that the stolen property was recovered. The flip side of the coin is that the appellant intruded into the complainant's privacy and not only threatened to use violence against her but also to rape her. That is not a light matter and a such a custodial sentence is therefore necessary. In our view a sentence of 25 years in prison suffices in these circumstances.
27. The upshot of the foregoing is that the appeal against conviction lacks merit and is hereby dismissed. The appeal against the sentence partially succeeds resulting in the setting aside of the death penalty and a substitution of the same with a custodial sentence of 25 years. The prison authorities, guided by their records, will ensure compliance with the proviso to section 333(2) of the *Criminal Procedure Code*.



DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024

F. TUIYOTT

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR

