



REPUBLIC OF KENYA



**Simon v Republic (Criminal Appeal 9 of 2021)  
[2023] KECA 265 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 265 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 9 OF 2021  
MSA MAKHANDIA, S OLE KANTAI & GWN MACHARIA, JJA  
MARCH 17, 2023**

**BETWEEN**

**JOSPHAT ALI SIMON ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya (J. Ngugi & Jaden JJ.) dated 10th December, 2013 in Machakos HCCRA No. 301 and 302 of 2010)*

**JUDGMENT**

1. This is a second appeal in which our remit is circumscribed by section 361 of the *Criminal Procedure Code* to consideration of matters of law only. In this remit, we are duty bound to pay due homage to concurrent findings of fact by the two courts below save where the findings are not based on the evidence tendered in the trial court. Only then do those findings of fact become matters of law. See *Karingo vs Republic* [1982] KLR 213.
2. The appeal emanates from the judgment of the High Court at Machakos delivered on December 10, 2013 by Ngugi (as he then was) & Jaden, JJ.= in Criminal Appeal No 301 and 302 of 2010.
3. The appellant together with another were charged with two counts of robbery with violence contrary to section 296(2) of the *Penal Code*. In count 1, the particulars were that on April 23, 2008 at around midnight at Sekea Village, Kithungathi sub-location, Kisasi Location in Kitui District of Eastern Province, the appellant jointly with others not before court and while armed with offensive weapons namely pangas, iron bars, bows and arrows robbed Joseph Muilu Mumo of 1 mobile phone make Nokia 1100 valued at KShs 4,200, 1 radio Sonitec make valued at KShs 2,800 and cash KShs 1,850, all valued at KShs 8,850 and immediately before or immediately after the time of such robbery, used actual violence on the said Joseph Muilu Mumo.



4. In count 2, the particulars were that on the same day, place and time, the appellant jointly with others not before court and while armed in similar manner robbed Betty Mwende Joseph of one mobile phone make Nokia 2300 valued at KShs 5,000 and immediately before or immediately after the time of such robbery used actual violence on the said Betty Mwende Joseph.
5. The appellant denied the charges, was tried, convicted and sentenced to death. The co-accused was however acquitted. Aggrieved by the conviction and sentence, the appellant preferred a first appeal in the High Court at Machakos. The same was heard by Ngugi (as he then was) & Jaden, JJ who by a unanimous judgment delivered on December 10, 2013 upheld both the conviction and sentence. Undeterred the appellant is now before us on a second appeal.
6. During the trial, the prosecution called a total of 7 witnesses whose evidence in summary was as follows: PW1, Betty Mwenda Joseph, the complainant in count two, on the material day was asleep at home with her father, Joseph Muilu Mumo (PW6), and sister, when she heard a knock and upon peeping through the window she saw 3 people standing outside. She recognized the people as the appellant, Mwanzia Kisungu and Kabelu Masila. The appellant had a torch which he kept flashing and which at times captured his face. They demanded money which PW2 gave through the window but they said it was not enough. They threatened to burn down the house if not given more. They told PW6 to open the door and upon opening he was told to lie down, beaten and asked for his mobile phone. They then came to her bedroom and asked for her phone and the appellant hit her. When the robbers left she ran and woke her aunt Liz who rang the District Officer. The police came and took PW6 to hospital as he had been injured. She knew the appellant from childhood.
7. PW2, confirmed that whilst asleep he heard noises and his father called him telling him that there were robbers, he woke up and found his door locked from outside. The witness was however stood down and never recalled to testify further. PW3 John Wambua, a security guard at Sekea market, on the material day was on duty when he heard a commotion and people screaming. With his colleague, Pius Kilundu (PW4) they ran towards the house of Joseph Muilu Mumo, (PW6) and found the doors locked from outside. They broke into the house and were told that thieves among them, the appellant had attacked them. They went to the appellant's house where they found him but he denied committing the offence. They took him to the Chief's camp and police took over the case. PW4, corroborated the evidence of PW 3 in material particulars.
8. PW5, Peter Wambua a clinical officer attached to Kitui District Hospital examined PW6 who had a bruise on his head, pain on the right shoulder and right knee joint. He classified the injuries as harm. PW6, testified that on the material day whilst asleep in his house, he heard a knock on the window and PW1 came into his room and told him she had seen 3 armed men outside. His window was shattered with the robbers demanding construction money. They had torches which at times reflected on their faces. He passed them an envelope with KShs. 1800 through the window but they demanded more money by breaking more window panes. He eventually opened the door for them and they ordered him to lie down, tied him up, hit with a panga and took his mobile phone and then left. He recognized the appellant among the robbers having known him as a neighbour and who had taken his National Identity Card through his office. PW7, PC Jacob Yator attached to Mutitu Andei Police Station whilst on night duty received a radio report of a robbery and proceeded to the scene with his colleagues. They interrogated PW6 who stated that he had recognized the appellant as one of the robbers whereas PW1 had recognized all the three robbers. He thereafter recorded statements from witnesses and charged the appellant and co-accused.



9. Upon being placed on his defence, the appellant elected to give sworn testimony and called one witness. He stated that on the material night he was in his house asleep when at around 1:00pm, he heard people talking outside with his mother who woke him up and he was escorted by PW3 and PW4 to the Chief's shop. That evening he was suffering from a toothache and chest pain and had sought treatment from Katulani Dispensary where he was treated. He returned home at 6pm took the drugs and slept. He therefore did not commit the offence and was framed by PW1.
10. DW2 Berita Simon testified that the appellant was her son and on the material day she was asleep when she heard people calling from outside and when she opened the door, they asked for the appellant and she informed them that he was sleeping as he was not feeling well. The people took away the appellant. She followed them to Sekea Shopping Centre where PW6 said that he was among the ones who had attacked and robbed him. She confirmed that the appellant stayed at home the whole day and night as he was sick.
11. The trial court nonetheless convicted the appellant on both counts and sentenced him to death, with the sentence on the second count being held in abeyance.
12. The appellant has now preferred this second appeal on 6 grounds being that, the evidence of recognition was not cogent; the first appellate court failed to re-evaluate and analyze the evidence tendered in the trial court as required; prosecution evidence was contradictory and inconsistent; and finally, he was not accorded a fair trial.
13. The appellant through Mr. Marube, learned counsel, submitted that the first appellate court failed in its duty to weigh the evidence adduced in the trial court and draw its own inferences and conclusions. That the appellant was not properly identified as PW1 never mentioned his name in her statement. Further, the conditions prevailing at the time were not favourable for positive recognition as it had rained that night and there was no moonlight. That though the appellant's alibi defence was reasonable and plausible, was nonetheless casually disregarded. That there was no identification parade conducted. That the prosecution case was riddled with inconsistencies and contradictions regarding whether there was light or not, the amount of money stolen and how far the appellant's house was from the scene of crime. Ultimately, the appellant submitted that his conviction and sentence were not safe and prayed for the appeal to be allowed in its entirety.
14. The respondent through Miss Ngalukya, learned prosecution counsel, submitted that the ingredients of the offence were proved beyond reasonable doubt. There was sufficient evidence tendered by the PW1 and PW6 that the appellant was in the company of others and that actual violence was visited upon them in the course of the robberies which was supported by medical evidence adduced in the trial court. That though the circumstances of identification were poor in that it was at night, the appellant was known to both PW1 and PW6 prior to that night. Thus, the evidence was one of recognition rather than mere identification of a stranger. That there were concurrent findings of the two courts below that the appellant and his co-accused were recognized by the two witnesses and were known to them prior to the night of the offence.
15. Further, that whereas the offence took place at night, PW6 testified that there was a lamp in the corridor and that the appellant had not concealed his face, thus making his recognition easy. PW1 testified that she had known the appellant since birth while PW6 had known him since he issued him with an identity card through his office as the area chief. That the first appellate court discharged its duty as required, re-evaluated the evidence afresh and arrived at its own independent finding that indeed the appellant was recognized by the said witnesses. That whereas the appellant gave an alibi defence, the same was dislodged by the evidence of recognition which was free from error. The respondent therefore prayed that the appeal be dismissed.



16. This being a second appeal as we have already stated, our jurisdiction is limited to consideration of matters of law only. The issues of law before us are whether the offences charged were proved against the appellant and his identification and or recognition. The ingredients for the offence of robbery with violence were set out in the case of *Johanna Ndung'u vs. Republic* [1996] eKLR as follows:
  - a. if the offender is armed with any dangerous or offensive weapon or instrument, or;
  - b. if he is in the company with one or more other person or persons, or;
  - c. if at or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person.
17. Proof of any one of the above ingredients is enough to sustain a conviction. See *Oluoch vs Republic* (1985) KLR 549. Evidential facts tendered for proof of the ingredients of the offence must, however, be cogent and consistent save for such minor flaws as are curable under section 382 of the Criminal Procedure Code. Our evaluation of the evidence show that both PW1 and PW6 were attacked in their house at around midnight. The robbers were more than one, they were armed with pangas, bows and arrows, dangerous weapons and which they used to unleash violence on the victims, if the evidence of PW5 is anything to go by. The ingredients were therefore proved by these witnesses.
18. There are concurrent findings by the two courts below that the appellant was positively recognized by PW1 and PW6 in the course of the robbery through the torchlight that the appellant had and which he kept flashing occasionally flashing on himself. Besides the torchlight, there was also light provided by the lamp which was on throughout the robbery. The appellant was a person well known to them from childhood and was even a neighbour. He had not even disguised himself, thus making his recognition much easier. Having analyzed the evidence, we see no reason to depart from the concurrent findings of the two courts below on the issue. We say so well aware of the injunction in *R vs Turnbull & Others* [1976] 3 ALL ER 549, that:

“Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”
19. Being a case of recognition, there was no need for police identification parade as it would have been superfluous.
20. As to the ground of appeal that there was no proper evaluation of the evidence by the first appellate court, we are persuaded that the first appellate court properly evaluated the evidence tendered in the trial court and arrived at its independent conclusions as required.
21. A first appeal always proceeds by way of re-hearing based on the evidence on record and an appellant is therefore entitled to expect that the first appellate court will go beyond a mere rehashing of what is on record or a repetition of the findings of the trial court.
22. It is required to and must be seen to have, consciously and deliberately subjected the entire evidence to thorough scrutiny so as to arrive at its own independent conclusions on the factual issues in contestation, and to determine on its own, the guilt or otherwise of the appellant, the only limitation to its task being a remembrance that it is without the advantage, enjoyed by the trial court, of seeing and observing the witnesses as they testified, for which it must make due allowance. See *Pandya vs Republic* [1957] EA 336, *Okeno vs Republic* [1972] EA 32. From our scrutiny of the first appellate court's record, points to a job well done on this aspect. Accordingly, the complaint is misguided and has no factual or legal basis



- 23. The contradictions and inconsistencies in the prosecution evidence alluded to by the appellant, in our view, were immaterial and did not go to the root of the prosecution case.
- 24. Lastly, the two courts below concurrently found that the appellant’s *alibi* defence was a nonstarter and had been effectively displaced by the strong prosecution case. We have no reason to depart from that finding. For all the aforesaid reasons, we dismiss the appeal in its entirety.

**Dated and delivered at Nairobi this 17<sup>th</sup> day of March, 2023.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**G. W. NGENYE -MACHARIA**

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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

**DEPUTY REGISTRAR**

