



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbogo v Republic (Criminal Appeal 40 of 2020)  
[2022] KECA 1353 (KLR) (2 December 2022) (Judgment)**

Neutral citation: [2022] KECA 1353 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 40 OF 2020  
MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**JOHN MAINA MBOGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Nairobi  
(Ngenye, J.) dated 12th May, 2016 in HC. CR.A. No. 216 of 2014)*

**JUDGMENT**

1. This is a second appeal from the conviction of the appellant and sentence to death by the Chief Magistrates Court at Kibera for two offences of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. It was alleged in the charge sheet presented by the prosecution that the appellant on February 14, 2012 in Runda Estate in Nairobi jointly with others not before Court while armed with dangerous weapons namely pistols robbed Stephen Onserio Ontita of a motor vehicle and other items and that he immediately after the said robbery threatened to use personal violence against the said person. On the same day at the same place it was alleged that he with others robbed Inge Germanie Celestine of cash and other items and they threatened to use personal violence against the said person.
2. Being a second appeal Section 361(1) (a) *Criminal Procedure Code* mandates us to deal with issues of law only but not the facts of the case which have been considered by the trial court and re-evaluated on first appeal. It was held in the case of *Stephen M'Irungi & Another v Republic* [1982-88] 1 KAR 360 on the duty of the Court in a second appeal like this one:

“Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with



the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

3. A brief visit of the facts is necessary only to see how the two courts below dealt with matter before them. Stephen Onserio Ontita (PW2 Ontita), a taxi driver, testified that on February 14, 2012, he picked a customer called Inge Germaine at Nakumatt Village Market at 8.30 pm to drop him at Casablanca Guest House in Runda. When they reached the junction of Benin Africa Avenue he saw three men, two armed with pistols, who blocked their way and stopped them. He was afraid. The men entered the car and one of them took over and drove the car. Ontita was forced into the back seat. He and his passenger were robbed of money, mobile phones and other items and they were threatened that they would be killed. They got to Thika road, then under construction, and there was a traffic jam. Ontita saw a policeman controlling traffic and he screamed for help as did his passenger. Two of the robbers jumped out of the car and fled but in his own words:

"The two accused opened and fled the robber who was sitted with us who was not armed attempted to run away but I grabbed him and held on to him as we attracted other members of public came and helped us to arrest the accused".

4. According to him he never lost sight of the appellant; he held on to him until members of the public and a policeman (PW1 PC Dickson Kimanthi) apprehended the appellant. Kimanthi was controlling traffic that day when he saw a stationary car which attracted his attention. When he went to the car he was told by Ontita and the passenger that they had been robbed; the appellant was then being beaten by members of the public; he rescued him and took him to Pangani Police Station.
5. The case was investigated by PC Joseph Mutonya (PW3) who testified that when he visited Pangani Police Station he found the appellant unconscious and half naked after he had been beaten senseless during the robbery. The trial court found that there was a case to answer and upon being put on his defence, the appellant denied the charges stating that on the material day he was on Thika road when he was hit by a car and was surprised when Ontita shouted "thief" and he was beaten up and then arrested. He called as a witness his sister Monica Njoki Maina who testified that she and the appellant's wife had not seen the appellant for two days and finally located him at Industrial Area Remand Home. The appellant told her that a mobile phone she had purchased for him in Saudi Arabia had been produced in court by the prosecution as an item stolen from victims during the robbery. She did not have any documents to prove that the said phone belonged to the appellant. As we have seen the appellant was convicted on the first count and his appeal to the High Court at Nairobi was dismissed.
6. There are 5 grounds of appeal in the homemade Memorandum of Appeal drawn by the appellant. He complains that the evidence believed by the High Court on first appeal was insufficient; that the case was not proved beyond reasonable doubt; that his defence was not considered and that there were inconsistencies in the evidence.
7. As observed this is a second appeal and we are to consider issues law only. Was the case proved beyond reasonable doubt? We think that it was. Ontita never lost sight of the appellant. The appellant was in the company of two others; they stopped Ontita's motor vehicle while brandishing guns; they commandeered the motor vehicle and robbed Ontita and his passenger of money and other possessions. When they reached Thika road there was a traffic jam and when Ontita and his passenger saw a police officer (PW1) controlling traffic they shouted for help. Ontita held the appellant who was not armed and members of the public came to his rescue; they beat the appellant senseless. Ontita never lost sight of the appellant who was arrested at the scene and taken to Pangani Police Station. There can



be no doubt on the issue of identification as the appellant was arrested at the scene where Ontita had held him preventing him from escaping. The case was proved to the required standard. This appeal has no merit and is dismissed.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER, 2022.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

