Kagema v Republic (Criminal Appeal E056 of 2023)
[2025] KEHC 570 (KLR) (29 January 2025) (Judgment)

Neutral citation: [2025] KEHC 570 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL E056 OF 2023

AK NDUNG'U, J

JANUARY 29, 2025

BETWEEN

NICODEMUS KUIRA KAGEMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from original conviction and Sentence in Nanyuki CM Criminal Case No 1084 of 2020 – Ben Mararo, PM)

JUDGMENT

1. The Appellant, Nicodemus Kuira Kagema was convicted after trial 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 02/09/2020 at Nturukuma area in Laikipia East subcounty within Laikipia County jointly with others not before court robbed Boniface Mwirigi of his motorcycle make TVS registration no. KMFA 687A valued at Kshs.195,294/- and immediately before the time of such robbery beat the said Boniface Mwirigi. He also faced an alternative count of handling stolen property contrary to section 322(1) as read with section 322(2) of the Penal Code. The particulars were that on 03/09/2020 at Nyahururu town in Nyahururu subcounty within Laikipia County otherwise than in the course of stealing dishonestly retained motorcycle make TVS registration number KMFA 687A valued at Kshs.195,294 the property of Winn Kageni Gatobu knowing or having reasons to believe it to be stolen property.
2. On 13/02/2023, he was sentenced to thirty (30) years imprisonment for the count of robbery with violence.
3. He was dissatisfied with the conviction and the sentence hence his appeal to this court. He filed a petition of appeal raising the following grounds.

i. The learned magistrate erred by failing to note that the prosecution evidence was not enough to secure a conviction.

ii. The learned magistrate failed to note that the prosecution relied on circumstantial evidence.

iii. The learned magistrate failed to note that the prosecution's case was full of contradictions, inconsistencies and was not corroborated.

iv. The learned magistrate failed to note that it was a case of mistaken identity.

v. The learned magistrate failed to note that identification parade was not done hence there was no description.

vi. The learned magistrate failed to note that crucial witnesses were not availed.

vii. The learned magistrate failed to note that the prosecution's case was not watertight.

4. He also filed amended grounds of appeal accompanying his submissions but leave was not sought to amend the previous grounds filed.

5. The appeal was canvassed by way of written submissions. He argued that identification was by a single witness and the trial court failed to make any reference to the principles applicable in the evidence of a single witness. That none of the prosecution witness saw him or identified him. PW1 did not give the description of the assailant to the police, no identification parade was done and PW1 did not lead the police to his arrest. That there is no witness who testified on how the motor cycle was recovered and medical evidence from Nyahururu hospital was not produced to show that indeed, he was admitted there after he was beaten and taken there as alleged.

6. That there was no evidence how the motor cycle was tracked at Nyahururu and he was not found with the stolen property. That the motorcycle was easily traceable through Musoni Kenya Ltd but there was no record of movement of the motor cycle and failure to call witness from Musoni shows that the prosecution relied on hearsay evidence. Therefore, the circumstantial evidence was not sufficient to warrant a conviction as there was no nexus that was established between him and the crime. Further, none of the ingredients of the doctrine of recent possession were proved.

7. He submitted that the charge was duplex as section 295 and 296(2) of the Penal Code provide for different scenarios and when lumped up together, it might confuse an accused person. Reliance was placed on the case of Joseph Njuguna Mwaura & 2 others vs Republic Criminal Appeal No. 5 of 2008 (2013) eKLR. That this was a case of identification by a single witness in difficult conditions and might have been a case of mistaken identity. He submitted that no reason was given for rejection of his sworn evidence.

8. In rejoinder, the Respondent's counsel submitted that the Appellant has introduced new grounds of appeal without leave of the court contrary to Section 350(2) of the Criminal Procedure Code. She urged the court to ignore the amended grounds of appeal. She submitted that there was no error on recognition as PW1 testified that he had previously seen the Appellant in Nanyuki, there was sufficient lighting and he was interacting with the Appellant when he was transporting him. That this was confirmed by PW2 who testified that PW1 had told him who stabbed him and the Appellant did not deny that they were familiar. On the allegation that he was being framed, it is submitted that this was an afterthought. Further, there was no grudge that was alluded to and none of the prosecution's witnesses knew him personally. That the evidence against him was of recognition hence direct evidence and not circumstantial as alluded by the Appellant.

9. It is argued that the Appellant did not allude to any specific inconsistencies and that his defence was a mere denial as no evidence was brought to support his testimony and he had no report confirming the assault of his wife or him being booked for assaulting his wife. As to sentence, counsel submitted that the sentence of 30 years was lenient considering the seriousness of the offence and violence involved as PW1 was seriously injured and was admitted in hospital for ½ month.

10. A recap of the evidence at trial was as follows; The complainant testified as PW1. He testified that he owns the motor cycle registration no. KMFA 687E together with his wife. On the material night at 8:00pm, a customer approached him and said he wanted to be taken to Nturukuma ACK. They agreed on the price. They proceeded on the journey but made several stops as requested by the Appellant. He also changed the route severally. They argued but he agreed to proceed on the route heading to ACK. PW1 then felt a hit on his head by the passenger. He fell down and he heard people coming and asking 'ako hai'. He lost consciousness and gained it later and found himself at a small mabati house wearing a boxer and a vest.

11. In the morning, he got out and found a path and, on the road, he saw someone who inquired what was the problem and he explained. He volunteered to call the police and he led him to boda boda operators that knew him and he explained what had happened. The boda boda operators contacted his colleague and he was escorted home and to police station where he informed the police that the motor cycle had a tracker. He lost consciousness and he was taken to hospital and he was later informed by his colleague that the motor cycle was recovered in Nyahururu. That it was the first time to carry the Appellant. He testified that there was light at their stage, Total/KCB and street lights and that he had seen him once in town and they spoke on their way. That he had given the description of the passenger and the Appellant was beaten by the person who tracked the motor cycle. That the back of his head and the jaw were injured.

12. On cross examination, he testified that he could remember the person whom he carried and it was the Appellant and he was attacked by the passenger. That he gave description of his attacker. That P3 form indicated that he was attacked by people that he did not know and that his statement read that he was attacked by people he did not know and identification parade was not done. He testified on re-examination that it is the Appellant he carried on that day and he knows his voice.

13. PW2, complainant's wife testified that she waited for her husband but he did not return and on 3rd, he was brought home with injuries while wearing a vest and a boxer. He did not have the motorcycle. He said that he had carried a customer and he was attacked. That she reported to Musoni company who traced the motorcycle. She stated that she did not know the Appellant and that she heard the motorcycle was recovered in Nyahururu.

14. PW3 the clinical officer produced the P3 form as Pexhibit5 on behalf of Salat Guyo who was on leave. He testified that he had worked with him since 2018 so he was familiar with his handwriting. That the complainant had history of assault by unknown people while carrying a passenger. He had cut wound on occipital area and wound on the cheek. Weapon used was blunt object and in this case a metal rod. Degree of injury was maim. He maintained on cross examination that P3 form stated that he was attacked by people unknown to him.

15. PW4 produced the photographs of the motor cycle and the certificate.

16. PW5 the investigation officer stated that the complainant said that he was beaten and robbed. The motor cycle was tracked in Nyahururu by Musoni Kenya Ltd and the Appellant was beaten and taken to Nyahururu district hospital. He was discharged and he escorted him to Nanyuki police station. He visited the scene and recovered bloodied clothes which he produced as exhibits. The Appellant

was in bad state. He interrogated him but he did not give a reasonable explanation. He produced the investigation diary as exhibit.

17. He testified on cross examination that complainant said that he was robbed by people unknown to him and he did not give the physical description of the robber. That he did not photograph the scene and he did not recover anything belonging to the Appellant and scene of crime personnel was not involved in the recovery. That identification parade was not done. That he was taken to hospital then Nanyuki police station and he did not have medical records and doctors were not witnesses. That he sustained injuries from mob justice and he was admitted.

18. In his sworn defence, the Appellant testified that on 09/09/2020, he left work and found his house locked and his wife was not at home but reappeared later while drunk with a 4 weeks baby. They quarrelled and as a result, she was injured. She made a report at Nanyuki police station but he was brought in court for charges of robbery with violence, an offence he was not involved in. That at time of the said robbery and recovery of the motor cycle at Nyahururu, he was at home. That the complainant statement said that he was attacked by a passenger he did not know and he did not describe the assailant and identification parade was not done. That he was arrested at Katheri and motor cycle was not recovered from him. That there was no evidence on how the motor cycle was traced in Nyahururu and there was no OB to show that the said motorcycle was recovered from him and he was subjected to mob justice. There was no medical evidence to show that he was a victim of mob justice and that he did not have any injuries. There was no witness from Nyahururu who testified that he was subjected to mob justice.

19. He testified on cross examination that he was arrested on 09/09/2020 at Katheri on the way to Timau and he was not at Nyahururu. That he did not know the complainant or the investigating officer. That the investigation diary was incorrect.

20. I have read and considered the evidence as recorded by the trial court. In doing so, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have had due regard to the submissions made and case law cited. I have taken into account the applicable law. The issues for determination are whether the prosecution proved its case to the required threshold in law and, secondly, whether the sentence meted out by the trial court was legal and appropriate.

21. This being the first appeal, it is by way of a retrial and parties are entitled to this court's reevaluation, reanalysis and reconsideration of the evidence and its own decision on that evidence. The court should however bear in mind that it did not see the witness testify and give due allowance for that. (See Okeno v Republic [1972] EA 32).

22. This principle is buttressed in the decision in Kiilu & Another v Republic [2005]1 KLR 174, where the Court of Appeal held that:

> " 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. 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."

23. The burden of proof in criminal cases is well settled. In Philip Nzaka Watu v Republic [2006] eKLR, it was held that to for a conviction to lie in a Criminal case, the trial court has to be satisfied of the

accused person's guilt beyond reasonable doubt. On proof beyond reasonable doubt, the court stated in Stephen Nguli Mulili v Republic [2014] eKLR:

> " [I]t is not in doubt that the burden of proof lies with the prosecution. The locus classicus on this is the case of DPP V Woolmington, (1935) UKHL 1 where the court eloquently stated that the "golden thread" in the "web of English common law" is that it is the duty of the prosecution to prove its case. The Kenyan Courts have upheld this position in numerous cases. See Festus Mukati Murwa V R, [2013] eKLR."

24. In the famous case of Miller v Ministry of Pensions, [1947] 2 All E R 372, Lord Denning stated with regard to the degree of proof beyond reasonable doubt:

> " 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."

25. In Bakare v State (1987) 1 NWLR (PT 52) 579, the Supreme Court of Nigeria emphasized on the phrase proof beyond reasonable doubt, stating:

> " Proof beyond reasonable doubt stems out of the compelling presumption of innocence inherent in our adversary system of criminal justice. To displace the presumption, the evidence of the prosecution must prove beyond reasonable doubt that the person accused is guilty of the offence charged. Absolute certainty is impossible in any human adventure, including the administration of criminal justice. Proof beyond reasonable doubt means just what it says it does not admit of plausible possibilities but does admit of a high degree of cogency consistent with an equally high degree of probability."

26. The Appellant raised a preliminary point of law to wit, the charge sheet was duplex on account that section 295 and 296(2) of the Penal Code provide for different scenarios and when lumped up together, it might confuse an accused person. Reliance was placed on the case of Joseph Njuguna Mwaura & 2 others vs Republic Criminal Appeal No. 5 of 2008 (2013) eKLR.

27. Our superior courts have on several occasions stated that drafting the robbery with violence count under the two sections amounts to duplicity as was held in the case quoted by the Appellant of Joseph Njuguna Mwaurac(supra). The courts have also held that where the charge is deemed to be duplex, the test will be whether the defects occasioned any prejudice to the Appellant. The Court of Appeal in Paul Katana Njuguna v Republic [2016] eKLR while faced with a similar issue held thus;

> " ...In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused

is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective."

28. In this case, the Appellant understood the charges against him, he participated in the hearing by cross examining the witnesses and mounted a defence at the close of the prosecution case. He raised no complaint before the trial court and in the circumstances, I find that there was no miscarriage or failure of justice on the ground that the charge was duplex.

29. As to whether the charge of robbery with violence was proved to the required standard, the prosecution was supposed to proof the following ingredients as were clearly set out by the Court of Appeal in the case of OLUOCH –VS – REPUBLIC [1985] KLR where it was held:

> " Robbery with violence is committed in any of the following circumstances:
>
> a. The offender is armed with any dangerous and offensive weapon or instrument; or
>
> b. The offender is in company with one or more person or persons; or
>
> c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ....."

30. It has been held that the use of the word or in this definition means that proof of any of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. The prosecution duty was therefore to establish any of the above ingredients and to show the court that the Appellant robbed the complainant.

31. It is in evidence that the complainant was attacked and he was robbed of his motorcycle. He sustained injuries as a result of the said robbery and he was admitted in hospital for sometime. The clinical officer described the type of weapon used as a blunt object like a metal rod. It therefore follows that robbery with violence was proved.

32. Having established that the offence of robbery with violence was proved, the next question is whether the Appellant was the assailant. The evidence before the trial court was that the attack was at night. PW1 testified that a customer approached him at 8:00pm and requested to be taken to Nturukuma ACK. He testified that there was sufficient lighting at the place from total and KCB and as well street lights. He further testified that he had seen the Appellant once in Nanyuki town. While being cross examined by the Appellant, he testified that he could remember the person he carried and it was him. That he gave the description of the attacker but the P3 form indicated that he was attacked by people unknown to him. That the statement he recorded with the police indicated that he did not know the customer and no identification parade was carried out. He maintained on re-examination that it was the Appellant whom he carried on that day and he knew his voice.

33. PW5, the investigating officer testified on cross examination that the complainant statement read that he was attacked by people unknown to him. The complainant did not give physical description of the assailant and identification parade was not done. That the motorcycle was traced at Nyahururu and the Appellant was taken to the police station from hospital. He further testified that he did not know how the motor cycle was tracked.

34. The Appellant denied committing the offence in his defence and testified that he was taken to police station for assaulting his wife but was consequently charged with this offence. He denied being in

Nyahururu and being beaten by mob justice and that he did not have any injuries. He claimed that he was framed. There was also no evidence that the motor cycle was recovered from him and there was no medical record to show that he was admitted at Nyahururu district hospital. There was also no evidence that he was attacked or he was a victim of mob justice as alleged.

35. The principles to be followed when determining whether identification was proper and free from error were set in the case of R vs Turnbull [1976] 3 ALL ER 549, it was stated by the Lord Chief Justice of England and Wales as follows:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make sure reference to the possibility that a mistaken witness can be convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words. Secondly, the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have the accused under observation" At what distance" In what light" Was the observation impeded in any way, as for example by passing traffic or a press of people" Had the witness ever seen the accused before" How often" If only occasionally, had he any special reason for remembering the accused" How long elapsed (sic) between the original observation and the subsequent identification to the police" Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance"(emphasis added).

36. It is trite law that the court can convict on the basis of the evidence of a single witness if it believed that the evidence was trustworthy. The Court of Appeal of Uganda in Okwang Peter v Uganda Criminal Appeal No. 144 of 1999 held as follows: -

> "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 in respect to 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 is 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 possibility of error"

37. I have re-evaluated the evidence on identification. The incident took place at night. Though PW1 states that there was light at the scene from KCB and Total, the nature of the lighting is not explained. No evidence of description of the assailant to the police was availed. PW1's statement to the police indicated that he did not know the customer. On cross examination he admits that the P3 form reads that he was attacked by people he did not know. The investigating officer did not, for inexplicable reasons, find the need to conduct an identification parade to confirm the identification of the Appellant. On the evidence before court, the identification of the Appellant cannot be said to have been free from error.

38. The other available evidence connecting the Appellant to the offence herein is that of PW5 the investigating officer who stated that the motorcycle was traced at Nyahururu by Musoni Ltd and

recovered from the Appellant. That the Appellant was subjected to mob justice and he was admitted at Nyahururu district hospital. On his part, the Appellant argued that there is no evidence that indeed he was subjected to mob justice, that he was admitted in hospital and that he was caught with the motor cycle. Apart from the testimony of PW5 who only re-arrested the Appellant, no one testified to have seen the Appellant being attacked, no medical records were produced to show that he was admitted in hospital and there was no explanation on how the motor cycle was traced and whether the Appellant was caught with the motor cycle. For the doctrine of recent possession to be invoked, the following factors must be proved as was held in the case of Arum Vs. Republic [2006] 2 E.A. 10 cited by the Court of Appeal in the case of Gideon Meitekin Koyiet v Republic [2013] eKLR. It was held as follows;

> " Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, that is, there must be positive proof, first, that the property was found with the suspect, secondly, that the property is positively identified as the property of the complainant, thirdly, that the property was stolen from the complainant, and lastly the property was recently stolen from the complainant."

39. Therefore, the prosecution was required to prove that;That the property alleged to have been stolen was found in the possession of the accused;That the property so recovered is proved to belong to the complainant; and,That said property was recently stolen from the complainant.

40. The casual manner in which this case was investigated is dumbfounding. If the evidence by PW5 be true, he had everything in his hands to establish a watertight case based on the doctrine of recent possession. To the consternation of this court, evidence of recovery from the Appellant and which included evidence of his beatings by the public and admission to hospital was left out greatly prejudicing the chances of a conviction. Evidence of the tracking of the motorcycle was omitted. Evidence of the person(s) who did the actual recovery is omitted. Evidence from the hospital where the Appellant was allegedly admitted was omitted. How then did the prosecution expect to prove the doctrine of recent possession against the Appellant?

41. On the whole, investigations in this otherwise very serious case where a citizen suffered serious injury and lost property was shoddy and as a result, many unnecessary gaps are left in the prosecution's case. The prosecution had the duty to prove the charges herein beyond reasonable doubts. For reasons stated they failed so to do. The Appellant bore no duty to prove his innocence.

42. With the result that the Appeal herein has merit and is allowed. The conviction by the trial court is hereby quashed and sentence set aside. The Appellant be set at liberty forthwith unless otherwise lawfully held.

DATED SIGNED AND DELIVERED IN OPEN COURT THIS 29TH DAY OF JANUARY 2025

A.K. NDUNG'U

JUDGE