



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mugeny v Republic (Criminal Appeal E007 of 2023)
[2025] KEHC 1037 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1037 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL E007 OF 2023
JN KAMAU, J
FEBRUARY 26, 2025**

BETWEEN

PATRICK INDIASI MUGENYA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon M. Nabibya (SRM) delivered at Hamisi in Senior Principal Magistrate's Court in Criminal Case No 637 of 2017 on 11th November 2018)

JUDGMENT

Introduction

1. The Appellant herein was charged jointly with four (4) others with two (2) counts of the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the *Penal Code* Cap 63 (Laws of Kenya) and one (1) count of the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with an adult contrary to Section 11(A) of the *Sexual Offences Act* No 3 of 2006.
2. He was tried and convicted by the Learned Trial Magistrate, Hon M. Nabibya (SRM) who sentenced him to fifteen (15) years imprisonment for the offence of robbery with violence and twenty (20) years for the offence of gang rape. She ordered that the said sentences run concurrently.
3. Being dissatisfied with the said Judgement, on 20th April 2023, he lodged the Appeal herein. His Petition of Appeal was dated 4th March 2023. He set out five (5) grounds of appeal. Subsequently, on 26th June 2024, he filed Supplementary Grounds of Appeal dated 4th March 2024. He set out seven (7) Supplementary Grounds of Appeal.



4. His Written Submissions were dated 4th March 2024 and filed on 26th June 2024 while those of the Respondent were dated 15th October 2024 and filed on 17th October 2024. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Petition of Appeal, his Supplementary Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Prosecution proved its case beyond reasonable doubt; and
 - b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
8. The court dealt with the said issues under the following distinct and separate heads.

I. Proof Of Prosecution Case

9. The court dealt with the above issue under the following distinct and separate heads.

A. Robbery With Violence

10. Grounds of Appeal Nos (1) and (2) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1), (2), (3), (4) and (6) were dealt under this head.
11. The Appellant submitted that the direct evidence in this case did not place him at the scene of crime and that the Trial Court erred in relying on uncorroborated circumstantial evidence of an accomplice witness to convict him. He contended that there were no favourable circumstances for positive identification.
12. He argued that Gladys Shiraho (hereinafter referred to as "PW 1") identified the 1st, 2nd and 3rd Accused persons who were charged with him at the identification parade but that he was not identified at the parade. He averred that theft as an ingredient of robbery was not proved on his part beyond reasonable doubt thus absolving him from the case of robbery with violence.
13. He invited the court to note that Ruth Chelagat (hereinafter referred to as "PW 3") was an accomplice witness for she was found in constructive possession of the stolen wiko phone. He argued that her evidence ought to have been held untrustworthy for lack of corroboration that he accompanied his Co-Accused person seeking payment from her. He faulted the Trial Court for not criminalising (sic) and sentencing her before she gave her evidence therefore occasioning a miscarriage of justice.
14. He asserted that the evidence of M-pesa statements relied on by No 236207 Inspector Samuel Kimani (hereinafter referred to as "PW 6") and PW 3 were computer printout and neither of them produced



a certificate under Section 65(8) and 106 B(4) of the Evidence Act Cap 80 Laws of Kenya allowing the admissibility of such evidence. It thus urged this court to reject the evidence pursuant to Article 50(4) of the Constitution of Kenya, 2010.

15. In that regard, he placed reliance on the case of *Karanja & Another vs Republic* (1990) KLR where it was held that the uncorroborated evidence of an accomplice witness should be held untrustworthy as he was likely to swear falsely in order to shift the guilt from himself or disregard the sanctity of the oath or give his evidence under a promise of pardon or in expectation of an implied promise of pardon and was therefore liable to favour the prosecution.
16. He further argued that no sale agreement was adduced to show that he sold the Wiko phone to PW 3 through his Co-Accused person and that PW 6 conceded that he did not record any involvement particulars of the said transaction. He pointed out that he was a chang'aa (sic) brewer and had no skills on electronics.
17. He submitted that he had given a satisfactory explanation of where he was on that material night and how the money was sent to his phone without knowing that the Wiko phone had been stolen. He asserted that he withdrew the money and gave it to his Co-Accused person. He faulted the Trial Court for not appreciating his defence which he believed outweighed the Prosecution's case.
18. On its part, the Respondent placed reliance on the case of *Jeremiah Oloo Odira vs Republic* [2018] eKLR where it was held that theft and the use of threat to use actual violence must be proved for the offence of robbery with violence to be established. It submitted that the evidence that was tendered by the Prosecution proved the case against the Appellant beyond reasonable doubt.
19. It pointed out that the Appellant did not rebut PW 3's evidence that he together with his Co-Accused person went to her home to demand for payment of the sale of the Wiko phone.
20. It contended that the Appellant had a duty to give a reasonable explanation but he shifted the blame to his Co-Accused person who absconded court and did not give his defence. It was its case that the Appellant's defence did not create doubt on the Prosecution's case.
21. It further contended that the Appellant did not object to the production of the M-pesa statements that proved that PW 3 sent money to him. It was its case that he did not give a satisfactory explanation as to how he came to possess the stolen phone.
22. In this regard, it relied on the case of *Hassan vs Republic* [2005] 2 KLR where it was held that where an accused person was found in possession of recently stolen property, in the absence of any reasonable explanation to account for that possession, a presumption of fact arose that he was either the thief or a receiver.
23. It also cited the case of *Paul Mwita Robi vs Republic Criminal Appeal No 200 of 2008* (eKLR citation not given) where it was held that in a case where one was found in possession of a recently stolen property like in this case, the evidential burden shifted to him to explain his possession.
24. A perusal of the proceedings of the lower court showed that on 16th October 2017 at around midnight, PW 1 was sleeping with her husband and grandchildren when people entered their bedroom with bright torches. They were ordered to go back to sleep and cover their heads with blankets.
25. She stated that the attackers told them that they had been sent for their heads and Kshs 50,000/=. They took their meko (sic), microwave and PW 2's phone and car keys. They also took her Kshs 1,800/= from her hand bag.



26. Her further evidence was that they ordered her to wake up and hand over the money to them and when she did so, they pushed her to the floor and threatened to stab her if she did not give out the money. One of the attackers pointed a long knife at her neck. One of the attackers ordered him to stop and he kept away the knife.
27. She informed the Trial Court that one of the attackers held her by her chest on the right side and pulled her to the sitting room to show them where the television was. She showed them the microwave and the fridge and was made to sit near the television. The attackers then placed the hooper on the table and asked her if the same was working. When she said it was spoilt, she was pushed to the floor, one stepped on her neck using boots, another pulled her legs on one side and another on the other side. It was her testimony that three (3) of the attackers raped her in turns.
28. She stated that during the movements with torches, she was able to identify her attackers. One of the attackers came with some liquid in a green bottle which she believed was soda (sic) and he poured it on her private parts. He had asked her why she had shaved her private parts and she managed to respond that it was because of cleanliness.
29. She testified that the attackers carried household items as they ate available food. Two (2) of them took her back to the bedroom and pushed her on the bed. After sometimes, there was silence and PW 2, who was her husband woke up and went to his brother to borrow his phone. He called the local administrators and the police who responded.
30. She added that she identified three (3) of the attackers through an identification parade while the Appellant and another were arrested by the police for having handled the wiko mobile phone that belonged to PW 2. Her evidence was corroborated by that of PW 2 who was sleeping with her in the same bedroom on the material night.
31. Ruth Chelagat (hereinafter referred to as “PW 3”) testified that on 23rd October 2017 at around 5.00pm, she went home after IEBC training and found the Appellant’s Co-accused person, one Brian, who gave her a Wiko and a techno mobile phone. She picked the Wiko phone and agreed to buy the same at Kshs 3,000/=. She gave him a down payment of Kshs 500/= and Kshs 100/= for transport.
32. He came back on 24th (sic) and said the owner of the phone wanted more money. When she sent Kshs 500/= to the phone number he gave her, it brought the name of one Patrick Indiasi, the Appellant’s Co-Accused person. As at 27th (sic), she had paid them a total of Kshs 2200/=. They promised to give her phone receipt, earphones and charger on payment of the last instalment of Kshs 800/=. The Appellants’ Co-accused persons were arrested later. She pointed out that the phone was Wiko grey in colour.
33. PW 4 carried out the identification parade on 24th October 2017 and 25th October 2017. He testified that the identification parade was made up of eight (8) persons and that the Appellant is Co-Accused persons were identified by Pw 1.
34. PW 1 testified that the torches that were used by his attackers enabled her identify them. Thus, the lighting from the torches as they move around was conducive for positive identification. At one point the Appellant’s Co-Accused person threatened to kill her but another Co-Accused person ordered him not to stab her. Further, PW 1 testified that the Appellants’ Co-Accused persons raped her in turns.
35. PW 1 testified that whereas she identified three (3) of the Appellant’s Co-Accused persons at the identification parade, the Appellant herein and another Co-Accused person were arrested for being in possession of the Wiko phone that belonged to PW 2.



36. Having said so, the Appellant faulted PW 3 and PW 6 for relying on M-pesa statements which were computer printout and that neither of them produced a certificate under Section 65(8) and 106 B (4) of the *Evidence Act* Cap 80 Laws of Kenya allowing the admissibility of such evidence thus the court should reject the evidence pursuant to Article 50(4) of *the Constitution* of Kenya, 2010.
37. This court perused the M-Pesa statement that was adduced by PW 6 which clearly indicated that the Appellant herein received monies from PW 3 on 24th, 25th and 27th of October 2017. However, it was important to note that an M-pesa transaction was electronic evidence which could only be admissible if accompanied by a certificate prepared under Section 106 B(4) of the *Evidence Act* by a person who was competent in the management of the electronic device, outlining the manner in which the information was extracted. The said Section provides as follows:-
- “In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following--
- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - (c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and
 - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.”
38. In the absence of such a certificate therefore, this court agreed with the Appellant that the M-pesa statement printout was inadmissible and unreliable as its authenticity could not be vouched for.
39. Going further, the applicability of the doctrine of recent possession was set out by the Court of Appeal in the case of Isaac Nganga Kahinga alias Peter Nganga Kahinga vs Republic [2006]eKLR where it was held that before a court could rely on the doctrine of recent possession as a basis for conviction in a criminal case, it had to be first proven that the property was found with the suspect, secondly, that the property was positively identified as the property belonging to the complainant, thirdly, that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant.
40. This court also considered the case of Malingi vs Republic [1989] KLR in which it was held that by applying the doctrine of recent possession, the burden shifted from the prosecution to the accused person to explain his possession of the item complained about.
41. This court agreed with the Prosecution’s submissions that it had been settled in a plethora of decisions that if a person was found in possession of stolen goods, he or she would be required to tender an explanation in rebuttal, failure to which, an inference would be drawn that he either stole the goods or was a guilty receiver.



42. When placed on his defence, the Appellant did not tender any explanation as to how he came to be in possession of a mobile phone that was recently stolen from PW 2. He shifted the blame to his Co-Accused person who he stated was his friend and that they usually transported chang'aa (sic) together. His Co-Accused absconded court at the time of trial and therefore did not give his evidence in rebuttal of his assertions.
43. The Appellant did not also challenge the M-Pesa transaction message between him and PW 3. The Appellant admitted that he received money three (3) times on his phone. In the mind of this court, PW 3's evidence in that respect was uncontroverted.
44. In the premises, it was this court's considered view that the recovered mobile phone and particularly the M-Pesa text message established an undeniable nexus between the Appellant and this offence. The evidence tendered by the Prosecution witnesses was watertight and directly pointed to the Appellant as the robber, more so on the application of the doctrine of recent possession. The omission of a certificate accompanying the M-pesa statement was not fatal to the evidence that was tendered.
45. Turning on the issue of the Appellant's defence of alibi, this court had due regard to the definition of "alibi" in the Black's Law Dictionary, 10th Edition. It was defined as:-
- “A defence based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time”.
46. The principle has long been accepted that an accused person who wished to rely on a defence of alibi had to raise it at the earliest opportunity to afford the prosecution an opportunity to investigate its veracity or otherwise. The East Africa Court of Appeal came to a similar conclusion in the case of Republic vs Sukha Singh S/O Wazir Singh & Others [1939] 6 EACA 145.
47. It is also trite law that once a respondent raised an alibi defence, the onus shifted to the prosecution to displace the same as was held by the Court of Appeal in the case of Victor Mwendwa Mulinge vs Republic [2014] eKLR.
48. In this case, the defence of alibi was raised at the defence hearing and not at the beginning of the trial. The Prosecution did not rebut the same despite having the option of doing so as provided in Section 309 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides that:-
- “If the accused person adduces evidence in his defence introducing new matter which the advocate for the prosecution could not by the exercise of reasonable diligence have foreseen, the court may allow the advocate for the prosecution to adduce evidence in reply to rebut it.”
49. Be that as it may, weighed against the evidence that was adduced by the Prosecution witnesses, this court did not find the Appellant's alibi evidence to have been watertight enough to have weakened the inference of guilt on his part.
50. Turning to the issue of whether or not the Prosecution demonstrated the elements of the offence of robbery with violence herein, this court had due regard to the case of Oluoch vs Republic [1985]KLR where the Court of Appeal set out the elements of robbery with violence as being that at the time the offence was committed, the offender must have been armed with a dangerous and offensive weapon or instrument or he must have been was in company with one or more person or persons or at or immediately before or after the time of the robbery, the offender wounded, beat, struck or used other personal violence to any person.
51. Section 295 of the Penal Code stipulates that the elements of robbery with violence are :-



- a. That the offender is armed with any dangerous weapon or offensive weapon or instrument;
 - b. That the offender is in the company of one or more persons;
 - c. That 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.
52. PW 1 and PW 2 confirmed having seen the Appellant and his Co-Accused persons entered their bedroom armed with knives. PW 1 testified how one of the attackers pointed a long knife to her neck. They stepped on her head and thighs. PW 5 examined PW 1 at Kaimosi Hospital. He opined that PW 1 had been assaulted as she had injuries on the thigh which was tender. He produced the P3 Form as exhibit which showed that she was raped during the atrocious attack.
 53. PW 1 and PW 2 testified that the Appellant and his Co-Accused persons robbed them of their meko (sic), Kshs 5000/= which was under PW 2's pillow, PW 2's car keys, Kshs 1,800/= from PW 1's handbag, both their phones, makes Wiko and Huawei. PW 6 tendered in evidence the Wiko phone which was recovered from the Appellant's Co-accused persons.
 54. PW 6 testified on behalf of Sergeant Majani and PC Bwoti who were the investigating officers in this case. His evidence corroborated that of PW 1, PW 2, PW 3, PW 4 and PW 5. He produced the recovered Wiko phone which PW 2 identified as his through the IMEI Number and features like whatsapp messages, photos and email.
 55. It was evident that the Appellant was in the company of others when they robbed PW 1 and PW 2. They were armed with dangerous weapons. During, immediately before and after the offence, they wounded PW 1. PW 2's Wiko phone was recovered from PW 3 who had purchased it from the Appellant's Co-Accused person.
 56. As the chain of events was unbroken, this court was satisfied that the Prosecution established its case of robbery with violence against the Appellant herein beyond reasonable doubt. The Trial Court thus proceeded correctly when it found that all the ingredients constituting the offence of robbery with violence were present in this case and convicted him accordingly.
 57. In the premises foregoing, Grounds of Appeal Nos (1) and (2) of the Petition of Appeal and Supplementary Grounds of Appeal Nos (1), (2), (3), (4) and (6) were not merited and the same be and are hereby dismissed.

B. Proof Of Gang Rape

58. Grounds of Appeal No (3) and (4) of the Petition of Appeal and Supplementary Ground of Appeal No (5) were dealt with under this head.
59. The Appellant argued that none of the Prosecution witnesses mentioned him in respect to the offence of gang rape, thus, his conviction on the said offence was against the weight of evidence.
60. On its part, the Respondent invoked Section 10 of the [Sexual Offences Act](#) and Section 21 of the [Penal Code](#) and argued that a person may not have engaged in the sexual act of defilement but was guilty of gang rape when he was in company of others who committed the offence with common intention. It pointed out that PW 1's testimony was corroborated by that of PW 5 which confirmed that there were sperm cells that were seen on PW 1's vagina during medical examination.
61. PW 1's evidence of what transpired on the material night of 16th October 2017 was unwavering and was corroborated by PW 2. The evidence that three (3) of her attackers raped her was cogent and was



further corroborated by the scientific evidence that PW 5 adduced during the trial. Indeed, there was presence of sperm cells and pus cells in PW 1's vagina which led PW 5 to conclude that she was raped.

62. Be that as it may she testified that she did not recognise the accused persons who were found in possession of PW 2's Wiko phone. When she was cross-examined, she confirmed that she only recognised one Nicholas one of the Appellant's Co-Accused as the person who raped her.
63. Her said statement thus exonerated the Appellant herein from the offence of gang rape as the same was not proven to the required standard, which in criminal cases was beyond reasonable doubt. In this regard, the Trial Court therefore erred when it convicted him for the offence of gang rape.
64. In the premises foregoing, Grounds of Appeal No (3) and (4) of the Petition of Appeal and Supplementary Ground of Appeal No (5) were merited and the same be and are hereby allowed.

II. Sentencing

65. Ground of Appeal No (5) of the Petition of Appeal and Supplementary Ground of Appeal No (7) were dealt with under this head.
66. The Appellant submitted that he was arrested on 31st October 2017 and his sentence was made to run from the date of its pronouncement. He faulted the Trial Court for not holding that his sentence do run from the date of his arrest. On its part, the Respondent submitted that the sentences meted upon the Appellant were proper and commensurate to the charges. It however urged the court to allow his prayer under Section 333(2) of the *Criminal Procedure Code*.
67. Notably, the Appellant was found guilty of the offence of robbery with violence and gang rape.
68. Section 295 of the *Penal Code* states that:-

“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.”

69. Further, Section 296 (1) and (2) of the *Penal Code* provides as follows:-
 1. Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
 2. 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.
70. Section 10 of the *Sexual Offences Act* provides that:-

“Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.”

71. The Trial Court sentenced the Appellant to fifteen (15) years imprisonment for the offence of robbery with violence and twenty (20) years imprisonment for the offence of gang rape which sentences were



to run concurrently. In the mind of this court, the Trial Court was very lenient as it had the option of sentencing the Appellant to death for the offence of robbery with violence.

72. As this court had found that the Prosecution did not prove its case as against the Appellant on the charge of the offence of gang rape, the Trial Court therefore erred for having convicted and sentenced him on the same. However, in respect of the charge of robbery with violence, it was this court's view that considering the atrocity that was meted on PW 1 and PW 2 herein, the sentence ought to be higher than what was meted upon the Appellant. However, in view of this court's discretion on sentencing, it left the sentence of fifteen (15) years imprisonment undisturbed.
73. Going further, this court was mandated to consider the period the Appellant spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
74. The said Section 333(2) of the Criminal Procedure Code provides that:-
- “Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code
- Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).
75. Further, the Judiciary Sentencing Policy Guidelines provide that:-
- “The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”
76. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
77. Notably, as per the charge sheet, the Appellant was arrested on 31st October 2017. Although he was granted bond, he did not seem to have posted the same. He was sentenced on 11th December 2018.
78. A perusal of the lower court proceedings indicated that the Trial Court did not take into consideration the said period while sentencing the Appellant. This was a period that therefore ought to be taken into consideration while computing his sentence.

Disposition

79. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated 4th March 2023 and lodged on 20th April 2023 and Supplementary Grounds of Appeal dated 4th March 2024 and filed on 26th June 2024 were partially merited. The Appellant's conviction and sentence in respect of the offence of robbery with violence be and is hereby upheld as they were both safe. His conviction and sentence in respect of the offence of gang rape be and is hereby dismissed as it was unsafe.



80. It is hereby directed that the period between 31st October 2017 and 10th December 2018 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

81. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF FEBRUARY 2025

J. KAMAU

JUDGE

