



REPUBLIC OF KENYA



KENYA LAW
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**Munika v Republic (Criminal Appeal E083 of 2022)
[2025] KEHC 6413 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 6413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E083 OF 2022**

**S MBUNGI, J
APRIL 30, 2025**

BETWEEN

WYCLIFFE ONGAI MUNIKA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence by Hon. L. Kassan (CM) in Kakamega CR case No. E063 of 2021 delivered on 27/10/2022)

JUDGMENT

introduction

1. The Appellant herein in the company of another were charged with the offence of robbery with violence contrary to section 296 (2) as read with section 295 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, Laws of Kenya.
2. The particulars of the robbery with violence charge were that on 15th day of April 2021 at 2000hrs at [Particulars withheld] village, Khayega location in Kakamega East sub-county within Kakamega county while armed with pangas and runguns, jointly robbed RT off (1) safaricom iPhone (2) Techno mobile phone (3) 1 kg sugar (4) 1 mobile charger, (5) 3 packets of milk (6) blood pressure drugs all valued at Kshs. 8,250/= the property of the said RT, and immediately before the time of such actual violence to the said RT.
3. On the second charge he was charged with Gang rape contrary to section 10 of the penal code particulars being that on 15th day of April at [Particulars withheld] village, khayega location in Kakamega East sub-county within Kakamega County, in association with Wycliffe Ongai intentionally and unlawfully caused his penis to penetrate the vagina of RT without her consent.



4. The appellant denied the charges on 22nd April 2021, and a trial ensued, during which three witnesses testified and the defence called 2 witnesses. The trial court found that the prosecution proved its case against the accused persons and found them guilty. The accused persons were sentenced to 30 years for robbery with violence and 10 years for gang rape.
5. The appellant, being dissatisfied with the conviction and sentence of the trial court, appealed on the following grounds;
 - a. The learned trial magistrate erred in law and fact in presiding over a trial that did not meet the threshold and standard of a fair hearing as stipulated under article 50 (2) (c) (g) (h) and (j) of *the constitution* of Kenya.
 - b. That the learned trial magistrate erred in law and fact by finding the offence of robbery established, and provided the absence of proof of ownership of the alleged stolen phone.
 - c. That the learned trial magistrate erred in law and fact by admitting the evidence of PW1 one Rose Tendwa, regarding identification.
 - d. That the learned trial magistrate erred in law and facts by withdrawing the appellant's legal counsel and thereupon subjecting him to a hearing with all the prosecution witnesses, ruling on the case hearing of the defence case, and finally giving a judgment date.
 - e. That, the trial court erroneously admitted the evidence of PW3 and convicted him of the offence of gang rape without the same being adequate.
 - f. That the learned trial magistrate erred in law and fact by failing to appreciate that there was no direct or forensic link between the appellant with the crime.
 - g. That in all manner the sentence imposed is harsh and excessive, hence not considerate of the period of time spent in remand custody prior to the sentence.
 - h. That the trial court failed in handling the appellant a long custodial sentence without considering the age, hence violating the purpose of the sentence.

Summary of the evidence.

6. PW1 was the complainant Roseline Watendwa, who gave a sworn testimony. She testified that on 15/4/2021, around 8-9 p.m., she was walking along Khayega Shinaylu road when the 1st and the 2nd accused came out of a bush, one was behind and the other in front of her. They requested her to move from the road, and when she resisted, the 2nd accused placed a panga on her neck while the other accused poked her with a club on her right ribs.
7. She claimed that they took her to a bush near a church and that the 2nd accused threatened her. They then proceeded to rape her and when they finished, she pleaded for them to take whatever they wanted, they forcefully took money from her bag which was Kshs. 1800 and some coins. In her bag, she stated there were her charger, some drugs, keys, and shopping that was sugar, milk. They divided the spoils in her presence.
8. She avers that they inquired where her home was, and she offered to show them. She requested them to give her the SIM cards. The 1st accused removed the SIM card, and it was at that time that she was able to see their faces. She knew the 1st accused by name, while she said that she had seen the 2nd accused person before but did not know his name.



9. She broke free from the accused persons, and ran all the way home, where she met her brother B . She told him about the incident, and he called the police officers. She reported the incident to Khayega police station, and was advised to seek medical treatment. The doctors gave her the ARVS and some medicines to prevent pregnancy since the accused did not use a condom.
10. She accompanied the police to where the 1st accused person was, who later took them to the 2nd accused person whom she positively identified..
11. The PW2 was Musa Sahel, a senior clinical officer formerly of Shinaylu Sub-County Hospital. He produced the P3form, PCR, and the treatment notes. He testified that on 16th April 2021, a client came to the Hospital, the complainant, Roseline. She alleged that she was assaulted by two people whom she had met the previous day. She had injuries on her right hand as well as on her head. She said sharp objects were used to assault her and that she was also raped. He saw she had the injuries on her right hand, which was also swollen. She was sent to the laboratory. On examination her labia was red and tender, and she was in pain, which meant that there was forced penetration.
12. He prepared a report and signed it.
13. PW3 was Sergeant Kupalo No. 227053. He was initially based in Khayega. He stated that on 16th April 2021, he was at the station when the complainant came to report that she was a robbed and raped by two people whom she knew. They threatened her with a panga and a rungu they stole her bag that had her shopping. They took her to a bush behind the church where they forced her to sit and forced her not to make any noise. The 2nd accused pushed her on her back, removed her panty and the 1st accused placed a panga on her neck, the 2nd accused person raped her while the 1st accused held a panga to her neck. The 2nd accused told the 1st accused that they should go but the 1st accused demanded to rape her also. The 2nd accused took a club and pressed it on her ribs and the 1st accused raped her. They threatened her not to make any noise. they opened her bag and removed her phone valued at 4000/= 3 packets of milk, 1 kg of sugar and drugs, cash 1900/= and some coins.
14. The witness stated that the complainant was able to recognize them. She knew the 1st accused as Joseph and that he was a stammerer, and the 2nd accused was Wycliffe aka Sigiti. She used to meet them every day on her way to work. They used to do casual work at her home.
15. He asserts that they went to the 2nd accused's home. Who led them to the 1st accused's house. The complainant was able to recognize the accused persons .
16. The prosecution closed its case, and the court made a ruling that the accused persons had a case to answer.
17. The 1st accused person when he put on his defence, he stated that his name was Joseph Bahati from Khayega. He stated that he is a farmer. He claimed that on that day of the offence, he was at home building his father a house. He just heard people say that he had committed the offence of robbery and rape. He asserted that the complainant fabricated the case. That He and the complainant were acquaintances. That sometimes he toiled her land at her home as a casual, and the complainant did not pay him, for work he did and as a result she became hostile to him when he sought his money.
18. The 2nd accused in his defence claimed that he came from Khayega as well and said that he did not know the complainant. He denied committing the offence.

Submissions

19. The court directed that the appeal be disposed of by way of written submissions; however, at the time of writing this judgment, none of the submissions had been filed on the CTS or the court's file.



Analysis and determination

20. This being the first appeal, this court is, as a matter of law, enjoined to analyze and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. *Okeno v Republic* (1072) EA 32, the court of appeal set out the duties of the first appellate court as follows;

“An appellant on first appeal is entitled to expect the evidence as a whole to be submitted to fresh and exhaustive examination (*Pandya v Republic* (1957) EA 336) and the appellate court makes its own decision on the evidence made. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusion (*Shantital M Ruwala v Republic* (1957) EA 570). 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 and to correct findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it be decided 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 advantages of hearing and seeing witnesses. See *Peters versus Sunday Post* (1958) EA 424.”

21. From the grounds of appeal as framed, the main issues for determination are whether the prosecution proved the offences beyond a reasonable doubt with consistent evidence and whether the sentence imposed by the trial court was harsh and excessive in the circumstances.

22. The offence of robbery with violence is contained in sections 295 and 296(2) of the [Penal Code](#) as follows:

“295. 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 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.

296.

(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

23. What constitutes the offence of robbery with violence was well defined in the case of *Olouch vs Republic* (1985) KLR, where this Court stated as follows: -

“...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.”



24. I will proceed to analyze the grounds of appeal vis-à-vis the Viz law as to what constitutes the offence of robbery with violence
25. According to the appellant, he was not accorded a fair trial as stipulated under article 50 (2) (c) (g), (h), and (j) of *the constitution*.
26. Article 50(2)(g) and (h) of *the Constitution* provides as follows: -

“ 50

(2) Every accused person has the right to a fair trial, which includes the right-

(g) to choose, and be represented by an advocate, and to be informed of this right promptly.

h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly.

27. The above provision guarantees an accused person’s right to a fair trial. Under sub-article 5(2)(g), the trial court is required to inform an accused person of his right to counsel.
28. The ground raised by the Appellant was that the trial did not meet the threshold and the standard of a fair hearing. Without further elaboration through submissions, it is not possible for this court to clearly understand which standard was not met. I have perused the trial court proceedings, and note that the Appellant was informed in Kiswahili of the charges to which he denied, and the prosecution commenced. The appellant did not expound further on the violation. This ground fails.
29. On the ground of whether the prosecution proved the offence of robbery with violence beyond a reasonable doubt,
30. It was Pw1 evidence that on the night of the incident she was closing her shop when the 1st and the 2nd accused jumped out a bush and attacked her. she recalled how the 1st accused placed her panga on her neck while the 2nd accused poked her with a club and drugged her off the road and took turns in raping her and later stole from her.
31. She was able to recognize the 1st accused by name and identified the 2nd accused by his appearance.
32. Her evidence was supported by the evidence and testimony of Pw2, a senior clinical officer formerly based at Shinaylu Sub-County Hospital, who produced the treatment notes, P3 form, and the PRC form. He examined her and saw that she had bruises on the left side of the head, injury on her right hand and later on examining her vagina found that her labia were red and tender and that she was in pain indicating that there was forced penetration although there were no spermatozoa, the epithelial cells showed that there was rape.
33. The appellant also raised an issue of identification.



34. It is given that in a case as this, identification is key, given that it is the link that connects an accused person to an alleged act that constitutes an offence. Identification has been defined by Black's Law Dictionary, 2nd Edition, as:

“Proof of identity; the proving that a person, subject, or article before the court is the very same that he or it is alleged, charged, or reputed to be; as where a witness recognizes the prisoner at the bar as the same person whom he saw committing the crime; or where handwriting, stolen goods, counterfeit coin, etc., are recognized as the same which once passed under the observation of the person identifying them – ‘Identitas vera colligitur ex multitudine signorum’”.

35. As the incident occurred at night, care should be taken to ensure the appellant was positively identified as the perpetrator of the offence. The court in *Wamunga v Republic* (1989) KLR 424 at 426 had this to say:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favorable and free from possibility of error before it can safely make it the basis of a conviction.”

36. From the evidence of PW1, it is clear that he knew the appellants. She testified that the 1st accused was known to her and even identified him as Wycliffe, while he had seen the 2nd accused around and that he did some casual work for her. She recalled that though it was at night, the 2nd accused used the phone torch, which shone on the 1st accused, and she was able to positively identify the two accused persons.

37. Therefore, the identification of the Appellant as one of the perpetrators cannot be in doubt.

38. In the case of *Abdalla Wendo v Republic* (1953) 20 EACA 166, it was held that:

“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 respecting identification especially when it is known that the conditions favoring correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be 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 the possibility of error.”

39. It is my considered view that the Appellant was properly and positively identified by the PW1. She stated that she knew her attackers before the attack, and she was able to positively identify them when the 2nd accused used the phone torch to illuminate the 1st accused while changing the SIM cards. I find the testimony of PW1 to be reliable direct evidence of visual identification against the Appellant.

40. On the ground by the appellant, whether the phone belonged to PW1.

41. PW1 testified that the phone was hers and that it was stolen from her possession by the 1st and the 2nd accused persons.

42. The Black's Law Dictionary, 9th Edition defines a 'beneficial owner' as one who enjoys, uses, and manages property as of right and can convey it to others; an equitable ownership.



43. In Nancy Ayemba Ngaira –vs- Abdi Ali [2010] eKLR, the Court had the following to say on ownership: -
- “..... In judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership, beneficial ownership, and possessory ownership. A person who enjoys any of such other categories of ownership may, for practical purposes, be much more relevant than the person whose name appears in the certificate of registration.”
44. In some instances, the law does not mandatorily require documentary evidence of ownership of property. Whereas PW1 did not avail ownership documents of the phone, there was ample evidence of actual and possessory ownership by PW1. Further, no one else laid claim over the ownership of the phone. Legally, it was, therefore, proved that the phone belonged to PW1.
45. On the issue of whether the appellant was armed and or in the company of one or more persons, it was the evidence of PW1 the complainant, that the 1st accused was armed with a panga which he placed on her neck while the 2nd accused had a club which he used to poke her. Her evidence was consistent even during cross-examination.
46. From the evidence of PW1, the 1st and the 2nd accused jointly attacked her and they were armed with a panga and a club respectively which they used to threaten her to surrender her items and they assaulted her on the left side of the head and her right arm which was swollen according to the evidence of PW2 who corroborated her evidence by production of the medical treatment notes, the P3 form as well as the PRC form indicating that PW1 was sexually assaulted.
47. The prosecution’s case was well established in my view and the ingredients of robbery with violence as well as gang rape was well proven beyond reasonable doubt. I find the conviction was safe and I upheld the same.
48. The final issue for determination was whether the sentence imposed was harsh and excessive in the circumstances.
49. Sentencing is a discretion of the trial court. In *Ambani –Vs- Republic* (1990) KLR 161, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate with the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.
50. In the case of *Wanjema v R* [1971] EA 493, 494, the court held that the appellate court is entitled to interfere with the sentencing discretion of the trial court in view of plain error of the omnibus sentence and the illegality of the sentence.
51. The question is whether this court should interfere with the sentence. In *James Kariuki Wagana – v- Republic* (2018) eKLR Prof. Ngugi. J (as he then was) stated- ‘while the sentence of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances.
52. The trial court the 1st and the 2nd accused persons were sentenced to serve 30 years for the 1st count of robbery with violence and 10 years for the offence of Gang rape to run concurrently.
53. Section 296 of the *Penal Code* reads 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.”

54. The trial magistrate at the time of sentencing considered the appellant’s plea for leniency and gave a sentence of 30 years for robbery with violence. The appellant’s argument that he was given a harsh sentence, although he did not submit further on this argument. In any event, this Court finds that the trial Court exercised leniency and sentenced him to 30 years as opposed to the prescribed death penalty.

55. . For Count II, ‘Gang Rape contrary to Section 10 of the *Sexual Offences Act*’ the Appellant was sentenced to 10 years’ imprisonment. The penalty section for gang rape provides for a minimum of 15 years’ imprisonment which may be enhanced to imprisonment for life. This Court thus finds that the 10 years’ imprisonment was within the confines of the law.

56. With those factors in mind, I find no reason to disturb the sentence meted out on the appellant.

57. Accordingly, appellant’s appeals fail and are hereby dismissed, and, consequently, the Judgment of the trial court is hereby upheld.

58. It is so ordered.

59. Right of Appeal 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF APRIL, 2025

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Albright Sunguti

Appellant present online.

Ms Chalo for the DPP present online.

