



**Maingi v Republic (Criminal Appeal 183 of 2023)
[2024] KEHC 1573 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1573 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 183 OF 2023
DR KAVEDZA, J
FEBRUARY 22, 2024**

BETWEEN

GEOFFREY MUTISYA MAINGI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. Juma (SPM) on 23rd November 2016 at Kibera Chief Magistrate's Court
Criminal Case no. 298 of 2013 Republic vs Michael Odhiambo Ogolla & anothe)*

JUDGMENT

1. The appellant jointly with two others not before this court was charged with 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. After a full trial, he was sentenced to death. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his petition of appeal, he raised four (4) grounds, which have been coalized as follows: He contended that the charge sheet was defective. He challenged the totality of the prosecution's evidence against which he was convicted. He also contended that his defence was not considered by the trial court. He urged the court to quash his conviction and set aside the sentence.
3. The key ingredients for a robbery with violence charge are found in section 296(2) of the [Penal Code](#). It provides as follows-

“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”.



4. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt leading to a proper conviction and sentence.
5. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate and reanalyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See [*Okeno v Republic* \[1972\] EA 32](#))
6. The prosecution called seven witnesses in support of their case. The prosecution's case as told by Michael Kioko (PW 1) and Francis Sammy Ole (PW 3) is that on 24th January 2019, they were delivering a consignment to Athi River from the airport in Motor vehicle KBT 144D make lorry, when they were intercepted by a saloon car which was carrying persons dressed in police uniform. The assailants, among them the appellant, were armed with pistols. Both PW1 and PW3 were ordered to step out of the lorry. The assailants demanded the keys to the lorry and PW3 handed it over. The key was given to the appellant who was asked to drive the lorry. PW1 and PW2 were beaten, handcuffed, bundled in the car and later abandoned at the Delmonte Farms in Thika. Security guards at the farm rescued them and escorted them to Makongeni Police station to make a report.
7. On the same day, not long after the lorry was stolen, Senior Sergeant Peter Muthee (PW2) and his colleague PC Kuweka Hassan (PW4) arrested the appellant as he drove the said lorry in the company of another not before this court.
8. In the course of arrest, the appellant identified himself as Mutisya and offered to take the officers to where the consignment in the lorry had been offloaded. PW4 remained with the lorry while appellant directed PW2 to a house where the offloading was done. PW5 took photos of the recovered exhibits, including new laptops and servers, which were in boxes.
9. No. 52844, Sgt. Nathan Njoroge, the investigating officer produced handcuffs recovered from PW1 and PW3, the lorry, the laptops and the servers that were recovered from the scene. He told the court that he investigated the matter and charged the appellant, jointly with others not before this court with the offence of robbery with violence.
10. In his sworn defence, the appellant told the court that on the material date, he left his workplace at 11:30 am and boarded a matatu to a junction where two officers approached him shortly after alighting, saying that they had been looking for him. He claimed that the officers asked him to show them the people who were with the stolen lorry. The officers then asked him to accompany them but he resisted. He further stated that two women who had alighted from the same matatu as the appellant told the officers that they came from Mlolongo together. The police officers asked the women to go away. The appellant was then handcuffed and taken to Mlolongo Police station. The appellant conceded that PW2 arrested him but denied having led the officers to where the laptops were recovered.
11. The appeal was canvassed by way of written submissions which have been considered. The offence of robbery with violence under section 296(2) of the [*Penal Code*](#) is proved when an act of stealing is committed in any of the following circumstances; the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see [*Dima Denge Dima & Others v Republic*](#) NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR and [*Oluoch v Republic* \[1985\] KLR 549](#))
12. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt. The evidence on record shows



that PW 1 and PW 3 were in the motor vehicle that was car jacked by a group of assailants. Both PW1 and PW3 identified the appellant as one of the assailants in the car that intercepted them. They further stated that it was the appellant who was handed the key to the lorry to drive. This testimony is corroborated by PW2 and PW4 who confirmed that at the time of arrest, the appellant was the one driving the lorry. The appellant did not dispute that he was present at the scene and that PW1 and PW 3 were indeed hijacked.

13. During the ordeal that occurred in broad daylight, the assailants, who were armed with guns, stole the motor vehicle registration number KBT 144D, laptops, servers, mobile phones and cash. From the material placed before the court, PW1 and PW3 were very clear on the facts of the incident, and their evidence was not shaken on cross-examination. It is my considered view that the appellant was properly and positively identified and apprehended after the incident. I find the testimony of the prosecution's witnesses to be reliable direct evidence of visual identification against the appellant.
 14. For the consideration of whether violence was used during the incident, it was the testimony of prosecution witnesses that the assailants were armed with guns and beat both PW1 and PW3 before handcuffing them and bundling them in the car. The use of violence was therefore present. This court is satisfied that the prosecution proved that the appellant and his accomplices, being armed with guns, robbed and used actual violence against the PW1 and PW3. His conviction for the offence of robbery with violence was therefore safe.
 15. The appellant argued that the trial court failed to consider his defence. In his defence, the appellant denied committing the offences and maintained his innocence. He maintained that he was running his errands at the time of arrest. From the record, the trial court considered the appellant's defence and found it to be unbelievable and an afterthought. The ground therefore fails.
 16. The appellant also argued that the charge sheet was defective because it initially listed his last name as Maingi, but was later altered to Munyao without explanation, when the charge sheet was amended. However, at the trial court, the appellant did not contest this alteration. The error occurred during the amendment when a second charge was introduced. Be that as it may, the appellant was identified by PW 1 and PW 3. He actively participated, cross-examined witnesses, and presented his defence using the name Maingi, as reflected in the court proceedings. Besides, the charge sheet provided all necessary information for the appellant to understand the charges and defend himself adequately. This ground is therefore dismissed.
 17. On sentence, the appellant was sentenced to death. Section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find the sentence imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh. I also take into consideration, as highlighted by the respondent, that the appellant deserves some leniency as he led the police to where the stolen goods were, and that most of the stolen items were recovered.
 18. Therefore, the appeal on sentence succeeds. The sentence of death is hereby vacated. I hereby resentence the appellant to 20 years imprisonment each for the offence of robbery with violence. The sentence shall run from the date of conviction, taking into account the time spent in remand custody.
- Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 22ND DAY OF FEBRUARY 2024

D. KAVEDZA



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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Appellant present in person

Ms. Ntabo present for the Respondent

Nelson Court Assistant.

