



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthini v Republic (Criminal Appeal 15 of 2023)  
[2024] KEHC 2182 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2182 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KWALE  
CRIMINAL APPEAL 15 OF 2023  
DKN MAGARE, J  
FEBRUARY 22, 2024**

**BETWEEN**

**DENNIS MUTHINI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(This is an Appeal from the Judgement of Trial Court, Hon. S.A Ogot, SRM delivered on 2nd November 2022 in Msambweni SRM CRC No. E005 of 2022.)*

**JUDGMENT**

1. This is an Appeal from the Judgement of Trial Court, Hon. S.A Ogot, SRM delivered on 2<sup>nd</sup> November 2022 in Msambweni SRM CRC No. E005 of 2022.
2. The Appellant was charged with robbery with violence contrary to Section 295 as read with Section 296(1) of the Penal Code.
3. The particulars of the offence were that on 4<sup>th</sup> January 2022, at Mwabandari Village, in Lungalunga Subcounty of Kwale County, robbed Mariana Ndulu Wambua of her handbag valued at Kshs. 1000, mobile phone valued at Kshs. 1,200, and Kshs. 1,650 and immediately before such robbery wounded the said Mariana Ndulu Wambua.
4. The Trial Court, Hon. S.A Ogot, SRM heard the case and found the Appellant guilty of the offence and convicted him to life imprisonment.
5. The Appellant, aggrieved, lodged this Appeal.
6. The Grounds were that the Trial Court erred in law and fact:
  - i. In finding that the prosecution had proved its case beyond reasonable doubt.



- ii. For not noticing that the Prosecution had not tendered sufficient evidence
- iii. For failing to find that no dusting was done on the exhibits to prove the case.

### **Evidence**

7. At Trial, PW1, the Complainant testified that he saw the Appellant's eyes because he had covered his face.
8. It was her testimony that the Appellant emerged from behind and held her mouth warning that he would kill her should he scream.
9. It was her case that the Appellant was her neighbor and she knew him.
10. That he cut her on the palm of her left hand before leaving with her hand bag.
11. On cross examination, she testified that the Appellant forcefully snatched her handbag which had Kshs. 1,650/- and some money were recovered on his arrest, Kshs. 1000/=.
12. Further, the panga he threatened her with before the unlawful act was recovered from his house and produced in court.
13. PW2, testified that he got a call that the Complainant had been attacked and cut with a panga.
14. That the Appellant was searched and found with Kshs. 1000/- in notes of Kshs. 200 and 100.
15. PW3 informed the court that he was with PW2 when they were informed that the Complainant had been snatched her bag and cut with a panga. That the Appellant admitted to stealing the money and as Kshs. 1000/- was recovered he gave it to Paul who said it was Kshs. 1000/-.
16. PW4 testified that he was the clinical officer. That he stitched the Complainant.
17. It was his case that the degree of injury was harm. He relied on treatment notes and P3 Form which he produced in evidence.
18. PW5 was the arresting officer.
19. He produced 1 note of Kshs 200, 8 notes of Kshs. 100, 2 Kshs. 20 coins, 1 Kshs. 10 coin and 3 Kshs.5 coins in evidence.
20. PW 6 was the Medical Doctor. It was her case on cross examination that the hymen was not intact meaning she had sex.
21. PW7 was the Investigation Officer. He testified that the results of the investigations pointed to the Appellant as offender and they arrested him.
22. He produced a panga, brown bag, blue scarf, Techno Phone, Money and Mask.
23. The Appellant also testified. It was his case that he had cut the Complainant with a panga.
24. It was his case that while he was being taken to Kikoneni Police Station, people stopped him. They were pikipiki riders. They forced him to say where the panga was lest they kill him. He went and showed them so that they do not kill him. That they also searched him and found Kshs. 1000/=.
25. It was his case that the panga did not have blood.
26. DW2, testified that he was a nephew to the Appellant. That the techno phone was his own phone which he had assisted the Appellant to use.



27. On cross examination, it was also his case that he gave the Appellant Ksh. 1000 to buy clothes for himself.
28. The Trial Court considered the case and rendered its Judgment on 2<sup>nd</sup> November 2022. The court found the Appellant guilty and convicted him of the offence.

### **Submissions**

29. Directions were given for parties to file submissions. The Appellant filed submissions dated 1<sup>st</sup> August 2023.
30. It was his case that the Complainant did not identify him as the person who robbed her.
31. He also submitted that the evidence by the Complainant was not corroborated by Nyanya to implicate him. He relied on *Kemoni v R* Crim App No. 220 of 1991.
32. Further, that there were contradictions in the evidence by the prosecution where treatment notes refer to injury to the right palm while P3 form referred to the left palm.
33. Further, he submitted that there ought to have been a parade identification which was missing.
34. The Respondent filed submissions on 27<sup>th</sup> November 2023.
35. It was the Prosecution's case that the Trial Court correctly found the Appellant guilty and convicted him as charged.
36. The Respondent submitted that all the ingredients of robbery were proved beyond reasonable doubt.
37. It was submitted that it was proved that the Appellant was armed with a dangerous weapon and it was proved that he had a panga which he cut the Complainant while stealing the money and bag.
38. Further, that the Appellant was well identified by recognition and there was no need for identification parade.
39. Reliance was placed on the case of *Anjoroni & Others v Republic* (1980) eKLR recognition was of the assailant was the more satisfactory identification method.
40. I was urged to dismiss the Appeal.

### **Analysis**

41. I have perused the record of proceedings and evidence in the Trial Court as well as the filed submissions. The issue is whether the Trial Court erred in convicting and sentencing the Appellant as he did.
42. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 is as follows:-

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made



on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

43. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

44. This is an appeal from the conviction and sentence meted out by Hon. S.A Ogot – SRM E005 of 2022. The Appellant was charged with Robbery with Violence contrary to Section 296(2) of the Penal Code.

45. After hearing the Appellant was convicted and sentenced to life imprisonment on 22/11/22. He filed a Petition of Appeal on 5/12/2022.

46. I note that the particulars of the offence was that on 4/1/2022 at Mwembeni Jari village in LungaLunga sub County of Kwale county while armed with a panga, robbed Marianna Ndulu Wambua of her had bag valued at Kshs. 1000 mobile valued at 1200 and Kenya shillings 1650 and immediately before the time of such robbery wounded the said Marianna Wambua. The Appellant pleaded not guilty.

47. In criminal cases, the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J (as he then was) in Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR expressed himself as hereunder:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

48. Also, it was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

“What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-



“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.”

49. Guided by the above authorities, I have perused the crux of the Complainant’s testimony and evidence. The complainant testified that she is a farmer. On 4/12/2022, she came from home a 3:00 pm headed to Kiloneni. She passed thorough a bush to cross a river. She stopped to rest. The person came from behind. She only saw eyes. He covered his face. She turned to face front. The assailant covered her mouth and was holding the neck.
50. The person threatened the accused “Ukipiga kelele nitakuuaa”. The person was holding a panga. The person took off with her bag. The person is said to be a neighbor.
51. On my revaluation of evidence, I note that the ingredients of the offence of robbery with violence were not proved beyond reasonable doubt.
52. Consequently, I fault the trial court in its verdict and set it aside, both on conviction and sentence.

#### **Determination**

53. Consequently, I make the following orders: -
  - a. The conviction and sentence are set aside and the Appellant is at liberty unless otherwise lawfully held.
  - b. The file is closed

**DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of: -**

Appellant present

Miss Nyawinda for the state

Court Assistant - Brian

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