



REPUBLIC OF KENYA



**KENYA LAW**  
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**Okello v Republic (Criminal Appeal E024 of 2022)  
[2024] KEHC 1944 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1944 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E024 OF 2022  
A. ONG'INJO, J  
FEBRUARY 22, 2024**

**BETWEEN**

**GOODLUCK OKELLO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the decision of the Hon. M. O. Rabera (SRM)  
on 12th February 2018 in Mombasa Criminal Case No. 554 of 2017)*

**JUDGMENT**

**Background**

1. The Appellant, Goodluck Okello, was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code Laws of Kenya.
2. Particulars of the offence are that Goodluck Okello on the 4<sup>th</sup> day of April 2017 at Mtongwe area in Likoni Sub-County within Mombasa County jointly with others not before court while armed with a dangerous weapon namely panga robbed Subira Hamisi of her mobile phones make Nokia C1 valued at Kshs. 5,000/- and cash Kshs. 950 and immediately after the time of such robbery used actual violence on Subira Hamisi.
3. The appellant was arrested while running away from the scene of crime when the complainant was assisted by PW2 to pursue the robbers and on arrest, the phone stolen from the complainant was recovered. The panga that the appellant used in the course of robbery was also recovered. PW1 said he knew the appellant physically and not by name and that when he was arrested and brought back to Soko Mjinga where there was security light, he recognized him as a person who was known to him physically. PW2 called the police who took the appellant to Manyatta Hospital where the appellant was treated and later escorted to Inuka Police Station and was charged. PW1 and PW2 said the appellant had covered his face and it is after he was pursued and arrested that a scarf he had used to cover his



face was removed and PW1 realised he knew him. PW2 said he forcibly snatched the panga from the appellant and disarmed him. PW2 said he also knew the appellant physically.

4. The appellant was convicted and sentenced to suffer death.
5. He has preferred the appeal herein against the conviction and sentence on the following amended grounds of appeal filed on 4<sup>th</sup> January 2024: -
  1. That the learned trial magistrate erred in law and fact by failing to find that identification by PW1 and PW2 could not be free from possibility of error
  2. That the learned trial magistrate erred in law and fact by relying on identification at the locus in quo, yet PW1 and PW2 did not give a unique feature about the appellant that made them identify him.
  3. That the learned trial magistrate erred in law and fact by failing to make inquiry as to the source of light at the locus in quo to the point of arrest.
  4. That the learned trial magistrate erred in law and fact by failing to find that nothing belonged to the complainant was found in the appellant's possession.
  5. That the learned trial magistrate erred in law and fact by failing to address major contradictions in his judgment.
  6. That the learned trial magistrate erred in law and fact by failing to find that more evidence was required to establish that the recovered mobile phone was the one which was stolen, given that no purchase receipt was produced during trial.
  7. That the learned trial magistrate erred in law and fact by failing to swear PW2 before he testified in the trial contrary to Section 151 of the Criminal Procedure Code.
  8. That the learned trial magistrate erred in law and fact by failing to find that the disclosed defence for which the appellant could have been convicted with was preparation to commit a felony contrary to Section 308 of the Penal Code.
  9. That the learned trial magistrate erred in law and fact by failing to consider the time spent in remand custody as provided under Section 333(2) of the CPC.
6. The appellant prayed that the conviction should be quashed, sentence set aside and he be released.

### **Prosecution Case**

7. PW1, Zubeda Hamisi, said that on 4.4.2017 at 1.00 am, he was around Soko Mjinga still doing his bodaboda work when a man and a woman approached him and wanted to be taken to Barrier Gate Mwisho wa Barabara where he was to drop the man while the lady was to be dropped at Maliadaza ground at Mtongwe. That when he dropped the lady, she told him that she was to continue with her journey and that he should wait for her. That PW1 had waited for 5 minutes when 5 men entered and among them being the accused. PW1 identified the accused by pointing at him. He said that he knew the accused not by name but by physical appearance. That they asked what he was doing there and PW1 told them that he was waiting for a client. That they started searching him and took his phone and Kshs. 950. That PW1 then saw a spotlight and the 5 men including the accused ran away.
8. PW1 testified that they then chased the men and arrested the accused. That the accused tried to hit him with a panga using the blunt surface but PW1 was not cut. That the accused had covered his face



- with a scarf and that they took him to Soko Mjinga where there was light and they discovered that it was the accused.
9. PW1 said that John alias Goto who assisted him in chasing the thieves with a spotlight called the police using his phone. That the police went and assisted him to the station and that he accompanied them to Manyatta Hospital where he was treated because he had been injured when people started beating him. That they later went to Inuka Police Station where they recorded their statement and that his Nokia C1 phone was recovered from the accused.
  10. PW2, John Ogode Obura, said that on 4.4.2017 at 1.30 am, he was at Homeland Pub taking a drink and that when he left for home, he heard a confrontation and shone the spotlight on his phone towards the direction. He said that he saw a person with a bike who had been surrounded by 4 people who ran away on seeing the light. That he agreed with the owner of the bike to pursue one person who was the accused herein and that they caught him. That the accused had a panga which was recovered by PW2, and that in the process, so many other people went and started beating him. That PW2 later called the police who went and took him to the police station. PW2 identified the accused in court by pointing at him. That the accused had covered his face with a scarf which was removed and PW2 used his phone light to recognize him.
  11. PW3, No. 77229 P.C. Justus Wafula, the investigating officer from Inuka Police Station said that on 4.4.2017 at around 8.00 am when he was going through the OB, he found a report of robbery with violence which had happened the previous day. That the accused had already been arrested and was in custody. PW3 said that he went and saw the accused in the cells, that he was injured and had been treated and that PW3 was given the items which had been stolen from the complainant. PW3 said he called the complainant who went to the station with his witnesses and that they items taken to the station included a Nokia C1 phone and a panga. That the complainant went and identified the phone and that he was also robbed of Kshs. 950 which money was never recovered. PW3 said he recorded the complainant's statement and charged the accused with the offence before court. PW3 produced the phone as Exp1 and the panga as Exp2.

### **Defence Case**

12. The accused, Goodluck Okello gave sworn statement that on 4.4.2017 at about 5.00 am, he was from the sea heading home and that in his hand he had fish that he had fished that day. That when he got to the main road at Mtongwe stage, there were many vehicles including tuktuks and matatus. He said there was a stampede as the complainant and witnesses were looking for thieves and that people were running for their lives. That members of the public who were assisting in chasing the thieves said the accused was one of them and that he was beaten until he lost consciousness. That he lost his fish and fishing net.
13. This appeal was canvassed by way of written submissions.

### **Appellant's Submissions**

14. The appellant filed his submissions on 4<sup>th</sup> January 2024. The appellant submitted that there was no sufficient basis for making the finding that the appellant was identified beyond reasonable doubt. That the complainant testified that the incident occurred at 1.00 am when it was dark and that then it would not have been possible to see and identify the appellant.
15. The appellant argued that there is no evidence to show how the two witnesses identified the appellant. That nothing is said about the robber's features, attires or other descriptions. The appellant submitted



that on evidence however, the robbers had already left before PW2 lit his spotlight. The appellant relied on *Maitanyi v Republic (1986) eKLR* which held as follows: -

“It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves. Otherwise who will be able to test with the “greatest care”...”

16. The appellant stated that the spotlight from a mobile phone at around 1.00 am did not favour positive identification. That there may have been light from a mobile phone but how intense was the light, where was it and for how long were the attackers under observation by PW1 and PW2 to enable them see the attackers sufficiently for purposes of identification.
17. The appellant testified that there were conflicting versions of how and what was recovered from him. That while PW1 said that the phone was recovered from the accused, PW2 said that the complainant told him that he lost a phone and money, and that he did not see the phone. The appellant submitted that the trial magistrate completely failed to address the contradiction in his judgment and that there was absolutely no other evidence on recovery of the items from the appellant. That further, there was no evidence to show that PW1 owned the alleged mobile phone which was stolen on the material day as was held in the case of *Titus Muhindi Mukoma v Rep. Cr. App. No. 275 of 2011*. The appellant contended that he was under no obligation to offer any explanation of being in possession of the recovered mobile phone and that several questions and doubts in the prosecution’s case ought to have been resolved in favour of the appellant.
18. The appellant argued that PW2 was never sworn before he testified in accordance with Section 151 of the Criminal Procedure Code which provides: -

Every witness in a criminal cause or matter shall be examined upon oath, and the court before which any witness shall appear shall have full power and authority to administer the usual oath.
19. The appellant submitted that PW1 and PW2 testified that the appellant was found with a panga and from the evidence that was adduced by the prosecution, the offence for which the appellant ought to have been convicted with was preparation to commit a felony rather than robbery under Section 308 of the Penal Code. Therefore, the mandatory death sentence meted on the appellant was manifestly harsh in the circumstances. The appellant also prayed that this court considers the time spent in custody in accordance with Section 333(2) of the Criminal Procedure Code.
20. The Respondent did not file any submissions even after indulgence accorded on 12.1.2024 after Mr. Ngiri promised to file submissions on the same day.

### **Analysis and Determination**

21. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic (2010) eKLR* where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without



overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

22. After considering the grounds of appeal and records of the trial court and submissions, issues for determination are as follows: -
- i. Whether identification by PW1 and PW2 was free from possibility of error
  - ii. Whether what belonged to the complainant was found in the appellant’s possession
  - iii. Whether the trial magistrate addressed major contradictions in his judgment
  - iv. Whether more evidence was required to establish that the recovered mobile phone was the one which was stolen
  - v. Whether the trial court failed to swear PW2 before he testified in the trial contrary to Section 151 of the Criminal Procedure Code
  - vi. Whether preparation to commit a felony contrary to Section 308 of the Penal Code was the offence that the appellant ought to have been convicted with
  - vii. Whether the trial court considered the time spent in remand custody as provided under Section 333(2) of the CPC

**Whether identification by PW1 and PW2 was free from possibility of error**

23. The appellant was arrested at the scene on the material night after PW2 urged the complainant they should pursue the robbers. The appellant had concealed his face with a scarf but when apprehended and the scarf removed, both PW1 and PW2 realised he was someone known to them physically. The panga he had used while robbing PW1 was snatched from him and PW1’s phone that had been robbed recovered. The appellant having been arrested at the scene and a stolen mobile phone recovered, there was no need of mounting an identification parade as the people who would have been required to identify him on parade had already come into contact and interacted with him when he was apprehended.
24. PW1 and PW2 admitted it was dark but PW2 used his torch until they apprehended the appellant and on taking him to Soko Mjinga the scarf he used to cover his face was stripped off and he was recognized by PW1 and PW2. Allegations by the appellant that PW1 said he did not see the phone recovered is not in the evidence of PW2. PW2 said he snatched the panga from the appellant. PW2 said his phone was stolen and PW3 the investigating officer confirmed phone was recovered. There was therefore no material contradiction in the prosecution’s case.
25. PW2 testified to corroborate the evidence of the complainant but it is not shown if he took an oath before he testified and the court has not recorded if he was a vulnerable witness so as not to understand nature of an oath. The effect of a witness testifying without taking an oath goes against the mandatory provisions of Section 151 of the Criminal Procedure Code and therefore renders such evidence
26. Ngenye, J. (as she then was) in *Lawrence Frank Wanyama & another v Republic* (2020) eKLR held that failure of a witness to testify on oath vitiates the entire proceedings and can in no way be curable under Section 382 of the Criminal Procedure Code.



27. In the case of Rashid Wachilu Kasheka v Republic (2015) eKLR, it was held: -

“In Odongo v. Republic (1983) KLR 301, the Court held that the unsworn statement of an accused is not evidence and could therefore not be used against his co-accused. If the statement of an accused made on oath is consistently rejected by the courts as being ‘not evidence’ as in Odongo, supra, and May before it and others after it, it must follow that the consequences of unsworn evidence given by a prosecution witness who should have been sworn is equally worthless and cannot be relied upon to found a conviction. Moreover, in permitting the receipt of unsworn evidence, whether by mistake or otherwise, is an illegality that renders the trial defective and a ‘nullity’ as in R. v. Marsham ex. parte Pethick Lawrence [1912] 2 K.B 362 DC...”

28. In the Court of Appeal decision in the case of Samuel Muriithi Mwangi V Republic (2006) eKLR the court stated as follows: -

“The usual practice of all the courts in Kenya is of course to show in the record that a witness has taken an oath before testifying. In the record before us, there is no way in which we can determine one way or the other that the witnesses were or were not sworn before they gave their evidence. Most likely they took the oath before giving evidence. But there is also the probability that they might not have taken the oath and if that be the position it would mean that the appellant was convicted on evidence which was not sworn. That would be in violation of Section 151 of the Criminal Procedure Code and the provisions we have set out herein. That in our view, cannot be a matter curable under section 382 of the Criminal Procedure Code.”

29. In line with the provisions of Section 151 of the Criminal Procedure Code and the above authorities, this court finds that the proceedings were a total mistrial and what is to be considered is whether it is in the best interest of justice to order for a retrial.

30. In this matter the appellant has been in custody since 5.4.2017 on allegations of robbery with violence on the night of 4.4.2017 in Mtongwe area and it is alleged he robbed goods worth Kshs. 5,950. Making an order for a retrial would not be a feasible option as it would be prejudicial to the appellant who has served substantial period in custody.

31. Considering that there was a mistrial, it would not be necessary to reevaluate and analyse the other grounds of appeal as it would be an exercise in futility. The conviction is quashed and sentence set aside. The appellant is set at liberty unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,  
THIS 22<sup>ND</sup> DAY OF FEBRUARY 2024**

**HON. LADY JUSTICE A. ONG'INJO**  
**JUDGE**

**In the presence of: -**

Etropia- Court Assistant

Mr. Ngiri for State

Appellant present in person

**HON. LADY JUSTICE A. ONG'INJO**



**JUDGE**

