



**Obonyo v Republic (Criminal Appeal 100 of 2023)
[2024] KEHC 5965 (KLR) (28 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5965 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 100 OF 2023**

DR KAVEDZA, J

MAY 28, 2024

BETWEEN

BENARD ODUOR OBONYO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered by
Hon. D. Kuto (P.M) on 24th November 2022 at Kibera Chief Magistrate's
Court Criminal Case no. 502 of 2017 Republic vs Benard Oduor Obonyo)*

JUDGMENT

1. The appellant was charged and after a full trial convicted for the offence of robbery with violence contrary to section 295 as read with 296(2) of the Penal Code. The particulars of the offence were that on 31st January 2017, at Congo stage within Kawangware, Nairobi County, jointly with another not before the court, robbed Nathan Wanyonyi Barasa of a wallet, cash Kshs. 17,000, NSSF Card, and NHIF card all valued at Kshs. 18,000 and at the time of the said robbery used actual violence to the said Nathan Wanyonyi Barasa. He was sentenced to death.
2. In his petition of appeal and submissions, the appellant raised five grounds which have been coalized as follows. He challenged the totality of the prosecution's evidence against which he was convicted. He contended that he was not properly identified by the prosecution witnesses. Finally, the sentence imposed was harsh and excessive.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse 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).



4. The prosecution called five witnesses in support of their case. PW1, Nathan Wanyonyi Barasa, stated that on 31/1/2017, he left work at 7:30 p.m. and got off at Congo stage. Two people approached him from behind, accusing him of insulting them. One punched him in the mouth, causing him to fall. They then took his black jacket, which contained a wallet with Kshs 17,000/-, his NHIF and NSSF cards, and his payslip. He identified the attackers as Bernard Oduor, commonly called Junior, who worked as a tout and driver, and another person who assisted Junior in assaulting him. Albert (PW2) arrived while he was being beaten. PW1 was taken to Mary Magdalene Hospital and later reported the incident at Muthangari Police Station, identifying his brown jacket. He maintained that the appellant was one of his assailants and he had known him for a long time.
5. PW2, Albert Onacha, testified that he is a security guard with Regimental Security. On 31/1/2017, at 7:30 p.m., he was getting out of a vehicle at stage number 48 when he saw two people boxing PW1 from about 20 meters away. One of them was Junior, who worked as a driver and conductor. The assault knocked PW1 to the ground. He testified that PW1 was going home and that the scene was well-lit.
6. In cross-examination, PW2 stated that he saw the incident but did not accompany PW1 to the police station. He had alighted ahead of the person who was attacked and mentioned that he often saw the appellant at the stage. He maintained that the incident happened in front of him.
7. PW3, Josephine Nyaga, a doctor, testified that on 31/1/2017, PW1 was referred to her from Muthangari Police Station with allegations of being attacked by two men. PW1 had a laceration on the left inner aspect of his upper lip, no injuries to the chest or stomach, and a bruise on the fourth finger. The injuries were one day old and caused by a blunt object. PW1 had previously been seen at Magdalene Hospital. She assessed the degree of injury as harm.
8. PW4, Police Constable Nicholas Odundo, based at Muthangari Police Station, testified that on 15/2/2017, he was on duty in Kawangware with Corporal Muituya and PC Koskei when he received a call from the complainant, who needed assistance regarding a report made at the station. They went to Congo, where the complainant identified one of his assailants, the appellant herein, who was then arrested and taken to the police station. The appellant did not resist arrest. He denied that the appellant was arrested with a sack of maize maintaining that the appellant was properly identified.
9. PW5, Police Constable Orina, from Muthangari Police Station, testified on behalf of Veronica Thuo, the initial investigating officer. He stated that the complainant reported a robbery with violence on 31/1/2017 at 7:30 PM. The complainant was attacked by two young men in the Congo area, who beat him and took his money and wallet before fleeing. A P3 form was issued, and PW1 was examined, with the form being filled out and a treatment note produced.
10. PW5 testified that the officer visited the scene, drew a sketch plan, and arrested the appellant after the complainant pointed him out. He produced the statement of his colleague as an exhibit. In cross-examination, He denied any knowledge of demands for Kshs. 50,000/- and clarified there is no difference between a threat of violence and actual violence. He was unaware of any desire by the complainant to withdraw the case and confirmed that nothing was recovered.
11. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence, he gave unsworn testimony and did not call any witnesses. He testified he sold green maize and lived in Lavington Numa Estate. On 15/2/2017, he woke up at 10 AM, went to Kawangware Market Centre to buy maize, and was dropped at Congo stage to catch a vehicle to Lavington. There, he was arrested by police officers and taken in a Land Cruiser to the police station. He was later informed he was being charged with robbery with violence. He maintained his innocence and stated he was a born-again Christian.



12. 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, that is to say, 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)
13. 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 does prove that PW 1 was stopped by the appellant and another assailant on his way home. He was attacked by the appellant who punched him in the face. The two assailants beat him and he fell.
14. During the incident, the attackers stole cash (Kshs. 17,000) a wallet, and identification documents. The appellant's identity was clear, as one of the assailants. PW2, who knew the appellant was an eyewitness to the attack and when he intervened, the appellant and his accomplice ran away. In addition, he knew the appellant, who was a conductor and driver at the stage. Furthermore, the area was well-lit with street lights and the appellant's identity was not in doubt.
15. From the material placed before the court, PW 1 and PW 2, 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.
16. For consideration is whether force was used to rob the victim. It was the testimony of prosecution witnesses that the assailants punched the complainant until he fell to the ground. This resulted in injuries to the complainant. It was noted that he had lacerations on the left inner aspect of his upper lip. The injuries were classified as harm. Violence was therefore present. This court is satisfied that the prosecution proved that the appellant and his accomplices robbed and used actual violence to harm the complainant. His conviction for the offence of robbery with violence was therefore safe.
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.
18. Therefore, the appeal on the sentence succeeds. The sentence of death is hereby vacated. I hereby re-sentence the appellant to fifteen (15) years imprisonment. The sentence shall run from the date of arrest 15th February 2017 pursuant to section 333(2) of the Criminal Procedure Code, Cap 75 Laws of Kenya.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Wamuthii for the Appellant



Appellant present

Ms. Tumaini for the Respondent

Joy Court Assistant

