



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Akwanga v Republic (Criminal Appeal 169 of 2015)  
[2023] KEHC 20967 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20967 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CRIMINAL APPEAL 169 OF 2015**

**DK KEMEL, J**

**JULY 28, 2023**

**BETWEEN**

**WYCLIFFE WANZALA AKWANGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein Wycliffe Wanzala Akwanga with four others who are not in this appeal was tried and convicted with four counts of robbery with violence contrary to section 296(2) of the [Penal Code](#) and in which the trial court sentenced him to death in all the counts.
2. Under Count I, the particulars of the offence were that Wycliffe Wanzala Akwanga on 1<sup>st</sup> May 2013 at Akapowait in Busia County jointly with four others in court plus others not before the Court, while armed with dangerous weapons namely: pangas, rungus and iron bars robbed one Annah Otolim Kshs. 30,000/= and at the time of such robbery killed one Linus Otolim.
3. Under Count II, the particulars of the offence were that Wycliffe Wanzala Akwanga on 1<sup>st</sup> May 2013 at Akapowait in Busia County jointly with four others as well as others not before the Court, while armed with dangerous weapons namely: pangas, rungus and iron bars robbed one Duncan Otolim Ekazil Kshs. 200/= and at the time of such robbery used actual violence to the said Duncan Otolim Ekazil.
4. Under Count III, the particulars of the offence were that Wycliffe Wanzala Akwanga on 1<sup>st</sup> May 2013 at Akapowait in Busia County jointly with four others as well as others not before the Court, while armed with dangerous weapons namely: pangas, rungus and iron bars robbed one Lillian Omuse Ochokolo Kshs. 6,000/= and at the time of such robbery used actual violence to the said Lillian Omuse Ochokolo.
5. Under Count IV, the particulars of the offence were that Wycliffe Wanzala Akwanga on 1<sup>st</sup> May 2013 at Akapowait in Busia County jointly with four others as well as others not before the Court, while



armed with dangerous weapons namely: pangas, rungas and iron bars robbed one Rose Otolim Kshs. 6,000/= and at the time of such robbery used actual violence to the said Rose Otolim.

6. Aggrieved by the conviction and sentence, the Appellant preferred this appeal vide supplementary grounds of appeal as follows;
  - i. That the trial Court erred in law and fact in convicting him by relying on inconclusive evidence of identification,
  - ii. That the sentence meted out is manifestly excessive, inhuman, cruel, harsh and degrading. Its mandatory nature is unconstitutional.
  - iii. That the prosecution's case was marred with contradictions, discrepancies and inconsistencies that were inconsequential to conviction.
7. The case, as presented by the prosecution was that PW1, Annah Otolim, the complainant in Count I testified that the Appellant herein was a church member at Akoboit Catholic Church. According to her, on 1<sup>st</sup> May 2012 while her husband was listening to a football match on the radio while she was sleeping, she heard screams 'thieves! thieves!'. She quickly got up and her husband shut off the radio. She heard the voice of someone saying he is Daniel and that he was injured and she recognized the voice as that of her son Daniel. She told the Court that on opening the door, the Appellant pursued her husband, who tried to run away through the back door. He had a panga with him and used the same to cut him to death. Together with others, the Appellant ordered her to lead them to her bedroom where they asked her for Kshs. 40,000/= and that they were aware her husband had sold jaggery and that they had money. She stated that they beat her up as they asked for the money and she gave them Kshs. 30,000/= and they took her two mobile phones and her husband's mobile phone. She testified that the Appellant was the most aggressive and that she sustained cut wounds on her head. She testified that on regaining consciousness her, sons confirmed that her husband had died as she was rushed to the hospital.
8. On Cross examination by the Appellant, she testified that she knew him very well as he used to come to visit her sons and that she was able to identify him when he gained access to her house. She told testified that the Appellant robbed her for the first time and that he came from her village.
9. PW2 was Rose Otolim who testified that on 1<sup>st</sup> May 2013 while sleeping in her house, she was awakened by screams emanating from the house of PW1. She quickly woke up and noticed her door had been locked but four people had entered her house. They ordered her not to scream and that they had bright torches. According to her, she was able to identify the Appellant and that the four people asked her for money. They took Kshs. 6,000/= and a Nokia 1200 mobile phone. She stated that the Appellant was also known as Daddy and that she identified him.
10. On cross-examination by the Appellant, she stated that she went to the same school with him and she knew him and that his alias name is Daddy.
11. PW3 was Joseph Nasete Wanjala, who testified that on 1<sup>st</sup> May 2013 while at his house sleeping, he heard screams from a far distance and then suddenly his door was knocked and people forcefully entered and ordered him not to scream. According to him, the Appellant was among the robbers and that he took his phone as they attacked him. He told the Court that he only identified the Appellant from the seven assailants.
12. PW4 was Lilian Ochikalo who testified that on 1<sup>st</sup> May 2013 she heard sounds outside from a person crying like they were being beaten. She heard footsteps outside her house and saw some light shining in her house. She heard a command being made to someone to open the door and that people knocked



- the door and entered her house. She stated that the individuals were armed with pangas and rungas and that she noticed one with an axe. One of them enquired on the whereabouts of her husband to which she informed them that she had no husband. According to her, she only identified the 1<sup>st</sup> accused as a neighbour and who cut her with a panga on the hands, face and left leg.
13. PW5 was No. 232749 IP Shem Mutegu who testified that he is the Deputy OCS from Rangwe Police Station and that he was previously based at Nambale Patrol Base. He stated that he received tip off from an informant and after pursuit, he was able to apprehend the fifth accused.
  14. PW6 was Patson Kubuta who testified that he is a medical officer at Busia Referral Hospital. He stated that on 8<sup>th</sup> May 2013 he filled a postmortem report of one Linus Otolim and which was identified by Daniel Otolim and Duncan Otolim. He observed that the body had a deep cut on the hand and other smaller cuts in the right and the low temporal area. He saw a blunt force injury on the right temporal face which went to the brain. He formed an opinion that cause of death was severe loss of blood and excessive brain injury. On cross-examination, he stated that the deceased had been hit with both sharp and blunt object.
  15. PW7 was No. 72507 PC Peter Ouma who testified that he works at DCIO office Teso. He told the Court that on 1<sup>st</sup> May 2013 he received a call at 4.00am from his supervisor to accompany him to a scene of robbery at Akapowait village. On arrival, they found a group of people in an unmarked vehicle. According to him, they received a tip off from a member of the public that some attackers had been identified. They proceeded to arrest the accused person called Bahati. They took him to Malaba Police Station where he was charged and later more suspects were arrested.
  16. Upon being put on his defence, the Appellant gave a sworn testimony where he told the Court that he stays in Malaba and that on 4<sup>th</sup> March 2013 while travelling from Kocholia to Malaba he met officers at the road as he was questioned on why he was riding a motor cycle with no helmet.
  17. On cross examination by the Prosecution, he told the Court that he was arrested for a higher offence but not charged with a traffic offence.
  18. It was submitted that the Appellants were not properly identified by the Prosecution witnesses as the circumstances at the time of the offence alleged to have taken place could not allow positive recognition. It was submitted that the prosecution witnesses evidence was full of contradictions, discrepancies and inconsistencies as they did not establish the requisite ingredients beyond reasonable doubt to warrant a conviction.
  19. The appeal was opposed by the Respondent, who argued that the Respondent sufficiently proved all the ingredients of the offence of robbery with violence and that the same was corroborated. On the identification aspect, the Respondent argued that PW1 identified the Appellant by recognition as he had known him for quite a while. PW2 also identified the Appellant while PW3 further testified that she recognized the Appellant since he was well known to her and that she referred to him as Daddy noting that they even attended the same school. The Appellant also confirmed that he was well known to PW2 when he claimed that she had a grudge against him because he had refused to marry her.
  20. This being the first appellate Court, it has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing and hearing the witnesses and observing their demeanor



and it must give allowance for the same. This was well put in the well-known case of *Okeno v Republic* [1972] EA 32 where the court stated as follows:

“The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v R* [1975] EA 57). 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’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide 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 advantage of hearing and seeing the witnesses.”

21. What constitutes the offence of robbery with violence was well captured in the case of *Olouch v Republic* [1985] KLR where the Court of Appeal stated as follows: -

“... Robbery with violence is committed in any of the following circumstances:

- i. The offender is armed with any dangerous and offensive weapon or instrument; or
- ii. The offender is in company with one or more person or persons; or
- iii. 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.”

22. In the case of *Dima Denge Dima & Others v Republic*, Criminal Appeal No. 300 of 2007, it was stated that:

“...The elements of the offence under section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”

23. According to the evidence adduced, PW1 was with her husband at home when the incident occurred. She further told the Court that she was able to identify the 1<sup>st</sup> Accused person and the Appellant vide her husband’s flash light. She stated that the 1<sup>st</sup> accused person hit her with a metal bar on her chest prompting her to fall down on the chair and as her husband tried to run towards the back door, the Appellant pursued him while armed with a panga and cut him to death. She further testified that the Appellant asked her for the clothes she had worn to the market on that day and on giving him he took the Kshs. 700/= that was in the clothes. On cross-examination, she testified that she knew the Appellant as he used to visit her home to see her sons. PW2 also testified that she was able to identify the Appellant and that she had known him as Daddy. PW3 on the other hand also identified the Appellant who took his phone and confirmed that the robbers cut him on the head and used metals to beat him.

24. From the foregoing, it is clear that the ingredients of the offence were rightfully proven as the offenders were armed with dangerous and offensive weapons which included a stick/rungu, pangas and iron bars. Further, the offender was in the company of one or more persons, and that violence and threats were occasioned.

25. The question of identification of the Appellant may be answered with reference to the setting of the Complainant’s (PW1, PW2 and PW3) association with the Appellant. PW1 testified that she recognized the Appellant as he visited her sons at his house and that they attended the same church. PW2 was able to corroborate the evidence of PW1 as she recognized Appellant, to be precise, she was able to identify him via his moniker and further told the Court that she attended the same school with



the Appellant. The Appellant confirmed this evidence of recognition as he alleged that PW2 had a grudge against him because he refused to marry her. PW3 also testified that out of the seven people who robbed him, he was able to identify the Appellant. In this case, it is elaborate that there can be no question as to the identification by the weightier evidence of recognition of the Appellant because the Complainants' identification was not done in any difficult circumstances, PW1-PW2 having known the Appellant by his respective names and the moniker used by the Appellant.

26. There was no evidence by PW5 and PW7 that an identification parade was conducted and that the Appellant was positively identified by the three complainants. It was the evidence of PW1, PW2 and PW3 that they were able to identify the Appellant at the Police Station. It is clear that the said witnesses had no doubt at any point as to the identity of the appellant herein.

27. These places the Court in a position to deliberate on whether the evidence of PW1, PW2 and PW3 was sufficient enough to warrant a conviction of the Appellant by the trial Court. The law is settled that where the only evidence against an accused is that of identification/recognition, the Court must scrutinize that evidence with great care and be satisfied that there was no possibility of error. In Wamunga v Republic [1989] KLR 426, the Court of Appeal stated:

“It is trite law that 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 favourable and free from possibility of error before it can safely make it the basis of conviction.”

28. Similarly, the same Court held in Nzaro v Republic [1991] KAR 212 that evidence of identification or recognition at night must be absolutely watertight to justify a conviction. (See also Kiarie v Republic [1984] KLR 739).

29. The above principles were established in R v Turnbull & Others (1976) 3 ALL ER 549, where the Court laid down the factors that ought to be considered when the only evidence turns on identification by a single witness, thus:

“... The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?...Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

30. There can be a safe recognition even at night and the Court of Appeal stated as much in Douglas Muthanwa Ntoribi v Republic [2014] eKLR while upholding evidence of recognition at night that:

“The learned Judge further noted that the complainant testified that he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error.”



31. In *Peter Okee Omukaga & Another v Republic* [2011] eKLR the Court of Appeal stated on the evidence of recognition at night:

“We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as ‘neighbours’ from the village’, that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.”

PW1 to PW3 gave concise account of the events of the robbery. PW1 also testified that the Appellant used to visit her husband and her sons at her house and that the Appellant was a fellow church member. It was the evidence of PW2 that she recognized the Appellant and that they referred to him as Daddy as they attended the same school. It was the evidence of the Appellant that he was arrested for a traffic offence and that he ended up being charged with a higher offence. The Appellant’s evidence did not shake that of the respondent or even cast doubt on the evidence tendered in by the Prosecution.

32. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable and assuring than the identification of a stranger (see *Anjononi & Others v Republic* [1980] KLR 59).
33. The Appellant in his evidence did not raise any evidence that cast any contradictions in the evidence of the prosecution. He faulted the trial magistrate for arriving at a decision based on evidence that was full of contradictions. However, his evidence is only to the effect that he did not commit the offence. This did not at all cast any doubt on the prosecution’s case and hence the trial Court properly rejected his defence.
34. In its decision in *Erick Onyango Ondeng’ v Republic* [2014] eKLR the Court stated as follows with regard to the duty of a Court when considering contradictory evidence.

“The primary duty of the trial court is to carefully analyze that contradictory evidence and determine which version of the evidence, on the basis of judicial reason, it prefers. It is the trial court, when it comes to questions of fact, which has the singular advantage of seeing and hearing the live witness testify and being subjected to cross-examination, that time-honoured devise for testing the truth or correctness of evidence. Next is the first appellate court which by law, it is its bounden duty to re-consider, re-evaluate and analyze the evidence that was before the trial court, to determine whether, on the basis of those facts, the decision of the trial court is justified. (See *Okeno v Republic* [1972] EA 32).”

35. I am satisfied that the prosecution’s evidence bore no contradictions. In my view therefore, this ground also has no merit.
36. I therefore affirm the conviction. Although it was at night, I am satisfied that PW1 was able to recognize the Appellants and that PW2 and PW3 were able to corroborate her evidence as she also recognized the Appellant and thus there was no likelihood of error. I am unable to fault the trial Court on this finding of fact.



37. As regards sentence, it is noted that the nature of the robbery and the level of violence unleashed on PW1 to PW3 is sufficiently serious to warrant life imprisonment. In any case, the sentence provided for in section 296(2) of the *Penal Code* is a death penalty. However, following the Supreme Court's decision in *Francis Karioko Muruatetu & Anor. v. R.*, [2017] eKLR, the sentence of death is no longer mandatory as the trial Court has been given a leeway not to consider the mandatory nature of minimum sentences but to mete out sentences upon considering mitigation and circumstances of the offender. It is noted that the Appellant did mete out violence on PW1 to PW3. It is thus clear that the robbers intended to cause severe grievous harm to PW1 to PW3 at the time but that the sentence imposed by the trial Court was not justified in the circumstances. It is noted that during sentencing, the trial Court took cognizance of the Appellant's mitigation as clearly seen in the trial Court's records. I find the death sentence imposed as harsh and excessive and hence I proceed to replace the same with a sentence of 20 years as this is appropriate enough to meet the justice of the case with respect to retribution, rehabilitation and deterrence.
38. In the result, it is my finding that the Appellant's appeal partly succeeds. The appeal on conviction is upheld while the sentence imposed on the 22/9/2015 is set aside and substituted with a sentence of twenty years' imprisonment which shall commence from the date of arrest namely 5<sup>th</sup> May 2013.

It is so ordered.

**DATED AND DELIVERED AT BUNGOMA THIS 28<sup>TH</sup> DAY OF JULY 2023.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

Wycliffe Wanzala Appellant

Ayekha for Respondent

Kizito Court Assistant

