



**Ouma v Republic (Criminal Appeal E014 of 2021)
[2022] KEHC 12006 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 12006 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E014 OF 2021**

**KW KIARIE, J
JUNE 22, 2022**

BETWEEN

TIMON OKINYI OUMA APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in Criminal case No.98 of 2016 of the Principal Magistrate's Court at Mbita by Hon. Nicodemus N. Moseti–Senior Resident Magistrate)

JUDGMENT

1. Timon Okinyi Ouma, the appellant herein, was convicted of the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the [Penal Code](#).
2. The particulars were that on the 2nd February, 2016 at Mbita Township, Gembe West Location in Mbita Sub county within Homa Bay County, jointly with others while armed with metal bars robbed Gilbert Onyango Gor of three cameras, one pair of binoculars, one bag, two mobile phones, two shaving machines and a metal safe all valued at Kshs 470,000.00 and immediately before or immediately after the time of such robbery killed the said Gilbert Onyango Gor.
3. The appellant was convicted and sentenced to death. He was dissatisfied and appealed against both conviction and sentence. He was represented by J.O. Magolo, advocate. He raised grounds of appeal that I have summarised as follows:
 - a. That the learned trial magistrate erred in law and fact in proceeding with a trial and reaching a conviction on a charge that was defective.
 - b. That the learned trial magistrate erred in law and fact in finding that the offence charged and its particulars had been proved.



- c. That the learned trial magistrate erred in law and fact in finding that the evidence pointed to the guilt of the appellant.
 - d. That the learned trial magistrate erred in law and fact in convicting the appellant on unclear facts.
 - e. That the learned trial magistrate erred in law and fact in basing a conviction on the doctrine of recent possession yet the possession was not proved.
 - f. That the learned trial magistrate erred in law and fact was in breach of the Constitution in failing to ensure that the appellant was accorded legal representation considering the charge he faced and his age.
 - g. That the learned trial magistrate erred in law and fact in finding that his hands were tied and that he could only impose a death sentence even where leniency was deserved.
 - h. That the sentences were manifestly excessive.
4. The appeal was opposed by the state through Mr. Ochengo, learned counsel.
 5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.
 6. Nicodemus Moseki, the learned trial magistrate allowed corporal Michael Nyamboki (PW9) to adduce evidence of confession. This was contrary to section 25A (1) of the Law of Evidence that provides:

A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice.
 7. Chief inspector Joseph Rutere (PW11) was allowed to give the details of the purported confession without enquiring from the second accused whether he made the said confession and whether it was voluntary. This procedure is important in that if it is claimed it was not made or it was not voluntarily made, then the court embarks to hold a trial within a trial to satisfy itself that the statement was made and was voluntary before admitting the same and allowing the details to be given. Though the alleged confession was made by the co-accused of the appellant, this statement was prejudicial to the appellant.
 8. The trial against the appellant amounted to a mistrial. I accordingly quash the conviction and set aside the sentence against the appellant. I am aware that in Mbita law Courts there is currently only one magistrate who tried this case and whose judgment has been appealed against. I therefore order that the appellant be escorted to Homa Bay chief Magistrate's Court within 7 days for retrial before another magistrate of competent jurisdiction.
 9. This is a 2016 matter and the initial trial took more than three years. I therefore order that the trial proceed on a day to day basis as much as circumstances will allow to avoid unnecessary delay.

DELIVERED AND SIGNED AT HOMA BAY THIS 22ND DAY OF JUNE, 2022

KIARIE WAWERU KIARIE

JUDGE

