



**Nyamasara & another v Republic (Criminal Appeal E020 of 2022)
[2022] KEHC 16638 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16638 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E020 OF 2022
KW KIARIE, J
DECEMBER 20, 2022**

BETWEEN

KENNEDY OMONDI NYAMASARA 1ST APPELLANT

JOSHUA OUMA ODHIAMBO 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in Criminal case
No.476 of 2019 of the Senior Resident Magistrate's Court at
Mbita by Hon. Nicodemus N. Moseti—Senior Resident Magistrate)*

JUDGMENT

1. Kennedy Omondi Nyamasara and Joshua Ouma Odhiambo, the appellants herein, were convicted of the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*.
2. The particulars were that on the 18th December, 2018 at Manyala village, Suba South sub county within Homa Bay County, while armed with a pistol and a hammer, jointly with others not before court, robbed Duncan Onoka Onyieko of a Bajaj Boxer Motor cycle registration number KMEH 255W valued at Kshs.100, 000.00 and immediately before the time of such robbery used actual violence to the said Duncan Onoka Onyieko.
3. The appellants were convicted and sentenced to death. They were aggrieved and filed this appeal against both conviction and sentence. They were in person and raised the following grounds of appeal:
 - a. That the trial court failed to observe that the investigation tendered was shoddy.
 - b. That the trial court failed to consider that the prosecution evidence was full of contradictions hence unsafe to base a conviction upon.



- c. That the trial court failed to consider that the sentence imposed was against the weight of the evidence adduced.
 - d. That the trial court failed to appreciate that the sentence imposed was unconstitutional due to its ambiguity.
4. The appeal was opposed by the state through Mr. Ochengo, learned counsel on the following grounds:
 - a. That this was a case of recognition.
 - b. That all the ingredients of the offence were proved.
 - c. That the conviction and sentence were proper.
 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. The ingredients of the offence of robbery contrary to section 296 (2) of the Penal Code were stated with clarity by the Court of Appeal in *Johana Ndungu vs. Republic*[1996] eKLR where it stated:

In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

 1. If the offender is armed with any dangerous or offensive weapon or instrument,
or
 2. If he is in company with one or more other person or persons, or
 3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.
 7. In the instant case I will endeavour to establish if these ingredients were established to the required standards.
 8. The evidence that was adduced was at variance with the particulars of the offence. The particulars of the offence were that the appellants jointly with others not before court robbed the complainant herein. The evidence of the complainant and that of his witnesses was that the robbery was by two people. Where the particulars of the offence are at variance with the charge, the accused is entitled to an acquittal. This was held in the case of *John Brown Shilenje vs. R.* High Court (NBI) Criminal Appeal No 181 of 1981 (unreported). The rationale is very simple. The draftsman in respect of the charge is ordinarily informed by the evidence on record. In the instant case it would mean that the contents of the charge must have emanated from the complainant or his witnesses. This was a material contradiction in the prosecution case that raised doubts of credibility.
 9. While on the issue of credibility, the evidence of the complainant Duncan Onoka Onyieko (PW1) and PC Peter Nyakundi (PW4) contradicted each other as to where and from whom the pistol was



recovered. PW4 testified that the pistol was recovered in the house of accused 2 and inside a boot. PW1 on the other hand said that the pistol was recovered in the house of 1st accused inside a bucket that had some flour. These witnesses dented their credibility and could not be relied upon. The Court of Appeal in the case of *Ndungu Kimanyi vs. Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

10. The act of robbery complained of was according to the complainant committed at about 7.30 p.m. His evidence was that darkness had started to set in. The circumstances were not therefore conducive for a positive identification. In the leading case on identification when circumstances were unfavorable *Lord Widgery in R. vs. Turnbull and Others* [1976] 3 All ER 549 issued the following caution:

Secondly, 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 the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? 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 recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

11. The complainant testified that he recognized the first appellant when they approached him to ferry them to Manyala. He said he was assisted by the bright light from a lamp. This is a person he said used to sell water at Sindo. He did not describe him as such to anybody in authority. It was very necessary to describe him to the police while reporting. Failure to do so, he may be accused of trying to fit his description to the person he saw after the arrest.
12. His evidence did not indicate how much he had, the person he said was the first appellant, under observation. From his evidence we can deduce it must have been pretty short and the same explains why he said he did not identify the second appellant.
13. At the time they were traveling, there was no chance of him identifying his assailants.
14. James Wasonga Oguttu (PW2). He testified that he recognized the second appellant as he met with him riding the complainant's motor cycle. This must have been a matter of seconds. Unless two cyclists slow down especially at night, it may not be possible as this witness wanted the court to believe, to recognize the other rider. This explains why he conceded that in his recorded statement he did not state that he identified this appellant.
15. Daniel Onyango Kai (PW3) testified that he recognized the second appellant. He conceded that he did not describe him to the police.



16. The upshot of the foregoing analysis of the evidence on record, is that the conviction of the appellants was unsafe and was not supported by the evidence on record. I therefore quash the conviction of each of them and set each at liberty unless if otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 20TH DAY OF DECEMBER, 2022.

KIARIE WAWERU KIARIE

JUDGE

