



REPUBLIC OF KENYA



**Oduory v Republic (Criminal Appeal E040 of 2023)
[2025] KEHC 1634 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1634 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E040 OF 2023
DK KEMEL, J
FEBRUARY 21, 2025**

BETWEEN

PAUL OMOTO ODUORY APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment of Hon. P.J. Nandi (SPM)
in Bondo PMCCR No. E743 of 2022 delivered on 5/9/2023)*

JUDGMENT

1. The Appellant herein Paul Omoto Oduory was charged before the trial court with an offence of robbery with violence contrary to section 295 as read with 296 (2) of the *Penal Code*. The particulars of the offense are that on the night of 1st December 2022 at lake Victoria Kenyan waters along Nambo area in Bondo Sub County within Siaya County jointly with others not before court, while armed with a panga and wooden sticks(rungus) robbed Denis Otieno Osogo of a Yamaha engine model C 15HP, serial number 684K 15FMHL 1158523X, fuel tank and fuel line all valued at Ksh 190,000/= the property of Peter Ochieng Otieno and at or immediately before or immediately after the time of such robbery, wounded the said Denis Otieno Osogo and William Saidi Owuor.
2. The Appellant also faced an alternative count of handling stolen property contrary to section 322 (2) of the *Penal Code* with the particulars being that on the 2nd day of December 2022 at Port Victoria area in Budalangi sub county within Busia County otherwise than in the course of stealing retained on Yamaha engine model C 15HP Serial No. 684K 15FMH L 1158523X knowing or having reasons to believe it to be stolen property.
3. After a full trial, the Appellant was convicted and sentenced to 20 years' imprisonment for the main count of robbery with violence.



4. Aggrieved by the said conviction and sentence, the Appellant has lodged a petition of appeal wherein he raised the following grounds of appeal:
 - i. The learned trial magistrate erred in fact and law by basing his conviction on identification but failed to observe that conditions and circumstances were not favourable for positive identification.
 - ii. The trial magistrate failed in law and in fact by basing the conviction on identification parade but failed to observe that the same was not conducted in accordance with Chapter 46 of the Police force standing orders.
 - iii. That the trial magistrate erred in law and in fact in basing his conviction on the doctrine of recent possession but failed to observe that the same did not measure to the required standard.
 - iv. That the magistrate erred in law and fact in convicting him yet the prosecution failed to prove their case beyond reasonable doubt.

The Appellant thus prayed that the appeal be allowed, conviction quashed and sentence set aside.

5. This being a first appeal, it is the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent findings and conclusions. (See *Okeno vs. Republic* [1972] EA 32). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in *Ajode v. Republic* [2004] KLR 81.
6. The prosecution called a total of ten witnesses in support of its case.
7. PW1 Denis Otieno Osogo stated that on 01/12/2022 at 3.00pm, he went to the lake in Osieko in the company of William Saidi and Jonathan Otieno. That they put their fishing net in the lake and later fell asleep. That they woke up and saw another boat near theirs. That he saw a person trying to pull a fuel line rope of their boat. That he stood up, saw two people in the other boat and that one of them raised a panga and cut him on the palm of his left hand. That they were ordered to hand over their engine make Yamaha model D and engine horse pipe. That the one who held a panga prevented the others who were sleeping from coming out of their sleeping cabin. That the incident happened at 11.46 pm and that there was full moonlight and that the attackers had a torch and so he saw them under the moonlight. That he was cut three times on his left hand, right hand and left leg. That he went to Mageta health centre for treatment. He identified the treatment sheet which was marked as MFI 1 while the P3 form was marked as MFI 2. That the engine make Yamaha C15 HD Serial No.1158523 was recovered and was marked as MFI 3. That the engine belonged to Peter Ochieng Otieno, his employer.

On cross examination, he stated that he was attacked by two people who were armed with pangas and rowing pads (wooden). That he remembers the person to whom he gave the engine. That he was later called to identify the attackers at the police station.
8. PW2 William Saidi Owuor a resident of Mageta testified that on 1/12/2022 at about 11.30 pm he saw another boat next to theirs. That he saw a person cutting Denis with panga. That his head was outside the canvas that covered him as he slept. That he tried to come out of his covering but he was prevented by the attacker who was beating him. That one attacker directed a torch light on PW1 who had been cut and was crying and asking him to wake up and help him and that another attacker was beating him and ordering him to remain where he was. That he saw everything that was happening. That he did not see the holder of the torch but he saw where the torch was lit which was to the Appellant herein who was then the 1st accused. That the attackers went away after taking the engine. That they were treated at Mageta health center. He identified his treatment chit which was marked as MFI 4 while the



duly filled P3 form was marked MFI 5. That they were later called and directed to go to Usenge police station to participate in an identification parade. That he went with PW1 and Jonathan. That he was taken to a room where there were nine people and that he was able to identify the Appellant herein. That while at the station he saw the engine bearing the name Ben Olando (witness shows the name on the engine), that it belonged to Ochieng their employer.

On cross examination, he stated that he saw the Appellant herein who was the 1st accused using the torch light and he had a white cloth which had a color and had a police like uniform. That they were attacked by two people and that one had a NYS sweater green in color. That the police called him and informed him that they had arrested one suspect. That he was taken to a room where there were nine people and that he was able to identify the Appellant herein. That PW1 was the first to be taken to identify the witness and who did not go back to where he was.

9. PW3 Nafula Mwofu stated that on 2/12/2022 at 6.30 Am his in-law Paul who is the Appellant herein knocked his door and she welcomed him. That the Appellant informed her that he was tired and hungry and so she prepared food for him. In her kitchen she found that the Appellant had brought a boat engine and that he requested him to take to his bedroom as she feared that the kitchen could catch fire. That upon asking him about the engine, the Appellant informed her that it belonged to him and that his friend would come for it. That the Appellant took her phone number and informed her not to release the engine before talking to him. That later on when she had left the house briefly to get some vegetables, her children informed her that the engine people had come for it and so she rushed back to the house and found them. She told them that the Appellant had brought it and that it was then that they informed her that he had been arrested. That she too was also arrested but released afterwards on cash bail. She identified Paul as the Appellant herein.

On cross examination, she stated that the Appellant did not disclose the name of his friend.

10. PW4 No. 11059 PC Gibert Kipchirchir stated that on 2/12/2022 he was called by Shamala and proceeded to the report office at Port Victoria Police Station where he found BMU chairman and other people claiming that they had arrested Paul (Appellant) while another had escaped and that they also claimed that they knew where the engine was. That he and CPL Shamala proceeded to Mageta area where they found a certain lady and that they identified themselves to her as officers. That she led them to her house where they found the Yamaha engine and lerted the complainant who was outside the house to identify if the engine was his. That they took the engine to Port Victoria police station. The said engine was marked as MFI- 3.

On cross examination, he stated that they arrested Nafula as she was in possession of the engine and that the engine belonged to her in-law one Paul who was at that time in their custody. That the said Paul was the Appellant herein.

11. PW5 William Ngeso Wade stated that he was the vice chairman Osieko beach. That on 2/12/2022 at 3.00 am he received a call from one Otayo who reported to him that his fishermen had been attacked and their boat engine stolen. He promised them that he would follow it up. That at 6.00 am he went to Osieko beach and talked to some fishermen and followed up the issue. That he then saw Omoto, the Appellant herein whom he had known before as he had schooled at Osieko. That he asked him where he had come from and who claimed that he was with Offisa and that he called the said offisa who indicated that he was not around for three days. Eventually, he gathered information that he was the one who came with a boat from Osieko and they arrested him.

On cross examination, he stated that he had known Gab as a fisherman, and that the Appellant herein had the same clothes he was wearing the previous day and that it was the same situation to his co-accused. That they arrested them. That the Appellant herein had no weapon at the time of his arrest and



that he had oil and bloodstains on his trouser. That the Appellant's companion Gab had no weapon on him.

12. PW6 Nelson Ambeyi stated that he is a fisherman and resident of Mageta Island. That on 1/12/2022 at 11.00 pm he was in the latrine when another boat went to where they were and that Daniel informed them that they had been attacked. He had a torch and he saw blood stains on the boat. That they used another engine and took them offshore. That he called their employer one Ochieng and informed him of the incident.

On cross examination, he stated that he did not see the attackers.

13. PW 7 Peter Ochieng Otieno stated that on 1/12/2022, Denis, William and Jonathan who operate his boat went fishing. That at about 11.30pm, Nelson called him to inform him that Denis, William and Jonathan had been attacked and their engine and fuel tank robbed. He asked him to assist them to reach off shore. That he reported to Mageta police station and also informed chairmen BMU of Osieko and Nambo. That eventually, a suspect was arrested and the engine recovered. The engine make was Yamaha which he identified it in court and marked as MFI- 5, the purchase receipt of Kshs 190,000/- marked as MFI- 6, with serial number 1158523.

On cross examination, he stated that his boss was Ben Olando whom he was working under when he started the business. That he was well known and that's why he put his name on the engine.

14. PW 8 No. 67196 Sgt Joel Omuya stated that on 2/12/2022 at 8.00Am one Peter Ochieng reported at Magaeta police station that his boys who were at the lake had been attacked, injured and their engine and fuel tank robbed. That he booked the report and issued P3 forms. That later the engine was recovered and a suspect arrested.

On cross examination, he stated that the boat which had oil spillage and blood stains was not in court.

15. PW9 Jeremiah Ngugi Mucheru stated that he was a clinical officer at Mageta health centre. That he treated Denis Otieno Osogo, and William Saidi. That P3 for Deniss showed multiple cut wounds on the forehead, swollen right side of the abdomen, deep cut wound on the left hand palm, deep cut wound on right arm, two cut wounds on left leg anteriorly, deep cut on right leg. That the age of the injuries were four hours as he was still oozing blood. The weapons used were sharp and blunt objects. The degree of injury was harm. Treatment book produced as exhibit 1, P3 form produced as exhibit 2. Further, the P3 Form for William showed swollen right side of the back which was tender to touch and that the age of injuries were hours and degree of injuries was classified as harm. P3 form produced as exhibit 5, treatment book produced as exhibit 4.

16. PW10 No. 237110 Ip Kipyegon Murey stated that he was OC Crime Usenge police station. That on 3/12/2022 the investigation officer approached him to conduct an identification parade in respect of Paul Omoto Oduor. That Denis Otieno Osogo was able to identify the Appellant Paul Omoto by touching him. That William Said was also able to identify Paul Omoto by touching him. The 3rd witness Jonathan Omondi Otieno was able to identify the Appellant Paul Omoto Oduory by touching. That he enquired from the suspect if he was satisfied with the exercise and if he had any issue and he stated that he had none. He produced the parade form which was signed by the suspect as exhibit 7.

17. The trial court later established that the Appellant had a case to answer and was thus placed on his defence. He opted to tender sworn testimony.

18. DW1 Paul Omoto Oduory stated that he is a farmer from Osieko. That on 1/12/2022 he was coming from his uncle's place when he met pw1, PW2, PW4 and PW7. That he greeted them and asked them



if they could ferry him using their boat. That PW4 then requested him to help carry a few items then he would ferry him. That they told him they go get another friend at the police station then proceed and so they went to the police station. That while at the station, Pw4 and pw7 talked to an officer who came and handcuffed him and then placed him in the cells. That he was later taken to court and his case consolidated with another person whom he did not know.

On cross examination, he stated that on 1/12/2022 he left Bukoma area at his uncle's place. That he was waiting for a boat to Abindu. That he left Osieko that morning at 6.00 Am. That the night before 1/12/2022 he was at Osieko and left in the morning at 6.00 Am. That he was alone when he went to Abindu boat stage. That all the people he mentioned he knew them. That they boarded a motor cycle and they took him to Port Victoria police station. That PW3 and Pw7 are the ones who knew where the engine was recovered. That he does not know the 2nd accused. That he knows PW3-Nafula Mwofu who is his sister in law.

19. The instant appeal was canvassed by way of written submissions. Both parties duly complied.
20. The Appellant on his part submitted that 20 years imprisonment was manifestly excessive. That he ought to have been acquitted as he was not positively identified. That no exhibits were recovered from the Appellant's house.
21. The Respondent on their part submitted that they had proved the case beyond reasonable doubt as by law required. It was submitted that all the ingredients of the offence were duly proved against the Appellant. It was further submitted that the Appellant was placed at the scene of crime as he was identified by the two victims and that the stolen and recovered boat engine from his sister-in-law's home left no doubt about his involvement in the crime.
22. I have considered the record of the lower court and the rival submissions. I find the issue for determination is whether the Respondent proved its case against the Appellant beyond any reasonable doubt.
23. This Court will first deal with the offence of robbery with violence, the requisite ingredients and how Courts have appreciated its prosecution.
24. The *Penal Code* defines robbery is section 295 as follows;

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.
25. In the process of prescribing punishment for the offence of robbery, the *Penal Code* in Section 296(2) provides for the offence of robbery with violence in the following manner;

If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.
26. In the case of Oluoch -Vs- Republic {1985} Klr 549, the Court observed that proof of any one of the above ingredients is enough to sustain a conviction under Section 296(2) of the *Penal Code*. Deriving from the foregoing, the offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the aspect of violence.



27. PW1 Denis Otieno Osogo testified that on 1/12/2022 at about 11.46 pm while in the lake fishing they were attacked and their boat engine robbed. He stated further that he was cut with a panga on the palm of his left hand, his left leg and right leg. On cross examination, he stated that he could remember the attacker to whom he gave the engine.

PW2 testified that he saw the attackers cut PW1 and when they took the engine they walked away. PW3 who is a sister in law to the Appellant testified that the Appellant knocked her house early in the morning claiming to be tired and hungry. That as she went to prepare the food for him, she found an engine in her kitchen and that the Appellant claimed that it was his. That when she inquired further, he informed her that his friend would come for it.

28. PW4 on his part testified together with CPL Shamala they went to Mageta area and at PW3's house they found PW3 who claimed that the Appellant had brought the engine in her house that morning. That they called the complainant who was standing outside PW3's house and identified the Yamaha engine as his. The same was marked MFI which was later produced by PW7 as exhibit 3.

Further, PW9 the clinical officer testified that he treated PW1 and PW2. That PW1 had the following injuries- multiple cut wounds on the forehead, swollen right side of the abdomen, deep cut wound on the left-hand palm, deep cut wound on right arm, two cut wounds on left leg anteriorly, deep cut on right leg. He classified the degree of injuries as harm. P3 form of PW1 produced as exhibit 1, treatment book produced as exhibit 2.

PW2 William showed swollen right side of the back which was tender to touch, pw2's P3 form produced as exhibit 5, treatment book exhibit 4.

Therefore the evidence of personal violence on the two complainants was proved by the Respondent beyond reasonable doubt.

29. The other crucial issue for this court to consider is that of identification of the Appellant at night. In *Wamunga vs Republic* (1989) KLR 424 the Court of Appeal stated as follows regarding the evidence of identification generally:

“It is trite law that where the only evidence against a defendant is evidence on 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 a conviction.”

Similarly, the Court further cited its own decision in *Abdala bin Wendo & Another vs Republic* (1953), 20 EACA 166 where it held:

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

30. It was PW1's testimony that he positively identified the person to whom he gave the engine. That when he was called to identify the perpetrator, he was taken to a room where there were nine people and he positively identified the Appellant by touching him. PW2 also testified that he was able to see



everything that was happening, that he did not see who was holding the torch but it was directed at the Appellant. That when he was also called to identify the perpetrator he was able to identify him.

31. From the foregoing, I am satisfied that the two aspects of theft and violence were well proved. The Appellant was likewise placed at the scene of the crime and positively identified as the perpetrator. Further, it was the Appellant who took the stolen engine to his sister in law's house and instructed her (PW3) to keep it for her as he would come for it. It was the said PW3 who confirmed the Appellant as the person who had the stolen boat engine.
32. The evidence by the Appellant was a mere denial and which did not dislodge the watertight evidence of the Respondent which was quite overwhelming against him.
33. Ultimately, I find that the prosecution proved the case against the appellant beyond reasonable doubt. The finding on conviction by the trial court was quite sound and I see no reason to interfere with it.
34. On the issue of sentencing, section 296 states that the punishment for robbery with violence is death. The trial court sentenced the Appellant to 20 years' imprisonment after receiving his mitigation. Indeed, sentencing is an exercise of discretion by the trial court and that an appellate court should be slow to interfere with it unless the same is unlawful. I find that the sentence meted out is neither harsh nor excessive and that the same is within the law and that i find no reason to vitiate the same.
35. The upshot of the foregoing observations is that the Appellant's appeal is devoid of merit. The same is dismissed. The conviction and sentence by the trial court is upheld.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 21ST DAY OF FEBRUARY, 2025.

D. KEMEI

JUDGE

In the presence of:

Paul Omoto Oduory.....Appellant

Kofa.....for Respondent

Ogendo.....Court Assistant

