



REPUBLIC OF KENYA



**Ochieng v Republic (Criminal Appeal E026 of 2023)  
[2025] KEHC 1508 (KLR) (14 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1508 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E026 OF 2023  
DK KEMEL, J  
FEBRUARY 14, 2025**

**BETWEEN**

**AUGUSTINE ONYANGO OCHIENG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of the conviction and sentence of Hon J P Nandi  
(Senior Principal Magistrate) in Bondo Senior Principal Magistrate's  
Court Criminal Case No. 735 of 2019 delivered on 25th May 2021)*

**JUDGMENT**

1. The Appellant herein Augustine Onyango Ochieng was charged alongside three others before the trial court with two counts of an offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. The particulars of the first count were that on the night of 27<sup>th</sup> August, 2019 at about 8.30pm, at Maggetta island in Bondo Sub County within Siaya County jointly with others not before the court while armed with offensive weapons namely a gun and pangas, robbed Felix Kiboka Onyango of one boat engine serial number 1158523 make Yamaha valued at Kshs 190,000/= and at the time of such robbery used actual violence on the said Felix Kiboka Onyango.  
  
The particulars of the second count were that on the night of 27<sup>th</sup> August 2019 at about 8.00pm, at Maggetta island in Bondo Sub County within Siaya County jointly with others not before the court while armed with offensive weapons namely a gun and pangas, robbed Denis Ouma Ominde of one boat engine serial number T09013368 make Parsun valued at Kshs 130,000/= and at the time of such robbery used actual violence on the said Denis Ouma Ominde.
2. The Appellant also faced an alternative charge of handling stolen goods contrary to Section 322 (2) of the *Penal Code*. The particulars were that on the 21<sup>st</sup> day of September, 2019, at Lwanda Kotieno Beach in Rarieda Sub County, within Siaya County otherwise than in the course of stealing jointly with



another were found to have retained one boat engine serial No. D09013368 make Parsun knowing or having reasons to believe it to be stolen goods.

3. After a full trial wherein the Respondent called a total of 16 witnesses, the Appellant was found guilty and was convicted and sentenced to 15 years' imprisonment on both counts which were ordered to run concurrently.
4. Aggrieved by the said conviction and sentence, the appellant has appealed to this Honorable court wherein he has raised the following grounds of appeal:
  - i. That he pleaded not guilty to the offence.
  - ii. That the doctrine of recent possession should have been applied to shed light on how the recovery was done.
  - iii. That the evidence was never corroborated to warrant a conviction.
  - iv. That the evidence relied upon was never proved beyond reasonable doubt.
  - v. That the charge sheet was defective.

The Appellant thus prayed that he should be set at liberty.

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 16 witnesses in support of its case.
7. PW1 Felix Kiboka Onyango testified and recalled that on 27/08/2019 at 8.00pm while he was asleep in a boat in the lake and while in the company of Ochieng and Musa, another boat carrying three people came and knocked them. That one of the people was armed with a gun while the other two were armed with pangas. They ordered them to unscrew their boat engine make Yamaha and give it to them. That they obliged. That the group assaulted them, cutting him with a panga and then taking off with his clothes and Musa's clothes. That he was able to identify one of the attackers who had a bald head. That he saw him using a torch light. The one with the bald head had a long gun. That one of his colleagues who had a phone called their boss one Mr Ochieng who together with police from Mageta police station came to their rescue. Then he was taken to Mageta hospital and thereafter went home. That he reported the matter to their boss their boss Ochieng who then reported to Mageta police station. He identified the treatment book from Mageta Health Centre which was marked as PMFI 1, P3 form marked as PMFI 2. That the police continued with investigations and that he later learnt that some people had been arrested. That he saw two people who were on patrol boat with the engine which he later identified at Usenge police station. He identified photographs showing the stolen boat engine which were marked as PMFI 3(a) and (b).

On cross examination by the Appellant, he stated that he saw him one week later at the beach in the patrol beach.

8. PW2 Dennis Ouma Ominde testified that he is a fisherman from Kwoyo beach. He recalled that on 27/8/2019 at 8.00pm, he was with one Amos Ongiele fishing in the lake when the three accused persons went to where they were in a boat. That the 1<sup>st</sup> and 2<sup>nd</sup> accused (the Appellant herein) had pangas while the 4<sup>th</sup> accused had a gun. Too much light was directed at them and that he also directed



his torch light towards them but one of them warned him and he switched it off. That he was then assaulted, cut on the forehead and waist using a panga.

That Amos jumped into the water upon being assaulted, when he resurfaced out of the water they ordered him to unscrew the boat engine and give it to them, he obliged. That the 1<sup>st</sup> and 2<sup>nd</sup> accused (Appellant) received the engine. The engine was of parsun make. That they took their clothes and the boat where they were sleeping and went away. That before they were assaulted, he was able to see them. One was tall, another short and another had a cap on had a bald head who seemed to be the ring leader. That they towed their boat using sticks to Mageta beach where he was taken to Wacha Wacha hospital within Mageta Island, then to Mageta Health Centre. He identified the treatment notes from Mageta Health Centre and which were marked as PMFI 4. Then his employer Mr. Peter Oyol took him to a private hospital.

That he later reported to Usenge police station where he was given a P3 form dated 28/8/2019 and which was marked PMFI 5. That he was later called to Usenge Police Station to identify the engine. Photo of the parsun engine marked PMFI 6A) and 6b). That he later learnt that some people had been arrested. He went and identified the 1<sup>st</sup> accused and the 2<sup>nd</sup> accused (the Appellant) at Usenge Police station. That he later identified the 4<sup>th</sup> accused at Usenge. That the 1<sup>st</sup> accused was the short one while the second accused was a tall one while the 4<sup>th</sup> was the one driving the boat that they they had.

On cross examination by the Appellant/2<sup>nd</sup> accused, he stated that he was sleeping when he heard the sound of another boat engine. That he immediately woke up and directed his torch light towards them. That he was only able to identify them by their height and body size. That he saw the Appellant/2<sup>nd</sup> accused at Kwoyo beach before identifying him at Usenge police station. That he did not know him before the attack and that he was not present during the recovery of the engine.

9. PW3 No.227243 PC Nahashon Otieno of Mageta police station testified that on 21/9/2019 at 1330hrs he was at the office when he received information from chairman Kwoyo beach that some people and engines had been robbed at the lake. That on 27/08/2019 the stolen engines were recovered at Sindo beach. That he and his colleague PC Momanyi were assigned to go and collect the engines. That upon reaching Sindo Police station, they found one suspect Augustine Ochieng who was arrested with one boat, 3 fuel tanks, 2 fuel lines, 2 engine keys and 2 pangas. That he interrogated the suspect who admitted that he was involved in the robbery together with Augustine and Obiero. That he also admitted that they stole two engines. That he directed them to Lwanda Kotieno beach where they found the engine with the chairman of the beach who informed him that one Nancy Akinyi, a relative of Augustine had brought it.

That the chairman took them to Litare beach where they found Nancy who admitted that the engines had been brought by Augustine and Augustine. That they used Nancy's phone to track Augustine to come as she told him he had found an engine buyer from Rusinga island. That they went to Rusinga island where Augustine was and he was arrested. That they took the recovered items and escorted them to Usenge police station. He identified Austine and Augustine as the 1<sup>st</sup> and 2<sup>nd</sup> accused in the dock.

On cross examination by the Appellant/2<sup>nd</sup> accused he stated that they did recovery at Lwanda Kotieno beach. That it was an engine in the custody of the BMU chairman Lwanda Kotieno beach in his house. That he did not have the call data in court but he laid a trap to arrest him and he was arrested without any exhibit.

10. PW4 Peter Ochieng Otieno testified that he is a fisherman at Kwoyo beach at Mageta. He recalled on 27/08/2019 at 9.00pm he was at Mageta island when he received a phone call from Moses using Paul's phone, who informed him that he had been attacked by people who had taken the boat engine make Yamaha 15 horse power. That he reported to Mageta police post. That he later got information



from Willis Opiyo Mboya, the chairman informing him that other people had also been attacked and severely injured. That they went to the lake with the police officers as Felix had been badly injured. That they found them and took them to hospital.

That in September 2019, he was called by the secretary gateway beach at Sindo and asked him whether he had hired out his boat engine at Sindo as there was an engine which had his phone number 0706 886767. That he informed him that he had not hired it. That he asked whether it had initial 'POO' BEN ALANDO and on the gear box Kwoyo beach which marks he confirmed. The photo marked PMFI 3 (a) is for Yamaha engine having marks 'POO'. That they went to Sindo police where they found Lydia and Austine who had been arrested. That Augustine and that the police went to Lwanda Kotieno and went back with two engines. That Nancy informed the police that Austine was the one who took the engine to her house. That she called Augustine to go for money who went and he was arrested. They then went back to Usenge Police station where he recorded his statement.

That the serial number was the one given to him upon purchasing the engine on 12/04/2018 and it was 1158523. The purchase receipt for Yamaha dated 12/04/2018 was marked as PMFI 7. That the said Austin was the 1<sup>st</sup> accused, Augustine 2<sup>nd</sup> accused and Lydia the 3<sup>rd</sup> accused. That he had not known them before he heard their names at the police.

11. PW5 Nancy Akinyi Akoth testified that she's a fish monger from Lwanda Kotieno. That on 10/09/2019 at 5.30pm she found two engines in her house. That upon asking her children who informed her that some two men had brought them. That shortly, Austine and Augustine came and informed her that one engine was theirs while the other one was for sale.

That the following morning the beach chairman called her over the engines. That two days later, Austine went to her house with the police. She spent the night at Sindo police cells. That the following day she was booked with the Yamaha and two Pasan engines. That she cooperated with the police and later tricked the Appellant herein that the boat engine had been sold and that he should go for the money. That Augustine went to her house for the money and that he was arrested. That she identified the photos of pasan boat engine which were marked PMFI 6(a) and (b). That the photo also shows the Yamaha engine that she saw at the police station.

On cross examination by the Appellant/2<sup>nd</sup> accused she stated that he was one of the persons who brought the engines to her house on 10/9/2019. That she didn't know him before. That he only gave her his number which she called and he was arrested. That her phone number got lost together with the number he had given her.

12. PW6 Peter Were Ajulu testified that he was the chairman Wichlum beach. That he received a call from Meshack Oduor on 20/09/2019 at 8.30pm claiming that his boat had been stolen. That he went back to the beach, got some security guards and started searching for the boat. That they met some fishermen who informed them that they had seen a boat pulling another boat. That they suspected Austine, Augustine and Charles as they had previously arrested them for the same offence.

That on 21/09/2019, Meshack and Jared called him from Sindo beach that they had spotted the stolen boat. That they reported to the BMU chairman who called the police from Sindo. That they then proceeded to the house of Charles Obiero and Lydia Obiero where they found the boat and some stolen nets. That the police also found a Yamaha engine written with the name BEN ALANDO, Kwoyo beach Mageta and phone number written on the engine. That Lydia informed them that the engine belonged to her husband as it had been brought by her husband, Austine and Augustine. That she also pointed out the house of Austine where they went and arrested him.

That Austine took the police officers to Lwanda Kotieno where they recovered two passen engines. That Ben went with another team from Mageta who identified his Yamaha engine. That he identified



the photos recovered at Lwanda Kotieno beach, MFI 6a) was an old engine and MFI 6b) was a new pasan engine. That he knew the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> accused persons as he had arrested them before.

On cross examination by the Appellant/2<sup>nd</sup> accused he stated that Jared and Meshak called him while they were at Sindo beach. That they did not find him at Sindo beach. That it's the 3<sup>rd</sup> accused who had reported that the 1<sup>st</sup>, and 2<sup>nd</sup> accused were the ones who had taken the Yamaha engine to her house. That the 2<sup>nd</sup> accused was not found with anything stolen.

13. PW7 Jared Opondo testified that he was a clinical officer from Bondo sub county hospital. That he had a P3 form filled on 24/09/2019 by one Jackline Anyango, under her supervision. That he was familiar with her handwriting and signature. That the said Jackline had since been transferred. That on examination, the patient had a swelling on the forehead, bruises on the back, cut wound on the right index finger, bruises on right thigh. The degree of injury was harm. That he also had a P3 in favour of Denis Okumu and that the degree of injury was harm. He produced the P3 form-(Exhibit 5), treatment notes marked MFi 4 produced as exhibit 4.

On cross examination by Appellant/2<sup>nd</sup> accused, he stated that he did not treat the patients. That Felix was treated on 27/8/2019 as per his treatment notes. That according to the P3 form, he was assaulted by unknown people.

15. PW 8 Juma Musa Ouma adopted his evidence in case no. 734 of 2019 where he had testified as PW10. There was no cross examination.

16. PW9 George Owuor Otuoma testified that he is a businessman and the chairman of Lwanda Kotieno beach. That his evidence in Criminal Case 734 of 2019 where he testified as PW6 is adopted as his evidence in chief.

There was no cross examination.

17. PW10 No. 237283 IP Leonard Omuse testified that he was attached to Bondo Police station OC crime. That the identification parade was done by IP David Mireri who had since been transferred to Tassia Police station in Nairobi. That they worked together at Garissa police station for one year being on promotion course.

That on 25/10/2019, an identification parade was conducted for suspect Austine Ochieng Ochieng. They had two witnesses. The parade had 8 members. The accused was positively identified. Identification parade form of Austine produced as exhibit 8a).

An identification parade was also conducted for Augustine Onyango Ochieng. The parade likewise had 8 members. The suspect stood between the 6<sup>th</sup> and 8<sup>th</sup> member in the parade. The witnesses were kept away. There were two witnesses. The first witness did not identify him positively. While the 2<sup>nd</sup> witness positively identified the suspect. The identification parade form for Augustine Onyango Ochieng produced as Exhibit 8 b).

The third identification parade was for Charles Otieno which was done on 7/11/2019. There were 5 witnesses, and the parade had 9 members. The suspect stood between the 5<sup>th</sup> and 6<sup>th</sup> member in the parade. The first witness positively identified him as the one who had a bald head. For the second witness, the suspect retained the same position and he was likewise identified as the one with the bald head. The third witness likewise identified him while on the same position. That 4<sup>th</sup> witness went and the suspect had changed to stand between the 3<sup>rd</sup> and 4<sup>th</sup> person on the parade and still he was positively identified. The 5<sup>th</sup> witness was called and the suspect had changed to stand between the 8<sup>th</sup> and 9<sup>th</sup> person on the parade, he also positively identified him. The identification parade of Charles produced as Exhibit 8 c).



On cross examination by the Appellant/2<sup>nd</sup> accused he stated that the parade was properly done. That The witnesses had seen the suspect during the night of the incident because of the moon light and the torch light they had. That the suspect did not object to the process. That the investigating officer is not allowed to carry out identification parade.

18. PW 12 Victor Ounga Ochieng stated that he is a fisherman. That on 21/9/2019 at 8.00 am while at the office of Sindo BMU with Lawrence Obonyo, one Jared Oketch from Wichlum beach came to them while claiming that he was looking for a lost boat. That they allowed him to go ahead and check around. That after about 20 minutes he returned to say that he had found it so they accompanied him to confirm. That other fishermen at the beach said that the said boat belonged to one Charles Obiero. That when Obiero saw them from afar he took off. That they went to Obiero's house, they found a boat engine Yamaha model C bearing the name BEN AGANDO and a phone number which they called and asked the owner to go to Sindo beach.

That Jared called BMU Wichlum who came and took them to Obiero's house where they found Mama Desmond who took them to Austin's house and arrested him. That they handed Austine and the engines to the police. That he had known Austine, Obiero and Augustine before.

On cross examination by the Appellant, he stated that they did not find him in his house when Austine took them as he had already vacated.

19. PW13 Wilis Opiyo Ombura testified that on 26/8/2019 at 9.00pm he was called by one Ongielo who claimed that they had been attacked and a Yamaha and Pasan boat engines stolen. That he reported to Mageta police post and a patrol boat was dispatched. That on 21/9/2019 they went to Sindo police station where they found Austine who took them to Lwanda Kotieno where they recovered the Pasan engines. That they gave Austine a phone and he called Augustine and tricked him to go pick money for the engines. That Augustine went and he was arrested.

On cross examination by the Appellant he stated that he saw the victims in hospital who claimed that they were able to identify the attackers. That it is Austine who mentioned the Appellant to have been part of the robbing team.

20. PW 14 No. 66783PC Simon Likonyi from crime scene office Siaya stated that on 20/11/2019 PC Obade took three boat engines to the office- one Yamaha and two pasan. That they had been robbed and recovered at Sindo beach. He took photos of the engines. Mfi 3 (a) and (b) produced as exhibits 3 (a) and (b). Mfi 6 (a) and (b) produced as exhibit 6(a) and (b). Certificated dated 20/11/2019 produced as exhibit 9. Photo of serial number T09013368of pasan engine which had been Marked as MFI 1 a) and b) in Criminal case no. 734 of 2019 produced as exhibit 1 a and b). Another certificate as exhibit 10.

There was no cross examination.

21. PW 15 No. 2017086418 PC Dominc Momanyi stated that he was based at Mageta patrol base. That on 21/9/2019 at 1300hrs he was instructed to go to Sindo beach for recoveries. They found that the 1<sup>st</sup> accused had been arrested. That they recovered two fuel tanks, two engine keys and two pangas. That the suspect confirmed participating in the robbery of 27/8/2019 together with one Augustine and Obiero. That they proceeded to Lwanda Kotieno where two engines which were found with the BMU chair person. That other officers went to Sindo beach where they found Nancy who helped them in arresting Augustine. That they recovered three engines one was for Yamaha couldn't remember the name of the other engines. He identified Austine and Augustine as the 1<sup>st</sup> and 2<sup>nd</sup> accused in the dock.

On cross examination, he stated that the 1<sup>st</sup> accused mentioned him as one of the attackers. That Nancy tricked the 2<sup>nd</sup> accused to go to her house where he was arrested.



22. PW16 No. 67045 Pc Charles Obade stated that he was at Usenge police station when he received the 1<sup>st</sup> and 2<sup>nd</sup> accused by Pc Otieno and Pc Momanyi on allegations of the offence of robbery. That 2 engines were also brought. He booked them.

On cross examination by Appellant, he stated that the 1<sup>st</sup> accused had mentioned him and the evidence of Nancy had also confirmed that he was one of the attackers.

23. The trial court later found that a prima facie case had been made out against the Appellant who was subsequently placed on his defence. He opted to give sworn evidence.

24. Dw2 Augustine Onyango Ochieng adopted the statement in Cr. 734 of 2019 as his evidence in chief. He stated that on 21/9/2019 at 11.30 pm while going from a bar, he saw a vehicle and on reaching where the vehicle was, people alighted from that vehicle. That they harassed him, that he was hit on the ribs and lost consciousness and only found himself alone in a certain room in the morning. He was later taken to another beach at Rusinga where they boarded a boat and was taken to Usenge Police Station where he was charged with the offence. That he has no idea about how the alleged incident took place.

25. The appeal was canvassed by way of written submissions. Both parties complied.

26. The Appellant submitted that the prosecution did not prove the case against him beyond reasonable doubt.

27. On the other hand, the prosecution submitted that they had proved the case against the appellant beyond reasonable doubt and that the trial court's decision should be upheld.

28. I have considered the record of appeal, submissions and authorities relied on by the parties. I find the issue for determination is whether the case against the Appellant was proved beyond reasonable doubt by the Respondent.

29. This Court will first deal with the offence of robbery with violence, the requisite ingredients and how Courts have appreciated its prosecution.

30. The [Penal Code](#) defines robbery in 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.

31. 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.

32. 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](#).

33. 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.



34. In the instant case, PW1 Felix Kiboka Onyango stated that they were attacked at 8.00pm while in the lake. That the people one of whom was armed with a gun while the other two carried pangas ordered them to unscrew their boat engine make Yamaha and give it to them and that they obliged. That they assaulted them, cutting him with a panga and then then took off with his clothes as well as Musa's clothes.

Jared Opondo (PW7) testified that he was a clinical officer from Bondo and that he produced the P3 forms of Felix and Denis Okumu who had been assaulted by unknown people on 27/8/2019. That on examination, the patient had a swelling on the forehead, bruises on the back, cut wound on the right index finger, bruises on right thigh. The degree of injuries was harm. He produced the P3 forms of the two victims as exhibits 2 and 5 and further produced the relevant treatment notes as exhibit 1 and 4.

From the foregoing, this court is satisfied that the aspect of violence was proved.

35. On the aspect of theft, PC Nahashon Otieno (PW3) of Mageta police station testified that on 21/9/2019 at 1330 hours he was at the office when he received information from the chairman Kwoyo beach that some engines that had been robbed at the lake on 27/08/2019 had been recovered at Sindo beach. That he and his colleague PC Momanyi (PW15) were assigned to go and collect the engines. That upon reaching Sindo Police station they found one suspect Austine Ochieng who had been arrested with one boat, three fuel tanks, two fuel lines, two engine keys and two pangas. That he interrogated the suspect who admitted that he had been involved in the robbery together with Augustine and Obiero. That he also admitted that they stole two engines.

Further, Wilis Opiyo Ombura (PW13) testified that on 26/8/2019 at 9.00pm he was called by one Ongielo who informed that they had been attacked and a Yamaha and Pasan boat engines stolen. That he reported to Mageta police post and a patrol boat was dispatched. That on 21/9/2019 they went to Sindo police station where they found Austine who took them to Lwanda Kotieno where they recovered the Pasan engines. That they gave Austine a phone and he called his accomplice Augustine and tricked him to go pick money for the engines. That Augustine fell for the trap and went there and was promptly arrested.

36. In light of the above, I find that the aspect of theft was also well proved.

37. The other crucial issue for this court to consider is that of identification of the robbers 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.”

38. 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.”

39. . In this instant case, an identification parade was carried out by PW10 where several witnesses positively identified the accused persons including the Appellant herein. PW10 testified that an identification parade was conducted on 25/10/2019. That an identification parade was also conducted on Augustine Onyango Ochieng. The parade likewise had 8 members. The suspect stood between the 6th and 8th member in the parade. The witnesses were kept away. There were two witnesses. The first witness did not identify him positively. While the second witness positively identified the suspect. The identification parade form for Augustine Onyango Ochieng was produced as Exhibit 8 b).
40. Further, the evidence herein confirmed that the Appellant was adversely mentioned by the 1<sup>st</sup> accused as his accomplice to the said crime and that upon the arrest of the Appellant’s accomplice, he led police to the arrest of the Appellant by calling the Appellant herein whom he tricked to come for the proceeds from the sale of one of the stolen boats and that the Appellant herein fell for the trap and was promptly arrested. Again, Nancy Akinyi Akoth (PW5) she stated that she’s a fish monger from Lwanda Kotieno. That on 10/09/2019 at 5.30pm she found two engines in her house. That upon asking her children, she learnt that some two men had brought them. That shortly, Austine and Augustine came and informed her that one engine was theirs and that the other was for sale. That she later teamed up with the police and tricked the Augustine to go to her house for the proceeds of the sale of one of the boats and that he fell for it and was promptly arrested. It is therefore quite clear that the Appellant was involved in the robbery incident and that he was placed at the scene of crime. The Appellant’s evidence and alibi did not shake that of the Respondent which was quite overwhelming against him.
41. Ultimately, I find that the trial court addressed its mind correctly to the facts of the case and properly convicted the Appellant. The conviction is hereby upheld.
42. On the issue of sentencing, section 296(2) of the *Penal Code* states that the punishment for robbery with violence is death. However, following the decision of the Supreme Court in Francis Karioko Muruatetu and 2 Others Vs R [2017] eKLR which declared that the mandatory nature of death sentence as unconstitutional and that courts must consider the mitigating circumstances of an offender before imposing an appropriate sentence thereafter. The said court further held that a court could as well impose a sentence of death if the circumstances warrant it. The trial court considered the Appellant’s mitigation and imposed a sentence of 15 years’ imprisonment each for the two counts which were to run concurrently. It is noted that the Respondent did not file a notice of enhancement of sentence. I find that the sentence imposed was neither harsh nor excessive. I will not interfere with the same. It is instructive that the Appellant and his accomplices inflicted serious injuries on the victims besides stealing their boat engines.
43. The upshot of the foregoing observations, it is my finding that the appeal is devoid of any merit. The same is dismissed. The Conviction and sentence of the trial court are upheld.

Orders accordingly.

**DATED AND DELIVERED AT SIAYA THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**D. KEMEI**

**JUDGE**

In the presence of :

Augustine Onyango Ochieng.....Appellant

M/s Kerubo.....for Respondent



Ogendo.....Court Assistant

