



REPUBLIC OF KENYA



KENYA LAW
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**Omukanakana v Republic (Criminal Appeal E063 of 2022)
[2025] KEHC 2862 (KLR) (3 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2862 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E063 OF 2022
AB MWAMUYE, J
FEBRUARY 3, 2025**

BETWEEN

NASHON ATINGO OMUKANAKANA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Judgment, Conviction and Sentence of the Hon. C.L Yalwala (SPM) delivered on 20th August, 2020 in Criminal Case No.185 of 2019)

JUDGMENT

1. The Appellant, Nashon Atingo Omukanakana, was charged with the offence of Robbery with Violence Contrary to section 296(2) of the [Penal Code](#) in count one, and breaking into a building and committing a felony contrary to Section 306 (A) of the [Penal Code](#) in count two.
2. On the first count, the particulars of the offence as stated on the Charge Sheet were that on the 5th March, 2019 at around 3.00 am at Maseno township in Kisumu west sub-county, whilst armed with dangerous weapon namely; panga and claw bars, jointly with others robbed of Isaac Munyera Agalo his mobile phone make Skyfon worth 1300/- and immediately before such robbery the appellant wounded the said Isaac Munyera Agalo.
3. On the second count, the particulars are that the Appellant and others on the 5th March, 2019 at around 3.00 am at Maseno township in Kisumu west sub-county, whilst armed with dangerous weapon namely; panga and claw bars, jointly with others broke the window of JCC Church, Maseno and stole 17 plastic chairs (light blue), 2 coffee tables (black) all valued at Kes.11,200/- the property of the said JCC Church.
4. The Appellant was also charged alone on the 1st alternative count with the offence of handling stolen goods contrary to Section 322 (1) and (2) of the [Penal Code](#). The particulars thereof are that the Appellant on the 17th March, 2019 at around 7.00 Pm at Luanda in Emuhaya Sub-county within



Vihiga County otherwise than in the course of stealing, dishonestly retained one mobile phone make Skyfon black in colour, the property of Isaac Munyera Agalo, a watchman of JCC Church, Maseno knowing or having reason to believe it to be stolen goods.

5. The Appellant was charged jointly with another person on the 2nd alternative count with the offence of handling stolen goods contrary to Section 322 (1) & (2) of the *Penal Code*. The particulars thereof are that the appellant and the co-accused on the 17th March, 2019 at around 7.00 Pm at Luanda in Emuhaya Sub-county within Vihiga County otherwise than in the course of stealing, dishonestly retained two plastic chairs, light blue in colour labelled JCC MSN and two coffee plastic tables, black in colour, the property of JCC church, Maseno knowing or having reason to believe to be stolen goods.
6. The Appellant pleaded not guilty on all the counts. The prosecution called 5 witnesses; the Appellant was put to his defence. The Appellant gave a sworn testimony. The Appellant was subsequently convicted and sentenced to serve 30 years imprisonment for the offence of robbery with violence and 5 years imprisonment for the offence of breaking into a building and committing a felony. The sentences were to run concurrently.
7. Having set out the background to the matter, this Court's duty is to evaluate and scrutinize the evidence and proceedings on record and reach its own independent conclusion as espoused in David Njuguna Wairimu V Republic [2010] where the court of appeal held: -

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

8. I have considered the Trial Court's proceedings, the Petition of Appeal, the Appellant's submissions and the Respondent's submissions and I identify issues for determination as follows: -
 - a. Whether the elements of the offence were proved beyond reasonable doubt as required in law;
 - b. Whether the appellant was positively identified; and
 - c. Whether the appeal should be allowed.

Whether the elements of the offence were proved beyond reasonable doubt as required in law

9. The Appellant was convicted for the offences of robbery with violence and of breaking into a building and committing a felony.
10. In analyzing the ingredients of the offence of robbery with violence, it is important to start with the text of the law. The Appellant was convicted of the offence of robbery with violence. Section 296 (2) of the *Penal Code* provides that:-

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in the 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.”



11. Under this section, therefore, the Prosecution is required to prove one of the following in order to successfully establish the offence charged:
 - i. That the offender was armed with any dangerous or offensive weapon or instrument; or
 - ii. That he was in the company with one or more other person or person; or
 - iii. That at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other violence to any person.
12. In the present case, PW1 stated that he was patrolling the church compound when he saw a white pick-up approach the church from the main road. Three people alighted. He went on with the patrol and suddenly came face to face with a group of 8 people. He stated that one of them cut him with a panga twice on the head and another hit him with a 'tarimbo' at the back and he fell down. They tied his hands and eyes and mouth. In the process, they stole his mobile phone.
13. PW2 also testified that he received a call from on the church elders who informed him that thugs had broken into the church. Upon reaching the church, he found one window had been broken. He also noticed that some chairs and two small tables were missing. The chairs stolen were 17 in number.
14. The Prosecution need only prove one of the ingredients.
15. In *Dima Denge Dima & Others Vs. Republic, Criminal Appeal No. 300 of 2007* the Court stated stressed this point when it stated as follows:

“...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.”
16. On the ingredients of the offence, I am satisfied that the all the elements of the offence are present. There were more than one person and they used physical violence on PW1 .

Whether the Appellant was positively identified

17. The evidence on record shows that PW1 was not able to identify any of the people that attacked him. In fact, during cross examination by the Appellant, PW1 stated that he did not identify any of the robbers. Further, PW2 testified that the police officers told him that they did not find anyone in the compound.
18. The only evidence linking the Appellant to the crime was that of PW3 who testified that the appellant had given him 15 chairs as part payment for a bed but did not give him a receipt for the chairs. PW5 also testified that they recovered two chairs marked 'JCC MASENO', 1 black plastic table and a mobile phone from the appellant's house.
19. There was no evidence adduced that placed the Appellant at the scene of crime. Furthermore, no one positively identified him at the scene of crime. In my opinion, since the Appellant was found in possession of the stolen items, the appropriate charge against him would have been one of being in handling stolen goods and not robbery with violence or breaking into a building and committing a felony; and he should have been convicted on that alternate count.
20. The maximum sentence under Section 322(2) of the *Penal Code* for handling of stolen goods is fourteen (14) years in prison. In the circumstances, and noting that the Appellant was convicted on 20th August, 2020 and further noting the time spent in custody pre-conviction it is just that a conviction



on the alternative count be matched with a sentence of time already served. I do so for the reasons that the Appellant was a first offender and for the reasons recorded as mitigation by the Trial Court.

21. From the foregoing analysis, the Appeal succeeds. The conviction is quashed and the sentence set aside, and an alternative conviction on handling of stolen goods contrary to Sections 322(1) as read together with Section 322(2) of the *Penal Code* is entered; the sentence for which shall be the time already served. Consequently, unless otherwise lawfully held, it is ordered that the Appellant shall be set at liberty forthwith.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 3RD DAY OF FEBRUARY, 2025.

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BAHATI MWAMUYE

JUDGE

In the Presence of:

Counsel for the Appellant – Unrepresented

Appellant present in person from Kisumu Maximum

Prosecution – Mr. Kipruto

Court Assistant – Mr. Guyo

