



REPUBLIC OF KENYA



KENYA LAW
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**Kiverenge v Republic (Criminal Appeal 87 of 2023)
[2025] KEHC 2418 (KLR) (10 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 87 OF 2023
DR KAVEDZA, J
MARCH 10, 2025**

BETWEEN

DUNCAN KIVERENGE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. E. Boke (S.P.M) on 7th April 2022 at Kibera Chief Magistrate's
Court Criminal Case no. E1145 of 2020 Republic vs Duncan Kiverenge)*

JUDGMENT

1. The appellant was charged with two counts of the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*, Cap 63 Laws of Kenya. After a full trial, he was sentenced to death on both counts to sentence to run concurrently. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his petition of appeal, he raised grounds, which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He argued that the identification was improper. He contended that his defence was not considered by the trial court. Further, the sentence imposed was harsh and excessive. He urged the court to quash his conviction and set aside the sentence imposed.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32)



4. The key ingredients for a robbery with violence charge are found in section 296(2) of the [Penal Code](#). It provides as follows-

“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”.

5. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt leading to a proper conviction and sentence.
6. It was the prosecution’s case that on the night of October 9, 2020, the complainant, Monica Wangui (PW1), was returning from an activation event at Rubi Company when she was dropped at Kangemi stage at approximately 10:00 PM. At the time, she was in possession of her mobile phone, an ITEL, and another phone, an iPhone, belonging to Kevin Mburu Wanjiku (PW2). While waiting for public transport, an unidentified male, in the company of two others, forcefully took her phone from her left pocket.
7. The area was well-lit by streetlights, enabling PW1 to see the individual who had taken her phone. The suspect moved ahead of her before turning back. Alarmed, PW1 informed PW2 about the theft. Upon confrontation by PW2, six additional individuals surrounded them. In the ensuing altercation, PW1’s iPhone was also snatched from her pocket.
8. During the attack, PW2 was struck on the head with a blunt object, rendering him unconscious. The assailants further took Kshs. 10,000 from PW2’s pocket before fleeing the scene using a public service vehicle. PW1 managed to secure a motorcycle and transported PW2 to Eagles Hospital, where he received medical attention, including stitches due to excessive bleeding. The matter was subsequently reported at Kabete Police Station, where PW1 provided receipts for the stolen phones as proof of ownership.
9. Shortly thereafter, PW2 spotted the suspect at the Kangemi stage, leading to his arrest. PW1 later identified the suspect during an identification parade at Kabete Police Station. Despite the arrest, the stolen phones were never recovered, and the identities or whereabouts of the remaining perpetrators remained unknown.
10. During cross-examination, PW1 confirmed that she had never met the appellant before the incident. While none of the stolen property was found in the appellant’s possession, he was found wearing PW2’s cap, which bore the Rubi Company logo. PW1 reiterated that she had a clear view of the perpetrator who was the appellant due to the presence of street lighting.
11. PW2 corroborated PW1’s testimony, stating that after being dropped at Kangemi, PW1 alerted him that her phone had been stolen. When PW1 pointed out the perpetrator, PW2 confronted him and demanded the return of the stolen property. Instead, the appellant verbally insulted him and seized his green cap. As the confrontation escalated, more individuals joined, encircling PW2. They forcefully took Kshs. 10,000 from his pocket, along with his iPhone valued at Kshs. 40,000. He was then struck on the head, causing him to lose consciousness. Upon regaining consciousness, he found himself at Eagles Hospital.
12. PW2 later identified the appellant at the Kangemi stage, confirming his involvement in the robbery. Following the appellant’s arrest, he repeatedly contacted PW2, seeking forgiveness and, on one occasion, requesting Kshs. 100 to purchase soap.



13. Upon cross-examination, PW2 affirmed that while PW1 had initially been holding his phone, he had retrieved it before the appellant and his accomplices launched their attack. He further emphasized that he clearly saw the appellant during the confrontation and later identified him in an ID parade.
14. Cpl. David Oluoch, the Investigating Officer from Kabete Police Station, testified that on October 10, 2020, he received a report from PW1 and PW2 regarding an attack. He corroborated their account of the incident and produced phone purchase receipts as exhibits—Ksh. 40,000 for PW2 and Ksh. 20,000 for PW1. Additionally, he submitted PW2's P3 form dated October 13, 2020, and treatment notes as evidence.
15. In the course of investigations, he and his colleagues pursued suspects known at the Kangemi matatu stage, leading to the arrest of Daniel Wainaina and Dancun Kiverenge. An identification parade conducted on October 17, 2020, resulted in PW1 and PW2 positively identifying the appellant. He produced the ID parade forms as exhibits.
16. During cross-examination, he acknowledged that recognizing an individual does not equate to knowing their name, justifying the ID parade. He confirmed that no stolen property was recovered from the appellant and clarified that the complainants were not present during the arrest but were called later for identification. He stated he was unaware if other officers had taken the complainants to the crime scene prior to the arrest.
17. In his defence, the appellant gave unsworn testimony and denied committing the offence. He stated that he works at Kangemi where he carries loads at the stage. He was arrested on October 16th 2020 from the stage for an offence he did not know. He maintained his innocence.
18. The offence of robbery with violence under section 296(2) of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR* and *Oluoch v Republic [1985] KLR 549*)
19. The key issue for determination is whether the appellant was positively identified and whether the prosecution has proved its case beyond reasonable doubt. The evidence adduced establishes that PW1 and PW2 were attacked by the appellant and other assailants, who robbed them of their mobile phones at the stage. The appellant further assaulted PW2 by striking him on the head with a blunt object, rendering him unconscious. During the incident, the assailants stole an ITEL and an iPhone belonging to the victims.
20. PW1 and PW2 positively identified the appellant. The offence occurred at 10:00 p.m.; however, the stage was well-illuminated by streetlights. Both witnesses stated that they saw the appellant's face during the attack. The well-lit conditions negate any possibility of mistaken identity. The identification parade conducted at the police station confirms the appellant as one of the perpetrators of the offence.
21. Based on the evidence presented, PW1 and PW2 gave a clear and consistent account of the events. I find that the appellant was properly and positively identified and was subsequently apprehended after the incident. The testimony of the prosecution witnesses constitutes credible and direct evidence of visual identification, which I find to be reliable.
22. On whether force was used, the prosecution's evidence further establishes that PW2 was struck on the head, necessitating medical treatment at Eagle Hospital. The use of actual violence is corroborated by the testimony of the Investigating Officer, PW3, who produced a P3 form confirming the injuries



sustained. The P3 form and medical records indicate that PW2 suffered a cut on the head with active bleeding, as well as minor bleeding from the mouth. The injuries were classified as harm.

23. In light of this medical evidence, I find that the injuries sustained by PW2 are duly proved. Consequently, I conclude that force was used to rob PW1 and PW2.
24. The prosecution has led credible evidence that the appellant, in the company of other assailants, used violence to rob PW1 and PW2 of their mobile phones and Kshs. 10,000/-. I am therefore satisfied that the offence of robbery with violence has been proved beyond reasonable doubt, warranting the appellant's conviction which is upheld.
25. On sentence, the appellant was sentenced to death on both counts. Section 329 of the Criminal Procedure Code, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed.
26. In 2016, the judiciary developed the Sentencing Guidelines as a response to the challenges experienced by judges and judicial officers. The Guidelines were developed pursuant to section 35(2) of the Judicial Service Act 2011. The guidelines collated the principles of law that should guide courts in the exercise of their discretion so that sentences for analogous circumstances are delivered transparently and consistently.
27. Since the formulation of the SPGs of 2016, the criminal justice landscape around sentencing has evolved significantly, prompting NCAJ to review (The Sentencing Policy Guidelines 2023) the Guidelines to align with the emerging jurisprudence and make them more responsive to the justice needs of Kenyans. The revised SPGs provide guidance in sentencing where the mandatory minimum and maximum sentences are concerned, as well as sentencing hearings.
28. Consequently, the evolution of law and jurisprudence should grow in tandem with the Constitution while acknowledging the judiciary guidelines on sentencing.
29. Flowing from above, it is equally my view that a sentence imposed on a convict has to meet the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection, and denunciation. Therefore, it is no longer necessary or desirable to hold a convict for an indeterminate amount of time as this does not meet the objectives of the sentencing policy guidelines.
30. In this case, it appears that in determining the sentence, the learned trial magistrate's decision was primarily influenced by the mandatory nature of the applicable law. This jurisprudence has since shifted after the promulgation of the Constitution of Kenya, 2010 (See: Manyeso vs Republic Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) and (Evans Nyamari Ayako vs Republic Criminal Appeal No.22 of 2022 Kisumu Court of Appeal)
31. I hereby set aside the death sentence imposed in Counts I and II and substitute it with a sentence of twenty (20) years imprisonment on each Count. The sentences shall run concurrently from 16th October 2020, the date of the appellant's arrest pursuant to section 333(2) of the Criminal Procedure Code.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 10TH MARCH 2025

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D. KAVEDZA



JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent

Tonny Court Assistant

