



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwasambo v Republic (Criminal Appeal E002 of 2024)
[2025] KEHC 3802 (KLR) (12 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3802 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E002 OF 2024
AN ONGERI, J
MARCH 12, 2025**

BETWEEN

SAMSON MGHANGA MWASAMBO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. C. K. Kitthinji
(PM) in Voi CMCR Case No. 505 of 2021 delivered on 4th January 2024)*

JUDGMENT

1. The Appellant Samson Mghanga Mwasambo was convicted with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the [Penal Code](#) and he was sentenced to life imprisonment.
2. The particulars of the charge were that on 11th March 2021 at about 0300hours at Dr. Aggrey High School Teacher's Quarters in Wundanyi Sub-County within Taita Taveta County, the Appellant jointly with others not before court while armed with a bow and arrow and a pistol, robbed Anourine Namaka Walubengo of 2 laptops, a T.V set, 2 mobile phones, a flash disk, a pair of delta boots, 2 jackets, a laptop bag, 2 ATM cards, ID card, cash Kshs. 2,500/= and Kshs. 34,000/= withdrawn from the Mpesa account all valued at Kshs. 237,197/= and during the robbery tortured and beat Anourine Wamaka Walubengo.
3. The Appellant pleaded not guilty to the charge. The prosecution called 6 witnesses whose evidence in summary was that on the material day, PW1 Anourine Namasaka Walubengo was with his colleagues Mr. Hamisi and Mr. Nyakundi who are all teachers at Dr. Aggrey High School.
4. They were at Taita Taveta Luxury Hotel from 7:00p.m to 9:30p.m when they left to go to their houses at the school compound.



5. The complainant said went to his house adjacent to the school. He said he stayed watching television and he dozed off.
6. The complainant said at 3:00a.m. someone tapped him to wake him up. He woke up and saw two people. One of them had a mask and a cap and was pointing a gun at him.
7. The other had no mask and had a bow and arrow. They demanded cash from him and tied his hands at the back using a rope.
8. They ransacked his pockets and took Kshs. 2,500/= They demanded his Mpesa number and he gave them.
9. They demanded his vehicle keys and he told them he leaves them at the school compound.
10. The complainant said during the robbery he dashed away towards the gate but they caught up with him. He said he wrestled and overpowered them.
11. The complainant said he rolled to the gate that was sloppy and a guard opened the gate. He said the people went away.
12. The matter was reported to the police and he recorded his statement. Months later the Appellant was arrested and he identified him as one of the two people who robbed him.
13. The complainant said the Appellant did not have a mask and the lights were on during the robbery and he would identify him.
14. The Appellant in his defence said he did not know where he was on 11th March 2022. He denied that he was involved in the robbery or that the goods were recovered from him.
15. The trial court found him guilty as charged and sentenced him to life imprisonment.
16. The Appellant has now appealed to this court on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact by failing to appreciate that the charge sheet was bad for duplicity.
 - ii. That the learned trial Magistrate erred in law and fact in not considering that the Appellant's identification was not positive since the image on the CCTV camera did not capture his full facial features neither was it at close range.
 - iii. That the learned trial Magistrate erred in law and fact in failing to follow the right procedure for adducing video evidence.
 - iv. That the learned trial Magistrate erred in law and fact by failing to appreciate that the Appellant's identification was not positive since the evidence reveals that the Appellant was wrongly implicated in the commission of the offence.
 - v. That the learned trial Magistrate erred in law and fact in placing the Appellant at the scene of crime on circumstantial evidence failing to deduce that the prosecution case lacks ingredients of the offence.
 - vi. That the sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the Appellant's mitigation and the facts and circumstances unique to the case.



17. The parties filed written submissions as follows:- The Appellant submitted that the charge he was facing was defective and bad in law for duplicity. He was charged with robbery with violence contrary to Section 295 of the Penal Code.
18. He said Section 134 of the *Criminal Procedure Code* provides for the manner in which a charge and its particulars should be drawn as follows:

The Appellant relied on the case of *Joseph Njuguna Mwaura & 2 Others v Republic* (2013) eKLR where the court said that it would be wrong to charge an accused person with robbery under Section 295 as read with Section 296(2) of the Penal Code and this would amount to a duplex charge.
19. The Appellant also submitted that the CCTV footage did not reveal an image with his facial features. He said the CCTV camera captured a man in a black cap and leather jacket trouser and boots in an Equity ATM lobby room. That the said person was not identified as the Appellant.
20. Further that the evidence was based on identification by a single witness and the trial court was required to examine such evidence with care and circumspection.
21. The Appellant also submitted that Section 106B(4) was not complied with in the production of the video.
22. The said section provides that a certificate confirming the authenticity of the electronic record be produced describing the manner of production of the record. He relied on the cases of *Republic v Barisa Wayu Marigunda* (2011) eKLR and *Samwel Kazungu Kambi v Nelly Hongo & 2 Others* (2017) eKLR.
23. The Appellant submitted that the court relied on circumstantial evidence to convict him. He said the same fell short of the standard expected.
24. Finally the Appellant submitted that the sentence of life imprisonment is harsh and did not take into account his mitigation that he is a family man.
25. The Respondent submitted that the submission that the charge sheet was defective for duplicity is misplaced. The Respondent submitted that the evidence adduced supported the charge and all the witness evidence pointed to the actions of the Appellant in the complainant's house.
26. The Respondent relied on the case of *Rebecca Mwikali Mabula & 2 Others v Republic* (2016) eKLR where the Judge defined duplicity as quoted in *Black's Law Dictionary* as follows:-

“The Black's Law Dictionary 9th Edition at page 578 defines duplicity as the charging of the same offence in more than one count of an indictment or the pleading of two or more distinct grounds of complaint or defence for the same issue”
27. The Respondent submitted that Section 295 defines the offence while Section 296(2) defines the sentence. Further that the charge was read and explained to the Appellant and he had the opportunity of cross-examining the witnesses.
28. On the issue of identification of the Appellant, the Respondent submitted that the Appellant was positively identified by PW4 through the CCTV images, the leather jacket and cap were identified as belonging to the complainant.
29. Further, that the Appellant was not wearing a mask when the complainant saw him in his house and later identified him at an identification parade.



30. The incident lasted more than one hour and the complainant had sufficient time to be familiar with the Appellant.
31. On the nature of the electronic evidence, the Respondent submitted that the certificate is on page 146 of the bundle attached to Exhibit 14, the CCTV footage and the photographs.
32. The Respondent submitted that the complainant's mobile phone Huawei Y7 (Exhibit 4) was traced to mobile number 0709xxxx34 which was found registered in the name of the Appellant.
33. Further, that the complainant's leather jacket was found with the Appellant.
34. Finally that the sentence prescribed by law is a death sentence. Section 296(2) states as follows:-
35. The Appellant was sentenced to life imprisonment. The Respondent submitted that the trial court was right in sentencing the Appellant to life imprisonment in the circumstances of this case. The Respondent relied on the case of *Mohamed Ali v Republic* (2013) eKLR. That the Appellant was armed with a bow and arrow and he was in the company of a person who had a pistol and during the robbery, they injured the complainant.
36. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced at the trial court and to arrive at its own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses.
37. The issues for determination in this appeal are as follows:-
 - i. Whether the Appellant was properly identified.
 - ii. Whether the prosecution proved its case to the required standard.
 - iii. Whether the appeal should be allowed.
38. On the issue of identification of the Appellant herein evidence that although the Appellant was identified by one witness, the Appellant was arrested with goods stolen from the complainant.
39. I find that the testimony of PW1 was corroborated. There is evidence that the complainant's mobile phone Huawei Y7 (Exhibit 4) was traced to mobile number 07095813234 which was found registered in the name of the Appellant.
40. The complainant's phone was found with the appellant when he was arrested a few days later. In the case of *Hassan v Republic* (2005) 2 KLR 11, it was held as follows;

“Where an accused person is found in possession of recently stolen property in the absence of any reasonable explanation to account for this possession a presumption of fact arises that he is either the thief or a receiver.”
41. Further, there is evidence that the complainant's leather jacket was also found with the Appellant.
42. In the case of *Isaac Ng'ang'a Kabiga & another v Republic* [2006] eKLR, it was also held as follows;

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property



was stolen from the complainant, and lastly; that the property was recently stolen from the complainant.”

43. The Appellant was not masked when the incident occurred and there was light in the complainant’s house.
44. The Appellant interacted with the complainant and he was able to identify him at an identification parade.
45. I find that the prosecution proved the guilt of the Appellant to the required standard.
46. The conviction herein is secure and the sentence lawful.
47. I dismiss the appeal and uphold both the conviction and the sentence.

DATED, SIGNED AND DELIVERED THIS 12TH DAY OF MARCH 2025 IN OPEN COURT AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Prosecutor: Mr. Ngigi

Court Assistants: Maina/Millicent

