



REPUBLIC OF KENYA



KENYA LAW
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**Oketch & 2 others v Republic (Criminal Appeal E003 of 2022)
[2025] KEHC 6739 (KLR) (4 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 6739 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E003 OF 2022**

A. ONG'INJO, J

MARCH 4, 2025

BETWEEN

KEVIN OMONDI OKETCH 1ST APPELLANT

EVANS ONYANGO OKETCH ALIAS TUNA 2ND APPELLANT

BRIAN OMONDI ALIAS BOY 3RD APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal arising from the conviction and sentence by Hon. R. K. Langat Principal Magistrate in Rongo Principal Magistrate's Case No. E 171 of 2019 delivered on 17.11.21)

JUDGMENT

1. The Appellants Kevin Omondi Oketch (CRA E003 OS 2022), Evans Onyango Oketch (CRA.E004 OF 2022) and Brian Omondi alias Boy (CRA E005 OF 2022) were charged with the offence of robbery with Violence contrary to Section 296 (2) of the *Penal Code*.
2. The particulars of the offence were that on 3rd day of May 2019 at Kabuoro Village, Central Kamagambo Location in Rongo Sub County within Migori County in the Republic for Kenya the Appellants while jointly armed with dangerous weapons namely pangas and knife robbed Wycliffe Moi Owuocha of Kenya Shillings 150/=, trouser valued at 500/=, a pair of gumboots valued at 650/=, identity Card, ATM Card for Equity Bank, all valued at Kshs. 1,300/=and immediately before and after such robbery used actual violence to the said Wycliffe Moi Owuocha.
3. Upon considering the evidence of 7 prosecution witnesses and the Appellants unsworn testimonies the trial magistrate convicted the Appellants and sentenced A1 and 2 to suffer death whereas the 3rd Accused having been 16 years at the time of the robbery was sentenced to 10 years imprisonment.



4. Being dissatisfied with the conviction and sentence the 1st Appellant Kevin Omondi Oketch preferred the Appeal herein by filing Petition of Appeal on 11/1/22 based on the following grounds:-
 1. That the learned magistrate erred in law and facts, when he found the Appellant guilty and convicted the and yet the evidence adduced was insufficient to warrant a conviction;
 2. That the learned magistrate erred in law and facts by convicting and sentencing the Appellant on the evidence of recognition and failed to note that the alleged offence was committed at 9:30 p.m when it was dark and PW3 and PW5 could not have positively identify the 3rd Appellant as it was dark.
 3. That the learned magistrate erred in law and fact by convicting and sentencing the Appellant on the evidence of recognition using a torch, which said torch was not produced as an exhibit before court so that it could be scrutinized if indeed its light was sufficient to recognize the Appellant under darkness.
 4. That the learned trial magistrate erred in law and in fact by failing to critically analyze the Appellants Defence and failed in giving it an objective analysis.
5. Being dissatisfied with the conviction and sentence the 2nd Appellant Evans Onyango Oketch alias Tuna preferred the Appeal herein by filing the Petition of Appeal on 11/1/22 based on the following grounds:-
 1. That my Lord I did not plead guilty as was charged
 2. That my Lord the learned Honourable Magistrate erred in both law and fact by imposing death sentence to while relying on evidence of recognition which was not properly proved by the prosecution.
 3. That the learned Honourable Magistrate erred in both lw and fact by not considering that there was no report which was made at the police station by my name to confirm the evidence which were adduced against me by the prosecution

Reason wherefore, I pray that my appeal be allowed conviction quashed and sentence aside of Any order deemed fit to grant.
6. Being dissatisfied with the conviction and sentence the 3rd Appellant Brian Omondi alias Boy preferred the Appeal herein by filing the Petition of Appeal on 11/1/22 based on the following grounds:-
 1. That I pleaded not guilty to the charge herein
 2. That the trial court erred in law and fact by failing to comply with Article 50(2) (g) (h) of *the Constitution* of Kenya
 3. That the trial court erred in both law and facts by not observing that the ingredients of the offence herein were not proved as required in law

Reason wherefore

SUBPARA 1.

Conviction quashed and sentence put aside.
 2. To adduce more grounds after receiving the lower court proceedings.
7. Prosecution case was that PW5 Wycliffe Moi Owuocha was from Rongo on 3/5/2019 at around 9.30pm when he met two people who asked him where he was coming from and he told them he was



coming from town. That the 2 asked for his phone and he told them he left it at home. That when they asked what else he had he told them he had 150/= and ID documents. That suddenly someone came from the sugarcane plantation besides the road armed with a sword and asked the 1st two why they were still playing with the Complainant and cut him on the head. PW5 said it was Boy who cut him. He said Tuna A2 also cut him with a panga on the head and he blocked using his right hand which was cut severally. He said Kevin A1 also attacked him by cutting him on the face near the eyes. He said all the 3 were armed with weapons. He said he fell to the ground and lost consciousness and he came to when in Rongo hospital from where he was referred to Kisii County Teaching and Referral Hospital. PW5 said he had cut wounds on his back, buttocks and legs and he remained in the ward for 3 weeks. Upon discharge PW5 reported the matter at Rongo Police Station and identified the suspects at the station. That he was also issued with P3 which was duly filled and signed.

8. PW5 said he knew Keven Omondi Oketch and Evans Onyango alias Tuna as his neighbours and Brian Omondi alias Boy as a bodaboda rider. The Complainant said he had a torch that enabled him recognize the attackers clearly.
9. In cross examination the Complainant said that he knew A1 by name and physically. He said he had been seeing A1 in company of A2 and A3 but he did not know his house and had never been to his house. He said he had a torch that uses 2 batteriea but he did not mention in his statement that he had a torch that enabled him recognize his attackers. He said before he was attacked he had already recognized the attackers and that A1 was wearing a T-shirt like that of a policeman.
10. In cross examination by A2 the Complainant said that he lived about 1km from past A2's home. He said that Police got him from the hospital and he went to the station and identified the suspects and then taken back to hospital.
11. PW5 said he knew A3 because he used to see him in his locality and that there was a day he carried him on his motor bike from Gracia to the plot where he resides. He said he sees A3 near a particular Kinyozi and he knew him from Kabuoro village. He said A3 was armed with a sword and was the 1st to cut him. He confirmed that in his statement he had said it was A1 and A2 who attacked him first. He said A 3 and Tuna, A2 were almost of same height and Kevin was taller than the rest of the accused persons. PW5 also said that the incident happened about 10km from where A3 resided. He said that his home was 1.5km from his residence and that he raised alarm before he lost consciousness. He said he had severally seen A3 with the other 2 accused persons. He also said A3 had rasta (dreadlocks) and it would not be correct if his statement did not indicate that A3 had no rasta.
12. In re-examination PW5 said that he was attacked at 9.30pm and it was Boyi who attacked him first when he came from the sugarcane plantation. PW5 said all the 3 attackers had rastas. He said he had been seeing A3 for about 1 year. In being re-examined by the court he said he did not see the torch in hospital and he suspected the panga may have cut the torch. He said he was sober as he had only taken a little alcohol.
13. PW1 Francis Ochieng Owuocha testified that on 4/5/2019 at around 2.00am he received a call from the OCS Kamagambo Police Statin who informed him that his brother had been attacked by thugs. He said that by then the Complainant was unconscious. He said on visiting the Complainant at Rongo Hospital he found he had cuts on his head, arms and the buttocks and some flesh was missing. That the Complainant was referred to Kisii Level 6 Hospital where he was admitted for 2 weeks. That when the Complainant came to he told PW1 that he had been attacked by people he could describe as he had seen them before. That the Complainant told police the same information and 2 days later 3 suspects were arrested. He identified the suspects in court as A3- Tuna, A2-Boyi and A3 –Ambiso. He said A1



- was arrested at a drinking place near the scene of attack whereas A2 was arrested within Rongo and A3 was arrested from his home. He said the 3 accused persons were arrested after he identified them.
14. In cross examination he said he knew A1 by the name Ambiso. He said nothing was recovered from A1 that was stolen from the Complainant and he did not witness the robbery.
 15. In cross examination by A2 PW1 said he had never spoken with A2 and they had never had any dealings before. He said he did not see A2 assault the Complainant. He said it is the description given by the Complainant that implicated A2.
 16. PW1 also said that it is the Complainant who gave the description that led to A3's arrest.
 17. PW2 Fredrick Ogutu testified that A1 and A2 are from his village. He said he did not know A3. He said that on 3/5/2019 they were at a funeral in Nyarach when at 9.00pm Tuna (A2) arrived on motor bike but did not alight. That after a short time he rode off. That within 30 minutes A2 returned and informed them he had seen someone on the road who had been cut very badly. Pw2 said people at the funeral feared going to the scene and he asked A2 to take him to the scene. That on arrival at the scene which was some distance from the funeral they found the Complainant who was not known to him was badly cut and could not even sit on a motor bike. Pw2 called the clan elder and reported the incident. That police visited the scene and took the Complainant to Rongo Sub-County Hospital.
 18. In cross-examination PW2 said A2 was his brother's son. He said A2 was not of good character. He said that when A2 reported the incident he did not appear to panic . He said that he and A2 accompanied the victim to hospital and he left him there to assist in propping the victim as he was being stitched. PW2 said that A2 was wearing a sweater that looked like for AP and when he heard police were coming he removed it and hid it in the bush and that is when PW2 got suspicious of A2. He however did not tell the police of his suspicion. PW2 said he did not know A3.
 19. PW3 Kennedy Otieno Agutu testified that on 3/5/2019 he was heading home at 9.00pm when he used a short cut and he heard someone crying for help and asking why he was being killed. PW3 said this was near a drinking place. That he shone his torch and saw 3 people standing over someone who was on the ground and he recognized one of the 3 as Tuna the 2nd accused person and that he was armed with a panga. That when he shone the torch Tuna-A2 asked who was shining torch on them and started going towards PW3 and chased him while still armed with the panga. PW3 said he ran into the maize plantation and used another route to go home. That the following day he learnt Tuna had been arrested. PW3 said he had D-Light torch and it was bright. He said it was only A2 he was able to recognize. He said when A2 went to ask why PW3 was spoiling his name he denied.
 20. In cross-examination PW3 said that the 2nd accused had a straight panga. PW3 said he did not know A1 and 3.
 21. PW4 Danga Dishon testified that he was the Chairman of Community Policing Rongo South. He said that on 3/5/2019 at 10.00pm he was sleeping when he received a phone call from Fredrick Ogutu who reported that there was someone who had been injured badly and was lying on the road. That he called and reported to the OCS and police visited the scene. That the following day he visited the police station and learnt that the victim was Wycliffe Owuoche. He said that some young men had been arrested by the time he went to the station.
 22. PW6 Sergeant Elizabeth Akinyi Otieno testified that on 4/5/2019 she was Duty Officer at Kamagambo Police Station when at around 02.00hrsshe received a phone call from the OCS who informed her that someone had been cut badly after being attacked by unknown people in Kabuoro village. That in company of another officer and the station driver they proceeded to the scene and found a male adult who had multiple cuts all over the body and he had no trousers and shoes. That the victim was also



- unconscious. She said they found Fredrick Ogutu and Evans Onyango at the scene and they took the victim to Rongo Sub-County Hospital where he was identified as Owuocha. That the victim's kin were notified.
23. That the following day an informer disclosed the identities of the attackers and they were arrested on 6/5/2019. That PW6 went to Kisii Referral Hospital where the victim had been admitted and she found he could now communicate and she recorded his statement and he said he had identified Kevi, Tuna and Boyi as the attackers. She said that the Complainant told her that the attackers had gone to their plot one day prior to the date of attack and demanded to see Nyar Kisumu also known as Amotta and he denied them entry and instructed the women never to open for them. PW6 said the informer found the suspects in the act of attacking the Complainant. She said that the items stolen from the Complainant were not recovered. She said that A1 and 2 had dreadlocks at the time of the incident but had since shaved.
 24. In cross-examination by A1 Pw6 said that A1 was arrested by members of public the following day. She said the Complainant recognized A1 and described him.
 25. Pw6 also said that A2 was found at the scene at 2.00am and he was interviewed but he did not record a statement. She said A2 was identified by the victim and also Kennedy and he was arrested at a changaa den. She said she did not force A2 to identify anyone.
 26. In cross-examination by A 3 PW6 said that A3 did not have dreadlocks at the time of arrest.
 27. PW7 Daniel Nyamairo Clinical Officer at Kisii Teaching and Referral Hospital produced referral document for the Complainant from Rongo to Kisii-EXP1. He said he examined the Complainant on 9/5/2019 as In Patient No 233320. He said that the Complainant had multiple stitches and wounds on the scalp and around the eyes with swellings. That there was healing wound on the left side of the head, the right lower eye was chopped off and the sight was red and unable to close. That there was also multiple stitched wounds on both hands and wrist joints. PW7 also observed large septic wound on the buttocks and on the left side of the abdomen. PW7 assessed injury as grievous harm. He said that the patient was awaiting plastic surgery. He filled P3 form and he produced it together with Dscharge Summary as as EXP2 and 3. He said the patient was discharged on 14/5/2019.
 28. He said he first saw the patient on 4/5/2019 and again on 9/5/2019 and he was talking. He said the patient's clothes were not availed at the time of examination.
 29. When placed on defense the Appellants gave unsworn statements. Kevin Omondi Oketch (1st Appellant) stated that on 5/5/2019 he was from Homabay heading to murrum when he met a customer who wanted to be taken to Rongo town and he took the customer. That on his way back at Hass Petrol Station he met another customer who wanted to be taken to Gracia Area and the customer led him there. That on reaching there he found people taking changaa and as he was still waiting for the customer a Probox vehicle came and it stopped. The people who were taking changaa fled and that is how he was rested. That he was asked if he assaulted anyone, he was beaten and taken to the crime office where his finger prints were taken on 6/5/2019, charged and brought to court. That he was charged with offence and people he didn't know.
 30. The 2nd Appellant Evans Onyango Oketch also gave unsworn statement and stated that on 3/5/2019 he was at the grandmother in-laws burial. That he had a motorbike and while on way he saw people lying on the road and it was 9:00p.m. He proceeded to the funeral and on his way he called the security at the funeral and explained to them what he saw. He said he carried the security officer to the scene where they recognized that the person he saw was resident in that area and he was bleeding. That the person was drunk and Kennedy told them to call the clan elder who in turn called the OCS and officers



were send to the scene and the said person was taken to Rongo Sub County Hospital. DW2 said he was arrested on 10/5/2019 charged and brought to court. That he was charged with offence that he was not aware off. That he only helped the complainant to be taken to hospital.

31. The 3rd Appellant Brian Omondi (Boy) testified that on 5/5/2019 at around 3:30p.m when he was doing daily work at home he saw 4 people approach him and one of them arrested him. The people who arrested him told him that they were police officers from Kamagambo Police Station. That when he asked why he was being arrested he was informed that he will get explanation in court. That he was charged on 20/5/2019 with the offence he didn't know. One of the witness recognized him. He also stated that he was not a bodaboda rider and was not riding motorcycle.
32. The Appeal was canvassed by way of written submissions.
33. The 1st Appellant Kevin Omondi Oketch filed submissions dated 22.8.23. He submitted that the trial court relied on the evidence of a single identifying witness to convict him and this did not prove beyond reasonable doubt that he was at the scene as the offence was committed at night. He said that the complainant did not have ample opportunity to recognize him as it was total darkness and the complainant PW5 merely believed that he was at the scene without plausible evidence.
34. The Appellant further argued that the complainant had taken a little alcohol and being that the torch was shown at his face directly it was not possible for him to identify the Appellant. He said none of the other witnesses identified him as having been at the scene.
35. The Appellant further argued that the prosecution had not proven the nexus between him and the offence in question. He said that he had explained where and why he was arrested and he should have been acquitted.
36. On the issue of sentence, the first Appellant argued the court to alter the sentence as per the Article 50(2) (p) of *the Constitution* to an appropriate sentence.
37. Finally, he also argued the court did not consider that he was in custody for three years during trial and his sentence ought to run from the date of arrest.
38. The 2nd Appellant submitted that although PW2 alleged that he suspected the Appellant to be the one who committed the attack on the victim he never informed the police of the suspicion. He also said that no identification parade was conducted to confirm that PW2 suspected him to have committed the vicious attack on the victim. He said that he and PW2 never recognized the victim but only assisted to call the police to rescue the victim as good Samaritans.
39. In regard to the evidence of PW3 the Appellant said that although PW3 alleged that he used a d-light torch that night which made him recognize the appellant and two others standing over a person who was crying on the ground PW3 did not report that to the village elder nor the police. That he didn't also indicate on his statement that he used the torch on material night. The 2nd Appellant said that the incident took place at night and there was no source of light and therefore PW3 gave false statement which cannot sustain a conviction. He said the evidence of PW3 was meant to fix the Appellant because PW3 and PW5 came from the same village as the Appellant. The Appellant said that the prosecution didn't prove their case to required standard as needed to sustain the conviction. He also argued that his defense was not considered. He urged the court to quash the conviction and set aside the sentence.
40. In the 3rd Appellant's submission his Advocate argued that PW1 testimony was based on information and description given to him by the complainant as he did not witness the incident happen. It is said that it was not clear whether he had identified the Appellant before or how he managed to positively identify him by the description given to him by the complainant. On the evidence of PW2 he submitted



that he didn't mention the Appellant and in cross examination he said he never saw the Appellant on the material night. PW3 also confirmed that he didn't know the Appellant neither did he see him on the material night. PW4 also confirmed not knowing the Appellant and didn't know who were arrested for this offence.

41. As for PW5 the complainant it was submitted that he didn't reveal how he was able to identify the Appellant considering that it was dark and that he lost consciousness immediately upon being attacked. It was also submitted that the mention of a torch in the Complainant's testimony was an afterthought to implicate the Appellant as the same was not indicated in his statement. It was submitted further that the few instances of interaction between the Appellant and the Complainant was not sufficient to bolsters his knowledge of the Appellant. That although the Complainant said that the Appellant had rasta hair investigating officer confirmed that the Appellant was identified as not having the rasta hair. The holding in *Terkali and Another vs. Republic 1952 E.A.* was cited to support the importance of the evidence by the first report by the complainant to the police. It was submitted that the Appellant's case appears to be that of mistaken identity since the person described to the police was not having rasta but in court PW5 says the assailant had rasta.
42. It was also submitted that the Appellant was arrested after an informer had disclosed his identity but the identity of the said informer was not given and it was not confirmed whether the said informer was at the scene of crime or how the informer came to know that it was the Appellant who attacked the complainant.
43. Regarding the identification / recognition of the assailants, it was that the court ought to examine such evidence carefully and be satisfied that the circumstances of identification were favourable and free from error before making a conviction.
44. The Appellant's counsel argued that PW5 did not give proper and correct description to the police during the first report and his inclusion was just after thought. The holding in *Wamunga vs. Republic [1989] KLR 24* was relied on by the Appellant.
45. The Appellant also faulted the Trial Magistrate for convicting him based on evidence of recognition using a torch without establishing if indeed the light from said torch was sufficient to recognize him under the darkness. He said the said torch was not produced in court and the same is not mentioned in the complainant's statement and is probably an afterthought. The Appellant theretofore concluded that the evidence on identification / recognition was not water tight and the Complainant didn't know the identity of his attackers and the description he gave to the police did not correspondence to the one made in court during trial. It was contended that PW5 is unreliable and as such his evidence against the Appellant was prejudicial. To support their position the Appellant's counsel relied of the case of *Ogeto vs. Republic 2004 KLR 19* where it was stated that"-

“It is trite law that a fact can be proved by the evidence of a single witness although there is need to test with the greatest care the identification evidence of such a witness especially when it is shown that conditions favouring identification were difficult. Further, the Court has to bear in mind that it is possible for a witness to be honest but to be mistaken.”

46. Finally, the Appellant argued that the Trial Magistrate failed to critically analyse the Appellants' defence. The Appellant argued that the complainant said that he was a bodaboda rider which allegations was not true and the court ought to have sought evidence to confirm whether indeed he was a bodaboda rider or not . he said that the Appellant's case appeared to be that of a mistaken identity.
47. Further it was submitted that the trial magistrate failed to give reasons why the Appellant was convicted and why the Appellants defense was not believed being that it was not challenged by the prosecution.



The Authority in *Peter Karobia Ndegwa vs. Republic* 1985 KLR was relied upon to support the position that an accused person is the most sacrosanct individual in the Administration of criminal justices. The case of *James Nyanamba vs. Republic* 1983 EKLR was also relied on where the Court of Appeal opined that the first Appellate court should have considered the evidence as a whole in order to comply with Section 169 (1) ad 169 (2) of the *Criminal Procedure Code* by identifying points for determination giving a decision and reasons for decision.

48. In conclusion of the 3rd Appellant's submissions it was argued that identification of the Appellant was not free from error as the Appellant was attacked suddenly and he observed his attackers momentarily as he lost consciousness upon being attacked. That in this state and circumstances he could not identify his attackers and that his identification or description of the Appellant was weak and was insufficient to support a conviction. That besides, there was no other person who was present or saw the Appellant attack the complainant. That the informer who aided the police to identify the Appellants was not called as a witness so that he could be interrogated on how he came to learn, recognize, or how he knew that it was the Appellants who attacked the Complainant.
49. In the Respondents submissions it is stated that the Complainant knew the 3rd Appellant as his neighbor and that he described him as Boy a bodaboda rider. That it is the Appellant who appeared at the scene and told his accomplices "Why are you still playing with him and he cut him on the head. The Respondent submitted that identification was by recognition which is more reliable than that of a stranger. That the complainants had a bright torch which would shine upto 10 meters and there was no error of identification as he saw the assailants clearly as they were close when attacking him.
50. On failure to produce the torch it was submitted that it was sufficient for the Complainant to describe the nature of lighting and its intensity. The Respondent submitted that the ingredients of the offence of robbery with violence namely theft, serious injuries to the complainant and the number of assailants as define in the case of *Oluoch vs. Republic* 1985 KLR were established.
51. The Respondent submitted that the Appellant's defense was considered and the same could not displace the cogent evidence presented by the prosecution. The court was urged to uphold the conviction and sentence of the Trial Magistrate.

Analysis and Determination

52. In a first appeal, the duty of the court was stated in *Mark Oiruri Mose vs. R* (2013) eKLR thus;

“... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”
53. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the judgment of the trial court and submissions by the rival parties, the issues for determination are :-
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether the identification of the accused was sufficient.
 - iii. Whether the sentence of death was manifestly harsh, inhuman and excessive considering the overall circumstance of the case.



Whether the prosecution proved its case beyond reasonable doubt.

54. The offence of Robbery with Violence is provided for under the Section 296(2) of the Penal Code as follows:“
296. Punishment of robbery
- (1)
- (2) 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.”
55. The ingredients of this offence were aptly discussed by Cockar, C.J., Akiwumi & Shah, JJ.A. in the case of Johana Ndungu vs. Republic CRA. 116/1995, [1996] eKLR where the Court of Appeal in Mombasa stated as follows:-
56. In order to appreciate properly as to what acts, constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is ‘use of or threat to use’ actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore -described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved, will constitute the offence under the subsection:
- i. If the offender is armed with any dangerous or offensive weapon or instrument; or
- ii. If he is in company with one or more other person or persons;
- iii. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”[See also Oluoch v Republic [1985] KLR].
57. Similarly, in the Court of Appeal case of Criminal Appeal No. 300 of 2007, Dima Denge & Others v Republic (2013) eKLR, the learned Bench 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.
57. In this case PW5 Wycliffe Moi Owuocha was on his way home on 3.5.2019 at around 9:30p.m when he was attacked by two people and were later joined by a third person who cut him on the head with a panga and as he was blocking the blows to his head his right hand was cutting severally. He said that all the three assailants were armed with weapons and they cut him in the back, head, hands buttock and legs. He was also robbed of the items mentioned on the charge sheet and that he lost consciousness and only came to while in hospital. He said he was admitted for three weeks.
58. In those circumstances the prosecution proved beyond reasonable doubt that the complainant was attacked by three people who were armed with dangerous and offensive weapons or instruments namely pangas and a sword. It was also proved that the assailants were more than one and that at the time of the robbery or immediately before or immediately after the time of robbery the assailants cut the complainant on the head, his right hand, face near the eyes, back, buttock and legs.



59. On the issue of whether the assailants were properly identified this incident occurred at night at 9:00p.m according to the complainant and therefore extra caution has to be taken to ensure that the Appellants were positively identified as the perpetrators of the offences. In the complainants evidence he said that the first and second Appellants were his neighbors and the third Appellant was a bodaboda rider. He said that he was able to recognize them because he had a torch that could shine up to 10 meters. In cross examination the complainant said that he didn't mention in his statement that he had a torch. He also said that he was taken to the police station to identify the assailants who had been arrested and was taken back to the hospital. He said that he had seen the three Appellants together before and that all the Appellants had rasta hair. The complainant said that he had only taken a little beer that day. The Complainant was therefore not sober at the time he was attacked and it was at night. The torch he alleged to have used was not indicated in his statement.
60. According to PW1 the Appellants were arrested 2 days after the attack and that the Complainant told him that he was attacked by people he could describe and whom he had seen before. He said that he led police to arrest the suspects. PW1 did not give the description of the suspects that the Complainant gave him that made him know it was the Appellants herein that attacked and robbed the Complainant.
61. According to the investigating officer Sgt. Elizabeth Akinyi Otieno an informer disclosed the identities of the attackers and they were arrested on 6.5.2019 and thereafter she went to the hospital where the complainant was admitted and the complainant said that he had recognize his attackers as Kevin, Tuna and one Boy. That the complainant told her prior to that date the three Appellants had gone to the plot where the Complainant was staying and demanded to see one Nyar Kisumu also known as Amota and he denied them access. The investigating officer said that the informer who disclosed the identities of the attacker found them in the act and that one Kennedy also saw them. In cross examination PW6 said that the first Appellant was arrested by members of public and that it's the complainant who described him. PW6 did not say the kind of description that the Complainant gave in reference to the 1st Appellant that made them know he was the one and therefore he was arrested.
62. In response to the 2nd Appellant PW2 said they found him at the scene at 2:00a.m and she interviewed him and subsequently he was identified by the complainant and one Kennedy. PW1 and PW6 did not give particulars of description that the complainant gave in respect to 1st Appellant that made them or members of the public to apprehend him. Whereas the Complainant said that 1st Appellant was wearing a T-shirt that resembled that of a policeman, PW2 who accompanied the 2nd Appellant to the scene on the material night said that it was the said 2nd Appellant who wore a sweater that resembled the one worn by AP and that 2nd Appellant removed the said sweater and hid it in the bush when he heard police were coming. The issue of what the suspects were wearing was not told to the police and is also not indicated in the statements of PW2 and PW5 and it leaves a lot of doubt as to the veracity of the prosecution evidence as to identification of the real attackers of the Complainant.
63. The Complainant said he knew the 2nd Appellant as they come from the same village and that he recognized him as Tuna but he did not give that name to the police. It is the 2nd Appellant who went to call PW2 that he had seen someone lying along the road and was badly injured. He accompanied PW2 to the scene and remained there until police arrived and took the victim to the hospital. The 2nd Appellant even remained at the hospital and assisted to prop up the victim as he was being attended to. PW3 who alleged he identified the 2nd Appellant at the scene did not described how he was dressed and he did not go to the station to report what he had seen at night, he said when Tuna went to ask why he was spoiling his name he denied that he had spoilt Tunas name.
64. The Complainant said that 3rd Appellant had rasta(dreadlocks) but the same was missing in his statement.PW6 the investigating officer said that the Complainant described the 3rd attacker as Boyi



but he had no dreadlocks. When the suspects were arrested the Complainant was removed from the hospital to go and identify them but the court was not shown that an identification parade was conducted to confirm that the suspects were properly identified. The question that this court asks itself is if the Complainant recognized his attackers why did he not give their names to the police or even his brother PW1? Why did he give a description which PW1 did not disclose? Why did he give contradictory description of A3? There is also the evidence by PW6 the investigating Officer that the 3 Appellants had gone to the plot where the Complainant stayed and demanded to see a lady known as Amotta and the Complainant denied them entry. The Complainant did not say the Appellants had been to his place some days before the incident and this piece of evidence by the I/O is not clear how it is connected to the offence herein and identification of the suspects..

65. Based on the fact that that the offence herein was committed at night and circumstances of identification were difficult, and considering the many discrepancies and doubts in the prosecution evidence this court finds that it was unsafe for the Trial Magistrate to convict the Appellants. The doubts raised ought to have been resolved in favour of the Appellants. The appeals herein are merited and are allowed. The convictions are quashed and sentences set aside. The Appellants are to be set at liberty unless lawfully detained.

DELIVERED, DATED and SIGNED at MIGORI this 4th day of March, 2025.

A. ONGINJO

JUDGE

Judgment delivered in the presence of:

Mr. Oimbo for Respondent

Victor / Lola

Accused 1 –present in person – Kisumu Maximum

2nd Appellant – present in person – Kisumu Maximum

3rd Appellant present in person – Held at Migori G.K.

