



REPUBLIC OF KENYA



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**Situma v Republic (Criminal Appeal E058 of 2023)
[2025] KEHC 3093 (KLR) (3 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3093 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CRIMINAL APPEAL E058 OF 2023**

RK LIMO, J

MARCH 3, 2025

BETWEEN

WILSON SIMIYU SITUMA APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. C.M. Kesse (Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case No. E4667 of 2021 delivered on 15th June, 2023)

JUDGMENT

1. Wilson Simiyu Situma, the accused herein was charged with the offence of Robbery with Violence contrary to Section 296(2) of the [Penal Code](#) vide Kitale CM's Court Criminal Case No.E4667 of 2021. The particulars of the charge were that on the 15th January 2021 at Sinendet Trading Centre, Kiminini within Trans-Nzoia County jointly with others not before court being armed with dangerous weapon namely AK 47 Rifle robbed Wycliffe Kipkorir Ngetich Kshs.100,000/- from the counter of his ADONAI MINI SUPERMARKET shop and immediately after the time of such robbery murdered PETESON OKUSIMBA.
2. The appellant denied committing the offence and the prosecution presented 5 witnesses. The appellant on his part gave sworn statement denying the offence but the trial court upon evaluation of the evidence found that the prosecution had proved its case and convicted him sentencing him to serve life imprisonment.
3. The appellant felt aggrieved and appealed against both conviction and sentence and filed this appeal. Before I delve on the grounds of appeal I will have a look at the summary of evidence tendered at the trial.
4. The prosecution's case was based on direct and indirect evidence. The appellant's main grievance in this appeal bridges on question of identification. According to him he was not positively identified or



linked to the robbery incident. He blamed the complainant for having a score to settle with him. The following is its summary of the evidence tendered.

5. Wycliff Kipkorir Ngetich (PW1), testified that on the 15th January 2021 at around 7.30pm (hereinafter to be referred to as material date and time), there was a blackout in his shop and he made arrangements to get alternative source of light by lighting candles and using the light from his mobile phone. He stated that while he was in the process of getting other sources of light, he heard a commotion outside and a customer being beaten. He added that two persons entered his supermarket and he heard gunshots as his attendants struggled with the intruders. He stated that the persons were in black and he had not seen them before. He revealed that one was armed with an AK 47 but he could not recognize him. He stated that he was in a corner of the shop and he opened a door and escaped.
6. Cosmas Kipkorir (PW2) testified that he was a shop attendant at the said supermarket and recalled that on the material date and time there was a blackout and that two people entered the supermarket while armed with a gun. He stated that he had lit candles and that one of the robbers who was armed with a gun hit him with a rungu and one of the attendants flashed a light on the appellant who responded by shooting him dead.
7. Inspector Mbalani Alfred Kahi (PW3) a ballistic expert from DCI Headquarters Forensic Ballistic Section testified that on 26/1/21 he received exhibits from PC Stephen Kimathi for forensic analysis. He told the trial court he received the following:-
 - i. two spent cartridges (marked A&B)
 - ii. 1 round of ammunition (marked C)
8. He stated that he was requested to examine the calibre of exhibit A & B and whether they were fired from a rifle. He was also required to examine the calibre of C. He told the trial court that from his examination, he established that exhibit C is a round of ammunition of 7.62 by 39mm and is designed for AK 47 rifle. He stated that exhibit A & B were fired cartridges of calibre 7.62 by 39mm.
9. He further testified that on 13/8/2021 he received further exhibits from PC Stephen Kimathi for forensic analysis and listed the same as follows:-
 - a. An AK 47 rifled serial number AB 3876 marked A1.
 - b. 1 magazine exhibit B1
 - c. 2 rounds of ammunition marked exhibit C1 and DII
10. He stated that upon forensic analysis he made the following findings/conclusions:-
 - i. That exhibits A & B were fired from the AK47 serial NO.3876 (Exhibit No.A1)
 - ii. That the same rifle fired exhibit A&B.
 - iii. That the same rifle was used in another robbery incident reported at Mudete police station vide OB No.37/04/10/2012.

He also told the trial court that the same rifle was used in a murder incident reported in Busia police station vide OB No.930/185/2021.
11. He tendered the exhibit memo as PExhibit 4, one round of live ammunition PExhibit 3, his report PExhibit 5, memo accompanying firearm PExhibit 6 and the rifle PExhibit 7. He stated that the firearm was taken to him from Kiminini police station.



12. Inspector John Kemboi (PW4) on his part testified that on 8/8/2021 he was called by a lady known as Eunice at Chepchoina Soko Mjinga Market at 9.30pm who informed him that they had found someone with a gun. He stated that he rushed to the scene where he saw a gun and a person who had been subjected to a beating by mob justice. He stated that he called his boss Inspector Patrick and a duty officer who joined him at the scene. He stated that they searched the suspect and recovered Samsung smart phone, 2 sim cards from Safaricom and Airtel. He stated they took the suspect to hospital and handed over the gun and the other items to the investigation team.
13. He stated that the suspect they arrested was the appellant and identified the gun he was found with together with 2 magazines and 2 rounds of ammunition. He stated that the suspect was in the process of attacking a village elder named Evalyne Namanje who had reportedly sold a parcel of land and was suspected to still be having the proceeds of land sale.
14. PC Zaddock Wafula (PW5) the investigating officer attached to DCI Kiminini testified that he took over the investigations of the case after he received a report at the police station Kiminini. He stated that he together with a colleague went to the scene at Kibomet, Adonai Supermarket, where they found goods scattered all over with candles burning. He stated that he checked at small hotel on top of the supermarket and recovered a cartridge of an AK 47 rifle. He also noted a person lying dead within the perimeter of the supermarket. He stated that he organized for the body to be taken to the mortuary. He stated that he later organized for a post mortem of the body and later prepared an exhibit memo of 3 exhibits, 2 cartridges and one live bullet found beside the body.
15. He stated that he began a manhunt of the suspect and on 8/8/2021 the suspect was arrested at Chepchoina Market with a rifle and he organized for the gun to be taken for forensic analysis in Nairobi.
16. He stated that the forensic analysis revealed that the rifle recovered was used in the robbery incident.
17. He further stated that the appellant had committed several crimes within Trans-Nzoia and its environs. He tendered the business permit of the Adonai Supermarket as PExhibit8 and post mortem report as PExhibit 9.
18. The officer further stated that he did not conduct identification parade but insisted that the appellant was positively identified.
19. When placed on his defence, the appellant gave sworn statement and denied committing the offence. He defended himself that none of the witnesses positively identified him other than one whom he faulted for having a grudge against him. He stated that the differences arose as a result of some charcoal he had bought which caused fire to a vehicle. He stated that he does not know how to operate a gun. He denied possession and denied being assaulted by a mob.
20. He pointed out that there was no evidence adduced from Safaricom to show use of sim card recovered and he also denied facing other cases in other courts. When pressed under cross-examination he stated that he differed with one John Kemboi and that is why he framed him. He also stated that he was not at the scene of crime at the material time.
21. The trial court evaluated the evidence tendered and found that all the ingredients of the offence of robbery with violence had been proved and linked the appellant to the required standard to found conviction.
22. As observed above the appellant was dissatisfied with the conviction and sentence and filed this appeal raising the following grounds namely:-



- a. That there was no identification parade conducted.
 - b. That the learned trial magistrate erred by failing to note that key and critical witnesses including the doctor, finger dusting expert were not called to testify.
 - c. That the trial magistrate erred by failing to note that the prosecution's case was not proved beyond reasonable doubt.
 - d. That the trial magistrate erred by imposing an excessive sentence.
 - e. That the trial magistrate erred by rejecting his defence without cogent reasons.
23. In his handwritten submissions the appellant has made extensive submissions some of which raise new grounds albeit without first seeking leave of this court to add new additional grounds as provided under Section 350(b) of the *Criminal Procedure Code*. This court will not consider the same because they have been raised improperly at submissions stage.
 24. The appellant submits that the complainant in his evidence in court did not mention anything being stolen in Adonai Mini Supermarket. He contends that the complainant neither mentioned any stolen item or property in his supermarket in examination in chief or under cross-examination.
 25. He further points out that PW2 who was also present at the scene did not mention that anything was stolen from the shop. He contends that there was evidence of an attack but none of the witnesses at the scene pointed out that anything was stolen from the shop. He contends that the charge against him should have been attempted robbery under Section 297(2) of the *Penal Code* but not robbery with violence under Section 296(2) of the *Penal Code*. He submits that the charge sheet was defective to that extent. He relies on the case of Jason Yongo –vs- Republic (1983)eKLR.
 26. He contends that the state ought to have charged him with attempted robbery instead because there was no evidence that he robbed the owner of the supermarket Kshs.100,000/- as per the information on the charge sheet.
 27. On identification, the appellant contends that because he was not known by the prosecution witnesses, visual identification was not conclusive. He faults the trial magistrate for not analyzing the evidence well with respect to identification.
 28. He claims that the complainant (PW1) stated that he had not seen the attackers before and that when he had gunshot rending the air, he opened the door and escaped. He also points out that PW1 stated that he came to know the appellant during trial adding that there was no identification parade conducted. He submits that the conditions or circumstances surrounding the scene or the supermarket were not conducive for positive identification.
 29. He further points out that the complainant never gave descriptions of the attackers to the police and that there was no evidence tendered to show how PW1 could identify him after the robbery incident.
 30. He submits that there was no evidence tendered that positively linked him with the robbery incident.
 31. He contends that PW2 gave contradictory evidence on whether he was present at the scene or not. He points out that at one instance he stated he was not present and in another instant he stated he witnessed the incident. The appellant submits that the evidence of PW2 as such was unreliable.
 32. He submits that there was no identification parade carried out because there was no witness who gave descriptions of the robbers. He submits that PW1 categorically stated he could not identify the attackers and workers how could he identify him during trial.



33. He further submits that his arrest was linked to an incident at Endeless on 8/8/21 as narrated by PW4 (Inspector John Kemboi). He contends that PW4 stated that he was called by a village elder known as Eunice and when he arrived at the scene, he saw a gun but never shed light as to who had the gun. He says that there was lack of clarity in the evidence given by PW4 and that the ambiguity was compounded by failure by the prosecution to avail the said village elder (Eunice) to shed light.
34. The appellant also points out that the evidence of PW4 had inconsistencies and points out that he testified that the appellant was arrested on 8/8/2021 after the incident at Chepchoina while he was presented in court on 18/10/2021 in court . He points out that PW4 did not reveal where he was kept and where he was arrested on 18/10/2021.
35. He submits that PW4 arrested him yet he did not know him and that there was no evidence tendered to show that one Evalyne Namanje was a target of another robbery. He denies knowledge of the weapon tendered during trial.
36. He further faults the investigating officer (PW5) for being malicious against him and acting on rumours. He contends that PW5 conspired with others to link him in other cases pending in other courts and gave examples which however are unrelated to this appeal. He contends that the prosecution did not prove its case beyond doubt.
37. He submits that he was not found with any stolen item because none was stolen. He contends that it is only PW5 who stated that Kshs.100,000/- had been stolen and a person killed. He submits that PW5 was not present at the scene when the incident occurred. He contends that the evidence of PW5 and all the prosecution witnesses were unreliable and asks this court to allow his appeal.
38. The State on the other hand vide the ODPP has opposed this appeal through written submission dated 2nd December 2021 done by M/s Jackline Kiptoo for the ODPP.
39. The Respondent however appeared to have gotten mixed up because the written submissions relates to another appeal NO.E048/23 involving the same appellant over an appeal against conviction from a charge of escape from lawful custody contrary to Section 123 as read with Section 36 of the *Penal Code*.
40. That notwithstanding, this court is inclined to determine this appeal on merit.
41. The appellant as observed above was charged and convicted of robbery with violence contrary to section 296(2) of the *Penal Code*. Section 295 defines robbery 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”.

Section 296(2) of the *Penal Code* provides for sanction for a robbery and Section 296(2) gives a different harsher sentence if the offender is armed with any dangerous or offensive weapon or is in company of one or more other persons. It states:-

“ If the offender is armed with any dangerous or offensive

weapon or instrument or is in the company with one or more other persons or, if, at or immediately before or immediately after the time of such robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.



42. Flowing from the above the offence of robbery with violence occurs when the following elements are established, proved and linked to an individual offender(s):-
- i. Theft of anything with use of force or threat of it.
 - ii. When the offender is either armed with dangerous/offensive weapon/instrument or is in the company of one other person or other persons and/or wounds, beats, strikes or uses any other form of violence to subdue the victim or retain the stolen item.
43. The appellant's main gist of his appeal is that the evidence tendered at the trial court lacked the element or the ingredient of theft because nothing was stolen as per the evidence tendered.
44. It is evident from the evidence tendered at the trial court there were 2 eye witnesses to the robbery incident on 15/1/2021 at a supermarket known as Adonai Mini Supermarket at some place known as Sinendet, Kiminini Sub-County. Wycliff Kipkorir Ngetich, (indicated as PW1 but it should be PW2) complainant and Cosmas Kipkorir indicated as PW2 but should be PW3. PW1 was Dr. Dennis Nanyingi who tendered post mortem report (PExhibit 1) of Peterson Okusimba Edmond who was shot dead during the robbery incident.
45. Going back to the evidence of the complainant Wycliff Kipkorir Ngetich (PW2) stated in his evidence in chief that there was black out and was lighting candles when 2 people entered the supermarket and he heard gunshots. He says he saw the two persons armed with AK 47. He stated that he "opened the door and escaped". He had not seen the attackers before and could not identify them but in his evidence there is no mention of any theft.
46. Now let me turn to Cosmas Kipkorir (PW3) who stated that he was an employee of the said supermarket. He also stated that there was a black out at the material time and was in the process of looking for alternative source of light (it was around 7.30pm) when two armed attackers entered the supermarket. He stated that one hit him with a rungu and his colleague (deceased) flashed light on one with the gun who in turn shot him. PW3 was categorical that it was the appellant who shot him. What is glaring from his evidence is that he did not mention that anything was stolen or that he saw any of the 2 attackers grabbing anything in the supermarket during the incident.
47. The only prosecution witness who touched on the theft was the investigating officer PC Zaddock Wafula (PW5 – it should be PW6). He mentioned only in passing about Kshs.100,000/- stating as follows:-
- “As we continued to manhunt the accused, the report came and was found by the accused, Kshs.100,000/- and in the process killed Peterson Okusimba, I compiled the file and charged the accused with robbery with violence”.
- The investigating officer was not candid that he recorded statements from a witness who saw the appellant or his accomplice rob the complainant or anyone at the scene of any money or valuable.
48. The trial court in its evaluation of evidence made a positive finding that the proprietor of Adonai Supermarket, Wycliff Kipkorir Ngetich (PW2 not PW1 as indicated in the record) was robbed of Kshs.100,000/-. That finding was a misdirection or erroneous because there is no evidence tendered to back up the finding.
49. In the absence of the crucial element of stealing or robbing, the charge of robbery with violence could not be sustained. It is true as submitted by the appellant that he could only have been charged with attempted robbery (contrary to section 297 of the [Penal Code](#)) and not robbery with violence but even



then there should have been evidence tendered showing the attempt to rob and/or how the robbery was foiled or thwarted.

50. The other important issue raised in this appeal is identification which is also crucial in cases of this nature. The appellant contends that there was no evidence tendered to show that he was positively identified faulting the prosecution for framing him without conducting an identification parade.
51. The complainant, Wycliff Kipkorir Ngetich (PW2) stated that he had not seen the attackers before and could not identify them. He stated that he saw them because there even if there was blackout, he had lit candles and was able to see one brandishing an AK 47 rifle. He was clear in his evidence that he was not invited to an identification parade. With only the candles identifying one at a distance was not easy.
52. Cosmas Kipkorir (PW3), the other only eye witness to the incident stated he saw the 2 attackers with one having a black torch and the other in a black jumper. He further stated one had a mask while the one holding the gun was not masked. He stated that it was the appellant who had the gun and he was the one who shot and killed the deceased colleague. He however never stated how he identified the appellant. The question posed is did he know the appellant before the incident? Or was he called to identify him when he was arrested about 8 months later? In the absence of clear or cogent evidence regarding how PW3 (Cosmas Kipkori) identified him, it was unsafe for the trial court to render a finding that the appellant was positively identified. This court is not satisfied that identification was beyond reasonable doubt because the prosecution left out glaring gaps in their case which were fatal to their case.
53. Taking a look at the evidence of the investigating officer for instance PC Zaddock Wafula (PW6 wrongly indicated as PW5 in the proceedings) stated that he never conducted any identification parade when put to task under cross-examination by the appellant, he stated the he had a witness who identified the appellant by name but stated “I cannot bring him to court”. The question posed is why would he not avail such a crucial witness in court? Again if the witness he availed did not know the appellant why not carry out an identification parade to strengthen his case against the appellant?
54. The other glaring gap in the prosecution’s case is how the appellant was arrested and the recovery of the gun that Inspector Mbalani Alfred Kahi (PW3- should have been PW4) carried out comprehensive forensic analysis.
55. Inspector John Kemboi (indicated as PW4 should have been PW5) stated in his evidence that on 8/8/2021 he was called to Chepchoina Soko Mjinga by a village elder known as Eunice. He stated that he told him that one of her residents had a gun and on reaching the scene, he stated:-

“I rushed there and the first thing I saw was a gun. Thereafter there was a casualty who had been mob assaulted”.

What is glaring from the above statement is that Inspector Kemboi first saw a gun, thereafter he saw the appellant. He did not say that the appellant had the gun. The said village elder Eunice was not called to give the nexus between the recovery of the gun and the appellant. None of the mob at Chepchoina Soko Mjinga who did a commendable job of thwarting a robbery that was intended at one Evalyne Namanje was availed. Not even the likely would be victim, Evalyne Namanje was availed to give evidence on how the attempted robbery unfolded.

56. The investigating officer appeared to have directed much effort to forensic analysis of the recovered gun and 2 cartridges found at the scene on 15/1/21 but unfortunately no efforts to link the recovered gun with the appellant. Despite great efforts made by ballistic expert Inspector Mbalani Alfred Kahi (PW4) in his forensic analysis and connecting the recovered gun to the activities of 15/1/2021 including the killing of one person, the efforts in the end were rendered useless because of failure by the



investigating officer Inspector Kemboi to provide the crucial link between the firearm (PExhibit 7) and the appellant. Inspector Kemboi did state that he saw the appellant holding the said gun when he arrived at the scene on 8/8/2021 at Chepchoina. The question posed therefore is where is the nexus or the link between the rifle and the appellant? The answer to that question is in the negative.

57. The other issue raised by the appellant is if he was arrested on 8/8/2021 where did the police hold him until 18/10/2021 when they produced him in court. There were claims that the appellant had other cases which could be true because even the appellant concedes to having many criminal cases but the investigating officer should have done a better job of telling the trial court the specific cases. He stated that the appellant “Committed a lot of crimes within Trans-Nzoia and also its environs. We have a matter in Court 2, Court1 and Court 8 in Kitale and one in Busia. He also tried to escape from prison cells. I am notthe accused. He is a serial killer”.

Now this court has no reason to doubt the veracity of the statement by investigating officer regarding the appellant but the question I have grappled with is why did he not give the specific case numbers and even copies of the charge sheet during the trial to buttress his damning and serious allegations against the appellant?

58. The gaps pointed out above left hovering doubts about whether the person (read the appellant) arrested at Chepchoina on 8/8/2021 by Inspector Kemboi (PW5) is the same culprit who committed the crime at Adonai Supermarket on 15/1/2021. So while there is no doubt that the gun recovered at Chepchoina on 8/8/2021 was the same one used in the robbery incident on 15/1/2021, the crucial link of that gun with the appellant is missing and that was fatal to the prosecution’s case despite a splendid job carried out by the ballistic expert (PW4 though indicated as PW3) which inter alia showed positively that the same gun was used in the killing of a person at Adonai Supermarket on 15/1/2021.

In the end this court finds that despite strong suspicion that the appellant was the one found with the gun (PExhibit 7) on 8/8/2021 at Chepchoina during a foiled attempted robbery, suspicion alone despite however strong cannot found a conviction. It is also true that the appellant was involved with other crimes at least the one he concedes in his further submissions, but that alone cannot salvage the prosecution’s case.

In the premises like the Pontius Pilate in the Good Book, this court washes its hands and finds that the conviction of the appellant was not safe. The prosecution’s case against him had fatal gaps pointed above and for that reason I will allow this appeal by quashing the conviction and setting aside the sentence. The appellant to be set free unless lawfully held and for avoidance of doubt, this court is now aware that he is being lawfully held for other crimes.

DELIVERED, DATED AND SIGNED AT KITALE THIS 3RD DAY OF MARCH, 2025.

HON JUSTICE R.K. LIMO

KITALE HIGH COURT

Judgement delivered in open court

In the presence of;

Mugun for the State

Wilson Simiyu Situma, the appellant in person

Court assistants – Duke/Chemosop

