



REPUBLIC OF KENYA



**Dakat v Republic (Criminal Appeal E031 of 2024)
[2025] KEHC 6584 (KLR) (9 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 6584 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CRIMINAL APPEAL E031 OF 2024**

JN ONYIEGO, J

APRIL 9, 2025

BETWEEN

BASHOW ISSACK DAKAT APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the conviction and sentence of Hon. R. Aganyo(PM)
delivered on 29-07-2024 in criminal case No. E345 of 2023 at Wajir PM's court)*

JUDGMENT

1. The appellant was charged with the offence of robbery contrary to section 295 as read with section 296(1) of the *Penal Code*. Particulars were that on 30.11.2023 in Got Ade location in Wajir East Sub County within Wajir County he robbed Yussuf Noor Sheik Kes. 10,000/- and immediately after the time of such robbery used actual violence to the said Yussuf Noor Sheikh.
2. He was convicted and subsequently sentenced to serve 14 years' imprisonment. Dissatisfied with both the conviction and sentence, the appellant lodged the instant appeal. He raised the following grounds of appeal for consideration:
 - i. The learned magistrate erred in law and fact by failing to appreciate that the prosecution's evidence was marred with contradictions that made its case unreliable and speculative.
 - ii. The trial court erred in law and fact by convicting him when the prosecution did not prove its case beyond any reasonable doubt.
 - iii. The trial court erred in law and fact by convicting him using evidence that did not flow logically and reasonably.
 - iv. That the trial magistrate erred in fact and law by rejecting the appellant's defence without a good reason.



3. When the appeal came up for hearing, parties were directed to file their written submissions.
4. The appellant in his oral submissions urged that the prosecution did not prove its case to the required standard hence not safe for conviction. On sentence, the appellant contended that the sentence meted out was not only harsh but also not commensurate to the circumstances of the case. In the end, he urged this court to quash his conviction and set aside his sentence.
5. Counsel for the respondent relied on his submissions filed on 14.10.2024. It was contended that the evidence adduced by the prosecution was cogent as the same established beyond any reasonable doubt that the appellant committed the offence herein. That from the evidence adduced by the prosecution witnesses, the same was not only corroborative but also established the elements of the offence preferred. It was contended that the sentence by the trial court was not only legal but also appropriate in the given circumstances. This court was therefore urged to uphold the finding of the trial court.
6. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusion and determination without losing sight of the fact that the trial court had the advantage of hearing and seeing the witnesses testify so as to assess their general demeanour—See *Okeno v Republic* (1972) E.A 32.
7. PW1, Yussuf Noor Sheikh testified that on 30.10.2023 at 2.00 a.m., he was in his house when some assailant attacked him after having broken into his shop which was connected to his house. It was his evidence that he was woken up by the noise from the mabati roof when he noticed somebody enter into his house. That he went and held the window through which the attacker had gained entry. He stated that the attacker who turned out to be the appellant had with him an axe which he had used in gaining entry to the shop and afterwards the house. He recalled that in as much as it was heavily raining, his wife heard the noises and called for help from the neighbours.
8. It was his evidence that it was the appellant who cut him with a knife on the middle finger, bit him on the right hand around the elbow area and hit him with an axe on his thumb thus removing the same. Nonetheless, they managed to arrest the appellant, tied him with ropes and then called the police. On cross examination, he stated that the appellant stole his cash and further damaged his goods in the shop.
9. PW2, Mohamed Noor Sheikh, a brother to PW1 recalled that on 30.10.2023 at around 2.15 a.m., he was asleep when PW1 and his wife called and informed him of the incident. He alleged that despite the heavy downpour, he dressed up and drove to the scene where he found many people already gathered. He went further to state that he rang the police thereby informing them of the incident.
10. It was his evidence that the alleged thief cut the window and gained entry through it into the shop building. That the assailant was armed with an axe and a metal bar that he used in breaking into the building. On cross examination, he confirmed that the appellant was the person who was arrested on the morning in question.
11. PW3, Mohamed Ibrahim Hassan recalled that on the material night, he heard some noise and upon getting out of the house, he went straight to the scene where he found PW1's shop having been broken into. That the alleged thief, the appellant herein had been arrested by the public and thereafter, police were called who subsequently arrested him. He also stated that at the time of the arrest, the appellant was armed with an axe and a small knife.
12. PW4, Siyad Samuel Hassan, a medical officer from Wajir County Referral Hospital testified that upon the complainant being presented at the hospital, he attended to him. That upon examination, he noticed a visible wound on the chest around the breast region with minimal bleeding and a bilateral



lymph wound on the right middle finger which had already been stitched. In the same breadth, he had a visible human bite on the left arm, a swelling on the right knee and physical bruises. In his opinion, the weapon that probably caused the said injuries was a blunt object together with a human bite. He categorized the injuries as harm.

13. PW5, No. 244065 PC Erick Ochieng', the investigating officer testified that upon the complainant reporting the matter, he commenced his investigations. He stated that the complainant reported that while he was asleep, he heard some commotion from outside his shop and upon getting out to check on the same, he found that the said commotions emanated from his shop. That upon proceeding to check on what was happening, he found the door to the shop open while the appellant was inside the said shop.
14. He recalled that the appellant was armed with an axe, a metal rod and was busy destroying the stores in the shop. He thus screamed for help hence attracting neighbours to come out to assist. That upon trying to gain entry into the said shop, the appellant became more violent and in the process, injured PW1. He stated that the appellant was well known in the area to be of bad character. It was his case that he proceeded to record statements from witnesses and thereafter charged him in court.
15. The appellant in his sworn defence submitted that on the material day, he had gone to visit his sister when it started raining heavily. He thus decided to take cover near a wall at Got Ade Primary School. That while there, someone asked him why he was standing there. At that point, the said man together with three other persons arrested him claiming that he was being difficult. It was his testimony that one of those people took away his phone.
16. He referred to the evidence of the complainant as a frame up. He contested the allegation that he bit the complainant since he did not have teeth as he was 'kibogoyo'(toothless). He denied committing the offence herein.
17. I have considered the record of appeal herein, grounds of appeal and parties' respective submissions. In my view, the grounds that stand out for determination are as follows:
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether there was positive identification of the accused.
 - iii. Whether the sentence was manifestly harsh in the given circumstances
18. It is trite that the burden of proving a criminal case always lies with the prosecution and the same does not shift. The standard of proof required is that of "proof beyond reasonable doubt". In reference to this Lord Denning in MILLER V MINISTRY OF PENSIONS, [1947] 2 ALL ER 372 stated thus:

"That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."
19. The appellant was charged with the offence of robbery with violence contrary to Section 295 of *Penal Code* which provides that; '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’.

20. In the case of Paul Katana Njuguna v Republic [2016] KECA 207 (KLR) the court of appeal went to a greater extent to elaborate on the definition of robbery under Section 295 vis avis the penalty section under 296(1)&(2) of the penal code as follows;

“

- “ 14. Although the side note describes Section 295 as definition of robbery, it is evident that the section goes beyond mere definition and creates a felony termed robbery by setting out clearly the elements of that felony.

On the other hand, Section 296 of the *Penal Code* states as follows:

“(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

- (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other 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”.

15. Thus, Section 296 of the *Penal Code* has two provisions. This is subsection (1) that is a penal provision providing the sentence for the felony of robbery; and subsection (2) that creates the offence of aggravated robbery and provides a stiffer penalty of capital punishment. Neither Section 295 nor Section 296 refers to an offence of “robbery with violence”. Indeed, the felony termed robbery as described under Section 295 of the *Penal Code* may involve use of actual violence or threat to use violence, while the aggravated offence of robbery as described under Section 296 (2) of the *Penal Code* may be complete with use of violence or no use of violence as long as there has been a theft and the offenders are either armed with offensive weapons or offenders are more than one. (See Oluoch v Republic [1985] KLR 549).

21. From the above guidance, prosecution was duty bound to prove that the accused person did steal cash from his shop and that he applied actual force or violence before or after. According to pw1, he was asleep in his house which was combined with a shop when his wife alerted him of some noise of somebody cutting iron sheets. When he responded, he came face to with somebody who had already entered into the shop. He raised alarm and people among them pw2 and pw3 responded. That he managed to get hold of the thief until pw2 and pw3 arrived and had the appellant arrested
22. According to him, cash 10,000 was stolen. The same however was not recovered. Where did the money go yet the appellant was instantly arrested and he had no opportunity to escape to hide the money? From this type of evidence, the critical element of stealing was not established. Was violence or force ever applied? According to pw1, he sustained a cut on the fingers after he was cut with a knife and hit with an axe. Pw2 and pw3 who responded to the attack confirmed that they saw the injuries sustained. Further, pw4 the clinical officer who treated the complainant confirmed the injuries which he classified as harm. Obviously, these injuries were not self-inflicted. To that extent, I am satisfied that force was applied against the complainant on the material night.
23. The key question then is, who inflicted the alleged injuries upon the complainant. Was there positive identification? The incident herein did not only occur at odd hours in the night but also, when there



was heavy downpour hence the issue of recognition remained pertinent. In the case of Hassan Abdallah Mohammed vs Republic [2017] eKLR the Court stated that: “visual identification in criminal cases can cause a miscarriage of justice and should be carefully tested.” [Also see the case of Nzaro vs Republic (1991) KAR 212].

24. There is no dispute that the person who was arrested during the material time turned out to be the appellant herein and therefore, identity cannot be faulted. Equally, the appellant does not deny having been arrested by pw1 and some people at the material time within the same locality. He only denies being arrested at the shop of the complainant and that he did not commit the offence.
25. What was he doing at 2.00am while armed with an axe and a knife? Why would the three witnesses fabricate a case against a stranger? Why would pw1 inflict injuries on himself just to frame up a stranger? That story does not up. The excuse that he was sheltering himself against rainfall is not convincing. The evidence of pw1-pw3 is consistent and well corroborated. There was no mistaken identity as the appellant was caught in the act. From his conduct and taking into account all the prevailing circumstances, am convinced that the appellant was the one who broke into the shop of pw1 and subsequently attacked him thus injuring him as he struggled with him.
26. The appellant’s defence did not displace that of the prosecution as to what exactly he was doing at the complainant’s house at the ungodly hour and worse still upon being arrested, he turned violent thus injuring the complainant. Having found that there was no proof of stealing, the offence of robbery does not arise. To that extent, it is my finding that the prosecution did not prove beyond reasonable doubt the offence of robbery. Accordingly, I am inclined to quash the conviction.
27. However, having established that the complainant was injured by the appellant in the cause of the attack, I would find the appellant guilty of a lesser charge of assault contrary to section 251 of the penal code pursuant to Section 179 of the [Criminal Procedure Code](#) which provides as follows:

“ 179.

(1) When a person is charged with an offence consisting of

several particulars, a combination of some only of which constitutes a complete minor offence, and the combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

28. In the case of Robert Mutungi Muumbi v Republic [2015] KECA 584 (KLR) the court of appeal had this to say;

“As is apparently clear, section 179 of the [Criminal Procedure Code](#) empowers a court, in some particular special circumstances, to convict an accused person of an offence, even though he was not charged with that offence. The court contemplated by section 179 can be either the trial court or the appellate court. The real question here is not whether the appellant was charged with indecent assault of NK for which the High Court convicted him. That was not necessary under section 179. The question is whether the special circumstances contemplated by section 179 were in existence to enable the court convict the appellant of an offence with which he was not charged”.

29. In the circumstances, I am constrained to substitute the charge of robbery with a lesser charge of assault c/s 251 of the penal court and subsequently convict him of the same.



30. On sentence, the court imposed a sentence of 14 years imprisonment provided for the offence of robbery. Having substituted the charge to that of assault attracting a maximum penalty of 5 years, I am inclined to set aside the 14year imprisonment term and substitute the same with an imprisonment term of 3 years to start running from the date of sentence. In imposing this sentence, I have however considered the period of seven months and 25 days spent in remand custody before sentence. The sentence pronounced herein to start running from the date of sentence.

31. ROA 14 days.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF APRIL 2025

J. N. ONYIEGO

JUDGE

