



**Kibisu & another v Republic (Criminal Appeal E136 & E137 of 2024
(Consolidated)) [2025] KEHC 4467 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4467 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL E136 & E137 OF 2024 (CONSOLIDATED)**

DR KAVEDZA, J

APRIL 8, 2025

BETWEEN

ALEX KIBISU 1ST APPELLANT

SIMON PETER KIMANI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered on 13th
June 2024 by Hon. W. Lopokoiyit (SRM) at Kibera Chief Magistrate's Court
Criminal Case no. E2011 of 2023 Republic vs Alex Kibisu and Simon Peter Kimani)*

JUDGMENT

1. The appellants were jointly charged and after a full trial convicted of three counts of robbery with violence contrary to section 296(2) of the *Penal Code*. After a full trial, they were both sentenced to death.
2. Being aggrieved, they filed the present appeal challenging their conviction and sentence. In their respective petitions of appeal, the appellants' challenged the totality of the prosecution's evidence against which they were convicted. They complained that the trial magistrate erroneously failed to consider their defence. They urged the court to quash their conviction and set aside the sentence imposed.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32).



4. The prosecution called four (4) witnesses in support of their case. PW1, Caroline Wakio Mugo, testified that on the night of the incident at around 7:00 p.m., she was walking near Uhuru Gardens with two friends when they were accosted by three men on a boda boda. Two of the men were armed and ordered them to lie down while demanding their belongings. After robbing them, the assailants fled. The victims immediately reported the matter at Lang'ata Police Station and recorded statements.
5. Later, PW1 was called for an identification parade, where she recognised the 1st appellant by a distinctive scar she had clearly seen during the well-lit incident. She also identified the 2nd appellant from the identification parade. PW2, Nyambura Wahome, and PW3, Virginia Wainaina, gave consistent accounts, confirming they were together during the robbery and also identified the appellants.
6. PW4, Corporal Daniel Opiyo, the investigating officer, stated that after receiving the report, he visited the scene. He later traced the suspects when they were arrested for a different offence and held at Riruta Police Station. Their photos, circulated online, led to their identification by the complainants. He confirmed the suspects were later charged, although the gun and motorbike used in the robbery were never recovered.
7. At the close of the prosecution case, the appellants were placed on their defence. DW1, the 1st appellant narrated that he was ferrying some customers using his motorbike when he was arrested after dropping them off at a bar. While in custody he was asked to pay a sum of Kshs. 5,000 in order to be released, which he refused. He firmly denied committing the offence. DW2, the 2nd appellant gave a testimony that corroborated that of DW1, adding that photos of them were taken at Riruta Police Station during the identification parade and sent to the complainants.
8. The appellants were convicted of the offence of robbery with violence. The key ingredients for a robbery with violence charge are found in section 296(2) of the [Penal Code](#). It provides as follows-

“if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death”.
9. Robbery with violence under section 296(2) of the [Penal Code](#) is established where the prosecution proves, beyond reasonable doubt, that the accused, while committing a robbery, was armed with a dangerous or offensive weapon, was in the company of one or more persons, or used actual violence on the victim.
10. In this case, the evidence of PW1, corroborated by PW2 and PW3, confirms that three men accosted them at night while armed with guns and ordered them to lie down before robbing them. This satisfies the ingredient of being in the company of more than one person and being armed with dangerous weapons. The use of threats and firearms to instill fear and subdue the victims amounts to actual violence, even if no physical harm occurred.
11. Furthermore, the immediate reporting of the incident, the identification parade, and positive identification in court by all three victims strengthened the prosecution's case. Although the stolen items, weapons, and motorbike were not recovered, their absence does not negate the offence, as the identity of the assailants and the use of violence were established. The evidence, therefore, supports the offence of robbery with violence under section 296(2). The upshot of the analysis above is that the appellants' conviction was proper and is upheld on all three counts.



12. The appellants were sentenced to death. Section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, the sentence imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh.
13. Therefore, the appeal on the sentence succeeds. The sentence of death imposed is substituted with a sentence of twenty (20) years imprisonment on each count. The sentences shall run concurrently from 11th December 2023 the date of their arrest pursuant to section 333(2) of the *Criminal Procedure Code*.
Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 8TH DAY OF APRIL 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellants Present

Mutuma for the Respondent

Tonny Court Assistant.

