



REPUBLIC OF KENYA



**Ambani v Republic (Criminal Appeal E033 of 2022)
[2025] KEHC 6623 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6623 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E033 OF 2022
WM MUSYOKA, J
MAY 23, 2025**

BETWEEN

FREDRICK AMBANI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from judgment of Hon. Mr. P. Olengo, Senior Principal Magistrate,
SPM, in Busia CMCCRC No. E1190 of 2021, of 1st September 2022)*

JUDGMENT

1. The appellant, Fredrick Ambani, had been charged before the primary court, with the offence of robbery with violence, contrary to section 296(2) of the *Penal Code*, Cap 63, Laws of Kenya.
2. The particulars were that on 5th April 2021, at Malaba township, Teso North Sub-County, within Busia County, jointly with others not before court, while armed with dangerous weapons, namely rungus and a hammer, robbed Patrick Ideke, of a motorcycle, registration mark and number KMFM 553N, make TVS, a helmet, and a Techno Camon 9 mobile phone, all valued at Kshs. 212,200.00; and at or immediately before or after the time of such robbery, used actual violence to the said victim.
3. There was an alternative charge, of handling stolen goods, contrary to section 322(2) of the *Penal Code*, with the particulars that on the said date, at Mayoni market, Matungu Sub-County, within Kakamega County, otherwise than in the course of stealing, he dishonestly retained the said motorcycle, knowing or having reasons to believe it to be stolen property.
4. He pleaded not guilty to the charges, on 8th April 2021, and a trial was conducted. Four prosecution witnesses testified, and one for the defence.
5. The complainant, PW1, Patrick Ideke, testified that on the morning of 5th April 2021, he was hired by a person to take him from Malaba Kenya to Malaba Uganda, to check on his vehicle, which had allegedly



broken down at Uganda. After they crossed the border, the passenger asked him to stop at some point, and left. While PW1 was at that spot, he was hit by another person, on the head, and he fell. The person he had taken across the border and the one who hit him on the head then took his motorcycle and left. He then crossed back to Kenya. The motorcycle was subsequently traced at Mayoni, using a car-tracker, where the two assailants were accosted by members of the public and beaten, where the one who had hired him died, and the other, the appellant herein, sought refuge at the Matungu Police Station. The motorcycle was recovered. The 1st appellant cut him on the head, while the 2nd appellant beat him with a stick. The 2 appellants escaped after he raised alarm. He established that the items listed in the charge were missing. He later went to hospital and reported the incident to the police.

6. PW1 reported the incident to PW2, Hussein Komol, who was a chair of the local association of boda boda riders. PW2 noted that PW1 was injured. He got information, from the company which had sold the motorcycle, and had the car-tracker, that the motorcycle was heading to Kenya, through Busia. He alerted motorcycle riders at Mayoni, who intercepted it, and arrested those who had it. He testified that the appellant was among those arrested, and that he saw him at Mayoni. PW3, No. 43449 Police Corporal Omudho Okwako, was the investigating officer, based at Malaba Police Station, he detailed the steps that he took, by way of investigation, after the matter was reported to him. PW4, Polline Sirengo, was a clinician. She attended to PW1 at Malaba Dispensary. He had injuries on his head and hand.
7. The appellant was put on his defence, in a ruling delivered on 9th December 2021. he made a sworn statement, on 21st April 2022. The appellant denied the charges. He said that he was nowhere near where the robbery incident happened. He said that he was a passenger on a motorcycle, on the material day at 11.00 AM, travelling from Matungu to Mayoni, when he and his rider were stopped by boda boda operators, who had blocked the road at Mayoni. They beat the rider to death. The police came to the scene, dispersed the crowd, and removed the body from the scene, and they took him to the police station, to assist with investigations. He insisted that he was just a passenger on the said motorcycle.
8. In its judgment, the trial court found that the appellant was sufficiently identified by the witnesses. The trial court was unimpressed by the defence that he was a mere passenger on the stolen motorcycle. The appellant was convicted of robbery with violence and sentenced to death.
9. The appellant was aggrieved, and brought the instant appeal, vide the petition of appeal, dated 6th September 2022, filed herein on 7th September 2022.
10. In his petition of appeal, the appellant grounds his appeal on arguments that the charge was incurably defective and bad for duplicity; the evidence amounted to hearsay and the testimonies were contradictory; the prosecution evidence lacked probity; the expert evidence was adduced and produced in a manner which was contrary to the provisions of the *Evidence Act*, Cap 80, Laws of Kenya; the defence was disregarded; there were violations, infringements, threats and denials of constitutional rights enshrined in Articles 49 and 50 of the *Constitution*; and the alleged robbery happened outside of the jurisdiction of the court. He sought that the evidence be evaluated afresh, the conviction quashed, and the sentence set aside; and the appellate court find and hold that there were constitutional violations, declare the trial null and order a retrial.
11. The appeal was canvassed, by way of written submissions, based on the request, made in that behalf, by the appellant on 5th February 2025, and the respondent on 3rd March 2025 and 27th March 2025. Only the appellant filed written submissions in the end, together with amended grounds of appeal, both dated 20th February 2025.



12. In the amended grounds of appeal, the appellant substituted the earlier grounds in the petition, dated 6th September 2022, with new grounds, which address such issues as violation of the fair hearing principles in Article 50(2)(c)(g)(h)(j) of the *Constitution*; convicting and sentencing the appellant to death, contrary to sections 134 and 214 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya; the offence was allegedly committed outside jurisdiction; the circumstances of the commission of the offence were not favourable to positive identification; the rejection of the otherwise cogent defence presented by the appellant; the trial being illegal or defective, on account of Article 50(2) of the *Constitution* and sections 169, 213 and 310 of the *Criminal Procedure Code*; and the sentence imposed being harsh, excessive, inhuman and degrading.
13. In his written submissions, he addresses the issues under unfair hearing, defective charges, lack of jurisdiction, flimsy evidence on recovery, defective illegal trial and sentence.
14. On unfair trial, he raises three issues: not being informed of his right to legal representation, not being assigned an Advocate at State expense and not being given the prosecution evidence in advance. He cites Thomas Patrick Cholmondeley vs. Republic [2008] (Omolo, O’Kubasu & Onyango Otieno, JJA) and Reward vs. Republic [1993] 2 All ER. On the charge being defective, he argues that the evidence tendered was not in tandem with the particulars in the charge. He cites sections 134, 137(f) and 382 of the *Criminal Procedure Code*, Archibald’s Criminal Pleadings/Evidence and Practice (40th edition) p. 52, Isaac Omambia vs. Republic [1995] eKLR (Akiwumi, Tunoi & Shah, JJA) and Jackson Akumu Yongo vs. Republic [1983] eKLR (Potter, Hancox JJA, & Chesoni, Ag JA). On jurisdiction, it is submitted that the offence was committed outside the jurisdiction of the court.
15. On identification, he argues that the circumstances of identification were unfavourable and cites Etudebo & others vs. Uganda [2009] 1 EA 132 (Mpagi-Bahigeine, Byamugisha & Anshimye, JJA), Jali Kazungu Gona vs. Republic [2017] eKLR (Visram, Karanja & Koome, JJA), Maitanyi vs. Republic [1986] KLR 198 (Nyarangi, Platt & Gachuhi, JJA) and Hassan Abdallah Mohamed vs. Republic [2017] eKLR [2017] KEHC 1684 (KLR)(DK Kemei, J). On flimsy evidence on recovery, he raises the principle of recent possession of stolen goods, on the basis that the robbery happened in Uganda at 9.00 AM, and the motorcycle was recovered at Mayoni at 15:30 Hours. He argues that he was not found in possession of the subject motorcycle. He cites Eric Obiero Arum vs. Republic CRA No. 85 of 2005.
16. On illegal and defective trial, he submits that after the close of the oral hearings, the parties were not given opportunity to submit, contrary to section 213 of the *Criminal Procedure Code*, and that irregularity could not be cured under section 382 of the same Code. He further submits that section 169(2) of the *Criminal Procedure Code* was not complied with, as the judgment did not specify the offence and the provision of law under which he was convicted and the punishment to which he was sentenced. He points out that he was allegedly convicted under section 210 of the *Criminal Procedure Code*, yet that provision is on acquittals. On the sentence, he submits that the death penalty is inhuman, degrading, unconstitutional and contrary to Article 25(a) of the *Constitution*. He cites Article 28 of the *Constitution* of Kenya, WWW vs. Republic [2024] KEHC 9475 (KLR)(R. Korir, J) and Vinter & others vs. The United Kingdom (App. No. 66069/09, 130/10 and 3896/10)(2016) 111 ECHR 317 (9th July 2013)(D Spielmann, P, & 16 JJ) .
17. The issues raised can be grouped into two. One group is on those issues that touch on the legality or competence of the proceedings. That is issues that, if established to have compromised on the legality or competence of the proceedings, would render the trial a nullity. These would relate to jurisdiction and compliance with the *Constitution*. The second group is on matters that require a merit review of the decision, focusing largely on the evidence and adherence to the rules of procedure.



18. I should start with the issues in the first group, relating to jurisdiction and adherence to fair trial principles, as determinations on these two have capacity to dispose of the appeal without the need to consider the other grounds of the appeal.
19. I will start with jurisdiction, for where there is no jurisdiction there would be no foundation for a court to conduct any proceedings. That would mean that if the trial court had no jurisdiction over the matter it was trying, then the entire proceedings were a nullity. See *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR (Nyarangi, Masime & Kwach, JJA) and *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others* [2012] eKLR (Mutunga CJ, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ).
20. The issue on jurisdiction turns around the matter of the offence having been committed outside of the jurisdiction of the trial court. That is, of course, not apparent from the face of the charge, for it is alleged, in the main charge, that the act or robbery happened at Malaba township, of Teso North, within Busia County, which is in Kenya. The alternative charge is that the offence of handling stolen property was committed at Mayoni, Matungu, in Kakamega, Kenya. The problem is with the evidence. The complainant, PW1, testified that he was robbed of his motorcycle on the Ugandan side of Malaba township. The question then would be whether a Kenyan court would have jurisdiction over an offence committed to a Kenyan by fellow Kenyans, on Ugandan soil.
21. The law on this would appear to be sections 5 and 6 of the [Penal Code](#), which define jurisdiction of the courts, with respect to the offences created under that Code. The two provisions state as follows:

III – Territorial Application of Code

5. Jurisdiction of local courts

The jurisdiction of the courts of Kenya for the purposes of this Code extends to every place within Kenya, including territorial waters.

6. Offences committed partly within and partly beyond the jurisdiction

When an act which, if wholly done within the jurisdiction of the court, would be an offence against this Code, is done partly within and partly beyond the jurisdiction, every person who within the jurisdiction does or makes any part of such act may be tried and punished under this Code in the same manner as if such act had been done wholly within the jurisdiction.”

22. Section 5 defines jurisdiction of Kenyan courts with respect to trial of offences under the [Penal Code](#). My understanding of it is that Kenyan courts have jurisdiction to try these offences, so long as they are committed within Kenya, including Kenyan territorial waters. That would mean that any [Penal Code](#) offence, committed outside the Kenyan territory, would be outside the jurisdiction of Kenyan courts.
23. That was the position taken in *Republic vs. Chief Magistrate’s Court, Mombasa Ex-Parte Mohamud Mohamed Hashi & 8 others* [2010] KEHC 4129 (KLR)(Ibrahim, J), where it was held that:

“... that the Kenyan Courts are not conferred with or given any jurisdiction to deal with any matters arising or which have taken place outside Kenya. The Kenyan Courts have no jurisdiction in criminal cases and in particular in the offences set out in the [Penal Code](#) where the alleged incident or offence took place outside the geographical area covered by the Kenya state or the Republic of Kenya. The Local Courts can only deal with offences or criminal incidents that take place within the territorial jurisdiction of Kenya.”



24. Section 6 of the *Penal Code* is about a situation where an offence is committed partly within and partly outside jurisdiction. In other words, where aspects of the offence are committed inside Kenya, and aspects outside of Kenya. In such a situation, a Kenyan court would have jurisdiction. Besides that, where the offence is committed wholly outside Kenya, the Kenyan court would be without jurisdiction.
25. That provision came up for consideration in *Alex Yowasi vs. Republic* [2020] KEHC 8254 (KLR) (Kiarie, J), whose facts were very similar to the facts herein. The complainant had been hired by the appellant to take him to Sofia in Uganda, from Kenya. The complainant delivered the appellant to Sofia, was asked to stop, so that the appellant could alight. He was given a Kshs. 100.00 note, and, as he was trying to get change for the appellant, the appellant turned against him and attacked him with a machete. He lost consciousness and only found himself at the Busia County Referral Hospital. His motorcycle was never recovered. The appellant was charged and convicted of robbery with violence. That conviction was quashed on appeal, based on section 5 of the *Penal Code*, as the robbery happened outside of Kenya. The High Court rejected the argument that the offence was partly committed in Kenya and partly in Uganda.
26. The evidence that was tendered by the complainant herein, PW1, was, just like in *Alex Yowasi vs. Republic* [2020] KEHC 8254 (KLR)(Kiarie, J), that he was lured out of Kenya into Uganda and then robbed of his motorcycle within Uganda. The robbery was committed in Uganda, and not Kenya.
27. Was any part committed in Kenya? I do not think so. Robbery is basically theft, accompanied by force or violence. The principal element of the theft is the taking of the thing stolen, while that of robbery is the use of force or violence in the taking. The taking of the motorcycle happened in Uganda, and so was the violence that accompanied that taking. None of the elements of that offence were in Kenya. It could be argued that the intention to steal with force or violence was formed in Kenya, and that only the actus reus was in Uganda. However, section 6 of the Penal Act is about the “act” and not the intention. The actus reus elements of the taking and the violence were all in Uganda. None of what happened in Kenya, before the robbery incident, was an act which formed part of the robbery.
28. For avoidance of doubt, the appellant is recorded as saying the following in his testimony:
- “I am a boda boda rider. On 5/4/2021 at 9.00 a.m. at my stage a customer came and told me that his vehicle got mechanical problem in Uganda and he wanted to go and see. I took him there using my motorbike ... I took him to Malaba Uganda. When we reached there he told to stop. He left and I was surprised when somebody hit me with a stick. When I fell down and rolled. The one who I had carried took the motorcycle and started riding it. the person who had hit me also board the said motorcycle and the left. I came from Malaba Uganda to Malaba Kenya.”
29. Going by *Alex Yowasi vs. Republic* [2020] KEHC 8254 (KLR)(Kiarie, J), I would, as I hereby do, conclude that the trial court lacked territorial jurisdiction to hear and determine the case against the appellant. As there was no jurisdiction the trial was a nullity.
30. Does it mean that the appellant should go Scot free? No. No robbery was committed in Kenya, but other offences were. The appellant should have been charged and tried of those other offences. The prosecution should have looked at the options open to them, before charging him of an offence that had been committed outside the country or jurisdiction.
31. The evidence tendered suggested that the offence in Uganda was committed by two individuals, who were later apprehended at Mayoni, in Kenya. Where more than one person is involved in commission of an offence, there must, of necessity, be some element of conspiracy. Conspiracy is an offence on its



own right. Perhaps, conspiracy could not hold, given that the other suspected conspirator died. The motorcycle was recovered in Kenya. Two suspects were cornered in possession of it. One died. The other, the appellant, did not. The motorcycle was alleged, by the complainant, to be a stolen item. An issue of being in possession of a stolen item arose, and a charge could be crafted around that, and whoever was found in that possession could quite properly be charged and tried of an offence related to that.

32. The other possible offence that could be charged in Kenya is handling stolen goods, which also arises from possession. The two accomplices were cornered in Kenya in possession of the motorcycle after it had been reported stolen. A charge of handling the said stolen motorcycle could be legitimately brought against the appellant, whether he could be convicted on the facts, is another matter. Indeed, he was charged with that offence, as an alternative to the robbery with violence. A question could arise, with respect to that, on whether, upon the main count being rendered bad, for lack of jurisdiction, the appellant could not be convicted on the alternative charge of handling stolen goods.
33. That cannot possibly work. The alternative count or charge is alternative to the main count or charge. See Patrick Gitonga vs. Republic [2020] KEHC 993 (KLR) (Waweru, J). The alternative count is not a second count. See Joseph Okumu vs. Republic [2017] KEHC 2358 (KLR) (Kiarie, J). Neither is it an addition to the main count. See George Mwangi Macharia vs. Republic [2017] KEHC 859 (KLR) (Waweru, J). It is also not an independent count, for it is sort of hangs on the main count. In MMM vs. Republic [2022] KEHC 15012 (KLR)(S. Githinji, J) it was compared to a spare tyre.
34. A conviction on the alternative count happens only where the main count is valid or good. Not where it is bad for lack of jurisdiction. The court will convict on the alternative where the evidence adduced falls short of establishing the offence charged in the main count, so long as that evidence is adequate to establish the offence in the alternative count. See Peter Mbugua Miringu vs. Republic [2018] KEHC 145 (KLR)(Njagi, J) and Mwaniki vs. Republic [2023] KEHC 23235 (KLR)(Njuguna, J). The alternative count is dependent on the main count. Where the main count is declared bad, for lack of jurisdiction, the alternative count would be robbed of its legitimacy or competence and cannot stand. It has no life of its own. It does not stand alone. The main count is the foundation of the case, and when it crumbles or collapses, for lack of legitimacy, rather than adequacy or sufficiency of evidence, it would crumble or collapse together with the alternative.
35. As the trial court had no jurisdiction to try the offence of robbery with violence committed in Uganda, and as the trial was a nullity, there would be no basis for conducting a merit review of the other grounds of appeal.
36. Overall, the appeal has merit. I hereby allow it, so that the conviction, of the appellant, is hereby quashed, and the sentence imposed upon him, of death, set aside. He shall be set free, unless he is otherwise lawfully held under separate warrant. I leave it to the complainant to decide on whether to charge the appellant with the offences that were committed within the Kenyan territory. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 23RD DAY OF MAY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. Fredrick Ambani, the Appellant, in person.

Advocates



Mr. Tony Onanda, instructed by the Director of Public Prosecutions, for the respondent.

