



REPUBLIC OF KENYA



**Kimori v Republic (Criminal Appeal E036 of 2024)  
[2025] KEHC 6155 (KLR) (16 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6155 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CRIMINAL APPEAL E036 OF 2024  
AN ONGERI, J  
MAY 16, 2025**

**BETWEEN**

**BENARD MAGHANGA KIMORI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the conviction and sentence of Hon. D. Wangeci (SPM)  
in Wundanyi SPM CR Case No. E839 of 2021 delivered on 22nd August 2024)*

**JUDGMENT**

1. The Appellant was sentenced to life imprisonment for the offence of robbery with violence contrary to Section 295(2) as read with Section 296(2) of the [Penal Code](#) on 4<sup>th</sup> September 2024 having been convicted on 22<sup>nd</sup> August 2024.
2. The particulars of the offence were that on 16<sup>th</sup> September 2021 at about 2030hrs at Mgama Village, Bura Location within Taita Taveta County, the Appellant robbed Benard Mgiri of cash Ksh.2000/-, two mobile phones Make Nokia and immediately before the time of such robbery used actual violence to the said Benard Mgiri.
3. The prosecution evidence in summary was that on the material day at 8.30p.m, the Complainant and his wife had retired to bed when they heard a knock at the door.
4. The Complainant took a panga and a torch and went to open the door. He saw someone standing at the corner of the house. He flashed a torch at him as recognized him as Benard. He asked for money which the Complainant had sold a cow.
5. A struggle ensued between the person and the Complainant. The Complainant's wife screamed and she went to look for help. When she returned with some people she found the Complainant had been



- robbed of Kshs.2000, two mobile phones and the Complainant's Identity Card and had sustained a cut on the right thumb and injuries on the hands.
6. The incident was reported at Mwatate Police Station and the Complainant was treated at Mwatate Sub-County Hospital.
  7. An identification parade was conducted where the Complainant identified the Appellant.
  8. The Appellant denied the offence in his defence and raised an alibi. He also said the charges were instigated by the Investigating Officer who had vowed to make him disappear.
  9. The trial Court found the Appellant guilty as charged and Sentenced him to life imprisonment.
  10. The Appellant has appealed to his Court on the following grounds.
    - i. That the learned trial magistrate erred in both law and fact in failing to appreciate the fact that the charges as laid out were not proved to the required standards as required in law.
    - ii. That the learned trial magistrate erred in both law and fact in failing to appreciate the fact that there was no positive identification cum alleged recognition in light of the fact that the instant matter occurred at night when it was dark when a positive identification would have been difficult in this case and therefore conviction was unsafe.
    - iii. That the learned trial magistrate further erred in both law and fact in not appreciating the fact that there is no way a Complainant would have conducted a parade on a person he had claimed to have recognized from his childhood clearly showing that the same was a frame up occasioning a prejudice.
    - iv. That the learned trial magistrate erred in law and fact in not putting into consideration that the Appellant was not arrested owing to the leading of the Complainant but only as a result of suspicion by the villagers who were never availed to adduce evidence in Court to tell the Court why they suspected him of the alleged heist yet he had not made the first report on the alleged recognition nor given any description to the police in the first instance.
    - v. That the learned trial magistrate further erred in law and fact in failing again to appreciate there was no proof tendered that the alleged exhibits were recovered on the person of the appellant and indeed no inventory form (recovery form), the owner of the alleged house from where the same were recovered hence the allegations of being in possession of the appellant were neither here nor there again occasioning a prejudice to the Appellant's case since the purported doctrine of recent possession was not proved.
    - vi. That it was fully incumbent upon the prosecution to prove the allegations of confession by the Appellant as alleged by Plaintiff Witness 3 (PW3) at the scene of arrest and which was not done leaving the same unproved rendering the conviction and subsequent sentence unsafe.
    - vii. That the learned trial magistrate again erred in law and fact in failing to appreciate that the instant matter was materially contradicted and inconsistent hence insufficient to attain a conviction let alone sustain one.
    - viii. That again, the trial magistrate court further erred in law and in fact, in not considering that the Appellant's statement in defence as on point, pragmatic, plausible and was not dislodged hence still stands and seek its reinstatement rendering an acquittal.
  11. The Appellant also filed supplementary grounds as follows:



- i. That the learned trial court magistrate erred in law and facts in convicting the Appellant by failing to consider the perpetrator's description to the Police before his apprehension in this matter is unmerited and disputable.
  - ii. That the learned trial court magistrate erred in law and facts in convicting the Appellant by failing to consider that the Appellant's trial at the lower court was contrary to the Provisions of Article 25(c) and 50(2) (j) (k) since the same was contravened hence unsatisfactory to sustain this conviction herein.
12. The parties filed written submissions as follows; The appellant submitted that he is challenging his conviction and life sentence for robbery with violence under Section 296(2) of Kenya's Penal Code, arguing that the trial court erred in law and fact on multiple grounds.
13. First, he contends that the magistrate improperly relied on the identification evidence of a single witness (PW1), failing to apply the stringent safeguards required for such testimony.
14. Though PW1 claimed to recognize the appellant (a fellow villager) by torchlight during the night attack, the appellant highlights inconsistencies as follows;
15. PW1 never called out his name during the incident, failed to alert neighbors or authorities promptly, and provided no corroborating details to rescuers or police.
16. That further, the trial court neglected to scrutinize whether the lighting, distance, and stress of the event undermined PW1's reliability, contrary to precedents like Abdallah Bin Wendo and Roria, which mandate careful testing of single-witness identification.
17. Second, the appellant asserts a violation of his right to a fair trial under Articles 25(c) and 50(2) of the Constitution. The prosecution withheld critical documents (e.g., photographs, forensic reports) until trial, prejudicing his defense.
18. Further, that the bloodstained clothing and a knife allegedly recovered were never subjected to DNA analysis, rendering them worthless as evidence.
19. The prosecution's failure to disclose exhibits in advance—despite defense objections—deprived him of a meaningful opportunity to challenge the case, as underscored by *R v Ward*.
20. Third, the appellant disputes the legitimacy of his arrest and exhibit recovery. PW5 (the arresting officer) gave contradictory testimony, claiming the appellant was caught in a mob justice incident days after the robbery, while the investigating officer (PW3) stated the appellant was arrested earlier with stolen items in his possession.
21. Further, that no link was established between the recovered knife and the complainant's injuries, nor was the alleged stolen money (from a cow sold months prior) ever verified.
22. The chaotic arrest and lack of procedural rigor cast doubt on the prosecution's case.
23. In light of these flaws—unreliable identification, procedural unfairness, and tainted evidence—the appellant urged the court to quash his conviction and set aside the sentence.
24. The appellant submitted that the trial court's failure to adhere to legal standards and constitutional safeguards renders the verdict unsafe.
25. The respondent opposed the appeal and submitted that the trial court's conviction and sentencing of the appellant for robbery with violence were justified based on evidence proving guilt beyond reasonable doubt.



26. That the prosecution presented seven witnesses whose testimonies consistently supported the case and proved the prosecution case to the required standard.
27. Key evidence included the identification of the appellant by PW1, who recognized him during one hour-long confrontation at night using both torchlight and moonlight, as corroborated by PW2.
28. PW1 also identified the appellant by voice, recalling a prior transaction involving a cow sale, which the appellant allegedly sought to violently reclaim. The appellant reportedly attacked PW1 with a knife, stole Ksh. 2,000 and a Nokia phone, and left PW1 with injuries confirmed by medical evidence (PW4).
29. Additionally, PW3, the investigating officer, found signs of a struggle at the scene and recovered PW1's stolen Nokia phone from the appellant's home the following day. The appellant failed to provide a credible explanation for possessing the stolen phone, implicating him under the doctrine of recent possession.
30. The respondent emphasized that the appellant did not offer an alibi, failed to rebut the prosecution's case during cross-examination, and could not justify his possession of the stolen phone.
31. Consequently, the trial court's judgment was sound, grounded in the facts, and properly convicted the appellant. The respondent urges the appellate court to uphold the trial court's decision.
32. This being a first Appeal, the duty of the first Appellate Court is to re-evaluate the evidence and the law presented before the trial court and to arrive at its own independent conclusions.
33. This is a crucial role that ensures a fair and just outcome for the parties involved in the appeal.
34. The Court of Appeal in *Okeno v Republic* [1972] EA 32 clearly outlined this duty, stating that;

“ A first appellate court must itself weigh conflicting evidence and draw its own conclusions... It is its duty to rehear the case on the record and to reconsider the materials before the trial judge. The appellate court must then make its own findings of fact and law, bearing in mind however that it has not had the advantage of seeing and hearing the witnesses.”
35. This principle has been consistently upheld in numerous subsequent Kenyan cases. For instance, in *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123, the court reiterated that;

“ an appeal from the High Court is by way of rehearing on points of law and fact... the Court of Appeal is not bound to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the evidence itself on the face of it bears no sufficient weight to support the findings.”
36. Therefore, when faced with a first appeal, the appellate court undertakes a comprehensive review of the trial court's decision, scrutinizing the evidence, the legal principles applied, and the overall fairness of the judgment. It is not simply a review of errors of law but a complete reconsideration of the case.
37. The issues for determination in that Appeal are as follows:
  - i. Whether the Appellant was positively identified.
  - ii. Whether the prosecution proved the guilt of the Appellant to the required standard in criminal cases.



- iii. Whether the Sentence was excessive.
38. As a first appellate court, the duty of the first appellate court, as clearly outlined in the case of *Okeno v Republic* [1972] EA 32 and reiterated in *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123, is to re-evaluate the evidence presented before the trial court, consider the law, and arrive at our own independent conclusions, bearing in mind that the appellate court did not have the opportunity to see and hear the witnesses firsthand.
39. The first issue for determination is whether the Appellant was positively identified as the perpetrator of the crime.
40. The Complainant (PW1) testified that he recognized the Appellant, whom he knew as a fellow villager, during the incident. Although the robbery occurred at night, the Complainant stated that he used a torch to illuminate the Appellant and was able to identify him.
41. Furthermore, the struggle between the Complainant and the assailant lasted for a significant period, providing further opportunity for recognition. The trial court found this to be a case of recognition rather than mere identification by a stranger in darkness.
42. The Appellant argued that the identification was not positive due to the darkness and the failure of the Complainant to immediately name him or provide a description to the police.
43. However, the fact that the Complainant knew the Appellant prior to the incident significantly strengthens the reliability of his recognition.
44. In cases of recognition, the familiarity of the witness with the accused is a crucial factor.
45. Furthermore, the recovery of one of the stolen mobile phones from the Appellant's possession the day after the robbery provides significant corroboration to the Complainant's testimony.
46. The Appellant offered no credible explanation for being in possession of this stolen item.
47. The doctrine of recent possession, as applied in Kenyan courts, holds that unexplained possession of recently stolen property raises a presumption that the possessor is the thief or has received the property knowing it to be stolen.
48. In this case, the recovery of the phone directly links the Appellant to the robbery.
49. The second issue is whether the prosecution proved the guilt of the Appellant for the offence of Robbery contrary to Sections 295 and 296(2) of the *Penal Code* to the required standard in criminal cases, which is proof beyond a reasonable doubt.
50. The offence of robbery with violence is contained in Sections 295 and 296(2) of the *Penal Code* as follows;
- “295. 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.
- 296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

51. The evidence presented by the prosecution, particularly the testimony of the Complainant and the medical evidence (PW4) confirming the injuries sustained, establishes that a robbery occurred and that violence was used.
52. The Complainant testified that the Appellant was armed with a knife and inflicted injuries upon him.
53. The recovery of the stolen phone from the Appellant further strengthens the prosecution's case, connecting him directly to the crime.
54. While the Appellant raised an alibi and alleged that the charges were instigated by the Investigating Officer, the trial court found these defences unconvincing.
55. I have carefully reviewed the record and find no compelling reason to differ with the trial court's assessment of the credibility of the witnesses.
56. The inconsistencies alleged by the Appellant regarding the arrest and recovery of exhibits do not negate the core evidence linking him to the robbery.
57. Finally, I must consider whether the sentence of life imprisonment is excessive. Section 296(2) of the *Penal Code* prescribes the sentence of death for the offence of robbery with violence.
58. The trial court imposed a sentence of life imprisonment. Given the violent nature of the crime, the injuries inflicted on the Complainant, and the provisions of the law, I find that the sentence of life imprisonment is lawful and not excessive in the circumstances.
59. In conclusion, having re-evaluated the evidence and the law, I find that the prosecution presented sufficient evidence to prove the guilt of the Appellant beyond a reasonable doubt.
60. The identification by the Complainant, coupled with the recovery of stolen property from the Appellant, provides a strong basis for the conviction. The sentence imposed is within the law and appropriate for the offence committed.
61. I find the Appeal unmerited. I dismiss it and uphold both the conviction and Sentence.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT VOI HIGH COURT THIS 16TH DAY OF MAY, 2025.**

**A. N. ONGERI**

**JUDGE**

In the presence of:

Court Assistants: Maina/Millicent

..... for the Appellant

..... for the Respondent

