



REPUBLIC OF KENYA



KENYA LAW
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**Otieno v Republic (Criminal Appeal E029 of 2021)
[2025] KEHC 6188 (KLR) (5 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E029 OF 2021**

AM MUTETI, J

MAY 5, 2025

BETWEEN

COLLINS ODHIAMBO OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

Background

1. The appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*.
2. The particulars of the charge were that on the 7th day of July 2014 at Kabonyo Block 15 in Muhoroni District within Kisumu County whole armed with a panga robbed Loise Aloo Agola her mobile phone make ITEL valued at Ksh.1600 and immediately before or immediately after such robbery wounded the said Loise Aloo Agola.
3. The case was heard to conclusion and the learned Honorable J.K NGANGAR SPM (as he then was) convicted and sentenced the appellant to death.
4. In the sentencing notes the learned Honorable magistrate stated:-

“I have considered the mitigation by the accused. The only available sentence is one mandatory this is death sentence. The accused is sentenced to suffer death is per the law.”
5. It is this sentence that the appellant is dissatisfied with and wishes to have set aside.
6. The appellant in his petition of Appeal received in court on 5th July 2021 raised five grounds which can be summarized as follows:-



- a. That the investigations that the offence were shoddy thus the learned Honorable magistrate erred in convicting the appellant.
- b. That the prosecution's case was marred with contradictions thus his conviction was unsafe.
- c. That the learned Honorable magistrate failed to appreciate that the sentence imposed was against the weight of evidence and that the sentence was unconstitutional due to this mandatories

Analysis and Determination

7. The appeal presents two issues for determination namely:-
 - i. Whether the case against the appellant was proved to the required standard
 - ii. Whether the death sentence imposed against the accused is constitutional and merited in the circumstances of this case
8. The duty of this court as a first appeal is in the nature of a re-hearing of the appeal.
9. The appellants expects and legally entitled to a fresh and exhaustive re-evaluation of the evidence in order to determine his guilt or innocence. See *Okeno Vs. Republic (CR Appeal No. 26 of 2021)* [2024] KEHC 2894 (KLR) 19th March 2024.
10. The court is however acutely aware that unlike the learned Honorable magistrate, this Honorable court did not have the benefit of seeing and hearing the witnesses , thus due allowance is to be made in drawing interferences and own conclusions.
11. The appellant at the hearing of this appeal informed this court he had filed submissions and that he was happy to rely on the same fully without having to highlight.
12. The prosecutions through MR. OKOTH prosecution counsel similarly informed the court that the prosecution had filed submissions which he sought to rely on entirely.
13. I have taken time to peruse the record of the lower court as well as the submissions filed by both parties.
14. The appellants submissions mainly focus on the sentence he has pleaded for mercy before this court.
15. It is his desire that this court reviews the death sentence to any other sentence that the court deems fit.
16. The submissions do not cover the issue of conviction but this court shall nevertheless look into the entire evidence to ascertain whether the conviction was safe.
17. The prosecution opened their case with the evidence of the complainant who testified as PW1.
18. According to the witness she met the appellant on 7/7/2024 on her way home at around 8:00 pm. The appellant was a person known to her as he was a neighbor. The appellant was armed with a panga when he threatened to use at her as he grabbed her phone which was in her bag.
19. At the time of the attack the complaint was alone so she screamed for help attracting neighbors to the scene.
20. According to PW1 it was Mr. Odongo who was the first to arrive at the scene.
21. The appellant took off and vanished into a nearby sugar cane plantation.



22. In the course of the struggle with the appellant PW1 says she was able to identify him and she suffered injuries in the hands by being cut by the appellant.
23. The witness told the trial court that she went to Chepsaita Police Station to make a report.
24. The victim was issued with a P3 form which she later got filled by a doctor and produced in court through PW6 as prosecution Exhibit No. 1 (b).
25. The prosecution witness No. PW6 was a clinician based at Masoge.
26. The clinician noted injuries on the upper limbs and on the right hand she had a cut wound exposing the bone. The wound was 16cm long covering the wrist joint to the palm. The witness further indicated that the index finger had a cut wound. The witness went further to state that she had suffered grievous harm.
27. The medical notes from Kasogo Hospital were as produced as PEX 1 (a). The victim was escorted to the police.
28. On 17th July 2022 PW7 testified that two members of the public went to the station at 4:30 pm and reported that they had spotted the appellant.
29. PW7 and another officer went to a nearby barber shop where the appellant was said to be. The officers found him there and arrested him.
30. The witness PW7 recovered the mobile phone of the complainant from the appellant.
31. The recovery was barely 10 days after the robbery.
32. The evidence of the complainant PW1 was corroborated in material particulars by PW3 who stated that on the date the offence was committed there was moonlight.
33. PW3 testified that she heard some one screaming saying “Collins why are you killing me”
34. PW3 states that she saw the appellant run into the sugar cane plantation. The witnesses similarly knew the appellant.
35. PW3 also confirmed that when she went to the scene to rescue the complainant had already been injured.
36. PW2 on his part got to the scene after the appellant had scampered for safety. He however learnt that the victim PW1 had been robbed of a phone.
37. The witnesses also testified that the appellant was arrested with the phone.
38. PW5 Richard Okodol also testified on the recovery of the phone from the appellant.
39. The appellant after being put to his defence he indicated to the court that he was to testify together with the witness.
40. The appellant in his defence claimed that the phone in issue was his and he wondered why it took the police 10 days to arrest him. He simply said that the charge was a frame up.
41. He went on to claim that he had gone away from home to look for a job and when he came back, he was arrested.
42. The appellant confirmed that he was known to the complainant who used to work at their place so she could have been able to identify him.



43. The appellant denied having robbed the complainant and insisted that the phone was his but he had no receipt to prove ownership.
44. The appellant despite indicating that he would call one witness he was unable to do so thus he closed his defense.
45. The above is the summary of the prosecution case as well as the defense.
46. The prosecution was able to prove that the appellant and the complainant were known to each other prior to the incident thus the identification of the appellant could not have been difficult.
47. The prosecution had evidence to prove that even though the offence took place at 8pm, there was moonlight and the appellant came into close contact with the complainant PW1 thus this was a case of recognition as opposed to mere identification of a stranger.
48. Taking into the account that the appellant was known to the complainant, it is the finding of this court the circumstances prevailing at the time of the commission of the offence favored positive identification of the offender.
49. The court in reaching this conclusion relies on the case of R Vs Turnbull (1977) Q.B 224 where the court provided a checklist of matters to consider in dealing with identification. The duration that a victim spent with the assailant as well as the distance between them favored positive identification.
50. In my view the incident was one in which the appellant struggled with his victim. That in my view offered sufficient time for the victim to identify the aggressor.
51. Further, the distance between them obviously must also have been close enough for the complainant to be able to grab the panga and the appellant to snatch the phone.
52. The fact of there, having been moonlight, this court finds that visibility must have been adequate for the victim and his witness to have positively identified the appellant.
53. The recovery of the phone from appellant 10 Days after the event perfectly within what would be described as possession of recently stolen property.
54. The victim was able to positively identify the phone and even though the appellant lay a claim to it, he had no document to prove that he owned the phone.
55. Possession of recently stolen property has been found to be sufficient to lead a court to the conclusion that the person found in possession of the property is either the thief or the guilty handler.
56. The presumption of guilt is however not an irrebuttable one therefore where the person found in possession is under duty to explain their possession of the thing in question.
57. I do find that the appellant did not rebut the presumption in this case. In R Vs Loughlin (1838) 173 ER 1090 the court held that possession of recently stolen property raises the presumption that the possessor is either the thief or guilty of receiving the goods knowing them to be stolen.
58. The appellant alleged that he was framed but did not lay a basis to that claim. He needed to discharge the burden of proving that indeed the phone belonged to him.
59. The period of time within which the recovery is made is key in determining whether the presumption of suit can be drawn. See R Vs HALL (1961) 45 C.R APP R316.
60. Recovery of the phone in this case was within 10 days after the robbery. I find and hold that the period was not unreasonable for one to draw the presumption of guilt.



61. Lastly, the ingredients of the offence of robbery with violence were all established beyond a reasonable doubt.
62. The appellant was armed at the time of the offence and he used actual violence on the victim.
63. The conviction against the appellant was therefore safe and should not be disturbed.
64. The appeal on conviction therefore fails.
65. In regard to the sentence, I have noted that the appellant was sentenced to death.
66. The sentence in my view was merited considering the totality of the circumstances. The fact of injuring the victim during the commission of the offence militates against any other sentence. The appellant must learn to live of his own sweat.
67. Whereas it is true the Supreme court declared the mandatoriness of the death sentence unconstitutional, the sentence is legal and can be imposed where circumstances so demand.
68. The appellant chose to reap from where he had not sown and as if that was not enough decided in so doing to employ violence.
69. The appellant is undeserving of the mercy of this court considering that he chose to rob a person who had played a caretaker role to him according to the evidence.
70. The appellant strikes me as a very mean fellow undeserving to return to the community.
71. The appeal on sentence is thus rejected.
72. In the end the appellant shall continue to serve the death sentence.
73. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF MAY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Court Assistant: Kiptoo

Appellant present in person

Ms Kibet for the state

