

REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL NO. E017 OF 2024

CHARLES OPONDO..... APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal arising out of the conviction and sentence of Hon J.P Nandi (Senior Principal Magistrate) in Bondo Principal Magistrate’s Court Criminal Case No. 242 of 2023 delivered on 21st March 2024)

JUDGMENT

1. The Appellant herein Charles Opondo was charged with two counts of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. In count one, the particulars of the offence are that on the 20th July 2023 at about 2000hours at Nango village Central Sakwa Location of Bondo Sub County within Siaya County, jointly with another

not before the court, while armed with crude weapons to wit pangas robbed one Emily Akinyi Oliech of her mobile phone make Samsung galaxy, 8.46 grams of gold stones valued at Ksh 54,000/=, and cash of Ksh 7625/= and immediately before such robbery threatened to harm her.

2. On count two, the particulars of the offence are that on the 20th July 2023 at about 2000hours at Nango village, Central Sakwa Location of Bondo Sub County within Siaya County, jointly with another not before the court, while armed with crude weapons to wit pangas robbed one Doris Adhiambo of her two porches that contained cash Ksh 9600/= and 13.5 grams of gold stones valued at Ksh 87,880/=and immediately before such robbery threatened to harm her.
3. The Appellant denied the charges and the matter proceeded to full hearing with six prosecution witnesses and one defense witness.
4. After the trial, the Appellant was found guilty of both counts, convicted, and sentenced to life imprisonment.
5. Aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal wherein he raised the following grounds:

- i. The trial magistrate erred in law and in fact by basing the conviction on contradictory evidence by the prosecution.
- ii. The trial magistrate erred in law and in fact by imposing a sentence that had been declared unconstitutional.

The Appellant thus prayed that the appeal be allowed, conviction quashed and the sentence be set aside.

6. This being a first appeal, it is the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent findings and conclusions. **(See Okeno vs. Republic [1972] EA 32)**. In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to make due allowance in that respect as was held in **Ajode v. Republic [2004] KLR 81**.

7. The brief facts of the case are that on the 20th July 2023 at about 8.00 P.M., Emily Akinyi Oliech (PW1) and Doris Adhiambo Adegga (PW4) were pillion passengers aboard a motorcycle controlled by the rider one Evans Otieno Ooro (PW3). At Nango area heading to Bondo, the road was not smooth and so the rider slowed down when suddenly two

people emerged from the bush nearby and held PW1, and that the motorcycle fell down while everyone was still on board.

8. That immediately the attackers holding pangas, held them against the necks of PW1 and PW4 while threatening to harm them if they did not hand over everything they had. That they robbed them of mobile phones, money and gold stones. They also attacked the rider who managed to escape with some minor injuries. That after the ordeal, the victims sought rescue separately. That the following day, PW1 reported to Safaricom offices which informed her that money had been withdrawn from Mode Enterprise at Nyangoma. That PW1 proceeded to Mode Enterprises and that the attendant one Martin Otieno Oluoch (PW6) informed her that the person who withdrew the money under the name Emily was well known to him and that he had given him Kshs 250/= and was to come and collect Kshs 20/= the following day as he did not have coins at the point of the withdrawal. They then waited for him to turn up the following day for the balance of the money.

9. The owner of the Mpesa -Mode Enterprise Martin Otieno Oluoch testified as PW6 and stated that he had known the Appellant for four years. That when PW1 came inquiring about the person who had made a withdrawal under her name, he pointed him to her. PW1 then informed the Assistant chief and that the Appellant was arrested. The investigation officer No. 246526 Sheldon Adenya (PW2) testified and produced an M-

mpesa statement of phone number 0715897387 belonging to PW1 which showed that indeed two money withdrawals from PW1's phone number had been made on the very night of the incident.

10. At the close of the prosecution's case, the trial court established that a prima facie case had been made against the Appellant who was subsequently placed on his defense. He opted to give a sworn testimony.

11. In his defense, the Appellant confirmed that on the night of the incident, he went to the said Mode Enterprise at the exact time of the withdrawal alleging to have escorted another person to the mpesa shop. The Appellant likewise testified that the following day after the withdrawal he went back to collect the Ksh 20/= that the Mpesa attendant (PW6) had remained with. He maintained that he has been made to suffer on behalf of somebody he had escorted to an M-pesa shop to withdraw money and who allowed him to collect the remainder of Kshs 20.

12. The appeal was canvassed by way of written submissions. The Appellant submitted that the prosecution failed to prove their case as the evidence thereon was contradictory. Further, that the sentence of life imprisonment in the circumstances was unconstitutional.

13. On the other hand, the Respondent submitted that they had proved their case beyond reasonable doubt and prayed that the conviction and sentence be upheld and affirmed.

14. Having considered the record of appeal, the rival submissions and authorities relied on, I find the issue for determination are:

a) Whether the prosecution proved its case beyond reasonable doubt.

b) Whether the sentence imposed was excessive.

15. The Penal Code defines robbery in section 295 as follows;

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.

16. In the process of prescribing punishment for the offence of robbery, the Penal Code in Section 296(2) provides for the offence of robbery with violence in the following manner;

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.

17. In **Criminal Appeal No. 116 of 2005 (Ur), Johana Ndungu V Republic** the Court of Appeal listed the ingredients of the offence of robbery with violence as follows;

- i. If the offender is armed with any dangerous weapon or instrument; or*
- ii. If he is in the company of one or more other person or persons, or;*
- iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.*

18. In **Criminal Appeal No. 300 Of 2007, Dima Denge Dima & Others Vs Republic**, the Court stated that the ingredients of the offense of robbery with violence are appreciated disjunctively. It is, therefore, proper to convict an offender in instances where only one of the ingredients is proved.

The Court observed: -***The elements of the offense under Section 296(2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offense of robbery with violence....***

19. In the case of **Oluoch -Vs- Republic {1985} KLR 549**, the Court observed that proof of any one of the above ingredients is enough to sustain a conviction under Section 296(2) of the Penal Code.
20. Deriving from the foregoing, the offense of robbery with violence is made up of two parts. The first part is the robbery and the other part is the aspect of violence.
21. It was the evidence of PW1 and PW4 that they were attacked by two men who were armed with pangas and that they held the pangas against their necks and ordered them to surrender everything they had to them. From the evidence of PW1 all through to PW6, the Appellant appears not to have been identified at the scene by both PW1 and PW4. However, the case took a turn when PW5 testified that it was the Appellant who went to make the withdrawal of Ksh 270/= on the night of 20th July 2023 and that he had known the Appellant for four years.

22. The icing on the cake was done by the Appellant himself when he blew his cover and stated that he escorted someone to withdraw money at the same mpesa point that night and that he himself went to take the balance of Kshs 20/= that had been left at the Mpesa that fateful night. That act of going back for the Kshs 20/= sold him off. It proved beyond reasonable doubt that indeed he was the one who had used the complainant's phone to withdraw the Ksh 270/=. Indeed, the Mpesa attendants (PW5 and PW6) stated that it was the Appellant who went to their shop and withdrew the sum of Kshs 270 using the first complainant's sim card number and that he only took Kshs 250 that was available and then came for the balance the following day when he was nabbed.

23. From the evidence of the Respondent's witnesses and the Appellant himself, the circumstantial evidence squarely placed the Appellant at the scene of the crime. It transpired from the evidence that the robbers visited Mode Enterprises for M-pesa services soon after the robbery incident and that the person (PW6) who served the customer recognized the Appellant who was well known to him and that the name that registered on the M-pesa statement was that of the first complainant Emily Oliech (PW1) and that she was able to point out the Appellant the following day when he went back to the M-pesa shop and was promptly apprehended and handed over to the police. In the case of **Sawe Vs R [2003] eKLR** it was held that in order to justify the inference of guilt, the inculpatory facts must be

incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It was further held that there must be no other co-existing circumstances that would weaken the inference of guilt. There is no doubt that the Appellant was one of the persons who had robbed the complainants on the date in question. Indeed, the Appellant confirmed in his defence evidence that he went back to the M-pesa shop to collect the remaining Kshs 20/ the following day. The Appellant's claim that he had accompanied somebody else to the M-pesa shop is not believable as he was the one who actually withdrew the money and no one else on the material date and that he was one of the persons who had robbed the two complainants. It is instructive that the withdrawal of the money was made a few minutes after the robbery incident and hence the Appellant was placed at the scene of crime as one of the perpetrators.

24. The sum total of the forgoing analysis, is that I find the Respondent proved the two counts against the Appellant beyond any reasonable doubt as by law required. The defence evidence did not shake that of the Respondent which was overwhelming against him. Consequently, the finding on conviction by the learned trial magistrate was quite sound and must be upheld.

25. As regards sentence, it is noted that the Appellant was ordered to serve life imprisonment Under section 296(2) of the

Penal Code, a person found guilty is liable to be sentenced to death. Following the decision of the Supreme Court in the case **of Francis Karioko Muruatetu Vs R [2017] eKLR** that the mandatory nature of death sentence was declared unconstitutional and that courts were to receive the mitigating circumstances of offenders and impose an appropriate sentence thereafter. It was further held that the courts could as well impose a sentence of death if the circumstances warrant it. The Appellant has challenged the sentence as unconstitutional and excessive. It is noted that the two complainants did not sustain injuries but definitely must have suffered psychological trauma. They also lost some properties. It is also noted that the Appellant's mitigation was taken into consideration by the trial court. The Appellant is also noted to be a first offender. Following the several authorities that have emanated from the Muruatetu case (supra), I am inclined to tinker with the sentence imposed by the trial court. The Appellant definitely requires to undergo comprehensive custodial rehabilitation before being released back to society. I find a sentence of thirty (30) years imprisonment on each count and which shall run concurrently is appropriate in the circumstances. As the Appellant remained in custody throughout his trial, the sentences shall commence from the date of arrest namely 23/7/2023.

26. In the result, the Appellant's appeal on conviction lacks merit and is dismissed. However, the appeal on sentence partially succeeds to the extent that the sentence of life imprisonment is hereby set aside and substituted with a sentence of thirty (30) years' imprisonment on each count which shall run concurrently from the date of arrest namely 23/7/2023.

Orders accordingly.

Dated and delivered at Siaya this 2nd day of May 2025.

**D. KEMEI
JUDGE**

In the presence of:

Charles Opondo.....Appellant

Soita.....for Respondent

Okumu.....Court Assistant

SIAYA HCCRA NO. E017 OF 2024 - JUDGMENT