



REPUBLIC OF KENYA



KENYA LAW
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**Etabale v Republic (Criminal Appeal E017 of 2023)
[2025] KEHC 9029 (KLR) (23 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9029 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL APPEAL E017 OF 2023**

S MBUNGI, J

JUNE 23, 2025

BETWEEN

ABEL NANGOMBE ETABALE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentencing of Hon. L.Kassan (CM) in
Kakamega CMC Criminal Case No. 196 of 2016 delivered on 6th March, 2023)*

JUDGMENT

1. The Appellant and another were arraigned before the Chief Magistrate at Kakamega, in CMC Criminal Case No. 196 of 2016, charged with the offence of robbery contrary to Section 295 as read with Section 296(1) of the *Penal Code*.
2. The particulars of the offence were that on the 16th day of January, 2016 in Shikoti shopping centre of Indangalasia Sub-Location in Lurambi Division within Kakamega county, the Appellant, John Muleshe jointly with others not before court, while armed with dangerous weapons, namely pangas, robbed AMOS AKALA ERONDE of Kshs. 10,000/ and, immediately before the time of such robbery threatened to use actual violence on the said Amos Akala Eronde.
3. The Appellant pleaded not guilty to the charge and in order to prove its case, the prosecution called a total of three (3) witnesses whose evidence is summarized below.

The Evidence

4. PW1, Amos Akaki testified that on 6/1/2016, at about 1200hrs, he was on his way from Murumba heading home when he was accosted by the Appellant, in the company of five other people, while armed with pangas. The Appellant demanded of the complainant that he gives him the parcel he had, or else he would die. They surrounded him and therefore, he gave away the parcel which contained a



sum of Kshs 10,000/ and photocopies of his mother's ID to the Appellant. He stated that he knew the two before the date of the incident and that he was able to identify the Appellant since the witness's aunt is married close to the Appellant's home. He admitted that he did not know the Appellant's name but could identify the two Accused persons by face. He added that he thereafter reported the incident at the Kakamega Police Station.

5. On cross examination by counsel for the Appellant, then 1st accused, the witness stated that he buys cane from farmers which he then sells to West Kenya Butali jaggery but admitted that he did not have the permit for the business. He stated that at the time of the attack he was with one Fabian Andika, that he had known the Appellant for two years and that the Appellant was the leader of the cane cutting gang. He further stated that the Appellant and his gang had pangas and that they were in fact cutting sugarcane but he had not provided them with permit. He again stated that he was by himself when he was attacked.
6. He alluded to have been accused by the two Accused persons and that he did not prevail upon the 2nd Accused to drop his complaint against him and that there were other cane cutters as he was accosted by the six attackers. He added that the Appellant took the money from him in an envelope, that the envelope was never recovered and that he suffered no injuries from the attack.
7. When cross examined by the 2nd Accused, the witness told the court that it was the 1st Accused who took the envelope from his hand adding that he, for no special reasons chose to make a report at Kakamega police station even though there was a police station at Shikoti. On further cross examination, he said that he did not know the number of people present at the scene as much as he did not know the serial numbers of the stolen currency notes.
8. PW2 No. 95682 PC Christine Kemunto attached at the Kakamega Police Station testified that on 6/1/2016, PW1 reported to the station that while in the company of one Fabian Andika they were attacked by six thugs armed with pangas at Shikoti area who robbed him of an envelope containing Kshs. 10,000/ and two National IDs. The complainant identified two of his assailants as Abel Nangombo and John Muleshia who the police traced and had them arrested. The witness added that the Accused would process permits for transporting cane on behalf of the complainant.
9. On cross examination by counsel for the 1st Accused, she stated that the Accused had dealt with the complainant before on issued of processing permits but denied that the case involved issues of permit. She added that the matter was never reported at the nearest police post. When cross examined by the 2nd Accused, the witness reiterated not being aware that the dispute was about permits and that one of the witnesses for the complainant was not willing to give evidence against him.
10. PW3 was Farbish Indika. He testified that on 6/1/2016 at about noon he met with PW1 while going about his errands and that as they walking near Shikoti Girls' High School a group of six men armed with pangas attacked them. The Appellant held PW1 by the collar of his shirt on one hand while the other hand raised a panga. The 2nd Accused then took an envelope from PW1 after which the two Accused persons fled from the scene. He stated that he did not know the Accused persons.
11. On cross examination by counsel for the 1st Accused, the witness stated that PW1 informed him that he knew the thugs and that he was processing cane cutting permits for them adding that the envelope he had lost had a copy of the permit as well as cash. He added that the incident happened on a broad daylight at a market center and that the thugs escaped after snatching the envelope which contained permits and cash. He said that even after the attack he never made any report to the police and that he only recorded his statement two days later adding that he suffered no injuries from the attack.



12. On cross examination by the 2nd Accused, the witness told the court that there was also an unnamed lady with them, that the attackers were armed with pangas and that he never reported to the nearby police station after the attack. When asked by the court, the witness said that PW1 went to the police and reported the matter immediately but the witness did not accompany him.
13. With the end of evidence by PW3, the prosecution closed its case and the court after recording submissions by the two sides, found a prima facie case had been established and placed the accused on their defence. Both chose to give sworn testimonies without calling any other witnesses.
14. The evidence of PW3 marked the close of the prosecution case with the court ruling that a prima facie case had been established and the accused person was put on Defence.
15. The Appellant testified as DW1 and told the court that PW1 came to his home and told him he was an agent of West Kenya Sugar Company and able to help him get a permit to sell the cane he had planted to the company. On 7/1/2016 the Appellant met PW1 and the two visited the Appellant's land when the complainant noted that the land could produce 3 tractors of cane. PW1 told the Appellant that he had to part with Kshs. 4,500/-, give a copy of his National ID card and phone number for the permit to be obtained.
16. On 14/1/2016, PW1 called to inform the Appellant that he was still pursuing his permit. On 16/1/2016, while the Appellant was at Shikoti the Appellant once again received a call from PW1 at about 11am, and he gave to PW1 the directions to where he was. PW1 showed up with another person and he asked him to accompany them to Shikoti market where he was to give him his license. He was with the 2nd Accused. When they got to a hotel, PW1 asked for Kshs. 4,500/- but the Appellant had only had Kshs. 1,500/- which PW1 refused to take. They parted ways. The next day he was arrested and charged. He denied the charges and stated that he only had a panga when at the farm cutting cane but when he went to the hotel, the panga remained at the farm.
17. On cross examination, he stated that he was in a gang of about eleven people at the farm cutting cane of which two were his friends who had refused to testify for being friends of the complainant.
18. By a judgment of the trial court delivered on 6/3/2023, the Appellant was convicted for the offence of robbery contrary to Section 295 as read with Section 296(1) of the Penal Code and sentenced to ten years' imprisonment.
19. Aggrieved with the judgment and sentence of the trial court, the Appellant has lodged this appeal seeking to have the judgment quashed citing the grounds of appeal to be that;
 - a. The court erred in law and fact in holding that the prosecution had proved a case on the appellant beyond reasonable doubt.
 - b. The court erred in convicting him when the evidence of recognition was based on one identifying witness without warning himself of the damages apparent in such conviction.
 - c. The court relied on evidence of recognition which was not sufficient to prove that the witness recognized the accused beyond reasonable doubt.
 - d. The court failed to take into account of the appellant's evidence and wholly dismissed it without analyzing it.
 - e. The sentence was excessive in the circumstance.
20. The appeal has been canvassed by way of written submissions which the court has duly considered and given the due weight in this determination.



21. In his submissions, the Appellant contends that he was not positively identified for the reason that the complainant stated that he knew him by face yet no description was given and the fact that he stated that he did not know him by name but when he got to the police station, according to page 33 of the record of appeal, the complainant gave the police the name of his assailants as Abel Nangombe and John Muleshia. He also argues that PW3 who was with PW1, at the time of the attack, did not identify the Accused or give a description of the attire he had worn that day. Additionally, he cites contradictions such as the assertion by PW1 that it was the Appellant who took the envelope from his hand while PW2 testified that that it was the 2nd Accused who took the envelope. Secondly, the complainant on cross examination stated that the crime took place where sugar cane was being cut while the charge sheet indicates that the incident took place in a market and finally that the person who was with the complainant at the time of the incident was Farbish Indika but the person who testified was Fabian Indika and that no evidence was tendered to the effect that it was one and same person.

Issues for Determination

22. The court has considered the grounds of appeal, the proceedings of the lower court and the submissions filed and discerns the following issues for determination: -
- a. Whether the prosecution proved beyond reasonable doubt the offence of robbery with violence against the appellant
 - b. Whether the appellant's defence was considered
 - c. Whether the sentence meted was commensurate or excessive in the circumstance

Whether the prosecution proved beyond reasonable doubt the offence of robbery with violence against the Appellant

23. On this broad issue, the center of the Appellant's contention as submitted is on identification. The Appellant argues that it was PW1's testimony that he only knew him by face yet when he went to report the incident at the police station on the same day he gave the police the names of his attackers as evidenced by PW2. He equally argues that PW3 who alleges to have been with PW1 testified that he did not know their attackers, failed to give a description of the attackers to the police who did not conduct any identification parade.
24. The complainant testified that he knew the Appellant by face since his aunt was married close to his home and his identification of the Appellant was by way of recognition. It is indubitable that identification by recognition is more satisfactory than identification, say, in a parade. see Anjononi & Others Vs. Republic [1976-80] KLR 1566.
25. That notwithstanding, a court of law is still obligated to examine such evidence carefully to ensure that the identification is free from error. The Court of Appeal in Wamunga –vs- R [1989] KLR 424 reiterated the position of the law when it observed;
- “Where the only evidence against a defendant is the evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”
26. Applying the principle of law in that decision to the evidence led in this matter, the court proceeds from the learning that even where there is evidence of identification by recognition, it remains a demand of justice that the evidence be cogent, clear and credible to justify founding a conviction.



27. In his evidence the complainant testified that he was attacked and robbed by the Appellant in the company of others on 16/1/2016. He claimed not to have known the name of his assailants. On the same day, however, according to PW2, the complainant made a report to the police by which he identified two of his assailants as Abel Nangombo and John Muleshia. The court is of the opinion that it is not believable that the complainant learnt of the names of his assailant on his way to the police but forgot about the same on the date he gave evidence. The court views the contradictions in the evidence of PW1 and PW2 to be material and leaves a lingering doubt in the mind of the court whether the alleged recognition and the entire evidence of the complainant was true, exaggerated or just made up.
28. Secondly, while the incident took place on a broad day light, PW1 and 2 cannot agree on whether it was the Appellant or his co-Accused who snatched the envelope from the complainant.
29. When such material contradictions are added to the admitted fact that the complainant had approached the Appellant and offered to assist him acquire a permit to harvest his cane at a consideration of Kshs 4,500/-, the credibility of the complainant is put to serious doubt why he would feign ignorance about the name of the Appellant.
30. Moreover, the incident took place in a market area, with at least ten people watching. It is irreconcilably inconceivable that none of the onlookers came to the aid of the complainant, none, other than PW3, offered to give evidence. The court views the evidence of PW1 and 2 to be unreliable and unsafe to found any conviction.
31. The court choses to resolve such contradictions and the consequent reasonable doubt in favour of the Appellant. It determines that the case was not proved to the requisite standards and therefore, that the conviction entered was not safe. The same not being safe is hereby quashed and the sentence founded upon it is set aside.

DATED AND SIGNED THIS 29TH DAY OF MAY, 2025.

PATRICK J O OTIENO

JUDGE

DATED, SIGNED AND DELIVERED AT KAKAMEGA, THIS 23RD DAY OF JUNE, 2025.

S. MBUGI

JUDGE

In the presence of:

Mr. Momanyi for the Appellant

Ms. Osoro for the Respondent

Appellant present on-line

C/A: Agong'a

