



REPUBLIC OF KENYA



KENYA LAW
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**Ogaro v Republic (Criminal Appeal E004 of 2023)
[2025] KEHC 7849 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 7849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CRIMINAL APPEAL E004 OF 2023
CM KARIUKI, J
JUNE 5, 2025**

BETWEEN

BENSON OGARO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was charged with offence of Robbery with Violence contrary to Section 296(2) [Penal Code](#).
2. Particulars being that on 30/4/2021 at Poroko Location Transmara within Sub- County Narok County together with others robbed Janet Nyakango Ochengo of Kshs.20,600.00. he was convicted and sentenced to 20 years. He has appeal challenging the fact that prosecution prove of case beyond reasonable doubt. That prosecution case was full of contradiction.
3. Parties were directed to canvass appeal via submissions.

Appellant submissions.

4. PW 2 said that while she was attacked students were passing as a result the Appellants ran away something that prompted her to scream for help from the students who were walking about in the vicinity. In the circumstances, as the complainant (PW 2) did not testify that the Appellants behaved in a suspicious manner before the complainant was robbed, this gives a clear impression that the complainant had no reason to pay special attention to the (1st and 2nd) Appellant.
5. The 1st and 2nd Appellant in this case points out that the first step that the complainant described was that she was held from the back at the neck and after being held she fall down with one of the assailants. In the circumstances, the complainant did not even give description as to the people who attacked her despite the fact that she was with them as alleged.



6. However, in the P3 form, the police to whom PW 2 reported the incident had indicated clearly that PW 2 had alleged; “to have been assaulted by people known to her....” That your lordship, the piece of evidence does not support the testimony of PW 2 who later alleged to have been robbed.
7. That your lordship in the instance case there was no evidence that the Appellants were armed with dangerous or offensive weapons. Therefore, if at all the Appellants were involved in the said ordeal then the offence disclosed was simple robbery contrary to Section 296(1) of the Penal Code. The Appellants cite from the case of Thomas Odhiambo Agao Vs. Republic, Mombasa Court of Appeal Case No. 46 of 2015, where the court substituted the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code with simple robbery under Section 296(1) of the Penal Code.

Respondent Submissions.

8. The court of Appeal in Oluoch Vs. Republic (1985) KLR, quoted in Maritim Vs. Republic Criminal Appeal E024 of 2021) (2022) KEHC 10256 (KLR) (6 July 2022) (judgment) rendered itself in the following words: -

“Robbery with violence is committed in any of the following circumstances:

- a. The offender is armed with any dangerous and offensive weapon or instrument; or
- b. The offender is in company with one or more persons; or
- c. At or immediately after the time of the robbery the offender wounds, beats, strikes or uses any other personal violence to any person.....”

9. Similarly, in Jeremiah Oloo Odira Vs. Republic (2018) eKLR, quoted in Juma Vs. Republic (Criminal Appeal E032 of 2022) (2023) KEHC 21351 (KLR) (26 July 2023) (Judgment), the court observed that:-

“The offence of robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established. Theft and the use of or threat to use violence.”

10. PW 2 was the complainant. She testified that on 30th April 2021 at 9:00 a.m. the 1st Appellant approached her at her work place and offered to sell to her beans. They agreed on the bean variety and price and he told her that the beans were at Poroko Location. Together with the 2nd Appellant they all set out to Poroko Location on an understanding that the complainant was going to view and purchase the beans.
11. On arrival at Poroko, the Appellants showed her to one homestead where the 1st Appellant alleged that it was his sisters homestead where the beans was kept. On arrival the 1st Appellant again told the complainant that the beans were not there but in another homestead which he would lead her to. While on their way along a narrow path, the 2nd Appellant turned on her, held her by the throat and pulled her backwards. She fell and it was then that she noticed that it was the 2nd Appellant who was doing that to her.
12. The 2nd Appellant then immediately ransacked the pockets of the attire (apron) she was wearing and took away Kshs.20,600.00. The cash was in 20 denominations of Kshs.1,000.00, 5 denominations of



Kshs.100/= and 2 denominations of Kshs.50.00. The 1st Appellant held her hands together and dared the complainant to scream. Luckily, some passers by approached the scene and on spotting them, the Appellants fled. The complainant screamed and the passers by pursued the Appellant into a sugarcane plantation. The complainant was injured and was spitting blood.

13. A search was conducted at the sugarcane plantation and the 2nd Appellant was found and arrested by members of the public. He was later rescued from irate mob by the area chief and policemen. The complainant informed the officers on what had transpired and a search was conducted on the 2nd Appellant and all the sums of money taken from the complainant were recovered on him. She then sought treatment and had a P3 form filled. (See page 30 – 33 of the typed proceedings).
14. The money was produced as prosecution exhibit 3 i-x, 4 i-iv and 5 I & ii by PW 3, the investigating officer, who during his testimony confirmed that acting on a report, he among other officers rushed to the scene at Poroko, rescued the 2nd Appellant and took him to the police station, recorded the statement of the complainant, searched the 2nd Appellant and discovered the sums of money said to be stolen from the complainant. (See page 33 – 36 of the typed proceedings).
15. PW 1, the Clinical Officer, testified that of the 30th day of April 2024, when the complainant was examined at his facility, she found to present the following symptoms:-
 1. Tenderness on interior and anterior neck.
 2. Difficulty and pain during swallowing.
 3. Superficial cut wound on the left side of the tongue.

He concluded that she was likely strangled. The medical report (P3 form) was produced as exhibit 2. (see pages 16 & 17 of the typed proceedings).

16. The evidence in totality shows that the Appellants were in company of each other when they robbed the complainant of Kshs.20,600.00 and immediately before such robbery, the 1st Appellant strangled the complainant and fell her to the ground, occasioning her bodily harm.
17. The prevailing circumstances favoured the making of positive identification by the complainant which was free from error. The complainant met the 1st Appellant at 9:00 a.m. She travelled with both Respondents aboard a motor vehicle make probox from Kilgoris town to Poroko Location approximately 30 minutes after she met the 1st Appellant and agreed on the beans purchase. At Poroko Location they all trekked together on foot considerably, to one homestead where they rested a little then proceeded with the walking just before the offense and even during the offense, it was just the three of them at the scene as the Appellants robbed the complainants prior to them being found out by passersby. Clearly there was enough time and enough day light for the complainant to make a positive identification of the Respondents that is reliable and free from error. She could not, under those circumstances, be said to have mistaken any of the Appellants identities.
18. Having tendered evidence that the 2nd Appellant was found with the stolen money, it is clear that he had recent possession of the said monies at the time of arrest which was shortly after the offense. However, despite his insistence on his innocence throughout the proceedings and even after conviction, he never tendered any evidence, during his defense, in relation to how he got the said money in line with such obligation as bestowed upon him under Section 111 of the Evidence Act CAP 80. “The doctrine of recent possession places the duty to explain possession on the party in possession. This arises from the requirements of Section 111 of the Evidence Act. No one other than the accused is in a vantage point to explain where he got the item. Such an item must be shown to have causal link to the crime.” Those



were the words of M.D. Kizito J in *Wanjiku Vs. Republic* (Criminal Appeal E021 of 2023) (2024) KEH 4947 (KLR) (2 MAY 2024).

19. By failing to provide an iota of proof of where he got the monies recovered from him upon arrest. The 2nd Appellant failed to shake the prosecution evidence on recent possession of the complainant's monies.
20. In their defences, both the Appellants offered mere denials. They also regurgitated the events in their own versions and tendered no iota of evidence to prove their testimonies.
21. On the issue of sentencing, the trial court noted that the Appellants were not remorseful. The court cannot be faulted as even the Appellant's conduct during the trial of escaping from prison where they were remanded and their decline to make any apologies for the crime is symptomatic of their lack of remorse. The offence clearly calls for a deterrent sentence to protect women traders from such schemes and predatory offenses, and to dissuade the conscience of those who may consider perpetrating such offenses. The offense, in law, has maximum penalty of death sentence, thus 20 years, for which they were sentenced, was extremely lenient owing to the nature of the offense and their lack of remorse.
22. Thus, court orders that,
 - i. The appeal on both conviction and sentence is dismissed.

JUDGMENT DELIVERED DATED AND SIGNED THIS 5TH DAY OF JUNE 2025.

JUSTICE CHARLES KARIUKI

JUDGE

