



REPUBLIC OF KENYA



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**Aloo v Republic (Criminal Appeal E103 of 2024)
[2025] KEHC 10072 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E103 OF 2024**

A MABEYA, J

JULY 11, 2025

BETWEEN

STEPHEN OTIENO ALOO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the judgment & conviction of Hon. D. Ogal PM
delivered on the 9/12/2024 and sentence passed on the 18/12/2024 in Winam
PMCCr Case No. E254 of 2022, Republic v Stephen Otieno Oloo & 2 Others)*

JUDGMENT

1. The appellant and 2 others not before this Court were charged with 3 Counts of Robbery with violence contrary to section 295 as read with section 296 (2) of the [Penal Code](#).
2. The particulars of Count 1 were that on the 7/5/2022 at Nyamasaria area, in Kisumu East sub-county within Kisumu County, jointly with others not before court, the appellant immediately after the robbery used violence and robbed one Zhou Chao, a Chinese National of an OPPO A9 mobile phone, cash Kshs. 200 and an empty metal cash safety box, all valued at Kshs. 50,000/- the property of the said Mr. Zhou Chao.
3. The particulars of the charge on Count 2 were that on the 7/5/2022 at Nyamasaria area, in Kisumu East sub-county within Kisumu County, jointly with others not before court, the appellant immediately after the robbery used violence and robbed one Lucy Njeri Njuguna, a Techno Spark 7P mobile phone valued at Kshs. 20,000/- the property of the said Lucy Njeri Njuguna.
4. The particulars of the charge on Count 3 were that on the 7/5/2022 at Nyamasaria area, in Kisumu East sub-county within Kisumu County, the appellant jointly with others not before court immediately after the robbery used violence and robbed one Elizabeth Achieng Nyitong, an OPPO A3 mobile phone all valued at Kshs. 18,500/- the property of the said Elizabeth Achieng Nyitong.



5. The appellant pleaded not guilty and a full trial was conducted. The prosecution case was founded on the evidence of twelve (12) witnesses. The defence evidence was based on the appellant's sworn testimony.
6. In its judgment, the trial court acquitted the appellant on counts 2 and 3 but convicted him on count 1. He was sentenced to serve 25 years' imprisonment.
7. Dissatisfied by the conviction and sentence, the appellant filed his petition of appeal dated 27/12/2024 raising five grounds of appeal as well as a Supplementary Petition of Appeal dated 19/3/2025 also raising five grounds of appeal. The aforementioned grounds of appeal presented by the appellant are summarised as follows:
 - a. That the trial court erred in law in not making a finding that the appellant did not plead to the amended charge.
 - b. That the trial court erred in law in convicting the appellant relying on duplex charge sheet.
 - c. That the trial court erred in law and in fact in convicting the appellant relying on the circumstantial evidence of PW1 while not appreciating his defence which overwhelmed the prosecution case.
 - d. That the trial court erred in law and in fact in sentencing the appellant to serve 25 years which is manifestly excessive whereby the issues were not clear and reliance based on presumption to convict.
8. In support of his appeal, the appellant filed written submissions in which he stated that the trial court convicted him on circumstantial evidence of PW1 regarding the hiring of the vehicle used in the committal of the offence and which evidence was not availed in court by the prosecution thus failed to create any link with him.
9. That the charges against him were dropped as at the time the charge sheet was amended as only the 1st and 2nd accused pleaded to the charge and further that he was framed by the police and subsequently charged with the offence.
10. That the sentence of 25 years' imprisonment meted out was manifestly excessive and that it ought to run from the date of arrest pursuant to section 333 (2) of the *Criminal Procedure Code*.
11. On its part, the state submitted that all the ingredients of the offence of robbery with violence and stealing were proved beyond reasonable doubt. That the appellant was identified as the one who hired his boss's motor vehicle that was used in committing the offence.
12. That on the 15/01/2024 the charge sheet was amended as the 1st accused had passed on thus leaving the 2nd accused and the appellant herein who became the 2nd accused and who pleaded afresh to the amended charges. That the trial court considered the appellant's evidence which was an afterthought and mere denials that could not shake the overwhelming evidence that was adduced by the prosecution.
13. On the sentence, it was submitted that it was lenient and the court ought not to interfere with it. That there was no opposition to the invocation of section 333 (2) of the *Criminal Procedure Code*.
14. This being the first appellate Court, it is incumbent upon this Court to re-evaluate the evidence afresh and come to its own independent conclusions and findings but at all times considering that it did not see the witnesses testify. (See *Okeno v Republic* [1972] EA 32.)



15. The case before the trial court was that, PW1 Janesh Ochieng Ngome was a taxi driver at Kondele. On 7/5/2022 at about 6.30am, the appellant hired his Motor vehicle reg. no. KCY 451V, make Toyota Probox and paid him Kshs. 3,000/-. The appellant was to return the vehicle at 6.30pm but did not and when he and his boss checked the car tracker, they located the vehicle at Kondele Police Station. It was his testimony that when they saw the vehicle at the police station it had a registration number of KCE 942E and had bullet holes on the boot, left rear wheels with a rear windscreen shattered.
16. PW2 Lucy Njeri Njuguna testified that she identified 2 out of the three accused persons as the one who attacked her work place, Daima Mabati Company on the 7/5/2022. She testified that the accused persons who were armed with guns and who stole from her and the company left in a white Probox as they were being chased by police officers.
17. PW3 Vincent Onyango, a machine operator at Daima Mabati Company testified that he and others got involved in the police pursuit of the accused persons following the robbery. That the accused persons abandoned the motor vehicle they were using and ran away and that he saw the registration number of the motor vehicle as KCE 942E.
18. PW4 Snr Sgt Kennedy Juma testified that on 7/5/2022 while attached to Nyamasaria Police Post, an employee of Daima Mabati reported that they had been attacked. On rushing to the scene, they found a Probox with registration number KCE 942E facing Nairobi road which drove off on their arrival prompting one of his colleagues to fire at its tires.
19. It was his testimony that they followed the car till it was abandoned in a ditch wherein they found a steel box with 2 padlocks. They recovered 1 pistol on the road which had been thrown away by one of the accused persons during the chase. Later on, they received a report of a gunshot victim at Russia Hospital and they proceeded there with employees from Daima Mabati who identified the patient as one of the persons who robbed them and the 1st accused.
20. PW5 No. 2390117 PC Phaniel Olango Odawo corroborated the testimony of PW4.
21. PW6 Zhao Chao the operator of Daima Mabati Company testified that on the 7/5/2022 at about 9am whilst at the office, he was accosted by 4 people 2 of whom were carrying guns. They stole phones and money as well as a metallic safe box used to store money. That later, 3 people were arrested and he and other employees identified them at the identification parade.
22. PW7 No. 235253 Inspector Kiptum Bet, a firearm examiner in the Forensic Ballistic Department of the DCI produced a fire arm examination report, P Exhibit 8, dated 28/11/2022. He found that the exhibits recovered and marked PExh 1 to 5 were homemade guns. PW8 Polycarp Kweyu, the Government Analyst produced a report, PExh9, dated 19/10/2022 which showed that the torn brown long sleeved shirt stained with blood and two swab sticks with red stains all tested positive for the 1st accused's DNA profile.
23. PW9 No. 237462 Chief Inspector Julius Awekeya testified that he carried out the identification parade for the appellant whom he informed the reasons for the parade and inquired as to whether he had a friend who could be present but the appellant stated that he had none. That the appellant stood between member 2 and 3 of the parade and was positively identified by one Lucy Njeri by touching.
24. PW10 No. 73932 PC Peter Kibenei testified that on the 7/5/2022 he was called by PC Drake Busolo to document the scene of crime and he took photographs of the same which he produced as PExh1 (a – c) and the Certificate of the Photograph as P Exh3.



25. PW11 No. 56516 Cpl. Ben Wanyama testified that in the company of Cpl. Kissinger and PC Omeo they recovered a homemade gun and 3 bullets from the appellant's co-accused's home. PW12 No. 90354 Drake Busolo testified how he carried out the investigations and charged the accused.
26. When placed on his defence, the appellant testified that on the 7/5/2022 he was at a funeral in Mamboleo from morning and that he was arrested on the 15/5/2022. He denied leasing a vehicle from PW1 as there was no agreement produced in court and that he did not know PW1. He denied being identified in the Identification Parade. That he was identified because he had been photographed at the police. That he did not sign the parade forms once the parade was done. It is on the foregoing evidence that the trial court found the appellant guilty, convicted and sentenced him.
27. The offence of robbery with violence is a creation of section 296(2) of the *Penal Code*. The offence 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.
28. Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft, he uses actual violence or threatens to use 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.
29. Two things must, therefore, be proved for the offence of robbery with violence to be established. They are theft and the use of or threat to use actual violence. Robbery with violence is proved if any one of the following three ingredients is also established: -
 - a. The offender is armed with any dangerous or offensive weapon or instrument, or
 - b. The offender is in the company of one or more other person or persons, or
 - c. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.
30. In the present case, the appellant has faulted the trial court's conviction and sentence on, amongst others, the ground that the evidence presented by the prosecution was based on circumstantial evidence that did not link him to the offence.
31. The issue of identification of the appellant was hotly contested in this appeal. The appellant contended that the identification parade was not carried out properly as he was photographed whilst in the police cells and the police shared the photograph with those identifying him.
32. PW1 testified that he knew the appellant. That appellant had hired his taxi registration number KCY 451V on a number of occasions before. That on the material day, he hired the vehicle but failed to return the same on the agreed time. That when he and his boss followed the car tracker for the vehicle, they located the same at Kondele Police Station bearing a different number plate, KCE 942E. That he noted that the vehicle had bullet holes on the boot, left rear wheels and the rear windscreen was shattered.
33. This testimony was corroborated by that of PW4 and PW5 who were the officers who responded to the incident. They testified that they shot at the car's tires and that when they recovered the vehicle, they found extra number plates inside it.



34. The appellant was picked out of an ID parade by PW2 who was present when the offence was committed. The appellant stated in his defence that the police had taken his photo prior to the parade and that he did not sign the Identification Parade Form.
35. For an identification parade to be fruitful and of evidential value, the identification rules must be complied with. Failure to adhere to the identification parade guidelines affects the evidential value of a resulting identification.
36. In *Samuel Kilonzo Musau v Republic* [2014] eKLR, the Court of Appeal stated: -
- “The purpose of an identification parade, as explained in *Kinyanjui & 2 Others v Republic* (1989) KLR 60, “is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion.” It is precisely for that reason that courts have insisted that identification parades must be fair and be seen to be fair. Scrupulous compliance with the rules in the conduct of identification parades is necessary to eliminate any unfairness or risk of erroneous identification. In particular, all precautions have to be taken to ensure that a witness’s attention is not directed specifically to the suspect instead of equally to all persons in the parade. Once a witness has properly identified a suspect out of court, the witness is allowed to identify him on the dock on the basis that such dock identification is safe and reliable, it being confirmed by the earlier out of court identification.”
37. The procedures governing police identification parades are provided for in the Police Force Standing Orders pursuant to the *National Police Service Act*. These procedures were explained in *R v Mwango s/o Manaa* [1936] 3 EACA 29. These include that: -
- a. The accused has the right to have an advocate or friend present at the parade;
 - b. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;
 - c. Witnesses should be shown the parade separately and should not discuss the parade among themselves;
 - d. The number of suspects in the parade should be eight (or 10 in the case of two suspects);
 - e. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;
 - f. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and
 - g. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.
38. PW9 who carried out the Identification Parade testified that, the appellant when shown the Officer’s phone failed to get his photo which he alleged to have been taken. That he informed the appellant the reason for the parade, inquired as to whether he had a friend or counsel who would be present to which he declined. That he gave him the opportunity to stand wherever he wanted in the parade.



39. From the authorities referred to above, it is clear that PW9 complied with the rules for carrying out an Identification Parade. Despite the appellant's contestations, there was no evidence adduced to support the appellant's claim that his identification was flawed.
40. In any event, PW6 testified that he saw the appellant and went on to describe his clothing that he wore a blue T-shirt at the time of the offence and the appellant was unable to displace this testimony.
41. Accordingly, it's clear that the appellant was positively identified as one of the attackers at Daima Mabati Company Limited.
42. PW2, 3 and 6 all testified that the persons who robbed them were armed with guns.
43. On his part, the appellant gave an alibi that on the date of the robbery, he was away at a funeral at Mamboleo. He denied knowing PW1 or having leased the vehicle used in the offence.
44. In *Kiarie v R* [1984] KLR, the Court of Appeal laid down the following principle: -
- “An alibi raises a specific defence and an accused person who puts an alibi as an answer to a charge does not in Law thereby assume any burden of proving that answer and its sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable. The Judge had erred in accepting the trial Magistrate's finding on the alibi because the finding was not supported by any reasons.”
45. It is settled law that the prosecution bore the burden of proving the charge against the appellant beyond reasonable doubt. However, in relying on an alibi defence, the entirety of the prosecution evidence, direct or circumstantial evidence must be appraised to establish whether the appellant was elsewhere and not at the scene of the crime. The conduct of the appellant and the decision to raise an alibi defence during the defence hearing stage of the proceedings should not escape scrutiny of the Court.
46. In *R v Sukha Singh S/o Wazer Singh & Others* [1939] 6 EACA 145, it was held that: -
- “If a person is accused of anything and his defence is an alibi, he should bring forward that alibi as soon as he can because, firstly, if he does not bring it forward until months afterwards, there is naturally a doubt as to whether he has not been preparing it in the interval and secondly, if he brings it forward at the earliest possible moment, it will give the prosecution an opportunity of inquiring into that alibi and if they are satisfied as to its genuineness, proceedings will be stopped.”
47. In the present case, the plea of alibi was never raised at any stage during cross-examination. Though in law, time of the disclosure might not be in issue, the prosecution no doubt required adequate notice to investigate the allegation of the alibi defence in order to meet it.
48. The governing principle on alibi defence is that a failure to disclose an alibi at a sufficiently early opportunity to permit it to be investigated by the police is a factor which may be considered in determining the weight given to it. See *Charles Kasena Chogo v Republic* [2019] eKLR.
49. Having considered the totality of the evidence of the prosecution witnesses, I find the evidence of the prosecution witnesses who physically saw the appellant on the material date and time consistent, watertight and believable.
50. On whether the trial court considered the defence of the appellant, at pages 95 and 96 of the record, the trial court set out the appellant's case and considered it. At page 100, the trial court proceeded to find the appellant guilty.



51. The other ground was that the charge against him was a duplex charge as it was floated under section 295 as read with section 296 (2) of the Penal Code. However, other than pleading this ground, the appellant failed to address the court on it.
52. In Paul Katana Njuguna v Republic [2016] eKLR, the Court of Appeal held that: -
- “We appreciate that Section 296(2) of the Penal Code creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in Section 296(2) of the penal Code. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under Section 296(2) were absent or were not demonstrated by the prosecution.
- In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections, in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case he has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.”
53. In the present case, in the amended charge presented on 15/1/2024, the appellant was charged with robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code.
54. Section 295 is a definition section and it contains the ingredients of robbery. On the other hand, section 296(2) of the Penal Code deals with the specific degrees of the offence of robbery and has been framed as such.
55. The record shows that the charge was read and explained to the appellant and he pleaded to it as required by law. The charge against the appellant was for stealing and there was violence in the process. He was able to understand the charges he was facing. He properly cross-examined the witness having that fact in mind. As such, the charge sheet clearly framed the charge against the appellant and thus not defective.
56. He complained that he did not plead to the amended charge on 15/1/2024. The record shows that, on 15/1/2024 when the amended charge was read to the appellant and his co-accused, the initial 1st accused, Peter Ochieng, had passed on thus leaving the 2nd accused, Fredrick Ogada who now became the 1st accused and the appellant herein who became the 2nd accused. Both pleaded afresh to the amended charges as the 1st and 2nd accused, respectively. Accordingly, this limb of the appeal also fails.
57. As regards the sentence, it was the appellant’s contention that the same was excessive and that it did not comply with section 333 (2) of the Criminal Procedure Code.
58. Under section 296(2) of the Penal Code cited above, the only one express and mandatory sentence prescribed upon conviction for the offence of robbery with violence is the death penalty.



59. The appellant was sentenced to 25 years' imprisonment. The sentence prescribed by the law, section 296(2) of the *Penal Code* is death. In the present case, it is clear that the appellant was lucky to escape with a sentence of imprisonment rather than death.

60. In the case of *Idi Hassan Kazungu v Republic* Criminal Appeal No. 6 of 2018 (UR), the Court of Appeal expressed itself as follows: -

“*Francis Karioko Muruatetu & Another v Republic, Katiba Institute & 5 Others* [2021] eKLR [Muruatetu 2], the mandatory death sentence prescribed under Section 296 (2) of the *Penal Code* for the offence of Robbery with violence is still legal. Differently put, the appellant could not find refuge in the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [Muruatetu 1] as that decision only addresses mandatory death sentence in regard to the offence of murder contrary to Section 203 and 204 of the *Penal Code*. Muruatetu 2 directed that the decision in Muruatetu 1 does not apply to the mandatory death sentence provided under section 296 (2) of the *Penal Code*.”

61. Since no notice was given to the appellant of the likelihood of enhancement of the sentence, I will not disturb the sentence of the trial court although it was illegal as that would be prejudicial to the appellant.

62. The upshot of all the above is that I find that this appeal lacks merit and I proceed to dismiss it.

63. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE

