Juma v Republic (Criminal Appeal E046 of 2024)
[2025] KEHC 10438 (KLR) (16 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10438 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E046 OF 2024

RPV WENDOH, J

JULY 16, 2025

BETWEEN

DENNIS WAFULA JUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Dennis Wafula Juma, the appellant herein, was tried and convicted for the Offence of Robbery with violence contrary to section 296 (2) of the *Penal Code*.

2. The particulars of the charge are that on the night of 12/10/2023 at Weyonia Location in Kiminini Sub County, within Trans Nzoia County, while armed with dangerous weapons, namely panga, robbed Dorcilla Omenya Otieno of one mobile phone make Itel worth 1,600/= and Kshs.1000/= cash.

3. The appellant was sentenced to serve thirty (30) years imprisonment. The appellant is aggrieved by both the conviction and sentence and has preferred this appeal based on the memorandum of appeal and amended grounds of appeal filed together with the appellant's submissions.

4. The grounds of appeal can be condensed into the following.

    1. That the charge sheet was defective for being duplicitous;

    2. That the evidence on identity of the complainant was not full proof;

    3. That the court erred in finding that the appellant was found in possession of panga and torch.

    4. That the sentence is harsh and excessive.

5. The appellant therefore prays that the appeal be allowed, conviction quashed and the sentence set aside.

6. This is a first appeal and it behoves this court to exhaustively examine all the evidence tendered before the court, analyze it and arrive at its own convictions but make allowance for the fact that this court neither saw nor heard the witnesses testify. For this proposition, this court is guided by the decision of Okeno -V- Republic (1972) EA 32 where the court said,

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

Prosecution Case:

7. The prosecution called a total of four (4) witnesses in support of their case.

8. PW1 Dorcilla Otieno Omenya, a resident of St. Michael Kikanet recalled the night of 12/10/2024, while in the house with her siblings, as the father had gone in search of food and their mother is deceased. She heard a knock/bang on the door and stood up to go to the door. She saw a person getting into the house shining a torch at her. She went back to bed; that the torch the person had was shining at the front and behind which enabled her to identify the person as Wafula Juma a fellow villager; that the said suspect threatened her and she covered herself in the blanket; that he took her itel phone, lamp, switched off the phone and took Kshs.1,000/= that was on the window and escaped through the door though he had entered through the window; that the person had a panga which he threatened her with and hit her on the chest. Next day she reported to Weyonia Police station.

9. Chief Amos Odwenya Okwakau a resident of Sikhendu recalled that on 12/10/2023 about 8.30a.m. while working in his farm, Dennis Wafula Juma (the appellant) went near him and greeted him. He asked PW2 if he wanted to buy an itel phone which he had as he had an emergency. He claimed to be selling it at 800/= but PW2 asked to buy it at 700/=. PW2 wanted to send the money on phone but the said Juma denied having a phone. They went to the home of one Evans Wanyama where Juma asked for a number and PW2 sent the money to that phone. While still there, he heard that police officers had come to his home. He went to meet them and was asked if he sent money to any phone and he explained that he had used his wife's phone to send money to Denis. He denied knowing that the phone he had just bought had been stolen. He identified the black itel phone in court. He said that Juma had told him that the phone was not stolen, and he had known the appellant since childhood.

10. PW3 PC Joel Kipkirui of Weyonia Patrol Base recalled 12/10/2023 about 7.30.am, Dorcilla, (PW1) went to report that on 12/10/2023 about 3.00.a.m. somebody had broken the window, entered their house while armed with a panga and bright torch, went to her bedroom, took her itel phone and took money which was at the window. The complainant claimed to have seen the intruder using the torch that he had.

11. PW3 went to the scene, saw the broken window. After receiving the report, he went to Accused's homestead, found the wife, did search, found a panga and torch that when the torch was turned off, it lights on the back and that is how the appellant was identified; PW3 said that the appellant on hearing that the police had been at his house went to police station; that PW3 received a tip that the appellant

had sold a phone to Amos Okwakau (PW2). They arrested the appellant, traced Amos (PW2) and found him in possession of a black itel phone which PW1 identified in court; that PW2 claimed to have bought it from the appellant for Kshs.700/= He also identified the torch and panga in court.

12. PW4 PC Peter Mabuka testified that on 12/10/2023 about 7.30 p.m. while at Weyonia Patrol Base, One Prisilla Omenya reported that somebody broke into her house at midnight while armed with a panga and robbed her of an itel phone and Kshs.1000/=; that Priscilla named the appellant as the suspect. PW4 proceeded to the Appellant's home but he was not found. They conducted a search and recovered a panga and torch. Later the appellant reported to the station and denied having, robbed the complainant. The police officer received a tip that the appellant had sold a phone and they went and recovered the phone with PW2; that they called the complainant's who identified the phone as hers. They preferred the charge of robbery against the appellant.

The Defence:-

13. When called upon to defend himself, the appellant denied committing the offence; that on 12/10/2023, he left home for Weyonia market to buy sugar. He received information that he was required at the police post and he went. He was given jerricans to fetch water and after he finished, a person under arrest sent him for tea and mandazi. When the police saw him with the items, he was warned that he should not have done that and he was placed in cell.

    He denied knowing the complainant.

The appellant's submissions –

14. It was the appellants submission that the charge is duplex hence fatally defective because it is indicated to be brought under section 295 of the penal code as read with section 296 (2) of the *Penal Code*; that the charge describes two different offences and hence an injustice to the appellant because it is not clear what charge to plead to. He relied on the decision of -

    1. Joseph Mwaura Njuguna & 2 others -V- Republic (2013) e KLR

    2. Joseph Onyango Owuor and Another -V- Republic (2010) eKLR

15. The Appellant also submitted that no identification parade was conducted to test the correctness of the complainant's evidence on identification;

16. He relied on the decision of John Mwangi Kamau -V- Republic; that PW1's identification of the appellant was dock identification which is worthless, as held in the case of Gabriel Kamau Njoroge -V- Republic (1982)- (1988) 1 KAR 1134.

17. On recovery of the torch and panga, the appellant submitted that the items were not identified by the complainant as those used in the robbery; that the recovery of the items did not connect him to the offence.

18. He further submitted that the complainant's evidence that she identified the appellant using a torch which shone both front and back is uncorroborated; that the identification by the complainant is not without possibility of error. He relied on the decision of Kariuki Njiru and 7 others -V- Republic which set out the parameter's to be considered where the case rests on identification of the suspect for example, the time that the witness had the suspect under observation or what special features were on the suspect and whether the witness gave a description of the suspect. He also relied on the decision of Republic -V- Turnbull & others (1976) 2 ALL LR 549.

Respondent's Submissions: -

19. The Respondent submitted that the three elements of the offence of Robbery with violence were proved as were well set out to the case of Charles Maina Wamai -V- Republic (2003) eKLR where the court held that the prosecution needs only prove one of the three elements i.e. that the suspect was armed with a dangerous or offensive weapon or instrument or that the suspect was in company with one or more persons or that immediately before or immediately after the time of robbery, he beats; strikes, or uses any personal violence on the person; that in this case the appellant was armed with a panga which is a dangerous weapon; that the appellant struck the complainant with the panga therefore using violence on the complainant, hence the offence was proved.

20. On identification, Counsel relied on the case of Cleophas Otieno Wamunga -V- Republic (1989) eKLR where the court held that where the only evidence against a defendant is of identification or recognition the court has a duty to examine the evidence carefully and be satisfied that the circumstances of identification were favourable and free from possibility of error, before it can be a basis of a conviction.

21. Counsel also relied on Maitainy -V- Republic (1986) eKLR where the court held that where the circumstances for identification are unfavourable, the court has to consider the nature of the light, kind of light, the size, the position in relation to the suspect and whether the complainant was able to give a description of the assailant to the police or those who came to his aid; that despite the fact that the complainant did not tell the court the intensity of the light and how long she observed the assailant, she knows the appellant who hailed from the neighbourhood as supported by the testimony of PW2.

22. On the question of recent possession, the Respondent relied on the decision of Isaac Nganga Kahiga alias Peter Nganga Kahiga -V- Republic CRA (272/2005 where the Court of Appeal set down the prerequisites of the doctrine of recent possession that the suspect property must be found in possession of the suspect, that the property must be positively identified by the complainant, that the property was recently stolen from the complainant. Counsel also relied in the decision of Peter Kimaru Maina – V- Republic CRA 111/2003 Counsel urged that the Robbery was committed at night and the sale of the mobile was soon after, the next morning; that the appellant did not offer any explanation why he sold the phone to PW2 and the only conclusion is that he was the robber.

23. On sentence, Counsel submitted that section 296(2) prescribes a sentence of death and the appellant was only sentenced to thirty Years imprisonment; that he filed a notice of enhancement of sentence under section 345(3) of the CPC and the appellant opted to proceed with the appeal; that in Francis Karioko Muruatetu II the Supreme court clarified that Muruatetu I only applied to cases of murder and that it was confirmed in Hassan Kahindi Katana and another -V- Republic (2022) KECA 1160 where the appellant was convicted of robbery with violence and sentenced to death, and the Court of Appeal dismissed the appeal on sentence applying the Muruatetu II case. Counsel urged the court to enhance the sentence to life imprisonment.

Determination:

24. I have now considered the grounds of appeal, the evidence tendered in the lower court and all submissions by Counsel. The issues that arise are;

    1. Whether the charge was defective;

    2. Whether an offence of robbery with violence was proved;

    3. Whether the appellant was properly identified as the assailant;

4. Whether the doctrine of recent possession was established;

5. Whether the sentence is harsh and excessive.

Whether the charge was defective; The charge reads as follows:-

25. Denis Wafula Juma Charge: Robbery with violence contrary to section 295 as read with section 296(2) of the penal code.

26. Denis Wafula Juma - On the night of 12th October 2023 at about 0030 hours at Weonia location in Kiminini sub-county within Trans Nzoia county while armed with an offensive weapon namely a panga robbed. Dorcila Omenya Otieno one mobile phone make itel which is valued at Kshs.1,600/= and cash money Kshs.1,000/=.

27. Section 295 of the *Penal Code* describes the offence of robbery. It reads 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."

28. Section 296(2) of the penal code on the other hand provides for both the offence and sentence for the offence of robbery with violence Section 296(2) provides "(2) 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.

29. To establish an offence of robbery with violence under section 296(2) of the *Penal Code*, it must be proved that the robbers were more than one person and that he/they were armed with offensive/ dangerous weapons or that violence was visited on the victim before or after the robbery.

30. The rule of duplicity arises from the provisions of section 134 of the *Criminal Procedure Code* which provides as follows,"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"

31. A duplex charge is one which charges more than one offence in the same count. In Joseph Njuguna Mwaura (Supra) (2013) eKLR a five bench decision of the Court of Appeal clarified the difference between a charge of robbery with violence and robbery under section 295 of the *Penal Code* when it said; "We reiterate what has been stated by other courts in various cases before us. The offence of robbery with violence ought to be charged under section 296(2) of the *Penal Code*. This is the section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others, or if he uses personal violence to any person. The offence of robbery with violence is totally different from the offence defined under section 295 of the *Penal Code*, which provides that any person who steals anything and at or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296(2) as this would amount to a duplex charge"

32. In Amos -V- DPP (1985) RTR 198 the court observed that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed at countering so that there is no risk that the accused may be confused in what charge he may be meeting in the presentation of the charge which is mixed up and uncertain.

33. I have no doubt that the charge herein was duplex but the question is whether it rendered the trial fatally defective. In Peter Ndindi Njoroge -V- Republic HC.CR.APP. NO. 39/2017 (UR) the court observed that a fatally defective charge sheet cannot support a conviction.

34. In Paul Katana Njuguna -V- Republic (2016) e KLR, the court observed ,

In arguing the appeal, Mr. Nyaga submitted that the charge against the appellant was duplex as he was charged under both Sections 295 and 296 (2) of the *Penal Code*. Referring to Simon Materu Munyaru -v- Republic, [2007] eKLR, quoted in Joseph Njuguna Mwaura & 2 Others -v- Republic, [2013], eKLR, counsel submitted that it was wrong to charge the appellant with the offence of robbery under Section 295 as read with Section 296 (2), as that rendered the charge duplex and created a confusion. ... In regard to the alleged defect in the charge, Mr. Omirera submitted that Section 295 of the *Penal Code* was simply a definition section, and although charging an accused under both Sections 295 and 296 (2) was undesirable, doing so did not amount to a fatal defect in the prosecution's case, as the same could easily be cured by invoking Section 382 of the *Penal Code*.

35. The court went on to note that:

> Neither Section 295 nor Section 296 refers to an offence of "robbery with violence". Indeed, the felony termed robbery as described under Section 295 of the *Penal Code* may involve use of actual violence or threat to use violence, while the aggravated offence of robbery as described under Section 296 (2) of the *Penal Code* may be complete with use of violence or no use of violence as long as there has been a theft and the offenders are either armed with offensive weapons or offenders are more than one. (See Oluoch v Republic [1985] KLR 549)...."

36. In that appeal, the particulars of the charge were stated in the following terms:

> Paul Katana Njuguna - on the 28th day of January, 2009 at Kwa-wanzilu area, Ekalakala Location in Yatta District within Eastern Province jointly with others not before court while armed with offensive weapons namely rungus, and man-made pistol robbed from Danson Nzuki Mwasia of a wallet and immediately before he used personal violence to the said Danson Nzuki Mwasia".

37. Having considered those particulars, the court stated:

> The particulars as stated are clear and do support the offence of aggravated robbery. The defect is alleged to be in the statement of the charge in the count in which the appellant was charged with robbery with violence contrary to Section 295 as read with Section 296 (2). Is that fatal? We think not." (emphasis mine)

38. The court explained its thinking as follows:

> We have considered the law on duplicity in charges as expounded in case law and academic treatises and find an interesting trend which seems to have emerged... The Court cited with approval the case of Cherere s/o Gakuli -v- R. [1955] 622 EACA, where the predecessor of this Court reviewed the cases on the subject of the effect of a charge which is found to be duplex and concluded that "The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity"... In that case, the court held that the appellant was left in no doubt from the time when the first prosecution

witness testified, as to the case which he had to meet and he could not, therefore, be said to have been prejudiced in any way.

39. The judge in Katana case therefore warns that not every duplicity is fatal to the case. It will depend on the circumstances of every case.

40. I had set out the particulars of the charge earlier in this Judgment. The particulars clearly disclosed every ingredient of the offence of robbery with violence i.e. there was alleged theft, that the offender was armed with an offensive weapon and that there was violence meted on the victim. The question then is whether it was an injustice to include Section 295 in the charge for the charge to be decried to be fatally defective. I do echo the words of the Court of Appeal in Katana case (Supra) and State, I think not.

41. The appellant was aware of the charge he faced. He cross examined witnesses and there was no evidence of any confusion regarding the charge that he faced. I come to the conclusion that in the circumstances of this case, the charge was not fatally defective.

Whether the offence of robbery with violence was proved:

42. In CRA 300/2007, Dima Denge & others -V- Republic (2013) eKLR, the Court of Appeal stated as follows "the elements of the offence 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 offence of robbery with violence".

43. In Johana Ndungu -V- Republic CRA 116/1995 (1996) eKLR, the Court of Appeal set out the following as the ingredients that need to be proved

"(i) if the offender is armed with any dangerous or offensive weapon or instrument; or

(ii) if he is in company with one or more other person or persons; or

(iii) if at or immediately before, or immediately after the time of the robbery, he wounds, beat, strikes or uses any other violence on any person".

See also Oluoch -v- Republic (1985) KLR

44. In the instant case, PW1 stated that the assailant was armed with a panga; that he hit her with it on the chest. The prosecution only needed to prove one of the said ingredients. The appellant argued that the circumstances in which PW1 was allegedly robbed were not condusive for proper identification of the assailant. No doubt the only witness to the crime is PW1 and the same occurred deep in the night under unfavourable conditions for proper identification.

45. In Roria -V- Republic (1967) EA 183 the Court of Appeal stated.

> A conviction resting entirely on identity invariably causes a degree of uneasiness..... the danger is, of course greater whether the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should now be upheld, it is the duty of this court to satisfy itself that in all the circumstances, it is safe to act on such identification".

46. In the case of R.V Turnbull (Supra), the court set out the questions to be asked by the court in order to establish whether the evidence on identification is sufficient. The court said in Charo Changawa Karisa -V- Republic. "Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by the witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as

for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

47. The complainant stated that although it was dark in the house, the intruder had a torch, which shone, both the front and back and through it, she was able to see the appellant who was a neighbour in the village. PW1 therefore claims to have recognized the appellant.

48. On recognition, the court in Cleophas Otieno Wamunga adopted with approval the statement in Turnbull supra, that "Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

49. PW1 did not tell the court how far the light from the torch was from her, and its position in relation to the suspect. At the same time, she said it was dark and she did not explain at what stage he switched off the torch. Further, PW1 did not state how long the assailant was under her view.

50. PW3 and 4 told the court that PW1 reported to them about the robbery next morning and they went to the appellant's house but did not get him. They searched the house and recovered a torch and panga. In her evidence, PW1 said the torch in court is what the appellant had used the night before. She however, had not described the torch to the police nor did she tell the court that she knew how it looked like. All PW1 said was that the torch could see both the front and back. However, it was never demonstrated in court to determine whether the torch that was in court could see both the front and back.

51. PW2 testified that the appellant having sold to him an itel phone at Kshs.700/= on the morning of 12/10/2023, and soon after, the police came looking for the phone. PW3 and 4 confirmed that they got information that PW1's phone had been sold to PW2 and recovered the phone from him.

52. The question then is whether the doctrine of recent possession applies. The doctrine of recent possession was explained in the case of Isaac Nganga Kahiga Supra where the court said

> ..... It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first: that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly, tht the property was stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other".
>
> Again, in Peter Kimaru Maina -V- Rep. CRA 111/2003 the court said "where there is evidence that the accused person is found in actual possession or has, shortly after a robbery sold one of the items stolen during the robbery, he is deemed to be in recent possession of the stolen property..... evidence of recent possession of a stolen item alone is sufficient to find a conviction for the offence of robbery with violence."

53. PW3 and 4 did not tell the court how PW1 identified the recovered phone to be hers. In her testimony PW1 said, "I have a phone in court (phone black in colour)". PW1 did not identify it as her phone. she did not produce any evidence of ownership in terms of a receipt or the IMEI number. A phone was indeed recovered, but it was not positively identified as PW1's phone and the doctrine of recent possession could not be invoked.

54. In the end, I find that the identification of the appellant as the culprit is not water tight. Identification by PW1 was in doubt and the only evidence that may have linked the appellant to the offence was that of recent possession but the evidence was not properly presented to the court. The appellant is a prime suspect but suspicion, however strong, cannot found a conviction. There being doubt as to whether the appellant was the robber, I give him the benefit of doubt and I quash the conviction and set aside the sentence. He is set at liberty forthwith unless otherwise lawfully held.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 16TH DAY OF JULY, 2025

R. WENDOH.

JUDGE.

Judgment delivered in open court at Kapenguria in the presence of:

Mr. Suter for the State

Appellant - present (virtual)

Juma/ Hellen - Court Assistant.