Korir v Republic (Criminal Appeal E021 of 2023)
[2025] KEHC 9778 (KLR) (2 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9778 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ITEN

CRIMINAL APPEAL E021 OF 2023

E OMINDE, J

JULY 2, 2025

BETWEEN

RODGERS KIPKOSGEI KORIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Charles Kutwa - Senior Principal Magistrate, in Iten Senior Principal Magistrates' Criminal Case No. E483 of 2023 delivered on 24/11/2023)

JUDGMENT

1. The Appellant was charged with the offence of Robbery with Violence Contrary to Section 296 of the *Penal Code*. The particulars of the offence were that on the 7th day of April 2023 at around 1500 hrs. at Kapchorwa trading center in Keiyo South Sub County within Elgeyo Marakwet County, being armed with a dangerous and offensive weapon, namely a knife, he robbed Joseph Kiptum Rugut cash money amounting to Kshs. 1,000/-.

2. The Appellant pleaded not guilty and the matter proceeded to full hearing.

Prosecution evidence at trial court

3. PW1 was Joseph Rugut, who testified that on 07/04/2023, the Appellant came to his hotel with a friend named Cosmas. They ate, paid and left. Later on, they returned and demanded Kshs. 1000/-. The accused entered the counter and Cosmas picked a piece of wood and he gave them Kshs. 1000. They then left.

4. During cross examination, the witness stated that it was the Appellant who demanded the money but he was not armed with a knife and he did not assault him. That 'Jeremy' paid with Mpesa.

5. PW2 was Vincent Kipkemoi. He testified that on 07/11/2023, he was at Ivy Hotel with the accused and the complainant. That one 'Jeremy' came and asked for tea, he then went outside and came back with the accused and Cosmas. They demanded Kshs. 1000 and one of them picked a piece of wood. At that point the complainant gave Cosmas Kshs. 1,000/- and then they disappeared.

6. During cross examination, he stated that there were many people and that the people were not fighting. That it is 'Jeremy' who demanded for Kshs. 1,000/- and additionally, that he did not see a knife.

7. PW3 was Hillary Kirwa, the complainants' employer. It was his testimony that the accused and the complainant are his neighbors. Further, that on 07/11/2023 he received call that the appellant entered his hotel and took Kshs. 1000/-. In cross examination, he stated that he was not at the scene and that he came after the incident.

8. PW4 was Constable Bethwel Kimutai from Metkei Police station, and the investigating officer in the case. He stated that on 07/04/2023 he received a report of robbery with violence. That the accused and two other people demanded Kshs. 1000 from the complainant and one of them picked a piece of wood and threatened to beat the complainant. During cross examination, he stated that the appellant stole Kshs 1000 and the incident was on 07/04/2023.

9. Upon considering the testimonies of the witnesses and the evidence, the trial magistrate determined that there was a prima facie case against the appellant, and placed him on his defence.

10. The Appellant gave unsworn testimony as DW1. He stated that he was arrested for the offence of causing disturbance but was shocked to be charged with robbery. He denied robbing the complainant.

11. Upon considering the evidence in court, the testimonies of the witnesses and the defence, the trial magistrate convicted the appellant of the main charge vide the judgement delivered on 24/11/2023. After considering his mitigation, she sentenced him to 20 years' imprisonment.

12. Dissatisfied with the conviction and sentence, the Appellant instituted this Appeal vide a Petition of Appeal filed on 19/12/2023 premised on the following grounds;

    1. That the charge sheet was defective.

    2. That learned trial magistrate erred in law and fact in convicting the appellant did not meet the required standard.

    3. That the learned trial magistrate erred in law and fact by relying on extrinsic not adduced during trial.

    4. That the prosecution evidence was full of contradictions and inconsistences on evidence.

13. The parties filed submissions on the Appeal. The Appellant filed submissions on 05/03/2025 drafted in person whereas the State filed submissions dated 10/06/2024 through Prosecution Counsel Calvin Kirui.

Appellants' Submissions

14. The Appellant started out his submissions by listing 'Amended Grounds of Appeal' as follows;

    1. That the trial magistrate erred in law and fact by failing to find that the prosecution charge sheet in question is fatally defective.

    2. That, the trial magistrate erred in law and fact by failing to find that the prosecution had failed to establish a clear nexus to link the appellant to the allege commission of robbery.

3. That, the trial magistrate erred in law and fact by failing to properly examine and analyze the prosecution evidence hence entered into erroneous conclusion that the prosecution case was proven beyond reasonable doubt.

15. The 'Amended Grounds of Appeal' are more or less similar to those contained in the Petition of Appeal,

16. The Appellant submitted that he was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296 of the *Penal Code*. He then reproduced the particulars therein and urged that the charge sheet was defective. He stated that Section 137 of the *Criminal Procedure Code* provides the rules for the framing of charges and information. That this was intended to guide the drafters of the charge so as to adhere to the rule of law. He urged that in the charge sheet, it was an offence of robbery with violence only if the ingredients are clearly spelt out under Section 296(2) of the Penal code. i.e.

    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. The Appellant submitted that in the instant case, he is the only person charged with the offence of robbery in question. That from the charge sheet, it is very clear there were no other persons charged with him and brought before the court in company of the appellant. That on the same note, the charge sheet does not disclose whether the appellant was in the company of other persons not before court. He urged that failure by the prosecution to strictly adhere to the rule of law while preparing the charges as provided under Section 137 of the *Criminal Procedure Code* and Section 296(2) of the *Penal Code* amounts to total and fatally defective charges brought against the appellant. He urged the court to acquit him on these grounds.

18. On whether the prosecution provided a clear nexus to link the Appellant with the offence in question, he submitted that the duty of prosecution is to lead evidence beyond reasonable doubt. Further, that in the instant case, the prosecution failed to lead evidence to link the appellant to the commission of the crime in question. He urged that the pertinent question that ought to be determined by this court is the role played by the appellant during the commission of the offence, pointing out that the evidence of PW1 did not disclose his role. He placed reliance on the case of Daniel Muthomi M'Arimi V. Republic (2013) eKLR in this regard.

19. The appellant urged that since there was no evidence that was led to prove the existence of the alleged dangerous weapons in the form of 'knife and piece of wood' the prosecution failed to prove the first limb of the essential ingredients of the charge of robbery with violence. That PW1 testified that he was not assaulted and never saw a dangerous weapon, in this case a knife, therefore it was error in law for the trial court to convict the appellant on the charge that was not proved beyond reasonable doubt.

20. The Appellant further submitted that the prosecution didn't confirm, whether the appellant was in the company of other persons who were supposed to be produced in court, and for this reason, among other components and ingredients required by law to establish and prove the offence of robbery with violence, the prosecution failed to lead evidence to the required standard in law to secure a safe conviction. Therefore, the trial magistrate erred in law by failing to examine and analyze the entire prosecution evidence and ended up making an erroneous conclusion that the appellant was guilty of robbery with violence contrary to section 296(2) of the *Penal Code*, while the charge sheet and the facts of the case didn't support the said offence as required by the law. He urged the court to allow the appeal, quash the sentence and set him free.

Respondents' submissions

21. Learned counsel stated that the Appellant was charged with the offence of robbery with violence contrary to Section 295 as read together with Section 296 (2) of the Penal code. He cited the case of Joseph Onyango Owuor & Cliff Ochieng Oduor vs R [2010] eKLR (Criminal Appeal No 353 of 2008) with regard to the disclosure of an offence by citing both sections. Counsel urged that in the instant appeal, the theft involved the use of force, threats and a crude weapon. That Section 295, in the charge sheet, defines the offence of robbery and establishes its ingredients while Section 296 (2) gives the punishment of the offence. Counsel posited that the Appellant was aware of the charges facing him during the trial process and he failed to raise the issue of defective charge sheet at trial. Further, that he proceeded to cross-examine the witnesses accordingly, which is a clear indication that no confusion during the trial and thus the charge sheet was not fatally defective.

22. Counsel laid out the ingredients of the offence of robbery as set out by the Court of Appeal in the case of Oluoch vs Republic [1985] KLR and pointed out that the use of the word OR in this definition means that proof of any one of the ingredients is sufficient to establish an offence under Section 296(2) of the *Penal Code*. That in this case, PW1 testified that the Appellant and one other accomplice confronted him while working in a hotel where he was employed. They demanded for Kshs. 1,000/-. The Appellant was therefore not alone but in company of another and this fulfils ingredient (b). The complainant testified that the Appellant and his companion demanded for Kshs. 1,000/- and the Appellant's companion picked a piece of wood which was intended to be used as a weapon. The complainant was threatened with harm if he did not yield to the demands of the Appellant which fulfils ingredient (a).

23. Counsel urged that the fact that the complainant did not sustain any injury in the course of the robbery does not reduce the offence to simple robbery. That the two ingredients of robbery with violence under Section 296(2) have been shown to have existed and that is sufficient to prove the offence. He placed reliance on the case of Hassan Abdallah Mohammed v Republic [2017] eKLR on identification and submitted that the witnesses testified that they were neighbors to the Appellant and they all knew him well. This evidence was not challenged by the Appellant during cross examination and during his defense. Further, that the incident took place during the day at 3pm in the presence of PW1 and PW2 who also confirmed that there were other people in the hotel at that time. There is therefore no loophole in the manner in which the Appellant was identified.

24. Counsel submitted that the prosecution proved all the ingredients of the offence beyond any reasonable doubt and the trial magistrate was correct in imposing a conviction under Section 296(2).

25. On sentence, counsel submitted that sentencing is a discretion of the trial court and being so it must be done judiciously, placing reliance on the case of Shadrack Kipkoech Kogo v R. Eldoret Criminal Appeal No.253 of 2003 and Bernard Kimani Gacheru v Republic (2002) eKLR. He cited Section 296(2) of the *Penal Code*, emphasizing that the punishment for the offence of robbery with violence is therefore death. Further, that in this case, the court sentenced the Appellant to 20 years' imprisonment and in meting out the sentence, the trial court considered the Appellant's mitigation and the aggravating factors. The court was lenient in sentencing the Appellant as he was charged with a capital offence, but the court sentenced him favorably. He urged the court to dismiss the appeal in its entirety.

Analysis & Determination

26. Having considered the Application as well as the submissions, the two issues for determination that arise are as follows;Whether the Prosecution has proved its case beyond reasonable doubtWhether there is a defect in the charge as drawn that is fatal to the prosecution's case.

27. In Kiilu & Another vs. Republic [2005] 1KLR 174 the Court of Appeal stated that:

> " 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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.
>
> 2. 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. 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."

28. Section 137 of the *Criminal Procedure Code* as has been submitted by the Appellant provides the rules for the framing of charges and information. On the provision relevant to the ground of appeal herein raised by Appellant on the defect of the charge as herein summarised, it states as follows;

The following provisions shall apply to all charges and informations, and, notwithstanding any rule of law or practice, a charge or information shall, subject to this Code, not be open to objection in respect of its form or contents if it is framed in accordance with this Code—

(a)

(i) Mode in which offences are to be charged. —a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence;

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence;

29. Section 296 of the *Penal Code* provides as follows:

> " 296. Punishment of robbery
>
> (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
>
> (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.

30. The above provision of Section 296(2) of the *Penal Code* was elaborated by the Court of Appeal in the case of Oluoch –Vs – Republic [1985] KLR in the following terms:

> " 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 person or persons; or
>
> c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person ....."

31. Further, in the case of Dima Denge Dima & Others vs Republic, 2013 eKLR, the Court of Appeal explained further 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." [Emphasis mine]

32. The above said, I will begin with my very brief analysis and finding on the evidence in support of the Prosecution case. The charge states that the used a knife to commit the offence. However, the prosecution witnesses were clear in their testimonies that the persons who accosted the complainant did not have a knife but used a piece of wood that was picked at the scene. From the said testimonies, it is evident that the appellant was in the company of others when they demanded Kshs. 1,000/- from the complainant carrying a piece of wood with which they intimidated the complainant with into giving them the money. The court herein notes that the issue of the weapon used is a key contradiction of the evidence of the witnesses with the charge as particularized.

33. Having noted that, I will now proceed to the ground of appeal that the charge was defective for the reasons stated and so therefore the court should find that the conviction reached by the Learned Magistrate on the basis of this charge is unsafe and the court ought therefore to set it aside and set him free. I have perused the charge sheet and I have noted that the particulars of the charge read as follows;

> On 7th day of April 2023 at around 1500 hours at Kapchorwa Trading Center in Keiyo South Sub County within Elgeyo Marakwat County being armed with a dangerous weapon namely a knife, robbed Joseph Kiptum Rugut cash money amounting to Ks. 1,000/-

34. These particulars when juxtaposed against what constitutes an offence of Robbery with Violence as provided under Section 296(2), the court notes that the same have omitted two key ingredients of the offence. As has been rightly pointed out by the Appellant the particulars do not state whether he was in the company of other persons who are either before or not before the court. The court has also noted that the element of whether at, or immediately before or immediately after the time of the robbery the Appellant wounded, beat, struck or used other personal violence to any person has also not been stated.

35. The court notes that whereas the Prosecution Counsel does not deny that there was such a defect in the charge, his submission in response to this ground is that the Appellant was aware of the charges facing him during the trial process and he failed to raise the issue of defective charge sheet at trial. That further, he proceeded to cross-examine the witnesses accordingly which is a clear indication that he was not in confusion during the trial and thus the charge sheet cannot therefore be said to have been fatally defective. Counsel further submitted that by the use of the word OR in the definition of what

constitutes an offence of Robbery under Section 296(2) of the *Penal Code* means that proof of any one of the ingredients is sufficient to establish an offence as was held in the case of Oluoch vs Republic [1985] KLR.

36. Further the court notes that under Section 137(a)(ii) of the Criminal Procedure Act on framing of charges, it states inter alia that the particulars of the charge or information do not necessarily have to state all the essential elements of the offence. This therefore can be construed to mean that the failure to include all the essential elements of the offence in the particulars of the charge ought not then render the charge fatally defective.

37. This may very well be so given the circumstances of each particular case in relation to the offence that an accused person is charged with. However, it is my very well considered opinion that in a charge of Robbery with Violence contrary to Section 296(2) as is the case here, it is precisely for the reason that each ingredient and/or element of the charge is to be read disjunctively and not conjunctively, and that any one of any of the three elements if proved is sufficient to sustain a conviction that there is even more reason that the particulars of a charge must all be clearly spelt out in the charge sheet.

38. This fact is even made more crucial and critical by dint of the fact that the offence of Robbery under Section 296(2) is a very serious charge for reasons that it carries a sentence of death upon conviction. Framing a charge given these circumstances should therefore be done with the requisite diligence and a defect as in the charge such as the ones herein pointed out cannot casually be dismissed as inconsequential.

39. It is therefore not enough to state that the accused was well aware of the charge and that proceeded to the cross-examination the witnesses accordingly and that this therefore means that the said charge was not fatally defective. The burden is always upon the prosecution to ensure that an accused person is charged with a known offence in all its particulars so that he is able to adequately prepare a well thought out and considered defense.

40. Further, it should be noted that he Prosecution's submission that because the three elements of the charge ought to be considered disjunctively and so therefore the failure to disclose each of these elements in the particulars of the charge is not fatal to the prosecution case can actually lead to an absurdity. This could be in the sense that a situation may arise where the element whose particulars have not been disclosed in the charge may end up to be the one that is proved. This example underscores the need to ensure that particularly in Robbery under Section 296(2) of the *Penal Code*, it is necessary that all the elements of the charge be clearly and unequivocally stated in the particulars thereof and failure to do so in my well-considered opinion renders any such charge fatally defective.

41. In handling a situation similar to the one now facing this court, in the case of Sigilani -vs- R (2004) 2 KLR 480, it was held that:

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence."

42. Further, the Court of Appeal in Nyamai Musyoka v. Republic (2014) eKLR expressed itself as follows on this very same issue: -

> " The test for whether a charge sheet is fatally defective is a substantive one.....If a defective charge is followed by a series of other procedural or substantive mistakes and which in particular affect the rights of the accused person, or the defect goes into the root of the charge

distorting it in a way that the accused person cannot understand the charge, then the Court ought to be reluctant to apply Section 382 C.P.C. to cure the defect…"

43. In light of my conclusion herein, and having associated myself completely with the holdings in the cases herein above cited, the then is that I am of the finding that the charge as drawn was defective and in the circumstances of the offence of Robbery with Violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*, this defect was fatal to the Prosecution case. In this regard, I am satisfied that the conviction founded on the said charge by the Learned Trial Magistrate is unsafe and the said conviction as well as the sentence of 20 years' imprisonment is now hereby set aside in its entirety, the accused is accordingly acquitted and is to be released forthwith unless otherwise lawfully held. Right of Appeal 14 days.

READ DATED AND SIGNED AT ELDORET ON 2ND JULY 2025

E. OMINDE

JUDGE