



REPUBLIC OF KENYA



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**Onyango v Republic (Criminal Appeal E042 of 2024)
[2025] KEHC 10521 (KLR) (21 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10521 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E042 OF 2024**

A MABEYA, J

JULY 21, 2025

BETWEEN

DUNCAN OTIENO ONYANGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. D. Ogoti CM
passed on the 27/05/2024 in KSM CMC Case No. 709 of 2018, Republic v
Kelvin Nyonimo Ochieng Duncan Otieno Onyango & Erick Onyango Ondiek)*

JUDGMENT

1. The appellant and others not before Court were charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the [Penal Code](#).
2. The particulars of the charge were that on the 24/09/2018 at Imperial Hotel in Kisumu City within Kisumu County, jointly with others not before court being armed with dangerous weapons namely a pistol, robbed Millicent Akinyi Ochieng of Kshs. 217,920/-, a mobile phone make Techno Spark 7 valued at Kshs. 10,000/- and at the time of such robbery threatened to use actual violence to the said Millicent Akinyi Ochieng.
3. The appellant pleaded not guilty and a full trial was conducted. The prosecution case was founded on the evidence of three (3) witnesses whereas the defence evidence was based on the appellant's sworn testimony.
4. In its judgment, the trial court found that the prosecution had proved its case to the required standard as against the appellant and convicted him of the offence. After considering his mitigation, the trial court sentenced the appellant to serve 18 years' imprisonment.



5. Dissatisfied with that decision, the appellant filed his petition of appeal dated 3/06/2024 raising five (5) grounds of appeal as follows: -
 - a. That the learned trial magistrate erred in both law and fact by relying on evidence of a witness who should have been treated as a hostile witness.
 - b. That the learned trial magistrate erred in both law and fact by amending the charge sheet without the appellant's knowledge.
 - c. That the learned trial magistrate erred in both law and fact by failing to establish that the prosecution side did not prove their case beyond reasonable doubt.
 - d. That the learned trial magistrate erred in both law and fact by relying on uncorroborated evidence.
 - e. That more grounds to be adduced once the appellant is served with trial records.
6. The appeal was canvassed by way of written submissions. The appellant submitted that there was a disparity in his identification as evident in the testimonies of PW1 & PW2. That that the evidence emerging from the identification parade was of no evidential value as the parade officer was not called to attest to the evidence and produce the identification parade form.
7. That it was not proven beyond reasonable doubt that the motorcycle alleged to have been hired from PW3 was the actual motorcycle used by the robbers in committing the offence. That he was convicted based on evidence not produced as the relevant exhibits were not produced in court and thus of no evidential value.
8. That the court could not ascertain if the prosecution witnesses were stating the exact findings of the investigations as the investigating officer was not called to testify and that the trial court in convicting the appellant relied on duplex charges.
9. On its part, the State submitted that the ingredient of identification was proved beyond reasonable doubt and that the sentence meted of 18 years' imprisonment was too lenient and the court ought not to interfere with it.
10. This being the first appellate Court, the duty of this Court is to re-evaluate the evidence afresh analyze the same and reach its own independent conclusion and findings at all times considering that it did not see the witnesses testify. (See *Okeno v Republic* [1972] EA 32.)
11. PW1 Millicent Akinyi Ochieng testified that on 24/9/2018 at about noon, she was headed to Diamond Trust Bank to bank some money, Kshs. 217,920/-. When crossing the road, someone tried and managed to snatch her bag. She screamed and members of the public came to her rescue and shortly she had a gunshot and the crowd dispersed.
12. That a motorbike ridden by a man with red lips and a scar on the forehead arrived and the man who had accosted him boarded it and after some distance, a third man boarded the motorbike that went through a rough road at Ardhi house. She picked up a Samsung phone at the scene which she handed over to the police. On 9/10/2018, she was called to an identification parade where she managed to identify the appellant as the person who snatched the bag she had.
13. PW2 George Odiwo Ocholla, a security guard at Imperial Hotel manning the entry corroborated PW1's testimony on how she was confronted and robbed. That he was later called for an identification parade and was able to identify the appellant as one of PW1's attackers.



14. PW3 Barnabas Simbo Were testified that he owned a motorcycle registration number KMDR 933W which he usually leases out. That had leased it out to the appellant on the 24/9/2018 which the appellant returned at about 2.30pm on the same day. That on the 4/10/2018, he was informed of the appellant's arrest and on the 8/10/2018 he was called to the police station and asked to produce the motorbike which he had given to the appellant.
15. When placed on his defence, the appellant denied committing the offence. He stated that he was arrested on the 4/10/2018 while at a resting base where he had parked a motorbike he used to ride. That he was held for 3 days and subsequently charged with the offence and brought to court.
16. The Court has considered the record. The appellant was charged with the offence of Robbery with Violence. The ingredients of this offence were aptly discussed by Court of Appeal in Johana Ndungu v Republic CRA. 116/1995, [1996] eKLR as follows: -

“To appreciate properly what acts, constitute an offence under Section 296 (2) one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is ‘use of or threat to use’ actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore-described ingredients constituting robbery is presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below, and any one of which if proved, will constitute the offence under the subsection:

- 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, beats, strikes or uses any other violence to any person.”

17. Similarly, in Dima Denge & Others vs. Republic (2013) eKLR, the Court of Appeal it was 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 find an offence of robbery with violence.”

18. The grounds of appeal by the appellant may be collapsed into two. That the trial court erred in convicting the appellant on a duplex charge and, that the trial court erred in convicting the appellant yet the prosecution did not prove the charge beyond reasonable doubt.
19. The first ground is that the trial court erred in convicting the appellant on a duplex charge. The question of duplicity in charges was considered by the Court of Appeal in Paul Katana Njuguna v Republic [2016] eKLR citing with approval the following principles as the correct law: -

“The test is whether the application of the test must depend to some extent upon the circumstances of the case and the nature of duplicity. Cherere s/o Gakuli vs Republic [1955] 622 EACA.

The vice at which the rule against duplicity is aimed and is intended to counter is uncertainty and confusion in the mind of the accused in having to deal with charges which are mixed up and uncertain. Amos vs DPP [1988] RTR 198 DC.



...

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.”

20. In the present case, the appellant, was charged with robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. Section 295 is a definition section and it contains the ingredients of robbery. It does not deal with the degree of violence being merely a definition section. Section 296(2) of the *Penal Code* is the one that deals with the specific degrees of the offence of aggravated robbery and have been framed as such.
21. 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. Further, the appellant was duly represented by an advocate throughout his trial and at no point did he raise any queries as to the prejudice suffered or likely to be suffered by the appellant as a result of the charges brought forth against him.
22. For those reasons, it is not in doubt that the appellant from the time of plea was fully aware that he faced a charge of robbery with violence. Therefore, the charge sheet does not contain duplex charges and neither was it prejudicial to him. As such, the charge sheet properly framed the charge against the appellant and was not defective.
23. The second ground was that the trial court erred in convicting the appellant yet the prosecution did not prove its case beyond reasonable doubt. That the case was not investigated as the investigations officer did not testify. He submitted that he was not properly identified as there was a disparity on his description as testified by PW1 and PW2 and that the Parade Officer did not testify and produce the parade forms.
24. The appellant submitted that the failure to call the investigation officer to testify was fatal to the prosecution case as it meant that the case against him had not been investigated and proved. It is expected of the prosecution in a criminal case to call the investigating officer as a witness to shed light on his or her role and how he or she concluded that the accused person was culpable for the charged offence.



25. Ordinarily, the investigating officer is the witness who neatly ties the knots interlinking the prosecution's evidence and, in the process dismantle the accused person's defence. Sometimes, the failure to call the investigating officer can be fatal to the prosecution's case because the investigator paints the whole picture and assists the court in making sense of the disparate information placed on record by different witnesses.
26. However, as the Court of Appeal has previously held, the failure to call the investigating officer does not in itself automatically become fatal to the prosecution's case. In *Harward Shikanga Alias Kadogo & Another v Republic* [2008] eKLR, it was held that: -
- “We think that in all cases it would be good practice which prosecuting authorities ought to comply with, but the mere failure to comply with it, i.e. calling an investigating officer, cannot automatically result in an acquittal. Each case would have to be considered on its own circumstances in order to determine the effect of such a failure on the entire case for the prosecution.”
27. Similarly, in *Reuben Gitonga Nderitu v Republic* [2009] eKLR, the Court held that:
- “Secondly, with regard to the complaint that the investigating officer was not called to testify is also neither here nor there. It is not mandatory that he be called, unless there is an allegation that he would have said something adverse to the prosecution case.”
28. In the present case, the evidence on record was sufficient to prove the appellant's involvement in the robbery. Maybe the only additional thing the investigating officer would have done was to produce the motorcycle owned by PW3 that was used in committing the offence. That complaint fails.
29. The other challenge on the conviction was that the appellant's identification was inconclusive as the Parade Officer was not called to testify. The fact that a witness who identified an appellant would be able to provide the police with a description of the attacker should be considered by the court when evaluating the identification evidence (see *Simiyu and Others v Republic* [2005] 1 KLR 192).
30. If an ID parade is not done in such circumstance, the identification amounts to a dock identification which as the Court of Appeal observed in *Gabriel Kamau Njoroge v Republic* [1982-1988] 1 KAR 1134 was, “generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade”.
31. In *In Ibrahim Agevi Kigame and Another v Republic* ELD CA Criminal Appeal No.289 of 2009 [2011] eKLR, the Court of Appeal had this to say about the failure to call the officer who conducted the identification parade: -
- “Looking at the record, many aspects of the evidence on these parades could only be answered by the officer who conducted the parades and the parade forms. Thus, that officer was a necessary witness for the prosecution in the entire case, for without him and the forms it could not be established as to whether the identification parades were fairly conducted. He was a witness that the prosecution needed to establish their case on identification beyond reasonable doubt. He was not called; with the consequence, that in our view, the evidence establishing identification of the appellants was not before the court ...
- We, with respect do not share the view of the superior court that the identification of the appellants was otherwise than mere dock identification. In the absence of the officer who



conducted the identification parade and the parade forms, nothing remained before court other than dock identification which is worthless. Conviction could not therefore proceed on that evidence alone.”

32. And, in *Achieng v Republic* [1981] KLR 175, the Court of Appeal held: -

“Where an identification parade was held, the officer who conducted it must be questioned about it. Where such an officer is not questioned the evidence of identification can still be accepted as reliable if there is other evidence such as the finding of goods in possession of the appellant.”

33. It is trite that identification is key given that it is the link that connects an accused person to an alleged act that constitutes an offence. Identification has been defined by the *Black’s Law Dictionary* 2nd Edition as: -

“Proof of identity; the proving that a person, subject, or article before the court is the very same that he or it is alleged, charged, or reputed to be; as where a witness recognizes the prisoner at the bar as the same person whom he saw committing the crime; or where handwriting, stolen goods, counterfeit coin, etc., are recognized as the same which once passed under the observation of the person identifying them – ‘Identitas vera colligitur ex multitudine signorum’”

34. In *Wamunga v Republic* (1989) KLR 424, at 426 the court had this to say: -

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and 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.”

35. In the present case, PW1 testified that she was headed to bank some money when someone tried and managed to snatch her bag. That on the 9/10/2018 she attended an identification parade where she managed to identify the appellant as the person who snatched the bag she had. At the same parade, PW2 identified the appellant as the person he saw as the rider of the getaway motorcycle while he identified the appellant’s co-accused as the one who snatched PW1’s bag.

36. It is clear that both PW1 and PW2 placed the appellant at the scene of crime. They only identified him at the identification parade that was conducted some days after the incident. The parade officer was not called to satisfy the court that the parade was conducted in accordance with the law. There is nothing on record to show that the safeguards that go with identification parades were present in the identification of the appellant by Pw1 and Pw2.

37. There was no reason that was advanced as to why that officer was not called to testify and produce the identification parade forms. To this Court’s mind, the appellant’s identification remains dock identification which is worthless. Even the motorcycle that was alleged to have been used by the appellant to get away was never produced.

38. Accordingly, I find that the conviction of the appellant was unsafe. I find the appeal to be meritorious and I allow the same. The conviction is quashed and the sentence set aside. The appellant is to be released and set at liberty forthwith unless otherwise lawfully held.

It is so decreed.



DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF JULY, 2025.

A. MABEYA, FCI ARB

JUDGE

