



**Kivivu v Republic (Criminal Appeal E028 of 2022)
[2024] KEHC 15 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 15 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CRIMINAL APPEAL E028 OF 2022
GMA DULU, J
JANUARY 11, 2024**

BETWEEN

JULIUS KELI KIVIVU APPELLANT

AND

REPUBLIC RESPONDENT

*(From the conviction and sentence in Criminal Case No. E083 of 2021
delivered on 5th August 2021 at Makueni by Hon. J. N. Mwaniki (CM))*

JUDGMENT

1. The appellant was charged in the Magistrate's court with robbery with violence contrary to Section 296(2) of the *Penal Code*, the particulars of which being that on 29th March 2021 at Mwangaza area in Makueni County, while armed with a knife robbed Purity Ndumi Muthii one mobile phone Techno, a black handbag containing 6,000/= and keys valued at 12,000/= and immediately before such robbery wounded the said Purity Ndumi Muthii.
2. He denied the charge. After a full trial, he was convicted of the offence and sentenced to seven (7) years imprisonment.
3. Aggrieved by the conviction and sentence, the appellant has come to this court on appeal, claiming mainly that the charge was defective.
4. In proving their case the prosecution called five (5) witnesses. On his part the appellant tendered sworn defence testimony and did not call additional witnesses.
5. Having considered the arguments of the appellant and the arguments of the Director of Public Prosecutions, I find no defect or fatal defect on the charge. The fact that evidence given in court does not support the charge does not mean that the charge is defective, though it might mean that the charge will not have been proved through evidence. I dismiss that ground.



6. Coming back to the proof of the charge, the charge was a serious one of robbery with violence. However the evidence on record from both sides was that the complainant and the appellant were strained lovers who had a disagreement, and the alleged incident was a consequence of the said love gone sour.
7. In my view, though the charge of robbery with violence was technically not defective, what was proved from the evidence on record was assault occasioning actual bodily harm after the appellant was not allowed to pursue his sexual advances that day. What the appellant did was criminal but did not amount to robbery with violence.
8. I will thus quash the conviction for robbery with violence and substitute it with conviction for assault causing actual bodily harm contrary to Section 251 of the [Penal Code](#). I will also vary the sentence.
9. Consequently, I quash the conviction for robbery with violence and set aside the sentence imposed by the trial court.
10. Instead, I enter a conviction for assault occasioning actual bodily harm contrary to Section 251 of the [Penal Code](#). I sentence the appellant to four (4) years imprisonment from the date he was sentenced by the trial court. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JANUARY 2024 VIRTUALLY AT VOI.

GEORGE DULU

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:-

Ms. Nusura – Court Assistant

Appellant

Ms. Omolo for State

