



**Mwinzi & another v Republic (Criminal Appeal E063 of 2022)
[2024] KEHC 31 (KLR) (11 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 31 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CRIMINAL APPEAL E063 OF 2022
KW KIARIE, J
JANUARY 11, 2024**

BETWEEN

MOHAMED KAVATA MWINZI 1ST APPELLANT

HASSAN KOMBO NGALA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(From the original conviction and sentence in S.O. case NO. 1098 of 2019 of the Chief Magistrate's Court at Mombasa by Hon. R.M. Amwayi– Senior Resident Magistrate)

JUDGMENT

1. Mohamed Kavata Mwinzi and Hassan Kombo Ngala, the appellant herein, were convicted of 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 offence are that on the 25th day of June 2019 at Barclays Bank Nkrumah Road Branch in Mvita District within Mombasa County, jointly with others not before the court, while armed with an AK 47 rifle robbed Abdul Rasheed Ali of his cash Kshs. 1,950,000/=.
3. The appellants were sentenced to life imprisonment. They were aggrieved and appealed against the conviction and the sentence. They raised grounds of appeal as follows:
 - a. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellants to life imprisonment and failed to note that the first report was lacking.
 - b. That the learned trial magistrate erred in law and fact by failing to note that the investigations were shoddy.
 - c. That the learned trial magistrate erred in law and fact by failing to note that the AK-47 rifle was not produced.



- d. That the learned trial magistrate erred in law and fact by dismissing the mitigation.
4. The appeal was opposed by the state through Ms. Nyawinda Kernael learned counsel, who contended that the evidence was overwhelming against the appellants.
 5. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court. I have drawn my conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno vs. Republic* [1972] EA 32.
 6. Abdul Rasheed Ali Hussein (PW1) had withdrawn some Kshs. 1,950,000/= from The Gulf Bank and intended to deposit the money in Badayo Bank to purchase fuel. When he alighted from his motor vehicle, a pillion passenger alighted from a motorcycle. He removed a gun from a bag and ordered him to drop the envelope with the money. He complied and the robber picked it. The rider and the pillion passenger left on the motorcycle. While chasing them, some police officers told him they were going to pursue them.
 7. PC Mary Kilonzo (PW3) and PC Duke Matwere (PW4) were the police officers who gave chase to the motorcyclist who was being chased by the complainant. He had a pillion passenger. The rider left the scene but they arrested the pillion passenger. When the rider was later arrested, the two officers and the complainant were able to identify him.
 8. This was a case where the second accused was arrested at the scene and the first accused was purportedly recognized. In the celebrated case of *R. vs. Turnbull and Others* [1976] 3 All ER 549 Lord Widgery CJ stated as follows:

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each 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" If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
 9. Although one may be tempted to conclude that these witnesses did not have ample time with the rider, the evidence of Suleiman Chembe Nyando (PW2) the motorcycle owner put any lingering doubts to rest. His evidence was that at about 10 a.m. Mohamed Kavata Mwinzi went and reported to him that the motorcycle had been impounded by the police. He had the motorcycle's key in his hands. When he took him to the police, he learned that his motorcycle had been involved in a robbery.
 10. The prosecution adduced sufficient evidence which proved that the two appellants were involved in the robbery against the complainant.
 11. The penalty for the offence of robbery under section 296 (2) of the *Penal Code* is a death sentence. The section provides:

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.

The appellants are lucky that the sentence meted out is not legal and no notice for enhancement was given to them.

12. The appeal lacks merit and the same is dismissed.

DELIVERED AND SIGNED AT MOMBASA THIS 11TH DAY OF JANUARY, 2024

KIARIE WAWERU KIARIE

JUDGE

