



**Kinyoro v Republic (Criminal Appeal 162 of 2023)  
[2024] KEHC 1554 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1554 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 162 OF 2023  
DR KAVEDZA, J  
FEBRUARY 21, 2024**

**BETWEEN**

**FESTO KINYORO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by  
Hon. E. Riany (SRM) on 31st August 2023 at Kibera Chief Magistrate's  
Court Criminal Case no. E235 of 2021 Republic vs Festo Kinyoro)*

**JUDGMENT**

1. The appellant was charged and after a full trial, convicted for the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. He was sentenced to death. Being dissatisfied he filed an appeal challenging his conviction and sentence.
2. In his appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. The appellant complained that the trial court failed to give due consideration to his defence. He urged the court to quash his conviction and set aside the sentence imposed.
3. In response, the state filed grounds of opposition. The grounds raised were that no grounds exist to set aside the conviction and sentence imposed by the trial court. The prosecution proved their case beyond reasonable doubt. The trial magistrate considered the accused appellant's defence. The appeal is misconceived and lacks merit.
4. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate and reanalyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32)



5. The prosecution called four witnesses in support of its case during the trial. Marystella Maiya, (PW1), underwent a harrowing experience on the night of February 8, 2021, around 2:00 am. She ventured outside to collect rainwater for harvesting, and as she filled her third jerrycan, she was ambushed by three assailants—two outside and one intruder who gained access to her house. Amidst her cries for help, they inflicted cuts on her right leg and left hand, making off with valuable items including her 32-inch television, a 6kg pro-gas cylinder, Techno mobile phone, and a bag containing bras, two panties, and a blouse.
6. Her sister, who had been hiding, emerged and promptly contacted her employer, who arrived at the scene. While going to the hospital they heard a crowd shouting out at thieves and stopped them. Subsequently, during the arrest of two individuals, one was found in possession of her bag containing her items being a brown top, bra, and panties. The other stolen items were not recovered.
7. At the hospital, a P3 form was filled. One of the arrested individuals was identified as the intruder, was apprehended still wearing the same jacket he had on during the break-in, and she positively recognized him as the perpetrator who had entered her house and inflicted harm.
8. PW2, Mildred Maiya Achieng, and the sister of PW1 provided an account of the incident where they were residing together. Around 1-2 am, she was startled by her sister's screams, and an intruder entered their home wielding a machete in one hand and a 'rungu' in the other. Threatening to kill them if they made noise, he proceeded to collect their belongings, placing them near the door, including a television, gas cylinder, and phone. PW 2, stayed in bed as the intruder warned her not to rise when he approached the bed.
9. Once the intruder left, Mildred discovered her sister bleeding. Despite neighbours not opening their doors, PW 2 reached out to a colleague from work, who arrived with a car. They transported her sister to the hospital, encountering a commotion with people shouting "thief" on the way. They stopped and found one of the accused individuals in possession of her sister's black bag, containing – a bra, panties, and a blouse.
10. PW3, APC George Ndunda, was on duty on the day of the incident. Around 2:00 am, he received a call from PW2, reporting an at their home. In response, he quickly rushed to the scene and discovered PW1 with injuries on her right hand and leg. They immediately transported her to the hospital, but during the journey, they encountered a crowd accusing someone of theft.
11. As they approached, it was revealed that the accused had broken into a shop and was being pursued. PW2, in the vehicle, claimed to recognize the accused, pointing out his distinctive bag as belonging to PW1. In pursuit, they managed to apprehend and arrest the appellant.
12. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. In his defence he gave unsworn testimony. He testified that on February 17, 2021, he entered his house in Kawangware and rested. The next morning, around 4:00 am, he prepared to leave for the market where he was employed. As he walked near the road, a commotion ensued at the gate, with people shouting "thief." A vehicle with officers approached, and despite his innocence, he was mistaken for one of the thieves and subsequently arrested.
13. The appeal was canvassed by way of written submissions which have been considered. The offence of robbery with violence under section 296(2) of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence



to any person (see *Dima Denge Dima & Others v Republic* NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR and *Oluoch v Republic* [1985] KLR 549)

14. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt. The evidence on record does prove that PW 1 and PW 2 were attacked in their home by three male assailants on the night of 7<sup>th</sup> and 8<sup>th</sup> February 2021. PW 1 told the court that the attackers were armed with a 'rungu' and machete which was used to inflict injuries upon her. It is established that one of the robbers was the appellant. It was the evidence of PW 1 and PW 2 that the appellant was holding a machete in one hand and a 'rungu' on the other.
15. During the ordeal, they stole a 32-inch television, a 6kg pro-gas cylinder, a Techno mobile phone, and a bag containing bras, two panties, and a blouse. The complainant told the court that the house was well lit with electricity and she could identify her assailants. In addition, the appellant was caught fleeing the scene and was identified after his arrest by both PW 1 and PW 2. In addition, he was also arrested in possession of the bag stolen from the victim's premises.
16. From the material placed before the court, PW 1 and PW 2 were very clear on the facts of the incident, and their evidence was not shaken on cross-examination. It is my considered view that the appellant was properly and positively identified by PW 1 and PW2 during his apprehension while fleeing from the scene. I find the testimony of PW1 and PW2 to be reliable direct evidence of visual identification against the appellant.
17. For consideration is whether force was used to rob them. It was the testimony of PW 1 and PW 2 that the appellant was armed with a machete and a 'rungu' which was used as a weapon to threaten harm. PW 1 told the court that that the machete inflicted cuts on her arms and legs and had to receive medical attention after the ordeal. This court is satisfied that the prosecution proved that the appellant and his accomplices robbed and threatened to harm the complainants.
18. The appellant also argued that the trial court failed to consider his defence. In his defence, the appellant denied committing the offences and maintained his innocence. From the record, the trial court considered the appellant's defence and found it to be unbelievable. This ground of appeal therefore fails. His conviction for the offence of robbery with violence was therefore safe.
19. On sentence, the appellant was sentenced to death. Section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find the sentence-imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh.
20. Therefore, the appeal on sentence succeeds. The sentence of death is hereby vacated. I hereby resentence the appellant to 25 years imprisonment from the date of his conviction. However, the 2 years, 6 months and 23 days spent in remand custody to be considered during the computation of the appellant's sentence.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21<sup>ST</sup> DAY OF FEBRUARY 2024**

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**D. KAVEDZA**

**JUDGE**



**In the presence of:**

Appellant present in person

Ms. Ntabo for the State

Nelson Court Assistant

