



**Amanga v Republic (Criminal Appeal E032 of 2021)
[2024] KEHC 2251 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CRIMINAL APPEAL E032 OF 2021**

KW KIARIE, J

MARCH 6, 2024

BETWEEN

WYCLIFFE AMANGA APPELLANT

AND

REPUBLIC RESPONDENT

*(From the original conviction and sentence in Criminal case No.434 of 2020 of the
Chief Magistrate’s Court at Homa Bay by Hon. T. Obutu–Senior Principal Magistrate)*

JUDGMENT

1. Wycliffe Amanga, the appellant herein, was convicted of the offence of robbery with violence contrary to section 295 as read with section 296 of the Penal Code.
2. The particulars were that on the 19th day of July 2020, at Kaduogo area in Homa Bay sub-county of Homa Bay County, jointly with others not before the court while armed with a machete, robbed Clement Okello Ochuka, a motorcycle and a phone all valued at Kshs. 66,100/= and immediately before the time of the said robbery, injured the said Clement Okello Ochuka.
3. The appellant was convicted and sentenced to suffer death as prescribed by the law. He was aggrieved and filed this appeal.
4. The appellant was in person and raised the following grounds of appeal:
 - a. That the learned trial magistrate erred in law and facts in his judgment, which was arrived at using scanty, contradictory, and inconsistent evidence to support the robbery charge with violence.
 - b. That the learned trial magistrate erred in law and facts by sentencing the appellant to a harsh and excessive sentence.



- c. That the trial magistrate erred in law and fact by basing the conviction and sentence on a duplex charge, rendering the whole trial null and void.
5. The state opposed the appeal. It was contended that the conviction and the sentence were proper.
6. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of Okeno vs Republic [1972] EA 32.
7. The charge was erroneous. It should have been indicated whether the appellant was charged under section 296 (1) or 296 (2) of the Penal Code. Section 382 of the Criminal Procedure Code provides:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

In the instant case, the error did not prejudice the appellant.

8. Clement Okello Ochuka (PW1) testified that two people stopped him near a home. When he slowed down to carry them for money, they attacked him. His phone fell, and one of the attackers went for it. He got a chance to escape and left his motorcycle on the road. He escaped to a maize plantation. He, however, said that he did not see his attackers, for it was dark.
9. During cross-examination, he changed his story and said the scene was near a shop and a bar. He also changed his story and stated he did not carry passengers on his motorcycle.
10. In his defence, the appellant contended that the complainant went where he (the appellant) was guarding and attacked him. He left his motorcycle and ran away. He took the motorcycle to Ndhiwa police station. The officers took him to the hospital and later escorted him to Homa Bay Police Station.
11. When the complainant testified that he slowed down to carry the people who stopped him for money, and in another breath, he said that he does not take passengers on his motorcycle, it raises doubts about his credibility. He also testified on two locations of the same incident. In his evidence-in-chief, he said he was attacked near a home, but in cross-examination, he stated it was near a shop and a bar. The Court of Appeal in *Ndungu Kimanyi vs republic* [1979] KLR 283 (*Madan, Miller and Potter JJA*) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

I find that the complainant was unreliable.

12. The prosecution did not call any police officer from Ndhiwa police station to testify on how the motorcycle got to their station. This omission is fatal to the prosecution case. The defence of the



appellant was not challenged. The Court of Appeal in the case of *Bukenya vs Uganda* [1972] EA 549 (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

In the instant case, I am persuaded to infer that had they called a police officer from Ndhiwa Police Station who received the motorcycle and arrested the appellant, his evidence would have been unfavourable to the prosecution case.

13. I find that the conviction of the appellant was unsafe. I quash the conviction and set aside the sentence. He is set at liberty unless otherwise lawfully held.

DELIVERED AND SIGNED AT HOMA BAY THIS 6TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE

