



REPUBLIC OF KENYA



**Cheptumo v Republic (Criminal Appeal E026 of 2023)  
[2024] KEHC 5068 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5068 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL APPEAL E026 OF 2023**

**RB NGETICH, J**

**MAY 9, 2024**

**BETWEEN**

**WILLIAM CHEPTUMO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement of Senior Resident Magistrate Hon. EDWIN  
MULOCHI dated 17th day of August 2023 at the chief magistrate's court at Kabarnet)*

**JUDGMENT**

1. The Appellant was charged jointly with another person not before court with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that the accused jointly with another not before court on the 27<sup>th</sup> day of June, 2022 at about 20:00 Hours at Ossen Village in Baringo North Sub-county within Baringo County, robbed Benjamin Kiptoo Kshs.1550/=, mobile phones:- Tecno valued at Kshs.1500, Nokia valued at Kshs.1700, Tecno Kshs.1500, immediately before and the time of robbery, threatened the said Benjamin Kiptoo with a panga.
2. On 12<sup>th</sup> July, 2022 upon the appellant being presented to court for plea, the substance of the charge and every element thereof were read to the accused who denied the charge and the matter was set down for full trial. The prosecution availed 4 witnesses in support of the charge against the accused and upon the close of the prosecution's case, by ruling delivered on 18<sup>th</sup> July, 2023 the trial court found that a prima facie case had been established to warrant accused be placed on his defence. The Appellant gave sworn statement and did not call any witness.
3. Upon the close of the defence case, by judgment delivered on the 17<sup>th</sup> day of August, 2023 the trial court found him guilty, convict him accordingly under Section 215 of the Criminal Procedure Code and sentenced him to death.



4. Dissatisfied and aggrieved by the trial court, the appellant lodged this appeal on the following grounds:-
  - i. That the charge sheet was defective.
  - ii. That the trial magistrate grossly erred in law and facts by not observing that the prosecution did not prove their case beyond reasonable doubt.
  - iii. That the prosecution evidence was contradicted and fabricated.
  - iv. That the crucial witnesses were not brought to court to testify.
  - v. That the essential exhibits were not tendered in evidence as legally mandated by law.
  - vi. That the prosecution's side did not prove their case to the required standard.
  - vii. That the appellant was not accorded a fair trial.
  - viii. That the trial magistrate grossly erred in law and facts by disregarding his alibi defense.
  - ix. That, more grounds to be adduced at the hearing.
5. The appellant filed amended grounds of appeal brought under Section 350 (2) of the criminal procedure code raising the following grounds;
  - i. That the learned trial magistrate erred in law by awarding the appellant a conviction and a sentence in a prosecution case but failed to note that the charges were framed in a defective charge sheet. The panga purported to have been used was not described as a dangerous weapon, this was a defect which went to the root of the prosecution case.
  - ii. That the learned trial Magistrate erred in law by awarding a conviction and a Mandatory Death Sentence but failed to appreciate recent law developments, the Sentencing policy Guidelines 2015 and the constitutional Provisions Article 50(2)(q).
  - iii. That the learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a prosecution case but failed to note that, the elements of the charge of robbery with violence as defined under section 296 (2) of the penal code were not proved as possession and recovery of the purported stolen property was not proved as against the appellant.
  - iv. That the learned trial magistrate erred in law and fact when he failed to consider the defense evidence given by the appellant alongside other prosecution evidence.
6. The appellant prays for the following orders:-
  - a. That the conviction be quashed and the sentence imposed on the appellant be set aside and the appellant be set at liberty.
  - b. That this honourable appellate court does issue any further orders as may be just and expedient in the circumstances.
  - c. That, this honourable appellate court be pleased to re-evaluate the whole evidence tendered, evaluate the court judgement, consider my submissions on matters of law and make an independent ending on both conviction and proper sentence.



## Appellant's Submissions

7. The appellant submits that the charge sheet was defective in form. That the particulars of the charge clearly mentioned a Panga but does not state whether the Panga was a dangerous weapon and the omission was fatal to the prosecution case as it went to the root of the prosecution case. He relies in the provisions of Section 214(1) of the criminal procedure code on defective charge sheets and submits that the defect is incurably defective and it could not be cured under section 382 of the criminal procedure code.
8. On the issue of sentence, he submit that the recent law developments have shown that courts have discretion and can divert from mandatory sentences. He submits that a death sentence is in conflict of the above objectives and also in conflict with Article 50 (2) (q) of *the Constitution*. The Appellant places reliance in Constitutional and Human Rights Division Petition No. 5 of 2022 as consolidated with Constitutional Petition No. 6 of 2022 - Shaban Salim Ramadhan and 9 Others in Mombasa. The appellant further relies in the Court of Appeal decision in Oprodi Peter *Omukanga Vs Republic Cr.App. No.260 of 2019*.
9. The Appellant implores upon this court to find that by the time the appellant was incarcerated, he was a young man, that there is need to rehabilitate and reintegrate offenders into society to eke a meaningful life after imprisonment as one of the objectives of punishment and should never recede to the background in sentencing. That in the circumstances of this case, death sentence may not serve such restorative or rehabilitative purposes for the appellant before court.
10. The appellant submits that the death sentence has been commuted to Life imprisonment by the president and urge the court to consider recent decisions on life sentence in the case of Bernard Kiprono Koech Vs Republic Eldoret Court of Appeal criminal appeal no I7 of 2017 and in Joseph Maina Mwangi V Rep Cr; App No 28 Of 2014.
11. He submits that a Life sentence should be reserved for repeat or depraved offences and should be imposed with utmost caution considering its harsh nature and placed reliance in the case of Julius Kitsao *Manyeso V Republic Criminal Appeal No.12 of 2021* and in the case of Ali Abdalla Mwanza V Republic Criminal appeal NO.259 of 2012. In light of the above, the appellant urged this court to consider that he was only 37 years old at the time of incarceration and is now 38years old and urged this court to exercise discretion and consider favorable sentence.
12. The appellant further submits that the charge of robbery with violence was not proved beyond reasonable doubt and urged this court scrutinize the evidence on record to find if the ingredients of the offence were proved.
13. On the first ingredient of being armed with dangerous weapon or instrument ,the appellant cited the case of Suleiman Juma Alias Tom Vs Republic [2003]eKLR where the court of appeal found that the appellant having been armed with knives, the particulars of the charge do not clearly state whether the knife was a dangerous weapon and under Section 296(21) of the Penal Code, the charge must state that the accused was armed with a dangerous or offensive weapon or instrument but in this case, Pw1 only mentions a Panga but the charge sheet did not indicate whether it was a dangerous weapon; further that the Panga was not recovered from the appellant neither was it availed in court as an exhibit.
14. The appellant further submit that it is crystal clear that the Panga belonged to one James Kangogo who is not an accused person in this matter and it is the said James Kangogo who threatened the complainant and not the appellant and submits that the ingredient for the offence was not proved.



15. On the second ingredient of the offender being in company of one or more other person or persons, the appellant submits that Pw1 said he received four visitors but it is clear whether the person who committed the theft was one person that is James Kangogo and not the appellant and relied on the case of *Musa Ahmed vs Republic* (2016) eKLR.
16. The appellant further submits that within the meaning of the Section 296(2) of the penal code, the appellant did not commit the act of robbery neither was he found in possession of stolen property/ item and cannot therefore be said that he was guilty of robbery with violence merely because he was with company of others hence the second ingredient was not proved.
17. In respect to the 3<sup>rd</sup> ingredient being whether he wounds, beats, strikes or uses violence the complainant, the appellant submits that it was pw1 who was at the scene and he was not injured or wounded in any way. Further that the complainant said James Kangogo hit the Panga on the ground which means no one was hurt. That there was no medical evidence produced to prove any assault. No P3 Forms were produced as the complainant was not hurt. He relied on the case of *Wyclife Otieno Saasita V Republic* [2011] eKLR in support of this case and in *Donald Atemia Sipendi v Republic* (2019) eKLR.
18. The appellant further submit that the property alleged to have been stolen was money totaling Ksh.1,550/= and a phone but the circumstances were not grievous and the force used was minimal and if any crime was committed, it was under Section 296 (1) of the Penal Code which is simple robbery or stealing under Section 275 of the Penal Code.
19. Further that all the recorded stolen properties do not bear serial numbers, Mobile phones; Techno valued at Ksh.15001/= Nokia valued at Ksh.1700/= and it was impossible for the court to differentiate the stolen property and any other property of the same make and model, taking into considerations that most of the items are common Phones used by every person and it was a misdirection for the learned trial magistrate to hold that the appellant stole a Techno phone and a Nokia phone without categorizing what kind of Phone and its IMEI numbers.
20. Further that no inventories were made and PW4 did not visit the scenes of crime, the list of exhibits given in the charge sheet does not bear serial numbers and it was impossible to differentiate these Phones with any other Phones of similar make; further that no receipt or marks of identification were produced in court to prove that the items belonged to the complainants. That the prosecution witnesses, who recovered the phone were not called to testify thus, the recovered Phone could not be valid as evidence without calling the person who recovered it as the phone was recovered from the compound of the complainant. That without any corroborative evidence, there is only the allegation of Pw1 and Pw4 that some items were recovered. He relied on the case of *Samuel Mwangi Macharia and Another vs Republic* (2015): eKLR. That no direct evidence was adduced to implicate the appellant. He also relies on the case of *Suleiman Juma Alias Tom vs Republic* cr. App. No. 181 of 2002 and argues that the charge of robbery with violence was not proved against the appellant by the evidence before court.
21. The appellant submits that the trial court failed to analyze the appellant's defence and give reasons as to why the defence was not admissible before giving a verdict. He submits that he gave unsworn evidence; that the charge was fabricated and the case was poorly investigated. He argues that the prosecution was supposed to invoke Section 309 of the Criminal Procedure Code and seek leave to adduce further evidence to rebut the appellant's defence and failure which the offence of robbery with violence cannot be said to have been proved. He urges this court to allow his appeal.



## Respondent's Submissions

22. The prosecution counsel Ms. Ratemo submitted orally in court that the accused was charged with the offence of robbery with violence and the prosecution availed 4 witnesses. She submitted that the prosecution was required to establish 3 ingredients of the offence of robbery with violence. She submitted that the complainant testified that the accused took money Kshs 1550/= and a mobile phone from him and in the course of the robbery, the accused was armed with a panga and he hit the panga on the ground and told them that he had come for them.
23. She further submitted that during cross examination, it was not disputed that the accused went to the scene on the material day and that he had a panga and the panga was used to instill fear on the complainant and those who were with him. Further that it is not disputed that the complainant lost Kshs. 1550/= and mobile phone; and submitted that Pw2 and Pw3's corroborated Pw1's evidence by stating that the appellant was carrying a panga and he used the panga to threaten them.
24. She submitted that the Appellant on his part did not avail any witness to corroborate his evidence of alibi and there was no notice of alibi prior to the start of hearing so as to enable the prosecution to verify whether or not the appellant was at the scene. She further submitted that in his defence, the appellant said that the person who robbed the victim was one Kangogo.
25. She submitted that the trial court considered the appellant's defence and rejected it as there was no evidence of land dispute between the complainant and the appellant and that the appellant merely denied being at the scene at the time of the robbery but his defence confirmed he was at the scene at the time. That in his defence, he said he witnessed all that happened and it is important to note that while the appellant was being cross examined PW1, he did not raise land dispute and his defence was therefore an afterthought. She submits that the evidence adduced by prosecution was watertight and that the prosecution proved all the ingredients of the offence.
26. The prosecution counsel submitted that the appellant was sentenced to serve death sentence and death sentence was usually reserved for the most heinous of offences of robbery with violence and therefore the trial court was justified in imposing the sentence as the same is provided for by the law.
27. On the issue of crucial witnesses not being called to testify, the prosecution counsel submits from *Evidence Act*, no particular witnesses are to be called to prove particular facts. That the prosecution availed witnesses who proved facts as per the offence the appellant was charged. She submitted that this appeal is not merited and urged this court to dismiss it

## Analysis And Determination

28. This being the first appellate court, I am expected to subject the entire evidence adduced before the trial court to a fresh evaluation and analysis. This I do while bearing in mind the fact that I did not have the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of OKENO VS REPUBLIC [1972] EA 32 where it was stated as follows: -

“The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported.



In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See *Peters v. Sunday Post*, [1958] EA 424.)”

29. Further in *Mark Oiruri Mose –Vs- Republic* [2013] eKLR Criminal Appeal No.295 of 2012 the Court of Appeal stated:

“It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence.

30. In view of the above, I have considered the record of appeal together with the rival submissions by the parties herein and wish to consider the following as issues for determination: -

- i. Whether the charge sheet was defective.
- ii. Whether the ingredients for the offence of Robbery with violence were proved beyond reasonable doubt
- iii. Whether sentence imposed was harsh and excessive

#### **Whether the charge sheet was defective**

31. The Appellant contends that the charge sheet was defective for failing to indicate that the panga was a dangerous weapon. In *Brian Kipkemoi Koech vs. Republic* [2013] eKLR the court held that:

“What constitutes a defective charge sheet was spelt out in the case of *YOSEFU AND ANOTHER -VS- UGANDA* (1960) E.A., 236. The East Africa Court of Appeal held: -  
“The charge was defective in that it did not allege an essential ingredient of the offence; i.e. that the skins came from animals etc, in contravention of the Act.”

32. Further, in the case of *SIGILANI -VS- REPUBLIC* (2004) 2 KLR, 480, the court stated as follows: -

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

33. On the other hand, Section 134 of the Criminal Procedure Code provide for the components/ ingredients of the charge sheet constitute as follows: -

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

34. Further, the Court of Appeal in *Peter Ngure Mwangi vs. Republic* [2014] eKLR, quoted the *Isaac Omambia* case with approval and further stated as follows: -

“A charge can also be defective if it is in variance with the evidence adduced in its support. Quoting with approval from Archibold, *Criminal Pleading, Evidence and Practice* (40th Edn), page 52 paragraph 53, this Court stated in *YONGO v R*, [198] eKLR that:



“In England it has been said: An indictment is defective not only when it is bad on the face of it, but also:

- i. when it does not accord with the evidence adduced before the committing magistrates either because of inaccuracies or deficiencies in the indictment or because the indictment charges offences not disclosed in that evidence or fails to charge an offence which is disclosed therein,
  - ii. when for such reason it does not accord with the evidence given at the trial.”
35. The Court of Appeal in the Peter Ngure case was further guided by the case of Peter Sabem Leitu v R, Cr. App No. 482 of 2007 (UR) where the Court held thus:-

“The question therefore is, did this defect prejudice the appellant as to occasion any miscarriage of justice or a violation of his fundamental right to a fair trial? We think not. The charge sheet was clearly read out to the appellant and he responded. As such he was fully aware that he faced a charge of robbery with violence. The particulars in the charge sheet made clear reference to the offence of robbery with violence as well as the date the offence is alleged to have occurred. These particulars were also read out to the appellant on the date of taking plea. The fact that PW1 was not personally robbed and did not also witness the robbery did not in any way prejudice the appellant.”

36. Further, in the case of Obedi Kilonzo Kevevo vs. Republic [2015] the Court of Appeal stated that:

“The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants’ conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage of justice resulting in great prejudice to the appellant. In the case of JMA v. Republic (2009) KLR 671, it was held inter alia that:

“It was not in all cases in which a defect detected in the charge on appeal would render a conviction invalid. Section 382 of the CPC was meant to cure such an irregularity where prejudice to the appellant is not discernible.”

37. Section 382 of the Criminal Procedure Code provides as follows: -

“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.”

38. The above statutory curative position is also replicated in Section 214(2) of Criminal Procedure Code which provides that:

“...variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be



amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.”

39. Having considered the above cited authorities and the above legal provisions, I am of the view that failure to state that the panga was a dangerous weapon in the charge sheet was a minor omission and did not occasion any prejudice or occasion any miscarriage of justice to the appellant and the error is curable under Section 382 of the criminal procedure code. The Applicant’s ground on the charge being defective charge cannot therefore stand:

**Whether the ingredients for the offence of Robbery with violence were proved beyond reasonable doubt**

40. The ingredients for the offence of robbery with violence were clearly set out by the Court of Appeal in the case of Oluoch –Vs – Republic [1985] KLR where the court stated as follows:

“Robbery with violence is committed in any of the following circumstances:

The offender is armed with any dangerous and offensive weapon or instrument; or

The offender is in company with one or more person or persons; or

At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person .....

41. The use of the word “OR” in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under Section 296(2) of the Penal Code. This was stated in the case of Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007 where the court 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 found an offence of robbery with violence.”

42. Record show that the complainant was in his house with pw2 and pw3 taking supper when the appellant and one Kangogo arrived. The appellant and the said Kangogo joined them in taking supper and shortly after, the said Kangogo stood and removed a panga he had, hit it on the ground and pointed it on complainant’s head before chasing pw2 and pw3. The said Kangogo held the complainant’s hand and took money kshs.1550/= from his right pocket. He further stated that the said Kangogo and the appellant pushed the complainant into his bedroom and took his mobile phone .From the evidence adduced, it is clear that the appellant was with the said Kangogo and even if Kangogo was the one holding the panga (machete),the appellant was with him. The said panga no doubt is a dangerous weapon and was used to scare the complainant.

43. The complainant, pw2 and pw3 were together in the house and they all confirmed that the appellant was with the said Kangogo. From the evidence adduced, the complainant was not injured but the appellant having been with another when they forcefully took the complainant’s money and mobile phone, the ingredients of being in company of another and being armed with dangerous weapon (a panga) was proved beyond reasonable doubt. For the offence of robbery with violence, the word “or” is used in respect to the ingredients required to be proved and the two ingredients were proved. Prove of any the three ingredients is sufficient to prove the offence of Robbery with violence.

44. On the issue of identification, there is no doubt that the appellant and his companion were known to the complainant. The appellant was therefore recognized by complainant, pw2 and pw3. I have



also perused the judgment and confirm that the trial court considered the appellant's defence. Even though the appellant raised defence of alibi, he placed himself at the scene in his own defence by saying he witnessed what happened. From the foregoing, there is no doubt that the offence of robbery with violence was proved beyond reasonable doubt.

#### **whether sentence imposed was harsh and excessive**

45. Though in his written submissions the appellant said his sentence was computed to life sentence, while in court he said his sentence had not been computed to life sentence.
46. The Appellant argues that the death sentence imposed on him was illegal or inappropriate. He relied on the case of Francis Karioko Muruatetu & another v Republic [2017] eKLR where the Supreme Court declared the mandatory nature of death sentence unconstitutional. The supreme however clarified that the decision in Muruatetu 1 was in respect to sentence in murder cases under Section 204 of the Penal Code only and not any other offences. Death sentence provided for the offence of Robbery with Violence still remain in law and is not therefore illegal.
47. On whether the sentence meted on the appellant by the trial court was harsh and excessive, it is trite law that this court has supervisory jurisdiction over subordinate courts. The enabling law for revision is Article 165(6) and (7) of *the Constitution* and Section 362 as read together with section 364 of the Criminal Procedure Code.
48. Further, the Court of Appeal while dealing with the issue of sentence in the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR restated as hereunder: -

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”
49. Having found that the offence of Robbery with violence was proved against the appellant herein, the Section 296 (2) of the penal code provide for death penalty which is still legal as it is provided by statute however, I do agree with the decision in the case of James Kariuki Wagana vs Republic [2018] eKLR, where Prof. Ngugi J, observed that death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he “unnecessarily injure the Complainant during the robbery” and was not armed during the robbery. He therefore reduced the appellant's sentence of death to imprisonment for fifteen years, from the date of conviction.
50. In respect to the appellant herein, I have considered the circumstances of the offence, I also take note of the weapon used being a panga. In my view it is not as lethal as other weapons like a gun. The appellant herein was not personally in possession of any weapon and from the evidence adduced, he was in company of the said Kangongo who appeared to have played a lead role in the commission of the offence. In view of the role played by the appellant and fact that no injury was inflicted on the complainant, I am of the view that the sentence imposed was harsh and excessive. In view of the above I hereby set aside death sentence and impose 10 years imprisonment.



51.

**Final Orders: -**

1. Appeal on conviction is hereby dismissed
2. Death sentence is hereby set aside
3. The appellant to serve 10 years imprisonment
4. Period served in remand to be computed in the sentence above.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KABARNET THIS 9<sup>TH</sup> DAY OF MAY, 2024.**

**HON. RACHEL NGETICH**

**JUDGE**

In the presence of:

Ms. Ratemo for the State

Appellant: present in person

Elvis/Momanyi: Court Assistant

