



**Wendo v Republic (Criminal Appeal 36 of 2023)  
[2024] KEHC 5533 (KLR) (21 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5533 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 36 OF 2023  
DR KAVEDZA, J  
MAY 21, 2024**

**BETWEEN**

**DERRICK JUMA WENDO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by  
Hon. P. Mutua (S.P.M) on 23rd November 2023 at Kibera Chief Magistrate’s  
Court Criminal Case no. E978 of 2020 Republic vs Derrick Juma Wendo)*

**JUDGMENT**

1. The appellant with another not before this court was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code*, Cap 63 Laws of Kenya. After a full trial, he was sentenced to twenty (20) years imprisonment. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his petition of appeal, he raised grounds, which have been coalized as follows: He challenged the totality of the prosecution’s evidence against which he was convicted. He contended that his defence was not considered by the trial court. He argued that the sentence imposed was harsh and manifestly excessive. He urged the court to quash his conviction and set aside the sentence.
3. The key ingredients for a robbery with violence charge are found in section 296(2) of the *Penal Code*. It provides as follows-

“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”.



4. 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 leading to a proper conviction and sentence.
5. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse 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)
6. PW1, Allan Juma Mwangi testified that on 14<sup>th</sup> September 2020 he got off a vehicle on Wanyee Road and encountered the appellant and other individual. They demanded money from him which he and his colleagues refused. The group then assaulted him and took his phone, causing his colleagues to flee. The appellant and the other assailants falsely claimed that PW1 was a thief, and had stolen a phone. His parents who were in the vicinity arrived and confirmed that the phone belonged to him by bringing receipts. The other assailants fled. The appellant was arrested at the scene and taken to Riruta Police Station. PW1 was treated for his injuries and issued a P3 form. He also reported the theft of Kshs. 700, his wallet with documents including his ID card, and a necklace. The phone was not recovered as the appellant's accomplices escaped with it.
7. During cross-examination, PW1 clarified that only two of the four assailants, including the appellant, attacked him. He denied that his mother threatened the appellant and confirmed the incident occurred during the day, and disputed the appellant's claim that he was merely a bystander.
8. Allan Gathuku, testifying as PW2, stated that he had alighted from a vehicle with PW1 when three boys attacked them, demanding money. PW1 was hit on the head with stones. During the ordeal, he told the court that he lost Kshs. 1,000, while PW1 lost his phone. The attackers falsely accused PW1 of theft, with the appellant claiming PW1 had stolen his phone. Bystanders came to PW1's rescue, and the appellant tried to flee but was apprehended, while the other attackers escaped. The incident was reported at Riruta Satellite Police Station. At the scene, a receipt and a phone box were brought by PW1's parents to confirm that the phone belonged to PW1.
9. PW3, PC Gilbert Omanga of Riruta Police Station, testified that he investigated the case and charged the appellant. He presented the treatment notes, receipts for the phone obtained during the investigation, and the P3 form since the doctor who completed it had passed away and the Police Surgeon's office was vacant.
10. During cross-examination, PW3 stated that the statements he recorded were sufficient and that nothing was stolen from the appellant as alleged. He confirmed that the other assailants were not traced and denied allegations that he asked for Kshs. 5,000 for fuel to trace them. PW3 also refuted claims that he framed the appellant because of bribery issues, stating that he found the appellant had been already arrested.
11. 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 sworn evidence and did not call any witnesses. In his defense, the appellant argued that the investigation was flawed as the phone, a crucial piece of evidence, was not tracked and presented in court. He claimed that the investigating officer failed to visit the scene of the crime and pointed out the presence of nearby business premises, suggesting potential witnesses. DW1 questioned the inconsistency between the value of the phone listed in the charge sheet and the receipt provided. Additionally, he noted the absence of a receipt for the stolen necklace. DW1 raised doubts about the timing of the offense and highlighted that despite PW1's claim of losing Kshs. 1,000, no police report was filed regarding this incident.



12. 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)
13. The issue for determination is whether the appellant was positively identified and if the prosecution has proven its case beyond reasonable doubt. The evidence presented indicates that PW1, accompanied by PW2, was accosted by the appellant and other assailants who demanded money. When PW1 refused, they proceeded to assault him, accusing him of theft and stoning him. During the ordeal, they stole Kshs. 7,000 and his mobile phone, resulting in injuries to the complainant. Members of the public intervened when PW1 raised an alarm.
14. The attackers, including the appellant, were identified by PW2, who witnessed the incident and intervened, causing the appellant's accomplices to flee while the appellant was arrested at the scene. The attack occurred during day, leaving no doubt about the appellant's identity as one of the assailants.
15. 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 and apprehended after the incident. I find the testimony of the prosecution's witnesses to be reliable direct evidence of visual identification against the appellant.
16. For consideration is whether force was used to rob the victim. It was the testimony of prosecution witnesses that the assailants threatened to harm the complainant. When he resisted, the attempts to steal from him, the assailants used actual violence resulting in injuries on the head and neck. Violence was therefore used. The problem however is that the medical officer who prepared the P3 form did not testify. The court was informed that he had passed away. The P3 form was therefore produced by the investigating officer.
17. I have perused the said P3 form and I am unable to decipher what injuries the complainant suffered. The handwriting of the doctor is illegible for my eye. In my view therefore, the injuries sustained by the complainant are not proved. For that reason, it was unsafe to convict the appellant. Ideally, the trial court should have directed the prosecutor to avail another doctor to produce the P3 Form under section 77 of the *Evidence Act*, Cap 80 Laws of Kenya.
18. That notwithstanding, the prosecution was required to prove only one limb of the offence of robbery with violence. The prosecution led evidence to the fact that the appellant while armed with armed with stones used the threat of violence to rob the complainant. the appellant's conviction for the offence of robbery with violence was therefore proved beyond reasonable doubt.
19. On sentence, the appellant was sentenced to serve 20 years imprisonment. Considering the aggravating circumstances of the offence, and the fact that the appellant was not harmed, I hereby set aside the sentence of 20 years imprisonment imposed by the trial court and substitute it was sentence of seven (7) years imprisonment with effect from the date of conviction 23<sup>rd</sup> November 2023.

Orders accordingly.

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

**D. KAVEDZA**



## **JUDGE**

In the presence of:

Appellant Present

Mr. Mong'are for the Respondent

Nelson Court Assistant

