



REPUBLIC OF KENYA



**Odhiambo v Republic (Criminal Appeal E016 of 2023)
[2024] KEHC 8129 (KLR) (Crim) (1 July 2024) (Interim Judgment)**

Neutral citation: [2024] KEHC 8129 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL APPEAL E016 OF 2023**

LN MUTENDE, J

JULY 1, 2024

BETWEEN

EDWIN ODHIAMBO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal arising from the original conviction and sentence in Criminal Case No. 1240 of 2016 at the Chief Magistrates' Court Makadara, by Hon. H. M. Nyaga (CM))

INTERIM JUDGMENT

1. Edwin Odhiambo, the Appellant, was arraigned following indictment for four counts of Robbery with violence contrary to Section 295 as read with Section 296(2) of the [Penal Code](#), offences that were alleged to have been committed on 7th day of November, 2015 along Manyanja road within Nairobi County.
2. He was taken through full trial, convicted and sentenced to serve twenty (20) years imprisonment on Count 1 and 4, sentences that were to run concurrently; and, acquitted on Count 2 and 3 as the complainants did not turn up to testify.
3. Aggrieved by both the conviction and sentence, he proffered an appeal on grounds that: The prosecution failed to prove the case beyond reasonable doubt; The case was riddled with contradictions, inconsistencies, and fabricated evidence that resulted into a selective judgment; the plausible defence given was not considered; and, that, vital ingredients of the offence were not proved as stipulated by the law.
4. Briefly facts of the case were that PW2 Dominic Osiemo operates a bar (Wines and Spirits shop) along Manyanja road. On the night of 7th November, 2015, he was the bartender and had four customers,



PW1 Jared Mwangi inclusive. The customers stayed while drinking until 11:00pm. As he prepared to close down he saw his customers who were drinking from the exterior part of the premises enter the bar followed by four (4) individuals. One of them pointed a gun at PW1 and ordered him to surrender his cell phone. Other customers were also frisked and their belongings taken. PW1's two (2) cell phones make Samsung and ITEL were taken. The intruders ordered PW2 to switch on lights and go behind the counter which he complied.

5. They took his watch, cell phone make HTC, cash and the Mpesa phone. The one who had a tattoo took his stock from the counter. Another one showed them a magazine of his gun and told them that they had enough bullets to kill them. They took away a television set make Samsung 32 inches and locked them inside the bar from outside and left. A few minutes later the Chinese national who operates a hardware next door opened for them and they proceeded to report the matter to the police.
6. On the 14th April, 2016, acting on information received, PW4 No 85906 PC William Achola arrested the appellant who had just boarded a Public Service Vehicle (Matatu). The matter was minuted to PW5 No No 91679 P. C. Amar Biketi to investigate.
7. On the 25th April, 2016, PW3 No 235103, Inspector Peterson Kunga conducted an Identification Parade and the appellant was identified as one of the attackers. PW5 concluded investigations and caused the appellant to be charged.
8. Upon being placed on his defence, the appellant who opted to make an unsworn statement in his defence testified that he sells clothes and on 14th April 2016 he went to Gikomba where he bought his stock and on his way he passed where he had purchased plastic bags and a commotion arose. He was arrested alongside other people and made to board the motor vehicle. Later each one of them was asked to give Kshs 1000/- but he refused to bribe hence was not released unlike those who bribed. He was taken to the police station and locked up for no apparent reason. Two days later he learnt that he was a robbery suspect.
9. The Officer Commanding the Station (OCS) removed him from cells and made him enter the boot of a motor vehicle. He was driven for some time and when the vehicle stopped he was pulled out of the boot and taken to a Wines and Spirits shop. The OCS talked to the person at the shop who came out and looked at him then he was taken back to the police Station.
10. After a while he was made to participate in the Identification Parade. The person he saw at the Wines and Spirits shop touched him. That he objected as the person had seen him but he was told to sign the Identification Parade forms which he did out of fear. Thereafter he was shocked to be charged.
11. The appeal was canvassed through written submissions. The appellant urges that the charges were duplex hence grossly defective. That elements of the charge were not proved beyond reasonable doubt as theft was not conclusively proved. That there were material discrepancies between the sum stated as having been stolen and the testimony of the complainant that phones alleged to have been stolen were not tracked to prove the alleged theft.
12. That identification of the perpetrators was erroneous, marred by irregularities as there had not been description of the perpetrators previously and conditions at the time did not favour correct identification.
13. The appeal is opposed by the State/Respondent. It is submitted that the case against the appellant was proved to the required standard. That the appellant had a gun, a dangerous weapon that was used to threaten the victims whose property was stolen. That the incident took about 10 minutes hence the victims had the opportunity of looking at the assailants who even told them to look at their faces which they did and were able to identify them.



14. This being a first appeal, the primary duty of the court is to re-evaluate and reassess the evidence adduced at the trial and come up with independent conclusions; the court must however note that it did not see or hear the witnesses and thus must give due allowance for this. (See the case of *Okeno v Republic* [1972] EA 32 and *Pandya v R* [1957] EA 336).

15. Ingredients of the offence of robbery with violence and the punishment thereof are captured in both Section 295 and 296(2) of the [Penal Code](#). The provisions of the law provide that:

...295.

Definition of robbery

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296.

Punishment of robbery

(1)

Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2)

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....

16. In [Jobana Ndungu v Republic](#) CRA. 116/1995, [1996] eKLR the Court of Appeal stated as follows:

“To appreciate properly what acts, constitute an offence under Section 296 (2) one must consider the subsection in conjunction with Section 295 of the [Penal Code](#). The essential ingredient of robbery under Section 295 is ‘use of or threat to use’ actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore-described ingredients constituting robbery is presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below, and any one of which if proved, will constitute the offence under the subsection:

- i. If the offender is armed with any dangerous or offensive weapon or instrument;
or
- ii. If he is in company with one or more other person or persons; or
- iii. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”

17. Particulars of the offence were that jointly with others, while armed with pistols, the appellant robbed Dominic Osiemo of one Samsung TV set 32”, HTC Desire 816. Assorted alcoholic drinks and juices all valued at Kshs 193,000/- and in respect of Jared Mwangi they took his mobile phone, Samsung 5830 valued at Kshs 11,000/-. In both instances the assailants threatened to use actual violence to the victims.



18. The charges as drawn include both the definition of the offence and the punishment thereto. The inclusion of both provisions of the law did not occasion any injustice which could call for allowing the appeal.
19. In *Dima Denge & others v Republic* [2013] eKLR, the Court of Appeal stated as follows:

“...the elements of the offense under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to find an offense of robbery with violence.”
20. PW2 the owner of the bar testified to have been inside when his customers who were drinking from outside were made to enter inside the bar. With them were four (4) men who threatened them with guns, and, took from them their property without their consent. Soon after they left a report was made to the police.
21. The appellant cast doubt on whether a crime was committed. He denied having been at the scene at the time of the act therefore he did not have the authority premised on fundamental truth to controvert the evidence adduced by the prosecution witnesses.
22. Evidence by the prosecution proved the fact of the assailants’ having been more than one. They had guns, devices designed to propel explosive force. A gun is a firearm an object that can kill upon being fired hence a dangerous weapon. Therefore, the crime committed was robbery with violence.
23. PW2 stated that he was ordered to switch on lights. This was hence a case of visual identification, indicating that the witnesses identified the appellant based on their memory. The appellant was not arrested immediately after the act. He was deprived of freedom following information received from an informant on 14th April, 2016, some five months later.
24. PW3 No.235103 Inspector Peterson Kunga conducted an identification parade where the appellant was identified as one of the assailants who intruded the bar on the material night. He testified that he arranged for a parade at a secluded area, a search room. Three people, PW1, PW2 and Doreen Mwikali who did not testify identified the appellant. The parade had eight (8) members, the appellant inclusive who did not object to the parade being conducted as he duly signed the form.
25. On cross examination he stated that he ensured the witnesses did not see the suspect prior to the parade. He was however not aware that the appellant had been taken to the scene of the incident before.
26. The manner in which a parade is conducted should be conducted was emphasised by the Court of Appeal in *David Mwita Wanja & 2 others v Republic* [2007] eKLR as follows:

“...The purpose for, and the manner in which, identification parades ought to be conducted have been the subject of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor to this Court emphasised that the value of identification as evidence would depreciate considerably unless an identification parade was held within the scrupulous fairness and in accordance with instructions contained in Police Force Standing Orders...”
27. The purpose of an Investigation parade is for an eye witness to establish if the suspect did commit the offence. It is an instrument where the witness had not seen the suspect before and after the act, prior to the parade is conducted.



28. This is a case where the appellant claims that after his arrest he was removed from the police cells and taken to a Wines and Spirits shop where the person at the shop went and looked/observed him. Subsequently, it was the same person who identified him on the parade. That he objected to the parade as he had seen him before but he was ordered to sign the form hence he did it out of fear.
29. In his testimony, PW5 the Investigating Officer said the appellant led them to several shops along Manyanja road. He also told court that he was present when the Identification Parade was conducted.
30. According to the Police Force Standing Orders, witnesses cannot see the suspect before the parade; the suspect ought to be placed among at least eight persons as far as possible of similar age, height, general appearance and class of life as himself.
31. From evidence of the Parade Officer, it is not clear whether members of the parade had similarities with the appellant. It is also not clear what role the Investigating Officer who was present played. Having seen the complainant before, the parade was improperly conducted hence prejudicial to the appellant. It is questionable if the identification in question was cogent.
32. In the premises, it cannot be authoritatively stated that the appellant was one of the robbers. Therefore, the appeal has merit. Accordingly, the conviction is quashed and sentence meted set aside. The appellant shall be released forthwith unless otherwise lawfully held.
33. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY

THROUGH MICROSOFT TEAMS AT NAIROBI,

THIS 1ST DAY OF JULY, 2024.

L. N. MUTENDE

JUDGE

