



REPUBLIC OF KENYA



**KENYA LAW**  
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**Deng alias Zero & another v Republic (Criminal Appeal E007 of 2023)  
[2024] KEHC 10049 (KLR) (8 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10049 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT LODWAR  
CRIMINAL APPEAL E007 OF 2023  
RN NYAKUNDI, J  
AUGUST 8, 2024**

**BETWEEN**

**ATEM DENG ALIAS ZERO ..... 1<sup>ST</sup> APPELLANT**

**MICHAEL OMULANY ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. C.A. Mayamba;  
HSC in Kakuma law court Cr. Case No. E002 of 2022)*

**JUDGMENT**

1. The Appellants was charged with robbery with violence contrary to Section 295 as read with section 296(2) of the *Penal Code*. Particulars stated that the Accused persons on the 29<sup>th</sup> day of December, 2021 at Kakuma in Turkana West sub-county within Turkana County, jointly, while armed with rungun and knives robbed John Alier one television set make LG 40' valued at Kshs. 30,000/=, one mobile phone make Samsung galaxy S10s valued at Kshs. 26,000/=, one Nokia mobile phone valued at Kshs. 1,500/= and techno mobile phone valued at Kshs. 1,500/=, at the time of such robbery threatened to use actual violence to the said John Alier.
2. The Appellants were convicted of the charge and sentenced to 25 years' imprisonment.
3. Being aggrieved by both the conviction and sentence meted out against them by the trial court, they filed the instant appeal.
4. The 1<sup>st</sup> appellant filed submissions in agitating his appeal whereas the respondent filed none save for his grounds of appeal as follows:
  - i. That I pleaded not guilty at trial



- ii. That the learned trial magistrate erred in both law and facts when he failed to consider that the prosecution case did not prove against me the required standard of the law.
- iii. That the learned trial magistrate erred in both law and facts when he failed to acknowledge the fact that there were no crucial witnesses availed in court by the prosecution.
- iv. That the overall prosecution case was contradicting and clouded with doubts.
- v. That the learned trial magistrate erred in both law and facts when he failed to affirm that the ingredients and elements that constituted to robbery with violence were not met.
- vi. That the learned trial magistrate erred in both law and facts when he failed to consider my defence.

### **1<sup>st</sup> Appellant's submissions**

5. It was the 1<sup>st</sup> appellant's submission that there was no weapon used in this case and that the prosecution did not establish the guilt of the accused person. That the question to be answered in this case is whether the evidence from the witnesses is sufficient to establish guilt of the accused person beyond reasonable doubt. He submitted that the prosecution did not prove its case to the required standards.
6. The appellant submitted that it could have been vital to call other witnesses including the wife of the complainant and some of the persons who arrested the accused person to effectively confirm the occurrence of events.
7. Further that the prosecution failed to call witnesses who arrested the accused person as their evidence was very vital to show the circumstances under which the appellant was arrested, what he had in possession and if anything was recovered from him. To this end, the appellant cited the case of *Bukenya v Uganda* (1972) E.A 549.
8. The appellant submitted that he is a victim of mistaken identity and that the prosecution ought to prove its case beyond reasonable doubt. In concluding the appellant argued that the prosecution's case in overall was clouded with doubt and as such the case should be dismissed.

### **Analysis And Determination**

9. This being the first appellate court, my duty is to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32. The court should however bear in mind that it did not see witnesses testify and give due consideration for that.
10. Having considered the grounds of appeal, and evidence adduced before the trial court, it is my opinion that the paramount issue for determination is whether the prosecution proved its case to the required standard.
11. The offence of robbery with violence is contained in Sections 295 and 296(2) of the [Penal Code](#) as follows:

“295. 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(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

12. Further, In *Jeremiah Oloo Odira v Republic* [2018] eKLR the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:

“Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

- i. The offender is armed with any dangerous or offensive weapon or instrument, or
- ii. The offender is in the company of one or more other person or persons, or
- iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person” See *Olouch v Republic* (1985) KLR)

13. Based on the evidence of PW1 and PW2 who led evidence to what unfolded on the material morning, it is clear that PW1 was threatened with crude weapons and in the process robbed of the items as listed in the charge sheet.
14. It was the prosecution case that the complainant was ambushed by a group of people numbering 4. That he was headed home at around 4am and was carrying his television set and other assorted mobile phones. The assailants who were armed with crude weapons threatened him before snatching away his items.
15. PW3 in giving her testimony stated that she was given the case to investigate. It was her testimony that the report was made to the extent that on the 29<sup>th</sup> December, 2021 at around 4Am, Alier and his wife arrived aboard a shuttle. They hired a boda boda and he had television LG make, TV stand, a bag containing assorted clothes, 2 mobile phones make tecno and Nokia. Upon reaching Kakuma 1 distribution centre they were stopped by a group of 3 men armed with rungu and a kitchen knife. They snatched away the television together with its stand but the stand fell down and broke. They also took away the bag. It was her testimony that the cyclist knew the 1<sup>st</sup> accused by his nickname zero whom he begged not harm anyone and also not to steal anything. It was her testimony that the first accused grabbed the mobile phone make Samsung galaxy before running away. She stated that the complainant is diabetic and was taken to hospital where she was admitted. The 1<sup>st</sup> accused was arrested the same day at Ethiopian market and he was the one who led the arrest of the 2<sup>nd</sup> accused person. It was her testimony that the 1<sup>st</sup> accused is the one who led members of the public to the 2<sup>nd</sup> accused under guise of recovery. She stated that the lady who the 2<sup>nd</sup> accused led them to being the recipient ran away to Sudan. She tendered the damaged TV stand as PEX1.



16. When put on his defence, the 1<sup>st</sup> accused stated that he is a resident of block 15 and a shopkeeper. He told the court that he was arrested while headed to work. That he was called by people who claimed that he had something of which he denied knowing anything. It was his testimony that he was beaten and led to the police station. He was arrested and brought before this court after the charges herein were preferred together with the 2<sup>nd</sup> accused whom he did not know.
17. The 2<sup>nd</sup> accused on the other hand stated that he was a resident of block 11 and a loader. It was his testimony that on 31<sup>st</sup> December, 2021 he was at home whereby he was given some duties by his mother. She asked him to repair some seats. He worked until 10:00AM before proceeding to relax before he waited for work. At 1PM, police officers came and woke him up as they were searching for stolen items which they did not know. He denied the charges.
18. On identification, and considering the fact the trial court observed the demeanor of the witnesses, the court noted PW2's testimony who stated that he had known the 1<sup>st</sup> accused person since the year 2014 since they hailed from the same community and were residing from the same neighborhood. It was PW2 testimony that when they were attacked, he saw the 1<sup>st</sup> accused and even talked to him from robbing his customer. It was further his testimony that he was able to see the 1<sup>st</sup> accused as the place had flood lights together with other security lights within the reception centre. The trial court to this end noted that the 1<sup>st</sup> accused did not deny being at that place or PW2 being a stranger to him. PW3 also pointed out that it is the 1<sup>st</sup> accused who led them to the 2<sup>nd</sup> accused. the trial court further noted that on cross examination of PW2, the 2<sup>nd</sup> accused did not deny knowing the 1<sup>st</sup> accused. That from the demenour, it was very well founded that they were working together. On this background the court was convinced beyond reasonable doubt that the appellants were positively identified.
19. I have had the occasion to peruse the record as well as the judgment of the trial court and I wholly agree with the findings of the trial court that the elements of robbery with violence were properly established and as such the conviction and sentence was proper.
20. The upshot of this analysis is that the appeal on conviction is quashed and the conviction at the trial court upheld.

On sentence

“295. 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(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

21. In the “Muruatetu Case”, the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to re-sentencing;
  - “(a) age of the offender;
  - (b) being a first offender;
  - (c) whether the offender pleaded guilty;



- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.”

22. In my considered view, the accused mitigation ought to count in sentencing. The objectives of sentencing should be considered in totality.

23. Further, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

- 1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
- 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
- 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
- 5) Community protection: to protect the community by incapacitating the offender.
- 6) Denunciation: to communicate the community’s condemnation of the criminal conduct.
- 7) ) Reconciliation: To mend the relationship between the offender, the victim and the community.
- 8) Reintegration: To facilitate the re-entry of the offender into the society.

26. The Penal Code prescribes a death sentence for the offence of robbery with violence. Given the appellants’ mitigation and in incorporating the objectives of sentencing in their totality, I will interfere with the sentence meted upon the appellants and substitute it with 15 years, given the strength of the principles in the case of *Benard Kimani Gacheru v. Republic* (2002) eKLR resulted that: “ 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 factors, 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 the interfering with the discretion on the trial court on sentence unless, anyone of the matters already states is shown to exist.” For the above reasons the commencement date be effected as at 21.4.2022 in terms of Section 333(2) of the *Criminal Procedure Code*.

27. It is so ordered.

**DATED AND SIGNED AT ELDORET THIS 8TH DAY OF AUGUST, 2024**

.....

**R. NYAKUNDI**



**JUDGE**

In the Presence of  
Mr. Kakoi for the State  
Appellants

