



**Otieno v Republic (Criminal Appeal 77 of 2023)
[2024] KEHC 12319 (KLR) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIBERA
CRIMINAL APPEAL 77 OF 2023
DR KAVEDZA, J
OCTOBER 15, 2024**

BETWEEN

VICTOR OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the original conviction and sentence delivered
by Hon. M. Mararo (P.M) on 23rd March 2023 at Kibera Chief
Magistrate’s Court Criminal Case no. 368 of 2019 Republic v Victor Otieno)*

JUDGMENT

1. The appellant was charged and convicted on two counts of offences: robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code, Cap 63 Laws of Kenya, and attempted robbery with violence contrary to section 297(2) of the Penal Code. After a full trial, he was sentenced to death. 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 conviction on a charge of robbery with violence stating it was duplex and hence ambiguous Contrary to Sections 134 and 137 of CPC. He contended that the prosecution had failed to prove the ingredients of robbery with violence to the required standard beyond reasonable doubt. 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. Before delving into the specific re-evaluation of the evidence on record, I will deal with the preliminary issue raised by the appellant thus: the charge sheet was defective for duplicity. The appellant contended that he was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) are two separate offences intertwined as one. He argued that as a consequence, his conviction on a defective charge sheet was unsafe.



4. The Court of Appeal in *Paul Katana Njuguna v Republic* [2016] eKLR considered the issue of duplicity where the appellant had been charged with the offence of robbery with violence contrary to Section 295 as read with section 296(2) of the *Penal Code*. The Court observed as follows;

“Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the *Penal Code*? We observe that the offence under Sections 295 and 296 (2) were not framed in the alternative. So, following the decision in *Cherere s/o Gakuli -v- R (supra) Laban Koti -v- R. (supra)* and *Dickson Muchino Mahero v R. (supra)*, the defect in the charge herein is not necessarily fatal.”

5. In this case, the appellant understood the charge against him and participated in the hearing by cross-examining the witnesses. He did not raise any complaint before the trial court and in the circumstance, I find that there was no miscarriage of justice on the ground that the charge was duplex.

6. 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”.

7. The issues for consideration by this court are whether the prosecution did prove its case beyond reasonable doubt leading to a proper conviction and sentence.

8. As the first appellate court, it is the responsibility of this court to reassess, re-examine, and review the evidence anew in order to reach its own conclusion. However, the court must also take into account the fact that it did not witness the testimony of the witnesses first hand and should give due consideration to that factor. (See *Okeno v Republic* [1972] EA 32)

9. Paul Ouma PW1 testified that on 7/3/2019, after alighting at the Southern Bypass at around 8 am, he was approached by two men wielding a machete and a knife. He witnessed these men attack two individuals and attempt to rob another person before being arrested. PW1 identified the appellant as one of the attackers and stated he knew him well. The appellant admitted to the crime and led the police to recover stolen items including the screwdriver, drill, wallet, cash, ATM cards, and a Tecno Spark 5 phone. He was also found in possession of the machete used in the attack.

10. PW2 Wesley Kebenei, an inspector at Bomas Police Station, PW2 testified that he was involved in the appellant's arrest on 16/3/2019 following a report of theft along Forest Edge Road. PW2 and a constable arrested the appellant, who was found holding a machete. Upon being taken to Lang'ata Police Station, PW1 identified the appellant as one of the perpetrators involved in the incident.

11. John Ratemo PW3, an Administration Police Constable, corroborated PW2's account, confirming that he participated in the arrest of the appellant. He confirmed that the appellant was armed with a machete at the time of arrest and was the only suspect apprehended, as the others fled into a nearby forest.

12. PW4 Alfred Ooko A security guard at Yaya Centre, testified that on 7/3/2019, he was attacked by two men, including the appellant, but he managed to flee the scene before they could rob him. He reported



- the incident at Bomas Police Station. Later, he encountered a man named Chris, who confirmed being attacked by the same suspects. PW4 saw the two suspects enter the forest after the attacks.
13. PW5 Francis Ndirangu, an officer at Lang'ata Police Station, took over the investigation file on 20/4/2020 from Inspector Kennedy Owino. PW5 confirmed that the evidence collected was consistent with PW1's testimony, including the appellant leading officers to recover stolen items. PW5 stated he was not directly involved in the initial investigation but reviewed the exhibits and case file.
 14. The evidence establishes that the complainants, PW1 and PW4, were attacked near Ngong Forest. During the attack, PW1's Tecno Spark 5 phone, two machines (drill and circular saw), and a wallet containing Ksh. 2,100, identification documents, ATM cards, and a large bag were stolen. PW4's attack was unsuccessful as he escaped and reported the incident at Bomas Police Station. The assailants were armed with a machete, which they used to threaten the victims.
 15. PW2 and PW3, who arrived at the crime scene shortly after, corroborated the complainants' accounts. They arrested the appellant, who was in possession of the machete used during the attack, while the other suspects fled. Both PW1 and PW4 identified the appellant as one of the attackers present at the scene, confirming his involvement.
 16. The appellant's identification was deemed reliable, as the incident occurred during daylight, reducing the likelihood of mistaken identity. The stolen items recovered from the appellant were positively identified by PW1 as his tools of trade. The appellant also failed to provide a credible explanation for his possession of these items, invoking the doctrine of recent possession.
 17. This doctrine, along with the positive identification by the complainants, supports the charges of robbery with violence and attempted robbery with violence against the appellant. I hold that the prosecution proved its case to the required standard of proof on the charge of robbery with violence and attempted robbery with violence against the appellant beyond reasonable doubt. The conviction by the trial court on both counts is therefore affirmed.
 18. On sentence, the appellant was sentenced to death in Count I, and the sentence in Count II was held in abeyance.
 19. In 2016, the judiciary developed the [*Sentencing Guidelines*](#) as a response to the challenges experienced by judges and judicial officers. The Guidelines were developed pursuant to section 35(2) of the [*Judicial Service Act*](#) 2011. The guidelines collated the principles of law that should guide courts in the exercise of their discretion so that sentences for analogous circumstances are delivered transparently and consistently.
 20. Since the formulation of the [*SPGs*](#) of 2016, the criminal justice landscape around sentencing has evolved significantly, prompting NCAJ to review (The [*Sentencing Policy Guidelines*](#) 2023) the Guidelines to align with the emerging jurisprudence and make them more responsive to the justice needs of Kenyans. The revised [*SPGs*](#) provide guidance in sentencing where the mandatory minimum and maximum sentences are concerned, as well as sentencing hearings.
 21. Consequently, the evolution of law and jurisprudence should grow in tandem with the [*Constitution*](#) while acknowledging the judiciary guidelines on sentencing.
 22. Flowing from above, it is equally my view that a sentence imposed on a convict has to meet the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection, and denunciation. Therefore, it is no longer necessary or desirable to hold a convict for an indeterminate amount of time as this does not meet the objectives of the sentencing policy guidelines.



23. In this case, it appears that in determining the sentence, the learned trial magistrate's decision was primarily influenced by the mandatory nature of the applicable law. This jurisprudence has since shifted after the promulgation of the *Constitution of Kenya*, 2010 (See: *Manyeso v Republic* Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) and (*Evans Nyamari Ayako v Republic* Criminal Appeal No.22 of 2022 Kisumu Court of Appeal)
24. I hereby set aside the death sentence imposed in Count I and substitute it with a sentence of thirty (30) years imprisonment on each Count. The sentences shall run concurrently from March 18, 2019, the date of the applicant's arrest pursuant to section 333(2) of the *Criminal Procedure Code*.
- Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 15TH DAY OF OCTOBER 2024

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Maroro for the Respondent

Achode Court Assistant

