Abdirahman alias Omo v Republic (Criminal Appeal E010 of 2025)
[2025] KEHC 13855 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13855 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CRIMINAL APPEAL E010 OF 2025

JN ONYIEGO, J

SEPTEMBER 30, 2025

BETWEEN

KAMALDIN ABDI ABDIRAHMAN ALIAS OMO ..... APPELLANT

AND

REPUBLIC ..... PROSECUTION

(Being an appeal against the conviction and sentence in CMCC No. 1345 of 2014 at Garissa and delivered on 18.03.2015 by Hon. B.J. Ndeda – S.P.M.)

JUDGMENT

1. The appellant was charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the offence as stated on the charge sheet were that on 03.08.2014 at Ifo Refugee Camp in Daadab District within Garissa County with another not before court, while armed with a dangerous weapon namely Somali knife, robbed Sunday Diing Kon of her cash Kes. 6,000/-, a mobile phone make Techno valued at Kes. 6,000/-, Nokia Lumia screen touch valued at Kes. 20,000/ and a Nokia Asha valued at Kes. 9,000/- and at or immediately before or immediately after such robbery used actual violence to the said Sunday Diing Kon.

2. He pleaded not guilty and the prosecution called 3 witnesses to prove its case. The appellant was put on his defence and subsequently convicted and sentenced to death.

3. Being dissatisfied with the trial court's judgment and sentence, he filed a petition of appeal dated 24.03.2025 citing grounds that; the prosecution failed to prove its case beyond any reasonable doubt and that there was no positive identification.

4. The appeal was canvased by way of written submissions.

5. The appellant submitted orally urging this court to reconsider and reduce his sentence to 20 years or that he be released in consideration of the time already served. The respondent, on the other hand in

its submissions dated 06.05.2025 urged this court to uphold the conviction and sentence, arguing that the prosecution's case was watertight and that the ingredients of the offence were fully met.

6. It is trite that this Court's duty as a first appellate court is to re-evaluate and scrutinize the evidence tendered before the trial court a fresh and arrive at its own independent conclusion. This legal position was espoused in the Court of Appeal decision in the case of David Njuguna Wairimu vs Republic [2010].

7. Briefly, PW1, Sunday Ding Kon recalled that on 03.08.2014 at 10.00 a.m., she and one Rebecca were at Bosnia Market where they had gone to buy some meat and tomatoes. She stated that she was carrying a wallet in her hand when suddenly the appellant snatched the same. That she tried to resist but the appellant together with his accomplice took out a dagger from his waist and pointed at them. That they began to scream but the appellant ran away. It was her evidence that her wallet had Kes. 6,000/- out of which Kes. 4,000 belonged to Rebecca. Additionally, the wallet held a Nokia Asha, Nokia Lumia and Nokia X2 phones. That they reported the matter to Ifo Police station.

8. She further testified that on 05.08.2014, they went to replace their sim cards. On the way, they met the appellant who upon approaching them, they took a boda boda to the police station where they were told to report the following day. Upon returning the following day, they saw the appellant at the police station still wearing the same red T-shirt he had previously worn while robbing them.

9. PW2, Rebecca James Wour, stated that she stayed at Sudan III at IFO Camp. It was her case that on the material day, she had given PW1 Kes. 4,000/= which she put in her bag. That she saw the appellant approach them and then snatched Sunday's wallet. That upon PW1 making an attempt to recover the said wallet, the accomplice to the appellant took out a dagger thus prompting them to scream. That the appellant also took out a dagger from his trouser waist thus leaving them with no choice but to return home. According to her, they lost the phones which were in the wallet.

10. That on 06.08.2014, they left for the Bosnia Market to go replace their lost lines. That they encountered the appellant with his friend again. She stated that they started walking fast while approaching them thus prompting them to run away. Noting that it was already night, they reported the matter to Ifo Police station on the following day. Their statements were recorded but despite the appellant being arrested, nothing was recovered from him.

11. PW3, No. 70522 Cpl. John Muturi stated that on 06.08.2014, he was at the station minuting cases when PW1 and PW2 arrived and made a report concerning the robbery incident. That while still there, the officer in charge of the County was taking the appellant to the toilet as he had been charged with another offence of robbery. That upon seeing the appellant, PW1 and PW2 were struck with fear as they identified him as the person who had robbed them. He stated that he recorded their statements and upon completion of investigations, he preferred the charge herein against the appellant. According to him, PW1 and PW2 claimed to have lost 3 mobile phones, Lumia valued of Ksh 20,000/= and Asha and Techno mobile phones.

12. That the complainants claimed that Techno mobile phone was valued at Kes. 6,000/= belonging to Rebecca's mum and Kes. 4500/= in cash, an amount which they intended to use in buying food. It was his statement that the appellant had previously been arrested on 05.08.2014 or thereabouts in relation to another case. He identified the appellant as the one in the dock. He further stated that the appellant was a person unknown to him and that he also learned of his name later. According to the officer, nothing was recovered from the appellant despite being asked to return the phones so that he could be forgiven.

13. DW1, Kamaladin Abdi Abdirahaman in his sworn statement stated that he worked as a casual using a wheelbarrow assisting passengers carry luggage. That on the material day, he was at his house when people went to him informing him that he should report to the police station and assist in translation. That upon reaching the station, he was instead accused of stealing. That he spent a night in the cells and upon reaching the following day, he was escorted to the toilet when he saw three Sudanese girls who identified him as having allegedly robbed them on the previous night. He urged that at the alleged time, he was in custody.

14. DW2, Hadija Mohamed Aden, DW1's mother testified that one morning, 3 Somali persons arrived at her house and informed her that her son and another boy had stolen their phones. She stated that she enquired from her son who denied the same. That later, her son was arrested and charged in court.

15. I have considered the trial court's record, the grounds of appeal and the respective parties' submissions. Issues for determination are as follows;

    i. Whether the ingredients of robbery with violence were established;

    ii. Whether there was sufficient evidence linking the appellant to the offence;

    iii. Whether the sentence imposed was lawful and constitutional.

16. The offence of robbery with violence is a creation of Sections 295 and 296(2) of the Penal Code. It is pertinent that in considering the offence of robbery with violence as provided under section 296 (2) of the Penal Code, regard must be had to section 295 of the Penal Code which defines robbery as:

> " 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."

17. In the case of Johana Ndungu vs Republic, CR. APP. No. 116 of 1995 the Court stated that:

> " In order to appreciate properly as to what acts, constitute an offence under section 296(2) one must consider the sub-section in conjunction with s. 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. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s. 296(2) ..."

18. To prove the offence of robbery with violence, the element of stealing must be proved coupled with one or all of the other elements set out in section 296(2), namely; that the offender was armed with a dangerous or offensive weapon or instrument; was in the company of one or more others; or immediately before or immediately after the time of the robbery he wounded, beat, struck or used other personal violence on the victim.[See the case of Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007].

19. In the instant case, PW1 and PW2 testified that on 03.08.2014 at 10.00 a.m., they were at Bosnia Market when the appellant together with his accomplice snatched PW1's wallet. That the contents of the wallet were; Kes. 6,000/-, a Nokia Asha, Nokia Lumia and Nokia X2. According to them, when they reported the matter to the police station, they managed to see the appellant as at that very time, he was being escorted by a police officer to the toilet. That they easily identified him as he was still in

the same red T-shirt that he was in at the time of the robbery. According to the prosecution witnesses, the items in the wallet were never recovered.

20. The appellant denied being properly identified as the aggressor as he claimed that on the very day, he spent the night at the police cells. In the case of Francis Kariuki Njiru & 7 others vs Republic Criminal Appeal No. 6 of 2001, the Court of Appeal held that identification evidence must be carefully examined, particularly where the incident occurred at night.

21. As already noted, the appellant contends that his identification was not proper as the circumstances prevailing at the alleged time of commission of the incident were not favourable. PW1 in her testimony stated that the incident occurred at 10.00 a.m. and that they managed to see the appellant together with his accomplice. Additionally, that at the time when they saw him at the police station, the appellant was still dressed in the very red T-shirt he was in at the time of the robbery. Apparently or coincidentally, he had been arrested for another robbery committed the previous day yet the instant robbery had been committed on 03-08-2014 three days earlier.

22. From the foregoing, it is my view that noting that the incident happened during the day and further, the time spent between the appellant and the complainants being long enough, it thus cannot be denied that the same wasn't favourable to enable positive identification. [See Lord Widgery, CJ's comments in the case of Republic vs Turnbull [1976] 3 ALL ER 549 at page 552].

23. In his evidence, PW3 stated that the appellant was arrested after having been associated with a different case. That the complainants independently recognized the appellant when he was being escorted to the toilet having been arrested on the previous day. That it was proof enough that there was no possibility of error or mistaken identity. It is no wonder that he did not challenge prosecution's case at all as he never asked a single question despite being given an opportunity to cross examine. The prosecution evidence was well corroborated and unshaken hence no reason to doubt the prosecution's case on identification.

24. On the ingredients of the offence, it is clear that the appellant at the time in question was in the company of an accomplice and that they robbed the complainants while armed with a Somali knife which he used to threaten the complainants. It is therefore not true that the ingredients of the offence were not proved beyond reasonable doubt. I am convinced that the trial magistrate cannot be faulted for convicting the appellant as the offence was proved to the required standard.

25. On sentence, the principles guiding interference with sentencing by the appellate Court were properly set out in S vs Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that: -

> " A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

26. According to the appellant, this court ought to set aside the death sentence and replace the same with a 20-year sentence or consider the time already served and set him free.

27. The appellant submits that the mandatory nature of the death sentence under section 296(2) of the Penal Code is unconstitutional. At this point, it is important to state that in the case of Francis Karioko Muruatetu & Another vs Republic [2017] eKLR, the Supreme Court held that the mandatory death sentence for murder was unconstitutional. In the said decision, the said court decision did not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts.

28. This court notes that in as much as the trial court imposed a mandatory death sentence, the trial court could not be faulted in light of the Muruatetu's case as the above related to murder cases only. In view of that clarification in muruatetu II, the minimum sentence for robbery with violence remain to be the death penalty which is lawful in the circumstances unless and until amended by parliament. Accordingly, it is my finding that the appeal hearing filed 11 years down the line has no merit and the same is dismissed. Both the conviction and the sentence are hereby upheld.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF SEPTEMBER 2025

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J. N. ONYIEGO

JUDGE