



**Kithuku v Republic (Criminal Appeal E117 of 2024)
[2025] KEHC 14344 (KLR) (24 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 14344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL APPEAL E117 OF 2024
NIO ADAGI, J
SEPTEMBER 24, 2025**

BETWEEN

KIOKO KITHUKU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal of the conviction and sentence delivered on 5th June 2024
in Chief Magistrate's Court at Kithimani Criminal Case No. E017 of 2020)*

JUDGMENT

Introduction:

1. The appellant, Kioko Kithuku was charged with the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The appellant pleaded not guilty to the charges and the matter was set down for hearing.
2. The prosecution called seven (7) witnesses in proving its case. The appellant was convicted of the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code and was sentenced to 30 years imprisonment 5th June 2024.

Petition Of Appeal

3. Being dissatisfied with the decision of the trial court, the appellant has lodged the instant appeal against both the conviction and sentence. The appellant has filed three (3) grounds of appeal namely:
 - i. THAT the learned trial magistrate erred in law and facts to rely on identification by recognition evidence not supported on implicating first report made to the police soon after the incident.
 - ii. THAT the learned trial magistrate erred in law and facts on misrepresentation of mitigations given thereby being compelled to pronounce 30 years sentence that is manifestly unsafe.



- iii. THAT the defence evidence was not put into effective consideration having been subjected through unfair trial within the meaning of Article 50(20(h) of the Constitution.
4. The appeal was canvassed through written submissions. Both the Appellant and the State filed their respective submissions.

Submissions

Appellant's Submissions

5. The appellant submitted on the grounds raised in his Petition of Appeal;
On ground 1 on whether the identification by recognition evidence was free from an honest mistake; the appellant submitted that the learned magistrate having addressed to the entire case relied on the mitigations to determine the sentence that:-

“I note mitigation by accused and sentiments by state counsel. The offence is a serious capital offence. The accused has now owned up in mitigations and said that the incident occurred. He shall be sentenced to serve 30 years imprisonment.”
6. The appellant argues that the contentious fact here relates to the expression by appellant which once looked at literally does not amount to alleged owning of the offence charged. This is because having been subjected to entire trial in which the appellant expressed sentiments that “it is true incident happened” does not in his humble contention conclude participation in the robbery in question.
7. The appellant submitted that the learned trial magistrate was bound by law to analyse effectively the attributed identification by recognition evidence and approach it cautiously without forgetting that a victim in recognition-based matters may believe most genuinely that he or she recognized someone yet still be mistaken.
8. He submitted that PW1 gave scanty evidential encounter narrating about the attack and prevailing circumstances giving rise to purported identification by recognition of the stranger. That this evidential extract was distorted and remained questionable on the following reasons;
 - (a) PW2 the wife responded and approached the scene upon receiving a call from mother-in-law. She had woken up early and gone to the nearby kiosk and that upon returning home she found appellant and two others whom she stated all totalled to four assailants.
 - (b) PW1 on his part was emphatic that the people were saying, “remove him get him out”. The allegation by the wife (PW2) about the husband (PWI) bewitching Kioko's wife which was heavily relied upon by the learned magistrate as alleged motive was not within the evidential context of PW1.
 - (c) PW3, a college student present at the scene when the assailants arrived was clear that he never identified any of the attackers. He similarly never heard allegations being shouted to the effect that PW1 bewitched Kioko's wife made at the scene by the said attackers.
9. The appellant submitted that this inconsistent is a pointer to the victim's credibility evidential-wise thereby rendering their evidence on identification by alleged recognition clearly questionable. The appellant relied on the case of *Wamunga v Republic* [1989] KLR 424 which highlighted the need for caution in relying on visual identification as mistakes are often made.



10. The appellant submitted that the evidence of PW4 related to his response upon receiving a text from one Shadrack on the morning of 2nd January 2020 which reported that people had attacked him. He was clear that upon arrival he found a crowd who wanted to kill him, while he had locked inside the house himself with a child and a mother.
11. That PW4 stated he called the OCS Masinga who came and they received him.
The it was evident that according to the area Assistant Chief there was no attack and robbery incident against PW1. That PW4 never confirmed any breakages of the door padlock as alleged by PW1 or even torn clothes seen and collected at the scene for further investigations and or trial purposes.
12. PW6, on his part testified about visiting the scene with the OCS who had received a distress call via text message from the area Assistant chief. His evidence therefore related to events much later after the arrival of PW4 and was bound to be disregarded.
13. As regards grounds 2 and 3 on whether denial of probono advocate and misinterpretation of mitigations vitiated the Prosecution case, the appellant submitted on burden of proof and submitted that PW-7 was categorical that upon arrival at the scene he produced a treatment note of Shadrack who was treated on 4th January 2020. According to his examination the approximate age of the injury was hours, he referred to PExt.1.
14. He submitted that it was undisputed fact that the robbery incident occurred on 2nd January 2020 and the treatments as per the evidence of PW-7 was inconsistent with the injuries sustained by PW1 as a result of the robbery which is the subject of the current charges. That such medical documents therefore had no impact to the veracity of the case at hand. The appellant relied on the case of *Musungu v Republic Criminal Appeal E081 of 2024* which reinforces the principle that failure to present substantive evidence creates doubt.
15. The appellant submitted that his defence evidence amounted to an alibi that escaped the learned trial magistrate keen analysis. The trial magistrate's admittance of being present at the scene did not mean that he was one of the attackers rather as one of the neighbours. This was confirmed by PW6 that those who attacked PW1 had boarded motorbikes, and a lady was amongst them called Margaret.
16. Thus, the appellant submitted that its worthy noting that he was accorded unfair trial having been provided with a probono Advocate but later disappeared without the court's knowledge or making efforts to know cause why he could not represent the Appellant in the trial process having been registered for such purpose rather than opting to proceed to hear the testimony of all the Prosecution witnesses yet none of them was cross-examined at all. That this lacuna according to Article 50(2) (h) of *the constitution* rendered the entire trial and thirty years sentence meted upon the appellant null and void as enunciated in *David Njoroge Macharia v Republic [2011] eKLR* whereby the right to legal representation in criminal trials was discussed and emphasized. The appellant cited the court of appeal in *Kiarie v Republic [1984] KLR 739* where it was held that once an alibi is raised, the burden of proof remains on the prosecution. He also cited the case of *Maina v Republic (Criminal Appeal E004 of 2024) [20251 KEHC 3680 (KLR)* where the court explored proportionality in sentencing and the importance of considering mitigating factors which is akin to his case.
17. The appellant prays that this appeal be allowed, conviction quashed and 30 years sentence set aside.

Respondent's Submissions

18. The respondent submitted that PW1 stated that early morning on the fateful day he was at home the appellant and others broke into his home. They pulled him out of the house tore his clothes and bet



him with runigus and jembes. PW1 saw the appellant enter the house and remove him outside. He also saw the appellant hit him with a metal on head. PW2, PW3 and PW5 all saw the appellant at the scene. PW6 confirmed as she testified that it was early morning at around 6:00a.m. Thus, it was during the day. The appellant seemed to be known to PW1 as it was said he was a pastor and the motive of the attack was that PW1 had bewitched the appellant's wife. PW2 also stated that she was at the shop early morning. The appellant seemed to have been known to PW2, PW3, PW4 and PW5 previously and it was not the first time they were seeing him.

19. The respondent submitted that in determining the identification of the appellant the trial court considered the length of time the witnesses had for seeing the perpetrator, the position from the appellant and the quality of light as was reiterated in *Mwaura vs Republic* [1987] KLR 645. That the time of day was in the morning thus it was daytime. The beating and assault happened outside thus it was in full view of the witnesses who were present. The appellant further asked PW5 if he had seen PW1 thus placing him on the scene and the other witnesses all saw him enter the house, pull the complainant out and beat him.
20. The respondent relied on the case of *Michael Nganga Kinyanjui vs Republic* [2014] eKLR where the Court of Appeal considered quoted *Cleophas otieno Wamunga vs Republic* that:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimise this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need of caution before convicting the defendant on reliance on the correctness of the identification, the way to approach the evidence was succinctly stated by Lord Widgery, C.J in the well-known case of *Republic vs Turnbull* [1970] 3 ALL E.R 549 – ‘the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation, at what distance, in what light, was the observation impeded in any way, had the witnesses ever seen the accused before , how often, if only occasionally had he any special reason for remembering the accused, how long elapsed between the original observation and the subsequent identification to the police’ – Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance. Recognition may be more reliable that identification of a stranger but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

21. The respondent submitted that identification was by recognition. The witnesses knew the appellant and were able to place him on the scene and identify him as the perpetrator. Thus, the appellant was able to be attached to the offence against PW1.
22. As regards theft, the respondent submitted that PW1 stated that when his coat was brought to him, he realised Kshs.20,000 was stolen. PW6 stated that Kshs.20,000/= was stolen but they were only able to recover Kshs.5,280/= which the appellant had dumped in a maize plantation. This proves that an item was stolen from the complainant PW1 which was cash money.
23. As regards use of or threat to use actual violence, the respondent submitted that PW1 stated that he was hit on the head with a metal. The appellant and others tore his clothes and beat him till he lost consciousness. PW2, PW3 and PW5 saw the appellant and others beat the complainant PW1 with runigus. PW7 corroborated his evidence. In producing the P3 Form PW7 stated that on examining



PW1 he had blood on the nose, cut wounds on the scalp, injuries on the cheeks, right eye was swollen and reddish, chest had tenderness, bruises on both shoulders, pain on both lower limbs. PW7 also confirmed that the weapon used were sharp and blunt. Thus, it was proved that the complainant PW1 was assaulted during the incident.

24. In submitting on the issue of the appellant's defence, the respondent argued that the appellant tendered unsworn evidence. He stated that he was a casual worker and he knew the complainant and they were people he knew but he denied being present. He stated that he was not present at the scene. The respondent submitted that this defence was an afterthought and that was not strong enough to rebut the prosecution evidence as against the appellant and hence the trial court was right in rejecting the same.
25. In light of the foregoing, the respondent submitted that the prosecution discharged its burden of proof and that the appellant was properly convicted of the offence of robbery with violence. The evidence by the prosecution witnesses was credible, consistent, reliable and well corroborated. All ingredients of the offence were established beyond reasonable doubt.
26. The respondent also submitted on the grounds of appeal raised by the appellant as follows:-

With respect to ground I of appeal, it was submitted that identification was by recognition and there was no mistake or error in identification by the complainant PW1 and the corroborating witnesses. They were able to place him on the scene as having committed the offence. The court was urged to dismiss this ground of appeal.

With respect to ground II of appeal, it was submitted that when the appellant was convicted the prosecutor stated that he was a first offender and prayed the court would give an appropriate sentence as per the law. The appellant in mitigation stated that he prayed for a non-custodial sentence and he had young children and it is true the incident happened. The trial court took into consideration the sentiments by the state and the appellant. The trial court noted the offence was serious and the appellant owned up in mitigation that the offence was committed. It thus sentenced the Appellant to 30 years imprisonment. It is submitted that the trial court did take into consideration the mitigation when meting the sentence. The respondent urged the Court to reject this ground of appeal.

With respect to ground III of appeal, it was submitted that the appellant was accorded a fair trial as envisaged in article 50 of *the Constitution*. The appellant was accorded the opportunity to cross examine the witnesses and he chose not to. The court was asked to dismiss this ground of appeal.

27. The respondent therefore urged this Honourable court to uphold the conviction and dismiss this ground of appeal.
28. On sentence, the respondent submitted that the appellant was sentenced to 30 years imprisonment. He was given a chance to mitigate where he prayed for leniency and stated that he had a family and children who depended on him and that the incident was true. The court further considered a probation report before sentencing the appellant. The prosecution informed the court that the appellant was a first offender.
29. The respondent cited Section 296 (2) provides that:

“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, strikes or uses any other personal violence to any person he shall be sentenced to death.”

30. The respondent submitted that in the instant case, the complainant was injured and also robbed of items by the appellant. He committed the act using actual force that injured the complainant. The learned trial magistrate evaluated the evidence on the prosecution and was proper in finding that the prosecution proved its case beyond reasonable doubt. The conviction was safe and proper.
31. As regards the sentence imposed, the respondent submitted that the lawful sentence under the law for offence of robbery with violence is death sentence. The trial court however did not indicate as to why it departed from the prescribed sentence by law in an offence of robbery with violence. Be that as it may, looking at the circumstances of the case the respondent submitted that the 30 years sentence imposed by the trial court is a sufficient and deterrent sentence and urges this court to confirm the same.
32. The respondent submitted that the appeal lacks merit and should therefore be dismissed in its entirety.

Analysis And Determination

33. The first appellate court is under duty to re-evaluate the evidence presented at trial and draw its own independent conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses give their testimonies. Thus, matters of demeanour are best observed by the trial court. See *Okeno vs. Republic* [1972] E.A 32.
34. I have perused the lower court record, written submissions and authorities relied upon by both parties. The issues for determination are: -
 - i. Whether the prosecution proved its case beyond reasonable doubt.; and
 - ii. Whether the trial court failed to put the appellant’s defence evidence into effective consideration and whether the appellant was subjected through unfair trial within the meaning of Article 50 (2) (h) of *the constitution*.
 - iii. Whether the 30 years imprisonment sentence imposed on the appellant was manifestly unsafe.

i. Whether the prosecution proved its case beyond reasonable doubt;

35. The elements of the offence of robbery with violence were set out by the Court of Appeal in the case of *Oluoch –Vs – Republic* [1985] KLR thus:

“Robbery with violence is committed in any of the following circumstances:

- a. The offender is armed with any dangerous and offensive weapon or instrument; or
- b. The offender is in company with one or more person or persons; or
- c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person” [Emphasis mine].



36. And according to the case of Dima Denge Dima & Others vs Republic, Criminal Appeal No. 300 of 2007,:

“...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”

37. In this case PW1 stated that early morning on the fateful day he was at home the appellant and others broke into his home. They pulled him out of the house tore his clothes and beat him with rungas and jembes. PW1 saw the Appellant enter the house and remove him outside. He also saw the appellant hit him with a metal on head. PW2, PW3 and PW5 all saw the appellant at the scene. PW6 confirmed as she testified that it was early morning at around 6:00a.m. Thus, it was during the day. The appellant seemed to be known to PW1 as it was said he was a pastor and the motive of the attack was that PW1 had bewitched the appellant’s wife. PW2 also stated that she was at the shop early morning. The appellant seemed to have been known to PW2, PW3, PW4 and PW5 previously and it was not the first time they were seeing him.

38. PW1 stated that when his coat was brought to him, he realised Kshs.20,000 was stolen. PW6 stated that Kshs.20,000/= was stolen but they were only able to recover Kshs.5,280/= which the appellant had dumped in a maize plantation. This proves that an item was stolen from the complainant PW1 which was cash money.

39. As regards use of or threat to use actual violence, PW1 stated that he was hit on the head with a metal. The appellant and others tore his clothes and beat him till he lost consciousness. PW2, PW3 and PW5 saw the appellant and others beat the complainant PW1 with rungas. PW7 corroborated his evidence. In producing the P3 Form PW7 stated that on examining PW1 he had blood on the nose, cut wounds on the scalp, injuries on the cheeks, right eye was swollen and reddish, chest had tenderness, bruises on both shoulders, pain on both lower limbs. PW7 also confirmed that the weapon used were sharp and blunt.

40. Accordingly, the prosecution proved beyond reasonable doubt that;

- i. the offenders were armed with dangerous and offensive weapon or instrument;
- ii. the offender was in company with one or more person or persons; and
- iii. at or immediately before or immediately after the time of the robbery the offenders wounded, beat, strike or used other personal violence them.

ii. Whether the trial court failed to put the appellant’s defence evidence into effective consideration and whether the appellant was subjected through unfair trial within the meaning of Article 50 (2) (h) of the constitution.

41. The appellant asserts that his defence evidence amounted to an alibi that escaped the learned trial magistrate’s analysis. That the trial magistrate’s admittance of the appellant being present at the scene did not mean that he was one of the attackers rather as one of the neighbours. That this was confirmed by PW6 that those who attacked PW1 had boarded motorbikes, and a lady was amongst them called Margaret.

42. In his judgement, the learned magistrate stated that the appellant gave a general denial which did not bring any doubt to the strong prosecution’s case.



43. The appellant submitted that it is worthy noting that he was accorded an unfair trial having been provided with a pro bono Advocate but later disappeared without the court's knowledge or making efforts to know cause why he could not represent the appellant in the trial process having been registered for such purpose rather than opting to proceed to hear the testimony of all the Prosecution witnesses yet none of them was cross-examined at all. That this lacuna according to Article 50(2) (h) of *the constitution* rendered the entire trial and thirty years sentence meted upon the appellant null and void.
44. On the foregoing, this court has perused the trial court's record and there is no indication that the appellant raised any concern about his advocate being absent and requiring him to be present during the hearing and or seeking not to proceed without an advocate.
45. Finally, it is not correct that the trial court did not consider the appellant's defence. The judgment is quite clear in its analysis and rejection of the Defence theory. The Court concluded: "The accused gave a general denial which did not bring any doubt to the strong prosecution case."

iii. Whether the 30 years imprisonment sentence imposed on the appellant was manifestly unsafe.

46. While sentencing the appellant, the trial magistrate stated that he noted mitigation by appellant and sentiments by state counsel. The offence is a serious capital offence. The appellant had now owned up in mitigations and said that the incident occurred and proceeded sentence him to serve 30 years imprisonment.
47. The lawful sentence under Section 296(2) of the Penal Code for the law for offence of robbery with violence is death sentence. The trial court did state that it considered the appellant's mitigation and the fact that he owned up that the incident occurred thus he sentenced the appellant to 30 years imprisonment.
48. It is this court's considered view that by owning up that the incident did indeed occur, did not construe that the appellant admitted to committing the offence. While force was used, one cannot say here that the appellant critically injured the complainant. The P3 Form classified the degree of injuries sustained by the complainant as "harm".
49. The law of the land as it stands today, is that the maximum penalty for both murder and robbery with violence is the death penalty but the Court has discretion to impose any other penalty that it deems fit and just in the circumstances.
50. In light of this, I will, therefore, proceed to determine the appropriate sentence. First, it is true that all the elements for the offence of robbery with violence were proved. However, there are no truly aggravating circumstances which would lift this case to the scales of the death penalty or manifestly excessive sentence. Death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. That is not the case here.
51. Given that "simple" robbery under Section 296(1) of the Penal Code attracts a minimum sentence of fourteen years imprisonment, it seems logical that the minimum sentence for robbery with violence should begin at fifteen years imprisonment. Since there are no aggravating circumstances to take the crime here to the realm of heinous robbery with violence beyond the ingredients of the crime, it is fair and proportionate to give the minimum sentence logically possible.
52. In his mitigation, the appellant prayed for a non-custodial sentence and submitted that he had young children to take care of and that it was true the incident happened. I have taken these mitigating circumstances into consideration in regard to this case. I, therefore, sentence the appellant to fifteen (15) years imprisonment for the conviction for robbery with violence.



Disposition

53. In light of the foregoing, while I uphold the conviction, I set aside the 30 years imprisonment sentence and substitute therefore a sentence of 15 years imprisonment which I deem fit and just in the circumstances.
54. In compliance with the provisions of Section 333(2) of the Criminal Procedure Code, the sentence shall be reduced by the period the appellant was held in custody pending trial from 03/01/2020 when he was arrested to 23/01/2020 when he was admitted to and released on bond.
55. Right of Appeal fourteen (14) days.
56. It is so ordered.

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 24TH SEPTEMBER 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 24TH SEPTEMBER 2025

In the presence of:

Appellant..... in person

Ms Agathafor state

Milly Grace.....Court Assistant

