



REPUBLIC OF KENYA



**Ndungu v Republic (Criminal Appeal E053 of 2022)
[2025] KEHC 13426 (KLR) (29 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13426 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL E053 OF 2022
HI ONG'UDI, J
SEPTEMBER 29, 2025**

BETWEEN

SOLOMON GICHARA NDUNGU APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment delivered by Hon. A. Mukenga (Senior Resident Magistrate) in Molo Criminal Case No. 1575 of 2020 on 14th July, 2022)

JUDGMENT

1. Solomon Gichara Ndungu hereinafter referred to as the appellant was charged with the offence of robbery with violence contrary to section 296(2) of the penal code.
2. The particulars were that the appellant on 27th July, 2020, at Kapsita in Molo subcounty in Nakuru county, jointly with others not before court, robbed John Ndungu Kiarie of a motor cycle registration number KMEF 701X Dayun black in colour valued at Ksh 65,000/= and immediately before the time of such robbery, wounded the said John Ndungu Kiarie.
3. He denied the charge and the matter proceeded to hearing with the prosecution calling five (5) witnesses while the appellant gave an unsworn defence without calling any witnesses. Thereafter the trial Magistrate found the appellant guilty, convicted him and sentenced him to thirty (30) years imprisonment on 14th July, 2022.
4. Being aggrieved by the Judgment he filed this appeal on 22nd July, 2022 citing several following grounds of appeal. He however, on 19th March, 2025 filed the following amended grounds of appeal
 - a. That the learned trial magistrate erred in law and in facts when she put more reliance on the witness evidence which was not-corroborating to convict the appellant.



- b. That the learned trial Magistrate erred in law and in facts when she failed to consider the discrepancies and contradicting evidence placed before her to arrive at the verdict of guilt.
 - c. That the learned trial magistrate erred in law and in facts during the conclusion of this case where she also put more reliance on the identification at the "dock" which is worthless according to law to arrive at a verdict of guilt when in deed the appellant was not identified.
 - d. That the learned trial magistrate erred in law and in facts when she failed to note that in this case no arresting officer and other witnesses gave evidence before court to prove the course of arrest and the gaps created by them which were to be resolved in favour of the appellant.
 - e. That the learned trial Magistrate erred in law and in facts in shifting the burden of proof from the prosecution to the appellant and waiting on the appellant to fill the gaps in the prosecution case.
 - f. That the learned trial magistrate erred in law and in facts when she rejected his defence without cogent reasons.
 - g. That the learned trial Magistrate erred in law and in facts in convicting the appellant on mere suspicion.
 - h. That the learned trial Magistrate erred in law and in facts in exerting a harsh and punitive sentence in total disregard to the appellant's instigation, circumstances and the time the appellant had been in custody.
5. John Ndungu Kiarie testified as PW1. He stated that he is a boda boda rider. On 28th June, 2020 he was at Kapsita for a funeral night vigil, when he was approached by the appellant, who requested to be taken to some place. This was around 10.00pm. He left with the appellant on his motorbike, and he carried two (2) more people and they headed towards the forest as he was directed by the appellant.
 6. Suddenly he was assaulted by the appellant as the others joined in and he lost consciousness. He was later taken to hospital. He suffered serious injuries but was treated and a P3 form filled. He identified the appellant as a person he knew well. In cross examination he reiterated that it was the appellant and others he carried on the motor bike registration No. KMEF 701X, who attacked him. He was not able to identify the lady who rescued him as he was semi-conscious.
 7. Elizabeth Mumbi Njonge - PW2 from Kapsitu testified that the appellant was his employee who used to ride her motorbike registration No. KMEF 701X. He used to remit the dues to her in the evening. She said she bought the motorbike from Ayub Nderitu vide the document (EXB 3a). She explained that on 25th July, 2020 the appellant came to her home wanting her to employ him as the rider to the motorbike instead of PW1, which she refused. He returned the next day with the same request and really tried to persuade her but she stood her ground. On the night of 27th July, 2020 at 9.00pm she heard some loud motorbike noise and went out where she heard the appellant's voice saying "Kados ni kusonga sasa." Kados is PW1's nick name.
 8. The next morning, she received a report from PW1's sister on how PW1 had been found seriously injured in the forest. Arrangements were made and PW1 was taken to hospital. The motorcycle was never recovered. She identified PW1 who was well known to her.
 9. Philip Gachoga Gute (PW3) is the husband to PW2. He confirmed that PW1 was the rider to the motor bike they had bought. The rest of the evidence is similar to that of PW2.



10. Alice Wanjiru (PW4) is a clinical officer at Molo, sub county hospital who produced PW1's P3 form (EXB 1). She confirmed that PW1 had injuries which were assessed as grievous harm. When he was first brought to the hospital his clothes were soaked with blood, the trousers were torn and his face was swollen. He had many injuries.
11. In cross examination she said the patient was brought to the hospital on 28th July, 2020. She confirmed having treated PW1.
12. No. 72491 P. C. Alfred Ong'ayi PW5 was the investigating officer. Upon receipt of the report on 28th July 2020 he visited the scene and found when PW1 had been taken to Molo sub-county hospital and thereafter referred to Nakuru P.G. H. He visited PW1 in hospital but he was still unconscious. He was discharged on 9th August, 2020 when he led the officer to the appellant's home but he wasn't there. On 10th August, 2020 the appellant surrendered himself at Elburgon police station. An identification parade was later conducted where PW1 identified the appellant. He produced photos of PW1 showing injuries on his head and chest as P EXB 2a – c. He also produced the sale agreement and receipts for the purchase of the motorbike EXB 3a-c.
13. In his unsworn defence the appellant said on 8th August, 2020 there was a family gathering at home. His mother sent him to represent her in Nyahururu. The next day he was called and informed that police were looking for him. He travelled back home and went to the police station from where he was arrested. He denied the offence.
14. The appeal was disposed of by written submissions

Appellant's submissions

15. The same are dated 10th March, 2025 and were filed by Wambeyi Makomere & Co. advocates. Counsel submitted while referring to a number of excerpts from the proceedings that a number of persons mentioned by PW1-PW3 were not called to testify. Further that the name 'Kados' mentioned by PW2 was never confirmed to belong to PW1. Further that PW1 never stated that during the incident they stopped at PW1's home. Counsel raised issues with the receipts and sale agreements produced in respect of the vehicle. He submitted that in view of this it should be found that no property was stolen.
16. Counsel further submitted that the prosecution case is riddled with such contradictions and inconsistencies of the magnitude above ranging from the firearm, scene of crime, alleged phone communication and non-recovery of the motor bike rendering the conviction of the appellant unsafe. Reference was made to the case of Dickson Elia Nsamba Shapwata and another V Republic Criminal Appeal No. 92 of 2007 (Tanzania Court of Appeal).
17. Counsel further submitted that the appellant was never identified as the assailant. That PW1 never gave the name or description of the assailant to the police. Counsel mainly referred to the evidence of PW2 who never recorded or told the police what she had allegedly heard the previous night. Further that despite the mention of an identification parade having been conducted no forms were produced as evidence. Its counsel's argument that what was done in this case was dock identification which the court should not rely on. On this counsel referred to the cases of:
 - i. Wamunga V Republic [1989] KLR 424, 426
 - ii. Amolo V Republic (1990 – 1994) E. A 22.
18. Counsel mentioned the names of witnesses who ought to have been called to testify but were not namely: The arresting officer Sister to PW1 Ayub Nderitu Job Ndigi alleged owners of the



motorbike Patrick who was at the night vigil and allegedly saw PW1 carry the appellant from the night vigil scene.

He further submitted that the reliance on the voice identification by the trial court was a grave error. See – Joseph Muchangi Nyaga & another V Republic [2013] (KECA) 88KLR.

19. Counsel submitted that the appellant’s defence was rejected including his conduct of presenting himself to the police station when he learnt he was being sought. Reliance was placed on the case of *Sawe v Republic* [2003] KLR 354 where the Court of Appeal held:

“Suspicion however strong cannot prove the basis of inferring guilt which must be proved by evidence beyond reasonable doubt”.

Counsel contended that the finding by the trial court based on the evidence of PW2 and PW3 of the appellant seeking employment from them was based on mere suspicion.

20. Finally, on sentence counsel submitted that the trial court had not considered the period the appellant had been in custody. He referred to the advisory opinion by the Supreme Court in *Francis Karioko Muruatetu & another V Republic* [2017] eKLR Petition No. 15 of 2015.

Respondent’s submissions

21. The same were filed by M/s Emma Okok Principal prosecution counsel and are dated 24th April, 2025. Counsel gave a summary of the evidence that was adduced before the trial court. In response to the appellant’s submission that failure to call some witnesses was fatal to the prosecution case, counsel referred to section 143 of the *Evidence Act* which provides:

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact”.

22. She thus submitted that the evidence adduced by the prosecution witnesses was sufficient and proved the appellant’s guilt. That there was no need to call the arresting officer as the arrest was not in dispute she argued. Coming to the appellant’s defence, it is her submission that the same was a mere denial which did not rebut the prosecution case.
23. On the sentence of thirty (30) years imprisonment meted out against the appellant counsel urged the court not to interfere with it as it was lawful and deserving. She however added that the sentence should run from 10th August, 2020 when the appellant was arrested.

Analysis and determination

24. This being a first appeal, this court has a duty to re-examine and re-consider the evidence that was adduced before the trial court and arrive at its own independent conclusion. It must also remember that unlike the trial court it did not have the advantage of seeing or hearing the witnesses testify, and an allowance must be given for that. This had been the position in the cases of:
- i. *Okeno V Republic* [1972] E.A 32
 - ii. *Kiilu & another V Republic* [2003] I KLR 174
 - iii. *Simiyu & another V Republic* [2005] I KLR 192 among others



25. Upon careful consideration of the record of appeal, grounds of appeal, both parties' submissions, cited authorities and the law I find the main issue for determination to be whether a case of robbery with violence was proved against the appellant. Section 295 of the penal code defines robbery as follows:

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.

Section 296(2) of the Penal Code defines robbery with violence 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

26. From the above definitions, it follows that for a charge of robbery with violence to be proved the following elements must be established.
- i. Theft
 - ii. Any one or all of the elements set out in section 296(2) of the Penal Code.
 - iii. Identification of the culprit.

The evidence by PW1, PW2 and PW3 confirms that PW2 and PW3 owned a motor cycle registration No. KMEF 701X and they had employed PW1 as its rider. PW2 told the court that PW1 used to remit to her the dues in the evening. After the robbery the motor cycle was never recovered. This is confirmed by PW1 – PW3. Theft was therefore proved.

27. It was also stated by PW1 that he was requested to take the appellant to a certain destination that night. On the way the appellant requested him to pick two other people which he did. At the forest he was attacked and injured by his three passengers and robbed of the motorcycle.
28. The medical evidence produced by PW3 a clinical officer vide the P3 form (EXB 1) confirmed that PW1 suffered serious injuries assessed as grievous harm. The evidence adduced therefore confirms that the motor cycle was stolen, the attack was by more than one person and PW1 was injured in the process. All this confirm that indeed the offence of robbery with violence was committed.
29. The crucial issue left is whether the appellant was one of the three people who robbed PW1.
30. In her evidence PW2 did not tell the court whether PW1 remitted the day's dues on the evening of 27th July, 2020, before he left for the funeral night vigil. Were PW2 and PW3 aware that their employee was at the night vigil with the motorbike? Neither PW1, PW2 or PW3 made mention of this.
31. The appellant has raised issue with the prosecution's failure to call Patrick or any other witness who saw PW1 and the appellant leave the night vigil venue together on the appellant's motor cycle. The response by the respondent is reliance on section 143 of the Evidence Act which gives no set number of witnesses to prove a fact.



32. It is not lost to this court's mind that the time of incident as stated by PW1 was 10:00pm. It was obviously late in the night. From the evidence adduced by PW1 there is no mention of any source of light, either where he was and/or where the appellant was. Were they seated together? All he says is:

“Solomon came and asked me to transport him to some place”

Where did Solomon come from as he approached him?

33. A charge of robbery with violence is a serious offence and the issue of identification is very critical hence the questions I have raised above. The incident here occurred at night and the prosecution was duty bound to adduce sufficient evidence to prove its case on identification. In cross-examination this is what PW1 stated at page 23 lines 4-6:

“There is someone who saw me leaving the homestead. He did not record his witness statement”.

Why did this person not record a statement to confirm that indeed PW1 left the night vigil on his motor cycle with the appellant?

34. Still on identification PW2 told the court that on 27th July, 2020 at 9.00pm she heard some commotion and a loud motor bike noise, she went outside and heard the appellant's voice, saying “Kados ni kusonga sasa” Kados being PW1's nickname. In other words, she identified the appellant by voice which was by her word. Was this alleged voice recognition ever tested? The investigating officer (PW5) did not inform the court of what he did to be convinced that indeed PW2 heard and identified the appellant's voice. The trial court relied on this voice recognition for the reason that PW2 knew the appellant well. This is what the trial court stated in the Judgment:

“Since PW2 knew the accused person well, I am satisfied that she was able to identify his voice even without seeing him, and her evidence satisfied me that the accused person was a passenger on the complainant's motorbike on the night of the incident”

35. Besides hearing what she alleges to have heard what else did she do? She alleges to have heard a commotion, then an address by the appellant to PW1. If indeed that is true what did she do to ensure that her employee (PW1) was safe? From the record she did nothing.
36. PW5 in his evidence stated that on 28th July, 2020 he received a report of the robbery and he visited the scene. At no point did he say that PW1, PW2 or PW3 had given him the names of the culprits. In their evidence the said witnesses (PW1 – PW3) explained how they knew the appellant so well to the extent that PW1 on 9th August, 2020 led the officers to the appellant's home. In his further evidence PW5 stated this:

“We went to Elburgon police station and with the help of DCI, an ID parade was done and the complainant identified the suspect”

37. Several issues arise from this statement namely:
- i. Was the appellant's name given to the police during the first report?
 - ii. If his name was given why was an identification parade conducted?
 - iii. Who conducted the alleged identification parade?



- iv. If PW1, PW2 PW3 described and gave the appellant's name why was PW1 leading the police to the appellant's house and his mother's house?

From the record there is no evidence of any identification parade having been conducted.

38. Upon doing the above analysis I have come to the conclusion that the appellant was suspected to be the culprit because of the request he had made to PW2 and PW3 to be employed in place of PW1. Otherwise the way the whole issue was conducted leaves a lot of doubt in the court's mind on the identification of the appellant. Mere suspicion cannot be the basis of a conviction.
39. In the case of *Sawe V Republic* [2003] KLR 364 the Court of Appeal held that suspicion however strong cannot form the basis for a conviction. In the circumstances and for the gaping holes stated above it is my finding that the identification of the appellant as the culprit was based on mere suspicion and fails the test of identification. For that reason, I find merit in the appeal which I hereby allow.
40. I quash the conviction and set aside the sentence. The appellant shall be released forthwith unless otherwise lawfully held under a separate warrant.
41. Orders accordingly

**DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 29TH DAY OF SEPTEMBER, 2025 IN
OPEN COURT AT NAKURU**

H. I. ONG'UDI

JUDGE

