Otieno v Republic (Criminal Appeal E011 of 2025)
[2025] KEHC 13585 (KLR) (30 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13585 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E011 OF 2025

RPV WENDOH, J

SEPTEMBER 30, 2025

(ORIGINAL CM.CASE NO. E4286 OF 2023)

BETWEEN

JEFF OTIENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Jeff Otieno alias Toto, the appellant, was charged with another, for the offence of robbery with violence contrary to section 296(2) of the Penal Code.

2. The particulars of the charge were that on 12/12/2023 at Matisi Trading Centre in Trans Nzoia County, robbed Kizito Kibukwa of his mobile phone make itel valued at Kshs.1,500/= and cash of Kshs.5,000/= and immediately before such robbery, wounded the said Kizito Kibukwa.

3. After a full trial, the appellant was convicted of the offence and sentenced to serve sixty (60) years imprisonment.

4. The appellant is aggrieved by the conviction and sentence and preferred the appeal based on the amended grounds of appeal, namely,

    1. That the Court failed to comply with section 200(3) of the Criminal Procedure Code (CPC);

    2. That the appellant's rights under Article 50 (2) (g) & (h) of *the Constitution* were violated;

    3. That the prosecution evidence was inconsistent as regards identification;

    4. That the prosecution erred by failing to conduct an identification parade;

    5. That the sentence is excessive.

5. The appellant therefore prays that the appeal be allowed, the conviction be quashed and sentence set aside.

6. This is a first appeal and it is the duty of this court to exhaustively re-examine the evidence tendered in the trial court, evaluate it and arrive at its own conclusions. The court has to however, make allowance for the fact that it neither saw nor heard the witnesses testify. This court draws guidance from the case of Okeno -Versus Republic 1972) EA 32.

The Prosecution Case.

7. PW1 Kizito Bukwa testified that on 12/12/2023, at about 6.30p.m. while on the way from his place going to visit his father, he met his brother who had a motor cycle and he asked the brother to go with him. The brother received a phone call and remained behind as he talked on phone. He then met three (3) people and two attacked him; That the first one stabbed him on his back and right hand while the appellant who was accused 2 took his phone and cash; that the people ran off when his brother approached; that he became unconscious after the incident; that it was not yet dark and he was able to see the appellant whom he knew very well.

8. PW2 David Bukwa Wekesa recalled that he was fueling his motor cycle when he met his brother PW1, who asked him to escort him home. He parked his motor cycle and followed PW1. He received a call and picked it and he found PW1 had been attacked by three (3) people and was on the ground screaming for help; that the suspects ran away and he got help to take PW1 who was injured, to hospital; that he was able to see the assailants as he was only seventy (70) metres away. He knew the appellant as 'Toto', a nickname. PW2 said that the incident took place at 6.30p.m. and he was able to see the assailants.

9. PW3 John Koima, a Clinical Officer from Kitale County Referral Hospital produced the P3 form filled by one Nelson who had worked with him. The medical Officer had found that the complainant had sustained injuries to the right hand i.e stab wound which had been stitched 4cm deep and 4cm long and injuries to the chest and that the weapon used was a knife.

10. PW4 Sgt. Leonard Kimichiri of Matisi Police Station recalled that on 12/12/2023, a report of robbery with violence was reported and assigned to him to investigate. He visited the complainant at his home and confirmed that he had been attacked by three (3) people; that the appellant and another were arrested in appellants house but no recoveries were made. PW4 produced the receipt of the stolen mobile phone as P.Exh.3.

Defence Case: -

11. When called upon to defend himself, the appellant (DW1) stated that he was working as a conductor in Kitale Town, and was arrested on 2/12/2022 from his house; that the house was searched and no recovery was made and that he was charged with an offence he did not know of.

The appellants Submissions.

12. It was the appellant's submission that Hon. Mukua who took over the case from Hon. Makila did not comply with Section 200(3) of the Criminal Procedure Code; that since he was facing a serious offence, the court should have strictly complied with the said section. He relied on the case of Simiyu -V- Republic CR.A E050/2022 where the court failed to comply with Section 200 of the Criminal Procedure Code and the High court held that failure to comply rendered the trial a nullity; He also cited the case of Nahashon Njiru Ireri -V- Republic (2008) eKLR.

13. On the second ground, it was submitted that the court did not promptly inform the appellant of his right to choose an advocate; that that right should have been explained to him at the time of plea so that if he could not afford Counsel, he could have invoked section 43 of the *Legal Aid Act* for the State to avail Counsel to him. He relied on the decisions of JOO –V- Republic (2021) eKLR and K.O. -V- Republic CR.A E026/2021 where court's held that failure to comply with the said provision subjected the appellant to unfair trial and it should be declared a nullity.

14. On ground three, it was submitted that PW4 arrested the appellant on suspicion.

15. It was further submitted that the evidence of identification must be scrutinized and only relied upon if the court is satisfied that there was positive identification with no possibility of error. The appellant urged that the witnesses should have stated the facial appearances, body size, clothing etc.; that the witness should have given a description of the assailant; that there is no explanation why an identification parade was not done to test the veracity of the complainant's testimony. He relied on Cleophas Wamunga -V- Republic CR.177/2000 where the court considered issue of visual identification and observed that sometimes mistakes are made in identification of a person one knows and that the court should warn itself of the need for caution before convicting based on evidence of identification.

16. The applicant also submitted that to test the correctness of an identification, it is necessary to hold an identification parade; that what the witnesses did is dock identification which is worthless as was held in Gabriel Kamau Njoroge -V- Republic (1982) 1 KAR1134 and therefore the court should not rely on it.

17. As regards sentence, the appellant submitted that the court did not comply with Judiciary Guidelines on sentencing where the court should consider retribution, deterrence, rehabilitation, restorative justice etc; that the sentence is excessive in the circumstances and should be set aside.

The Respondent's Submissions

18. The appeal was opposed and the prosecution Counsel filed written submissions. He identified five (5) issues for determination. As to whether the offence was proved beyond reasonable doubt, Counsel relied on the case of Johana Ndungu -V- Republic (1996) KECCA 187 where the Court of Appeal observed that the prosecution only needs to prove one of the following three ingredients; that the person was armed with an offensive or dangerous weapon, that the accused is in company with one or more persons or that if immediately before or immediately after the time of the robbery, he beats, strikes, or uses any personal violence to the person; that in this case, all the three ingredients were proved because, the complainant was attacked by three (3) persons, violence was visited on the complainant and the persons were armed with a dangerous weapon.

19. On the question of defective charge, Counsel relied on the case of Dima Denge Dima & others -V- Republic (2013) KE CA where the Court of Appeal discussed the contents of charge sheet; it should contain the section creating the offence, the statement of the offence and prescribed sentence. Counsel argued that the charge sheet as drafted was not defective and even if there was a defect, it was curable by dint of section 382 of the CPC. Counsel also relied on the case of JMA -V- Republic (2009) eKLR where the court observed that not all defects in a charge render the conviction invalid and that Section 382 CPC was intended to cure any irregularity in a charge or order.

20. On the Complaint that the sentence is excessive, Counsel submitted that Section 296(2) of the Penal Code prescribes the death sentence upon conviction on a charge of robbery. Counsel urged that the

Court of Appeal in the case of Hassan Kahindi Katana & Another -V- Republic (2022) KE CA held that the mandatory death sentence in robbery with violence case has not been done away with

21. In Supreme Court case in Wanga -V- Republic (2024) KESC 38, also clarified the rule in Muruatetu case when it said that it only applied to Murder cases.

22. The prosecution Counsel had issued an enhancement notice upon the appellant and urged the court to substitute the sixty (60) years sentence with the mandatory death sentence for robbery with violence.

Determination: -

23. I have considered all the evidence on record, the grounds of appeal and the submissions of the parties.

24. Although the appellant had listed one of his grounds that the charge was defective, he did not submit on it and did not indicate the defect in the charge sheet. Section 134 of the CPC provides for framing of charge sheets. It reads as follows-

> "Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"

25. In determining whether or not a charge sheet is defective or not, the Court of Appeal in Sigilani -V- Republic (2004)2 KLR 480 said the following "The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable the accused to prepare this defence".

26. In the case of Dima Denge Dima (Supra) the Court of Appeal stated thus "The law of drafting of charges as we understand it is that it is the punishment or penal section that creates the offence and as such it is the one what is cited in a charge sheet. In the book Essentials of Criminal Procedure in Kenya (Law Africa, 2010) P. O. Kiage (now J.A, on this bench) did point out and we agree as follows;

> If the offence charged, is one created by a statutory enactment, it must contain a reference to the Section of the enactment creating the offence. The correct procedure is to specify in the statement of offence, not the section that defines the offence, but the one that prescribes the punishment therefore".

27. I have looked at the charge sheet and it includes the statement of the offence and prescribes the sentence. In any case, if there is a defect in a charge sheet that is not substantial or goes to the root of the charge, it is curable by section 382 of the Criminal Procedure Code which provides thus- Section 382 "Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

28. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

29. The charge sheet as framed was not defective as to render the trial invalid.

Whether section 200 CPC was complied with;

30. On 8/10/2024, S.M. Mokua Chief Magistrate took over this matter from Hon. S. N. Makila Principal Magistrate who was said to be on transfer.

The record reads;

> "8/10/2024.
>
> Hon. S.M. Mokua – CM
>
> Court Prosecutor – Brian
>
> Court Assistant – Mwangi
>
> Accused 1 – present
>
> Accused 2 – present.
>
> Court- This matter was partly heard before Hon. Makila – PM. There is need to comply with Section 200 (3) of the CPC.
>
> Hon. S.M. Mokua – CM
>
> Accused 1- I pray to proceed from where this matter had reached.
>
> Accused 2- May the case go on from where it had reached.
>
> Court- Section 200(3) of the CPC complied with to the effect that it goes on from where it had reached.
>
> Mention 15/10/2024 for the State to supply a copy of the P3 form.
>
> S.M. Mokua – CM"

31. The appellant indicated to the court that he wanted the case to proceed from where it had reached. He could only have made that statement after he was informed of his rights under section 200 CPC. This court is satisfied that the said section was complied with by the incoming magistrate.

32. Whether the appellant's rights under Article 50 (2) (g) and (h) of *the Constitution* were violated;

Article 50 of *the constitution* guarantees an accused person right to fair trial

Article 50(2) & (h) provides as follows-

> 50(2) Every accused person has the right to a fair trial, which includes the right—
>
> (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
>
> (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

33. Under both subarticles, an accused has to be informed of the right promptly either at the time of plea or soon thereafter to enable an accused prepare for his defence.

34. See Joseph Kiema Philip -V- Republic (2018) eKLR. The court in JOO – v- Republic and K.O. -V- Republic (2021) held that failure to comply with the above provisions rendered the conviction a nullity

and ordered retrials. However, the court of Appeal in William Odongo Oongo -V- Republic (2022) KECA 23 took a different view.

35. It stated thus "It should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation. *The constitution* demands it. In the present case, the record does not show that the appellant was informed by the trial court of those rights. However, quite apart from the fact that these matters were not raised before the trial court. From the way the appellant cross examined the prosecution witnesses and form his general conduct during the trial, it s not evident an injustice, nay substantial injustice, resulted from the omission by the trial court to inform the appellant of his rights under Articles 50(2)(g) and 50(2) (h) of *the Constitution*. The failure by the trial court to inform the appellant of his rights in this case should not therefore be a basis for vitiating his trial. All in all, we are satisfied that the conviction is well founded, and we have no basis for interfering with the same."

36. The Court of Appeal expressed the same view in Herman Mweru Mwavughanga-V- Republic CRA 111/2022 and several other decisions. The Court of Appeal said that the operative circumstances that trigger the necessity for legal representation in criminal cases is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused and the incapacity and inability of the accused to participate in the trial. It means that the court has to look at whether the appellant herein was able to ably take part in the proceedings or was his capacity to understand and take part in the proceedings impeded by the complexity of the case. Under the doctrine of stare decisis this court is bound by the decisions of the Court of Appeal.

37. I have looked at the proceedings before the trial court and confirm that the appellant actively took part in the proceedings. He cross examined the witnesses and at the end, when called upon to defend himself, he gave unsworn evidence. At no time did the appellant demonstrate his inability or impediment in presenting his case. The court therefore finds that the appellant has not suffered any substantial injustice arising from the failure by the trial court to inform him of his rights as alleged.

Whether the offence of Robbery with violence was proved:

38. In Johana Ndungu -V- Republic (1996) KE CA 187, the Court of Appeal stated as follows,

> "an accused person commits the offence of robbery with violence, if with an intention to steal, he commits one or more of the following acts:
>
> a. Is armed with any dangerous or offensive weapon or instrument; or
>
> b. Is in company with one or more persons; or
>
> c. Immediately before or immediately after the time of the assault he beats, strikes or uses any personal violence to the person."

Whether the offence of Robbery with violence was proved

39. In Dima Denge Dima (Supra) the Court of Appeal said that the ingredients of the offence of robbery with violence are appreciated disjunctively. The offence is therefore proved if one of the elements is proved. The Court said "..... The elements of the offence under section 296 (2) of the penal code are three (3) in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence".

40. In the instant case, PW1 and 2 testified that the assailants were three in number. One was armed with a knife. Infact PW1 received serious stab wounds that were classified as grievous harm.

41. Thirdly, PW1 told the court that his money and itel phone were stolen. He produced a receipt in evidence to prove that he owned such phone. All the three elements were proved.

Identity of the perpetrator;

42. The only issue that remains is whether the appellant was properly identified as the perpetrator.

43. The appellant was not arrested at the scene, but later in his house. According to PW1 and PW2, the incident occurred at 6.30p.m. and there was still light. PW1 told the court that it is the appellant who took his property while the 1st accused stabbed him and that he is a person he knew by appearance. PW2 who was following PW1 and was about seventy (70) metres away also testified to having seen the appellant whom he knew by the nickname 'Toto'. The appellant did not deny the fact that he was also known as 'Toto' According to PW4, the arresting officer, it is the complainant who told him who had attacked him and that led to the appellant's arrest. PW4 also knew the appellants before. I believe that once he was described as 'Toto' he was known. Although this was a case where an identification parade should have been held, I find that the offence having been committed during the daytime and having been in close proximity with the complainant and the identifying witnesses being two, the appellant was properly identified as one of the robbers.

44. There was no plausible explanation given as to why the complainant and PW2 would pick on the appellant as one of the robbers. I find the conviction to be sound and I affirm it.

Whether the sentence is harsh and excessive.

45. In sentencing, the court is guided by *the Constitution*, the relevant statutes and the Judiciary Sentencing guidelines Section 296(2) provides for mandatory death penalty upon conviction.

46. In the case of Wanga -V- Republic (2024) KESC 38 KLR the Supreme Court clarified that the Muruatetu case was only applicable to murder cases; that it does not apply to other cases such as Robbery with violence cases or sexual offences. Under the doctrine of stare decisis this court is bound by the decision of the Supreme Court. The appellant had been warned by the Prosecution Counsel that the prosecution had issued notice of enhancement of sentence in the event the appeal was dismissed and the appellant insisted on proceeding with the hearing of the appeal. The only sentence available under section 296 (2) is one of death.

47. Consequently, I set aside the sentence of sixty (60) years imprisonment and substitute it with the death sentence. The appellant is sentenced to suffer death under Section 296(2) of the Penal Code. The appeal lacks merit and is hereby dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAPENGURIA THIS 30TH DAY OF SEPTEMBER, 2025.

R. WENDOH

JUDGE

In the Presence of:-

Appellant – in person (virtual)

Mr. Majale holding brief for Mr. Mugun for Respondent

Juma/ Hellen Court Assistants