



REPUBLIC OF KENYA



**Ogangi alias Denno v Republic (Criminal Appeal E032 of 2022)
[2025] KEHC 13900 (KLR) (16 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 13900 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E032 OF 2022
JM OMIDO, J
SEPTEMBER 16, 2025**

BETWEEN

DENNIS OCHIENG OGANGI ALIAS DENNO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the judgement, conviction and sentence of Hon. F.M. Rashid, Principal Magistrate delivered/imposed on 14th July, 2022 in Winam Criminal Case No. 705 of 2019, Republic v Dennis Ochieng Ogangi alias Denno)

JUDGMENT

A. The Charges

1. Dennis Ochieng Ogangi alias Denno (hereinafter referred to as “the Appellant) was in the first count charged with the offence of robbery with violence contrary to Section 296(2) of the Penal Code, Cap 63 Laws of Kenya.
2. It was stated in the particulars of the offence that on the 6th day of August, 2019 at about 2200hrs at Mbeme area in Kisumu East Subcounty within Kisumu County, jointly with others not before the court, the Appellant while armed with a dangerous and offensive weapon namely a gun robbed Rosemary Odhiambo (hereinafter referred to as “the Complainant) of Ksh.77,000/-, a Samsung mobile phone valued at Ksh.19,500/-; property all valued at Ksh.96,500/- and immediately before the time of such robbery, used actual violence against the complainant.
3. The Appellant was in the second and third counts charged with the offence of being in possession of identity cards for other persons contrary to Section 14(f) of the *Registration of Persons Act* Cap 107 Laws of Kenya.



4. It was stated in the particulars of the offence that on 17th August, 2019 at Mowlem area, Kisumu East Subcounty within Kisumu County, with intent to defraud, the Appellant had in his possession identity cards with the following details:
 - i. Identity card number 9xxx8, serial number 2xxx 0 in the names of Joseph Odhiambo Onginya (count 2).
 - ii. Identity card number 2xxx5, serial number 2xxx3 in the names of John Ouko Owiti (count 3).
5. In the fourth count, the Appellant faced a charge of being in possession of a homemade firearm contrary to Section 34(1) of the [Firearms Act](#), Cap 114 Laws of Kenya.
6. The particulars of the offence in the fourth count were that on 17th August, 2019 at Mowlem area, Kisumu East Subcounty within Kisumu County, the Appellant was found to be in possession of a homemade gun.
7. The Appellant denied all the four counts, which then called for a trial.
8. Ultimately, the Appellant was convicted on the first count and sentenced to serve a sentence of imprisonment for fifteen years. He was acquitted on all the other counts.

B. The Prosecution Case

9. The prosecution case was founded on the evidence of two witnesses while the defence comprised of the Appellant's sworn testimony.
10. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence tendered before the trial court and make its own conclusions. It must, however, have in mind that the trial court, unlike this court, had the advantage of hearing their evidence of the witnesses first hand, seeing them when they testified and observing their demeanour.
11. In the Case of *Okeno v Republic* [1972] EA 32, the then Court of Appeal for Eastern Africa, was succinct that in a first appeal, it is the duty of the first appellate court to re-evaluate and re-assess the evidence adduced before the trial court and to arrive at its own conclusions while bearing in mind that the appellate court did not see or hear the witnesses when they testified.
12. The said duty had also been dealt with earlier by the former Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336, where the court posited that:

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanour which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”



13. In a case of *Mark Oiruri Mose v Republic* [2013] eKLR, the Court of Appeal observed that:

“It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanour of the witnesses and hearing them give evidence and to give allowance for that. The well-known case of *Okeno vs Republic* [1977] EA 32 which sets out that principle has been referred to in several decisions of this Court and of the High Court. In our view, it does not appear that the learned Judge was alive to those legal requirements or if he was, then he did not apparently put them into practice.”
14. The prosecution’s first witness was Emmanuel Otieno (“PW1”). The witness told the court that he was a resident of Nyamasaria area in Kisumu County and a businessman by occupation.
15. PW1 narrated the events of 6th August 2019 and told the trial court that on that day at about 2200hrs, he ferried the complainant, who was his client, using his friend’s bodaboda from Carwash area to Mbeme area where she had a wholesale outlet. Upon reaching the complainant’s gate, PW1 saw a man standing near the gate, whom he named before the trial court as Dennis. He stated that the man was his friend, well known to him, adding that he even knew the man’s wife. He further stated that Dennis was dressed in a t-shirt, cap and pair of jeans that were all blue in colour.
16. PW1 explained that Dennis remained standing at the complainant’s gate as the complainant paid PW1 for the bodaboda services. He explained that his bodaboda’s headlight was on and that there was light from the gate.
17. It was PW1’s further testimony that as the complainant walked towards her house, he saw Dennis “jumping on her”. He rushed to her rescue and as he tried to help, two other men emerged and one pointed a gun at him. The men then ordered PW1 to leave. PW1 then pushed the bodaboda towards the men and the same fell on them. He took to his heels while screaming and shouting for help.
18. PW1’s testimony was further that neighbours and members of the public responded and arrived at the scene.
19. The matter was subsequently reported at Kondele Police Station where PW1 recorded his statement the following day. He learnt of Dennis’s arrest on 17th August, 2019. The witness pointed out the Appellant in court as the one he referred to as Dennis. He stated that the Appellant was his friend and was well known to him before the incident.
20. Upon being cross examined by the learned counsel for the Appellant Mr. Odhiambo, B.F., PW1 stated that he recorded his initial statement on 6th August, 2019 and his further statement on 18th August, 2019. He stated that he had the Appellant’s cell phone number which he had saved as Denno and that the Appellant resided near Marende Carwash.
21. The second prosecution witness was the complainant, who told the trial court that she was a resident of Mbeme area and a teacher and business lady by profession.
22. The complainant told the trial court that on 6th August, 2018 at about 2100hrs, she closed her business and went to a neighbour’s shop that had an Mpesa outlet where she deposited some cash, after which she requested for bodaboda services from PW1 to ferry her to her home in Mbeme.
23. The complainant told the trial court that PW1’s bodaboda developed mechanical problems and did not ignite. PW1 then used one Obisa’s bodaboda to take the complainant to Mbeme. Upon arrival



at her home, the complainant saw a man standing near her gate. She alighted from the bodaboda and as she walked towards her gate, the man walked towards her, accosted her and grabbed her bag which had about Ksh.77,000/- in it. Just then, another man emerged. The complainant threw her bag into a nearby bush. She attempted to run but fell down as one of the men pursued her while the other went to the direction where she had thrown the bag.

24. At that moment, the complainant's husband and his brother rushed to the scene to her rescue, but found that the robbers had already fled with the bag. PW1 told them that the one who had stood at the gate was Denno and that he was well known to PW1. The complainant did not know the robbers.
25. The complainant reported the matter to Kondele Police Station the next morning and recorded her statement.
26. Upon being cross examined by learned counsel for the Appellant, the complainant told the trial court that the two robbers fled on a motorcycle. She further stated that she did not see the faces of the two men who robbed her and was therefore unable to identify them.
27. After the testimony of the complainant, the prosecution was granted several adjournments to call more witnesses but failed to do so. Ultimately, the prosecution case was closed on 26th May, 2022.
28. On 2nd June, 2022, the trial court found that the prosecution had established a prima facie case against the Appellant and he was placed on his defence. The trial court however failed to state, as is the requirement, the counts in respect of which the Appellant was placed on his defence.
29. In the case of David Musila v Republic [2009] eKLR, the court held that where an accused person is charged with more than one count and the trial court finds that there is a case to answer, then the court must state clearly which counts the accused is to be placed on his defence.
30. There could be situations, depending on the circumstances of the particular case where failure to state the counts in respect of which the accused person is placed on his defence can render the trial unfair and potentially lead to the quashing of a conviction on appeal, or to a retrial, particularly where the court, upon evaluating such failure, reaches the finding that the same violates the accused person's right to a fair trial under Article 50 of *the Constitution*.

C. The Defence Case

31. The Appellant opted to give sworn evidence and told the trial court that he woke up at 0600hrs on 5th July, 2019 and received a phone call from a driver by the name George Odoyo, who told the Appellant that he was unwell and requested the Appellant to assist in ferrying some people to Migori County, for which he would be paid Ksh.2,500/- and an additional Ksh.500/- per day for the six days that he was to be at Migori. The Appellant stated that Odoyo was deceased at the time he testified.
32. The Appellant stated that he left his house on that day at about 0800hrs and proceeded to pick the vehicle that he was to use to Migori from Regal Petrol Station. He collected the money and left for Migori at 1430hrs and arrived at Suna area in Migori at 1800hrs. He told the trial court that he remained in Migori for six days and returned to Kisumu on 12th July, 2019 at 1330hrs and took the vehicle to a garage.
33. The Appellant told the trial court that on 17th August, 2019, he was arrested by police officers for consuming illicit alcohol, who beat him up and demanded for Ksh.5,000/- from him. He was then taken to Kondele Police Station.
34. The Appellant did not call any witness. He closed his case at that stage.



D. Grounds Of Appeal

35. The grounds upon which the present appeal is premised, as discernible from the Appellant's petition of appeal and the submissions filed are, in precis, as follows:
- a. That the particulars in the charge sheet and the evidence were at variance.
 - b. That the prosecution did not provide sufficient evidence of identification/recognition of the Appellant.
 - c. That the Appellant's defence was not considered.
 - d. That the charge of robbery with violence was not proved against the Appellant beyond reasonable doubt.

E. Issues For Determination

36. I have carefully considered the respective testimonies of the two prosecution witnesses and the sworn testimony by the Appellant. I have further considered the grounds of appeal, the submissions by the two sides and the record of the trial court. I will frame the issues for determination, as discernible from the material before me, as follows:
- a. Whether the prosecution proved to the required standard that the complainant was attacked and robbed of cash Ksh.77,000/- and a Samsung mobile phone valued at Ksh.19,500/- on the night of 6th August, 2019.
 - b. Subject to (a) above; whether the Appellant was properly identified by PW1 without any degree of fault as among those who attacked and robbed the complainant on the night of 6th August, 2019.
 - c. Whether the Appellant's defence was properly considered by the trial court.
 - d. Whether it was proved beyond reasonable doubt that the Appellant committed the offence of robbery with violence against the complainant on the night of 6th August, 2019.
37. The first issue for determination which is whether the prosecution proved to the required standard that the complainant was attacked and robbed of cash Ksh.77,000/- and a Samsung mobile phone valued at Ksh.19,500/- on the night of 6th August, 2019. On this, although the complainant did not state that she was robbed of a cell phone, her unchallenged evidence was that the attackers stole from her a bag that contained Ksh.77,000/-. This fact was well corroborated by PW1 whose evidence was that she witnessed the attack by the robbers upon the complainant.
38. The Appellant however challenged the proper identity of the person who is said to have been robbed, whether it was Rosemary Odhiambo (as per the charge sheet) or Rosemary Adhiambo Abonyo (as per the self-introduction made by the complainant).
39. In the case of *Benson Muriithi Munene v Republic* [2016] eKLR the court held that the misdescription of the name of a complainant in criminal proceedings was not fatal, as long as there was no doubt about the complainant's identity.
40. In *Republic v Mohamed Abdow Mohamed* [2013] eKLR the court held that misdescription of a complainant's name was not necessarily fatal if the accused is not misled or prejudiced, and if the person is clearly identifiable.



41. In the matter before the trial court, the identity of PW2 as the same complainant named in the charge sheet was not in question. This court is not in doubt that the person who testified as the complainant was indeed the complainant. As such, the misdescription of the complainant's name was not fatal as the Appellant was not misled or prejudiced. The misdescription of the complainant is curable under Section 382 of the Criminal Procedure Code.
42. In his submissions, the Appellant questioned whether the amount that the complainant was robbed was Ksh.96,500/- as per the charge sheet or Ksh.77,000/- as per her evidence. What I understand the prosecution meant was that the value of the stolen phone was Ksh.19,500/- while the amount that she stated was in the bag was Ksh.77,000/-, thus making the total value of the property to be Ksh.96,500/-.
43. In any event, even if the amount stated in the charge sheet was to be of such difference from that in the complainant's evidence, the discrepancy would be one that is curable under Section 382 of the Criminal Procedure Code.
44. In the case of Maxwell Kimani Njuguna v Republic [2003] eKLR, where the amount stated in the charge sheet was less than the amount actually stolen, the court held that this was merely an irregularity, and not a defect that would invalidate the charge. The court stated that the discrepancy was curable under Section 382 of the Criminal Procedure Code, since no prejudice to the accused person had been demonstrated.
45. The second issue for determination is whether the Appellant was properly identified by PW1 without any degree of fault as among those who attacked and robbed the complainant on the night of 6th August, 2019. Noting that the complainant did not see the faces of her attackers, the learned trial Magistrate relied entirely on the evidence of a single witness – PW1 – to convict the Appellant.
46. The evidence of a single identifying witness can be sufficient to convict an accused person in a robbery with violence case, but only under strict conditions. Courts have repeatedly held that identification evidence must be treated with great caution, especially when it is the sole evidence linking the accused to the crime.
47. The court in the case of Republic v Eria Sebwato [1960] EA 174 held that where the evidence of identification rests on a single witness, the court must warn itself of the danger of relying on such evidence, and must examine it with great care.
48. In Abdalla Bin Wendo & Another v R [1953] 20 EACA 166 the court observed as follows:

“Subject to certain exceptions, a fact may be proved by the testimony of a single witness... but this rule does not lessen the need for testing with the greatest care the evidence of such a witness respecting identification...”.
49. Thus then, in a situation where the court has to rely on a single identifying witness, the court must carefully evaluate the credibility of the witness and the reliability of the identification and if there is doubt about the accuracy of the identification, then the benefit of the doubt must be given to the accused, with the court reaching the result that the identification was not fool proof.
50. In the case of Roria v Republic [1967] EA 583 the accused was convicted based on the evidence of a single identifying witness. The incident occurred at night and visibility was poor. The witness claimed to have seen the accused for only a few seconds. No corroborating evidence was presented. The Court of Appeal held that the conviction was not safe and quashed the same. The court emphasized the dangers of relying solely on a single identification especially under circumstances that were not



conducive to identification without a degree of error such as poor visibility or short exposure. The court held thus:

“A conviction resting entirely on identity invariably causes a degree of uneasiness... It is not enough for the judge to warn himself; he must also look for other evidence to support identification.”

51. The evidence of PW1 was merely that he saw and recognized the Appellant as one of the men who attacked and robbed the complainant. He stated that the Appellant was a person well known to him and that the headlight of the bodaboda that he had and the lights from the complainant’s gate provided light that enabled him to see and recognize the Appellant.
52. It is to be recalled from the evidence of PW1 that he did not describe the intensity of the light and it is unclear whether the same enabled good visibility, taken that the robbery occurred at night. PW1 did not explain the period of exposure to the assailant – whether it was for a short or considerable time. Notably, the learned trial Magistrate did not warn herself on the danger of relying on such evidence to convict, especially considering further that the officers who arrested and investigated the case did not present themselves before the trial court to give an account on their investigations of PW1’s testimony.
53. In the case of *Bwaneka v Uganda* [1967] EA 768, it was held that it is the duty of prosecutors to call as witnesses the police officers who investigated the case and charged the accused.
54. On that point, Sir Udo Udoma, the then Chief Justice of Uganda, made the following observations:

“Then there is the practice indulged in by the police or other prosecutors when prosecuting in magistrates’ courts of not calling police officers who had investigated the case and arrested and charged an accused person involved in such a case. It seems to me that the police, do not attach importance to their duty of investigating cases reported to them, but are content to sit back and wait for a civilian to bring to them someone suspected of or arrested for an alleged commission of a crime.

The result of this practice is the tendency for the police to place much more reliance on complaints made to them without themselves enquiring into the matter. Everywhere the police consider it unnecessary to make further investigations into allegations made against a suspected person, one would normally have thought that ultimately in any case it must be the duty of the police to arrest and charge the suspected person with having committed the offence before bringing him before a magistrate for trial.

The prevailing practice of not calling police officers during trials in magistrate’s courts to testify as to the part they played in deciding ultimately to arrest and charge an accused person is most unsatisfactory. It gives the impression that the police do not seem to realize that it is their duty to control and conduct all prosecutions in the magistrate’s courts in Criminal cases.

.....It is the duty of prosecutors to make certain that police officers, who had investigated and charged an accused person, do appear in court as witnesses to testify as to the part they played and the circumstances under which they had decided to arrest and charge an accused person.

Criminal prosecutions should not be treated as if they were contests between two private individuals.



In the instant case.....There was no evidence as to which police officer had taken charge of the case and what steps, if any, he had taken when he decided to arrest and charge the appellant. The absence of such evidence necessarily creates a lacuna in the case for the prosecution because it gives the erroneous impression that the central government police officers had nothing to do with the case and had taken no part whatsoever in investigating and deciding on the charge to be preferred against the appellant.

It is to be hoped that in future this practice would be discontinued because without the evidence of an accused person having been arrested and charged by the police, the proceedings of the trial with respect to the prosecution case appear to be incomplete”.

55. What I hear the court to be saying in the above case is that there could be situations where the failure to testify by the investigating and/or arresting officer(s) could lead to the acquittal of an accused person. The trial before the learned Magistrate is one in which, in my view, the evidence of the arresting and/or investigating officer(s) was crucial and the absence of such evidence vitiates the conviction, considering the shaky identification evidence of one witness.
56. The foregoing being the case, my persuasion is that the identification of the Appellant by PW1 was not without any degree of error as there was no other evidence to support such identification and further considering that there is no evidence that the allegations by PW1 (that he recognized or identified the Appellant) were subjected to investigations.
57. The third issue is whether the Appellant’s defence was properly considered by the trial court. The learned trial Magistrate rendered herself as follows on the defence by the Appellant:

“I have looked at the defence by the accused person. He told the court that he was in Migori when the incident allegedly happened. He said that he had ferried mourners to a funeral in Migori. He however did not avail any evidence or witness to buttress his defence of alibi. I thus find that his defence is not strong enough to displace the prosecution’s case.”
58. When an accused person wishes to rely on alibi evidence, the best practice demands that the prosecution be notified of the same at the earliest opportunity so that they consider presenting rebuttal evidence. However, where the defence of alibi is introduced during defence as was in the case before the trial court, the prosecution, under Section 309 of the Criminal Procedure Code had the liberty to apply to rebut it, which the prosecution failed to do, with the result that the alibi cast reasonable doubt on the case for the prosecution, especially so in a case where the investigating and/or arresting officers did not testify on the investigatory steps that they took to establish the truth. I therefore agree with the Appellant that the defence of alibi was not properly considered by the trial court.
59. The last issue for me to determine is whether it was proved beyond reasonable doubt that the Appellant committed the offence of robbery with violence against the complainant on the night of 6th August, 2019. Without much difficulty, as the Appellant was not properly identified as one of the men who attacked and robbed the complainant, I reach the finding that the prosecution did not provide sufficient evidence to prove beyond reasonable doubt that the Appellant committed the offence that he was convicted on.
60. Being of the findings above, I reach the result that the appeal on conviction is meritorious. I proceed to allow it, quash the conviction and set aside the sentence of imprisonment of 15 years.
61. The Appellant shall be set at liberty forthwith unless he is otherwise lawfully detained.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 16TH DAY OF SEPTEMBER, 2025.



JOE M. OMIDO

JUDGE

Appellant: Present, Virtually.

For The Appellant: Mr. Omollo.

For The Respondent: Ms. Muema.

Court Assistants: Mr. Ngoge.

