

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CRIMINAL APPEAL NO. E054 OF 2024**

**ERICK OMONDI ..... 1<sup>ST</sup> APPELLANT**  
**COLLINS OTIENO ..... 2<sup>ND</sup> APPELLANT**  
**WILLIS RAMADHAN ..... 3<sup>RD</sup> APPELLANT**  
**- VERSUS -**  
**REPUBLIC ..... RESPONDENT**

(Being an appeal from the judgment & conviction of **Hon. D.K. Mtai PM**  
delivered on the **25/4/2024** and sentence passed on the **15/7/2024** in **Winam**  
**SPMCCr Case No. E255 of 2023, Republic v Erick Omondi, Collins Otieno &**  
**Willis Ramadhan)**

**J U D G M E N T**

1. The appellants were charged with 1 Count of Robbery with violence contrary to ***section 295 as read with section 296 (2) of the Penal Code.***
2. The particulars of the charge were that on the **26/6/2023** at around 21.30hrs at Nyalenda village in Kisumu East Sub County within Kisumu County, the appellants with three others not before court, armed with dangerous weapons namely Panga, they robbed one **Sharon Anyango** her TV set, 4½ x 6 inches' mattress, a Samsung Galaxy A3 Core mobile phone and Mengas Cylinder all valued at **Kshs. 56,600/-**.
3. The 1<sup>st</sup> appellant also faced a second Count of house breaking contrary to ***section 304 (1) (a)*** and Stealing contrary to ***section 279 (9) of the Penal Code.***

4. The particulars of the charge were that, on the **1/7/2023** at Nyalenda village in Kisumu East Sub County within Kisumu County, the 1<sup>st</sup> appellant broke and entered the building used as a dwelling house by **Rose Otieno** and stole a black and white subwoofer make SAYONA valued at Kshs. 7,000, the property of **Rose Otieno**.
5. There was also an alternative charge of handling stolen goods contrary to **section 322 (i) of the Penal Code**. In Count 3, the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were charged with the offence of burglary contrary to **section 304 (2)** and stealing contrary to **section 279 (b) of the Penal Code**.
6. The particulars of the charge were that on the night of **25/6/2023** at 0200hrs in Nyalenda village in Kisumu East Sub County within Kisumu County, the 2<sup>nd</sup> and 3<sup>rd</sup> appellants broke and entered into the house of **Hallan Imbote** with intent to steal from therein and did steal from therein a mobile phone make Tecno Phantom 9 valued at **Kshs. 47,000/-**, the property of **Hallan Imbote**.
7. The appellants pleaded not guilty and a full trial was conducted. The prosecution case was founded on the evidence of five (5) witnesses. The defence evidence was based on the appellants' sworn testimony.
8. In its judgment, the trial court found the appellants guilty and convicted them on Count 1 and sentenced them to serve 25 years' imprisonment. The trial court further convicted the 1<sup>st</sup> appellant on Count 2 and sentenced him to serve 7 years' imprisonment. It acquitted the 2<sup>nd</sup> and 3<sup>rd</sup> appellant on count 3 and directed that the sentences meted out do run concurrently.
9. Dissatisfied with that decision, the appellants filed a joint petition of appeal dated **18/7/2024** raising five grounds of appeal summarised as follows: -

- a) *That the learned trial court erred in law and fact by failing to consider that the ingredients of the offence of robbery with violence were not proved.*
  - b) *That the learned trial erred in law and fact by failing to consider that the evidence tendered was marred with contradictions, discrepancies and inconsistencies thus unsafe to warrant a conviction.*
  - c) *That the sentence imposed was harsh, excessive, punitive and meted out in bad faith against the principles of proportionality, equity and human dignity.*
10. In support of the appeal, the appellants filed separate written submissions. The 1<sup>st</sup> appellant submitted that the trial court made an error in fact and law in not testing the circumstances under which **Pw1**'s identification by recognition was made. This submission was reiterated by the 3<sup>rd</sup> appellant.
11. The 2<sup>nd</sup> appellant submitted that he was not identified by **Pw1** as one of her assailants and as such, he was exonerated from the crime.
12. On his conviction and sentence under Count 2, the 1<sup>st</sup> appellant submitted that the exhibits relied on by the prosecution were obtained in a search that was undertaken contrary to *sections 25, 26, 28 and 29 of the Criminal Procedure Code* as well as *Article 31 of the Constitution of Kenya*.
13. The appellants all submitted that the sentence of 25 years was manifestly excessive considering the issues pertaining to the offence they were charged with were not clear.

14. On its part, the state submitted that all the ingredients of the offence of robbery with violence and stealing were proved beyond reasonable doubt. That there were no contradictions in the evidence presented by the prosecution and further that none had been pointed out by the appellants.
15. That the sentence of 25 years' imprisonment meted out for the offence of robbery with violence and 7 years' imprisonment meted out for the offence of house breaking and stealing were lenient and should not be interfered with.
16. This being the first appellate Court, it is incumbent upon this Court to re-evaluate the evidence afresh and come to its own independent conclusions and findings but at all times considering that it did not see the witnesses testify. (See **Okeno v Republic [1972] EA 32.**)
17. The case before the trial court was as follows; **Pw1 Sharon Anyango** from Nyalenda testified that she knew the appellants prior to the incident as they came from the same estate. That on the **26/6/2023** at around 9.30pm, whilst in her home with her children, she heard the door being locked and six people entered. These were, **Erick, Willis** and **Steve** whom she identified as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> appellant.
18. That **Erick** slapped her face with a panga and told her to keep quiet as they picked things from the house all of which were valued at **Kshs. 56,000/-**. That the 1<sup>st</sup> appellant stood guard as the others picked the various items from the house after which they left. That as the assailants left the house, she screamed.
19. In cross-examination, she stated that there was no electricity on that particular date but that her candle was on and saw the assailants well.

20. **Pw2 Rose Otieno** testified that she knew the appellants as they were her neighbours at Nyalenda. That on **30/6/2023** she returned home and found her house broken into and things missing including sufurias, the TV, woofer, wheelbarrow and cash of **Kshs. 5,000/-**. That she was later called by the chief and informed that some items had been recovered. That she recovered the woofer and speaker. That the woofer was recovered in the 1<sup>st</sup> appellant's home. That the appellants were her neighbours and that she was close to the 3<sup>rd</sup> appellant.
21. **Pw3 Hellen Amondi Mbote** identified the 2<sup>nd</sup> appellant as the person who stole her Techno Phantom mobile phone on the **25/6/2023**.
22. **Pw4 Phillip Kilimo** testified that he examined **Pw1** on the **28/6/2023** and filled the P3 form. That **Pw1** had sustained injuries on the right side of the forehead that was swollen and she further had a cut wound on the left shoulder joint which was tender.
23. **Pw5 No. 120175 PC Boniface Maina** the investigating officer, testified that the incident was reported at Kasagam Police Station on the **26/6/2023** by **Pw1**. That he established that the suspects were well known to **Pw1**. That the 2<sup>nd</sup> complainant, **Pw2** reported that some suspects had broken into her home and stolen a Soyana woofer together with assortment of bedsheets. That **Pw2** informed him that the suspects were the appellants herein.
24. That **Pw3** also reported that the appellants broke into her home and stole her mobile phone. That she was able to see the suspects running with the aid of a torch light. That they conducted a raid in Nyalenda and recovered a Nayana sub-woofer from the 1<sup>st</sup> appellant who could not explain his ownership of the same but instead chose to flee.

25. When placed on their defence, each of the appellants elected to give a sworn testimony. **Dw1, Erick Omondi Owino** denied committing the offences he was charged with and stated that on **26/6/2023** at 9.30am, he was at home sleeping. That he was arrested on the **6/7/2023** and taken to the police station. He denied knowing **Pw2** and **Allan Imbote**. That on **26/6/2023** at 9pm, he was at home with his wife and that on **1/7/2023** he slept home alone. That he did not know any of his co-accused.
26. **Dw2, Collins Otieno Onunga** testified that on the **26/6/2023** he was at home sleeping. That he was arrested on the **6/7/2023** but that nothing was recovered from him. He denied knowing **Pw1** or **Hallan Imbote**.
27. **Dw3, Willis Ramadhan Ibrahim** testified that on **26/6/2023**, he was at home sleeping. That he was not aware that a search was conducted in his home or that anything was recovered. That he did not know **Pw1** or **Hallan Imbote**.
28. The offence of robbery with violence is a creation of **section 296(2) of the Penal Code**. The offence is made up of two parts. The first part is the robbery and the other part is the aspect of violence.
29. Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft, he uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto.
30. Two things must, therefore, be proved for the offence of robbery with violence to be established. They are theft and the use of or threat to use actual violence or the perpetrator is in the company of another or others.

31. Robbery with violence is proved if any one of the following three ingredients is also established: -

- a) *The offender is armed with any dangerous or offensive weapon or instrument, or*
- b) *The offender is in the company of one or more other person or persons, or*
- c) *The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.*

32. In the present case, the appellants have faulted the trial court's conviction and sentence on, amongst others, the ground that the evidence presented by the prosecution was marred with contradictions, discrepancies and inconsistencies.

33. The issue of identification of the appellants was hotly contested in this appeal. The appellants contended that the trial court failed to test the circumstances under which **Pw1's** identification by recognition.

34. **Pw1** testified that she knew the appellants prior to the incident. That further despite there being no electricity on that day, she had a candle with which she could see the appellants and further that a solar bulb was on.

35. **Pw2** testified that on the **30/6/2023**, she discovered that her home had been broken into and things stolen therefrom, including a woofer which was eventually recovered from the 1<sup>st</sup> appellant's house.

36. The appellants all gave evidence that on the particular night they were at home asleep. However, it is worth considering the evidence on the

appellants' identity as given by **Pw1** which remained unchallenged and unshaken in cross-examination.

37. The appellants' assertion that they were not properly identified and that an identification parade ought to have been undertaken in my view unmerited. In **Katana & Another v Republic [2022] KEC 1160 (KRL)**, the Court of Appeal held that: -

*“... it is also notable that an identification parade is not necessary where the witness is positively confident at the time of commission of the crime as to the identity of the perpetrator of the offence and will only become necessary where the victim of the crime did not know the accused before his acquaintance with him during the commission of the offence, or identification was made under difficult circumstances such that the witness may have made a mistake...”*

38. **Pw1's** identification of the appellants was by recognition as she knew them and was able to disclose their names to **Pw5** who arrested them. I am thus persuaded that the appellants were positively identified as the perpetrators of the offence.

39. **Pw1** testified that the persons who robbed her were armed with pangas. That during the course of the robbery, she was slapped with a panga and that she sustained injuries. This testimony was corroborated by **Pw4** who examined her two days later and confirmed the injuries sustained by her.

40. The appellants further contended that their conviction and sentence was grounded on evidence marred with contradiction and inconsistencies though they failed to point out the alleged contradictions and inconsistencies.

41. In MTG v Republic (Criminal Appeal E067 of 2021) [2022] KEHC 189 (KLR) (15 March 2022) (Judgment) cited with approval Twehangane Alfred v Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6 as follows:

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*“With regard to contradictions in the prosecution’s case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”*

42. In the present case, this Court has subjected the evidence adduced to fresh scrutiny and the Court is unable to find any contradictions or inconsistencies and if at all there were any, the same were not material enough to warrant interference with the conclusions arrived at by the trial court.

43. Having considered the totality of the evidence of the prosecution witnesses, I find the evidence presented by the prosecution witnesses who physically saw the appellants on the material date and time consistent, watertight and believable.

44. As regards the charge brought against the 1<sup>st</sup> appellant in Count 2, it is clear that there was no evidence presented on record of the 1<sup>st</sup> appellant breaking into Pw2’s house and stealing the woofer. However, the said woofer was recovered from his house.

45. The trial court convicted the him on under this charge based on the doctrine of recent possession. Under our law, the doctrine of recent possession is a

principle of circumstantial evidence that states that if someone is found in possession of recently stolen property without a reasonable explanation, then a rebuttable presumption can be drawn that they stole the property or received it knowing it was stolen.

46. The Court of Appeal restated the doctrine and the elements which must be proved before the doctrine can be applied in **Erick Otieno Arum v Republic Criminal Appeal 85 Of 2005 [2006] eKLR** where it held: -

*“In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”*

47. In the present case, the woofer stolen from **Pw2** was recovered from the 1<sup>st</sup> appellant’s house and the appellant never contested the ownership. The appellant did not offer any explanation why and how the woofer was in his possession but instead denied that the same was found in his house. This, without more, would have been sufficient to link the appellant with the robbery. In this case, it fortifies the identification evidence as analyzed above and further links the 1<sup>st</sup> appellant to the charge of house breaking and stealing.

48. As regards the sentence, it was the appellants' contention that the same was excessive.

49. Under **section 296(2) of the Penal Code**, the only one express and mandatory sentence prescribed upon conviction for the offence of robbery with violence is the death penalty.

50. The appellants were sentenced to 25 years' imprisonment. The sentence prescribed by the law, **section 296(2) of the Penal Code** is death. In the present case, it is clear that the appellants were lucky to escape with a sentence of imprisonment rather than death.

51. In **Idi Hassan Kazungu v Republic Criminal Appeal No. 6 of 2018 (UR)**, the Court of Appeal expressed itself as follows: -

*“Francis Karioko Muruatetu & Another vs Republic, Katiba Institute & 5 Others [2021] eKLR [Muruatetu 2], the mandatory death sentence prescribed under Section 296 (2) of the Penal Code for the offence of Robbery with violence is still legal. Differently put, the appellant could not find refuge in the Supreme Court decision in Francis Karioko Muruatetu & Another v Republic [Muruatetu 1] as that decision only addresses mandatory death sentence in regard to the offence of murder contrary to Section 203 and 204 of the Penal Code. Muruatetu 2 directed that the decision in Muruatetu 1 does not apply to the mandatory death sentence provided under section 296 (2) of the Penal Code.”*

52. Since no notice was given to the appellants of the likelihood of enhancement of the sentence, I will not disturb the sentence of the trial court although it was illegal as that would be prejudicial to the appellants.

53. The upshot of all the above is that I find that the appeal lacks merit and I hereby dismiss it in its entirety.

It is so ordered.

**DATED** and **DELIVERED** at Kisumu this **9<sup>th</sup>** day of **October, 2025**.

**A. MABEYA, FCI Arb**

**JUDGE**