

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
CRIMINAL CASE NO. E049 OF 2025

REPUBLIC-----
APPELLANT

VERSUS

PAUL MUTAMBO -----1ST
RESPONDENT

AMOS OMINA----- 2ND
RESPONDENT

BOAZ ONGAYI----- 3RD
RESPONDENT

(Being an Appeal against the acquittal of the respondents arising from the judgment of the Principal Magistrate Hon. R.S Kipng'eno in Criminal Case Number E 1485 of 2024 delivered at Butali Law Court)

JUDGMENT

INTRODUCTION

1. The Respondents herein were charged with the offence of Robbery with violence contrary to section 295 as read with section 296 (2) of the penal code.
2. The facts are that on the 9th day of December 2024, at Mbagara village, Mutuma location, in Lugari sub-county within Kakamega county, jointly, while armed with crude weapons, namely metal rods, wooden sticks, and a panga, robbed one HESBORN LIBESA GAZEMBA of money worth Kshs. 150,000/= and a phone make Techno pop 7 valued Kshs. 35,000/= and immediately after the time of such robbery wounded the said complainant was wounded.
3. The Respondents took plea and pleaded not guilty, and the matter proceeded with the prosecution calling five witnesses while the defence had four defence witnesses.
4. The trial court found that the prosecution had failed to prove its case beyond a reasonable doubt and acquitted the three Respondents under section 215 of the Criminal Procedure Code.
5. The appellant, being aggrieved by the decision of the trial court, filed an appeal raising the following grounds of appeal;
 - a) That the learned trial magistrate erred in law and in fact in failing to find that the evidence against the respondents

disclosed the offence of Robbery with violence, hence the charges against the Respondents were proved; therefore, it was very safe to convict and sentence the respondents accordingly

- b) That the learned trial magistrate erred in law and fact and misdirected himself in law by failing to sufficiently analyse the prosecution's evidence and doing so would have established that the evidence was sufficient, conclusive, and reliable to sustain a conviction of Robbery with violence.
- c) That the learned Trial Magistrate erred in law and fact and misdirected themselves by failing to note that the Respondents herein were positively identified by the prosecution witnesses through recognition rather than identification.
- d) That the learned Trial Magistrate erred in law and misdirected himself in law when he failed to consider that the Respondents were persons who were well known to the complainant and his witnesses.
- e) That the learned Trial Magistrate erred in law and in fact by failing to recognize that the prosecution had proved all the ingredients of the offence of Robbery with violence, to wit, actual violence was meted upon the complainant, brazen theft of the property of the complainant, the respondents were armed, they were three in number and lastly, they were positively identified.
- f) That the learned trial Magistrate erred in law and fact by failing to consider that the prosecution was able to prove the presence of the Respondent at the primary scene through digital evidence.
- g) That the learned trial Magistrate erred in law and fact by failing to appreciate that many eye witnesses swore that they saw the Respondents herein rob the complainant herein.

- h) That the learned trial Magistrate erred in law and fact and misdirected himself by failing to critically analyse the prosecution evidence, but instead came up with conclusions that were based on personal whim rather than proven facts.
- i) That the learned Trial Magistrate erred in law and fact by failing to explain the reasoning behind his judgment and acquittal of the Respondents herein, as is required by law.
- j) That the learned trial Magistrate erred in law and in fact by failing to give credence to the digital evidence that proved the complainant was where he claimed he was attacked, and ignoring all the medical records that showed the complainant was injured and failing to take note that the complainant was a business man therefore it was possible that he had in his possession the money he claimed was robbed from him.
- k) That the learned trial Magistrate erred in law and fact by failing to take note that even the defence witnesses testified that they saw the complainant that evening as he approached his gate, thereby corroborating his evidence.
- l) That the Learned trial Magistrate erred in law and fact by failing to interrogate what the Respondent and their witnesses were doing at the gate of the complainant or their motive for being there at the time of night.

6. . The appeal was canvassed by way of written submissions.

7. I have looked at submissions, the evidence adduced at the lower court and the trial courts Judgment.

Summary of the Evidence before the Lower Court.

8. Pw1 testified that on 19/12/2024 at 8 P.m, he was waiting at his gate, which was locked with a motor vehicle, together with the shop assistant and his young daughter, when he saw 3 people he identified as the three Respondents. He identified Paul Mutambo, who was his neighbor, Amos, and Boaz, who were general laborers since 2010.

9. He testified that he was able to identify them since the light from the car illuminated them. He said that he was attacked by Paul Mutam using a panga while his two accomplices attacked him with a wooden plank and a metal rod. That they beat him and kicked him.
10. He claimed that the 1st accused retrieved a phone from his bag while the 2nd and 3rd accused ransacked his pocket and ordered him to move out of the area or they will burn his shop.
11. He raised an alarm, his wife and children came to his rescue. The three assailants fled on a motorcycle. He went and reported the matter to the police station. He was later treated at Lumakanda County Hospital.
12. During cross-examination, he testified that he had known the 1st accused for 10 years and that they had had a land dispute with the 1st accused's family, and as a result, the 1st accused had kept destroying his fence. He testified that he was able to see the Respondents approach them when they neared the gate, although the security light was not yet operational. The Respondents removed him from the car, which they also damaged.
13. He testified some independent witnesses refused to testify after they were threatened by the Respondents.
14. On re-examination, he testified that he still had an ongoing land case with the accused before the Eldoret court.
15. PW2 was Zelphan Mponde, who recalled that on 9/12/2024 at around 8.30 P.m, she was together with the complainant on their way home, and when they reached the gate she saw 3 people approaching the gate, she identified them as the three Respondents. She identified Amos, who was their customer and had known Paul and Boaz for three years. She recalled that Paul had a panga, Amos a plank of wood, and Boaz a metal rod.
16. She said the Accused took the money which was in a carrier bag(*daily sales*). The assailants took the bag and phones. She screamed.

17. At cross-examination, she testified that they closed the shop at 8.00 and that they had day sales of Kshs. 150,000/= which they were taking home when they were attacked by the Respondents.
18. She testified that Amos struck the vehicle with a wooden object when PW1 stopped the motor vehicle. She alighted the vehicle and started screaming Paul took the money from the car after attacking PW1, he bled profusely as a result.
19. On re-examination, she said that the CCTV camera captured the incident for it was adjacent the gate. She maintained she saw Paul take the money from the carrier bag. The Accused ordered them to move from the area .
20. PW3 was Nelson Agulinda, who recalled that on 9/12/2024, around 8.30 p.m., he was from the shop heading home when he saw three people whom he recognized as the Respondents standing at the gate. He stated that he saw them attack Pw1 and take something from the car when members came.
21. During cross-examination, he stated that he was able to identify the 2nd accused as Boaz and that he did not know the 3rd accused. He stated that he was from the shop to purchase sugar, the shop adjacent to the gate and heard someone being slapped and saw the 1st accused raise a panga and assault PW1 and then enter the motor vehicle.
22. PW4 was the clinical officer Bosire Vincent. he produced the P3 and the treatment form for PW1, which was filed by his colleague whose signature he said was familiar with.
23. According to the report, the complainant came to the facility with blood-soaked clothes, a white vest which was marked PMF1-5, and black jeans. The complainant was bleeding from the nose and mouth and his upper left canine, missing and had injuries.
24. He stated that the complainant was treated with painkillers and antibiotics. He produced the treatment notes from Lumakanda County Hospital as PExh 2, P3 form as PExh 3, and treatment notes from Malava County Hospital as PExh 4.

25. Pw5 was the investigating officer testified that the complainant was on his way home when he was attacked by the three people who attacked him, and robbed him, Kshs. 150,000/= and a phone. After which the complainant managed to drive himself to Lumakanda county hospital for treatment.
26. The witness produced the bloodied clothes worn by the complainant, being a blood-stained vest, as well as 5 torn shirts - PMF1-6 photos of the motor vehicle that was damaged.
27. The prosecution closed its case, and the defendants were placed on their defence.
28. DW1 was Paul Mafupi Mutambo, he testified that on 9/12/2024, he shut his barber shop at 4 p.m. to attend a funeral committee planning and was there until 9.30 pm, and he went to sleep.
29. He denied being present when Pw1 was attacked.
30. During cross-examination, he denied being party to the land dispute between the Complainant and their family.
31. DW2 was Amos Omina Wanyama, who stated that he knew the complainant and denied the charges leveled against him. He stated that on the material day 9/12/2024, he was at 2 Lion Bar when PW1 called him to his house, he refused to go because of the harsh threats issued against him by PW1. He claimed that the complainant came for him, attacked him, and pulled him towards his house. He produced a P3 form DMF1-4, to show that he was attacked and injured by the complainant
32. During cross-examination by the prosecutor, he denied attacking the complainant and claimed that the CCTV footage that was played in court was falsified. He acknowledged knowing PW1 and PW2, who were the shop assistants. He claimed that he was the one attacked and that he was referred to the hospital for treatment after he was injured on the right hip, back and left elbow, and head, although the p3 form did not indicate the head injury. He claimed

that he was saved by DW3 after PW1 attacked him and that his clothes had been torn, although not blood-stained.

33. DW3 was Boaz Ongayi , denied attacking PW1. He testified that on the material day, he found PW1 fighting with DW1 in a bar, he was drunk, and he was overpowered by PW1. He denied having any quarrel with PW1 and admitted that PW1 had brought land from them.

34. DW4 was James Mushina, testified that on 9/12/2024, the complainant came home at 9.00 pm as usual, and on that day, instead of stopping, went to the 2nd accused and started a fight with him. Although the 2nd accused was drunk, he was seriously assaulted, and when he came to the scene found the 3rd accused. He claimed PW1 entered his vehicle and left. He claimed that the incident took place around 8-9 pm and he witnessed the complainant attack the 2nd accused who was drunk.

35. During cross-examination by the prosecution, he stated that he had sold his land to the complainant and denied hatching a plan to evict him. He claimed to have seen the complainant's car arriving home and entering his residential home. He denied seeing the 2nd accused with a white top and maintained that it was PW1 who attacked the 2nd accused.

36. DW5 was Mercy Mulele. A clinical officer. He produced the treatment notes and P3 for Amos Wanyama, which indicated he had an injury on his left arm after being hit by a car. She produced the P3 form as Dexh 4(a)(b).

37. During cross-examination, she denied being paid to testify and stated that she treated the patient on 9/12/2024 and not 10/12/2024. During re-examination, she stated that the history indicated 2nd Respondent was injured by a moving car.

38. DW6 was Martin Wangila, who testified that he had known the Respondents since childhood and the complainant. He recalled that on the material day, PW1 turned his car at the gate and went around to attack the 2nd accused. He denied seeing the 1st accused.

He stated that PW1 went to his vehicle and reversed it, injuring the 2nd accused person in the process, after which he escorted him to the hospital.

39. During cross-examination. He stated that the 2nd accused was drunk, and he went to seek treatment and report the assault to the police. He was referred to the CCTV and identified the 2nd accused's voice.

40. DW7 testified that he knew the accused and the complainant, and on 9/12/2024, he testified that he was at home and that the 1st accused was at his son's funeral committee until 8 P.m.

41. During cross-examination, he stated that he had a matanga at his home, although he could not recall the time each visitor came and left. The 1st accused was part of the committee.

42. During re-examination, he confirmed that he had a burial planning meeting and that the 1st accused was there until 10 p.m., although he did not produce any document or book to support his claims.

43. The defence closed its case.

44. The trial found that the prosecution had failed to prove its case beyond a reasonable doubt and hence acquitted the Respondents under section 215 criminal procedure code, for the offence of robbery with violence.

45. The prosecution, being dissatisfied with the decision of the lower court, appealed against the judgment.

46. I have carefully considered the grounds of appeal, the entire evidence presented before the trial court, and the written submissions filed. I have also read the judgment of the learned trial magistrate. Having done so, I find that the key issue that emerges for my determination in this appeal is whether the prosecution proved its case before the trial court beyond any reasonable doubt, and if so, whether the trial court erred in acquitting the Respondents.

Analysis and Determination

47. This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced before the trial court so as to reach its own independent determination whether or not to uphold the conviction of the appellant. As was held by the Court of Appeal in **Okeno vs. Republic (1972) EA 32**, the Court of Appeal therein stated as follows:

' An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M Ruwala Vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958] EA 424.'

48. The appellant herein submits that the trial court erred in acquitting the respondents of the charge despite the overwhelming evidence adduced in court pointing towards their guilt. The appellant avers that the trial court focused on the defence evidence rather than on the prosecution's case.

49. The offence of robbery with violence is provided for in sections 295 and 296(2) of the Penal Code as follows:

"295. 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 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.

(2) 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

50. What constitutes the offence of robbery with violence was well captured in the case of **Olouch vs Republic (1985) KLR**, where this Court stated as follows: -

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

The offender is armed with any dangerous and offensive weapon or instrument; or The offender is in company with one or more person or persons; or 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.”

51. I will proceed to analyze the grounds of appeal vis-à-vis the law as to what constitutes the offence of robbery with violence, the evidence on record and the trial courts judgment.

52. The trial court correctly isolated the key ingredients to prove as:-

- i. If there was theft.
- ii. The ownership of the property stolen.
- iii. If there was any form of threat or actual violence to the complainant ,before ,during or after the incident
- iv. If it was committed by one or more persons and if one was armed with a dangerous/offensive weapon or instrument.

53. Pw1 and Pw2, the appellant witnesses, testified that they were at the gate waiting to enter the compound when they saw the three

Respondents being Paul Mutambo, Amos Omina, and Boaz Onyayi, approach their vehicle. They identified the three as they were neighbours. They testified how the three attacked PW1 using a panga, a wooden plank, and a metal rod, and afterwards stole Kshs. 150,000/= from the car, as well as a phone that was on the dashboard.

54. PW4, the clinical officer, confirmed injuries suffered by PW1 (bleeding, lost tooth) and produced treatment records, the P3 and treatment notes PMF1-3 and PMF1-4, respectively.

55. PW5 (investigating officer) produced the torn clothes, photographs prepared in the course of investigations to support his case that PW1 was attacked and robbed by the Respondents.

56. The defence denied any involvement in the attack and offered defence of alibi, the 2nd Accused claimed the complainant was the aggressor for he attacked him while he was intoxicated.

57. On the claim of theft; PW1 and PW2 testified that Kshs. 150,000/= in a (*carrier bag*) and a Techno phone were stolen during the assault. The trial court's insistence on an M-Pesa book as necessary proof was unduly rigid; the law does not always demand documentary proof where credible oral evidence is offered. The complainant being a business person, it is possible that had the amount of money stolen and again it should not be lost that other items like the phone was also stolen. I therefore find that theft occurred. The trial magistrate seems to have found that some money was stolen but his problem was the money allegedly from the Mpesa business was not proved to be part of the money stolen for failing to produce the Mpesa book when he stated in his judgment "**there is the issue of the money allegedly stolen, some of which was from Mpesa business. The Mpesa book was not produced to support the allegation at all**".

58. On the issue of violence, PW1 testified that he was attacked by the 3 Respondents. He recalled how he was hit and beaten with a panga, a metal rod, and a wooden plank he bled and lost a tooth in

the process. Pw4, who was the clinical officer, confirmed the injuries and the loss of a tooth by PW1 and produced medical treatment notes as evidence. This shows that violence was meted against the complainant during the robbery.

59. On the element of being in company and being armed. It was the evidence of the witnesses that the three Respondents attacked the complainant while armed with a panga, a metal rod, and a wooden plank. The trial magistrate found so in his judgment.

60. Now the question to answer is, who were the assailants?

61. The complainant maintained that he was attacked and robbed by the Respondents whom he knew for they are his neighbours. He was able to recognize them for the lights of his motor vehicle were on and they were also captured by the CCTV camera and even the voice of the 2nd accused could be heard. The Respondents did not deny that they are neighbours with the complainant and that they know each other.

62. The trial court agreed with the complainant in its judgment, when the magistrate stated “ ***on the 2nd issue the 1st Accused denied being at the scene at that time, and called evidence to that effect. The 1st Accused claimed that he had been dragged into the case to settle the land issue. Given that the parties are well known to each other being neighbours, I find that the 1st Accused was properly identified through recognition in the lighting conditions and probably by their speech. The CCTV footage had a voice hollering in the background that he must move/Lazima utahama. This was attributed to the 2nd Accused who was said to be at the two lions bar in the neighbourhood. His comments were attributed to the threatened of eviction of the complainant from the area. I find that the accused were in company of one more persons at the time of the attack. This ingredient is therefore proved beyond reasonable doubt***”.

63. Further the magistrate also stated ***“The myriad of issue revolving around the parties makes a honest consideration of the incident as common assault or other offence but not robbery with violence. On this point , some reasonable doubt exists as to whether the Accused waited outside the Complainants gate to rob or beat him up”***

64. From the above quotes, it is clear that the trial court had formed its mind that the complainant was attacked, injured by the Respondents and categorized the offence as a common assault or any other offence but not robbery with violence. If this was so, the trial court should have involved the provisions of Section 179 of the Criminal Procedure Code and punished the accused accordingly.

65. I note that the trial court in its judgment leaned heavily on the issue of the land dispute which has been pending since 2018 as the main cause of the attack, and absence of clear mens rea on the part of the Respondents. To me this was a misdirection because the long standing land dispute could have made the Respondents harbour the requisite mens rea to harm the complainant. This coupled with the repeated threats to evict the complainant from the land he has settled leaves no doubt the possible reasons as to why the Respondents might have attacked the complainant.

66. The defense’s case was a general denial and gave conflicting accounts of their movement on the material day. They did not offer credible alibi evidence that was supported by independent confirmation of what occurred on the material day.

67. The trial magistrate correctly dismissed the alibi noting that the CCTV camera captured the 3 Respondents being present at the scene of the attack.

68. It is a trite law that the defence of alibi should be raised early enough in the proceedings to enable the prosecution adequate time to rebut the same if need be.

69. The Respondents raised the defence of alibi late in the proceedings such that the prosecution had no time to rebut the

same though as observed by the trial court the production of the CCTV footage dethroned the Respondents defence of alibi.

70. From the analysis of evidence adduced at trial, it is apparent that the trial court misdirected itself by finding that the prosecution had not proved its case beyond a reasonable doubt when there was watertight evidence that the three Respondents attacked the complainant, injured him, causing him grievous harm and stole from him. Facts it had established in its judgment.

a) In these circumstances, I find that the trial court's acquittal cannot stand. The evidence, when properly analysed, discloses a case of robbery with violence proved beyond a reasonable doubt as per Section 215 of the Criminal procedure code.

71. Accordingly, the appeal is allowed. The judgment of acquittal by the Principal Magistrate in Criminal Case No. E1485 of 2024 is set aside, and a conviction is substituted I do order as follows:-

b) The respondents (Paul Mutambo, Amos Omina, Boaz Ongayi) are convicted of the offence of robbery with violence contrary to Sections 295 read with 296(2) of the Penal Code .

c) The matter is referred to the Chiefs Magistrates Court Kakamega for hearing on sentencing , for the 2 magistrates sitting in Butali Law Courts handled the matter at some stage.

d) Mention on 27th October, 2025 before Chief Magistrate for further directions.

e) It is so ordered.

f) Right of Appeal 14 days.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA
THIS 14TH DAY OF OCTOBER, 2025.**

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Mr Muaka for the Respondent present online.

Ms Osoro for the DPP present online.

MS OSORO: I pray for warrants of Arrest against the Accused's.

COURT: Warrants of Arrest to issue against the Accused's, OCS Butali Police Station to execute.