



**Republic v Omollo & another (Criminal Case E100 of 2024)
[2025] KEMC 127 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEMC 127 (KLR)

**REPUBLIC OF KENYA
IN THE VIHIGA LAW COURTS
CRIMINAL CASE E100 OF 2024
JA AGONDA, SPM
MAY 28, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

MARYFAIR OMOLLO 1ST ACCUSED

ERICK HAMISI 2ND ACCUSED

JUDGMENT

1. The accused persons Mayfair Omollo and Erick Hamisi are charged with the offence of robbery with violence contrary to Section 296(2) of the [Penal Code](#) Cap. 63 Laws of Kenya.
2. Particulars are that on the 12th January, 2024 at 8.30p.m. at Madzu village Mungoma location, Vihiga sub county within Vihiga County while armed with dangerous weapons namely pangas and knives jointly with other not before court robbed Agnes Lavuna Kshs.4,000/=, TV set 32 inch make Vidaa and a mobile phone make Samsung A11 all valued at Kshs.37,000/=, during the time of such robbery you used actual violence to the said Agnes Lavuna.
3. The accused persons denied this charge. The prosecution called three witnesses in support of their case. The two accused persons gave sworn statements in their defence without calling any witness.
4. Agnes Makungu Lavuna testified as Pw1 the complainant. It was her evidence that on 12th January, 2024, she was at home with her maid Caroline Mbone. She was seated on her bed. She was talking to a police officer. The accused entered into her house with his accomplice. She saw them as the lights were switched on. The accused entered into her bedroom. The 1st accused had a panga and inserted substance in her mouth. He told her to remain silent otherwise he would kill her whereas the 2nd accused was searching for money and the title deeds. 1st accused was beating her and the 2nd accused was ransacking the room. He took 5litre of cooking oil and new gumboots. The 2nd accused was carrying her household effects from her house. 1st accused asked for ATM card, pin, phone and ID card. He hit



her asking for mpesa and bank pin numbers that she had given them wrong numbers. He also took Kshs.5,000/= from her purse. The accused persons left and went to the sitting room and took the television. They left after the house and locked in her bedroom. She screamed through the window and the neighbours came to rescue her. The maid was at her bedroom. The neighbours tried tracing the title deeds but they were missing. She reported the matter at the police station. He was referred to the Vihiga Referral hospital for treatment as per treatment notes dated 24th January, 2024 “PEXh.1” and P3 form dated 30th January, 2024 “PEXh.2.” The accused had worn masks and added clothes in their bodies. She identified them by their voices and that the accuseds’ father was related to her late husband. They were her relatives. They tried to transact on her bank but she had blocked the same. That on her phone, she did not know what transaction the accused did as she never recovered her phone. The next day, she reported the matter at the police station and that the accused were known as hardened criminals by the area chief. She said that the accused had not attacked her before. That the television was bought by their children and it was smart television model Hisense. It was not recovered. She identified the accused in court. That 1st accused was wearing purple top whereas 2nd accused was wearing black and green shirt.

5. Nariva Bwire testified as Pw2 a clinical officer. It was his evidence that she examined the victim eleven days after the incident. According to the client’s history, she was assaulted on 12th January, 2024 at 8.30p.m at Madzu sub location by three men and one of them was known to her by his voice and appearance. The victim was cut by a panga on her face and kicked her on her chest. On examination, she had swollen face and in between the eyes. She was given painkillers and hypertension drugs and the classified injury as “harm.” He was not the first medical personnel who treated the victim. She produced P3 form “PEXh.2.”
6. PC Abdi Mohammed [116476] testified as Pw3 the investigating officer based at Vihiga police station. It was his evidence that on 13th January, 2024 he received a call from DCIO, Vihiga that an elderly lady was attacked at Chanzu village. He visited the scene with his colleagues. He established that the elderly lady and maid were attacked. The gang gained entry through back door that had not been locked. He interrogated the victims who revealed the named of the accused persons and identified them. The maid said that one of the accused was her boyfriend i.e Eric Hamisi. He arrested the two accused who were positively identified by the victims. The stolen items were not recovered. But jacket belonging to Eric was recovered and identified by the maid. The back door not locked but the clutch was placed without a padlock. The house was ransacked, the television was removed from the wall. He charged the culprits with the offence herein and they were arraigned in court. The clothes were all over in the house. The complainant identified Eric who was a neighbour. A blooded stained panga was found in 1st accused’s house. 2nd accused had a grey jacket and 1st accused had a black jacket, mask and gloves. He stated that on 20th January, 2024 they recovered grey jacket when 2nd accused was wearing it that was identified by the maid. The 1st accused was arrested on 20th January, 2024 at Isinya whereas 2nd accused was arrested on 21st January, 2024 at home. The items stolen were television, Samsung phone and cash and the said items were not recovered. That was the close of prosecution case.
7. On the other hand, the (2) accused persons gave their sworn statement without calling any witness. Mayfair Omollo testified Dw1. It was his evidence on 12th January, 2024, he did not know what happened. That on 20th January, 2024, he was at work at Luanda, he received two customers who he took at CDF, Vihiga. He went with them to Kidondo power station. They requested that he show him his licence and he did not have a valid licence. He was arrested and one of the police asked for Kshs.50,000/= to be released. That on the day, he was arraigned in court, he was to be charged with traffic offence. He was charged with offence of robbery with violence. He said that he did not know



the complainant or the maid Caroline.. He stated that he hailed from Kisingu and not Boma location. He did not know what transpired on 12th January, 2024.

8. Erick Hamisi testified as Dw2 the 2nd accused. It was his evidence that on 12th January, 2024 he was at home doing his daily chores. He was arrested on 21st January, 2024 while at home and taken to Vihiga police station. He was not told the offence he was arrested for. He was told that he had cut trees from someone's farm. He was arraigned in court and charged with offence of robbery with violence. He was not arrested in possession of any weapons. He did not know the complainant together with Caroline.

Issues and Determination

9. I have carefully evaluated the evidence by the prosecution and accused persons on record. I have now to decide whether or not the prosecution has proved their case to the required standard as against the accused person i.e. beyond any reasonable doubt. As the accused persons are charged with the count that is of the offence of robbery with violence. With regard to the offence of robbery with violence, the main ingredients thereof which the prosecution ought to have proved to the required degree as enunciated under Section 296 (2) of the [Penal Code](#) Cap. 63 Laws of Kenya are as follows:-
 1. Whether the accused persons were armed with a dangerous and/or an offensive weapon on 12th January, 2024 at 8.30p.m.during this incident?
 2. That the accused person was in the company of more than one person?
 3. That That the accused persons threatened and or used actual violence immediately before, during and or after the said robbery incident by injuring or wounding the victims thereof while using the said dangerous weapons?
 4. Whether the accused was positively identified or not?
 5. Whether the accused persons stole Kshs.4,000/=, TV set 32 inch make Vidaa and a mobile phone make Samsung A11 all valued at Kshs.37,000/= from the complainant's house on 12th January, 2024 at 8.30p.m?
10. The main ingredients of an offence of robbery with violence which ultimately becomes the main issues for my determination. In the circumstances therefore, the prosecution needed only to prove one of them to the required standard against the accused persons in order to sustain this charge. I am also alive to the requirement that proof of any one of the above ingredients of robbery with violence is enough to base a conviction on under Section 296 (2) of the [Penal Code](#) as was held Oluoch-vs-Republic, (1985) KLR 549 Court of Appeal, at Kisumu stated that the offence of 'robbery with violence is committed in any of the following circumstances: a) The offender is armed with any dangerous and offensive weapon or instrument; or b) The offender is in company with one or more other person or persons; or c) 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.'
11. On the first issue, with regard to the attackers having dangerous and offensive weapons during the melee/attack. The complainant Pw1 in her oral evidence stated that on 12th January, 2024, she was at home with her maid one Caroline Mbone. She was seated on her bed. When the accused persons entered into her house. She saw them as the lights were switched on. The 1st accused entered into her bedroom and he was carrying a panga and he went ahead and inserted some substance into her mouth. That 1st accused was beating her and ordered her to remain silent otherwise he would kill her. At the same time, the 2nd accused was ransacking the room looking for money and the title deeds. Having considered the evidence on record, I note that during this incident the complainant's attackers were



armed with dangerous and /or offensive weapons i.e. panga. This is clearly proved by the evidence tendered by the complainant Pw1. Pw1's evidence was corroborated by the investigating officer Pw3 in his oral evidence stated that he recovered a blooded stained panga at the 1st accused's house. On the date of the robbery incident, the 2nd accused had a grey jacket and 1st accused had a black jacket, mask and gloves. He stated that on 20th January, 2024 they recovered grey jacket when 2nd accused was wearing it. The same was identified by the maid who was his girlfriend. The 1st accused was arrested on 20th January, 2024 at Isinya whereas 2nd accused was arrested on 21st January, 2024 at home. All the above evidence tendered by the said prosecution witnesses and which evidence not only mutually corroborated each other but also remained wholly unchallenged, in my humble view proves beyond any shadow of doubt that the complainant's attackers were indeed armed with the dangerous weapon being panga during this robbery incident. And that is why Pw1 confirmed that she was injured and sort treated as per the clinical officer Pw3 stated in his evidence. I have no reason to doubt that a robbery did take place that was confirmed by Pw1 who was beaten and tortured by the 1st accused who left her with bodily injuries. I find that the evidence of the said prosecution witnesses was consistent and their testimonies corroborative. On the first issue, I find I the affirmative that the attackers had a dangerous weapon i.e a panga.

12. On the second issue, it is my further finding that the complainant's attackers were in the company of more than one person. This is clearly proved by the evidence tendered by the complainant Pw1 who stated categorically that he saw two men who entered into the house and that 1st accused went straight into her bedroom whereas the 2nd accused was ransacking the house and carrying away her household goods. There was no identification parade done. Though the complainant stated that she was able to identify both the attackers as the electricity lights was on. Pw1 evidence was fortified by the investigating officer Pw3 who managed to arrest the two accused persons who attacked the complainant at her house. I hold that the prosecution evidence was water tight. I am inclined to believe Pw1 and Pw3's testimonies taking into account that the same was consistent with the initial report the complainant made to the police to the extent of having been attacked by more than one person. The complainant Pw1 was at home with her maid who happened to be 2nd accused's girlfriend. On the second issue, I find that there was more than one person when the robbery incident ensued.
13. On the third issue, whether or not the complainant was subjected to an actual violence during this robbery incident, the Pw1 stated that the 1st accused had a panga and that in the process of asking for mpesa Pin number and bank account pass word. When she refused to disclose. He assault her using the panga and in the process she sustained injuries. The complainant's evidence was fortified by the clinical officer Pw2 who stated that the victim visited their hospital. According to her history, she was attacked on 12th January, 2024 at 8.30p.m at Madzu sub location by three men and one of them was known to her by his voice and appearance. The victim was cut by a panga on her face and the 1st accused kicked her on her chest. On examination, the complainant had swollen face and in between the eyes. He gave her painkillers and hypertension drugs and he classified injury as "harm." He was not the first medical personnel who treated the victim. He produced P3 form "PEXh.2." In the foregoing premises, it is my finding that the complainant Pw1 was physically assaulted with dangerous weapon i.e a panga and 1st accused subjected her to actual violence. On the third issue, the prosecution has proved that the 1st accused person meted out physical violence on the complainant and she sustained injuries as per P3 form "PEXh.2."
14. On the fourth issue, accordingly, whether or not it is the accused persons who not only attacked the complainant on the material night but also robbed her off, of her properties as particularized in the charge sheet. This brings me into the realm of the evidence of identification. It was therefore incumbent upon the prosecution to prove to the required degree that the accused persons were properly identified



on the material night at the scene as the complainant's attackers so as to rule out any possibility of mistaken identity. There is evidence of identification which was tendered by the prosecution. This incident took place on the night 8.30p.m. To this end the complainant Pw1 herein that she saw two men enter into her house and the one with the panga went directly to her bedroom demanding for her mpesa Pin number and bank accounts' passwords. The Pw1 saw the two men properly and her house was well lit. She stated that though the 1st accused was wearing a mask and gloves. She recognized him by his voice and appearance. Thus, identification was by way of recognition. Thus, Pw1 had a clear view of the accused persons during the robbery incident and buttressed by the fact that the complainant was able to narrate the precise role which the two accused persons played in this incident. The evidence on identification is given by one prosecution witness the complainant.

15. I cite the case of *Kinyanjui & 2 Others-vs-Republic* [1989] KLR, the court stated:

“The purpose of an identification parade is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion.” (Emphasis added)

16. Though identification parade was not conducted, I hold that it was no fatal to the prosecution case. The complainant Pw1 having properly identified her attackers and considering the length of time, the attackers took in the scene of crime that was well lit, there was ample time for the complainant and her maid to have sufficiently recollected themselves and identify their attackers. In my view the complainant gave a very cogent and concise account of the events of that material date. Further, the circumstances were optimal for a positive identification. More importantly, I am satisfied that notwithstanding the fact that identification was by one eye witness the complainant, my view is that the identification was water tight. I have interrogated the circumstances under which such identification was made. I note that there was only one attacker who had a mask and gloves but the complainant knew him by his voice and appearance. All these are circumstances which in my view favour positive identification and linked the accused persons to the offence to robbery with violence. I am convinced that the identification of the accused persons was free from possibility of error.

17. On the other hand, the accused persons denied having been at the scene of crime, 1st accused gave his evidence that on 12th January, 2024, he did not know what happened. That on 20th January, 2024, he was at work at Luanda, he received two customers who he took to CDF, Vihiga. He went with them to Kidondo power station. They requested that he showed them his licence and he did not have a valid licence. He was arrested and one of the police asked for Kshs.50,000/= to be released. That on the day, he was arraigned in court, he was to be charged with traffic offence. He was charged with offence of robbery with violence. He said that he did not know the complainant or the maid Caroline. He did not know what transpired on 12th January, 2024. Whereas 2nd accused Dw2 stated that on 12th January, 2024 he was at home doing his daily chores. He was arrested on 21st January, 2024 while at home and taken to Vihiga police station. He was not informed of the offence he had committed. He was told that he had cut trees from someone's farm. He was arraigned in court and charged with offence of robbery with violence. He was not arrested in possession of any weapons. He did not know the complainant or her maid one Caroline.

18. In essence the accused persons were raising the defence of alibi. The general rule of law is that the burden of proving the guilt of a person before any reasonable doubt never shifts whether the defence set up is one of alibi. Ordinarily, for one to avail himself of the defence of alibi, he should raise it at



the earliest instance possible so that the prosecution can have an opportunity to rebut it. In *Karanja V Rep* (1983) KLR 501 the Court of Appeal held:

- “ 1. The word “alibi” is a Latin verb meaning “elsewhere” or “at another place”. Therefore where an accused person alleged he was at a place other than where the offence was committed at the time when the offence was committed and hence cannot be guilty, then it can be said that the accused has set up an alibi. The appellant’s story in this case did not amount to an alibi as it was mentioned in passing when giving evidence and, furthermore, it was not raised at the earliest convenience, ie when he was initially charged.
2. In a proper case, the court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused’s guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence, or his alibi, if it amounts thereto, at an early stage in the case, and so that it can be tested by those responsible for investigation and prevent any suggestion that the defence was an afterthought.”

19. In this case, from the evidence of the investigating officer Pw3 that was detailed and gave the chronology of the event that led to the both accused being arrested. Thus, the defence of alibi is an afterthought. But in any event, even if the prosecution set out to rebut the alibi, it may not have achieved much because the said alibi is very vague as it does not specifically state where the accused were on 12th January, 2024 at 8.00pm. In my view the accused persons having totally failed to lay the foundation of their defence case during their cross examination of the complainant, clinical officer and investigating officer and based on the pertinent and relevant issues, only goes a long way to connote that their purported defence was an afterthought and a fabrication tailor made for the purposes of this case and must be rejected as such. From the complainant’s evidence, she identified the accused persons without any doubt, in my view the overwhelming evidence by the prosecution does not connote conduct of innocent persons at all. Thus, I find and hold that the accused have been properly placed at the scene of crime. The alibi was very vague. I, therefore dismiss the alibi as an afterthought and untrue.
20. All the above evidence tendered by Pw2 and Pw3 in my humble opinion corroborates the complainant’s evidence as far as the robbery was committed. In the circumstances, it is quite evident that three ingredients of the offence of robbery with violence as established under section 296 (2) of the *Penal Code* in my humble opinion were all properly proved to the required degree by the prosecution. I believe that all the complainant’s properties as particularized in the charge sheet and further alluded to in his evidence i.e. the complainant lost Kshs.4,000/=, TV set 32 inch make Vidaa and a mobile phone make Samsung A11 all valued at Kshs.37,000/= were actually stolen from her during the robbery incident as this was proved by her own evidence tendered to that effect and which evidence was further fortified by the investigating officer Pw3. In any event, the recovery of a panga from 1st accused’ house proved that the accused persons were the culprits who committed the offence during the robbery incident. The prosecution had proved that beyond any doubt the complainant the sole victim properly identified the accused persons herein within the meaning of section 268 of the *Penal Code* Cap. 63, Laws of Kenya.
21. On the whole therefore and based on all the reasons I have advanced hereinabove I hold and find that the prosecution has proved its case i.e. the count herein against the accused persons to the required standard. I hereby do find them guilty as charged and therefore proceed to convict them accordingly in terms of Section 215 of the *Criminal Procedure Code* Cap 75 Laws of Kenya.

Orders accordingly



DATED, SIGNED AND DELIVERED IN THE OPEN COURT THIS 28TH DAY OF MAY, 2025.

J.A.AGONDA

PRINCIPAL MAGISTRATE

On: 28.05.2025

Before: J.A. Agonda PM

C/A: Francis

C/P: Muchiri

1st Accused: Present

2nd Accused: Present

Counsel for Accused: Ms. Lumallas

Court: Judgment delivered, signed and dated in the open court.

J.A.AGONDA

PRINCIPAL MAGISTRATE

