Republic v Ekwam (Criminal Case E113 of 2025)
[2025] KEMC 226 (KLR) (16 September 2025) (Ruling)

Neutral citation: [2025] KEMC 226 (KLR)

REPUBLIC OF KENYA

IN THE MARALAL LAW COURTS

CRIMINAL CASE E113 OF 2025

AT SITATI, SPM

SEPTEMBER 16, 2025

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

JOSEPH EKWAM ..... ACCUSED

RULING

1. In Count I, the accused person denied the charge of robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 11th May, 2025 at 1930hours at Maryland area within Maralal township in Samburu Central Sub-County of Samburu County, jointly with others not before the court robbed Michael Mulwa of Kshs 3,300/= Cash, Infinix mobile phone worth Kshs 1,000/= and a cordless drilling machine valued at Kshs 6,500/= and before the robbery threatened to use violence on the said Michael Mulwa.

2. In Count II, he pleaded guilty to the charge of failing to register as a Kenyan citizen contrary to section 5 of the *Registration of Persons Act*. The particulars were that on 13th May, 2025 at Maralal Police Station in Samburu Central Sub-County he was found not to have registered as a Kenyan citizen despite his attainment of the age of majority i.e. over 18 years. A presentence report returned a favourable finding on his suitability for a non-custodial sentence.

3. The accused person was represented by Mr. Lanyasunya Namayana as a Pro Bono Advocate while Prosecution Counsel Peter Eysimkele conducted the DPP's case.

The DPP'S Case

4. PW1 Michael Mwati Mulwa told the court that on 11th May, 2025 at 7pm he delivered renovation materials to Lucky Boy Hotel and left to collect his working tools. He told the court that on his way back to the hotel with the cordless drilling machine, he discovered that he had forgotten to carry a measuring tape. This made him to reroute to his friend who lived around the Toyota Maralal area. He

added that as he approached the Toyota Maralal area from the Maryland direction, he saw a group of young men coming from the Somo Mjinga direction. He counted 6men in total. He described the area as having bright security lights on both sides of the road. He pointed out that each street lamp was 5 or 6t feet high and was electric powered.

5. The witness added that no sooner had he gotten near Toyota Maralal than one of the 6 men tripped him while the others surrounded him. As he went down, one of the six snatched away his cordless drill while a second suspect frisked empty his pockets for cash Kshs 3,300/=. A third suspect removed and took away his shoes and the fourth took the mobile phone. He noted that none of the 6 suspects was armed with any offensive weapon.

6. His salvation came about when a motorcycle came along with full headlights. When it shone its lights on the gang, the gangsters scattered. He got up and ran as a fast as a deer and reported to the owner of Lucky Boy Hotel about the attack and robbery. The owner notified the police. Due to the urgency of the renovation works, he did not immediately report to the OCS the crime incident.

7. PW1 stated that the next day on 12th May, 2025 he was at a pool table when he spotted 1 of the 6men who had participated in the robbery. He immediately notified the pool owner who asked him to leave the venue discreetly. After exiting the scene discreetly, PC Hassan was notified and he effected the arrest of the suspect. No stolen property was recovered from the accused person.

8. The witness clarified that he did not see the faces of all the 6men except for the one whose face was shone on by the motorcyclist's bright headlights. He told the court that the particular suspect was the one who held him by the waist to pin him down when he was trying to get up.

9. In cross-examination, the following emerged:It was dark at the time of the robbery.The scene of the attack was out of range of the coverage of the street lightsHe admitted that the attack happened too fast for him to see the faces of the gangstersHe clarified that the motorcyclist shone the headlights very briefly on the face of one of the robbers who is now the accused person but conceded that when he lodged his initial statement with the police he never mentioned any headlights from a motorcycleHe did not describe the appearance of the suspect when he lodged his first report to the policeHe did not give out the name of any suspect involved in the robberyHe confirmed that the suspect in court had a hoodie on at the time of the attack

10. In re-examination, he told the court that the suspect was a complete stranger to him prior to the attack and that the scene of robbery was out of range of the street lights.

11. PW2 STEPHEN KIBE told the court that he had hired PW1 for some renovations at his hotel on 11th May, 2025. The witness stated that before the work was done, he received a call from the complainant alerting him that he had been robbed en-route to the hotel. When cross-examined, he stated that the complainant showed up at the workplace looking shaken moments after the alleged robbery

12. PW3 S/NO. XXX Police Corporal Amos Mulama testified as the Investigating officer. He told the court that on 12th May, 2025 a case of robbery with violence was reported at the Maralal Police Station. The OCS Minuted the case to CPL Mulama who then called the complainant on his mobile but he was unreachable. The net day he learnt that the suspect had been arrested by OC Hassan and detained at the station. He thus recorded the statement of PC Hassan who then contacted the complainant to meet CPL Mulama for statement recording. The complainant stated that he was robbed of his Kshs 3,300/=, mobile phone, shoes and a cordless drilling machine worth Kshs 6,000/=. No recoveries were made.

13. The investigator visited the alleged crime scene and noted that there was no single street light around the scene of the robbery and observed that the attack took place in a very dark area. He affirmed that

much later the complainant stated that there was a motorcycle that had shone its lights on the face of one of the robbers.

14. In cross-examination, the following emerged:There were 2 versions of the investigation diary and he believed that the second one had been edited.The police did not carry out an identification parade since the suspect was arrested by PC Hassan after the complainant picked him outHe conceded that a robbery situation is a situation of duress and a victim might be mistaken on identityHe confirmed that neither the name nor the description of the suspect was given to the police at the time of the first report.

15. PW4 Administration Police Constable Hassan Mwangi told the court that he effected the arrest of the accused person on 12th may, 2025 at 2330hours after the complainant approached him with the alert that the wanted suspect was in a pool table playing. Before effecting the arrest of the suspect, the complainant named the suspect as "VJ".

16. In cross-examination, APC Mwangi affirmed that the complainant named and pinpointed "VJ" at the pool table but could not tell whether the complainant had known the suspect prior. He stated that to the best of his recollection, there was security light on the nearside of Maryland.

17. At that stage, the DPP closed their case. he duty of this Court is to determine if the DPP has established a prima facie case against the accused person.

Determination

18. What constitutes a prima facie case has been well explained in the authority of Ramanlal Trambaklal Bhatt -Versus- Republic (1957) EA 332 which has recently been re-applied in the case of Republic -versus- Benard Nthiwa Makau [2019] eKLR (Wakiaga J.) where the latter superior court had this to say:

> 4. At this stage of the proceedings all that the court has to determine is whether the prosecution has established a prima facie case to enable the court place the accused person on his defence. Prima facie case has been defined in the case of Ramanlal Trambaklal Bhatt v Republic (1957) EA 332 as follows:-
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> Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot argue that a prima facie case is merely one which on full consideration might possibly be thought sufficient to sustain a conviction.
>
> This is perilously near suggesting that the court could not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case, nor can we argue that the question whether there is a case to answer depends only on whether there is "some evidence irrespective of its credibility or weight sufficient to put the accused on his defence."
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> A mere scintilla of evidence can never be enough nor can any amount of worthless discredited evidence... It may not be easy to define what is meant by prima facie case but at least it must mean one on which a reasonable tribunal properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence." (Emphasis added)

19. The learned Mr. Justice Wakiaga in Nthiwa Makau (supra) went on to pronounce the law as follows:

> 5.3 In the case of Republic v Jagjivan M. Patel & Others (1) TLR as follows:-

> All the court has to decide at the close of evidence of the charge is whether a case is made out against the accused just sufficiently to require him to make a defence, it may be a strong case or it may be a weak case. The court is not required at this stage to apply its mind in deciding finally whether the evidence is worthy of credit or whether, if believed, it is weighty enough to prove the case conclusively, beyond reasonable doubt.
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> A ruling that there is a case to answer would be justified, in my opinion, in a borderline case where the court, though not satisfied as to conclusiveness of the prosecution evidence, is yet of opinion that the case made out is one which on full consideration might possibly be thought sufficient to sustain a conviction." (Emphasis added)

20. An extensive discussion of the elements of robbery with violence were recently explained in the authority of Charles Mwai Kimani -v- Republic (2022)(Kariuki J.) in the following words:

> 50. The offence of robbery with violence is contained in Sections 295 and 296(2) of the Penal Code as follows:
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> > 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 in order 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.
> >
> > 296(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."
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> 51. Further, In Jeremiah Oloo Odira v Republic [2018] eKLR the Learned Judge encapsulated the aforementioned sections and elaborated on the offence of robbery with violence as follows:
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> > Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person 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. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

21. On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

i. The offender is armed with any dangerous or offensive weapon or instrument, or

ii. The offender is in the company of one or more other person or persons, or

iii. 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"

21. While there is no doubt about the occurrence of the robbery with violence on account of the presence of more than one gangster who committed the theft, there is a lot to be desired on the issue of identification of the suspects. The leading authority on this issue was Maitanyi v Republic [1986] KECA 39 (KLR) (J.O.Nyarangi, H.G .Platt & J.M. Gachuhi JJ.A.) had to state about the evidence of a single identifying witness in difficult circumstances:

> It must be emphasized that what is being tested is primarily the impression received by the single witness at the time of the incident. Of course, if there was no light at all, identification would have been impossible. As the strength of the light improves to great brightness, so the chances of a true impression being received improve. That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and it position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the great burden of senior magistrates trying cases of capital robbery to make these enquiries themselves. Otherwise who will be able to test with the "greatest care" the evidence of a single witness?
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> There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his or her assailants, to those who came to the complainant's aid, or to the police. In this case no inquiry of any sort was made. If a witness receives a very strong impression of the features of an assailant, the witness will usually be able to give some description. If on the other hand the witness says that he or she could not identify or recognise the person, then a later identification or recognition must be suspect, unless explained. It is for the magistrate to inquire into these matters."

22. In the present case, as admitted by the investigating officer and the complainant, the robbery took place at night at a very dark location out of the range of the coverage of the street lights. This was a very difficult situation for either positive identification or positive recognition for the complainant.

23. 3With no street light, the complainant urged the court to find that he utilized the motorcycle lights to see the face of the suspect. This type of light will be required to be gauged using the standards explained by the Court of Appeal in Maitanyi –verus – Republic (supra). In the case before this court, the complainant who was under duress during the onslaught by the six gangster had less than ample opportunity to see clearly the face of the suspect who in any event had covered his head with a hoodie. Notably, when he went to record his initial statement, he never gave out either name or description of any of the robbers. If he did not have their names and description at the first reporting, how did he later name "VJ" to APC Mwangi if there had not been framing up or mistaken identity? His first report was vague and the naming of "VJ" was probably embellishment or at the very least mistaken identity.

24. The value of a first report in testing the truthfulness of a witness was well explained in Terekali /SO Korongozi & Anor –v- Rex (1952) 19 EACA 259 recently applied in Republic v Onesmus Kaingu Kulola alias Mtawali [2014] KEHC 5192 (KLR) (C.W.Meoli J.)

> We have had reason before to commend on the fact, particularly in cases tried in Tanganyika, that evidence of the first complaint made to a person in authority has not been adduced. Such Statements are admissible under Section 157 of the Indian *Evidence Act* which applies in the Territory. Their importance can scarcely be exaggerated for they often provide a good test by which the truth or accuracy of the later statements can be judge, thus providing a safeguard against later embellishment or the deliberately made-up case. Truth will often [came] out in the first statement taken from a witness at a time when recollection is very fresh and there has been no opportunity for consultation with others."

25. Finally, there is no corroborating witness and there is no stolen item recovered from the accused person to independently link him to the crime.

26. In the result, the court finds that there is no prima face case established against the accused person herein. He has no case to answer and is acquitted under section 210 of the Criminal Procedure Code and is set at liberty insofar as Count I is concerned. Right of appeal is 14 days.

DATED, READ AND SIGNED AT MARALAL THIS 16TH DAY OF SEPTEMBER, 2025

HON.T.A. SITATI

SENIOR PRINCIPAL MAGISTRATE

MARALAL LAW COURTS

Present

Accused Person

DPP Eysimkele

Kelvin C/Assistant