

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CRIMINAL APPEAL NO. E017 OF 2025**

**KEVIN ONYANGO KIGOYO ..... APPELLANT**  
**- VERSUS -**  
**REPUBLIC ..... RESPONDENT**

(Being an appeal from the conviction of **Hon. A.K. Mokeross SPM** delivered on the **16/2/2024** & sentence meted out on the **23/5/2024** in **Tamu SPMC Criminal Case No. E211 of 2023, Republic v Kevin Onyango Kigoyo & Hussein Akaku Etela**)

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

1. The appellant was charged with the offence of robbery with violence contrary to ***section 296 (2) of the Penal Code.***
2. The particulars of the charge were that, on the **25/6/2023** at Kogutu area of Muhoroni sub county within Kisumu County, jointly with others not before court and being armed with dangerous weapons namely knives, they robbed **James Kamau** of his motor vehicle Toyota Hilux registration number **KCN 879V** valued at **Kshs. 1,800,000/-** and at the time of the said robbery used actual violence on the said **James Kamau Gichimu.**
3. The appellant also faced the charge of stupefying in order to commit a felony contrary to ***section 230 of the Penal Code.***
4. The particulars of the charge were that on the **25/6/2023** at Kogutu area of Muhoroni sub county within Kisumu County, jointly with others not before

court with the intent to facilitate the commission of a felony namely stealing, they administered an overpowering drug to **James Kamau**.

5. The appellant pleaded not guilty and a full trial ensued. The prosecution case was founded on the evidence of eight (8) witnesses. The defence evidence was based on the appellant's sworn testimony. The trial court found the appellant guilty of the charge of robbery with violence and sentenced him to death. On the second charge of stupefying, the trial court similarly found the appellant guilty of the same and sentenced him to 5 years' imprisonment however the said sentence was held in abeyance in light of the sentence on the charge of robbery with violence.
6. Dissatisfied with that decision, the appellant filed his petition of appeal dated **18/2/2025** raising six (6) grounds of appeal summarised as follows: -
  - a) *That the trial court erred in law and in fact in making a finding that the appellant administered a drug to stupefy the complainant in order to commit a felony negating the fact that the complainant did not medically test positive to have taken the alleged drug.*
  - b) *That the trial court erred in law and in fact in not making a finding that his identification was flawed, mistaken and marred with contradictions and discrepancies thus inconsequential to his conviction.*
  - c) *That the appellant was denied a fair trial when he was not informed of his right to recall witnesses pursuant to section 214 of the CPC following the amending of the charge sheet.*

- d) That the trial court erred in law and in fact in not making a finding that the mandatory nature of the sentence under section 296 (2) of the Penal Code is unconstitutional thus sentencing the appellant to a manifestly excessive sentence in the circumstances of the case.*
- e) That the trial court erred in law and in fact in not appreciating the appellant's defence that overwhelmed the prosecution case.*
- f) That the trial court erred in law and in fact in denying the appellant his right envisaged in Article 50 (2) (g) (h) of the Constitution of Kenya 2010.*
7. In support of his appeal, the appellant filed written submissions in which he submitted that the case against him was not proved beyond reasonable doubt as the evidence presented by the prosecution was laced with contradictions, inconsistencies and discrepancies that ought to lead to his acquittal.
8. That the trial court erred in making a finding that he administered a drug to stupefy the complainant in order to commit a felony negating the fact that the complainant did not medically test positive to have taken the alleged drug.
9. That his identification was flawed and mistaken and not proven beyond reasonable doubt but was rather concocted to fix him with the alleged crimes.
10. That following the amendment of the charge sheet, he was not informed of his right to recall witnesses to testify afresh hence his trial was defective and cannot be cured under section **382 of the Criminal Procedure Code.**

11. That he was denied his right to legal representation as enshrined under **Article 50 (2) (g) (h)** and further he was denied the right to the least sentence under **Article 25 (c) and 50 (2) (p) of the Constitution**.
12. On its part, the State submitted that it proved all the ingredients of the offence of robbery with violence beyond reasonable doubt. That the appellant was arrested at the scene of the crime and thus there was no need for an identification parade. Further, that the appellant's defence was considered and found to be an afterthought and did not displace the evidence presented by the state.
13. That as regards **section 214 of the Criminal Procedure Code**, the amendment of the charge was not as a result of any defect of charge in substance or form but to remove the 2<sup>nd</sup> accused in order to expedite the trial. That consequently, the appellant was not prejudiced in any way by the said amendment but instead benefited from the same. That the sentence meted out on the appellant was just, fair and lawful considering the circumstances of the case.
14. This being the first appellate Court, its duty is well spelt out namely, to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion but at all times bearing in mind that it did not see the witnesses testify. (See **Okeno v Republic [1972] EA 32**).
15. At the trial, **Pw1 Victor Ouma Ouma** testified that on the morning of **25/6/2023** whilst in the company of one **Evans Onyango**, they were on their way from Kogutu center heading towards Onyalo Biro center using a road

that passed through sugarcane farms. That they heard people talking in the middle of the plantation while another stood on the road talking on phone.

16. That they proceeded on their way and on their way back they heard the same voices but decided to proceed. That some ladies approached them and raised concerns that the people they had heard might have been crooks. Suddenly, a person emerged from the plantation running towards Onyalo Biro.
17. That shortly after, a Tuktuk carrying the same man who had emerged from the plantation stopped and the man regaled to them how his vehicle had been stolen and he had been detained in the cane plantation by a man wielding a knife. That the Tuktuk driver alerted them to be on the lookout for the other man who had been in the plantation. Shortly thereafter, a person in a jean shirt and trouser walked out of the plantation towards the home of a person known to **Pw1**.
18. That when the individual realized that he was being watched he went back to the plantation where he was found seated, flushed out and eventually surrendered to the police. **Pw1** identified the appellant as that individual. That he was later called by one Ojwang who informed him that he had found socks, tablet casing, a jacket, a bottle of water and shoes at the place in the plantation where they had first heard the voices so he called the police and informed them of the find and took the items to the police station.
19. **James Kamau Gichimu**, the complainant testified as **Pw2**. That on **23/6/2023**, he received a call from his friend Allan who sought to lease his vehicle to Vihiga for some clients. That on the following day, **24/6/2023**, he called one of the clients, James, then proceeded to Nairobi to pick them. That there were 3 individuals including the appellant.

20. That on their way back, they briefly stopped at Awasi and when they were about to proceed on their journey, the appellant held him by the neck and informed him that they were going to take away the vehicle as the other client, Karis took the steering wheel. That the appellant pushed his head under the chair, hit him on the head with his fist and proceeded to step on his head so as to keep him on the floor of the vehicle.
21. That the vehicle started to move and he attempted to grab the steering wheel but the appellant beat and punched him. That Karis informed the appellant to get a knife from a black bag and stab him but he pleaded with them to spare his life. That he then lay on the ground and saw the appellant take a water bottle and add some tablets, shook it and forced him to seat up and drink the contents or else he, the appellant, would kill him.
22. That he declined to drink the concoction but the appellant opened his mouth and forced the contents of the water bottle down his throat as he hit him. That at some point the appellant and James took him into a sugarcane plantation where the appellant kept hitting him as he informed him to sleep or the drugs to take effect. That as he sat down, he felt the drugs take effect.
23. That he saw the appellant and his conspirators talk on the phone and while they were distracted, he ran to the road where he managed to flag down a motorcycle and informed him of what had happened before he was transferred to a Tuktuk where he lost consciousness. That he woke up at a hospital where he realized he did not have his jacket, shoes and socks. That he later reported the incident to the police and later on his vehicle was tracked to Malaba.

24. **Pw3 Dennis Ouma** a clinical officer at Nyangoma sub county hospital testified that he examined the complainant on the **25/6/2023**. That on examination, he noticed that the complainant had a swelling on the parietal region of the head. He produced the P3 and medical report as **Pexh9a** and **10**, respectively.
25. **Pw4 Washington Ouma Owino** testified that on the **25/6/2023**, he met a rider with one passenger. That he then saw a man who was barefoot coming out of a sugarcane plantation shouting ‘mnisaidie mnisaidie’. That the man had bruises on the head and walked like he was drunk. That he then took the individual to Awasi Police Station from where they proceeded to Chemilil Police Post where the complainant made his report.
26. **Pw5 Wallace Ojwang Oyugi** testified that on the **25/6/2023**, whilst at home he received a call from **Pw2** who inquired from him if he was at home and if he had seen a stranger in his compound. That he got outside and saw a man dressed in a blue jean shirt and trouser but when the man heard him describe his clothing to **Pw2** over the phone, he ran away to the cane plantation.
27. That the individual was confronted by people who wanted to lynch him but he and **Pw2** stopped them. That on his way home, he passed through the plantation where he found a pair of socks, rubber shoes and jacket. That at the scene, they also found a parcel of tablets, a bottle and a photocopy of an ID with the name **James Oyoo** which **Pw2** took to the police station. That the appellant pleaded with the crowd not to kill him.
28. **Pw6 Dalmas Kibet** a government chemist at Kisumu Government Chemist testified that on **3/7/2023** he received exhibits from **PC Kipruto**. Inside the

envelope, there was white powder and an empty tablet casing with a request to investigate what was contained in the bottle.

29. On examination, he found the white substance in the bottle to be zolpidem, a strong sedative meant for people with sleeping disorders. That it is possible to purchase the tablet over the counter but on prescription only and if one takes the tablet above the prescribed dosage it is fatal. He produced his report dated **10/7/2023** as **Pexh11**.
30. **Pw7 PNo. 240456 Inspector Justus Moi** testified that on the **25/6/2023** at **10am**, he received a call from the county CCIO who informed him that a stolen vehicle was heading towards Busia. He established that the said motor vehicle was registration number KCN 879V Toyota Hilux grey in colour.
31. That they traced the vehicle to Kamuriai location Ostagai sub location Karipai village and noted that the vehicle had the plates **KCU 296A** affixed on it. They gave chase to a place next to a maize field where the driver ran into the plantation but they managed to arrest him. That the driver identified himself as **Hussein Akaku alias Etela**.
32. **Pw8 PNo. 98233 P.C. Elisha Kipruto** testified that he was assigned the case on the **26/6/2023**. On carrying investigations, he established that the appellant was found at the scene of the crime and further that he was identified by the complainant as one of the people who had threatened him during the theft of the motor vehicle. That he was the one who forced him to take the contents of the bottle. That one **Akaku** was the one found with the stolen vehicle.
33. When placed on his defence, the appellant denied committing the offence. He instead offered up an alibi stating that he was arrested in a bar on the

**25/6/2023** following a pub fight that had erupted therein. That he was subsequently charged with robbery with violence.

34. I have considered the evidence and the submissions on record. Firstly, the appellant alleged that there was a failure to inform him of his right to legal representation. This is a right under **Article 50(2)(h) of the Constitution**. The record shows that on the **13/7/2024**, when the appellant initially took plea, the trial court informed him of his right to legal representation. Consequently, this limb of the appeal fails.

35. The appellant further impugned the trial court's conviction on grounds that he was denied a fair trial since he was not informed of his right to recall witnesses to give fresh testimony or cross-examine them pursuant to **section 214 of the Criminal Procedure Code** following the amendment of the charge sheet.

36. The record shows that on the **22/1/2024**, the state applied to amend the charge sheet to dispense with the 2<sup>nd</sup> accused, **Hussein Akaku Etela**, as they proceeded to withdraw its case against that accused under **section 87 "A"**. The record further shows that there was no response by the appellant to the application for amendment of the charge by the State.

37. The court allowed the amendment and had the amended charge sheet read out to the appellant to plead again under **section 214 of the Criminal Procedure Code**. However, the trial court did not inform him of his right to recall witnesses to testify afresh.

38. **Section 214 of the Criminal Procedure Code** provides that:

*“(1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—*

- (i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;*
- (ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.”*

39. The State submitted that the amendment was not as a result of any defect of charge in substance or form but to remove the 2<sup>nd</sup> accused in order to expedite the trial.

40. The intention of Section 214 of the Criminal Procedure Code was considered by the Court of Appeal in the case of **Josphat Karanja Muna v Republic [2009] eKLR** where the court held: -

*“... the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was*

*not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word.”*

41. In this case, the amendment of the charge sheet was to remove the 2<sup>nd</sup> accused and expedite the trial. The gravamen of the initial charge did not substantially change as the amendment did not introduce a fresh element into the offence.

42. It is this Court's view therefore that failure by the trial court to fully comply with the second proviso of **section 214 of the Criminal Procedure Code** did not occasion prejudice to the appellant in the circumstances of this case. That challenge therefore fails.

43. The appellant contended that his right to legal representation as envisaged in **Article 50 (2) (g) (h) of the Constitution** were infringed thus denying him a fair trial. The same provide as follows: -

**“50(2) Every accused person has the right to a fair trial, which includes the right-**

**(g) to choose, and be represented by an advocate, and to be informed of this right promptly.**

**(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly.”**

44. **Article 50** of the *Constitution* guarantees an accused person's right to fair trial. The said rights cannot be derogated by virtue of **Article 25 (c)** of the *Constitution*. Under **sub article 2 (g)**, the court is under a duty to inform

an accused of his right to be represented by counsel of his own choice. The court is also enjoined to inform the accused of such right promptly before plea is taken or before the hearing commences. This is to enable the accused make an informed decision whether or not to seek services of counsel or seek services of counsel from the Legal Aid Committee.

45. In **Republic v Karisa Chengo & 2 Others [2017] eKLR**, the Supreme Court considered the issue of legal representation at state expense and held that: -

*“(87) Article 50(2) (h) of the Constitution provides that “[every accused person has the right to a fair trial, which includes the right... to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.]” It does not define what “substantial injustice” means. However, in David Macharia Njoroge vs Republic, (supra), the Court of Appeal held that “substantial injustice” results to “persons accused of capital offences” with “loss of life” as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are “if substantial injustice would otherwise result...” While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to*

*have embraced this reasoning in a recent decision in Thomas Alugha Ndegwa vs Republic; C.A. No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.*

*(88) In addition to the above, we do not agree with the Court of Appeal's holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of the Constitution is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the Legal Aid Act. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result".*

46. In **Bernard Kiprono Koech v Republic [2017] eKLR**, the Court considered an argument similar to what is now before this Court and stated as follows: -

*"39. Secondly, there is now a framework in place, which was not in place at the time of the appellant's trial, under which an accused person can apply under section 40 of the Legal Aid Act No. 6 of*

*2016 for legal representation at state expense. Section 43 of the Act imposes a duty on the court to inform an accused person of his right to apply for legal representation. It provides as follows:*

*‘43(1)A court before which an unrepresented accused person is presented shall —(a) promptly inform the accused of his or her right to legal representation;(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and (c) inform the Service to provide legal aid to the accused person.’*

*40. I am satisfied that in the present case, there was, first, no substantial injustice as suggested in the Karisa Chengo case resulting to the appellant. Secondly, it is evident that the accused fully understood the charges facing him, and was able to address himself to the issues that arose.”*

47. The appellant took plea on the 13/07/2023. It is recorded thus: -

*“You have a right to legal representation of your own choice; you are encouraged to exercise it. You are hereby informed that you are also entitled to apply to the Legal Aid Board for assistance should you desire.”*

48. I have considered the record. It is evident as set out above that the trial court complied with the provisions of **Article 50 (2)(g) and (h) of the constitution**. Further, it is clear that the appellant was not incapacitated in the conduct of his defence. In the premises, the Court does not find any merit in the appellant’s argument that his right to a fair trial under **Article 50(2)(g) and (h) of the Constitution** was violated.

49. As to whether the State proved its case against the appellant before the trial court to the required standard, 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.

50. 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.

51. 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.

52. Robbery with violence is proved if any one of the following three ingredients is also 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.***

53. The appellant contended that his conviction was grounded on evidence marred with contradiction and inconsistencies though he failed to point out the alleged contradictions and inconsistencies.

54. 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: -

*“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.”*

55. 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.

56. The complainant who testified as **Pw2** was clear in his testimony of how the appellant whom he had travelled with from Nairobi was part of the group that drugged, assaulted and robbed him. He testified how the appellant constantly hit him and forced him, under threat of death, to consume the contents of a bottle that led him to lose consciousness. His injuries were confirmed by **Pw3** who examined him. Both **Pw1** and **Pw5** identified the appellant as the person whom they flushed from the cane plantation where the complainant had been robbed and assaulted.

57. Having considered the totality of the evidence of the prosecution witnesses, this Court finds the same to be consistent, watertight and believable when put against the defence offered by the appellant. Indeed, the trial court considered the entirety of the evidence before it and found that the prosecution had proved its case against the appellant beyond reasonable doubt. This Court finds no reason to interfere with the same.

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

59. 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.

60. The appellant was sentenced to death as prescribed by the law, *section 296(2) of the Penal Code*. In *Idi Hassan Kazungu v Republic Criminal Appeal No. 6 of 2018 (UR)*, the Court of Appeal expressed itself as follows:

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*“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.”*

61. This Court will thus not disturb the sentence of the trial court. The upshot of all the above is that I find that the appeal lacks merit and I hereby dismiss the same in its entirety.

It is so decreed.

**DATED** and **DELIVERED** at Kisumu this 31<sup>st</sup> day of **October, 2025**.

**A. MABEYA, FCI Arb**

**JUDGE**