



REPUBLIC OF KENYA



KENYA LAW
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**Salim alias Sharo v Republic (Criminal Appeal E094 of 2024)
[2025] KEHC 15688 (KLR) (31 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL APPEAL E094 OF 2024
M THANDE, J
OCTOBER 31, 2025**

BETWEEN

MWAYAYA NYAMAWI SALIM ALIAS SHARO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The Appellant was tried and convicted of the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. He was sentenced to 30 years imprisonment.
2. Being dissatisfied with both the conviction and sentence he preferred this Appeal. His summarized amended grounds are that the trial court erred in both law and fact for:
 1. failing to note that the charge sheet was defective.
 2. convicting the Appellant on mistaken identity.
 3. failing to appreciate that the case was fabricated and poorly investigated and not proved to the required standard.
 4. failing to consider the Appellant's defence.
3. The Appeal was canvassed by way of written submissions.
4. As a first appellate Court, I am required to subject the evidence adduced before the trial Magistrate to a fresh analysis and evaluation while giving due allowance for the fact that unlike the trial court, I neither saw nor heard the witnesses. See *Okeno v. Republic* [1972] EA 32 and *Kariuki Karanja v Republic* [1986] KLR 190).
5. The evidence before the trial court was as adduced by 4 prosecution witnesses.



6. PW1, Selina Dama Mnjama stated that on 17.10.22 at 10.30pm, she concluded work for the day at Katinyeni pub, at about 10pm. As she turned off the lights, 2 men approached her and demanded money. They then cut her handbag took it and forced her to open the pub. When she opened, they turned on the lights, ransacked the whole place looking for money. PW1 gave them Kshs. 2,000/= and a phone from the pub. They then carried her to a local brew den where the Appellant threw her on the ground and assaulted her and hit her on the head with a bottle. The other 2 went to the pub and she remained with the Appellant. She managed to escape and got on to a motorcycle that took her to the hospital. She reported the matter at Bondor Police Station who referred her to Kaloleni Police Station. At Mariakani Hospital, she was treated and a P3 form completed.
7. On 28.10.22, the Appellant boarded a matatu in which PW1 was. He then alighted and went into a local brew den. PW1 called her boss who informed the police. PW1 took the police to the den and after she identified the Appellant, he was arrested.
8. PW2 Mwachireri Makemba Riaga, the owner of the pub stated that on the morning of 18.10.22, his neighbor, a boda boda rider informed him that he found the pub open and that there was a lot of blood there. He went to PW1's house and found that she had been injured in the head. He took her to Mariakani Hospital for further treatment. They then went to Kaloleni Police Station and made a report. A week later, PW1 told him that she had spotted the Appellant in a matatu. She went with the police to where the Appellant was and he was arrested. He stated that he lost a phone and assorted drinks worth Kshs. 236,000/=.
9. PW3 Mwangolo Chigulu a senior clinical officer at Mariakani Subcounty Hospital stated that PW1 was treated at the hospital after being assaulted by persons not known to her. Her clothes were blood stained. She had a cut wound on the head, painful neck and swollen hand. He produced the P3 form and treatment notes.
10. PW4 No 85441 PC Gosi Ephantus the investigating officer stated that a report of robbery with violence was reported by PW1. After recording her statement, he visited the scene and established that PW1 had been assaulted and robbed at the pub on the night of 17.10.22. He issued her with a P3 form. On 28.10.22 PW1 took the police to where the Appellant was and she positively identified him and he was arrested. As investigations continued, officers from Mariakani identified the Appellant as having similar cases. He was then charged with the offence before court.
11. In his defence, the Appellant denied committing the offence. He stated that on 28.10.22, he woke up and proceeded to work. At 8 am he left work to go shower and returned to work. At 9 am he took a motorcycle to visit his friend Mapenzi Charo at Kaloleni. At 4.30pm, while at Mangueni, 3 police officers came and took him to Kaloleni Police Station where they interrogated him. They later charge him with the offence before court. He stated that this was a case of mistaken identity and denied having seen PW1 before. He stated that he was facing another case of robbery in Kwale court.
12. Parties filed their written submissions. However, the submissions of the Respondent were filed before the amended grounds were filed. As such, they relate to the previous grounds of appeal which were abandoned by the Appellant.
13. The issues for determination are:
 - i. Whether the charge sheet was defective.
 - ii. Whether the Appellant was positively identified
 - iii. Whether the prosecution proved its case to the required standard.



- iv. Whether the Appellant's defence was considered.

Whether the charge sheet was defective

14. The Appellant submitted that the charge sheet was at variance with the evidence adduced, thereby rendering it incurably defective. He contended that the information in the charge sheet on the types of items said to have been stolen was not supported by the testimony of PW2.
15. Section 134 of the Criminal Procedure Code (CPC) provides as follows:

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.
16. Section 134 provides in mandatory terms that every charge should be precise and abundantly clear to an accused person. To this end, the charge must be communicated clearly and without ambiguity, allowing the accused to understand the specific accusation he is facing. This clarity will also assist the accused in preparing their defense.
17. In *Augusti Erasmi v Republic* [2016] KECA 308 (KLR), the Court of Appeal considered a ground of defective charge and had this to say:

From the evidence on record, the appellant knew from the onset that the charge facing him was robbery with violence. Its particulars were clearly spelt out, which included the date of the offence, the place of the offence, the act constituting the offence and the name of the victim. This is confirmed by the fact that in the trial, the appellant extensively cross examined prosecution witnesses and defended himself.
18. In the present case, the charge the Appellant faced is known in law. The offence was disclosed and stated in a clear and unambiguous manner. Its particulars including the date and place of the offence, as well as the act constituting the offence and the name of the victim, were clearly spelt out. Indeed, at trial, the Appellant extensively cross examined the prosecution witnesses and defended himself by giving a sworn statement.
19. In light of the foregoing, I find that the Appellant's argument that the charge is defective because the same was at variance with the evidence and that the information in the charge sheet on the types of items said to have been stolen was not supported by the testimony of PW2, to be lacking in merit. The evidence adduced was in respect of the offence with which the Appellant was charged. In any event, the issue of the charge sheet being defective was not raised in the trial court and no decision was made thereon. As such no appeal can lie on an issue in respect of which a decision has not been made by the lower court. (see *Kipkorir v Republic (Criminal Appeal E056 of 2022)* [2024] KECA 745 (KLR) (21 June 2024) (Judgment)).

Whether the Appellant was positively identified

20. As I consider this ground, it is necessary to first consider how to approach evidence of visual identification. In *Katana & another v Republic* [2022] KECA 1160 (KLR), the Court of Appeal cited its decision in *Francis Kariuki Njiru & 7 others v Republic* [2001] eKLR where it stated:

The law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted



and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see *R v Turnbull* [1976] 63 Cr App R 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all.

21. The Court of Appeal went on to state:

The relevant circumstances to be considered in determining whether the identification by a witness meets the positive threshold were identified in *R v Turnbull* (supra) and in *Wamunga v Republic*, [1989] KLR 424 as follows:

- a. The length of time the witness had the accused under observation and in what distance and light.
- b. Whether the observation by the witness was impeded in any way.
- c. Whether the witness had ever seen the accused before, and if so, how often.
- d. The length of time that elapsed between the original observation and the subsequent identification to the police.
- e. Whether there is any material discrepancy between the description given by the witness and the actual appearance of the accused.

22. In the present appeal, the trial court did consider the circumstances of the Appellant's identification by PW1 and was satisfied that that the identification of the Appellant by PW1 was free from error.

23. In her testimony, PW1 stated that she did not know the Appellant prior to the attack. She was however able to identify the Appellant as she had been with him for about 1 hour during the incident. He grabbed her by the neck and strangled her. She further stated that the security light outside the shop was on. Further that when the Appellant and his companion took her back into the pub, they switched on the lights. She stated that there was plenty of light and was able to clearly see her attackers. Later when she saw the Appellant in a matatu about 10 days later, she was able to identify him.

24. The circumstances herein are that for a period of about 1 hour the Appellant was with PW1. During this time, he demanded money from her, carried her to the nearby local brew den, threw her on the ground and beat her, grabbed her by the neck and strangled her. There was illumination from the security lights as well as the light in the shop. As such, PW1 was no doubt able to see and observe him clearly enough to recognize him later. There is no evidence that her observation of the Appellant was impeded in any way. Further, she was able to identify the Appellant to the police just 10 days later. Applying the test in the *Turnbull* case therefore, I am satisfied that the Appellant was positively identified and his plea of mistaken identity is unsupported and lacks basis.

Whether the prosecution proved its case to the required standard

25. The offence of robbery is provided for in Section 295 of the Penal Code as follows:

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.



26. The ingredients of the offence of robbery with violence and punishment thereof are stipulated in Section 296(2) of the Penal Code as follows:

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 before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

27. The ingredients of the offence of robbery with violence were restated by the Court of Appeal in the case of *Johana Ndungu v Republic* [1996] eKLR as follows:

In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument,
or
 1. If he is in company with one or more other person or persons, or
 1. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

Analysing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the court to so convict him.

In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction thereunder must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly.



28. The 3 ingredients of the offence of robbery with violence are to be read not conjunctively, but disjunctively. As such, 1 element is sufficient to constitute the offence of robbery with violence. (see *Dima Denge Dima & Others v Republic* [2013] eKLR).
29. In the present case, there was a robbery at the pub. PW1 testified when the Appellant and his companion demanded money, she gave them Kshs. 2,000/= which was in the pub and they also took a phone. PW2, the owner of the pub stated that what was stolen from his pub was a phone and assorted alcoholic drinks. PW1's further testimony is that the Appellant and his companions carried her to a local brew den where they threw her on the ground and started beating her. The Appellant hit her on the head with a bottle. The fact of stealing was established. Further there was used of actual violence on PW1 during the stealing, thus constituting the offence of robbery.
30. The evidence shows that the Appellant was armed with a bottle which he used to assault PW1. He was in the company of 2 other people. During the robbery, the Appellant assaulted PW1 inflicting a cut wound on the head. As a result of the attack, she also had a painful neck and a swollen hand. The ingredients of the offence of robbery with violence were thus satisfied from the evidence on record.

Whether the Appellant's defence was considered

31. In its judgment, the trial court stated that in his defence, the Appellant denied committing the offence and that his defence did not in any way exonerate him from the offence. In dismissing the Appellant's defence, the trial court stated that the Appellant's defence did not cast any doubt on the otherwise water tight evidence of the prosecution. Contrary to the Appellant's contention, the trial court did consider his defence but found that the same did not shake the prosecution case.
32. In the end, I find that the prosecution proved its case beyond reasonable doubt. Accordingly, the Appellant was properly convicted and sentenced. The Appeal is dismissed and both the conviction and sentence are upheld.

DATED SIGNED AND DELIVERED IN MALINDI THIS 31ST DAY OF OCTOBER 2025

M. THANDE

JUDGE

