

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIBERA
CRIMINAL APPEAL NO. E062 OF 2025

ERICK NJUGUNA KAMAU.....
APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. E. Boke (S.P.M) on 19th October 2022 at Kibera Chief Magistrate's Court Criminal Case no. 3606 of 2017 Republic vs Eric Njuguna Kamau & 2 others)

JUDGEMENT

1. The appellant jointly with two others not before this court was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code, Cap 63 Laws of Kenya. After a full trial, he was sentenced to death. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. Aggrieved, he filed an appeal challenging the totality of the prosecution's evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence.
3. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyze the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See **Okeno v Republic [1972] EA 32**)
4. The prosecution called eleven (11) witnesses to prove its case. PW1, Michael Karanja, testified that while supervising a construction site near Impala Club along Ngong Road, he heard

gunshots and saw two men, one dressed in a black hoodie and the other in a beige shirt, struggling with the victim. After the victim cried for help, the assailants fled on a motorbike. Karanja and others rushed to assist the victim and drove him to the hospital using the victim's Prado vehicle. Later, at Thika Police Station, he identified the appellant and his co-accused as the assailants. Although Karanja admitted some uncertainty about the date and certain details during cross-examination, he maintained that he clearly recognised the appellant and his accomplice.

5. PW2, the complainant, a police officer attached to the office of the Deputy Chief Justice, recounted that on 24th October 2017, while picking seedlings near Marsabit Plaza, opposite Impala Club, he was shot in the left jaw. His firearm, a Jericho pistol serial number 44338826, was stolen. He was assisted by PW3, Kiragu, who drove him to Nairobi Women's Hospital, where he remained admitted until 13th November 2017. The assailant was joined by another man before both fled on a motorbike. Later, at Ruiru Police Station, he identified his recovered firearm and holster engraved with his initials "JM".
6. He subsequently identified the appellant and his co-accused in an identification parade at Thika Police Station on 17th November 2017, stating firmly that the appellant was the shooter. During cross-examination, he reiterated that he was certain about the identification and denied any confusion or fabrication.
7. PW3, Elisavan Kiragu Gathua, confirmed that he was with PW2 on the day of the incident, purchasing seedlings for the Deputy Chief Justice. When they reached his business opposite Impala Club, he heard gunshots, ducked for cover under a car, and then drove PW2 to hospital in PW2's vehicle. PW4, an employee of PW3,

corroborated this account, adding that during the commotion, he saw one of the assailants snatch an item from PW2 before fleeing on a motorbike with an accomplice.

8. PW5, Chief Inspector Benard Wanyoike, conducted the identification parades at Thika Police Station on 19th November 2017 for both accused persons, Erick and James Wachira. He stated that PW1 and PW2 each identified the two accused in separate parades. Eight participants were used in each lineup, and the parade forms were produced as exhibits.
9. PW6, Alex Mudindi Mwandawiro, a ballistic examiner, testified that he received two expended cartridges (A1 and A2) and a fired bullet (E) recovered from the scene and later examined them. He determined that the cartridges had been fired from the same Ceskar pistol, which was subsequently linked to two other robbery scenes in Githurai Kimbo in 2017. He also examined a Ceskar pistol recovered by DCI Buruburu on 17th November 2017 and confirmed that it matched the cartridges and bullet. His report, dated 30th November 2017, was produced together with corresponding exhibit memos.
10. PW7, Police Constable Richard Rotich, testified that on 16th November 2017, he received information from Ruiru CID officers regarding hidden firearms at a house in Dandora belonging to one Kevin. Acting on the tip, they recovered a Ceskar pistol serial number 8269 with seven rounds and a Jericho pistol serial number 44338826 with two rounds from a chicken pen near Kevin's room. The firearms were seized in the presence of the OCS, CIP Ndogo. Rotich stated that among those earlier arrested was the appellant though he could not recall all suspects present. Kevin, the suspected owner, was never traced.

11. PW8, CIP Mathew Ngogo, corroborated PW7's testimony, confirming that he witnessed the recovery of the two pistols in Dandora Phase I. He said CID Ruiru officers led them to the location after interrogating appellant. The firearms were later handed over to DCI Buruburu. PW9, PC Joseph Gathecha, processed the crime scene at Ngong Road on 24th October 2017, recovering two spent cartridges and photographing the motorcycle alleged to have been used in the robbery. He admitted during cross-examination that there were discrepancies regarding the motorbike's colour but maintained that it was the same one later impounded.
12. PW10, PC Amos Mariechi, testified that on 27th November 2017, he intercepted a motorcycle linked to the robbery, arresting the 3rd accused, Shivaji, and his passenger, Bernard Aliuba. They were handed to DCI Dagoreti for further investigations. PW11, PC James Wanjohi Mwangi, the lead investigator, confirmed receiving the case report, coordinating the recovery of the firearms, and overseeing the identification parades. He confirmed the appellant's arrest alongside two other suspects on 17th November 2017, and their subsequent charging after file consolidation.
13. Upon the close of the prosecution's case, the trial court ruled that a prima facie case had been established and placed the appellant and his co-accused on their defence. The 1st accused in his sworn defence, stated that he was a resident of Umoja III and that on 17th November 2017, two men visited his home, searched his premises, confiscated personal items, and took him to Ruiru Police Station. He denied any involvement in the offence, insisting that he was at work on the day of the incident. Under cross-

examination, he alleged that police coerced him into signing documents and denied making any confession.

14. The appellant testified that he was arrested on 17th October 2017 and denied any connection to the crime. He alleged coercion during arrest and during the identification parade. The 3rd accused, a motorcycle taxi operator, confirmed that he was arrested on 27th October 2017 while at his stage. He admitted ownership of the motorcycle but denied involvement in the robbery, maintaining that he was at work when the incident occurred.

15. After considering the entire evidence, the trial court found that the prosecution had proved its case against the appellant and the 1st accused beyond reasonable doubt. Both were found guilty and convicted accordingly. The 3rd accused was acquitted for lack of sufficient evidence linking him to the offence.

16. The key ingredients for a robbery with violence charge are found in section 296(2) of the Penal Code. It provides 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”.

17. The key issues for determination are whether the appellant was positively identified as one of the perpetrators and whether the prosecution proved its case beyond reasonable doubt.

18. The incident occurred in broad daylight. PW1, PW2, and PW3 were eyewitnesses. PW1 saw the assailants at close range and

later identified them at Thika Police Station. PW2, the complainant, was shot and robbed of his firearm, which was later recovered and linked ballistically to the same Ceskar pistol associated with the appellant. PW5's evidence confirmed that proper identification parades were conducted, and PW1 and PW2 consistently picked out the appellant. This court finds no procedural defect in the parades and is satisfied that the identification was free from error.

19. The evidence of PW6 (ballistic examiner), PW7 (recovery of firearms), and PW8 (confirmation of recovery) linked the recovered firearm to the offence. This connection further strengthened the identification evidence. The testimonies of PW3 and PW4 corroborated the sequence of events, including the shooting, theft of the firearm, and escape of the culprits.

20. The appellant's defence amounted to a bare denial. He presented no corroborative evidence of his alleged alibi, and his assertions of coercion were unsubstantiated. The trial court rightly dismissed his defence as an afterthought. I find no reason to depart from that conclusion.

21. On whether violence was used, the evidence is overwhelming. The complainant was shot in the jaw, his firearm stolen, and he sustained serious injuries. The violence used was actual, deliberate, and intended to subdue resistance. The offence squarely falls within the ambit of section 296(2).

22. The prosecution proved beyond reasonable doubt that the appellant, while armed and in the company of another, violently robbed PW2 and inflicted injury upon him. The conviction was therefore sound in law.

23. On sentence, the appellant was sentenced to death. While section 296(2) of the Penal Code prescribes death as the maximum penalty, the court retains discretion to impose a lesser sentence. Sentencing must therefore take into account the circumstances of the offence and the prospects of rehabilitation.
24. The trial court considered the seriousness of the offence and the serious injury caused to the complainant. However, the appellant's youth and potential for reform warrant a determinate custodial term. The death sentence, in the present circumstances, extinguishes all prospects of rehabilitation.
25. In the result, the appeal against conviction fails and is dismissed. However, the appeal against sentence succeeds. The sentence of death is hereby set aside and substituted with a term of twenty-five (25) years imprisonment, to run from the date of conviction having considered the time spent in remand custody.
- Orders accordingly.

**Judgement dated and delivered virtually this 13th day of
November 2025**

**D. KAVEDZA
JUDGE**

In the presence of:

Appellant Present

Ms. Maina & Ms. Tanui for the Respondent

Karimi Court Assistant.