

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAHURURU**

**CRIMINAL APPEAL NO. E076 OF 2024**

**FRANCIS MAINA KABUIKA.....1<sup>ST</sup>**  
**APPLICANT**

**FRANCIS KAMAU MWANGI.....2<sup>ND</sup>**  
**APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**1. *Francis Maina Kabuika*, the 1<sup>st</sup> Appellant, and *Francis Kamau Mwangi*, the 2<sup>nd</sup> Appellant, respectively, were charged with the offence of **Robbery with Violence contrary to Section 296(2) of the Penal Code.****

**2.** In Count I, the particulars of the offence were that on the 3<sup>rd</sup> day of September, 2023, at around 1700hrs at Ndururumo Secondary School Area in Nyahururu Sub-County within Laikipia County with others not before court, being armed with dangerous weapons namely panga and an Axe robbed Gladys Nduta cash Kshs.20,000/-, one mobile phone make Techno valued at Kshs.10,000/- and one brown jacket valued at Kshs.1,500/- all valued at Kshs.31,000/-.

**3.** In Count II, the particulars were that on the 3<sup>rd</sup> day of September, 2023 at around 1700hrs at Ndururumo

Secondary School Area in Nyahururu Sub-County within Laikipia County with others not before court being armed with dangerous weapons namely panga and an axe robbed Erick Gatobu one mobile phone make Techno Pop II Plus valued at Kshs.7,500/-

4. Having been taken through full trial they were found guilty for the offence of robbery with violence, convicted and each Appellant sentenced to serve 25 years imprisonment.
5. Aggrieved, the Appellants appeal on grounds, as amended that;

**1) That the learned trial Magistrate erred in law and fact by not warning himself against the danger of relying on visual identification with no parade done.**

**2) That the learned trial Magistrate erred in law and fact in finding that the Appellant were properly identified at the scene of crime by the complainant in conditions that were not favourable for positive identification.**

**3) That the learned trial Magistrate erred in law and fact by convicting the Appellants on a defective charge sheet (duplex).**

**4) That the learned trial Magistrate erred in law and fact by convicting the Appellants but failed to note that the charge of Robbery with Violence was not proved beyond reasonable doubt.**

6. The brief facts of the case were that on the 3<sup>rd</sup> day of September, 2023, at 5.00pm Gladys Nduta (PW1) and Erick Gatobu Gichuru (PW2) both employees of AAA Growers were at the water supply, Ndururumo Secondary School at about 5.00pm when four (4) men emerged from the maize farm and surrounded them. They ordered them to surrender what they had. The individuals took a phone and Kshs.20,000/- from PW1 and a leather jacket which had a phone from PW2. The persons who were armed with pangas/machetes and axe demanded for their M-pesa pin lest they killed someone. In the process someone appeared on a motorcycle and they fled.
7. PW1 adduced in evidence a receipt for Kshs.10,000/- that she was issued with when she purchased the cell phone while PW2 testified that he purchased the Techno Pop phone from PW1, the receipt bore her name which was also produced as evidence.
8. PW1 identified the 1<sup>st</sup> Appellant (**Francis Maina Kabuika**) as a neighbour and also the 2<sup>nd</sup> Appellant having seen him. PW2 identified them by physical appearance.
9. They reported the matter to the police. The matter was assigned to **PW3 No. 113052 P.C. Denis Bosire** who arrested the 1<sup>st</sup> Appellant on being identified by PW1 and also arrested one other suspect.
10. Upon being placed on their defence, the 1<sup>st</sup> Appellant, Francis Maina Kabuika denied having knowledge of the charges. He stated that he woke up on 3<sup>rd</sup> September, 2023

as usual and the caretaker, Sowet, of the plot asked him to assist in repair of the fence work that he did until 6.00pm and he was paid. On 15<sup>th</sup> September, 2020 while at the club he was arrested with others and taken to the police station. Some of them were release while he was charged in the court of law.

**11.** The 2<sup>nd</sup> Appellant testified that on 3<sup>rd</sup> September, 2023, he was at Tumaini Area in Nyandarua attending a funeral of his late brother, John Mwangi. He stayed at Maina from 2<sup>nd</sup> September, 2023 until 5<sup>th</sup> September, 2023 without being told the reasons for his arrest. That he was with Samuel Karanja Wainaina who was in custody and he was subsequently charged on 19/09/2023.

**12.** The trial court considered evidence on record and concluded as follows;

***“41. I have evaluated the evidence which was tendered and find that the accused persons have not exonerated themselves from the scene. None of them seems to show where they were conclusively in order to discredit the evidence which had placed them at the scene. The 1<sup>st</sup> accused was known to the 1<sup>st</sup> complainant and she was the one who led the police to his arrest. It’s at the point of his arrest that the 2<sup>nd</sup> accused was also arrested having been seen by PW1 at the scene as someone whome she used to see with Maina Village. The complainant stated that***

***they had been under threat until when a rider appeared and the suspects disappeared into the maize farm. They had spent some time with the suspects who had not camouflaged in any manner but were in the natural self. I do therefore find and hold that indeed the 1<sup>st</sup> complainant was a key witness and she was able to identify and recognize the accused person by name for the 1<sup>st</sup> accused and by appearance for accused 2 and therefore placed at the scene of the robbery. I do therefore hold and find that it's the 1<sup>st</sup> and 2<sup>nd</sup> accused who committed the offence of robbery with violence.***

***42. The last issue that I will deal with is whether there are any doubts which have created by the 1<sup>st</sup> and 2<sup>nd</sup> accused in their defence. The witnesses of the defence were cross - examined intensely by the defence counsel but there was no contradiction which arose from their testimony. They were consistent and place accused 1 and accused 2 at the scene of the robbery. The accused in their defence raised an alibi which however came into picture too late in the day. The same was however discredited and impeached by the prosecution for its inconsistency.***

***43. Hence I do find and hold that the charge of Robbery with Violence has been established to the required standard and the accused persons are hereby convicted under Section 215 of the Criminal Procedure Code.”***

- 13.** The appeal was disposed through written submissions. It is urged by the Appellants that identification evidence was not sufficient to form a conviction. That the Complainants were not asked to describe the Appellants and identification could not have been positive without an identification parade being conducted.
- 14.** That a crucial witness namely the rider who appeared and the assailants disappeared was not called to testify which was a deliberate move to conceal exculpatory evidence which was prejudicial to the Appellants' case as held in ***Bukenya & Others v Uganda Cr. Appeal No. 68 of 1972 EACA 549.***
- 15.** That it was incorrect to charge the Appellants with **Robbery with Violence under Section 295 and 296(2)** which amounts to a duplex charge.
- 16.** That it was not proved that there was danger at the scene. And, although it was stated that there were more than 3 assailants, the victims were not accosted though PW1 said that the suspect placed a machete on her neck.
- 17.** That the trial court failed to consider the alibi defence raised.

**18.** The appeal is opposed by the Respondent who urge that all the three elements of the offence were proved; and, that, although the sentence prescribed is death, the sentence imposed should be life imprisonment following a Notice of enhancement of sentence filed.

**19.** This being a first appeal this court must re-examine evidence tendered before the trial court exhaustively, analyse it before reaching its own conclusion, bearing in mind the fact of not having seen or heard witnesses who testified. This duty was stated in **Okeno v Republic (1972)EA 32** where the court held that:

***“The duty of the first appellate court] is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision”***

**20.** It is urged that the Appellants were convicted on a defective charge sheet that was duplex. **Section 134 of the Criminal Procedure Code** provides:

***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.***

**21.** In ***Sigilai v Republic [2004] 2 KLR 480***, it was held that a defect in a charge is not fatal unless it has occasioned a failure of justice.

**22.** For a charge to be duplex would mean that two (2) distinct offences have been joined to be a single offence. When an accused person is made to answer two (2) counts purporting to be one offence, it makes it difficult for an accused to respond to the charges and prepare the defence.

**23.** **Section 295 of the Penal Code** provides:

***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.***

**24.** **Section 296(2) of the Penal Code** provides:

***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.***

**25. Section 295** is the definitive part of the offence of **Robbery** while **Section 296(2)** is the penalty section for the act that is aggravated. A reading of the two (2) provisions of the law do not disclose two (2) distinct offences. When read together it makes the person accused understand what is being alleged by the prosecutor as to what constitutes what the person is alleged to have done and the punishment thereof.

**26. Joseph Njuguna Mwaura & 2 others v Republic [2013] KECA 541 (KLR)** the Court of Appeal stated that:

***“... in Joseph Onyango Owuor & Cliff Ochieng Oduor v R [2010] eKLR (Criminal Appeal No 353 of 2008) the Court was again confronted with a similar situation. In that appeal, the appellants had submitted, as have the appellants in the present appeal, that section 296 (2) of the Penal Code does not create an offence but merely makes provision for the punishment for robbery with violence. The Court had this to say on the issue:***

***“Mr. Musomba submitted that unless the aforequoted sub-section (section 296) is read with section 295 of the Penal Code, then reliance on section 296(2), above, without more will not disclose the commission of an offence. Section 295 of the Penal Code defines the offence of robbery. Section 296(1) and 296(2) of the Penal Code, have a common marginal note, namely “punishment of robbery”. In this country marginal notes are as a general rule, read together with the section. By the ejusden (sic) generis rule, section 296 (1) and 296 (2), have to be read together. Section 296(1), above, provides that a person who commits the felony of robbery is liable to imprisonment for fourteen years. So that when dealing with the offence under section 296(2) of the Penal Code one has to read the statement of the offence as referring to the aggravated circumstances of the offence, or the robbery provided for under section 296(1) of the Penal Code.”***

**The Court then stated that section 295 of the Penal Code is merely a definition section, and held that:**

**‘Sections 296 (1) and 296 (2) of the Penal Code deal with the specific degrees of the offence of robbery and have been framed as such.’**

**We agree that this is the correct proposition of the law.”**

**27.** As to the issue whether the charge of Robbery with violence was proved; Ingredients for the offence of robbery with violence pursuant to **Section 296 (2) of the Penal Code** were stated in **Johanna Ndung’u vs Republic - Criminal Appeal No. 116 of 2005, (unreported)** as follows:

**(a) If the offender is armed with any dangerous or offensive weapon or instrument, or;**

**(b) If he is in the company with one or more other person or persons, or;**

**(c) If at or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.**

**28.** Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction. In **Dima Denge Dima &**

**Others v Republic [2013] KECA 480 (KLR)** the Court of Appeal stated that:

***“The elements of the offence under Section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction.”***

**29.** On the first element, of whether the offenders had dangerous or offensive weapons, the particulars of the offence stipulate that the offenders were armed with dangerous weapons namely panga and axe. **Section 89(4) of the Penal Code** provides thus:

***“offensive weapon” means any article made or adapted for use for causing injury to the person, or intended by the person having it in his possession or under his control for such use.***

**30.** PW1 stated that one of the men placed a panga on her neck which was not only a threat but utterances were made which was confirmed by PW2 who saw the men carrying 3 pangas and an axe. The alluded to weapons are inherently likely to cause serious injuries or even death hence dangerous. And, if intended, they can cause injury hence offensive.

**31.** As to the second element of being in company of one or more person(s) The Appellants denied having been present; and the prosecution witnesses testified to have seen four (4) young men who emerged from the maize farm. They were more than one (1) person.

**32.** On the third element, PW1 and PW2 testified to the offenders having taken from them cell phones and cash money, Ksh. 20,000/- from PW1, further, demanded the MPESA PIN, and, also threatened to kill someone if they did not release the PIN. There was no act of wounding, beating, striking of the victim. What was testified to was some threat to kill if the victims did not surrender what the offenders required.

**33.** Two of the elements of the offence of robbery with violence were present and sufficed.

**34.** It is contended by the Appellants that the alibi defence put up was not considered. Reliance is placed on the case of **Karanja v Republic (1983) KLR 501.**

**35.** The 1<sup>st</sup> Appellant alleged that on the material day he was assigned some work on the fence by the caretaker at the plot where he resided that he did work from 9:00am to 7:00pm, hence he was not at the *locus in quo*. In **Karanja v Republic (Supra)** the court stated that:

***“It is trite law that the burden of proving the falsity, if at all, of an accused’s defence of alibi lies on the prosecution.”***

**36.** PW1 stated that she saw the 1<sup>st</sup> Appellant and recognized him as her neighbour. And, upon making a report to the police, she encountered his mother and notified her of the incident. There was no recovery of the stolen items, hence the case solely of visual identification and recognition as the witnesses stated that they saw the culprits at the scene.

**37.** In *Cleophas Wamunga v Republic (Criminal Appeal 20 of 1989) [1989] KECA 47 (KLR) (22 June 1989) (Judgment)* the Court held as follows:

***“Where the only evidence against a defendant was evidence of identification or recognition, a trial court was enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it could safely make it the basis of a conviction.***

***Recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends were sometimes made.”***

**38.** The incident occurred at 5:00pm, this was part of the day hence there must have been daylight, the individuals were not masked hence conditions were most likely favourable. Through cross examination it was established that PW1 did not give the police the name of the robber whom she identified. That notwithstanding, from the police station she proceeded to the home of the 1<sup>st</sup> Appellant and complained to his mother. Although the description was not recorded by the police, being a neighbour, the witness was bound to know him. The claim by the 1<sup>st</sup> Appellant was that he was working elsewhere. The duty was upon the prosecution to prove him wrong.

39. In **Victor Mwendwa Mulinge v Republic [2014] KECA 710 (KLR)** the Court stated that:

***“The appellant was arrested on 16th May, 2003 and taken to Shauri Moyo Police Station where his statement was recorded. That statement was not produced before the trial court. Had that been done, the court would have been able to consider whether what the appellant had stated at the earliest opportunity regarding his whereabouts on the material day was in line with his defence of alibi before the court. In KARANJA v REPUBLIC (Supra), this Court held that in a proper case, a trial 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 of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby prevent any suggestion that the defence was an afterthought.”***

40. The allegation of having been elsewhere was introduced at the point of defence. Had it been introduced early enough the prosecution would have had the opportunity of interrogating it at the opportune time. Otherwise being introduced late in time raises questions as to its authenticity as it cannot be

tested since the prosecution's case cannot be re-opened. This called for limited weight being given to it and the trial court in rejecting it was not a misdirection.

**41.** With regard to the 2<sup>nd</sup> Appellant, he was identified as one of the perpetrators. Notably, a witness can be confident but may misidentify a suspect hence resulting into wrongful conviction. The 2<sup>nd</sup> Appellant was not known to the witnesses before, and, no identification parade was conducted. PW3 testified that:

***“The 1<sup>st</sup> complainant was to identify the suspect Francis Maina Kabuika whom she used to stay within the same plot(sic). I did arrange and had the known suspect arrested and one other suspect. We escorted them to Nyahururu Police Station and had them charged in the court”***

**42.** In her testimony, PW1 stated that she also saw the other suspect, accused 2. On cross examination she stated that she told the police the name of accused 1 but did not describe accused 2 to the police. Other than stating that she saw the 2<sup>nd</sup> Appellant at the scene of robbery she did not state with specificity what made believe he was the one. PW2 on the other hand stated thus:

***“I saw the robbers by physical appearance. Two of the robbers were short. The other two were of medium height”.***

**43.** Neither PW1 nor PW2 were present when the suspects were arrested. Both of them had no prior knowledge of the 2<sup>nd</sup>

Appellant, that is why an identification parade would have assisted in testing the accuracy of PW1 and PW2's visual identification. It was not sufficient to state as PW2 did that he clearly saw the accused at the scene of the incident but not say anything peculiar thing about them that made him believe they were the same individuals in the dock.

**44.** The appeal is against both conviction and sentence. The penalty provided for the offence is death sentence. It is a mandatory sentence. The court sentenced the Appellants to serve twenty-five years imprisonment. Notably, the Appellants did not address the court on the question of sentence despite the court having reminded them. That notwithstanding, the duty was upon the prosecution to notify the Appellant of the possibility of enhancement of the sentence which is provided for.

**45.** As forestated the sentence was not according to what is provided in law. In **JJW v Republic [2013] eKLR** the Court observed that:

***“In this appeal the prosecution did not urge enhancement of service and did not file cross appeal to that effect. The court did not warn the appellant of that possibility or in any case there is no record of such a warning if any not stand, yet all of a sudden, in the judgment, the learned Judge enhances the sentence from seven years to ten (10) years. The need for prior information to be given to the appellant in such a situation is to***

***enable him to prepare and argue his side of the case as regards such intended enhancement. In this case, the enhancement of the appellant's sentence to ten (10) years was done without affording him opportunity of persuading the court against such a proposal. We have perused the memorandum of appeal that was before the first appellant court and we note that save for a small part in passing, the appellant did not specifically appeal against sentence in that court and hence the need to inform him of the possibility of enhancing the sentence."***

**46.** The notice herein should have been given at the outset before the appeal was argued so that the Appellants could decide on whether to proceed with the appeal or not. For that reason, this court restrains itself from delving into the issue.

**47.** The upshot of the above is that the appeal by the 1<sup>st</sup> Appellant, **Francis Maina Kabuika**, fails and is accordingly dismissed in its entirety. For the 2<sup>nd</sup> Appellant, **Francis Maina Kamau**, the appeal is meritorious. The conviction against him is quashed and sentence meted is set aside. He will be released forthwith unless otherwise lawfully held.

**48.** It is so ordered.

**Dated, signed and delivered virtually this 12<sup>th</sup> day of November, 2025.**

.....  
**L.N. MUTENDE**  
**JUDGE**