

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & MUCHELULE JJ.A.)

CRIMINAL APPEAL NO E281 OF 2022

BETWEEN

PETER NJERU NDWIGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya
at Siaya, (Cherere, J.), delivered by (Makau, J.) dated 18th April,
2018*

in

HCCRA No. 56 of 2016)

JUDGMENT OF THE

COURT

1. The appellant, Peter Njeru Ndwiga, was charged with the offence of robbery with violence contrary to Section 295(2) as read with Section 296[2] of the Penal Code. The particulars of the offence were that on 14th January 2014 at Matumbu trading centre, Malanga sub location in Gem District within Siaya County, jointly with another person not before the

court, being armed with a dangerous weapon namely a pistol
robbed Carren Adoyo

Owuor of cash Kshs.215,000/=, two mobile phones make Nokia 1208, Samsung and a cheque of Kshs.10,440/= all totaling to Kshs.233,000/= and immediately before the robbery, wounded the said Carren Adoyo Owuor. He was tried before the Principal Magistrate's court at Siaya, convicted and sentenced to death.

2. Aggrieved, the appellant preferred an appeal to the High Court of Kenya at Siaya in Criminal Appeal No. 23 of 2016. The High Court (*Cherere, J.*) reevaluated the evidence and dismissed the appeal, affirming both the conviction and the sentence.
3. Still dissatisfied, the appellant lodged this second appeal faulting the learned judge for failing to find that the charge sheet was defective; the identification was not proper and disregarding the appellant's alibi defence.
4. The facts as established by the two courts below based on the testimonies of eleven prosecution witnesses are that on 14th January 2014, the complainant, Caren Adoyo Owuor (PW1) made several withdrawals and deposits of money into and from various accounts and remained with Kshs.215,000/-.

5. At around 11:30 a.m. to noon, upon alighting from a public vehicle in Mutumbu, she was attacked by five men in a white

saloon car. One wore police uniform and carried handcuffs, while another, referred to as **“mkubwa,”** had a walkie-talkie. When she resisted being forced into their car, she fell, injured her finger, and the men fled with her bag containing Kshs.215,000, cheque books, a Kshs.10,000 cheque, ATM cards, and personal items. Police later intercepted the robbers’ vehicle and arrested two suspects referred to as **“mkubwa”** and “AP.” She identified the suspects, their car (registration number KBS 332L), the walkie-talkie, clothing items, and her stolen belongings. She specifically identified the appellant as **“mkubwa,”** the man with the walkie-talkie.

6. PW2, Alice Atieno Owuor, an employee at the complainant’s shop, testified that on 14th January 2015, she was at the shop when she saw the complainant alight from a matatu about 10 metres away. She observed a white saloon car stop nearby, from which two men emerged and confronted the complainant. One of the men was dressed in a police uniform, while the other wore black trouser and a white shirt. The men tried to force the complainant into their car, but when she resisted, they snatched

her bag and drove off. PW2 later identified the appellant following his arrest on the same day.

7. PW3, William Onyango Sijeny testified that on 14th January 2014, while fencing a farm at Dudi, he met a man dressed in black jeans, black shoes, and a torn white shirt who claimed he had been carjacked and lost his phone and money. The man asked to borrow PW4's yellow t-shirt, which PW4 gave him, and later accompanied him to Nyawara Trading Centre, where the man renewed his Mpesa line, withdrew Kshs.5,000, gave PW4 Kshs.500, and left. Shortly afterward, PW4 was arrested for allegedly assisting robbers and identified the appellant still wearing his yellow T-shirt as the man he had met earlier.
8. APC Ann Ahenda (PW4) confirmed that around 11:30 a.m. the same day, police received information that violent robbers had escaped into their area. With the help of *boda boda* riders, they pursued and arrested the appellant, who was wearing a yellow T-shirt, at Muhanda area. The T-shirt was confirmed to be the one given to him by PW4, who was also arrested.

9. PW5, PC Boniface Asikoyo, testified that around noon on the material day, he was driving a police vehicle along the Siaya-Yala

road with two colleagues when they received a call from PC Kibui requesting assistance in tracking armed robbers in a white saloon car. Shortly afterwards, they spotted the speeding car, which swerved off the road to avoid a roadblock and stopped about 100-150 metres away. Five men fled from the vehicle, and after a chase, one suspect identifying himself as Musyoki was arrested. A search of the car's boot revealed a smoke jacket, jungle shirt, and trousers, and a beret with AP insignia.

10. PW6, PC Bogonko did not know the appellant but it was his evidence that he was in the company of PW5 when they arrested one suspect, Francis Mutuku, who was among 5 suspects that were travelling in the robbery getaway salon car on the material date.
11. Everline Odhuno, PW7, a clinical officer examined the complainant and filled her P3 form which showed that she had a cut wound on the 3rd right finger.
12. PW8, Luke Ouma Wende who was in the car hire business, testified that their motor vehicle KBS 332L, was leased to one Kivuva Leonard Musyoka, whom he did not know. He told the

court that he later found the vehicle at Yala police station and was informed that it had been involved in a violent robbery.

13. Police Constable Douglas Wamalwa, a Scenes of Crime officer, testifying as PW9 took 4 photographs of motor vehicle KBS 332L which he produced as P.EXH. 10.
14. Corporal Joab Etyang, the investigating officer, testifying as PW10 received the appellant and the other suspect and after investigations, charged them with the offences before the court. He produced a brown pouch, cheque books for Cooperative Bank, Equity Bank and KCB yellow T-shirt, a pair of handcuffs, walkie talkie, jungle jacket, jungle shirt and jungle trouser, a beret with AP insignia as Exhibits.
15. PW11 arrived at the scene of Musyoka's arrest after his arrest and recovered a smoke jacket, jungle shirt, jungle trouser and a beret with AP insignia from motor vehicle registration KBS 332L.
16. In his sworn defence, the appellant denied the charge; saying that he was arrested at Muhanda Trading Center and later charged with an offence that he did not commit. When cross-examined, he denied that he was wearing a yellow T-shirt

when he was arrested; his witness Darus Mugema Sarawa stated that

he was with the appellant on 14th January 2014, and parted ways at around 11.30 am; that he later met the appellant in prison where he is serving a sentence; and the appellant requested him to testify on his behalf.

17. The appeal was argued by way of written submissions. Ms.

Anyango, learned counsel, appeared for the appellant and relied entirely on her written submissions, while Ms. Kanyita, learned Prosecution Counsel, appeared for the respondent.

18. It is submitted for the appellant that he was charged and convicted under section 296[2] of the Penal Code. Under the said section, two elements must be established which are the robbery and the aspect of violence; that in the instant case, no violence was visited upon the complainant, as she testified that she fell during the struggle and injured her finger; that the charge as framed was ambiguous as the only weapon mentioned was handcuffs which were never used on the complainant. Relying on the case of ***Joseph Kaberia Kahinga & Others vs. Attorney General [2016] eKLR***, counsel submitted that the prosecution's evidence did not meet the threshold to secure a conviction for

the offence of robbery with violence.

19. Regarding the appellant's identity, it is submitted that in her testimony, the complainant never described her assailants; that similarly, both PW2 and PW3 who were some meters away equally never gave the appellant's description; his was therefore dock identification. Further, that the incident took a short time to enable the witnesses to identify a stranger. Reliance was laid on the case of **Daniel Kipyegon Ng'eno vs. Republic [2018] eKLR.**

20. The appellant complained that his defence of alibi was not considered; that in his defence, the appellant testified that on the said day and time, he was at his premises at Chavakali where he operates a beauty shop and was subsequently arrested at Muhanda, where he had gone to look for new business premises; that having raised the alibi defence, it was incumbent upon the prosecution to verify and prove the falsity of the same.

21. Relying on the case of **Ssentale vs. Uganda [1968] EA** it was

submitted that although the alibi was raised late, nothing prevented the prosecution from verifying the fact that the appellant operates a business at Chavakali. In the end, the

appellant urged this Court to find that the prosecution failed
to

prove its case beyond reasonable doubt and to quash the conviction.

22. Learned prosecution counsel opposed the appeal. Regarding the issue of a defective charge sheet, it was submitted that the issues were raised before the High Court and the learned judge rightly held that the inclusion of the pistol in the charge sheet and the exclusion of the pair of handcuffs and the complainant's personal effects from the charge sheet did not render the charge sheet defective.
23. In this case, the appellant was fully aware that he was charged with robbery with violence. Evidence showed that the complainant was attacked by a group of five men who used force, causing her to fall and sustain injuries, while her handbag containing money, phones, and other items was stolen. Under Section 296(2) of the Penal Code, robbery with violence is established if the offender is armed, acts with others, or uses personal violence. The prosecution's evidence proved all these elements. The appellant's argument about the pistol not being mentioned in evidence was immaterial, as proof of any one of the listed conditions is sufficient to

constitute robbery with violence.

24. On identification, it is submitted that the incident occurred in broad daylight, and there is no evidence indicating that the appellant's face was concealed during the robbery; that the appellant was apprehended shortly after the incident while fleeing from the vehicle involved in the crime; that the evidence overwhelmingly showed that the appellant was one of the robbers, leaving no room for mistaken identity.
25. Regarding the failure to consider the appellant's alibi defence, it was submitted that the trial court duly evaluated the defence but found that it did not weaken or contradict the prosecution's evidence. As a result, the appellant was rightly convicted as charged.
- 26.** This being a second appeal, the Court's jurisdiction is circumscribed. Section 361(1)(a) of the Criminal Procedure Code provides that a second appeal lies on matters of law only. This was aptly set out in ***Chemangong vs. R [1984] KLR 611.***
27. Further this Court in ***Samuel Warui Karimi vs. Republic [2016] eKLR*** stated as follows:

"This is a second appeal and this Court has stated many times before, it will not normally

interfere with concurrent findings of fact by the two courts below

unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong vs. R [1984] KLR 611."

28. Having duly considered the record of appeal, the memorandum of appeal, the submissions and authorities referred to by the parties herein, and the court's mandate the main issues for determination are whether: the appellant was positively identified as one of the robbers, the ingredients of the offence of robbery with violence were established to the required standard and whether the defence put forth by the appellant was considered.

29. The appellant argues that he was not properly identified and that his identification was a dock identification and that the complainant was indeed attacked suddenly by five men upon alighting from a public vehicle. We take note that she identified the appellant as the one who was being referred to as ***mkubwa*** and who had a walkie-talkie radio. In her evidence PW2 told the court that the robbery occurred at about 11.30 am, about 10 metres from the complainant's shop where she was and that she was able to identify the

appellant as the one who had a white

shirt. The appellant was arrested shortly after the robbery, wearing a yellow t-shirt given to him by PW4 after removing his torn white shirt. PW1 and PW2 identified him as one of the robbers. Since the offence occurred in broad daylight, mistaken identity was unlikely; and the only reasonable deduction to make is that the appellant's attempt to change clothes showed a guilty mind and an effort to conceal his identity.

30. However, the identification at the police post was not the sole basis of the conviction. PW3 identified the appellant as the person who borrowed from him his yellow T-shirt. Further, both the trial court and the High Court anchored their findings on the doctrine of recent possession. The essential elements of the doctrine were succinctly articulated by this Court in the case of ***Eric Otieno Arum vs. Republic [2006] eKLR***, that:

“In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the

complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the

stolen property can move from one person to the other.”

31. More importantly, the recovery of the motor vehicle used in the robbery with the complainant’s personal belongings, coupled with the appellant’s own conduct of borrowing a t-shirt from PW3 to conceal his identity, provided corroboration. Both courts below were satisfied that the identification was reliable when considered alongside the other evidence.

32. As to whether the ingredients of the offence of robbery with violence were established to the required standards, the Court in the case of ***Johana Ndungu vs. Republic [1996]***

eKLR stated

that

:

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

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(ii) If he is in company with one or more other person or persons; or

(iii) 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.”

33. It is well settled that the said elements should be proved separately and demonstration of one element is sufficient to establish the offence of robbery with violence. See **Dima Denge Dima & Others vs. Republic [2013] KECA 480 (KLR)**.

34. Applying that test to the present case, the High Court carefully considered the prosecution's evidence. The complainant testified that she was robbed between 11:30am and 12 noon. She was accosted by 5 men who were in a white saloon car. One of the men was in a police uniform and was being referred to as AP and had a pair of handcuffs. She struggled with the men who wanted to bundle her into their vehicle and when she resisted, she fell and injured her left finger and the men took off with her bag containing money and her belongings. The police managed to intercept the vehicle that the suspects had used and the suspect who was

referred to as ***mkubwa*** and the one who was in police custody were arrested.

35. The prosecution's evidence showed that, apart from being armed with handcuffs, injuries were inflicted on the complainant, and the appellant was in the company of another person when he attacked and robbed PW1. The ingredients of the offence were established against the appellant and there is no merit in his complaint in that regard.
36. The appellant contends that the charge sheet was defective, maintaining that the charge as framed was ambiguous, as the only weapon mentioned were the handcuffs which were never used on the complainant. The respondent on the other side argues that under Section 296(2) of the Penal Code, robbery with violence is established if the offender is armed, acts with others, or uses personal violence. The evidence showed that the complainant was attacked by a group of five men who used force, causing her to fall and sustain injuries, while her handbag containing money, phones, and other items was stolen. Addressing this issue, the High Court held as follows:

“It is not disputed that no pistol was involved in the robbery. There is also no dispute that the charge sheet shows that complainant was robbed only Kshs. 215,000/-; two mobile phones and a cheque for Kshs. 10,440/- and that the other personal effects produced

as exhibits do not were appear on the charge sheet. It is on record that the complainant was robbed by more than one person and more particularly by 5 men. The robbers had in their possession an instrument in the form of a pair of handcuffs and the complainant was injured in the course of the robbery. The learned trial magistrate rightfully found that robbery with violence had been proved on the ground that a pair of handcuffs was an offensive weapon since it could be used to curtail a person's movement. She also appropriately found that the offence was committed by more than one person and that violence was used on the complainant and she was injured.

I am in agreement with the trial court that the ingredients of a charge of robbery with violence had been proved. The inclusion of the pistol in the charge sheet and exclusion of the pair of handcuffs and complainant's personal effects from the charge sheet do not therefore render the charge sheet defective."

37. The High Court nevertheless proceeded to affirm the appellant's conviction not based on the evidence regarding the weapon used but on the evidence that the appellant was arrested immediately after the robbery, he did not deny being at the scene and that the appellant was in the vehicle that was used during the violent robbery. The question, perhaps, should therefore be whether the mentioning of the handcuffs that were never used on the complainant should vitiate a charge sheet.

38. Section 134 of the CPC, which makes particulars of the charge an integral part of the charge sheet and 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.”

39. Section 134 of the Criminal Procedure Code prescribes the format and substance of charges and stipulates that an error in the charge sheet does not automatically render a conviction invalid unless it results in a miscarriage of justice. This Court in **Richard Kaitany Chemagong vs. Republic** **[1984] KLR 611**

held that unless the accused was misled or prejudiced by such a defect, it should not vitiate the proceedings.

40. In the instant appeal, despite the indication of the handcuffs which were never used on the complainant, that did not occasion a miscarriage of justice to the appellant therefore the ground is without merit.

41. Regarding the complaint that his defence was not considered, the appellant, in his submissions, complained that he raised an alibi which was not considered. He stated that he was at his business premises at 11:30am before going to Muhanda

Trading Centre, where he was arrested. However, evidence overwhelmingly

displaced his alibi defence, and persuasively placed him at the scene; and acknowledged his presence there. Therefore, there is no merit to this complaint. The appellant's conviction remains sound. The sentence was as provided by law and we have no reason to interfere with it. Consequently, the appeal lacks merit, and is dismissed in its entirety.

Dated and delivered at Kisumu this 21st day of November, 2025.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H. A. OMONDI

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

DEPUTY REGISTRAR