

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL E052 OF 2023 , E050 OF 2023 & E051 OF
2023

BRIAN KYALO MUTUKU.....1ST APPELLANT
MULINGE KIOKO KIMEU.....2ND APPELLANT
SAID HASSAN KIRANGU.....3RD APPELLANT

-VERSUS-

REPUBLIC.....RESPONDE
NT

(Being an appeal of the conviction and sentence delivered on 1st August 2023 in Chief Magistrate's Court at Mavoko Criminal Case No. 113 of 2020)

JUDGEMENT

Introduction

1. The 1st, 2nd and 3rd Appellants (*herein referred to as the Appellants'*) were jointly charged with three others for 2 counts. In the trial case, the 1st Appellant was the 2nd accused, the 2nd Appellant was the 3rd accused and the 3rd Appellant was the 1st Accused.
2. In Count 1, they were charged with the offence of Robbery with violence contrary to section 296(2) of the Penal Code and in Count 2. They were charged with the offence of malicious damage to property contrary to section 339(1) of the Penal Code.
3. The Appellants pleaded not guilty to the charges and the matter was set down for hearing.
4. The prosecution called eleven (11) witnesses in proving its case. The Appellants herein were convicted of the offence of robbery with violence contrary to section 296(2) of the Penal Code and of malicious damage to property contrary to section 339(1) and were each sentenced to 40 years on the count of robbery with violence and 2 years each on the count of malicious damage to property, sentences were to run concurrently. The 4th, 5th and 6th accused persons were acquitted.

The Appeals

5. Being dissatisfied with the decision of the trial court, each appellant filed an appeal to this honourable court as follows:
 - HCRA E052/2023 – Brian Kyalo Mutuku v R
 - HCRA E050/2023 – Said Hassan Kirangu v R
 - HCRA E051/2023 – Mulinge Kioko Kimeu v R

6. On 12th March 2025 the three appeals were admitted and were to be canvassed together. HCRA E052/2023 was to be lead file. The Appellants' indicated that they would file their respective submissions to the appeals individually and the Prosecution/Respondent indicated they would address all three appeals in single submissions.

7. The Appellants filed undated Petitions of Appeals. They only appealed against the conviction and sentence of 40 years on the offence of robbery with violence and on the following similar grounds:
 - i. ***THAT*** the trial court convicted and sentenced the appellant of the offences which the prosecution failed to prove case beyond reasonable doubt.

 - ii. ***THAT*** the trial court convicted and sentenced the appellant of the offences notwithstanding the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence that resulted in a selective judgment.

 - iii. ***THAT*** the trial court convicted and sentenced the appellants of the offence charged without giving due consideration to their plausible defence, despite it not being displaced by the prosecution as required by law under section 212 of the Criminal Procedure Code.

iv. **THAT** the trial court sentenced the appellant to a harsh and excessive sentence considering his age, prospects of rehabilitation of the appellant in a lenient sentence, considering time is the only true measure of value for a youth.

8. In support of their appeals, the Appellants filed individual written submissions in which they basically submitted that the case against him was not proved beyond reasonable doubt as the evidence presented by the prosecution was marred with contradictions, inconsistencies and discrepancies that ought to lead to their acquittal.
9. They argued that the procedure and the application of the identification parade which was used to identify them was done in error hence ought to be rendered void.
10. That the sentence of 40 years imprisonment for robbery with violence is manifestly excessive and disproportionate, given the Appellant's ages, status of the 1st Appellant as first offender and the fact that no significant harm was caused during the commission of the offences.
11. 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**).

Prosecution's Case at trial court

12. In summary, it was the prosecution's case that PW5, Kennedy Mokaya Makori the complainant in count 1, was heading home in the company of

Josphat when they met a group of 20 young men at their gate. He recognized the 1st accused person since he knew him by name, he also recognized the 2nd and 3rd accused persons since he used to see them around the place he lives. The light at the gate was on, the men were armed with pangas and rungas and demanded money, phones and a radio. They followed him to the house and took his phone, Kshs.4,000/=, Radio, DVD player and his wife's identity card. They also cut his ring and middle finger and forehead. The caretaker and neighbours came to their rescue and the attackers smashed the bulb using a panga. The next day he reported that case. He was treated and had his P3 form filled. He was also called to the station where he was able to identify 1st, 2nd and 3rd accused persons only. He also testified that he was able to identify the accused persons since the plot had electric lights that aided him.

13. In cross-examination, he testified that he saw the 1st and 2nd accused person with pangas, the young men were seated outside the gate and the lights at the gate were on. He also testified that 1st accused person cut him using a panga and the 3rd accused kicked him on the hips The 2nd accused did not assault him but was present and it was the 3rd accused person who opened the door and the 1st accused person burnt the clothes. The neighbours came to their rescue when the clothes were burnt, he testified that the identification parade had seven people and that they were changed severally, he did not meet the suspects before the parade at the police station but he met the 3rd accused person at the plot after he was arrested by Nyumba kumi. He also explained that the attackers had left and came back later..
14. PW6 Erick Omoro testified on how he was asleep when PW5 whom they share the house rushed inside the unlocked house, he was bleeding and claimed that the people that were with him were killed. Three people rushed inside the house after PW5 as he tried to get up, he was cut on the left eye, they picked his clothes that were wrapped in a bedsheet after cleaning and burnt outside and thereafter they broke all the lights.

The neighbours screamed after the attackers broke the plot windows, the next day he reported the matter to the police and he was also treated.

15. In cross-examination, he testified that he was able to identify the 3rd accused person and that he was told by PW5 that the 3rd accused person was part of the people who attacked him.
16. PW7 Kelvin Shauga testified that he saw a group of men at the gate, he was about eight metres away, the group forced the gate open and entered inside the plot he was able to identify the 1st and 2nd accused persons, he also saw them enter Erick's house and came out with clothes that they burnt.
17. PW2 John Salau testified that he heard noises outside, he called on Kelvin PW7, and he went towards the noise, he saw about seven men breaking windows while armed with pangas and Rungus, he was able to identify 1st and 2nd accused persons by name and also pointed them in court.
18. In cross examination, he testified that the attackers came at 11 pm and came back again at 3am when they burnt the clothes. He was able to recognize the 1st and 2nd accused persons and he told the police. He cannot tell the motive of the attack.
19. PW1 Elizabeth Muthini confirmed receiving the call at 5.30 AM, she called the assistant chief who came to the plot. The Nyumba kumi were called and since the attackers were known, a search was done and Mulinge the 3rd accused was arrested, he identified the others and the 1st accused person surrendered to them. The police were called and the suspects taken to the police station; she also identified the photos of the burnt clothes and damaged windows.
20. In cross-examination she testified that she was not present when the attack happened, the security lights were broken.

21. PW3 Tom munyao Nzuki he is a Nyumba Kumi Chairperson, he was called by the village elder and he proceeded to the scene, he found 8 windows were broken. They arrested the 3rd accused person who denied committing the offence, they also arrested 2nd and 1st accused persons. The 5th and 6th accused persons were arrested for reasons that they had threatened them if their friends are jailed.

22. In cross-examination, he testified that the windows were broken, the 1st and 3rd accused person were arrested and no weapon was found with them.

PW4 George Mutua, he was called by PW3 and he accompanied him to the abandoned houses where they arrested the 3rd accused person. They later arrested the 1st accused person and handed them over to the police, he went to the scene and saw damaged windows.

23. The complainants were treated and their p3 forms were filled by PW8 Winfred Ntusembi, she produced the P3 forms for the 1st and 2nd complainants, their treatment notes and referral notes for Erick.

24. On cross-examination, she testified that Kennedy stated that he was assaulted by people known to him, the degree of injury was harm and the probable weapon is a blunt object.

25. PW9 CPL Kisilu received the six suspects and booked them, he also received a panga and burnt clothes as exhibits. Three suspects were brought first and three were brought later.

26. The identification parade was done by PW10 CIP Nicholas Wambugu, he conducted four identification parades. Erick Amollo and Kenndy Mayaka identified the 3rd and 1st accused persons while Erick Amollo identified the 4th accused person, he was not identified by Kennedy. On the fourth parade, the 2nd accused person was identified by Kennedy and not be

Erick. He produced the identification parade forms as exhibits number 5, 6, 7 and 8.

27. On cross-examination he testified that the 1st accused was identified by touch and the witnesses stated that he was the one who had asked for money, he also stated that the 2nd accused person was identified by touch and his tattoo was mentioned.
28. The case was investigated by PW11 Insp. Taura. The case was assigned to him by the OCS, he went to the scene and found the 2nd and 3rd accused persons were arrested by members of the public, he saw windows that were damaged and burnt clothes, he took the photos of the scene , he also took a panga from the scene and took the two suspects to the police station, identification parade was done and he charged the suspects. He produced burnt clothes, panga, photos, the photos were processed and a certificate was also produced.
29. On cross examination he testified that he found the 1st and 2nd accused person already arrested and at the scene. Erick the complainant was also present, the 1st, 4th, 5th and 6th accused persons were brought by the village elders. He also testified that another victim called Okoa was mentioned but he did not follow up the case. He could not explain where the panga was recovered and how the accused persons participated in the crime, he just believed that they were involved in the same.

Defence Case at the trial court

30. DWI Hamisi Mati, he was the 1st accused brother, he testified that he was with the 1st accused person at night of the 4th February 2020. The next day he came back and found the house door broken and items scattered, he was informed that the police had searched the house and that his brother was arrested. The police also demanded Ksh.10,000/=.

31. DW2 Moses Mutuku and the 2nd accused father testified that the 2nd accused person came home on the night of the 4th while drunk, he asked him to go to his room and sleep and he remained with younger kids watching TV, since the kids used to sleep with the accused person, he took the kids at about 11.45 PM and found the accused asleep, the next day the village elder came and asked for the 2nd accused person, he informed his son who went to the village elder and he was arrested. He tried to tell the police and the village elders that his son was home but they refused to listen.
32. DW3 the 1st accused person testified on how he was arrested by PW4 and PW3. He was arrested while he was going to work, the property in the area is built without documentation and he was not found with any weapon nor any item recovered from his house.
33. DW4 the 2nd accused person he denied committing the offence since he was asleep. He also took himself to Tom who arrested him and made him to seat with the 3rd accused person. He also believed that he was identified in the parade because the complainant had seen him tied with a rope at the scene after he was arrested.
34. DW5 the 3rd accused person testified that he was arrested while sleeping. He was taken to the scene and tied with a rope, later the 2nd accused was brought and the complainant was asked if he could recognize them, he was not sure. He also testified that he was arrested for reasons that he was a young man.
35. DW6 testified that no witness mentioned him and it was not possible for Kelvin to identify him in the darkness. He was arrested at a club and he was not found with any items connected to the crimes herein.
36. DW7 and DW8 testified on how they were found drinking alcohol with DW6 and the 4th Accused when they were arrested and charged. They were not at the scene and they did not threaten anyone.

Analysis and Determination

37. As to whether the prosecution proved its case against the Appellants 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.

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

“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, strikes or uses any other personal violence to any person he shall be sentenced to death.”

39. In **Jeremiah Oloo Odira V Republic [2018] Eklr Criminal Appeal No. 7 OF 2018 (Consolidated with High Court Criminal Petition No. 16 Of 2018) A.C Mrima J** stated that:

*“From the foregone legal provisions, it can be seen that the offence of robbery with violence is made up of two parts. The first part is the **robbery** and the other part is the **violence**.*

40. **Robbery** is committed when a person steals anything capable of being stolen and immediately before or after the theft the person 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. Two things must therefore be proved for the offence of robbery to be established: **Theft** and **the use of or threat to use actual violence.**

41. On the other hand, the offence of **robbery with violence** is committed when robbery is proved and further if any one of the following three ingredients are established: -

(a) The offender is armed with any dangerous or offensive weapon or instrument, or

(b) The offender is in the company of one or more other person or persons, or

(c) 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.

42. Thus, to prove an offence of robbery with violence one has to prove robbery and violence and thus prove:

a. theft

b. use of or threat to use actual violence

c. identity of the perpetrator

a. Theft

43. **PW5** testified that the Appellants' demanded for money, phone and radio. He testified that they took his phone, his cash and his wife's, his radio, DVD from his house. This proves that items were stolen during the incident.

b. Use of or threat to use actual violence

44. **PW5** testified that the Appellants were armed with a panga and rungu when he met them. He stated that they cut his ring and middle finger of the right hand and forehead. He stated that he saw the 3rd Appellant and 1st Appellant had pangas. **PW6** testified that on the fateful night, he too was attacked. He was cut on the left eye, below the eye. **PW8** confirmed the injured sustained by **PW5** and **PW6**. This proves that there was use

of actual violence used during the incident that occasioned the complainants to suffer injuries during the incident.

c. Identity of the perpetrator

45. **PW5** identified the 2nd Appellant. He testified that the 2nd Appellant led them to the other assailants. **PW5** was complainant in count 1. He testified that he saw the Appellants'. He knew the 3rd Appellant by name and he was able to recognize the 1st and 2nd Appellant by facial appearance as he had seen them where he lived. He stated that there was a security light at the gate/scene/plot that enabled him to positively identify the Appellants. **PW5** also confirmed he attended the ID parade and was able to identify the Appellants. **PW6** saw Mulinge, the 2nd Appellant in his house. **PW7** stated that he saw the 3rd Appellant and 1st Appellant. He stated that there was a security light thus he was able to see the 1st and 3rd Appellants as he knew them in the village. He also saw them with pangas and rungus.
46. The Appellants contended that their conviction was grounded on evidence of PW2, PW1, PW3 and PW5 which was marred with contradictions and consistencies and which the trial court did not give proper consideration. The failure to critically evaluate the contradictions resulted in a miscarriage of justice.
47. **Section 382 of the Criminal Procedure Code** provides that:

“Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings

under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

48. The role of this court is to be in the shoes of the Trial Court in evaluating, assessing and reconciling the evidence and to determine whether the said contradictions, discrepancies and/ or inconsistencies are prejudicial to the Appellant.
49. According to Black’s Law Dictionary 2nd Edition, contradiction means: In practice. To disprove. To prove a fact contrary to what has been asserted by a witness.
50. 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.”

51. 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.

52. The complainant who testified as PW5 was clear in his testimony on how he identified he identified the 2nd Appellant. **PW6** also saw the 2nd Appellant in his house. **PW7** stated that he saw the 3rd Appellant and 1st Appellant. He stated that there was a security light thus he was able to see the 1st and 3rd Appellants as he knew them in the village. He also saw them with pangas and rungas.
53. 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.
55. As regards the sentence, it was the Appellants' contention that the same was excessive.
56. 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**.
57. The Appellants were sentenced to 40 years each for the Count of robbery with violence and 2 years for each count of malicious damage to property, sentences were to run concurrently.

58. The prosecution informed the trial court that the Appellants were 1st offenders. The Appellants in mitigation stated that they were first offenders, they had cooperated with the court and prayed for leniency and that they had been in custody since the year 2020. The trial court thereafter ordered for a pre-sentencing report. From the pre-sentencing reports the trial court noted that the 3rd Appellant had two previous convictions, 1st Appellant had no previous conviction and the 2nd Appellant had one previous conviction. The report (*at the time*) was also not favourable to the Appellants and the prison authorities also indicated that the Appellants were very indisciplined.
59. In the instant case, the complainants were injured and also robbed of items by the Appellants. They committed the act using actual force that injured the complainants. The trial court evaluated the evidence on the prosecution and was proper in finding that the prosecution proved its case beyond reasonable doubt. The conviction was safe and proper. As regarding the sentence imposed, the lawful sentence under the law for offence of robbery with violence is death sentence. The trial court however did not state why it departed from the prescribed sentence by law in an offence of robbery with violence.
60. Be that as it may, looking at the circumstances of the case, I find that the 40 years sentence imposed by the trial court to be lenient and sufficient deterrent sentence. Similarly for the offence of malicious damage to property, I find that the sentence of 2 years was within the law therefore sufficient deterrent sentence although the Appellants did not appeal this 2 years sentence for malicious damage.
61. Accordingly, this Court will thus not disturb the conviction and sentence of the trial court. The upshot of all the above is that I find that all the three appeals herein lack merit and I hereby dismiss the same in their entirety.

It is so decreed.

Right of Appeal 14 days.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 20TH NOVEMBER
2025

**NOEL I. ADAGI
JUDGE**

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 20TH NOVEMBER 2025

In the presence of:

In person..... for Appellants

Ms. Agatha..... for Respondent

Millygrace..... Court Assistant