

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MIGORI
HCCRA NO E067 OF 2023

**KENNEDY ODHIAMBO
OGURU..... APPELLANT**

VERSUS

**REPUBLIC
DEFENDANT**

**(Being an appeal from the Judgement of Hon. C. N. ORUO P. M.
in Rongo P. M. CR C. No. E209 of 2022 delivered on 29th
September, 2023)**

JUDGEMENT

The Appellant herein **KENNEDY ODHIAMBO OGURU** was charged jointly with another with the offence of robbery with violence contrary to Section 296(2) of the Penal Code

The particulars were that the Accused person on 10th day of July, 2022 at 2300hrs at Kanga Machine area in Rongo Sub-County in Migori County while armed with runigus and pangas jointly with others not before court robbed Collins Chali of his mobile phone make Huawei valued at Kshs.15,000 and after the time of such robbery wounded the said Collins Chali

The trial herein was conducted by Hon. Langat P.M who took the evidence of 3 prosecution witnesses before Hon. Oruo P.M. took over pursuant to Section 200(3) of the Criminal Procedure Code and gave directions for hearing to proceed from where reached on 15th May 2023.

The evidence of the Complainant was that on 11th July 2022 he had gone to visit friends in Tunga area and on the way back the motor bike developed mechanical problems on reaching Kana area. That they

started to pushing the motor bike towards Rongo. That at Ranen they stopped and that at Kanga they were stopped by a group of 6 men at around 2300hrs. That he was in company of Edward. He said they realized they were under attack and Edward Mwita fled leaving him alone. PW1 said it was dark but there was moonlight and light from motor vehicles that were passing by. He said that the group of people jumped on him and started beating him and cut him on the head. He said the attackers demanded for Kshs. 30,000 which he did not have and his money Kshs. 5,000 was taken together with mobile phone make Huawei.

That when he saw the police vehicle approached the scene he managed to hold the Appellant herein who was holding him by the color and his colleagues arrived and apprehended him and he was taken to the station. The Complainant said that the Appellant was the ring leader of the group that attacked him and he was the one demanding for money and controlling the crowd. He said the other person ran into the sugarcane plantation.

The Complainant also said that one person reported at Kitere Police Post that his motor cycle was lost. He said the motor cycle alleged to be lost is the one Mwita went with. PW1 said that the accused who was discharged was among the group but he did not attack him. PW1 identified the motor cycle in court as exhibit.

PW1 in cross examination said that he apprehended the Appellant at the scene and that the Appellant did not go to rescue him.

PW2 Paul Mwita Edward said he was with PW1 on 11th July 2022 at night when their motor cycle broke down at Ranen. That on their way at Kanga Machine they were attacked by 6 men and they fought back. He said that one of the attackers had a motor cycle which he managed to take and rushed to Kamagambo Police Station and called the police. That on return to the scene the attackers fled but the Appellant was

arrested. He said that a report of lost motor cycle was made at Kitere Police Post. PW2 said that the attackers were armed with panga and sticks and also had torches. He said he handed over the motor cycle to the police.

PW3 CPL Ngali from Kamagambo Police Station investigated the offence. It was his testimony that on 10th July 2022 he was at the station at 2300hrs when he heard someone on a motorcycle crying and saying Chali is being killed. He said the person reported that a colleague had been attacked by robbers at Kanga Machine. That when they proceeded there they found the Complainant sitting down and was surrounded by 6 men. That immediately they stopped the attackers fled into the nearby bush but the Complainant jumped onto one of the attackers and he was arrested.

That on 11th July 2022 the 1st accused reported at Kitere Police Post that his motor cycle was lost and it was established it was the one that PW2 had used to the station. That the owner of the said motor cycle was arrested and detained and subsequently charged. PW3 said the motor cycle was bought by the 1st accused person through a loan from a company.

PW3 further said that the Complainant was injured and he also lost his phone which was being tracked.

On 5th April 2023 charge against 1st accused was withdrawn under Section 87(a) of the CPC.

Hon Oruo took evidence of the Clinical Officer Lilian Nyaboke who attended to the Complainant who presented himself at Rongo Sub-County Hospital with history of having been assaulted by a group of people and he was able to identify 2 of the assailants. The said Clinical Officer observed that the Complainant had a torn black Tee shirt and he had 2 deep cuts on the right side of the head measuring 4cm and 6

stitches were applied. She filled P3 form which she produced assessing injuries as harm and the probable weapon as sharp object.

Upon consideration of the evidence of 4 prosecution witnesses and the Appellant's sworn statement the Trial Magistrate found that the prosecution had adduced sufficient evidence to find the Appellant guilty for the offence of robbery with violence and he convicted him. The Appellant was then sentenced to serve life imprisonment to start running from 20th July 2022 when the Appellant was remanded in custody for trial.

The Appellant was aggrieved by the conviction and sentence and he preferred the Appeal herein vide Petition of Appeal dated 11th October 2023 on the following grounds: -

1. That the Learned Trial Magistrate erred in both law and facts in finding against the Appellant against the weight of evidence on record.
2. That the Learned Trial Magistrate erred in both law and facts in convicting the Appellant based on contradictory evidence of the prosecution.
3. That the Learned Trial Magistrate erred in both law and facts in convicting the Appellant while the prosecution did not prove the case against the Appellant beyond reasonable doubt.
4. That the Learned Trial Magistrate erred in both law and facts in proceeding with a trial to convict on a charge that was defective.
5. That the Learned Trial Magistrate erred in both law and facts in proceeding that he could make a finding of guilt just because the law allowed it.
6. That the Learned Trial Magistrate erred in both law and facts in failing to note that there was no sufficient explanation as to why it was only the Appellant that never fled from the alleged

- scene of crime while others ran away and failing to find that the Appellant was entitled to the benefit of doubt.
7. That the Learned Trial Magistrate erred in both law and facts in failing to give convincing and clear circumstances that led to discharge of other accused persons that were arrested and charged by the Trial court.
 8. That the Learned Trial Magistrate erred in both law and facts in dismissing the Appellant's defense without analysis.
 9. That the Learned Trial Magistrate erred in both law and facts in arriving at a conviction against the weight of evidence.
 10. That the sentence was manifestly excessive and harsh
 11. That the Learned Trial Magistrate otherwise erred in both law and facts in convicting the Appellant for further reasons which will emerge at the hearing of the appeal

REASONS WHEREFORE the Appellant/prays that the conviction be quashed and sentence set aside together with all consequential orders and that the Appellant be set at liberty.

The court gave directions for hearing of the appeal by way of written submissions.

The Appellant's submissions are dated 25th March 2025 whereas the Respondent's submissions are dated 15th November 2024.

ANALYSIS AND DETERMINATION

This being a first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify as espoused by the court of appeal in the case of **David Njuguna Wairimu Vs Republic [2010]**. It has to establish whether the decision of the lower court was well founded.

Having considered the grounds of appeal and the rival submissions and having re-evaluated the evidence on record in the trial court and the judgement of the Trial Magistrate the issues that arise for determination by this court are:

1. Whether the trial court complied with Section 200(3) of the Criminal Procedure Code.
 1. Whether the prosecution proved the ingredients of **robbery with violence** beyond reasonable doubt/ Whether the finding against the Appellant was against the weight of evidence on record.
2. Whether the Appellant's identification and implication were reliable.
3. Whether the Appellant's defence was properly considered.
4. Whether the sentence imposed was lawful and proportionate.
5. Whether the Appellant was convicted based on contradictory evidence of the prosecution
6. Whether the Appellant was convicted based on defective charge sheet.
7. Whether the Learned Trial Magistrate gave convincing and clear circumstances that led to discharge of other accused persons that were arrested and charged by the Trial court.

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.

Section 296 provides:

(1). Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2). 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.

Under **Section 296(2) of the Penal Code**, robbery with violence is established if:

- a. The offender is armed with a dangerous or offensive weapon, or
- b. The offender is in company of one or more persons, or
- c. At or immediately before or after the robbery, uses or threatens to use actual violence.

In the case of **Ronald Onyinkwa Nyamokoba Versus Republic [2018] KEHC 2733 (KLR)** it was held:

The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person

Any one of the above elements suffices to constitute the aggravated offence of Robbery with violence.

The prosecution bears the burden of proving these elements beyond reasonable doubt, and where identification is in issue, the test in **Roria v Republic [1967] EA 583** and **Wamunga v Republic [1989] KLR 424** applies — that visual identification under difficult circumstances must be treated with great caution.

In regard to compliance with Section **200(3) Criminal Procedure Code** the record shows that when Hon. Oruo took over the proceedings, the evidence of PW1, 2 & 3 had been taken and he complied with **Section 200(3)** by informing the accused of his right to have the witnesses recalled, and the Appellant elected to proceed from where the matter had reached. This was shortly after the Prosecuting Counsel had withdrawn charges against the Appellant's co-accused under Section 87(a) of the Criminal Procedure Code. There was therefore no procedural defect at takeover.

Hon. Oruo PM proceeded to take evidence of the Clinical Officer who treated the Complainant and filled P3 at Rongo Sub-County Hospital assessing injuries as bodily harm. The remaining one witness was not traced and he did not testify.

On whether the offence was proved the Complainant testified that he and PW2 had come from visiting a friend when their motor cycle broke down and they were attacked by 6 people and that the Appellant herein was arrested from the scene after PW2 went to call the Complainant's colleagues from the Police Station using one of the Assailants motor cycle

From the evidence on record it is true the Complainant was injured and he sustained two deep cut wounds on the head as corroborated by the Clinical Officer (PW4), who classified the degree of injury as harm

caused by a sharp object. This satisfied the element of actual violence. It is also not in dispute that the Appellant was arrested near the scene of the alleged attack. However, it is not explained how PW2 got the motor cycle of one of the assailants if indeed they were the ones under attack.

Presence of violence and injury by multiple assailants was also confirmed by the evidence of PW1 and PW2 who testified that they were attacked by a group of six men. That evidence remained consistent and was corroborated by PW3, the police officer who arrived at the scene and found a crowd surrounding the Complainant. The element of being "in company with others" was thus proved. From the charge sheet PW1 is said to have lost a mobile phone make Huawei valued at Kshs. 15000/= which was not recovered. In his testimony in court PW1 alleged he also lost Kshs. 5000/= which was also not recovered. In the testimony of the Complainant in court he said that his phone was worth Kshs. 6000/=. This is in contradiction with the figure in the charge sheet.

The Complainant testified that when the 6 people stopped them and cut him on the head he told them he was just passing by and they stayed with him for sometime as his friend Mwita escaped and went to call his colleagues. PW1 said that the assailants demanded for money and he told them he had 5000/= only and they bargained up to 30,000/=.

PW2 on the other hand said that they fought with the assailants and he overpowered one of them and managed to take his motor cycle and escaped to the police station and called for reinforcement.

PW3 the investigating Officer did not say anything in regard to alleged loss of money by the Complainant.

The Prosecutions evidence on the circumstances of attack and evidence of PW1 & 2 are not consistent with each other. The motor cycle that PW1 & 2 alleged was broken down on the material night was not identified or produced. The Appellant's co-accused who was discharged and who was the owner of the motor cycle that PW2 used to escape to the police Station did not testify and the reasons given for discharging him when it is clear that he was at the scene is dubious and suspicious. PW1 & 2 did not disclose the name of the friend they had gone to visit on the material night of the alleged attack. There is a witness the Prosecution failed to call and it is not known what evidence he was going to give and why he was not called to testify and yet he was discharged from prosecution as owner of the motor cycle that PW2 used to go to the Police Station. Failure on the part of the prosecution to call a crucial witness makes the court to infer that his evidence if tendered would have been adverse to the Prosecution and it was therefore not safe to convict the Appellant in the circumstances of such failure.

The Appellant did say that while in his house sleeping at 11.00pm he heard dogs bark and when he went out, he did not know that police were chasing people and while at the gate 2 people went and arrested him claiming he was a suspect. He said Brian Odhiambo was also arrested at the station for interrogation. The Appellant said that the Complainant's shirt that was allegedly torn was not produced and it was not true that he was identified at the scene.

PW3 the investigating Officer did not inform the court whether he investigated and established the Appellant's place of residence in relation to the scene of crime.

In consideration of the contradictions pointed out in the prosecution's case and in consideration of the questionable circumstances under which the alleged robbery took place and the fact that the Appellant's co-accused who was discharged and whose motor cycle was used by PW2 did not testify, this court finds that doubt has been raised in the prosecution's evidence and resolves the said doubt in favour of the Appellant and find that the conviction and sentence were not safe. The appeal has merit. The conviction is quashed and sentence set aside. The Appellant is to be released forthwith unless lawfully detained. Right of Appeal within 14 days explained.

DATED, SIGNED, AND DELIVERED AT MIGORI THIS 2nd DAY OF December, 2025.

.....
ANNE ONG'INJO

JUDGE

