Alumasa v Republic (Criminal Appeal E065 of 2024)
[2026] KEHC 367 (KLR) (20 January 2026) (Judgment)

Neutral citation: [2026] KEHC 367 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E065 OF 2024

LN MUTENDE, J

JANUARY 20, 2026

BETWEEN

BRAMWEL NGIRIMAN ALUMASA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Bramwel Ngiriman Alumasa, the Appellant, was charged with Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. Particulars of the offence were that on the 9th day of December, 2020, at Chunguti Village in Laikipia West Sub-County within Laikipia County robbed Isaac Khisa Baraza Kshs.20,000/-, one cell phone make Itel 4 worth Kshs.4,500/-, one shirt worth Kshs.800/-, one trouser worth Kshs.600/-, one black bag worth Kshs.1,500/- and at the time of such robbery used actual violence to the said Isaac Khisa Baraza.

2. In the alternative he faced the offence of handling stolen goods contrary to Section 322(1) (2) of the Penal Code. Particulars of the offence being that on the 11th day of December at Naresho Township in Nakuru County otherwise than in the course of stealing, dishonestly handled one mobile phone make Itel 4 knowingly or having reason to believe it to be stolen property.

3. He was taken through full trial, found guilty on the principle charge, convicted under Section 296(2) of the Penal Code and sentenced to suffer death as provided in law.

4. Aggrieved, the Appellant appeals on grounds that; the conviction was against the weight of evidence; no identification parade was conducted to ascertain the real perpetrator; the trial Magistrate erred in accepting only evidence of the Arresting Officer, Investigating Officer and Medical Officer, evidence that was hearsay.

5. That the court sentenced the Appellant after the complainant took note that he had lied and wrote a Notice of Withdrawal of the case.

6. Pursuant to directions taken by the court, the appeal was to be disposed through written submissions but only the Appellant filed submissions which I have taken into consideration.

7. Briefly, facts of the case were that on 9th December, 2020 at 3.00am, PW1 Isaac Baraza was asleep inside the house and when he turned he felt something on the chest. A person pounced on his chest but he struggled with him. He stood and went to switch on the lights only to realize that there was no power. He screamed, an act that made one of them run out of the house while one remained inside. He pushed him aside and managed to climb the iron sheet roof where he stayed until morning. On alighting, he realized that the door had been locked from outside hence he passed through the window which they broke and passed through.

8. It was the complainant's further testimony that he was injured having been stabbed with a knife on the right hand and the attackers had attempted to gorge out his eyes with their nails as they continued hitting him with a club on the chest at the rib area. He screamed and his employer Miriam Waithera went to his aid and on seeing injuries sustained she screamed attracting neighbours who went to the home and even saw his clothes that were blood stained and the rope used to tie him while on the bed. And his Kshs.20,000/- that was in a long trouser that was in the bag was missing. Also missing was his long trouser, a pair of shoes and a phone make Itel.

9. The matter was reported to the police. PW3 No. 219396 PC Richard Mwai visited the scene in company of Cpl Stephen Kemboi. They found the house was made of timber and the attackers had removed offcuts to gain entry. They recovered a nylon rope tied on the bed and a club under the bed. He obtained the cell phone number which they tracked. They traced the location to Kongoni, Naivasha.

10. PW2 No. 12034 PC Anthony Nyarara Kinyua of Kongoni Police Station was tasked with the assignment to arrest the suspect. They moved to Central Ndabibi Githiondu, a horticultural farm where the Appellant was found and arrested. That PW1 had identified the voice of the Appellant who talked to his accomplice on the fateful night as for a person who used to visit his place of work. A long trouser and cell phone make Itel were recovered. The complainant was subjected to medical treatment. Subsequently, he was moved to Rumuruti Police Station and changed.

11. Upon being placed on his defence the Appellant stated that he lived in Mutanga area but in July 2020 he moved to work in Naivasha with his family comprising of a wife and two (2) children. In November, 2020, his wife went home to attend to her sister who had been delivered of a child and her brother went to stay with him as he searched for work. Since he didn't have a cell phone he would use his brother in-law Isaac's phone.

12. That in December, 2020, he used the cell phone to call a person who would give him a job. The answer being positive they were required to meet him. Therefore, he sought permission to be away from work and both of them went to Rumuruti. He used the same cell phone to establish the whereabout of the individual who requested him to wait. Some two (2) lads joined them and even offered to buy them tea but he declined as he would have motion sickness but his brother in-law accepted. His brother in-law went to take tea with one of the lads while he remained with the other two (2) lads who asked him to escort them to collect some items that he was to take to his brother in-law.

13. They went and while on the way the lads said that he had escaped from the area but voluntarily returned by himself. That his wife was with them and he could do whatever he wished. He retorted that he had a right of doing whatever he wished while annoyed like running away from the area as he had done so as to look for work in Naivasha. His answer angered them. They assaulted him and injured his middle finger nail and private parts. He was treated following a court order. That he defended himself by biting his assailant's hand. He walked towards Nyahururu but on the onset of the night he slept in a caravat

until 4.00am then boarded a motor vehicle and went to Naivasha. His clothes were blood stained hence went to rest at the house. Later on, he reported to work and was given light duties.

14. While recording crates, he was called to the manager's office and was informed that people who had come were police officers. They were with his brother in-law. They turned out to be people that he fought. They sought to go to his house and he took them there. The lad he fought said he lost a cell phone and long trouser when they fought. His house was searched. The lad said he had found a long trouser and also identified a phone he had put on top of the radio which was not serviceable and he was arrested. He requested them to have his solar panel placed inside the house but the police put it in the motor vehicle and on being placed in cells at Rumuruti Police Station he could not tell where they took it. He later learnt that the lad he fought and bit his hand was the complainant.

15. That the complainant had reported that he robbed him when he went to the area, he took his wife and with whom he slept. That the complainant Isaac Khisa was known to him as he would go to his home and they would share a meal but he later realized that his intention was to sleep with his wife and that on 17th March, 2021 he went to court and said he wished to withdraw the case and forgive him. On cross examination he stated that the phone belonged to the complainant, he sold it to him before they disagreed but he had nothing to prove that he sold it to him.

16. It was the finding of the trial court that the complainant identified the Appellant by voice, his phone was tracked to the Appellant where his phone and long trouser were recovered which was evidence that he was the offender.

17. The first appellate court is required to reassess and analyse the evidence on record and come to its independent conclusions on whether the evidence can convict the Appellant. The court must however be minded that it never saw nor heard witnesses who testified. In David Njuguna Wairimu v Republic [2010] eKLR the Court of Appeal stated that;

> " The duty of the first appellate court is to analyze 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 decisions."

18. The offence of robbery with violence is provided for in Section 296(2) of the Penal Code which 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, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

19. In Johanna Ndung'u v Republic [1996] eKLR the Court of Appeal held that;

> " In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in

any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in S.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

If the offender is armed with any dangerous or offensive weapon or instrument, or

If he 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 violence to any person."

20. Elements as enshrined in law of the offence of Robbery with Violence are read disjunctively hence the court can convict when only one element is disclosed and proved. In Dima Denge & 7 Others v Republic Criminal Appeal No. 300 of 2007 the Court of Appeal stated that;

> " The elements of the offense under Section 296(2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offense of robbery with violence...."

21. In the amended grounds of appeal filed simultaneously with submissions, the Appellant submits that the charge was defective in form as particulars of the offence did not mention the 'knife' and state whether it was a dangerous weapon. Reliance is placed on the case of Suleiman Juma alias Tom v Republic Criminal Appeal No. 181 of 2002 where the court ordered that;

> " .....the charge refers to the Appellant having been armed with knives. The particulars of the charge do not clearly state whether the knife was a dangerous weapon. Under S.296 (2) of the Penal Code the charge must state that the accused was armed with a dangerous or offensive weapon or instrument, or was in the company of one or more other person or persons.."

22. Section 214(1) of the Criminal Procedure Code provides that a charge is defective where;

> (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—
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> (i) where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
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> (ii) where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

23. The instant charge of robbery with violence was brought under Section 295 as read with Section 296(2) of the Penal Code. A charge would be expected to clearly capture what the offender did that amount to elements of the offence. The offender would be expected to be armed, in company of more than one person and to have used some violence to the victim. The Appellant was stated to have used actual

violence to the victim at the time of the act. The question to ponder would be whether there was an injustice committed to the prejudice of the Appellant? In the Dima Denge case (Supra) the court was clear, the elements are separate. They are not considered cumulatively. What the prosecution is expected to prove is only one of the elements. (Also see Oluoch v Republic [1985] KLR).)

24. Although in his testimony the complainant mentioned the weapon used which was adapted to be a dangerous but had not been captured in the particulars of the offence, this was not fatal to the prosecution's case. It could not render the charge fatally defective as at the outset the Appellant knew he faced the charge of Robbery with Violence and that he robbed the complainant of various items stated in the particulars of the offence and actual violence was used in the process.

25. It is complained by the Appellant that he did inform the court of the complainant's intention to withdraw the case but the court disregarded it. Looking at the proceedings, on 30th August, 2021, the Appellant (Accused) notified the court that the complainant had withdrawn the case having written a letter to withdraw the case. In response thereto, the prosecution counsel indicated that they had not received any letter from the complainant. That the Investigating Officer was not aware of the allegations and was prepared to testify then. To that the court ruled that it had not been informed of the complainant's wish to withdraw the case.

26. Article 157(6)(a)(b) and (c) of *the Constitution* provide thus;

> (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may—
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> a. institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
>
> b. take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
>
> c. subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

27. The case was instituted by the Director of Public Prosecutions as provided in law. To discontinue the proceedings, it was the prerogative of the office of the Director of Public Prosecutions. The Appellant was seized of a letter attached to the submissions purportedly written to the Chief Magistrate by one Isaac Khisa which was not within the knowledge of either the prosecution counsel or the court. The Appellant could not move the court to withdraw the charge against himself.

28. On the charge having not been proved, the evidence was of a single witness. In Roria v Republic [1967] EA 583 the Court of Appeal stated at page 5 and 4 that;

> " A conviction resting entirely on identity invariably causes a degree of uneasiness, ...
>
> That danger is of course greater when the evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such

identification should never be upheld. It is the duty of this court to satisfy itself that in all the circumstances it is safe to act on such identification."

29. In Kiilu & Another v Republic [2005] eKLR the Court of Appeal held that;

> " Subject to certain well known exceptions, a fact could be proved by testimony of a single witness but that rule did not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it was known that the conditions favouring a correct identification were difficult. In such circumstances, what was needed was other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury could reasonably conclude that the evidence of identification, although based on the testimony of a single witness, could safely be accepted as free from the probability of error."

30. PW1 testified that the act of robbery occurred at 3.00am around it was done such that he could not see his assailants save that he recognized the voice of the Appellant a person well known to him. He had known the Appellant hence had sufficient familiarity with his voice. This was not only a case of familiarity of the voice but items stated to have been taken from him on the fateful night were found in the Appellant's possession.

31. The explanation given by the Appellant is that he had purchased the cell phone from the complainant long before the incident. And he fought him along the road as opposed to the alleged robbery. It was the argument of the complainant that he could not have sold the cell phone together with his line which enabled them to track down the Appellant although no data was availed to prove the allegation.

32. The complainant's testimony that he was assaulted by the attackers who wounded him was confirmed by medical evidence. He was seen in hospital on 10th December, 2020, at 10.20 hours at Oljabet Health Centre. He had redness of the right eye, tenderness on the chest. Bruising of the abdomen, penetrating injury on the right arm and a small wound on the left forearm. This was evidence of wounding in the course of the act. Although the Appellant alleged that he fought one of the persons. He was not forthright given the allegation at the outset that he did not know the complainant but ultimately changed the tale to the allegation that he was well known to him as he was even committing adultery with his wife.

33. The fact of the house having been broken into on the fateful night was confirmed by the police officers who visited the scene. Therefore, there was proof of the offence of Robbery with Violence.

34. On the sentence, the learned trial Magistrate is faulted for not considering what is provided by the 2016 Judiciary of Kenya guidelines where death sentence is in conflict with the objective of sentencing as it could be reviewed. The punishment provided by statute for the offence is death and it is in mandatory terms. In Dima & Another v Republic [2025] KECA 1206(KLR) the Court of Appeal stated that;

> " The penalty for the offence is coached in mandatory terms under Section 296(2) of the Penal Code."

35. In Oluoch v Republic (Criminal Appeal No. 108 of 2020 [2025] KECA 1064 (KLR) the Court of Appeal stated that;

> " The offence of robbery with violence therefore remains punishable by death as a mandatory sentence. While this Court acknowledges the evolving jurisprudence on sentencing, it is bound by the Supreme Court's determination in Muruatetu 2 which reverts the sentence of

robbery with violence to the reasoning in Joseph Njuguna Mwaura & Others -Vs- Republic (supra)."

36. I therefore find the sentence to have been in accordance with the law and the Appellant's rights were not infringed. The upshot is that the appeal lacks merit. Accordingly, it is dismissed in its entirety.

37. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF JANUARY, 2026.

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L.N. MUTENDE

JUDGE