

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**(CORAM: R. MWONGO, J.)**  
**CRIMINAL APPEAL NO. E012 OF 2025**

**SAMUEL MURIITHI MARINGA.....1<sup>ST</sup> APPELLANT**  
**BONIFACE NJIRU MARINGA.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(Appeal arising from the decision of Hon. R. Njoki Kahara in the Siakago MCCR E548 of  
2024 delivered on 20<sup>th</sup> February 2025)*

**J U D G M E N T**

**Background**

1. The appellants were charged with robbery with violence contrary to section 296(2) of the Penal Code. The particulars were that on 16<sup>th</sup> July 2021 at about 1100hrs, at Muchonoke sublocation, Mbeere North Subcounty within Embu County, the appellants, together with others not before court, robbed Wilfred Kinyanjui Kibe of his title deeds for land parcel numbers Nthawa/Gitiburi/2455 and Mbeere/Kiambere/678, a mobile phone make Simba, blue in colour and worth Kshs.2,700/= and cash of Kshs.750/= and in the process wounded the said Wilfred Kinyanjui Kibe using a panga and a crowbar.
2. They faced the alternative charge of handling stolen goods contrary to section 322(1&2) of the Penal Code. The particulars were that on 16<sup>th</sup> July 2021 at about 1400hrs, at Muchonoke sublocation, Mbeere North Subcounty within Embu County, other than in the course of stealing, the appellants dishonestly retained 2 title deeds for land parcel numbers Nthawa/Gitiburi/2455 and Mbeere/Kiambere/678 and a mobile phone make Simba blue in colour and worth Kshs.2,700/= the property of Wilfred Kinyanjui Kibe knowing/having reason to believe them to be stolen goods.
3. They pleaded not guilty to the charges and the case went to full hearing. The trial court convicted them of the main count and they were each sentenced to 15 years imprisonment.

## **The Appeal**

4. Dissatisfied with the decision of the trial court, the appellants filed a petition of appeal seeking for orders that the appeal be allowed, the conviction be quashed, the sentence imposed be set aside and the appellant be set at liberty. The appeal is premised on the following grounds:

- 1) That the learned trial magistrate erred in law and facts under Section 295 by failing to note that the appellants were not armed at the time the complainant stormed their homes;
- 2) That the learned trial magistrate erred in law and facts by convicting the appellants when the prosecution had not proved the case by discharging the required burden of proof;
- 3) That the learned trial magistrate erred in law and facts by convicting the appellants on fabricated charges on a defective charge sheet;
- 4) That the learned trial magistrate erred in law and facts by convicting the appellants after failing to scrutinize and analyze the credibility of the evidence adduced by the prosecution to enable her make a fair and just decision;
- 5) That the learned trial magistrate erred in law and facts by rejecting the appellants' defense without giving cogent reasons; and
- 6) That the learned trial magistrate erred in law and facts by imposing a harsh and excessive sentence without taking into consideration the mitigation circumstances.

## **Summary of the Evidence in the Trial Court**

5. PW1 was John Mwangi, a clinical officer at Siakago District Hospital. He produced a P3 form for the victim Wilfred Kinyanjui. He stated that the victim's clothes were soaked in blood and he had the following injuries: a cut would below the right elbow joint, swollen right leg just below the tibia fibula with bruises, tender and swollen right hip with limited movement, tender and swollen right thigh and scratch marks on both legs. He examined him 6 hours after the incident and he concluded that the injuries were inflicted by blunt and sharp objects. He categorized the injuries as main and the victim was treated. In cross-examination, he stated that the victim told him that he had been attacked by 5 people.
6. PW2 was Wilfred Kinyanjui Kibe, the victim. He stated that he knew the appellants in 2024 when their father sold land to him. On the day of the incident, one Michael Mbugua accompanied him from Githunguri in Kiambu to Muchonoke

in Embu to see a piece of land known as Nthawa/Gitiburi/2455 which the appellants' father had sold to him. Upon reaching, they left the vehicle at some distance and walked to the where the land was located. While on the way, they met the appellants and 2 other people who stopped them and ordered them to lie on the ground since they had not greeted them before going to the land.

7. He could not remember them because when their father sold him the land, they were very young. They tied him with ropes and cut him with a panga on various parts of his body. Michael took him to Siakago Police Station where they reported the matter and he was treated at Siakago District Hospital, and also at Kiambu Hospital when he got home. He added that the assailants also stole the title deeds he was carrying and his mobile phone. At the time of his testimony, his hand had not healed. He stated that he bought the land from the appellants' father in 1985.
8. In cross-examination, he rehashed his testimony and stated that he had found some houses built on this land which he had bought in 1985. That he could not recognize the appellants because they were small when he bought the land from their father. He denied being drunk at the time of the incident or that he had sustained the injuries from falling down.
9. PW3 was Judith Muthoni Mugo, the area chief. She stated that the appellants were her constituents and she met PW2 in 2024 during the incident. She stated that she was working when she was alerted about 2 people assaulting someone. She went to the scene accompanied by her colleague and some police officers from Muchonoke Police Post. At the scene, they found that PW2 had gone to visit the land he had bought but he had been assaulted by the appellants who had also taken his mobile phone and title deeds. They were led to where the appellants had hidden the title deeds by the 2<sup>nd</sup> appellant's daughter. They arrested the appellants and took them to Siakago Police Station. She denied knowledge of any land dispute between the appellants and PW2.
10. In cross-examination, she stated that she received distress calls from many members of the public about the appellants assaulting someone. When she arrived at the scene, the appellants themselves showed them the weapons used to attack PW2. The daughter of the 2<sup>nd</sup> appellant is the one who took the police to the place where the stolen title deeds had been hidden. Initially, the 1<sup>st</sup> accused told the police that PW2 was trying to steal his motorcycle. In any event, she said he had no right to cut PW2 with a panga.

11. PW4 was Irene Muthoni Ngari, the assistant chief of Muchonoke sublocation. She testified that the appellants are her constituents. She stated that while on duty at Siakago Town she received a call from another sub chief who had received information from PW3 that the appellants had been found assaulting someone. She went to the scene alongside other local administration officers and the police and they found a man lying down at the home of the appellants. He was injured on his hands and legs and was bleeding profusely.
12. The man later identified as PW2 stated that after the assault, the appellants had taken his title deeds and mobile phone. The appellants said that they had assaulted PW2 but they denied cutting him with pangas. The chiefs and police officers asked for the title deeds. One was brought by the 1<sup>st</sup> appellant and the second one was found by the 2<sup>nd</sup> appellant's daughter. In cross-examination, she stated that PW2 had bought land from the appellants' father who had given him the title deed. She said that the appellants were not assaulted in any way.
13. PW5 was PC Martin Kibucha who stated that he visited the scene alongside other local administration officers and they found PW2 lying down, with injuries and bleeding. He had been tied with ropes and he said that the appellants had stolen his mobile phone and title deeds. While they were still at the scene, the 1<sup>st</sup> appellant brought one title deed and the mobile phone to the police while the sub area chief went to search for the other title deed, which was found in a miraa farm. Members of the public found a stick and a panga with blood stains on it at the house of the 2<sup>nd</sup> appellant. The appellants were arrested and taken to Siakago Police Station. PW2 was taken to Siakago Hospital for treatment. In cross-examination, he stated that he found the 1<sup>st</sup> accused at Muchonoke Police Post but he did not know what he had gone to report. That the panga found was sharp and it had fresh blood stains on it. That there was an eviction order requiring them to move out of the land.
14. PW6 was PC Isaac Maina of Siakago Police Station who was the investigating officer. He testified that PW2 had been brought to the police station and it was reported that he had been assaulted by the appellants who also stole his mobile phone and title deeds. The stolen items had been recovered and the police at the scene had also found the assault weapons which were secured as evidence.
15. The appellants were arrested and brought to the police station and they told the police that PW2 was a thief who tried to steal their motorcycle. That allegation had also been reported at Muchonoke Police Post. Investigations revealed a different story to the effect that PW2 was the complainant. In cross-examination,

PW6 stated that he did not visit the scene and he was informed by the complainant that he had bought land from the appellants' father. The appellants were brought to Siakago Police Station by police officers from Muchonoke Police Post.

16. DW1 was the 1<sup>st</sup> appellant. He stated that the 2<sup>nd</sup> appellant is his brother and on the day of the incident, they saw 2 strangers walking around their homestead without greeting them. When they asked the 2 people what they were doing, PW2 told him that he intended to sell the land. He told PW2 that he did not have any rights over that land according to a civil case in Siakago. He said that he left PW2, his friend Michael and the 2<sup>nd</sup> appellant at the homestead and he went to call a village elder and by the time he left, there were no fights.
17. He reported the matter at Muchonoke Police Post and he returned with 2 officers to the homestead, where they found that a fight had ensued and PW2 claimed that he had lost some of his items. The 2<sup>nd</sup> appellant said that PW2 had started the fight. PW2's title deed was found at the farm and he and the appellant were both arrested. According to him, his father never sold any land to PW2 and the matter was determined in Civil Suit No. 176 of 1985 where the case was dismissed. That PW2 filed another suit in 2017 claiming that he had bought that land in 1996. He produced the judgment for that case as evidence.
18. DW2 was the 2<sup>nd</sup> appellant who stated that on the day of the incident, he noticed 2 people walking in their compound. He therefore instructed his brother to report to the police. He asked the strangers, PW2 and his friend, what they were doing on the land and PW2 said that he had come to sell it. After DW1 had left to go to the police station, he was left with PW2 and his friend who started assaulting him (DW2). He raised alarm and members of the public gathered, before PW2 and his accomplice ran away. Members of the public ran after them and assaulted them at the farm and they only stopped after he informed them that DW1 had gone to call the police. DW1 returned with police and chiefs and arrested them.

### **Parties' Submissions**

19. The appellants submitted that the respondent had to prove *mens rea*. They relied on the cases of **Republic v Mwaka Chivatsi & 2 others [2020] KEHC 46 (KLR)**, **Philip Muiruri Ndaruga v Republic [2016] KEHC 4252 (KLR)** and **Moneni Ngumbao Mangi v Republic (2006) eKLR**. They also relied on section 295 of the Penal Code and the case of **Johana Ndungu v Republic [1996] KECA 187 (KLR)** and argued that the main ingredient of the offence was stealing, which was lacking in this case. They also relied on the cases of **David**

**Njoroge Macharia v Republic [2011] KECA 406 (KLR)** and **Karisa Chengo v Republic [2019] KEHC 10109 (KLR)**. They submitted that the appellants were not armed by the time they met PW2 and his friend. Further reliance was placed on the case of **Bukenya v Republic (1972) EA 549**. They urged the court to allow the appeal since the prosecution witnesses failed to prove the case beyond reasonable doubt.

20. In its submissions, the respondent relied on section 296(2) of the Penal Code and the cases of **Oluoch v Republic [1985] KLR 549** and **Mohamed Ali v Republic [2013] KEHC 1623 (KLR)** which described the elements of the offence. The state relied on section 134 of the Penal Code and argued that the charge as drawn was not defective and it clearly stated the nature of the offence. Reliance was placed on the case of **Joseph Njuguna Mwaura & 2 others v Republic [2013] KECA 541 (KLR)** for the argument that the offence was proved beyond reasonable doubt. It stated that the sentence was not harsh or excessive and it relied on section 354(3) of the Criminal Procedure Code and the case of **Wilson Waitegei v Republic [2021] KEHC 1458 (KLR)**. The state argued that the sentence imposed by the trial court was a departure from the mandatory sentence prescribed in law.

### **Issues for Determination**

21. From the grounds of appeal and the submissions made, the issues for determination are as follows;

- 1) Whether the offence was proved beyond reasonable doubt;
- 2) Whether the sentence imposed should be set aside.

### **Analysis and Determination**

22. It is the role of this appellate court to re-examine the evidence adduced at trial to reach its findings. This was stated in the case of **Kiilu & Another vs. Republic [2005]1 KLR 174**, where the Court of Appeal held:

*“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; Only then can*

***it decide whether the Magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses.”***

23. On the issue of whether the offence was proved beyond reasonable doubt, sections 295 and 296 (2) of the Penal Code set out the elements of the offence of robbery and robbery with violence. The section provides:

***“295: 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.***

***296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”*** [Emphasis added]

24. In the case of **Charles Mwai Kimani v Republic [2022] KEHC 1459 (KLR)** the court cited the case of **Jeremiah Oloo Odira v Republic [2018] KEHC 2195 (KLR)** where the learned Judge elaborated on the offence of robbery with violence as follows:

***“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.***

***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: -***

- i. The offender is armed with any dangerous or offensive weapon or instrument, or***
- ii. The offender is in the company of one or more other person or persons, or***

**iii. 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” [Emphasis added]**

25. If any of these elements is proved to the required standard, the appellant will be found culpable, under the wording prescribed in the relevant provision. This was the position of the court in the case of **Dima Denge Dima & Others v Republic [2013] KECA 480 (KLR)** where the court stated:

**“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. This was considered at length by this Court in Johana Ndungu v. Republic Criminal Appeal No. 116 of 1995 (unreported);**

**“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 section 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 properly at 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 section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.””**

26. PW2 testified that he did not recognize the appellants because when he bought the subject land from their father, they were very young. He stated that he had gone to visit the property he had bought from their father when the appellants assaulted him and took his title deeds and mobile phone. At the time, he was with one Michael who has escorted him on the visit from Githunguri in Kiambu. He said they travelled in his car. He stated that on the way to the land, they met the appellants who ordered them to lie on the ground and they assaulted him with pangas. The injuries sustained were recorded by PW1 in a P3 form which was produced as evidence.

27. PW5 testified that he met the 1<sup>st</sup> appellant at Muchonoke Police Post but he did not know what he was reporting. That when he returned to the scene with him, they found PW2 lying down bleeding and with injuries. He stated that the 1<sup>st</sup> appellant gave them one title deed and the other title deed and the mobile phone

were found at a miraa farm. The hideout was identified by the 2<sup>nd</sup> appellant's daughter. PW3 who was at the scene stated that both title deeds were recovered from a hideout that was identified to them by DW2's daughter.

28. In his defense, DW1, the 1<sup>st</sup> appellant stated that when PW2 and Michael went to their home, he left and went to Muchonoke Police Post to report that PW2 had told them that he intended to sell the land. His story was corroborated by DW2 who stated that he is the one who sent DW1 to the police station to report the matter. DW1 also testified that PW2's ownership of the land was not established. DW2 testified that PW2 assaulted him when DW1 had left to go to the police station, and he raised an alarm. That members of the public gathered and chased him and they were the ones who assaulted PW2.

29. From the evidence, it is clear that DW1 was not present at the scene when PW2 was injured. Testimonies from both the prosecution and the defense witnesses remove him from the scene. The police officers who accompanied DW1 back to the scene from Muchonoke Police Station and local administration officers testified that when they arrived at the scene, PW2 was lying on the ground and bleeding profusely. This means that he had already been assaulted in the absence of DW1.

30. Even though PW5 testified that one title deed was produced by DW1 and the other was found at a hideout identified by DW2's daughter, there is contradiction in this evidence, which created reasonable doubt. PW2 testified that he was carrying the title deeds in one envelope, which was recovered at the hideout found by DW2's daughter. Does this therefore suggest that DW1 took one title deed and then went to the police station with it? This question cannot be answered as there is nothing in the evidence recorded to answer it.

31. All in all, there is doubt as to the evidence that DW1 was at the scene when PW2 was injured. Even though there is clear evidence of a long-standing land dispute between the appellants and PW2, to the extent that the matter has been in court severally, that only established motive. However, in the case of DW1, *actus reus* is not established beyond reasonable doubt.

32. In the case of DW2, he was left at the scene with PW2 and by the time the police and chiefs returned with DW1, the injuries had already been sustained by PW2. DW2's daughter is the one who unearthed the title deeds which had been taken and hidden by DW2 in a miraa farm. Michael, who accompanied PW2 did not testify. If he had, he would have been an eye witness to the incident. This therefore leaves the court with circumstantial evidence.

33. In order to consider and examine circumstantial evidence, it is trite that for it to be relied on, the same must form a strong chain of evidence such that the only conclusion which could be reached by it is a conviction. This was held in the case of **Chiragu & another v Republic (Criminal Appeal 104 of 2018) [2021] KECA**

**342 (KLR)**. There the court relied on the case of **Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR)** where it was held:

***“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: ‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”***

34. It emerged through evidence that while DW1 was away reporting the matter at the police station, DW2 remained at home where the police found PW2 having been attacked, and he was lying on the ground bleeding profusely. PW2 alleged he had been beaten and lost an envelope containing his title deeds and his phone. These were found by DW2’s daughter, hidden in the miraa farm. Both PW2 and DW2 stated that there were more than 2 people who attacked PW2. This evidence goes to show that DW2, alongside other people, attacked PW2 and assaulted him and then took his property without his permission.

35. In terms of the provisions of sections 296(2) and 21 of the Penal Code, the offence was thus proved. DW2 must be held responsible for the offence of robbery with violence as stated in the charge sheet and proved through evidence. As earlier pointed out, the same cannot be said for appellant 1.

36. On the question of whether the sentence imposed by the trial court should be set aside, section 296(2) of the Penal Code prescribes the death sentence in mandatory terms using the word “shall”, following conviction. In this case, the trial court imposed a sentence of 15 years imprisonment. The trial court considered

mitigation and exercised its discretion in the matter. There is no basis for reviewing this sentence.

### **Disposition**

37. Ultimately, and for the foregoing reasons, I find that the conviction of the 1<sup>st</sup> appellant is unsafe and it is hereby set aside. The sentence of 15 years imprisonment is also hereby set aside with an order that the 1<sup>st</sup> appellant be set at liberty forthwith unless he is otherwise lawfully held.

38. As for the 2<sup>nd</sup> appellant, his conviction and sentence is hereby upheld as found by the trial court.

39. Orders accordingly.

**Delivered, dated and signed at Embu High Court this 18<sup>th</sup> day of February, 2026.**

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**R. MWONGO  
JUDGE**

### **Delivered in the presence of:**

1. Both Appellants Present
2. Kimathi holding brief for Okwaro for Appellants
3. Ms. Mwaniki for the Respondent
4. Francis Munyao - Court Assistant