REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL APPEAL NO. E083 OF 2024

[Consolidated with Criminal appeal E082 of 2024]

(From the original conviction and sentence in Criminal case No. E470 of 2022 of the Senior Principal Magistrate's Court at Kehancha by Hon. M.O. Obiero–Senior Principal Magistrate)

EMMANUEL MWITA JOMO.....1st APPELLANT

JULIUS BOKE NKOROGO……. 2ND APPELLANT

VERSUS

REPUBLIC……...RESPONDENT

JUDGMENT

1. Emmanuel Mwita Jomo and Julius Boke Nkorogo, the appellant, were convicted for the offence of robbery with violence contrary to section 296 (2) of the Penal Code.
2. The particulars of the offence are that on the 20th day of June 2022 at Kwigena village, Kuria East Sub-County within Migori County, jointly with others, while armed with pistols and hammers, with intent to rob, Knight Chacha assaulted her, causing her actual bodily harm.
3. The appellants were sentenced to death. They were dissatisfied and appealed against both conviction and sentence. They raised grounds of appeal as follows:
    a) The trial court erred in law and in fact in not acquitting the appellant after making a finding that he was not positively identified in the vicinity of this case.
    b) The trial court erred in law and in fact in convicting the appellant, relying on circumstantial evidence that had a weak chain and with errors pointing towards the guilt of the appellant.
    c) The trial court erred in law and in fact in not complying with section 214 of the CPC in not informing the appellant of his right to recall the witnesses after amendment of the charge sheet. hence, a defence proceeding and an unfair trial.

d) The trial court erred in law and in fact in not gauging the evidence of the first report of the prosecution witnesses on the charges levied on them, hence arriving at a wrong decision

e) The trial court erred in law and in fact in denying the appellant an absolute right to at least the prescribed sentence pursuant to Article 25 (c), 50(2) (p) COK 2010.

4. The respondent did not file any opposition or submissions.

5. This is a first appellate court. As expected, I have analysed and evaluated afresh all the evidence adduced before the lower court, and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs Republic [1972] EA 32.**

6. Section 296 (2) of the Penal Code provides:

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.

7. The ingredients of the offence of robbery under section 296 (2) were stated by the Court of Appeal in the case of **Johana Ndungu vs Republic [1996] eKLR.** The Court said:

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 the 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 is presupposed 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:

1. ***If the offender is armed with any dangerous or offensive weapon or instrument, or***
2. ***If he is in company with one or more other person or persons, or***
3. ***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.***

8. In this case, there was no robbery. The particulars of the charge and the charge were at variance. The details and evidence suggested an attempted robbery. It is well-established law that if the particulars of the offence differ from the charge, the accused must be acquitted.

This principle was affirmed in the case of **John Brown Shilenje vs R. High Court (NBI) Criminal Appeal No 181 of 1981** (unreported).

9. The complainant (PW1) said she recognized the voice of Julius, the fourth accused, during the trial and the second appellant herein. On voice identification, the Court of Appeal in the case of **Simeon Mbelle vs Republic [1982] IKAR 578.** The Court said:

    In relation to the identification by voice, it would obviously be necessary to ensure:

    (a) That it was the accused person's voice;

    (b) That the witness was familiar with it, and they recognized it, and

    (c) That the conditions obtaining at the time it was made were such that there was no mistake in testifying to that which was said and who said it.

10. The purported recognition by voice of the second appellant did not pass the requisite test. It had no evidential value.

11. Tony Ibrahim Matiko (PW3) testified that he recognized the second appellant after shining his spotlight on him. Nyaboke Kuhera (PW4), on the other hand, stated she identified the second appellant when he entered her kitchen. However, the circumstances at the time were not conducive to a definitive identification. This is precisely why the court should have followed the guidelines set out by Lord Widgery C.J. in **R. v. Turnbull and Others [1976] 3 All ER 549**, where he emphasized the importance of proper identification procedures.

    Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize

someone whom he knows, the jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.

12. The prosecution should have asked the witnesses how long they had observed the people they identified and how bright the light was that aided them.
13. After reviewing the evidence on record, I conclude that there was no evidence on which to base the appellants' convictions. I quash the convictions and set aside the sentences. Each appellant is at liberty unless lawfully held.

Delivered and signed at Migori, this 26th day of February 2026

KIARIE WAWERU KIARIE

JUDGE