



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**CRIMINAL APPEAL NO. E082 OF 2023**

**[Consolidated with Criminal Appeal No. E036 of 2025]**

*(From the original conviction and sentence in Criminal case No. E710 of 2021 of the Chief Magistrate's Court at Migori by Hon. Naomi Wairimu–Senior Principal Magistrate)*

**KENNEDY OTIENO ORATO.....1<sup>ST</sup> APPELLANT**

**EVANS OTIENO OKINYI.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. Kennedy Otieno Orato and Evans Otieno Okinyi, the appellants, were convicted of 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 11<sup>th</sup> day of February 2021 at Mukuro village, Suna West Sub-County within Homa Bay County, jointly with others, while armed with pangas and other weapons, robbed Peter Chacha Mathias of a motorcycle registration number KMFJ 264Y valued at Kshs. 104,500.00, one mobile phone valued at Kshs. 7,999, and immediately before or after the said robbery, killed Peter Chacha Mathias.
3. The appellants were sentenced to 40 years' imprisonment. They were dissatisfied and appealed against both the conviction and the sentence. He raised grounds of appeal as follows:
  - a) The offence herein was not proved.
  - b) The learned trial magistrate disregarded the open discrepancies in the evidence of the complainants and adopted the evidence of a witness that was never presented before the court.

- c) The trial magistrate misdirected herself when she failed to critically analyze the entire evidence and realize that the inconsistencies could not sustain a conviction.
  - d) The sentence meted out herein is illegal in its entirety.
1. The respondent did not file any opposition or submissions.
  2. 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**.
  3. On the evening of 11 February 2021, Peter Chacha Mathias was robbed of his motorcycle while riding. Tragically, he was killed by his attackers. His body was later found in the River Migori, bearing multiple injuries. His motorcycle remained missing until 30 March 2021.
  4. Tobias Paul Nyakumwana (PW5) testified that he is the chairman of the Pamoja Karamu boda-boda riders CBO. On 30 March 2021, he received information that the motorcycle's signal had been detected as it entered Kenya from Tanzania. He was asked to assist in tracking it. The tracker directed him and others in his company to the motorcycle's location. The location was a funeral site. After the funeral, the rider was arrested as he picked up the motorcycle.
  5. George Otieno Orato (PW3) was the individual arrested with the motorcycle. The first appellant borrowed the motorcycle from the second appellant. His testimony stated that the second appellant arrived at their home, carrying the first appellant as a pillion passenger. The first appellant did not know how to ride, which is why he was riding it. The motorcycle lacked a registration plate.
  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, certainly, there was robbery. The issue which the trial court should have addressed was whether this was an appropriate case to invoke the doctrine of recent possession. On the application of this doctrine, in **Malinga v R [1989] KLR 225, 227** Bosire, J (as he then was) expressed himself as follows:

*By the application of the doctrine, the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts. Firstly that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in possession of the item. The doctrine, being a presumption of the fact, is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.*

9. The first appellant argued that he had asked the second appellant to take him and his parents to a funeral. However, he claimed to be unwell and handed over the motorbike to George Otieno Orato (PW3) to ride and transport them. His assertion was supported by PW3, his mother, Jennifer Awiti Ngege (DW2), and Millicent Auma Otieno (DW3).
10. Evans Otieno Okinyi, the second appellant, contended that the motorcycle belonged to the first appellant, who had given it to him on 15 February 2021. He conceded that he had taken it to the first appellant on 30 February 2021.
11. PC Boniface Ngare (PW10) testified that after obtaining intelligence, they visited the second appellant's home and retrieved the motorcycle's number plate. A photograph showing the plate with registration number KMFJ 264Y was presented.

12. The first appellant gave a satisfactory explanation of how he came to possess the motorcycle. There was no other evidence to connect him to the offences of robbery or handling stolen goods. His conviction cannot stand. The Same is quashed, and the sentences are set aside. He is set free unless otherwise lawfully held.
13. Peter Chacha Mathias, the deceased herein, was robbed and killed on the evening of 11 February 2021. Nineteen days later, the second appellant was found in possession, and, subsequently, the motorcycle's registration plate was recovered from the ceiling of his house. The doctrine of recent possession was correctly invoked to conclude that he must have been one of the robbers. His appeal has no merit; the conviction was based on sound evidence.
14. Although the sentence imposed is below the prescribed one, I will not interfere with it, as the respondent did not give the appellant the requisite notice for enhancement. Enhancing it without notice would be oppressive to the appellant.
15. The upshot of the foregoing analysis of the evidence on record is that the second appellant's appeal lacks merit. The same is dismissed.

**Delivered and signed at Migori, this 26<sup>th</sup> day of February 2026**

**KIARIE WAWERU KIARIE  
JUDGE**