REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL NO. E011 OF 2025

DICKSON MAINA

WANJOHI.....APPELLANT

VERSUS

REPUBLIC.....
..RESPONDENT

JUDGMENT

1. This is an appeal from the conviction and sentence meted out on 5.2.2025 by the Hon. E. Kanyiri, Principal Magistrate in Karatina SPMCCRC No. E416 of 2023.

2. The Appellant was charged with robbery with violence contrary to Section 295 as read with 296(2) of the Penal Code. The particulars of the charge in were that on 19.4.2023, at 2030hrs at Mathira East subcounty of Nyeri County, the Appellant being armed with dangerous weapons namely a knife and a stone robbed Julius Maina Kiniaru of his mobile phone make Tecno valued at Ksh. 2,800/=, Mpesa Money of Ksh. 2774/=, and cash money of Ksh. 3,600/= and

immediately before the time of such robbery wounded the said Julius Maina Kaniaru.

3. The trial court found the Appellant guilty as charged and sentenced him to serve 14 years' imprisonment. The Appellant filed a petition of appeal dated 18.2.2025 and amended on 17.4.2025, setting out the following grounds of appeal:
    a) That the trial court erred in both law and in fact in convicting the appellant when the ingredients of the offence were not proved beyond reasonable doubt.
    b) The trial court erred in both law and in fact in convicting the Appellant on contradictory evidence.
    c) The trial court erred in law and in fact in failing to note that the charge sheet was duplex and defective.
    d) The trial court erred in law and in fact in failing to note that the production of Mpesa statements was contrary to section 77 of the Evidence Act.
    e) That the trial court erred in law and in fact in convicting the Appellant on contradictory evidence.

<u>Evidence and proceedings</u>

4. PW1 was Dr. Stephen Nderitu. He examined the complainant. He had a swollen, bruised face with bruises also on his hands and legs. He produced the P3 Form filled 8 days earlier. The degree of injury was harm. The injuries were caused by a blunt weapon.

5. PW2 was Julius Maina Kanyiaru, the complainant. It was on 19.4.2023 at 6.00 pm. He was heading home. The Appellant appeared and ordered him to stop. He demanded what the complainant had. He knew the Appellant as a neighbour. There was moonlight. He called the Appellant by his name, Dickson, and the Appellant warned him against calling his name. The Appellant then hit him on the left ear using a stone. He fell down, and the Appellant, who had a metal rod, again hit him on the hands and legs. He demanded everything and removed a knife daring that he would kill the complainant as he had done so to others earlier. The complainant then surrendered and the Appellant took a Tecno mobile phone from the complainant's pocket. The Appellant, with the Tecno phone in hand demanded the complainant's M-pesa PIN which the complainant, terrified, gave him. The Appellant also removed Ksh. 3,600/= from the Complainant's pocket and together with the complainant's 3 keys and the Tecno phone, left the scene after the complainant screamed. The next day, he reported the matter to Karatina Police Station.

6. On cross examination, he testified that he knew the Appellant. The Appellant assaulted him.

7. PW3 was No. 112286 PC Harrison Wachira Gakahu. He was the investigating officer. He investigated a case of robbery with violence. He produced the Mpesa statement obtained

from the complainant. There was Mpesa transaction from the complainant to the Appellant. This was for Ksh. 2,774/=. On cross examination, he testified that he visited the scene 4 days later. The phone was never recovered. The Appellant weas arrested a month later.

8. DW1 was the Appellant. On 25.4.2023, he left his place of work. He worked as machine operator. He met the complainant at Ragati. One Wachira, the complainant's nephew had taken his phone. The complainant asked how much the phone cost and the Appellant said Ksh. 3,500/-. He then deposited via Mpesa Ksh. 2,774/=. Two months later, he was arrested. He was charged with assault but it was turned to robbery with violence. On cross examination, it was his case that the complainant paid the worth of the phone.

Impugned Judgment

9. The court analyzed the evidence and set out the definition of robbery under section 295 and the punishment for robbery under Section 296 of the Penal Code. The court found as follows:

> *The complainant claims that the accused accosted him and transferred funds to himself. The defence of the accused has not created a material doubt on the prosecution's case.*

10. Unfortunately, the court did not analyze any of the elements of the offence of robbery with violence.

Submissions

11. The Appellant filed undated submissions dated 17.4.2025 by which it was submitted that the charge sheet was duplex and defective. There were no accomplices and aggravating factors to amount to robbery with violence. He quoted Section 296 of the Penal Code. He relied on **Mugenya v Republic HCCRA No. E007 of 2023**.

12. He also submitted that the testimony of PW2 and the investigating officer were marred with contradictions. He cited *inter alia* **Bukenya & Others v Uganda. (1972) EA 549.**

13. The Appellant also testified that he was not identified as PW2 relied on the moonlight. He relied on **Wamunga v Republic (1989) KLR 424** based on which he submitted that circumstances were not conducive for positive identification.

14. He also submitted that the evidence in the Mpesa statement was digital evidence whose production was contrary to Section 77 of the Evidence Act. He cited **Barasa v Republic HCCRA No. E037 of 2021** in which he contended that the High Court propounded that such evidence as M-pesa statements could be produced subject to conditions on authenticity, compliance with legal framework, chain of custody and possibility of a witness from Safaricom testifying.

15. The Respondent also filed submissions dated 25.8.2025. It was submitted that the Respondent proved the ingredients of robbery with violence under Section 296(2) of the Penal Code.

16. The Respondent submitted that the elements of the offence of robbery with violence were proven beyond reasonable doubt. Reliance was placed on **Oluoch v Republic 1985 KLR** where it was submitted that the Court of Appeal fortified the ingredients of the offence of robbery with violence and held as follows:

"*Robbery with violence is committed in any of the following circumstances*

1. The offender is armed with any dangerous weapon and offensive weapon

2. The offender is in the company of one or more persons

3. At or immediately before or immediately after the time of robbery the offender

wounds, beats, strikes or uses other violence to any person.

Analysis

17. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in **Pandya -vs- Republic** [1957] EA 336 is as follows:-

> On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own

consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

18. In the case of **Okeno v Republic [1972] EA 32** at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> **"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) 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. (Shantilal M. Ruwala v. R., [1957] E.A. 570). 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; it must make its own findings and draw its own 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, see Peters v. Sunday Post, [1958] E. A. 424."

19. The issue in this case is whether the prosecution proved its case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of **H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481**, comes in handy in describing the legal burden of proof in criminal matters, that;

> **"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of**

England and no attempt to whittle it down can be entertained.''

20. In the case of **R vs. Lifchus {1997}3 SCR 320** the Supreme Court of Canada explained the standard of proof as doth:-

> **"The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty... the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such**

> **a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."**

21. The legal burden refers to the burden of proof which remains constant throughout the trial. It is the obligation of a party to establish the facts and contentions necessary to support its case, in this case the prosecutor. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> "The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

22. The standard of proof required in such cases was addressed by Brennan, J. in the United States Supreme Court decision of

In re Winship 397 U.S. 358 (1970), at pages 361–364, where he stated that:

> "**The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction…Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."**

23. In criminal cases, the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J (as he then was) in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

> **"To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered**

the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

24. Reasonable doubt needs not reach certainty, but it must carry a high degree of probability. It was held by the Court of Appeal in **Moses Nato Raphael vs. Republic [2015] eKLR** as doth:

"What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL

ER 372 where he stated:-'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

25. PW2 was categorical that he saw the Appellant. It was 6.00 pm and there was also moonlight. He knew the Appellant who was a neighbour. The Appellant stoned him on the ear and hurt his joints both on the hands and legs. He forcefully took PW2's mobile phone and Ksh. 3,600/= and also demanded the M-Pesa PIN that he used to withdraw KSh. 2,774/= from PW2's mobile. According to the investigating officer, the phone was never found. The M-Pesa statements were, however produced, which showed that the Ksh. 2,774/= was sent from PW2's phone to the Appellant's M-pesa number.

26. On his part, the Appellant maintained that PW2 sent him the money voluntarily and not in the course of a robbery. He testified that one Wachira, PW2's nephew, had taken his phone. That PW2 asked how much the phone cost, and the

Appellant said Ksh. 3,500/=. He then deposited via M-pesa Ksh. 2,775/=.

27. On identification, in ***Anjoroni v Republic 1980 KLR 59*** the court thus:

> ***"Recognition of an assailant is mere satisfactory, mere assenting, and mere variable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other"***

28. The Appellant and PW2 were neighbors, and they knew each other. The issue was whether it was the Appellant who violently robbed PW2. Section 296(2) of the Penal Code provides as follows:-

> 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.

29. The Appellant was said to be armed with a knife and a stone. The knife was not produced in evidence. The stone and the metal were not produced in evidence. The knife, metal, and stone may not have been retrieved for one reason or another. However, the injuries described by PW1 were not

attributed to the use of a knife, as they related to a blunt object. The nature of the blunt object said to be used was not described. PW2 and PW3 similarly did not describe the stone allegedly used. Clearly, no stone was a dangerous weapon.

30. The burden was on the prosecution to prove its case, to avoid connoting a mere robbery or theft with the serious offence of robbery with violence that had the impact, if proved, of justifiably denying or limiting the Appellant's fundamental rights and freedoms for an extended time. Section 111 of the Evidence Act provided as follows:

> **(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge**
> **of such person is upon him:**
> **Provided that such burden shall be deemed to be discharged if the court is**
> **satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:**
> **Provided further that the person accused shall be entitled to be acquitted of the**
> **offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defense creates a**

> **reasonable doubt as to the guilt of the accused person in respect of that offence.**
> **(2) Nothing in this section shall—**
> **(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged; or**
> **(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (1) of this section do not exist; or**
> **(c) affect the burden placed upon an accused person to prove a defence of intoxication or insanity.**

31. Therefore, once the primary facts are established, the Appellant bore the evidential burden to provide a reasonable explanation for his innocence, which in my view he did. This burden is evidential only and did not relieve the prosecution from proving its case to the required standard, beyond reasonable doubt. That explanation needed only to be plausible, and in my view, it was plausible. In ***Malingi v Republic [1988] KLR 225***. *In* ***Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008***, the Court of Appeal observed that;

> **Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially**

> **within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.**

32. The testimony of PW2, the complainant, was that the Appellant hit him on the left ear with a stone. The medical evidence did not reveal any injury to PW2's left ear. The court finds that the Respondent did not prove beyond a reasonable doubt that the Appellant was armed with dangerous weapons, being a knife and a stone, as described in the charge sheet. In **ODHIAMBO & ANOTHER Vs. R [2005] 2KLR 176** (in which two of the judges who decided **JUMA** also sat) which started by explaining that;

> ***"The charge must state that the weapon or instrument with which the appellant was armed was a dangerous or offensive one. The reason for that a knife, for example, or a Stone, is not an inherently dangerous or offensive item. A knife can and often is used under very many circumstances for entirely peaceful purposes … it is the use to which the weapon or instrument is put that makes it dangerous or offensive. Even a gun is not necessarily a dangerous or offensive weapon; a gun can be used in target practice, for example, and put to that use it is not an inherently dangerous weapon.***

33. No dangerous weapon was proved, and the Respondent also failed to prove that it was the Appellant who accosted

PW2. In the absence of proof of possession of a dangerous weapon alleged to have been used, I find that the conviction was not supported. Especially where the gravity of the offence necessitated a higher degree of punishment, the court had to be clear that the ingredients of the offence were well met before convicting the Appellant.

34. In the circumstances, the appeal against the conviction is allowed. Having found the conviction unfounded and set it aside, I find no utility in addressing the issue of sentence. The Appellant is set free.

Determination

35. In the circumstances, I make the following orders:-

a) The appeal on conviction and sentence is allowed. The conviction and sentence are set aside. The Appellant is set free unless otherwise lawfully held.

b) Right of appeal 14 days.

c) The file is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **11th** day of **February, 2026**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Kaniu for the State

Appellant in person

Court Assistant – Michael