

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HCCRA NO. E041 OF 2024

PAUL KOHORA

HINGA.....APPELLANT

VERSUS

REPUBLIC.....

...RESPONDENT

JUDGMENT

1. The appellant herein, **Paul Kohora Hinga**, was jointly charged with another accused, **Mohammed Kamau**, before the Chief Magistrate’s Court at Naivasha in Criminal Case No. 2027 of 2018 with the offence of Robbery with Violence contrary to Section 295 as read with Section 296(2) of the Penal Code.
2. The particulars of the offence were that on the night of 1st and 2nd June 2018 at Kayole Estate in Naivasha Sub-County, the accused persons jointly with others not before court, while armed with dangerous weapons namely guns, knives and iron bars, robbed Elijah Karoki Njiru of property valued at Kshs 1,145,800 and used actual violence. It was further alleged that they robbed Carolyn Abwomi Wasike of property valued at Kshs 52,500 and used actual violence.
3. At the end of the trial, the Appellant was convicted and sentenced to death.

4. Dissatisfied with both conviction and sentence, the Appellant filed the instant appeal and challenged the conviction on grounds that: -

- i) **Identification was not properly proved.**
- ii) **Dock identification was relied upon.**
- iii) **No identification parade was conducted.**
- iv) **Crucial witnesses were not called.**
- v) **Ingredients of the offence were not proved.**
- vi) **No stolen items were recovered from him.**
- vii) **His defence was not considered.**
- viii) **The death sentence was harsh.**

5. The Respondent opposed the appeal and submitted that:

- i) **The offence of robbery with violence was proved.**
- ii) **The evidence was sufficient.**
- iii) **Conviction and sentence were lawful.**
- iv) **The death sentence should be upheld.**

6. The Appeal was canvassed by way of written submissions which I have considered.

The Appellant's Submissions

7. The Appellant contended that identification was not properly proved. He argued that the conviction was based mainly on dock identification without a prior identification parade. He submitted that the trial court erred in relying on such evidence without exercising caution.

8. It was further contended that the offence occurred at night and the prosecution failed to demonstrate favourable conditions for positive identification.
9. The Appellant also pointed to inconsistencies in the testimony of prosecution witnesses regarding identification, including allegations that witnesses later claimed to recognize the appellant after seeing suspects on television.
10. The Appellant submitted that the prosecution failed to call material witnesses whose evidence would have been important to the case. Particular reference is made to the maker of the P3 form and persons who allegedly informed police about suspicious individuals.
- 11.** The Appellant argued that failure to call these witnesses prejudiced his right to a fair trial and denied him the opportunity to cross-examine them.
12. The Appellant contended that the prosecution failed to prove the essential ingredients of the offence of robbery with violence.
13. He argued that there was no conclusive proof that he participated in the robbery as there was no evidence linking him to the alleged weapons. He faulted the police for failing to conduct an identification parade or provide call data or other forensic evidence linking him to the offence. He added that evidence of violence was not sufficiently corroborated.

14. The Appellant submitted that no stolen property was recovered from him and that no evidence was presented connecting him to the alleged stolen vehicle or items.
15. He contended that this weakened the prosecution case.
16. The Appellant argued that the trial court failed to properly consider and evaluate his defence before conviction.
17. The Appellant challenged the death sentence, arguing that the trial court did not properly consider mitigation or the possibility of a lesser sentence.
18. He contended that the sentence imposed violated constitutional provisions relating to fair trial and human dignity.
19. The Appellant urged the court to allow the appeal, quash the conviction, set aside the sentence and set him at liberty. In the alternative, he prayed for a lesser sentence.

The Respondent's Submissions

20. The Respondent opposed the appeal and supported both the conviction and sentence imposed by the trial court.
21. The Respondent submitted that the Appellant was properly charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.
22. The Respondent submitted that the Appellant used actual violence on the complainant during the robbery.

23. The Respondent relied on ***Oluoch vs. Republic (1985) KLR***, submitting that the ingredients of robbery with violence are established where the offender is armed with a dangerous or offensive weapon; or the offender is in the company of one or more persons; or the offender uses or threatens to use violence at or immediately before or after the robbery.
24. It was submitted that all the above ingredients were proved beyond reasonable doubt.
25. The Respondent submitted that the Appellant was properly identified by PW1, PW2 and PW3.
26. It was submitted that the evidence of identification was sufficient and reliable and that the Appellant was correctly identified as one of the robbers.
- 27.** The Respondent argued that the Appellant's claim that he was convicted on insufficient evidence was without merit.
28. The Respondent submitted that the Appellant's defence consisted of mere denials and did not rebut the prosecution evidence.
29. It was argued that the defence was shallow and lacking in substance and failed to raise any reasonable doubt.
30. The Respondent submitted that the conviction and sentence imposed by the trial court were proper and in accordance with the law.
31. It was submitted that the offence of robbery with violence attracts the death sentence under Section 296(2) of the Penal Code and that the trial court properly

convicted the Appellant after considering the evidence and mitigation.

32. The Respondent urged the court to find that that the appeal is not merited and to dismiss it in its entirety.

Duty of the First Appellate Court

33. As a first appellate court, this court is required to reconsider and evaluate the evidence afresh and draw its own conclusions while bearing in mind that it did not see or hear the witnesses testify. This principle was clearly articulated in ***Okeno vs. Republic [1972] EA 32***, where the Court of Appeal stated:

“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] EA 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] EA 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.”

34. This Court has accordingly subjected the entire record to fresh scrutiny. A summary of the prosecution's case was as follows: -

35. PW1, Elijah Karoki Njiru (Complainant) testified that on 1st June 2018 at about 11.40 p.m., he arrived at his home in Kayole, Naivasha, driving motor vehicle registration number KBP 112N Subaru Outback. After he called his wife to open the gate, about five men entered the compound, one of whom was armed with a firearm (pistol) ambushed them.

36. The attackers ordered PW1 and his wife to lie down and later forced them into the house where they were tied using curtain blinds. The attackers demanded money and PW1 informed them that he had approximately Kshs. 13,000 in M-Pesa, whereupon he gave them his phone PIN and bank PIN.

37. The robbers stole several items including; a Lenovo laptop, television set (Sony), DVD player, camera, mobile phones, cooking gas, clothes, plumbing fittings, cash and motor vehicle registration number KBP 112N. The total value of the stolen property was estimated at Kshs. 1,145,800.

38. PW1 testified that the robbers remained in the house for about three to four hours. He stated that security lights and motor vehicle headlights were on, enabling him to see the attackers clearly.

39. PW1 testified that he identified Accused 2 as the person armed with a firearm who approached him at the vehicle

and ordered him to lie down. He also identified Accused 1 as the person who participated in tying them up and moving them into the house.

40. PW1 later saw the accused persons on television and reported to the police that he had recognized them. He stated that no identification parade was conducted.

41. PW2, **Caroline Abwomi Wasike**, the Complainant's wife, testified that on the material night she opened the gate for PW1 when several men forced their way into the compound.

42. She testified that the attackers tied her and PW1, demanded money, took PW1's M-Pesa PIN, stole household items which they loaded into the vehicle. She added that the attackers attempted to rape her.

43. PW2 testified that Accused 2 tied them up and took a knife from the kitchen while Accused 1 gathered items in the house

44. She stated that the security lights and vehicle headlights were on, enabling her to see the attackers clearly. She remained in close proximity with them for several hours and spoke with them.

45. PW2 testified that she later saw the accused persons on television and identified them as among the robbers. She did not attend an identification parade. She was treated in hospital and a P3 form was issued.

46. PW3, **Lydia Kwamboka Nyabuto**, a house help employed by PW2, testified that she heard screams and was confronted by robbers who ordered her to lie down.

She was taken downstairs where she found PW1 and PW2 tied up.

- 47.** PW3 testified that she saw Accused 1 seated on a sofa while Accused 2 was in the kitchen wearing a Maasai shawl. She stated that the robbers stayed in the house for several hours and that Accused 1 took her upstairs, tied her hands and legs, blindfolded her and sexually assaulted her by forcing her to perform oral sex. She added that she later identified the accused persons from photographs shown to her.
- 48.** PW4, **Elvis Mangwana**, a Minor aged about 10 years, testified after a voire dire examination. He stated that he heard screams and went downstairs where he found his parents tied up. He testified that one robber wore a red Maasai shawl. The robbers tied him and his parents. The robbers stole household items and the family motor vehicle. He later untied himself and untied his parents.
- 49.** PW4 testified that the lights were on and he could see the attackers.
- 50.** PW5, **PC David Njogu**, the Arresting Officer testified that on 14th August 2018, acting on information that a house was being used as a criminal hideout, he visited the premises with another officer where they found three suspicious persons. One escaped and two suspects were arrested, including the accused persons.
- 51.** PW5 testified that the following items were recovered; a pistol found on a bed, another pistol

recovered from Accused 1, five spent cartridges, one live round and a racket.

52. He testified that the 2nd accused was arrested at the scene.

53. PW6, **Inspector Hillary Ngetich**, testified that on 14th August 2018, after receiving information from members of the public, he visited a makeshift house near Lake Naivasha where he found three suspects, one of whom escaped, while the accused persons were arrested. PW6 testified that the following items were recovered; two pistols including a baby browning pistol, ammunition, spent cartridges, mobile phones, SIM cards, Identity cards, illuminating gadget and two sachets containing a brown substance

54. An inventory was prepared and signed by the 2nd accused. PW6 testified that the accused persons were later identified by witnesses.

55. PW7, **Benjamin Kuria**, a Clinical Officer, produced medical evidence showing that PW1 suffered the following injuries; bloody nose, swelling on chest and hands and bruises on the legs. He stated that the injuries were caused by blunt and sharp objects and classified the injuries as harm. He stated that PW2 had tenderness on forehead and chest pain which injuries he also classified as harm. He produced P3 forms as exhibits.

56. PW8, **Alex Mudindi Mwandawiro**, a Firearms Examiner, examined firearms and ammunition submitted to him. He made the following conclusions:

- i) ***Exhibit A was a Smith and Wesson pistol***
- ii) ***The pistol was damaged and incapable of firing***
- iii) ***Exhibit C was a starter pistol capable of firing 8mm PAK ammunition***
- iv) ***Ammunition and cartridges examined were consistent with the firearms***
- v) ***Magazines were functional***

57. PW8 produced a ballistic report.

58. PW9, **PC Japheth Ariga**, the Investigating Officer, testified that he received a report at about 3.20 a.m. that PW1's home had been attacked. He visited the scene and found PW1, PW2 and PW3 inside the house having been tied up. He confirmed that several household items had been stolen and that the stolen motor vehicle was later recovered at Ndabibi. He also confirmed that firearms and ammunition were recovered after the arrest of the accused persons and that the witnesses identified the accused persons

59. PW9 testified that no identification parade was conducted, and that identification was based partly on witness recognition and television footage.

Defence Case

60. Accused 1, **Mohammed Kamau**, testified on oath that he was a businessman from Bondeni, Nakuru. He stated that on the date of the alleged offence he was at home with his family.

61. He testified that on 14th August 2018 he was arrested at Kihoto where he had gone for business and that the police alleged he had been found with a gun.
62. He denied involvement in the robbery and stated that he had been charged with an offence he did not commit. He did not call any witnesses.
63. Accused 2, **Paul Kuhora Hinga**, the Appellant herein, testified on oath that he was a casual labourer from Kihoto.
64. He stated that on 14th August 2018 he had gone to Baharini looking for work when a person invited him into a compound where several people were present.
65. Police officers later arrived and arrested him alleging that he had been involved in illicit brewing.
66. He testified that a search was conducted and items were recovered but he denied ownership of the items.
67. He produced an OB extract showing that the complainant initially did not identify the attackers and photographs and certificate showing that he had been shown in the media before trial.
68. He testified that an identification parade had been conducted but he was not identified.
69. He denied committing the offence.

Issues for Determination

70. I have carefully considered the record of appeal and the parties' rival submissions. I find that the determination of the appeal turns on: -

- a) ***Whether identification was reliable***
- b) ***Whether the prosecution proved the case beyond reasonable doubt***
- c) ***Whether the conviction was safe***
- d) ***Whether the sentence was lawful***

Analysis and Determination

71. Section 295 of the Penal Code defines robbery as follows:

"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."

72. Section 296(2) provides as follows on robbery with violence:

"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."

73. In ***Oluoch vs. Republic [1985] KLR***, the Court stated that the ingredients of robbery with violence are proved if any one of the following is established:

- a) The offender is armed with any dangerous weapon or instrument**
- b) The offender is in company with one or more persons**
- c) The offender wounds, beats or uses violence.**

74. The Appellant and his co-accused were convicted for 2 counts of the offence of robbery with violence contrary to Section 296(2) of the Penal Code.

75. In order to secure a conviction, the prosecution was required to prove, beyond reasonable doubt, that there was a robbery, the robbers were more than one person or were armed with dangerous weapons or used violence and that the accused persons were positively identified as the perpetrators.

76. The court will therefore address the following issues:

- a) *Whether a robbery with violence occurred***
- b) *Whether the complainants were injured***
- c) *Whether the accused persons were positively identified***
- d) *Whether recovery evidence links the accused persons to the offence***
- e) *Whether the defence raises reasonable doubt***

77. On whether a robbery with violence occurred, PW1, PW2, PW3 and PW4 gave consistent and compelling evidence which showed that on the night of 1st June 2018, several men, about 5 in number, entered PW1's compound shortly after PW2 opened the gate. The men were armed with crude weapons and a firearm. They tied the complainants up, demanded money, stole household items and motor vehicle KBP 112N.
78. PW3 confirmed that the attackers tied PW1 and PW2 and searched the house.
79. PW4 also confirmed that the attackers tied the family members and stole items.
80. PW9 confirmed that he visited the scene shortly after the robbery and found the complainants tied up and property missing.
81. The evidence establishes that the robbers were more than one person, were armed with weapons, used violence and stole property.
- 82.** I find that the elements of robbery with violence under Section 296(2) of the Penal Code were therefore proved to the required standard.
83. On whether violence was proved, PW7 produced P3 forms confirming injuries sustained by PW1 and PW2. PW1 sustained a bloody nose, swelling on chest and hands, and bruises on legs. PW2 sustained tenderness on the forehead and chest pain. The injuries were classified as harm and were consistent with assault.

84. The court is satisfied that violence was used during the robbery.
85. On whether the Appellant (Accused persons) were positively identified, the prosecution relied mainly on visual identification evidence.
86. PW1, PW2, PW3 and PW4 testified that security lights/motor vehicle lights were on and that the attackers remained in the house for several hours when the witnesses interacted with them at close range
87. PW1, PW2 and PW3 testified that they identified both accused persons as participants in the robbery. PW4 testified that he saw the attackers although he did not specifically identify the accused persons.
88. The court however notes that the robbery occurred at night and that no identification parade was conducted. PW1 and PW2 claimed that they identified the accused after seeing them on television while PW3 stated that she identified them from photographs shown by PW2.
89. It is instructive to note that no identification parade was conducted and that neither the television footage nor the photographs which allegedly aided the witnesses in the identification of the robbers were produced in court as exhibits to enable the court to determine if indeed the Appellants were the persons shown on the television and photographs.
90. My take is that failure to conduct an identification parade and produce the television footage and photographs weakened the identification evidence.

91. The court also notes that the alleged television exposure before identification may have influenced the witnesses and further, that the 2nd accused stated that an identification parade was conducted but he was not identified. This evidence by the Appellant was not rebutted by the prosecution.
92. The court therefore finds that the visual identification evidence was not entirely free from the possibility of error.
93. On whether recovery evidence linked the Appellant to the robbery, PW5 and PW6 testified that the accused persons were arrested on 14th August 2018, about two months after the robbery. They testified that firearms and ammunition were recovered.
94. PW8 confirmed that the firearms examined were firearms within the meaning of the Firearms Act.
95. The court however notes that no stolen property was recovered from the accused persons. PW9 admitted that none of the stolen items were recovered from the accused persons. There was no forensic evidence linking the firearms to the robbery and no evidence was produced showing that the firearms were used during the robbery.
96. I therefore find that the firearms and ammunition recovery evidence does not directly connect the accused persons to the robbery.
97. The court notes the following weaknesses/investigation gaps in the prosecution case: -
- i) No identification parade was conducted.*

- ii) Identification was influenced by television and photographs exposure.*
- iii) The television footage and photographs were not produced as exhibits.*
- iv) No stolen items were recovered from the accused persons.*
- v) No forensic evidence linked the accused persons to the robbery.*
- vi) PW9 admitted he did not record the complainant's description of the attackers.*
- vii) The OB extract suggests the complainant initial report did not identify the attackers.*

98. I find that the aforementioned gaps create doubt as to whether the accused persons were the perpetrators of the offence.

99. Turning to the Appellant's defence, I note that the Appellant raised an alibi defence stating that he was at home on the date of the robbery. The prosecution did not investigate or rebut the alibi and I therefore find that the alibi raises reasonable doubt on the prosecution's case.

100. The Appellant testified that he had gone to look for work when he was arrested. He stated that he was not identified at an identification parade and that the Complainant initially did not identify the attackers. He was shown on television before trial and his evidence was not effectively rebutted by the prosecution.

101. The burden of proof rests on the prosecution and never shifts to the accused persons. The prosecution must prove its case beyond reasonable doubt.

102. In the present case, while I find that robbery and violence were proved, I am not persuaded that identification of the Appellant as the perpetrator of the offence of robbery with violence was proved to the required standard.

103. I find that the prosecution failed to prove, beyond reasonable doubt, that the Appellant was one of the perpetrators of the robbery. My further finding is that the evidence of identification was unsafe to sustain a conviction.

104. Given the gravity of a capital conviction, it is my view that identification must be free from possibility of error. In this case, the prosecution evidence leaves reasonable doubt as to whether identification was free from error.

105. The appeal on conviction succeeds. The conviction for robbery with violence is quashed and the sentence of death is set aside.

106. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 5TH DAY OF MARCH, 2026.

HON. W. A. OKWANY

JUDGE
05/03/2026

FOR APPELLANT 1 & 2 Present
FOR RESPONDENT Ms Chepkonga
COURT ASSISTANT Karani

ORIGINAL