REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT LODWAR

CRIMINAL APPEAL NO. E055 OF 2024

JOEL DENNIS.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGEMENT

Background of the Appeal

1. The Appellant herein was charged with the offence of robbery with violence, contrary to Section 296(2) of the Penal Code. The particulars of the charge were that on the 08/06/2024, at Kakuma Refugee Camp in Turkana West Sub-County within Turkana County, jointly with others not before the court and while armed with dangerous and offensive weapons, namely knives and pangas, robbed Mohammed Abdi Hassan of one mobile phone, an iPhone XR model valued at Kshs 50,000. It was further alleged that at the time of such robbery, actual violence was used against the said Mohammed Abdi Hassan.
2. When arraigned before the trial court and after being read the substance of the charge in a language he understood, the Appellant entered a plea of not guilty. The trial court then proceeded to conduct a full trial, during which the prosecution called five witnesses to substantiate the allegations against him. When placed in defence, the Appellant elected to give sworn evidence and called one other witness to support his defense of alibi. At the conclusion of the trial, the learned trial magistrate delivered its judgement on the 11/11/2024, finding the Appellant guilty of the offence as charged. Consequently, the Appellant was convicted and sentenced to serve ten (10) years of imprisonment.

3. Being aggrieved by both the conviction and the sentence, the Appellant lodged this appeal vide Petition of Appeal dated the 21/11/2024. The Appellant presents nine grounds of appeal which primarily challenge the trial court's findings on both conviction and sentence. It is asserted that the trial court erred in holding that the prosecution had proven its case to the required standards. The Appellant further asserts that he was 17 years old at the time of the offence, arguing that his constitutional rights as a minor were prejudiced by the trial and subsequent sentencing.

Summary of the Trial Proceedings

4. Briefly, PW1, the complainant, testified that on the 08/06/2024, at approximately 5:00 p.m. he went to Erupe Centre to have his football repaired and while the ball was being repaired, a man, whom he identified in the dock as the Appellant, approached the cobbler. The Appellant then turned to PW1 and demanded his iPhone XR, valued at Kshs. 50,000. When PW1 refused to yield, the Appellant drew a panga and struck PW1 on the nose, inflicting a cut.
5. A struggle ensued, and the Appellant was joined by a group of approximately five other individuals who also carried pangas. The gang beat him, stepped on him and tore his trousers before forcibly taking the phone and fleeing. PW1 fainted and was rescued by a shopkeeper who contacted his mother. Under cross-examination, PW1 admitted he had never seen the Appellant before the day of the incident but maintained that he had a clear view of the assailant during the daylight attack.
6. PW2, the complainant's mother, testified that she received a call about 30 minutes after her son left home, informing her that he was bleeding and his phone had been stolen. She found her son in a distressed state and took him to the Kakuma Police Station and subsequently to the hospital. She confirmed the injuries to his head, hand, buttocks and back. She corroborated that the stolen phone was an iPhone XR, which had been purchased by her sister in Nairobi.

7. PW3, the clinical officer at Kakuma Mission Hospital, testified on behalf of his former colleague, Peter Kimaiyo. He produced the P3 form PEX 1 which documented injuries sustained by PW1. The examination revealed fresh bruises on the nose and right shoulder, along with complaints of abdominal and neck pain. PW3 testified that the injuries were consistent with blunt force trauma, though he noted that the blunt side of a panga could cause such bruises.
8. PW4 was a police officer who testified regarding the identification parade conducted on the 12th day of June 2024. He stated that the Appellant was informed of his rights and chose to have a friend, James Lokaale, present. The parade consisted of eight individuals of similar build and appearance. PW1 identified the Appellant three times, even after the Appellant changed positions in the line-up. The identification parade forms were produced as PEX 2a-c.
9. PW5, the investigating officer, recounted to have taken over the file on the 09/06/2024. His investigations at the scene suggested that the suspect was the son of a local leader named Mary. He thus called Mary who lured the appellant to the station on the pretext that he was going to assist her shop for a mattress. When the appellant saw the witness, he tried to flee but the witness gave a chase and arrested him. PC Abdi testified that although the Appellant offered to help recover the phone, the recovery attempt was unsuccessful because the boys he referred the officers to could not be traced.
10. Upon cross examination, the witness reiterated that from the scene he was told that one of the gang members was a son to a local leader called Chair Lady for which reason she called the lady and the lady brought the appellant to the police station. He reiterated that he informed the appellant the reasons for his arrest and that the appellant mentioned to him other names adding that the people in the market did not record statements because of fear of the gang.

11. The court considered that corpus of the evidence and determined that a prima facie case had been established ant thus put the appellant on his defence.
12. The Appellant, DW1, elected to give a sworn statement in which he denied any involvement in the robbery. He claimed that at the time of the incident, he was at his neighbour's home and was later at home helping his mother with chores. He alleged that his mother deceived him into going to the police station by telling him they were going to buy a mattress.
13. On the identification parade, he claimed it was improperly conducted, alleging that he was not placed in a line-up but shown to the complainant alone and forced to sign forms under duress. He stated he was 17 years old, born in 2006.
14. DW2 was the Appellant's mother. She supported the Appellant's alibi stating that he was at home cooking and doing laundry during the time of the robbery. However, she contradicted the Appellant regarding his age, testifying that he was 20 years old and had left school in 2017. She admitted taking him to the station at the request of the police but maintained that he was of good character.
15. The court directed that the appeal be canvassed by way of written submissions which have been filed by both parties. It is however on note that the respondent also filed a notice of enhancement of sentence and served same upon the appellant.

Summary of Appellant's Submissions

16. The Appellant's submits that the prosecution failed to establish the specific elements that distinguish robbery with violence from simple robbery under Section 295. He contends that while the charge sheet mentioned being armed and in the company of others, the evidence produced in court did not convincingly prove these aggravating factors.

17. The gist of the Appellant’s submission is that the prosecution failed to call the *fundi* who was present at the repair shop. The Appellant argues that since PW1 testified that the cobbler was just seated there during the attack, the cobbler was the most independent witness available, and his absence creates an adverse inference against the prosecution's case. The Appellant emphasizes the non-recovery of both the stolen iPhone XR and the alleged weapon, panga. He argues that the absence of these exhibits, coupled with the lack of a purchase receipt for the phone, leaves the court with nothing but the uncorroborated oral testimony of the complainant.

18. The Appellant submits that his right to a fair trial under Article 25(C) of the Constitution was violated. He criticizes the interventionist approach to disclosure and argues that the trial court prioritized efficiency over a thorough exploration of the facts, thereby limiting his ability to conduct a proper defense investigation. The Appellant suggests that the complainant’s testimony was propelled by a prior grudge resulting from a fight in June 2024, a factor he believes the trial court failed to properly investigate. The court notes that that submissions on grudge is new because no such allusion was made in the evidence.

Summary of the Respondent’s Submissions

19. The Respondent argues that all elements of robbery with violence were proven and rely on PW1’s testimony that he was assaulted by the Appellant and five others who were armed with pangas and stole his phone. It is emphasized that under Section 296(2), the prosecution only needs to prove *one* of the listed aggravating factors, and in this case, they proved all three: being armed, being in company, and the use of violence.

The Respondent asserts that the identification of the Appellant was positive and free from error.

20. There is an additional highlight that the offense occurred in broad daylight at around 5:00 pm and that the Appellant was positively identified during a parade where he changed positions three times. They dismiss the Appellant's claims of forced signatures, noting that he signed the forms indicating satisfaction.

21. On sentence, it is argued that under the literal reading of Section 296(2), the mandatory sentence is death. The Respondent contends that the trial court erred by imposing a ten-year term and urges this Court to dismiss the appeal and substitute the sentence with the death penalty based on the notice of enhancement filed.

Issues, Analysis and Determination

22. As correctly observed by counsel for the respondent, this being a first appeal, the duty of this Court is to re-evaluate and re-analyse the evidence presented in the trial court and draw its own independent conclusions while giving due allowance for the fact that it did not see or hear the witnesses testify. See **Okeno V. R [1972] E.A. 32,**

23. Having re-evaluated the record of the trial court and considered the submissions of the parties, this Court identifies only two issues for its determination. The first issue is whether the ingredients of the offence of robbery with violence under Section 296(2) of the Penal Code upon which the Appellant was charged with were proved beyond reasonable doubt; and, secondly, whether the custodial sentence of ten (10) years imposed by the trial court was appropriate.

24. To start with, the issue of the Appellant's identification is hotly contested in this appeal as the Appellant contends that at the time of the incident, he was at his neighbour's home and was later at home helping his mother with chores. In law, evidence of identification a single witness, especially a stranger, must be treated with the utmost caution. The court

must closely examine the circumstances of the identification in totality including visibility, distance and duration.[1]

25. Here, the incident occurred at 5:00 p.m. in daylight. The complainant had the opportunity to observe the Appellant while he spoke to the cobbler and during the subsequent demand and struggle. This was not a fleeting glance in a dark alleyway as alleged by the Appellant; it was a face-to-face encounter in a public space with no obstructions, the cobbler's shop having provided a clear vantage point. The identification was reinforced by a formal parade conducted four days later, where PW1 identified the Appellant three times.

26. The Appellant's allegations that the parade was a sham were rejected by the trial court, and this Court finds having duly considered the procedure and the circumstances under which the parade was conducted finds no reason to disagree. The court finds that the parade was properly conducted in compliance with the necessary safeguards.

27. The Appellant was allowed to have a friend present, he chose his own positions, and he was picked out three times. His allegations that he was photographed in his cell and forced to sign the forms were rejected by the trial court as afterthoughts. For this court a challenge on the propriety of the parade should not have left out the evidence of the person named a friend of the appellant.

28. The court finds and holds that the Appellant's identification at the trial court was not only solid and positive but remained unshaken by the advanced fickle defence of alibi.

29. On the merits and to sustain a conviction under Section 296(2) of the Penal Code, the prosecution must prove that the robbery was accompanied by specific aggravating factors. As established in **Oluoch & another vs Republic (Criminal Appeal 50 of 2020) [2025] KECA 2281 (KLR)**, the court must be satisfied that the prosecution has proved that the accused was either armed with a dangerous weapon, was in the

[1] Wamunga vs Republic [1989] KLR 424

company of others, or used violence; wounding, beating, or striking before, during, or after the theft. Here the Appellant argues that these elements were not proved to the required standard. It is however worth noting that it is sufficient for the prosecution to prove only one of these factors to sustain a conviction on robbery with violence under this subsection.

30. The first issue therefore is whether a robbery actually took place. The prosecution's case rests heavily on the testimony of PW1 who was the sole eyewitness to the events leading to his robbing. PW1 stated that while at a football repair shop, he was accosted and his iPhone XR was taken by force. The Appellant challenges this by noting the prosecution's failure to call the cobbler (fundi) and absence of a purchase receipt and the phone number associated with the device.

31. Section 143 of the Evidence Act is the guiding light that no particular number of witnesses shall... be required for the proof of any fact. The court holds that while the cobbler was an eyewitness, the prosecution chose to rely on the direct testimony of the victim. In **Maitanyi v. Republic**, it was held that the evidence of a single witness in identification cases must be scrutinized with the greatest care, but if it is cogent and the conditions for identification were good, it can sustain a conviction.

32. On the absence of a purchase receipt and the phone number associated with the device, the court affirms the trial position and states that mobile phones are ubiquitous gadgets and that the failure to produce a receipt, while noted, does not automatically negate the fact of ownership or loss. Courts have frequently upheld convictions for robbery with violence even in the absence of recovered property or weapons, provided the oral testimony is credible. In **Mwanzia v Republic (Criminal Appeal E002 of 2024) [2025] KEHC 6991 (KLR,** for example**,** the court held that the core of the offense is the use of the weapon or the presence of accomplices at the time of the theft; the

subsequent recovery of the weapon is not a prerequisite for a conviction if the oral and circumstantial evidence is sufficient.

33. More firmly, the Supreme Court in **Goddrick Simiyu Wanga vs Republic (SC. Application No. E018 of 2023 eKLR)** reiterated the foregoing position of the law and held that where identification is positive and the circumstances of the robbery are clearly established, the failure to recover the stolen items does not vitiate the conviction.

34. Accordingly, the court finds the prosecution's evidence to have conclusively established all three ingredients of the offence of robbery with violence against the Appellant. It established that the assailant was armed with a panga; he was joined by other individuals while perpetrating the offense; and he struck the complainant on the nose causing an injury. The theft of the phone was not a simple snatching but was part of a coordinated and violent assault by a group of armed individuals.

35. Finally, the Appellant faults the trial court's sentence of ten (10) years imprisonment arguing to have been a minor aged 17yrs at the time of the offence hence the sentence was harsh. On the other hand, the Respondent argues for the death penalty codified under section 296(2) of the Penal Code. The court posits that while the death penalty remains a lawful sentence under Article 26(3) of the Constitution, its mandatory imposition is unconstitutional. That the statute imposes a mandatory sentence does not ipso facto take away the courts discretion to impose custodial sentences based on mitigating factors such as the age of the offender, remorse, and being a first-time offender.

36. In this matter, the trial court exercised a judicial discretion and none of the parties has demonstrated a basis to justify interference with the sentence imposed. On its own assessment, the sentence is commensurate with the offence he was convicted for.

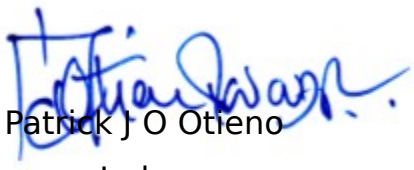
37. In upshot, the court finds and holds that the prosecution proved the elements of robbery with violence beyond a reasonable doubt and hence the conviction hereby upheld. In addition, the court finds no reason to

disturb the sentence of ten (10) years imposed by the trial court as it correctly exercised its discretion and not manifestly excessive as alleged by the Appellant.

38. The Appellant's age, whether 17 or 20, does not exempt him from a custodial sentence given the transition to adulthood during the trial.

39. However, in conformity with Section 333(2) of the Criminal Procedure Code, the sentence shall be computed from 09/06/2024 when the appellant was arraigned and placed in custody.

Dated, signed and delivered virtually this 18th day of March, 2026.



Patrick J O Otieno

Judge