

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MAKADARA**  
**CRIMINAL DIVISION**  
**APPELLATE SECTION**

**CRIMINAL APPEAL NO E066 OF 2025**

**RICHARD KIILU .....**

**APPELLANT**

**VERSUS**

**REPUBLIC .....**

**RESPONDENT**

**(Being an appeal from the original conviction and sentence in Criminal Case No 4627 of 2014 of the Chief Magistrates Court at Makadara)**

**JUDGEMENT**

1. The appellant was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code the particulars of which were that on the 23<sup>rd</sup> day of September 2014 at MRADI Embakasi within Nairobi County jointly with others not before the court while in the company of one more person robbed Beatrice Gakii Kaberia of cash Kenya shillings thirty five thousand (kshs 35,000) and at or immediately before or after the time of the said robbery used personal violence against the said Beatrice Gakii Kaberia.
2. He faced two other counts namely: count 1 stealing contrary to section 268 (1) of the penal code the particular of which were that on the 30<sup>th</sup> day of September 2014 at Dreamland Agencies Pipeline jointly with others not before the court stole cash kshs 38,000 the property of the said dream line Agencies. On count 3 he faced a charge of stealing contrary to section 268(1) of the penal code the particulars of which were that on the 30<sup>th</sup> of September 2014 at Unisource

Enterprise Utawala Estate in Embakasi within Nairobi County jointly with others not before the court, stole cash Kshs. 30,000/= the property of the said Uniforce Interprise.

3. He pleaded not guilty to the said charges and was tried , convicted and sentence to ten years imprisonment on the count of robbery with violence .
4. Being aggrieved by the said conviction and sentence, he filed this appeal initially as Criminal Appeal No 78 of 2019 at Milimani and raised the following grounds of appeal :
  - a) The court erred in fact and law in failing to find that there was no sufficient evidence to sustain the appellant conviction
  - b) No sufficient proof was tendered to establish the ingredients of the charge of robbery with violence
  - c) The charge sheet was defective
  - d) Key material witnesses were never called
  - e) The evidence tendered were at variance with the charge preferred against the appellant
  - f) The court relied on the inconsistent testimony of the prosecution witnesses
  - g) The identification parade was not conducted in accordance with the law
  - h) The appellant was not given an opportunity to defend the case
  - i) The sentence was harsh and excessive.

5. By a notice of motion dated 16<sup>th</sup> may 2019, the appellant sought to be released on bail/bond pending the hearing of this appeal and by a ruling thereon dated 31<sup>st</sup> July 2019, the court (Ngenye -Macharia J as she then was) admitted the appellant to a bond of Kenya shillings one hundred thousand (kshs 100,000) and in doing so stated as follows : “ 8. I have noted that section 211 of the criminal procedure code may not have been complied with , an observation that is likely to render the entire trial fatal .In addition to the fact that the appellant may not have been properly identified drives me to conclude that the appeal , prime facie has high chance of success ...”.
6. Upon the grant of those orders , the appeal for some reasons never took off for hearing , might be because the appellant was enjoying the said orders having been admitted for hearing on 25<sup>th</sup> September 2019. On the 13<sup>th</sup> February 2025 , the same was transferred to this criminal registry upon its establishment for determination and on 28<sup>th</sup> may 2025 directions were issued on the filing of written submissions thereon.

### **SUBMISSIONS**

7. On behalf of the appellant it was submitted that from the proceeding, the prosecution did not close its case and there was no opportunity to comply with section 306 of the Criminal Procedure Code thereby failing to comply with section 211 of the Code. It was submitted that the court therefore proceeded to illegally put the

appellant on his defence before the close of the prosecution case. It was the contention of the appellant that his right to fair hearing were violated and therefore his conviction was nullity ab initio. It was further contended that the identification of the appellant was not proper having been conducted after the plea had been taken and that the circumstance at the scene were not ideal for proper identification .

8. On behalf of the prosecution it was submitted that Pw1 identified the appellant two weeks after the incident when he was being subjected to a mob injustice on an allegation of stealing from an MPESA shop and that she was able to identify him as the man who had introduced himself to her as Felix in his sisters MPESA shop before robbing her. It was submitted that the offence of robbery was proved before the appellant was with two other people as stated in the case of ***Oluoch versus Republic [1985] KLR.***

9. On the identification of the appellant it was submitted that pw2 was able to identify the appellant and another person as those who had visited the Mpesa shop and was later able to identify the same at an identification parade the day after he had been arraigned in court. It was submitted that his defence was considered by the court. On sentence it was submitted that the same was not excessive as the offence attracts death or life imprisonment .

10. This being a first appeal the appellant is entitled to a re-evolution of the evidence tendered before the trial court by this court so as to come to its own conclusion while giving allowance to the fact that unlike the trial court , it did not have the advantage of seeing and hearing witnesses as stated in Okeno v Republic
11. PW1 Beatrice Gakii Kaberia stated that she did not know the appellant but on the material day a customer known as Felix went to the Mpesa shop and withdrew kshs 300, he then requested her to keep for him something which the person on condition that the person coming for them will withdraw some money. After two hours the person came for the items and left with them without withdrawing the money they later on came and forced themselves into the shop demanding for money , threw her on the ground causing her to give them the money. It was her evidence that the appellant spoke to her for a long time in Kamba language making it easy for her to identify him .After one week she found as mob beating two people for stealing from an Mpesa and she managed to identify them as those who had robbed her and that the appellant is the one who had identified himself as Felix .
12. In cross examination she stated that the person who withdrew the money had the name Felix mutua reflected in the transaction which was supported by his identification card and that she was able to identify him

at an identification parade which was made up of twenty people .

13. Pw2 Frida Kanario Kaberia was told by PW1 who was manning the Mpesa for her what had happened to her and that on 30<sup>th</sup> September 2014, she went to the scene where the appellant had been arrested while trying to steal from another Mpesa shop .PW3 I P John Kathae conducted an ID parade where the appellant was identified .

14. When put on his defence , the appellant stated he was in the business of selling bottles and that on 23<sup>rd</sup> September 2014 he wanted to send money via Mpesa and that the first shop he went to did not have float, when he went to the second shop , the attendant at the first shop came and alleged that he was a thief and called the crowd who attacked him. He was then taken to the police station from where the lady from the shop which had allegedly lost money stated that he had put drugs on her causing her to lose money.

### **DETERMINATION**

15. From the proceedings and submissions herein, the appellants appeal herein is founded on procedural laps on the part of the trial court, as submitted by the appellant and confirmed through the record of appeal, the last prosecution witness testified on 12<sup>th</sup> September 2017 and on 6<sup>th</sup> April 2018, the prosecution indicated that they intended to amend the charge sheet and

proceed with the case against the appellant only, his co-accused having absconded.

16. On 14<sup>th</sup> September 2018, the prosecution informed the court that the appellant can proceed with his defence and on 18<sup>th</sup> February 2019 the same proceeded with his defence. There is no evidence that the court complied with the provisions of section 21 and 306 of the Criminal Procedure Code as the prosecution did not close their case and neither was the appellant advised on his rights under section 306 of CPC and Article 50 of the Constitution and therefore as pointed out in the ruling herein the defence of the appellant was a nullity which cannot be allowed to stand .

17. To that extent I will allow the appeal herein and set aside the conviction and quash the sentence herein.

18. Should I be wrong on allowing the appeal on a procedural technicality, on the merit thereof the evidence of PW1 was that she gave the appellant kshs 30,000/= whereas the evidence of PW2 was that she added a float of Kshs 7,500/=. There was no evidence tendered to confirm the amount of money PW1 had in her possession and in what form. When looked at against the appellant defence to the effect that PW1 had stated that the appellant had put drugs on her and she lost money and her testimony that the appellant had left some bottles with her, I am of the considered opinion and find that the prosecution case was not proved beyond reasonable doubt.

19. As pointed by the court in the ruling herein, the appellants identification which was conducted after the same had been charged in court and having been arrested at a scene where it was alleged that he had attempted to steal from an Mpesa shop.
20. In the final analysis I find and hold that his conviction was not safe and therefore allow the appeal. On the sentence, the same is at the sole discretion of the trial court and there being no cross appeal thereof , I find that the same is not excessive and harsh noting that the sentence available include up to death sentence. I would not have interfered with the same had I dismissed the appeal. The appellant shall be set free forthwith unless otherwise lawfully held.
21. Having been released on bail pending appeal, the cash bail deposited herein to be released to the same and this file closed

**DATED, SIGNED AND DELIVERED THIS 18<sup>TH</sup> DAY OF MARCH 2026.**

**J. WAKIAGA  
JUDGE**

**In presence of: -**

Court assistant -

Counsel for the state -

Applicant -