



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPEAL NO. E084 OF 2023

SAMUEL MWANIA MAKAU.....
.....APPELLANT

VERSUS

REPUBLIC.....RESPOND
ENT

(Being an appeal against the Conviction and sentence delivered on the 18th day of November 2022 in the Machakos Chief Magistrate's Court Criminal Case No.E056 of 221 by Hon. E.H Keago, Chief Magistrate)

JUDGMENT

1. The appellant was charged with the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence were that on 5th day of May,2020 at 1800 hours at Kauti village, Kaewa location in Kathiani Sub County within Machakos County, the Appellant, robbed ANASTACIA NTHENYA MUIINDE of Techno Spark 2, shopping and cash of Kenya shillings Five thousand, all valued at Kshs 16,450 and immediately before the time of such robbery hit the said ANASTACIA NTHENYA MUIINDE on the head five times by the use of a hammer.

2. At the trial four (4) witnesses testified against the Appellant who on 4th July 2022, was found to have a case to answer and put on his defence. He elected to give unsworn evidence and did not call any witness. After evaluating the evidence, the learned Magistrate found the appellant guilty and sentenced him to a term of imprisonment for twenty (20) years.

3. Being aggrieved by the conviction and sentence, the Appellant has preferred this appeal on grounds that;

“a. The learned Trial Magistrate relied on prosecution evidence that was riddled with contradictions and discrepancies leading to selective judgment, considering the exhibit identifications was left in doubt.

b. The Trial Magistrate convicted and sentenced the appellant of the offence of robbery with violence, notwithstanding that the plausible defence of the appellant was not given due consideration, where his defence was not displaced by the prosecution as required by law in section 212 of the Criminal Procedure Code.”

4. The appeal was canvassed by way of written submissions. The Appellant relied on submissions dated 11th August 2025 wherein two main issues were raised pursuant to the amended grounds of appeal. He submitted that the trial court failed to bear in mind the demands of Section 14 (3) of the Criminal Procedure Code and ordered the sentences to run consecutively instead of concurrently yet it had no jurisdiction to do so. He contended that the sentences arose from one trial where he was sentenced to 20 years on the main count and 5 years imprisonment on counts 2, 3 and 4 respectively. He

urged this court to find that the sentences should run concurrently.

5. Secondly, he submitted that the sentences meant that the appellant would serve imprisonment for thirty years which would go against the concept of normal life expectancy as stated in the case of ***Ali Abdullah Mwanza vs Republic (2018) e KLR***. The Appellant contended that the sentence did not take his age into consideration and urged this court to take into account Article 27 (1) (2), Article 20 (3) (b), Article 25 (a) and 29 (f) of the Constitution. He urged this court to reduce the sentence of 35 years to one of 15 years imprisonment.
6. On the part of the Respondent, Counsel filed submissions on 15th September 2025 which raised two issues. Firstly, it was submitted that the elements of robbery with violence as set out in the case of ***Oluoch vs Republic [1985] KLR and Dima Denge Dima & Others vs Republic, Criminal Appeal no 300 of 2007*** had been proven beyond reasonable doubt; that PW1 was a credible witness and her account was consistent and supported by the evidence of all the other witnesses.
7. Secondly, it was submitted that the defence was an afterthought as the issue of mistaken identity was raised at the time of cross examination of PW1; that remains of PW1's stolen phone were recovered in the Appellants house. It was

contended that the Appellants defence did not displace the prosecution's case. The court was urged to uphold the conviction and sentence as they were sufficient and appropriate given the offence

Analysis and determination

8. As the first appellate court, I have carefully considered and evaluated the evidence adduced in the trial court so as to arrive at my own independent conclusion, albeit keeping in mind that unlike that court I did not see or hear the witnesses or the evidence. See the case of ***Okeno v Republic [1972] EA 32.***
9. In his submissions the Appellant makes reference to counts 2, 3 and 4 yet no such counts are reflected in the record or the judgment of the court below. This Court has noted that the Appellant was only charged with two offences at the onset, Robbery with violence contrary to Section 296(2) of the Penal Code and an alternative charge of handling stolen goods contrary to Section 322(1) (2) of the Penal code for which he took plea on 12th February 2021. I also note that the charge sheet, the alternative charge was crossed out with two lines. From the court record, it is not clear whether the charge was withdrawn but what is clear is that the Appellant was found guilty of the offence of Robbery with violence and only that of offence.
10. From the submissions of the parties, particularly that of the Appellant, he takes no issue with the conviction. In the

grounds and in the submissions he clarifies that the operative grounds are those in the amended grounds of appeal. Both grounds touch on the sentence and the manner of sentencing. Guided by the submissions, this court will therefore address its mind to the sentence only.

11. The Appellant has faulted the trial court for not considering Section 14 (3) of the Criminal Procedure Code but the trial court only tried him for one offence. In the judgment the learned magistrate only makes reference to one offence, Robbery with violence to which the accused was sentenced to imprisonment for 20 years. A single sentence cannot be concurrent or consecutive as there is no other punishment or imprisonment sentence to be considered by the court. The Appellant seems to refer to matters not before this court and therefore I cannot address my mind to the same. The court only acts on the evidence and pleadings before it and in this case an appeal from **Machakos Chief Magistrates Court Criminal case no E056 of 2021** is what was filed. I find therefore that the appeal herein is misconceived, is without merit and proceed to dismiss it.

12. Consequently, the conviction and the sentence are upheld, I do note however that the learned magistrate did not comply with the provisions of Section 333(2) of the Penal Code (did not take into consideration the period the appellant spent in remand custody) and accordingly direct that the sentence of

imprisonment for 20 years shall be computed to commence from 28th January 2021 when he was arrested.

It is so ordered.

Judgment signed, dated and delivered virtually on this 19th day of March, 2026.

E. N. Maina
Judge

In the presence of:

Mr. Motende for the State
The Appellant at Kamiti Maximum
Mary- Court Assistant/Interpreter