

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CRIMINAL APPEAL NO. E030 OF 2025**

**GREVIN JUMA alias OSCAR.....**

**APPELLANT**

**VERSUS**

**REPUBLIC.....**

**RESPONDENT**

**(Being an appeal from the conviction and sentencing of Hon. C.N. Njalale  
(PM) in Kitale CMC Criminal Case No. E2317 of 2024)**

**JUDGMENT**

1. The Appellant was arraigned before the Principal Magistrate's Court at Kitale in Criminal Case No. E2317 of 2024, charged 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 2<sup>nd</sup> August 2024, at Line-moja in Trans-Nzoia West Sub-County within Trans-Nzoia County, the Appellant, jointly with others not before the court and while armed with dangerous weapons namely, a knife and an iron bar, robbed one Evans Mathenge of a mobile phone make Infinix Hot 1 valued at Kshs. 20,000/= and cash in the sum of Kshs. 3,500/=.
3. The Appellant pleaded not guilty to the charge, and the matter proceeded to full trial, during which the prosecution called six (6) witnesses. Their evidence may be summarized as follows:

4. A *voire dire* examination was conducted on PW1, a 14-year-old Grade 8 pupil. Upon the Court being satisfied that she understood the duty of telling the truth, she was allowed to give sworn testimony. She recalled that on 2<sup>nd</sup> August 2024 at about 6:00 a.m., she was in the company of her sister Joyce (PW2) and her cousin, Evans Mathenge (PW3), on their way to school. As they walked, they were approached by three men riding on a motorcycle.
5. She described one of the assailants as dark-skinned, short, with unkempt hair and a gap in his teeth, who was armed with a knife. Another had dreadlocks, was brown-skinned and of medium build, and was armed with a blunt object. The third was described as dark-skinned, tall, and plump, and was the rider of the motorcycle.
6. It was her evidence that the assailant armed with a knife held PW3 and threatened him, while the plump rider attempted to take them away. PW3 managed to break free and ran off, whereupon the rider chased after him. PW1 and her sister were restrained by the remaining assailants but were released after they screamed “thief, thief,” attracting attention. They later found PW3 about ten minutes away, surrounded by members of the public. They proceeded to school and later reported the incident at Kitale Police Station.
7. She stated that there was sufficient light as dawn had already broken and that the assailants came into close proximity with them. She

identified the Appellant in court as the person armed with a knife, noting his shaggy hair, dark complexion, and the gap in his teeth.

8. On cross-examination, PW1 stated that the stolen phone was an Infinix Hot 10. She further stated that she did not note the registration number of the motorcycle as she was being pulled to the ground. She confirmed that she had not known the Appellant prior to the incident adding that members of the public escorted the victims to school, because they had a school trip that day.
9. A *voire dire* examination was equally conducted on PW2, a 13-year-old Grade 8 pupil, and she too gave sworn evidence after the Court was satisfied as to her understanding of the duty to tell the truth. She testified that on the material morning, between 5:50 a.m. and 6:00 a.m., she was walking to school with PW1 and PW3 when they were accosted by three individuals on a motorcycle. She stated that there was some light as the day was breaking.
10. She testified that one of the assailants held PW3 by the collar and questioned him. She described the rider as plump and chocolate in complexion, and stated that the person who held PW3 had a knife. She further stated that PW3 managed to escape, after which she and PW1 screamed, prompting the assailants to flee. They later followed PW3, who informed them that he had been struck with a blunt object.

11. PW2 stated that she was able to identify the Appellant by his facial appearance, including his shaggy hair and the gap in his teeth. She maintained that although she had not known him prior to the incident, she recognized him as one of the attackers.
12. On cross-examination, PW2 gave varying accounts regarding the role of the Appellant, at one point stating that he was carrying a jiko, and at another that he was the rider of the motorcycle. She also stated that she first saw him at the police station.
13. On re-examination, she clarified that the Appellant was among the attackers and that he was the rider of the motorcycle.
14. PW3, the complainant, testified that on 2<sup>nd</sup> August 2024 at about 6:00 a.m., he was escorting PW1 and PW2 to school before proceeding to work. At Line Moja, they encountered a motorcycle carrying three individuals. One of them held him while the other two attempted to seize the girls, who screamed.
15. He stated that it was the rider of the motorcycle who held him, drew a knife, and demanded money. He handed over Kshs. 3,500/=. As he attempted to flee, he was struck on the forehead with an iron bar and his mobile phone, an Infinix Hot 10, was taken. He further testified that the assailant raised an alarm accusing him of wanting to rape the children, thereby attracting members of the public who began to beat him, until PW1 and PW2 clarified the situation.

16. PW3 stated that he was able to see the assailants with the aid of street lighting and identified the Appellant as the one who attacked him, noting his distinctive hairstyle and the gap in his teeth. He produced a receipt for the stolen phone as an exhibit. He further testified that he later identified the Appellant when he saw him again in the presence of the police.
17. On cross-examination, PW3 maintained that it was the Appellant who struck him with an iron bar and pursued him using the motorcycle. He reiterated that he was able to identify him based on his appearance at the time of the incident.
18. On re-examination, he clarified that although the initial encounter occurred in relatively poor lighting, he was able to identify the Appellant when the latter caught up with him under street lighting.
19. PW4, a teacher at the school attended by PW1 and PW2, testified that on the material day, pupils were required to report to school by 6:00 a.m. for a trip. At about 6:40 a.m., PW2 approached her seeking assistance to contact her parents, reporting that they had been attacked and their cousin robbed.
20. She further testified that at about 7:40 a.m., a group of men went to the school demanding payment for allegedly rescuing the girls. She was, however, unable to identify any of them and could not

confirm whether the Appellant was among them. She later saw the Appellant for the first time at the police station.

21. On cross-examination, she confirmed that she did not know the Appellant prior to seeing him at the police station.
22. PW5, the investigating officer, testified that on 2<sup>nd</sup> August 2024, PW3 reported that he had been attacked by three individuals at Line Moja. He issued him with a P3 form and visited the scene, where he learnt that the assailants had also gone to the school demanding payment under the guise of rescuers.
23. He further testified that upon receiving a receipt for the stolen phone, he commenced investigations. While in the company of the complainant, PW3 identified the Appellant among a group of people. The Appellant was arrested and taken to Kitale Police Station, where he allegedly admitted being present at the scene as one of the rescuers.
24. On cross-examination, PW5 stated that identification was effected at the scene by way of pointing out, and that no identification parade was conducted as the complainant had positively identified the Appellant. He also stated that although efforts were made to trace the stolen phone, no line had been installed on it. He added that PW1 and PW2 also identified the Appellant at the police station.

25. PW6, a Senior Clinical Officer at Kijana Wamalwa Referral Hospital, testified that he examined PW3 on 2<sup>nd</sup> August 2024. He observed a swelling on the frontal region of the head and tenderness, as well as injury to the right knee. He opined that the injuries were approximately six hours old and were caused by a blunt object.
26. On cross-examination, he confirmed that his findings were based on physical examination of the patient.
27. The testimony of PW6 marked the close of the prosecution's case, upon which the trial court found that a prima facie case had been established and placed the Appellant on his defence.
28. In defense, the Appellant testified as the sole defence witness. He gave sworn evidence in which he denied the charge and disassociated himself from the alleged robbery. He stated that he was arrested while leaving a supermarket in Tulin, where he had gone to purchase tomatoes.
29. On cross-examination, he conceded that he might have been mistaken for another person with a gap in the teeth similar to his. He further stated that at the material time, he had long hair.
30. Upon conclusion of the trial, judgment was delivered on 27<sup>th</sup> March 2025, wherein the Appellant was found guilty and convicted of the offence as charged. He was thereafter sentenced to thirty (30) years' imprisonment.

31. Aggrieved by both conviction and sentence, the Appellant lodged the present appeal, setting out the grounds upon which he challenges the decision of the trial court.
32. In his Petition of Appeal dated 16<sup>th</sup> May 2025, the Appellant seeks orders that the appeal be allowed, the conviction quashed, the sentence set aside, and that he be set at liberty. The appeal is premised on the grounds that the trial court erred in convicting him on the basis of insufficient and/or circumstantial evidence, that he was not properly identified, and that his mitigation was not duly considered in sentencing.
33. The Court directed that the appeal be canvassed by way of written submissions but as at the time of preparing this decision, only the Appellant had filed submissions.

#### **Appellant's Submissions**

34. In his submissions, the Appellant contends that the investigations conducted by the investigating officer were inadequate and fell short of the required standard. He challenges the credibility of the prosecution's case, particularly the testimony that one of the assailants was carrying a lit jiko on a moving motorcycle, arguing that such evidence is implausible and lacks credibility, given the inherent danger of having an open flame in close proximity to a motorcycle powered by petroleum.

35. The Appellant further submits that his right to a fair trial as guaranteed under Article 50(2)(j) of the Constitution was violated, in that he was not furnished with the evidence that the prosecution intended to rely upon, thereby prejudicing his ability to adequately prepare his defence.

### **Issues, Analysis and Determination**

36. Being a first appeal, the Court is under a duty to re-evaluate, re-analyze and reconsider the entire evidence on record and to draw its own independent conclusions, while bearing in mind that it neither saw nor heard the witnesses testify and must therefore give due allowance for that fact. In **Okeno v Republic [1972] EA 32**, the Court of Appeal underscored this duty, holding that a first appellate court must subject the evidence to a fresh and exhaustive scrutiny and arrive at its own findings.

37. Upon consideration of the record of appeal, the grounds thereof, and the submissions by the Appellant, the following issues arise for determination:

**a) Whether the offence of robbery with violence was proved beyond reasonable doubt; and**

**b) Whether the Appellant was properly identified as one of the perpetrators of the offence.**

## Analysis

38. The Court of Appeal in **Oluoch v Republic [1985] KLR** held that the offence of robbery with violence is established if any one of the following elements is proved; that the offender was armed with a dangerous or offensive weapon; or was in the company of one or more persons; or, at or immediately before or after the time of the robbery, used or threatened to use actual violence on the victim.
39. From the evidence on record, it is not in dispute that PW3 was attacked by a group of three persons, one of whom was said to be armed with a knife while another wielded a blunt object. PW3 testified that he was robbed of his mobile phone and cash, and that he sustained injuries as confirmed by PW6. This evidence satisfies the legal ingredients of the offence of robbery with violence by establishing that a group of three, while armed with an offensive weapon did visit actual violence upon the victim.
40. The crux of this appeal, however, turns on the second issue, namely whether the Appellant was properly identified as one of the perpetrators.
41. The law on identification, particularly visual identification under difficult circumstances, is well settled. In **Wamunga v Republic [1989] KLR 424**, the Court of Appeal cautioned that evidence of visual identification must be examined with the greatest care, especially where the conditions favoring a correct identification are

difficult, and that a conviction should not be based on such evidence unless it is free from the possibility of error.

42. In the present case, the incident is said to have occurred between 5:50 a.m. and 6:00 a.m. While PW1 and PW2 testified that there was some light as the day was breaking, PW3 was categorical that at the initial point of encounter it was still dark and that he could not clearly see the assailants. He only claimed to have identified the Appellant later when the assailant caught up with him under street lighting. This sequence of events raises legitimate concern as to the continuity, consistency, and reliability of the alleged identification.

43. Further, the descriptions of the assailants as given by the prosecution witnesses were not consistent. PW1 described the assailant armed with a knife as short, dark-skinned, with unkempt hair and a gap in the teeth, and identified him as the Appellant, stating that he was the one who held PW3. PW2, on the other hand, gave varying accounts. At one point, she described the assailant as the rider of the motorcycle, whom she described as plump, chocolate in complexion, and of neither tall nor short stature, and stated that it was the rider who had a knife. At another point, she attributed different roles to the assailants and introduced the additional detail that one of them was carrying a lit jiko, an aspect not consistently corroborated by the other witnesses.

44. PW3, for his part, testified that it was the rider of the motorcycle who held him and threatened him with a knife. He described the assailant as having hair that was long in the middle with shaved sides and a gap in the upper jaw. The inconsistencies in the description of the assailants and the roles attributed to them materially weaken the reliability of the identification evidence.

45. It is further noted that no identification parade was conducted. The identification of the Appellant by PW3 was effected when, in the company of the police, he pointed out the Appellant along the road as one of the alleged robbers. While such a form of identification is permissible, it must be approached with caution. The Court of Appeal in **Gabriel Kamau Njoroge v Republic [1987] KECA 4 (KLR)** emphasized that identification evidence must be carefully scrutinized, particularly where it is not preceded by a formal identification parade, to guard against the danger of mistaken identity.

46. In addition, the identification in this case was largely based on general physical features such as hairstyle and the presence of a gap in the teeth. The Appellant himself admitted that he had long hair and a gap in his teeth, thereby raising the real possibility of mistaken identity, particularly in a public setting where such features are not necessarily unique or distinctive.

47. The prevailing circumstances, namely the early morning hours, the uncertainty and inconsistency as to lighting conditions, the absence of a properly conducted identification parade, and the contradictions in the testimony of key witnesses, render the identification evidence unsafe to be the only basis for identification leading to a conviction.
48. It is a cardinal principle of criminal law that the burden rests upon the prosecution to prove its case beyond reasonable doubt, and that burden never shifts. The Court of Appeal in **Sawe v Republic [2003] KLR 364** reiterated that suspicion, however strong, cannot form the basis of a conviction.
49. In the present case, while there is credible evidence that a robbery occurred, the identification of the Appellant as one of the perpetrators was not free from the possibility of error and therefore falls short of the threshold required in criminal law.

#### **Rendition And Final Orders**

50. In light of the foregoing analysis, the Court finds that although the offence of robbery with violence was established, the prosecution failed to prove beyond reasonable doubt that the Appellant was one of the perpetrators.
51. Consequently, the appeal is merited. The conviction is hereby quashed and the sentence founded on it set aside. The Appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated, signed and delivered at Lodwar this 9<sup>th</sup> day of April 2026



Patrick J O Otieno

Judge

Original