



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. E039 OF 2025

JOSEPH NYAGIMWISA MWITA

APPELLANT

VERSUS

REPUBLIC

RESPONDENT

*[Being an appeal from the conviction and sentence meted out
by the Hon. M.O. Obiero (SPM) given on 4.4.2025 in
Kehancha MCCR E433 of 2024].*

JUDGMENT

1. This is an appeal from the conviction and sentence meted out by the Hon. M.O. Obiero (SPM) given on 4.4.2025 in Kehancha MCCR E433 of 2024.
2. The Appellant was charged with robbery with violence, contrary to section 295, as read with section 296(2) of the Penal Code. The particulars of the charge were that on 19.03.2024 at around 2000 hours at Komomange sublocation, Kuria West subcounty, within Migori county, with others not

before the court, while armed with dangerous weapons, namely Rungus and pangas, robbed Lucas Ngerera Nyamohanga Ksh. 150,000/=, and immediately before the said robbery, wounded the said Lucas Ngerera Nyamohanga.

3. The appellant was convicted and sentenced to death. He filed a petition of appeal dated 17.05.2025 and set forth the following grounds:

- (i) That he pleaded not guilty to the charges.
- (ii) The court erred by not complying with articles 50(2) (g) (h) of the Constitution.
- (iii) The court erred in not observing that the ingredients of the offence were not proved to the required standards.
- (iv) The court erred in passing excessive sentence.

4. The Appellant also filed supplementary grounds of appeal together with his submissions by which it was stated as follows:

- (i) The trial court erred in not acquitting the Appellant after making a finding that he was not positively identified.
- (ii) The trial court erred in relying on suspicion that the Appellant's mobile phone number had communicated to PW2 a few hours before the robbery.
- (iii) The trial court erred in relying on inadmissible hearsay to convict the Appellant without Safaricom data or testimony of Safaricom liaison expert.

Evidence and Proceedings

5. PW1 was Lucas Nyamohanga Ngerera. It was his case that on 19.3.2024, he was at his home. He was with his wife. It was 8.00 pm. He opened the door to go and take a shower. He saw three people outside. Two of them entered the house. One remained at the door.
6. According to him, the two who entered the house attacked and assaulted him with rungas and demanded for money. His son went and brought the money in a bag, and handed to the duo. They also took Ksh. 10,000/= that was in his wife's bag. They took a total of Ksh. 150,000/=. His daughter screamed. One of the robbers said that things were bad. They ran away.
7. It was his case that one was wearing a mask and the other had covered his face with a piece of cloth. He testified that earlier when his wife was in Migori, somebody had called her and he had also called her again in the evening when she was going home. The voice resembled the voice of one of the robbers who were demanding for money. His wife reported the matter and the person was arrested.
8. PW2 was Tabitha Boke, PW1's wife. On 19.3.2024 at around 2.00 pm, she went to Migori to sell gold. She received a call from a stranger who asked her name but she did not disclose it.
9. After selling the gold, she went home at 7.00 pm. She gave her son a bag which contained the money. The son kept the

bag in the bedroom. It contained Ksh. 140,000/=. She remained with Ksh. 10,000/= in her handbag.

10. Later at around 8.00 pm, PW1 opened the door to go and take a shower. Two people bounced into the house and started assaulting and attacking PW1. They demanded for the money. She was afraid they could kill PW1. She sent her son who went and brought the money in the bag. She also gave them Ksh. 10,000/= which she had. She could identify one person. He was tall and dark with red eyes.
11. She went to the police station and reported the matter on 20.3.2024. She also gave the police the mobile number that had called her so that the person could be traced. When he was arrested, she confirmed the person was one of the people she saw in the house.
12. PW3 was the Clinical Officer, Marwa David Kari. He examined PW1 at Kuria West subcounty hospital. According to him, PW1 was treated on 26.3.2024. He produced the P3 form and treatment notes. He sustained a cut wound on the forehead, ears and face. The injuries were classified as harm.
13. PW4 was No. 90943, PC Laban Kalama. He testified that PW2 reported that she used to deal in gold mining. On 19.3.2024 when she was at work, she received a phone call from 0743226019. She did not know the caller. At around 6.30 pm later, she received a call from the same mobile

number. He enquired where she was. The caller declined to introduce himself and disconnected the phone.

14. The phone number was registered in the name of the Appellant. He also accessed the National ID for the Appellant which they used to trace him to his home. He was arrested on 2.5.2024.

15. DW1 was the Appellant. On 19.3.2024, he was at stadium where he did mining. He was also arrested at stadium when at work. He denied committing the offence. He testified that he had a grudge with PW1 after he refused to sell to him stones.

Submissions

16. The Appellant filed submissions dated 1.9.2025 by which it was submitted that the Appellant was not positively identified. He cited **Republic v Turnbull** (1977) QB 224 to support that where the quality of identifying evidence is poor he ought to have been acquitted.

17. He also submitted that the conviction was based on suspicion that his mobile number communicated with PW2 prior to the alleged robbery. He cited *PNO v Republic (2019) eKLR*.

18. The Appellant also submitted on sentence that the sentence imposed was manifestly excessive. He relied *inter alia* on **Hamisi Bakari & Another v Republic** (1987) eKLR.

19. It is unknown if the respondent filed submissions, as they were said to be sent via email as opposed to CTS.

Analysis

20. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. The Court of Appeal for Eastern Africa in *Pandya -vs- Republic* [1957] EA 336 stated as follows:-

On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

21. An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination, as held in the case of **Okeno v Republic [1972] EA 32** at 36 where the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

“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] E. A. 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] E.A. 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. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.”

22. The issue in this case is whether the prosecution proved its case to the required standards. Within this issue, there are three sub issues, that is:

- a. Identification of the appellant*
- b. Single witness evidence*

c. Circumstantial evidence

23. It must be remembered that the duty to prove a criminal case was on the state. The appellant entered proceedings having the presumption of innocence. The most oft quoted English decision of by Viscount Sankey L.C in the case of ***H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481***, comes in handy in describing the legal burden of proof in criminal matters, that;

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.”

24. An accused enters these proceedings presumed to be innocent. In the case of *R vs. Lifchus* {1997}3 SCR 320 the Supreme Court of Canada explained the standard of proof as doth:-

“The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

25. The legal burden refers to the burden of proof, which remains constant throughout the trial. It is the obligation of a party to establish the facts and contentions necessary to support its case, in this case the prosecutor. According

to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

26. The standard of proof required in such cases was addressed by Brennan, J. in the United States Supreme Court decision of *In re Winship* 397 U.S. 358 (1970), at pages 361-364, where he stated that:

"The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatised by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a

standard of proof that leaves people in doubt whether innocent men are being condemned.”

27. In criminal cases, the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J (as he then was) in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR** expressed himself as hereunder:

“To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant’s guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty...Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether

he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge.”

28. Reasonable doubt need not reach certainty, but it must carry a high degree of probability. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as doth:

“What then amounts to “reasonable doubt”? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-‘That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.’”

29. The matter turns on the evidence of PW2. Her evidence was that the voice of the attacker was that of the caller. This was not voice identification. In dealing with identification,

especially that of a stranger, there has to be more. A mere fact that the voice is similar is not enough. This was not a case of recognition but identification. The court must be aware of the dangers of identification by strangers, especially voice. In the case of Reuben Taabu Anjononi ,Benjamin Akisa Anjononi and Monya Anjononi v Republic [1980] KECA 23 (KLR), the court of appeal [Madan, Law & Potter JJ A)] posited as follows:

The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in *Siro Ole Giteya v The Republic (unreported)*.

30. PW1 and PW2 stated that it was about 8.00 pm. This was clearly night hour. The two robbers were described to have masked their faces. There was no mention of a source of light by which they were identified as identification was based on the voice through an earlier phone call to which the Appellant was attributed. Such voice identification was described by

PW1 only. In the case of **Abdulla Bin Wendo & Another vs Republic** [1953] 20 EACA166, the Court there addressed the manner in which the evidence of a single identifying witness should be treated and stated thus:

Subject to well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known the conditions favouring a correct identification were difficult.

31. The court had to assess the probability of error. In this case, the conditions based on which the Appellant could be clearly identified as offender were difficult. In **Kiilu & Another V. Republic** [2005] 1 KLR 174 the Court of Appeal held:

“Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on

the testimony of a single witness, can safely be accepted as free from the probability of error.

32. The identification in this case was not by recognition. PW1 and PW2 testified that they did not know the Appellant. The Appellant testified that he worked in the mines at the stadium. This is where PW1 and PW2 also worked. In **R -vs- Turnbull & Others** (1973) 3 ALL ER 549, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification by a single witness. The Court stated as doth:

The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way...? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? how long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made....

33. The conviction of the Appellant was based on suspicion. It is not worth that a case cannot be based on suspicion. There was no connection between the person who had called PW2 and the Appellant. Suspicion was raised because the alleged mobile number was said to be registered in the name of the Appellant. This fact was also not verified and remained not proved as no data was adduced to confirm the registration and use of the mobile number by the Appellant at the material time. In the case of **Faith Lucas V Republic** [2008] KECA 267 (KLR), the Court of appeal stated as follows:

... It would appear that the appellant was arrested, charged, convicted and sentenced purely on mere suspicion. We must point out that suspicion, however strong, cannot be used as evidence in a criminal case of this nature. It was upon the prosecution to prove its case against the appellant beyond reasonable doubt...

34. Further, attempting to access data without a court order or finding the identity card to check on ownership is obtaining personal data illegally. Illegally obtained evidence is useless. However, in this case, they did not even succeed in obtaining evidence illegally. In the case of **Kenya Railways Corporation & 2 others v Okoiti & 3 others [2022] eKLR**, the Supreme Court stated that admission of illegally obtained information is detrimental to the administration of justice and in violation of the provisions of Article 50(4) of the Constitution and Article 31 of the Constitution which

guarantees every person the right to privacy, including privacy of communication.

35. It is this court's considered position that PW2, under the circumstances, could be sure but truly mistaken on the voice. In the case of **Joseph Hare Mumba v Republic** [2019] KECA 829 (KLR), the court of appeal [Visram, Karanja & Koome, JJ.A)] addressed the question of voice identification as follows:

17. Was the above caution taken into account with respect to BK's recognition evidence? We believe it was. This is because the trial court, which had the opportunity of observing the witnesses as they gave their evidence, found BK to be a truthful witness and we see no reason to depart from that observation. See Nelson Julius Karanja Irungu vs. R [2010] eKLR. The trial court also observed, and rightly so, that despite the incident occurring at night it took a period of almost two hours, that is, from the time the appellant went to BK's house and took her to his house up until he defiled her. Moreover, during the incident BK was in close proximity with the appellant, who was well known to her, thus negating any possibility of a mistaken identity. Further, contrary to the appellant's contention, BK named him as the perpetrator to her mother and the police.

18. In as much as it is important for evidence to be led with regard to the exact words upon which a suspect is recognized, we, like the two courts below, are satisfied that in the circumstances of this case that BK was familiar with the appellant's

voice. Our position is fortified by the case of *Yaa Baya vs. R* [2017] eKLR wherein this Court expressed:

“With regard to voice recognition, it has been stated time without number that voice identification is just as good as visual identification. However, just like visual identification, care has to be taken to ensure that the voice was that of the appellant, that the person testifying as to the voice recognition was familiar with the voice and recognized it, the conditions prevailing at the time of the recognition were favourable.

36. The Appellant was thus convicted on circumstantial evidence. The threshold as stated in ***R vs Kipkering Arap Koske*** [1949] 16 EACA 135 is that such evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In *Sawe vs Rep* [2003] KLR 364, the Court of Appeal expressed that:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused.

37. For circumstantial evidence to be had regard of, it must be inconsistent with the accused's innocence. In the case of **Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR**, the court had this to say on circumstantial evidence:

“However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -‘It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial.’”

38. Having found that the Appellant ought to have been acquitted in the first place, I find no utility in venturing into the path of the sentence imposed. I set the Appellant free. My findings are that this appeal succeeds. I quash the conviction, set aside the sentence and order that the Appellant be set free unless lawfully held.

39. Before departing, I note that the court casually meted out a death penalty without considering the circumstances of the case. The court did not bother to address the question of duplicity that has been settled for robbery with violence, where an accused is charged under both sections 295 and 296(2) of the penal code. Had the appellant been found guilty, the court could have imposed a sentence of 14 years' imprisonment.

Determination

40. I make the following final orders:

- a) This appeal succeeds. The conviction is quashed, the sentence is set aside and the Appellant be and is hereby set free unless lawfully held.
- b) Right of appeal 14 days.
- c) File is closed.

DELIVERED, DATED and SIGNED at NYERI on this 21st day of April, 2026. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE
JUDGE

In the presence of: -

Appellant present

Mr. Kihara for the State

Court Assistant - Michael/Osoo

Sgt. Kitur at Kisumu Maximum present

ORIGINAL