

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT VIHIGA
CRIMINAL APPEAL NO E007 OF 2025

IAN ASENSA.....
APPELLANT

VERSUS

REPUBLIC.....
RESPONDENT

(Being an Appeal from the Judgment of Hon J.A. Agonda (PM) delivered at Vihiga in Principal Magistrate's Court in Criminal Case No 248 of 2020 on 20th January 2025)

JUDGMENT

INTRODUCTION

1. The Appellant herein was charged jointly with five (5) others with the offence of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code Cap 63 (Laws of Kenya).
2. He was tried and convicted by the Learned Trial Magistrate, Hon J.A Agonda (PM) who sentenced him to twenty (20) years imprisonment.
3. Being dissatisfied with the said Judgement, on 25th February 2025, he lodged the Petition of Appeal herein. The same was dated 24th February 2025. He set out four (4) grounds of appeal.
4. His Written Submissions were dated 11th July 2025 and filed on 24th July 2025 while those of the Respondent were dated and filed on 18th August 2025. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
6. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.
7. Having looked at the Appellant's Petition of Appeal, it appears his grounds of appeal were mixed up reason being that the main grounds were that age and penetration were not proved whereas his case was that of robbery with violence.
8. However, from his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-
 - a. **Whether or not the Prosecution proved its case beyond reasonable doubt; and**
 - b. **Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.**
9. The court dealt with the said issues under the following distinct and separate heads.

I. PROOF OF PROSECUTION CASE

10. Grounds of Appeal Nos (1), (2), (3) and (4) were dealt with together as they were all related.
11. The Appellant invoked Section 107(1) of the Evidence Act and placed reliance on the case of **Burunyi and Another vs Uganda (1968) EA 123**, whereby it was held that the duty of the court is to hold the scale to see that justice is done according to law on the evidence before it. He also cited **Pius Arap Maina vs Republic (2013) eKLR** and **Bakare vs State (1987) 1 NWLR (P7-52) 579** to emphasis on the duty of the prosecution to prove its case beyond reasonable doubt.
12. He submitted that the prosecution failed to prove its case beyond reasonable doubt for reasons that none of the prosecution's witnesses linked him to the offence since PW 3 and PW 5 testified that they had not seen him. PW6 the parade officer testified that he looked like 5th accused person and PW10, the investigating officer never demonstrated to the court how he was linked to the charge.
13. On its part, the Respondent submitted that PW 2 testified that the Appellant's Co-Accused person led them to the arrest of the Appellant. The Appellant was found in possession of a phone with sim card line 0745746828 which had been used at the time of the robbery and money had been transferred from complainant's phone to Appellant's number which was the basis of their investigations. That PW 10, the investigating officer also testified that the Appellant was linked to the commission of the offence during investigations.

PW 8 had stated that at the time of the robbery two persons entered her house however there were voices outside which shows that there were more people outside in company of the two who had invaded her house.

14. It therefore submitted that the evidence adduced proved beyond reasonable doubt that, the Appellant, in company with others and armed with dangerous weapons, robbed the complainant and also used violence immediately after the said robbery.

15. A perusal of the proceedings of the lower court file showed that on 28th January 2020 at between 11.00 pm and 2.00am, PW 8 was woken up from her sleep by a bang on her door and was shocked to see someone in her room. She said that the person took her black techno phone, an airtel line and other things from the room which he was handing over to another person in the other room. Her evidence was that there were two (2) persons in the house and commotion outside her house.

16. She added that two (2) persons raped her after robbing her and that she was only able to identify the Appellant's Co-Accused person in an Identification (ID) Parade. She confirmed that she did not identify the Appellant herein. She told the Trial Court that she went and informed Elisha Chagisia (hereinafter referred to as "PW 1"), her father in law of her ordeal. PW 1 then mobilised neighbours who took her to hospital. PW 1 corroborated her evidence.

17. PC Augustine Sifuna (hereinafter referred to as "PW2"), testified that on 21st February 2020, they received information that

the Appellant's Co-Accused person by the name of Musungu was arrested with a golden Tecno. He stated that the Appellant's Co-Accused person called the said Musungu through Telephone Number 0745746828 wanting to know where they would meet. He said that the Appellant's Co-Accused person herein told Musungu, who was at the time using Telephone number 0759925640 they meet in church but he did not show up. He stated that they traced the Appellant herein and arrested him. He tendered in evidence a Tecno phone and odeion(sic) phone which he identified in court.

18. When he was cross-examined, he testified that he did not have Safaricom details so he could not demonstrate that the line was registered in Appellant Co-Accused person's name. He also confirmed that nothing that had been stolen was found in his house.

19. PC Ibrahim Chars (hereinafter referred to as "PW3"), also corroborated PW 2's evidence. On cross-examination, he testified that he conducted a search on the Appellant's Co-Accused person herein and recovered mobile phone from his underpants which had Safaricom and Zain line. He said that the number that was used during the robbery was 0745746826. He said that he had seen some of the Appellant's Co-Accused persons who had been accused of stealing things and the said Benjamin had used the same number.

20. No 235791 CIP Samuel Mariengo (hereinafter referred to as "PW4") testified that he arrested Musungu, the Appellant's Co-Accused person. He said that he was not present when the Appellant's Co-Accused person was arrested but that he was

nearby. He stated that the Appellant's Co-Accused person was arrested with a mobile phone and sim card but he did not see the phone. He stated that the woman who was robbed money which had been transferred to Appellant Co- Accused person's number led them to investigation.

21. The Assistant Chief, Eugene Ambale, (hereinafter referred to as "PW 5") said that he did not know the Appellant and he did not know how he was linked to the offence. He also explained how he had arrested the Appellant's Co-Accused persons at different times for stealing.
22. No 237830 IP Mary Boke (hereinafter referred to as "PW 6") told the Trial Court that she carried out an Identification Parade and the Appellant was not identified by PW 8. She pointed out that PW 8 only identified one Peter Kawai Keya as one of the persons who robbed and raped her.
23. No 62919 PC William Kemboi (hereinafter referred to as "PW 7"), only produced the photographic evidence of the turkeys that were recovered. They were not linked to the Appellant herein.
24. A Court Administrator at Vihiga Law Courts, Dina Kusa, (hereinafter referred to as "PW 9") produced the file for **SO Case No 10 of 2020** where the six (6) accused persons were charged with the offence of gang rape. At the time that she testified, judgment in the aforesaid case was pending delivery.
25. No 95159 PC Hussein Osman (hereinafter referred to as "PW 10") testified on behalf of the initial Investigating Officer who was on

retire. On cross- examination, he testified that the Appellant herein was linked during investigation. He also added that the said Peter Kawai Keya and the said Musungu, the Appellant's Co-Accused person were the only ones who were convicted of the offence of gang rape in **SO Case No 10 of 2020.**

26. In his sworn defence, the Appellant denied committing the offence and stated that he was arrested while aiding his brother who was being beaten up. He asserted that he only got to know his Co- Accused persons after he was arrested.

27. The Trial Court determined that PW 8's money that was stolen was sent to the Benjamin's phone on the material night. It also linked him to the offence due to the investigations PW 4 was carrying out after a spate of robberies. The Trial Court also linked them to the offence basing on the doctrine of recent possession. The turkeys were, however, recovered from one Elijah which he had hid at one Zakaria Embumbi's home according to PW 5. She held that having failed to explain where they got the turkeys, they must have stolen them from PW 8.

28. Notably, the Appellant herein was not found in actual or constructive possession and the home of Zakaria was not linked to him. It was therefore a misdirection by the Trial Court to have stated that he was found with recently stolen properties.

29. Notably, there was no data that was produced from Safaricom to verify that indeed Benjamin, the Appellant's Accused person was the registered owner of Telephone Number 0745746828 or that he

received money from PW 8 at the night of the robbery. Indeed, PW 2 admitted that he did not have Safaricom details to demonstrate that the line was registered in the said Appellant Co-Accused person's name.

30. On his part, PW 10 only testified that Benjamin was linked to the offence during investigation. He, however, did not state which investigations led them to conclude that the said Benjamin was one of the perpetrators who attacked PW 8. Other than stating that there were more voices outside, there was nothing that linked the Appellant herein with the offence of robbery.

31. It is trite law that in criminal cases, the burden of proof lies with the prosecution and the standard of such proof is beyond reasonable doubt. It was the duty of the prosecution to prove the prisoner's guilt and on the whole of the case beyond reasonable case and if not proven, it would entitle an accused person to an acquittal. This was emphasised in the case of **JOO vs Republic [2015] eKLR**, where the court held that it is a cardinal duty on the prosecution to ensure that adequate evidence is adduced against a suspect so as to uphold any conviction and that it was better to acquit ten (10) guilty persons than to convict one (1) innocent person.

32. In the instant case, there was no evidence that was presented before the Trial Court that linked the Appellant herein with certainty to the commission of the offence. It was the considered view that the Trial Court erred when it convicted the Appellant herein merely

because there was a spate of robberies. The Appellant could not be convicted on offences which had not yet been proved in a court of law.

33. The sentences that were imposed in robbery with violence cases were long. Courts were, therefore, called upon to be cautious not to deprive accused or convicted persons their liberty when doubt arose. Indeed, courts were only asked to find persons culpable of offences when the evidence was overwhelming. If there was an iota of doubt, courts were enjoined to release such accused or convicted persons so as not to contravene Article 27 (a) of the Constitution of Kenya, 2010 that provides as follows:-

“Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.”

34. It was more prudent to acquit a guilty person if a court was uncertain of what transpired as opposed to convicting and/or upholding a conviction of an accused and/or appellant who may very well have been innocent.

35. Having considered the evidence herein, it was evident that the Prosecution had not proved its case against the Appellant to the required standard, which in criminal cases was proof beyond reasonable doubt.

36. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and (4) were merited and the same be and are hereby upheld.

37. The question of whether the Appellant was entitled to the benefit of the least severe sentence and the benefit of Section 333(2) of the Criminal Procedure Code were, therefore, rendered moot.

DISPOSITION

38. For the foregoing reasons, the upshot of this court's decision was that the Appellant's appeal was merited and the same be and is hereby upheld. His conviction and sentence be and are hereby set aside and/or vacated as they were both unsafe.

39. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be held for any other lawful cause.

40. It is so ordered.

DATED and **DELIVERED** at **VIHIGA** this **30TH** day of **APRIL** 2026

J. KAMAU
JUDGE