

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT VOI

CRIMINAL APPEAL NO. E024 OF 2025

1. JAMES MBAYA GIKUNDA

2. FRINDA MUTHONI

3. LEO WAGINA GERALD.....

APPELLANTS

=VERSUS=

REPUBLIC.....

RESPONDENT

**(Being an appeal from the Conviction and Judgment of Hon. E.
M. Kadima (PM) in Taveta MCCR Case No. 384 of 2018
delivered on 26th March 2025)**

JUDGMENT

1. The three Appellants were charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code.
2. The trial court found the three Appellants guilty as charged and sentenced them to thirty (30) years imprisonment each.
3. The Appellant pleaded not guilty to the charges. The prosecution called a total of four (4) witnesses.

4. The particulars of the offence was that on 5th July 2018 at Kasokoni Area in Challa Division at Taveta Sub-County within Taita Taveta County, while armed with dangerous weapons namely metal bars and pangas robbed JOHN KAIBA KINYANJUI of cash Kshs. 4,000/= a driving licence No. UV/097 a Samsung phone and a motor vehicle registration No. KBM 578B, Chassis/frame No. JALFRR33LA 7000090, model EEF RR33L make Isuzu Lorry Truck white in colour all valued at Kshs. 3,008,000 and at the time of such robbery used personal violence to the said JOHN KAIBA KINYANJUI.
5. The prosecution evidence in summary was that the complainant who testified as PW1 was the driver of motor vehicle registration No. KBM 578B Isuzu FRR Lorry which was owned by GERALD OKOKO.
6. PW1 said on 4th July 2018 he was approached by two people while he was at Ngara Area in Nairobi and the two people an old man and a young man told him they were looking for a lorry to transport onions from Loitoktok to Thika.
7. PW1 said they agreed at a cost of Kshs. 45,000. PW1 was introduced to a lady called FRIDAH who told him on phone that she was at Loitoktok.
8. PW1 said the old man left for Ruiru to get nets to carry the onions. He returned and said FRIDAH had enough nets.

9. PW1 said the old man paid a depot of Kshs. 15,000/= They met the owner of the motor vehicle at Kasarani and he gave them canvass to cover the onions.
10. PW1 said he was with his turnboy "Kinyanjui" (PW2) and the old man when they embarked on the journey to Loitoktok.
11. PW1 said the old man sat between him and his turnboy (PW2). When they arrived at Kasokoni trading centre, the old man pointed out at a lady and said "Mama ndio yule". The lady was identified as the 2nd Appellant in this case.
12. They alighted from the lorry and went to a hotel where the 2nd Appellant bought them coffee.
13. PW1 said the 2nd Appellant FRIDAH summoned the 1st Appellant whom she identified as a casual worker who was going to load the onions.
14. The 2nd Appellant told the 1st Appellant to board the small compartment behind the driver's seat.
15. PW1 said the 2nd Appellant kept communicating with some people on phone telling them "muko wapi? Gari inakuja" - (where are you?, the vehicle is coming)
16. PW1 said while on the way, the 2nd Appellant told him to stop the vehicle. He saw four men emerging from the thicket armed with clubs with their faces covered and they descended upon him and beat him up mercilessly.

17. PW2 jumped out of the lorry and tried to defend himself.
18. PW1 said the 2nd Appellant had a small bottle with contents which she tried to make PW1 to drink.
19. They tied his hands and dragged him 50 metres behind the lorry and they drove off the motor vehicle. PW1 said after some time, the turnboy (PW2) appeared and untied him.
20. They sought help from a nearby club but the revelers declined to help them and told them they themselves were thieves.
21. PW1 and PW2 waited until 5a.m when they got assistance. The testimony of PW2 was the same as that of PW1 in all material particulars.
22. The 1st Appellant said in his defence that he is a resident of Ruaka Kiambu and a driver by profession.
23. The 1st Appellant said he was asked to ferry goods to Eldoret from Mombasa and after taking the goods he returned the vehicle to Multiple Hauliers yard in Embakasi Nairobi.
24. The 1st Appellant said he was alter called by his sister who wanted help to transport onions to Nairobi from Taveta.
25. He went to Taveta and while in a hotel he was arrested in the company of the 2nd Appellant.
26. The 2nd Appellant also said in her testimony that on 5th July 2018 she was in Nairobi. She said she could only remember that she

was arrested on 20th July 2018 while going to Taveta to sell second hand clothes at Taveta during market days.

27. The 3rd Appellant said he is a boda boda driver. He said he was not able to recall what happened on 5th July 2018 but he recalled being arrested on 27th July 2018 at a boda boda stage at the old railway.

28. An identification parade was conducted and the next day he was charged in court.

29. The trial court found the three Appellants guilty as charged and sentenced them to 30 years imprisonment each.

30. The Appellants have now appealed against both sentence and the conviction on the following grounds:- The 1st Appellant's grounds of appeal were as follows;

(i) That the trial magistrate erred by failing to find that the prosecution did not properly identify the accused with the robbery with violence offence.

(ii) Specifically, the identification parade was flawed because the officer did not inform the accused of his right to legal representation or an acquaintance, did not certify the accused's signature on the parade form, there was no prior description of the perpetrators before the identification procedure, and the officer did not ensure that parade

members had comparable stature, complexion, colour, or similar attire to guarantee fairness.

- (iii) Additionally, the appellant contends that the magistrate erred by not recognizing that key prosecution witnesses were never called, including the arresting officer(s) to explain the mode of arrest and the investigating officer to testify on how the matter was investigated.
- (iv) The magistrate further erred by not recalling witnesses as requested by the defence and acknowledged by the court, with no objections raised, and the significance of the case starting denovo prejudiced the prosecution.
- (v) The defence testimony, which the appellant claims was cogent, truthful, and accurate, was not properly considered, and the prosecution failed to rebut it.
- (vi) Overall, that the prosecution did not adduce sufficient evidence to prove the case beyond reasonable doubt, the burden of proof was not discharged due to scanty and doubtful evidence, and the sentence imposed was harsh, oppressive, and unfair given the weakness of the evidence.

31. The 2nd appellant stated in her grounds of appeal as follows;

- (i) That she is a first offender aged 38 years, promising to always abide by the law and any conditions ordered by the court.

- (ii) She stated that she an expectant and single mother of two children, with a young family dependent on them, and argued that her incarceration is adversely affecting her family's life and her children's right to education.
- (iii) The appellant contended that the 30-year sentence imposed was extremely harsh, expressed remorse, and as a first offender, prayed for a sentence review.
- (iv) Specifically, she prayed that the court be persuaded to review or set aside the 30-year sentence and substitute it with a lesser period as deemed appropriate, and to grant such further orders as may be fit and just.

32. The third appellant also stated in his grounds of appeal as follows;

- (i) That he was never served with a defective charge sheet that improperly joined multiple accused persons.
- (ii) He contends that the trial magistrate erred in convicting and sentencing him to 30 years' imprisonment because no witness, particularly PW1, placed him at the scene of the crime or identified him as part of the robbery.
- (iii) He asserts that the court wrongly relied on the evidence of PW3, a fellow boda boda operator whom he had merely hired to transport passengers to Challa Hotel and whom he paid 500 shillings, but that PW3 did not witness any offence.

- (iv) He maintains that as a boda boda rider, he is entitled to carry any paying passenger to any destination, and the passengers he transported to and from Challa Hotel were unknown to him before that day.
 - (v) He denies possessing or handling anything connected to the robbery with violence under Section 296(2) of the Penal Code, and argues that he did not deprive PW1 of the motor vehicle or any property.
 - (vi) He further stated that the prosecution's evidence was contradictory, inconsistent, and insufficient to sustain a conviction beyond a reasonable doubt, and asks the appellate court to re-evaluate the evidence afresh and find that nothing links him to the alleged robbery.
33. The parties filed written submissions as follows: The appellant, James Mbaya Gikunda, submitted that he was convicted with the offence of robbery with violence in Taveta Law Court Criminal Case No. 384 of 2018 and sentenced to 30 years in prison.
34. He now appeals to the High Court at Voi, arguing that his conviction was unsound.
35. He contends that the prosecution failed to identify him properly as one of the robbers.
36. Specifically, the complainant gave no clear prior description of the attackers, the appellant was not represented by an advocate

or friend during the identification parade, the parade officer did not certify the appellant's signature on the parade form, and the parade members did not share similar stature, complexion, or attire to ensure fairness.

37. He also argues that essential witnesses were not called, including the arresting officers and the investigating officer, whose testimony would have explained the arrest and investigation process.
38. The trial court further erred by failing to recall witnesses after the case started de novo, despite the defence's request and no objection from the prosecution, which prejudiced the appellant.
39. The appellant asserts that his sworn defence, denying he was at the crime scene and stating that his co-accused were strangers, was cogent and unrebutted, placing only an evidential burden on him, which the prosecution did not displace.
40. He maintains that the prosecution did not prove its case beyond reasonable doubt, as there was no evidence of recent possession of the stolen motor vehicle, gaps in the case raise doubts that should benefit the accused, and the burden of proof never shifted from the prosecution.
41. Finally, he argues that the 30-year sentence is disproportionate, harsh, oppressive, and unfair given the weak evidence, and he asks the High Court to re-evaluate the evidence, find that he was

not afforded a fair trial, and set him at liberty in the interest of justice.

42. The 3rd appellant, Leo Wagina Gerald, submitted that he was convicted with the offence of robbery with violence under Section 296(2) of the Kenyan Penal Code and sentenced to 30 years in prison.

43. In his written submissions, he argues that his conviction was unsafe and should be overturned.

44. He stated he was never properly served with the charge sheet, which he describes as defective and informal, and that it incorrectly joined him with two other accused persons.

45. He emphasizes that he was only a boda boda rider who transported passengers to and from Challa Hotel, and that no witness, particularly the complainant (PW1), testified to seeing him at the scene of the crime, participating in the robbery, or being involved in hiring the complainant's motor vehicle.

46. He contends that the trial magistrate erred by relying on the evidence of PW3, another boda boda operator, who did not witness the robbery but was merely called by the appellant to help carry passengers for a fee.

47. The appellant argues that carrying passengers as a boda boda rider is his legitimate work, and that he did not know the passengers personally nor handle any stolen property.

48. He asserts that no exhibits were recovered from him, that the evidence was riddled with contradictions and inconsistencies, and that the prosecution failed to prove its case beyond a reasonable doubt.
49. He also points to the absence of an identification parade, discrepancies between initial reports and court evidence, and the failure of the trial court to properly evaluate his defence.
50. He cites numerous legal authorities to support his arguments on defective charges, unreliable identification, hostile witnesses, circumstantial evidence, and the duty of the first appellate court to re-evaluate evidence afresh.
51. He concludes that nothing links him to the robbery and that he is suffering imprisonment for an offence he did not commit, urging the High Court to acquit and release him.
52. The respondent opposes the appeal filed by James Mbayá Gikunda (1st appellant), Frida Muthonni M'Mujuri (2nd appellant), and Leo Wagina Gerald (3rd appellant) against their conviction and 30-year prison sentence for robbery with violence contrary to sections 295 and 296(2) of the Penal Code.
53. The prosecution relied on four witnesses and argued that all elements of robbery with violence, being armed with a dangerous weapon, being in company with others, and using personal violence, were proved beyond reasonable doubt.

54. According to the evidence, the 1st and 2nd appellants were directly identified by PW1 and PW2, who had interacted with them during a transport arrangement from Nairobi to Loitoktok, and were later attacked by them and others using clubs, resulting in the theft of a motor vehicle.
55. The 2nd appellant was specifically identified via vehicle lights and during a coffee meeting.
56. Regarding the 3rd appellant, the prosecution conceded that there was no direct evidence linking him to the robbery, relying instead on circumstantial evidence that he had arranged for a boda boda rider to ferry the 1st and 2nd appellants.
57. However, the respondent maintains that the trial court's findings against the 1st and 2nd appellants were sound.
58. The prosecution therefore prays that the appeal for the 1st and 2nd appellants be dismissed and their sentence upheld, while the 3rd appellant's appeal should be allowed.
59. The duty of a first appellate court is to re-evaluate the evidence presented at trial and draw its own conclusions, bearing in mind that it did not see or hear the witnesses testify.
60. The issues for determination in this appeal are as follows;
- (i) Whether the prosecution proved its case against each of the three Appellants beyond a reasonable doubt, and ;**

(ii) Whether the sentence of thirty years imposed was harsh and excessive.

61. On the issue as to whether the conviction of the 1st Appellant (James Mbaya Gikunda) and the 2nd Appellant (Frinda Muthoni) was safe, the prosecution's case against the 1st and 2nd Appellants relied heavily on direct evidence of identification by the complainant (PW1) and his turnboy (PW2).
62. The robbery took place on the night of 5th July 2018. However, the evidence shows that both PW1 and PW2 had spent considerable time in the company of the 1st and 2nd Appellants before the attack.
63. The journey from Nairobi to Kasokoni provided ample opportunity for observation.
64. PW1 testified that the 1st Appellant boarded the lorry and sat in the small compartment behind the driver's seat, while the 2nd Appellant was in the vehicle during the journey to the scene of the robbery.
65. They also interacted with the 2nd Appellant at a hotel where she bought them coffee.
66. The Court of Appeal has consistently held that evidence of visual identification in criminal cases must be carefully tested to avoid miscarriages of justice.

67. In the English case of R v Turnbull, it was emphasized that a court must consider how long the witness had the accused under observation, at what distance, in what light, and whether the witness had ever seen the accused before.
68. In the instant case, the identification of the 1st and 2nd Appellants was not a fleeting glance. PW1 and PW2 interacted with them over a significant period.
69. The 2nd Appellant was specifically identified during the coffee meeting and through her actions and communications.
70. The 1st Appellant was identified as the person the 2nd Appellant summoned as a casual worker.
71. The trial court was satisfied with the credibility of these witnesses. There is no evidence that the conditions for identification were difficult.
72. The 1st Appellant has raised issues regarding the identification parade procedure.
73. While compliance with Police Force Standing Orders on identification parades is important, the failure to strictly adhere to them does not automatically vitiate a conviction if there is other cogent evidence of identification.
74. The evidence of interaction before the robbery in this case is so strong that it transcends the need for a parade.

75. The evidence of PW1 and PW2, which the trial magistrate believed, directly places the 1st and 2nd Appellants at the centre of the conspiracy and the execution of the robbery.
76. Regarding the 1st Appellant's complaint about the failure to call certain witnesses, such as the arresting or investigating officers, this does not automatically sink the prosecution's case.
77. The law requires the prosecution to call witnesses who are necessary to establish its case. Section 143 of the Evidence Act provides that no particular number of witnesses is required to prove a fact.
78. The testimony of the victims of crime, if credible, can be sufficient to found a conviction.
79. The trial magistrate found PW1 and PW2 to be credible, and this court sees no reason to disturb that finding.
80. The defence offered by the 1st Appellant was a mere denial and an alibi that was not substantiated to a degree that could cast doubt on the overwhelming evidence against him.
81. The 2nd Appellant's defence that she was in Nairobi on the material day was rightly rejected by the trial court in light of the direct evidence placing her at the scene.
82. Consequently, the prosecution proved all the elements of robbery with violence contrary to Section 296(2) of the Penal Code against the 1st and 2nd Appellants.

83. These elements are: being armed with dangerous or offensive weapons (metal bars and pangas), being in the company of others (the four men who emerged from the thicket), and using personal violence against the victim.
84. The evidence of PW1 and PW2, which is consistent and corroborative, establishes these ingredients beyond a reasonable doubt.
85. On the second issue as to whether the conviction of the 3rd Appellant (Leo Wagina Gerald) was safe, I find that the State has conceded this appeal.
86. A review of the evidence against the 3rd Appellant shows that there was no direct evidence linking him to the robbery.
87. His alleged role was that of a boda boda rider who transported the 1st and 2nd Appellants.
88. No witness testified that the 3rd Appellant was among the four masked men who attacked PW1 and PW2, nor was he involved in the hiring of the lorry or the journey to Loitoktok.
89. He was not found in possession of any of the stolen items. The reliance on PW3, another boda boda operator, only established that the 3rd Appellant was carrying passengers, which is his legitimate occupation.

90. The prosecution's case against him was based on tenuous circumstantial evidence that falls far short of the required standard of proof.
91. The chain of inference is not complete, and there is a real possibility that he was an innocent person caught up in the events.
92. Identification is a key issue and when the evidence on record cannot sustain a safe conviction, an appeal must be allowed.
93. The conviction of the 3rd Appellant is therefore unsafe and must be quashed.
94. On the issue as to whether the sentence of 30 years imprisonment imposed on the 1st and 2nd Appellants was harsh and excessive, the offence of robbery with violence under Section 296(2) of the Penal Code carries a mandatory sentence of death.
95. The trial court departed from this mandatory sentence and imposed a sentence of 30 years imprisonment.
96. While the Court of Appeal in several decisions has affirmed the constitutionality of the death penalty, the trial court exercised its discretion to impose a lesser sentence, which is not illegal.
97. The 1st and 2nd Appellants, along with others, violently robbed the complainant of a motor vehicle worth millions of shillings.

98. The complainant was beaten mercilessly, and his turnboy was forced to jump out of the moving lorry. The violence used was severe.
99. The personal circumstances of the 2nd Appellant, including being a first offender and a mother, are mitigating factors, but they must be weighed against the gravity of the offence.
100. A sentence of 30 years for such a serious, pre-meditated, and violent robbery cannot be said to be so harsh or excessive as to warrant interference by this court.
101. The sentence is proportionate to the offence committed.
102. In the final analysis, the appeals by the 1st Appellant (James Mbaya Gikunda) and the 2nd Appellant (Frinda Muthoni) against both conviction and sentence are found to be without merit.
103. Their convictions are affirmed, and the sentence of thirty (30) years imprisonment each is upheld.
104. The appeal by the 3rd Appellant (Leo Wagina Gerald) is hereby allowed. His conviction is quashed, and the sentence set aside. He shall be set at liberty forthwith unless otherwise lawfully held.
105. Orders to issue accordingly.

Dated, signed and delivered this 28th day of April 2026 in open court at Voi High Court.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Eghwa

State Counsel:.....

Appellant:

ORIGINAL