

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VIHIGA**  
**CRIMINAL APPEAL NO E006 OF 2025**

**BENJAMIN MAYODI alias KIPTOO**

**alias NELSON CHAYUGA.....**

**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 20<sup>th</sup> 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 five (25) years imprisonment.
3. Being dissatisfied with the said Judgement, he lodged the Petition of Appeal herein dated 22<sup>nd</sup> February 2025 on 28<sup>th</sup> February 2025. He set out four (4) grounds of appeal. He filed his undated Supplementary Grounds of Appeal on 24<sup>th</sup> July 2025.
4. His Written Submissions were dated 7<sup>th</sup> July 2025 and filed on 24<sup>th</sup> July 2025 while those of the Respondent were dated and filed on 18<sup>th</sup> 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, 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 Section 200 of the Criminal procedure Code was complied with and if not, if the same caused him prejudice or not;**
  - b. **Whether or not the Prosecution proved its case beyond reasonable doubt; and**

c. **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.**

8. The court dealt with the said issues under the following distinct and separate heads.

I. **WHETHER SECTION 200 OF THE CRIMINAL PROCEDURE CODE WAS COMPLIED WITH**

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9. Supplementary Grounds of Appeal Nos (4) and (5) were dealt with together as they were both related.

10. The Appellant submitted on the same. He submitted that Hon B. Omollo (SRM) succeeded Hon S.O. Ongeru (SPM) and took the testimony of two (2) witnesses but failed to comply with the provisions of Section 200 of the Criminal Procedure Code . He added that the said Hon B. Omollo (SRM) then transferred the matter to Hon. J. A. Agonda (PM) without the order of the Chief Magistrate or the High Court. He pointed out that the said Hon. J.A. Agonda (PM) took the evidence of PW 10 but also failed to comply with Section 200 of the Criminal Procedure Code. He was emphatic that this was fatal to the case.

11. He argued that the magistrate ought to have observed the demeanour and credibility of the witnesses as was held in the case of **Richard Chadro Mole vs Republic (2010) eKLR** which was quoted in **Ndegwa vs Republic (1986) KLR 534.**

12. On its part, the Respondent submitted that, on both occasions, the court informed the Appellant of his right and his advocate elected to proceed from where the case had reached. It referred to the case of **Joseph Kamara Maro vs Republic (2014) eKLR** where the court emphasised that under Section 200(3) of the Criminal Procedure Code, the succeeding magistrate was not obliged to start the case *de novo* but was mandated to inform an accused person of this right.

13. A perusal of the record showed that the Appellant herein and his Co-accused persons were represented by an advocate. It was correct as the Appellant stated that Hon S.O. Ogeri (SPM), Hon Beryl Omollo (SRM) and Hon J. A. Agonda (PM) took the evidence of different witnesses. When the matter came up for directions on 14<sup>th</sup> December 2023, the Appellant's counsel prayed that the matter proceed from where it had reached. The Appellant was present in court.

14. The record further showed that on 19<sup>th</sup> August 2024, Hon. J.A Agonda (PM) took the evidence a witness. There was no indication in the file that when she took over the matter on 26<sup>th</sup> June 2024, the provisions of Section 200(3) of the Criminal Procedure Code were complied with.

15. Notably, Section 200(3) and (4) of the Criminal Procedure Code provides that;

**“(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded**

**by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.**

**(4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”**

16. According to this provision of the law, whenever one trial magistrate took over a trial from the preceding or a previous trial magistrate, it was incumbent upon the succeeding trial magistrate to inform the accused of his right to demand that any witness who had testified before the previous magistrate be re-summoned and reheard afresh failing which the court could order a retrial if the accused person had been prejudiced as provided in Section 200(4) of the Criminal Procedure Code.

17. The general principle was that a retrial should only be ordered where it was unlikely to cause injustice to both the victim and the accused person. The court was mandated to consider the length of time that had lapsed from the date of arrest and arraignment of the accused person or appellant, whether on proper consideration of the admissible evidence, or potentially admissible evidence, a conviction could result as was held in the cases of **Muiruri vs**

**Republic [2003] KLR 552 and Mwangi vs Republic [1983] KLR 522.**

18. This court found and held that although Hon J.A. Agonda (PM) did not comply with the provisions of Section 200(3) of the Criminal Procedure Code, the Appellant was ably represented by counsel who was aware of the importance of the said provision but nonetheless proceeded with the trial. Indeed, the said counsel had informed Hon Beryl Omollo (SRM) that the case could proceed from where it had reached.
19. The only assumption this court could make was that the Appellant's counsel intended to continue from where the matter had reached. This court did not in fact see any prejudice that the Appellant suffered because he proceeded with the defence hearing and did not object when the Prosecution closed its case. If he suffered any prejudice, then he did not demonstrate the same. This was not a suitable case to refer for retrial.
20. In the premises foregoing, Supplementary Grounds of Appeal Nos (4) and (5) were not merited and the same be and are hereby dismissed.

**II. PROOF OF PROSECUTION'S CASE**

21. Grounds of Appeal Nos (1), (2), (3) and Supplementary Grounds of Appeal Nos (1), (2), (3) and (6) were dealt with together as they were all related.
22. The Appellant faulted the Trial Court for having convicted him on circumstantial evidence. He cited in the case of **Abanga alias**

**Onyango vs Republic CRA No 32 of 1990** where it was held that for a court to be rely on circumstantial evidence, it had to be established that the circumstances from which the inference was drawn had to be cogent and firmly established, that those circumstances had to unerringly point towards the guilt of an accused person and that taking the circumstances cumulatively, the chain would be so complete as to remove the possibility of the crime having been committed by another person other than the accused person.

23. He submitted that the phone alleged to have been recovered from him did not belong to the Complainant, ECL, (hereinafter referred to as "PW 8") and it was not stated that it had a link with this robbery case. He pointed out that it was only stated that that phone transferred money in another robbery case that had no link with the present robbery case. He added that it was not also proved beyond reasonable doubt that the said phone was recovered from him or it belonged to him since Safaricom Liaison Officer was not called to testify to verify that the alleged sim card was registered under him and it was being used by him.

24. He further submitted that the investigation of the Chief and his informers did not link him to the charges but only talked of the perpetrators. He averred that the two (2) turkeys were recovered from Elijah in Zachariah's house but that the Prosecution failed to provide any reasonable evidence to link him to the said Elijah or the recovered turkeys.

25. He was also emphatic that the DNA results also excluded him and he was set free from the charges of gang rape in **SO CRC No10 of 2020**, which offence happened during the incident.
26. He added that PW 8 also failed to identify him during Identification Parade and the Trial Court erred when it stated that the doctrine of recent possession has been proved yet nothing was recovered from him.
27. He contended that there was no inventory of recovery and he cited **Letzur Teper vs The Queen (1952) 20 HC.48** where it was stated that while circumstantial evidence could sometimes be conclusive, it had to be always narrowly examined. He faulted the Trial Court for convicting him relying on the weakness of the Defence case than on the strength of the Prosecution's case.
28. On its part, the Respondent submitted that the Appellant was found in possession of a phone with sim card line 0745746828. The said line had been used at the time of the robbery and money transferred from PW 8's phone to the Appellant's number which was the basis of the investigations. It was emphatic that the evidence adduced though circumstantial proved beyond reasonable doubt that, the Appellant, in company with others and while armed with dangerous weapons, robbed PW 8 and also used violence immediately after the said robbery.
29. A perusal of the proceedings of the lower court file showed that on 28<sup>th</sup> 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.

30. 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.

31. PC Augustine Sifuna (hereinafter referred to as "PW2"), testified that on 21<sup>st</sup> 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 herein called the said Musungu through Telephone Number 0745746828 wanting to know where they would meet. He said that the Appellant 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.

32. 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's name. He also confirmed that nothing that had been stolen was found in his house.

33. 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 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.

34. 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 herein was arrested but that he was nearby. He stated that the Appellant herein 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's number led them to investigation.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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 persons were the only ones who were convicted of the offence of gang rape in **SO Case No 10 of 2020.**

40. In his sworn defence, the Appellant denied committing the offence and stated that he was ta Kakamega at the material time.

41. The Trial Court determined that PW 8’s money that was stolen was sent to the Appellant’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 been stolen from PW 8.

42. 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.

43. There was no data that was produced from Safaricom to verify that indeed the Appellant 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 Appellant's name.

44. On his part, PW 10 only testified that the Appellant was linked to the offence during investigation. He, however, did not state which investigations led them to conclude that the Appellant was one of the perpetrators who attacked PW 8.

45. 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.

46. 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 were a spate of robberies. He could not be convicted on offences which had not yet been proved in a court of law.

47. 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.”**

48. 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.

49. 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.
50. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and Supplementary Grounds of Appeal Nos (1), (2), (3) and (6) were merited and the same be and are hereby upheld.
51. The question of whether the Appellant was denied a chance to cross-examine the said Peter Kawai Keya and whether he 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**

52. 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.
53. It is hereby directed that the Appellant be and is hereby released from custody forthwith unless he be held for any other lawful cause.
54. It is so ordered.

**DATED** and **DELIVERED** at **VIHIGA** this **30<sup>th</sup>** day of **April** 2026

**J. KAMAU**  
**JUDGE**

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