



REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL NO. E004 OF 2025

LUCAS MWITA MARWA

APPELLANT

VERSUS

REPUBLIC

RESPONDENT

*[Being an appeal from the conviction and sentence meted out
by the Hon. M.O. Obiero (SPM) given on 16.01.2025 in
Kehancha MCCR E023 of 2024].*

JUDGMENT

1. This is an appeal from the conviction and sentence meted out by the Hon. M.O. Obiero (SPM) given on 16.01.2025 in Kehancha MCCR E023 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 07.01.2024 at around 1100 hours at Kegonga sub-location, Kuria East sub-county, within Migori county, while armed a

knife robbed off MUSA NYAKORMA NCHAMA, a round wooden table valued at Ksh. 3,000/= and immediately before and immediately after such robbery slapped MUSA NYAKORMA NCHAMA.

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:

- a. That I pleaded not guilty to the charges herein.
- b. That the trial court erred in both law and facts by not complying with article 50(2)(g)(h) of the Kenyan Constitution 2010.
- c. That the trial court erred in both law and facts by failing to consider that the ingredients of the offence herein were not proved to the required standard in law and facts.
- d. That the trial court erred in both law and facts by not considering my defence and mitigation.
- e. That, the trial court erred in law and in fact in not making a finding that there was no acceptable evidence as to search of the Appellant and recovery of the allegedly stolen table pursuant to section 29,25,22,26 CPC Article 31 and 50(4) COK 2010. Hence stealing not proved beyond a reasonable doubt standard.
- f. That, the trial court erred in law and in fact in denying the Appellant his absolute rights to a least prescribed sentence entitled to him by law

pursuant to Article 25(c), 50(2)(p) Constitution of Kenya 2010.

- g. That, the trial court erred in not making a finding that lack of a duly filled and signed inventory was fatal on the doctrine of recent possession on the appellant and the possession of alleged exhibits.

Evidence and Proceedings

4. The appellant was arraigned in court on 8.1.2024 and pleaded not guilty. he was granted bond of Ksh 300,000/= which he could not raise.
5. PW1 was Musa Nyakorma Nchama from Kegonga. He met Raphael Mwita who asked him to accompany him to the home of Daniel Kerario. When they reached there they found the wife to Daniel Kerario. Raphael Mwita gave him table to take to his home. On the way he met the appellant on the road, who enquired where he got the table. The witness answered that Raphael Mwita gave him to take to his home. The appellant slapped him and told him that the table was stolen the appellant slapped him and stabbed the witness on the chest. They struggled and the appellant fell. The appellant took the table saying the table was stolen. They later went for treatment and P3 form was filled.
6. On cross examination he stated that the appellant removed the knife but did not stab the witness. He stated that the did

not steal a table. He stated that he removed the knife but was caught midstream.

7. PW2 was Daniel Kerario, a police officer from Kegonga, he stated that he had sent Mwita Marwa to get a table from his home and the same belonged to Raphael. He stated that on cross examination, he stated that he was not there when the appellant took the table.
8. PW3 was Raphael Mwita. He testified that on 7.1.2024 he went to Daniel Kerario to assist collect some items he had assisted him with. Musa came back saying that Lucas had taken a table from him. They did not find the appellant from the scene. They went to a hotel and found the appellant with a table. They called PW2, who came and arrested the appellant. He stated that Musa told him that the appellant took the table.
9. PW4 was Mary Boke Mwita, a clinical officer who produced clinical officers. The complainant, Musa Nyakorema went to the hospital and alleged being assaulted by a known person on 7.10.2024. (This was after plea). It is miraculous by what magic the decision to charge was made. The complainant had a cut wound on the left side of the chest, right hand had a cut and the left hand had a cut. On cross examination, she could not know what caused the injuries.

10. PW5 was PC Samuel Mate from Kegonga police station. He stated that the complainant went to the police station in the company of Mwita and Kerario. He stated that the complainant was from PW2's home and met the appellant who was armed with a knife. They knew each other well. The complainants told the witness that the appellant had informed him that the table was stolen. The complainant gave the appellant the table. He went with PW2 and found Raphael Mwita. There were no eye witnesses. They found the appellant selling the table. Of course, I am sure that the buyer is one of the witnesses.
11. On cross examination, he stated that he did not go to the scene. The complainant did not scream for help. He stated that the person who was selling the table did not record a statement. They also did not go to the chief.
12. The appellant was placed in his defence. Upon compliance with section 211 of the criminal procedure code and opted to give unsworn evidence.

Impugned Judgment

13. The court set out wrong questions for determination as a result reached a plainly wrong decision. The court considered evidence of PW-5. He never bothered with defence evidence. The court then sentenced the appellant to

death. He found that the offence of robbery with violence was established. it is not clear to which standards this was.

Submissions

14. The Appellant filed undated and relied on a series of foreign decisions which are of no relevance to local jurisprudence. they submitted that there was no inventory filed. it was his case that the court misapplied the doctrine of recent possession. he prayed to be acquitted or a less sentence be imposed having regard to section 333(2) of the criminal procedure code. further reliance was placed on the case of Silas Maliolo Zakayo v Republic [2016] KECA 787 (KLR), where the court of appeal [**MUSINGA, GATEMBU & MURGOR, JJ.A**] held:

In addressing this issue, we will begin by setting out what constitutes the charge of robbery with violence under section 296 (2) of the Penal Code. The case of Johana Ndungu v. Republic Criminal Appeal No. 116 of 1995 (unreported) sets out the requirements in these words:-

“(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.

1. If the offender is armed with any dangerous or offensive weapon or instrument, or
2. If he is in company with one or more other person or persons, or
3. If, at or immediately before or immediately after the time of the robbery, he wounds,

beats, strikes or uses any other violence to any person.”

The Court is not required to look for the presence of all three ingredients, as proof of one of the ingredients would suffice to secure a conviction. Where the court reaches a conclusion that immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses any other violence to any person, the offence under subsection (2) is proved

15. I have not had sight of the respondent's case, though they indicated that they filed. there is nothing on the CTS.

Analysis

16. 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.

17. 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.”

18. 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
19. 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.”

20. 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.”

21. 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."

22. 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 stigmatized 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.”

23. 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.”

24. 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.'”

25. Even if the evidence rose to robbery, it could have only been robbery under section 296(1). there was no evidence of existence

26. The matter involved robbery with violence. The ingredients are set out in the charging section as follows:

If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

27. The offence is established under section 295 of the penal code as follows:

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

28. The first aspect is that the alleged violence was not for purposes of in order to obtaining or retaining the thing stolen or to prevent or overcome resistance to its being stolen or retained. The complainant was clear that the main complaint the appellant had was that the table was stolen. He was therefore treating the complainant as a thief. True to the appellant's words, there was no one willing to admit that the table was his. there was no evidence that the complainant owned the table.

29. The evidence of PW1 was to the effect that:

The appellant slapped him and told him that the table was stolen the appellant slapped him and stabbed the witness on the chest.

30. On cross examination he denied being stabbed. The charge slated to a slap. The medical evidence was off the mark. It was filed ling after the case was in court. it is unknown where the treatment notes for the slap went.

31. The extent of application of an expert opinion in judicial proceedings, and the general trend is that such evidence is not necessarily conclusive and binding. As was held in **Shah and Another vs. Shah and Others** [2003] 1 EA 290:

“The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in

the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so.”

32. Further, the Court of Appeal, on its part in **Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001** [2007] 1 EA 139, held that:

“... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so.”

33. Courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them as stated in **Parvin Singh Dhalay vs. Republic** [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

“While the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in

the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts: -

"The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:

"Because this is the evidence of an expert, I believe it."

34. The medical evidence was thus bogus since it had injuries which the complainant did to suffer. it is surprising that the investigating officer did not find it within himself to shield himself from the influence of PW2 who was a police officer from the same station, Kegonga police station. it is a fairly small police station, and nothing could have been easier than forwarding the file for investigations at Kehancha police station or any nearby station.

35. The evidence was paper thin and did not even rise to the level of assault. The court was plainly wrong in convicting the appellant. further the court abdicated its duty in not finding, from the evidence of PW1, that what could have been at best was affray between the appellant and PW1. Therefore, the appellant ought to have been acquitted. 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.

36. 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 up to sentence of 14 years' imprisonment under section 296(1) of the penal code

Determination

37. 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 **28th** 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 - Martin/Michael/Osoo

Sgt. Kitur at Kisumu Maximum present