



REPUBLIC OF KENYA



**KENYA LAW**  
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**Sidede v Republic (Criminal Appeal E047 of 2023)  
[2025] KEHC 851 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 851 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL APPEAL E047 OF 2023  
DK KEMEL, J  
JANUARY 31, 2025**

**BETWEEN**

**RONALD OCHIENG SIDEDE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the conviction and sentence of Hon. E. Malesi (PM)  
in Madiany Principal Magistrate’s Court Criminal Case No. E093 of 2023)*

**JUDGMENT**

1. The Appellant herein Benard Ochieng Sidede has lodged the present appeal against the conviction and sentence of the Honourable Principal Magistrate Hon E. Malesi vide Madiany Principal Magistrate’s Court Criminal Case No. E093 OF 2023 wherein he faced a charge of robbery with violence contrary to Section 295 as read with Section 296 (2) of the Penal Code. The particulars were that on the 12<sup>th</sup> day of April 2023 at Oyude market in Rarieda sub county within Siaya County jointly with others not before court while armed with dangerous weapons namely crude metal robbed Naomi Adhiambo Omulo of cash Kshs 71, 400/, mobile phone make Techno Pop 7 valued at Kshs 22, 200/, M-Pesa mobile phone make DK valued at Kshs 1000/, Navy blue purse, driving licence C of C PGJ-0100, identity card number 13708735, car keys, shop house keys, two bags and a and a child dress all valued at Kshs 95, 000/ and immediately before the time of such robbery hit the said Naomi Adhiambo Omulo on the right cheek.

The Appellant also faced an alternative charge of handling stolen goods contrary to Section 322 (1) (2) of the Penal Code with the particulars being that on the 13<sup>th</sup> day of April 2023 at Ochinya “A” village in Rarieda Sub County within Siaya County, otherwise than in the course of stealing, dishonestly retained key of motor vehicle registration number KCC 341 W Toyota Succeed the property of Naomi Adhiambo Omulo knowing or having reasons to believe them to be stolen and in which he was ordered to serve a sentence of ten years’ imprisonment.



2. Being aggrieved by the said conviction and sentence, the Appellant filed his Petition of Appeal dated 23/1/2023 wherein he raised the following grounds appeal.

- i. The learned magistrate erred in law and fact in convicting and sentencing the Appellant when the prosecution did not prove its case beyond reasonable doubt as required by law.
- ii. The learned magistrate erred in law and fact by pronouncing judgement and sentencing against the appellant in total disregard of the fact that proper identification was not conducted which is in contravention of the Police Force Standing Orders.
- iii. The learned magistrate erred in law and fact by convicting the Appellant without considering that there was no positive identification, hence the prosecution's case was based on presumption.
- iv. The learned magistrate erred in law and fact by holding that the ingredients of a charge of robbery with violence contrary to Section 296 (2) of the Penal Code had been proved yet the evidence on record could not support the charge against the Appellant.
- v. The learned magistrate erred in law and fact in failing to take into consideration the defence alibi raised by the Appellant and weigh it against the evidence of the prosecution.
- vi. The learned magistrate erred in law and fact in relying on hearsay evidence dismissing the Appellant's explanation for the recent possession of the car keys.
- vii. The learned magistrate erred in law and fact in when he misapplied himself on the doctrine of "recent possession."
- viii. The learned magistrate erred in law and fact in failing to record all the evidence tendered in court that would otherwise favour the case of the Appellant.
- ix. That the magistrate erred in law and fact in shifting the burden of proof to the Appellant.
- x. The magistrate erred in law and fact in having a fixed mind that the Appellant was guilty even before he was tried.
- xi. The magistrate erred in law and fact when he gave his biased view.
- xii. The sentence imposed was illegal, excessive and harsh.

The Appellant prayed that the appeal be allowed and that the conviction and sentence be set aside and he be acquitted. In the alternative, the appellant sought for an order that a mistrial be declared and a fresh hearing be commenced.

3. This being the first appellate court, its duty is well cut out namely to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis and thereafter come to its conclusion as to whether or not to uphold the decision of the trial court. This court will also have to make some allowance in that the trial court. Unlike this court, had the advantage of seeing and hearing witnesses as they testified. See the case of *Okeno vs R* [1972] EA 32.

4. PW4 Naomi Adhiambo testified that she was about to close her shop and proceed home when she was suddenly hit on her head. She was later assisted to Siaya for treatment. She stated that she lost several items that she had including money and car keys. That she was able to identify some of the items which were subsequently recovered namely car keys, driving licence, pink dress, assorted documents. That she did not know the Appellant and that she did not see the attackers.



On cross examination, she stated that one cannot be arrested for finding a lost item and seeking for the owner. That she learnt that there was somebody looking for the owner of lost items and who wanted to be paid for finding the same.

5. PW2 Ignatius Omondi Odera testified that he heard noises and that he stepped out of his business premises and headed to the complainant's shop only to find her lying down outside her shop and that he rushed her to hospital. That he later went to Ralew area where some of the stolen items were found and that the Appellant herein presented car keys which he claimed that he had found in a ditch.

On cross examination, he stated that the Appellant led the police to where he had found the car keys where it transpired that the village elder had received some of the stolen items from other persons who had come across them.

6. PW3 John Baki Achola testified that he is the village elder of Ochinya "A" village. That one of the villagers presented some baskets which he had picked up from a road side. On cross examination, he stated that if he found a lost item, then he would look for the owner. That the person who brought the baskets was not arrested.
7. PW4 Millicent Atieno testified that her shop is near that of the complainant. That she was at her shop when she saw the complainant lying outside her shop and that there were two people standing beside her and who had torches. She rushed to the scene and that the two persons who had a metal rod boarded a motor cycle and left. That she did not manage to identify the suspects.
8. PW8 No. 76547 PC Eliud Chepkui testified that he visited the scene of robbery and found the complainant had already been rushed to hospital. That he was led to Ndori market where he met the accused who had car keys and who led them to the place where he had picked them from. That they went to a neighbouring village where they recovered more items.

On cross examination, he stated that the car keys were inside a basket at the time of the robbery. That he received information from PW2 but who did not reveal the source of his information. That he arrested the Appellant when he came over with the car keys.

9. PW6 No. 65761 Senior Sergeant Japhet Ngetich stated that he investigated the matter and that the Appellant led police officers to Ochienga "A" village where he showed them the place where he had picked the car keys but who was unable to give a satisfactory explanation on where he had found them and that he wanted to be given appreciation for finding the car keys. That they later recovered more items from good Samaritans.

On cross examination, he stated inter alia; that he was informed that a certain person in Ndori was in possession of stolen car keys; that the Appellant claimed that he had picked the keys but did not give him sufficient explanation; that other villagers handed in more items that had been recovered from a road side; that he could not link the recovery of documents to the Appellant as the same had been picked by passersby.

10. PW7 Gilbert Omondi Ambila testified that he is a clinical officer based at Bondo sub county Hospital. That he had examined the complainant and produced the P3 form.
11. That marked the close of the Respondent's case. The trial court later established that a prima facie case had been established against the Appellant who was duly placed on his defence. He opted to tender a sworn evidence and called one witness.
12. DW1 Ronald Ochieng Sidede stated inter alia; that on the material date he closed his business at 7.00 pm and visited his friend Amos where he stayed upto 8.30 pm and then went to his house nearby;



that he picked some car keys as he started his work the following day and that he learnt that a robbery incident had taken place the previous night and that a certain woman had been robbed; that he was later introduced to one Brian who knew the owner of the car keys as he wished to give it to the owner upon refund of fuel for his motor cycle; that he was later arrested by police officers whom he took to the place where he had picked the car keys.

On cross examination, he stated that he had picked the car keys in the middle of the road at 6.30 am; that he did not know the person who had robbed the woman; that he did not have an idea of taking the car keys to the police.

On re-examination, he stated that upon collecting the car keys he embarked on getting to know the owner of the same.

13. DW2 Amos Adundo Atieno stated that he was with the Appellant on the material date and that they watched news and ate a meal together before the Appellant left for his house nearby.
14. The appeal was canvassed by way of written submissions. However, it is only the Appellant who complied.
15. I have given due consideration to the evidence presented before the trial court and the submissions filed. I find the only issues for determination is whether the Respondent's case was proved against the Appellant beyond any reasonable doubt and whether the sentence imposed was excessive.
16. The offence of robbery with violence is provided for under Section 296(2) of the Penal Code as follows:
  - (1) .....
  - (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more 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."
17. The ingredients of the offence were well laid out in the case of Johana Ndungu vs. R [1996] eKLR, where the Court of Appeal held as follows: -

"In order to appreciate properly as to what constitutes an offence under Section 296(2) of the Penal Code, one must consider the sub section in conjunction with Section 295 of the Penal Code. The essential ingredient of robbery under section 295 is "use of or threat to us "actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the aforescribed ingredients constituting robbery are presupposed in the 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 subsection:

- i. If the offender is armed with any dangerous or offensive weapon or instrument.
- ii. If he is in company with one or more other person or persons or
- iii. 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.



Again, the Court of Appeal in *Dina Denge & Others vs. R* (2013) KLR stated as follows:

The element of the offence under Section 296 (2) are three in number and are to be read not conjunctively, but disjunctively, one element is sufficient to found an offence of robbery with violence.

18. In the matter herein, the complainant (PW1) testified that she had just closed her shop at Oyude market at around 7.00 pm when she was ambushed by robbers who hit her on the right side of her head and that she fell down and lost consciousness. That when she came to after about two minutes, she learnt that she had been robbed of cash and other items totaling to Kshs95,000/=. That she was rushed to hospital for treatment. That she identified some of the recovered items such as car keys. That she did not manage to see the attackers. That she learnt that a certain person was trying to get to her over recovery of her car keys.
19. From the evidence of PW1, PW4 and PW7, it is clear that the Respondent managed to prove that the offenders were armed with dangerous and offensive weapons or instruments and that the offenders were in company of more than one person and that they did injure the complainant before fleeing from the scene.
20. It is also not in dispute that the Appellant herein was found in possession of the complainant's car keys that had been stolen from among other items. The Appellant, in his defence, stated that he had stumbled upon the said car keys from the road and that he made frantic attempts to contact the owner over the same.
21. It is noted that the incident took place at about 7.00 pm and hence the issue of identification is quite crucial. It is further critical that care should be taken so as to ensure that the person claimed to be one of the robbers was positively identified as the penetrator of the crime. The court in *Wamunga vs. R* (1989) KLR 424 held as follows: -

Where the only evidence against a defendant's evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were free from possibility of error before it can safely make it the basis of a conviction.

22. It is noted that the prosecution did not conduct an identification parade over the matter so as to leave out any doubt regarding the appellant's involvement. indeed, none of the prosecution's witnesses identified the Appellant herein.
23. It appears that the trial magistrate convicted the Appellant on the basis of the car keys found on him. The Appellant in his evidence stated that he briefed one Brian about the car keys he had found on the road and that he informed the said Brian to try and look for the owner who was to pay him for fuel as he had used his motor cycle in tracing the owner of the car keys. It seems that the trial court did not believe the explanation offered by the Appellant and thus convicted him. It is trite law that before a court can draw from circumstantial evidence, the inculpatory facts must be inconsistent with the innocence of the accused other than that he is guilty of the offence. The court must satisfy itself that there are no other coexisting circumstances which could weaken or destroy the inference of guilt. In the case of *SAWE VS. R* [2003] eKLR, the court held that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests inter alia; that the circumstance from which an inference of guilt is sought to be drawn must be cogently and firmly established; that the circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused, that the circumstances should form a chain so complete that there is no escape from the conclusion that within all human probability



the crime was committed by the accused and none else. (See Teper Vs. R [1952] ALL ER 480 and Musoke Vs. R [1958] EA 715).

24. The Respondent has hinged its entire case upon the fact that the Appellant was found in possession of car keys that comprised part of the stolen goods. The Appellant in his defence gave a credible explanation in my view to the effect that he sought for the owner of the items and engaged one Brian to trace the owner. Indeed, PW2 Ignatius Omondi Odra who is a relative of the complainant, confirmed that the said Brian informed him about the fact that the Appellant had the car keys and wanted to reach the owner. The said Brian was never called to testify. Again, John Baki Achola (PW3), the village elder, stated that one Joshua Onyango brought to him some baskets which were claimed to have been found abandoned in a ditch. The said Joshua Onyango was also not called by the prosecution to testify.

The investigating officer (PW6) did not give any reasons why these two witnesses were not called to testify as they could have helped resolve the issue of whether the Appellant had handled the car keys dishonestly and whether he was part of the robbers. I find the explanation offered by the Appellant was credible and believable. The Appellant just wanted to be paid some token by the owner of the car keys after he had found them on the road. It seems to me that the investigating officer formed a view that the Appellant was a suspect due to the interrogation conducted by him. Again, the learned trial magistrate made an observation during the cross examination of the Appellant when he indicated that he had no idea of taking the keys to the police, wherein the trial magistrate observed the Appellant's hesitancy in responding to the particular question. It is clear that the Appellant was convicted based on suspicion that he was part of the robbers. It is trite law that suspicion however strong cannot sustain a conviction against an accused person. It is highly unlikely that the Appellant could volunteer to look for the owner of stolen car keys if at all he was one of the robbers. That would be quite strange and thus the possibility that the Appellant was not part of the robbers since no right thinking person who is part of a group of persons who had been involved in a robbery would volunteer to come forward and seek to meet the owner of stolen goods in a robbery incident. Such behavior can only be attributed to innocent persons or those not connected with the crime in any way. The burden of proof is always upon the prosecution to discharge and which is beyond any reasonable doubt. From the totality of evidence tendered by both prosecution's witnesses and defence, i find that there is some doubt created regarding the Appellant's involvement in the crime. The benefit of such doubt should have been resolved in his favour. I find that the trial magistrate fell into error when he convicted the Appellant upon scanty evidence. In that regard, the finding on conviction was in error and must be interfered with.

25. As the appeal on conviction has succeeded, a determination on whether the sentence imposed was harsh becomes moot.
26. In the result, it is my finding that the Appellant's appeal has merit. The same is allowed. The conviction by the trial court is hereby quashed and the sentence imposed set aside. That Appellant is ordered to be set at liberty forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT SIAYA THIS 31<sup>ST</sup> DAY OF JANUARY, 2025**

**D. KEMEI**

**JUDGE**

In the presence of:

Ronald Ochieng Sidede.....Appellant

Jaoko.....for Appellant

M/s Mumu.....for Respondent



Ogendo.....Court Assistant

