



REPUBLIC OF KENYA



KENYA LAW
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**Otunga v Republic (Criminal Appeal E041 of 2023)
[2025] KEHC 772 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 772 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E041 OF 2023
REA OUGO, J
JANUARY 29, 2025**

BETWEEN

GEOFFREY WAFULA OTUNGA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon P.Y. Kulecho (PM) delivered at Webuye Senior Principal Magistrate's Court in Criminal Case No E281 of 2022 on 5th July 2021)

JUDGMENT

1. The appellant was charged with two counts of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The particulars were as follows:

Count On the 20th day of July, 2022 at Wabukhonyi Secondary School, Namarambi Location in
i: Webuye East Sub County within Bungoma County, jointly with others not before court, robbed Emmanuel Kasali Wanyonyi of his mobile phone make Techno IMEI number 3551901XXXX valued at Kshs 2,000/- and immediately before or immediately after such robbery killed the sail Emanuel Kasali Wanyonyi.

Count On the 20th day of July, 2022 at Wabukhonyi Secondary School, Namarambi Location in
ii: Webuye East Sub County within Bungoma County, jointly with others not before court, robbed one laptop make Pavion X360 Serial Number 032603XXXX x 20-887XXXX valued at Kshs 55,506 and cash Kshs 46,400/- all valued at Kshs 101,906/-, properties of the said Wabukhonyi Secondary School and immediately before or immediately after such robbery killed the sail Emanuel Kasali Wanyonyi.

2. A full hearing ensued, with the prosecution calling 8 witnesses, and the appellant giving sworn testimony in his defence. The appellant was convicted on count I and acquitted on the second count.



3. The appellant filed his Petition of Appeal and subsequently amended grounds of appeal dated 21st February 2024. The appeal is premised on the following grounds:
 1. That the trial magistrate erred in law and fact by failing to evaluate the charge sheet was incurably defective hence no amendment was done in compliance with section 214 of the CPC which failure to amend occasioned an injustice.
 2. That, the Pundit magistrate misdirected himself by failing to observe that charging the appellant with robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code rendered the trial court nullity as it was duplicity to charge inter alia hence prejudicial.
 3. That the trial magistrate erred in law and fact by failing to warn the appellant of the dire consequences if found guilty of the capital offence of robbery with violence.
 4. That the trial magistrate erred in law and fact by failing to inform the appellant promptly of his right to representation by an advocate which failure occasioned substantial injustice.
 5. That the trial magistrate erred in law and fact by failing to evaluate material contradictions and material discrepancies in evidence as the inconsistencies weaken and destroy inference of the accused person's guilt.
 6. That, the trial magistrate made non-direction on the insufficient evidence tendered by Pw6, a (sic) single evidence without corroboration of other independent evidence to support the allegation that the accused person gave her the SIM card as they were lovers not proved beyond reasonable doubt as the evidence was wanting to convict.
 7. That the trial magistrate erred in law and fact by basing a conviction on the doctrine of recent possession which was not proved to the standard of proof beyond reasonable doubt.
 8. That the trial magistrate erred in law and fact by failing to observe that the prosecution failed to prove their case beyond reasonable doubt by failing to summon their crucial witness to testify like the experts from Airtel or Safaricom to give (sic) an explicitly of what transpired on the alleged SIM Card that was recovered.
 9. That the trial magistrate erred in law and fact by failing to explain to the accused person what is entailed in section 211 of the CPC hence bad in law.
 10. That the trial magistrate erred in law and fact by failing to execute the strong sworn alibi defence of the accused as no evidence emerged to demolish it in compliance with section 212 of the CPC. But shifting the burden of proof to the accused person hence fundamentally prejudiced.
4. Although several grounds of appeal have been raised for determination, the single decisive issue resolving this appeal is whether the trial magistrate complied with Article 50 (2) (g) of *the Constitution*.
5. After a thorough review of the proceedings before the subordinate court, it is evident that the trial magistrate failed to inform the appellant of his right under Article 50(2)(g) of *the Constitution*. This omission renders the trial a nullity. This was the position in NMT alias Aunty v Republic [2019] eKLR where the Court stated:
 - “29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later... A court should



therefore not be in a hurry to take the plea before ascertaining that it has fully complied with Article 50(2)(g) of *the Constitution* among others as required...

34. Having said so, the inevitable question that now follows is: What is the effect of the derogation of the right under Article 50(2)(g) of *the Constitution* in the circumstances of this case?....

37. ...upon proof of derogation of the right under Article 50(2)(g) of *the Constitution* then the trial is rendered a nullity.”

6. Therefore, the only issue I must now consider is whether I should order a retrial. In *Mwangi v Republic* [1983] KLR 522 the Court of Appeal held that;

We are aware that a retrial should not be ordered unless the appellate court is of the opinion, that on a proper consideration of the admissible, or potentially admissible evidence, a conviction might result. In our view, there was evidence on record which might support the conviction of the appellant.

7. In this case, I find the offence for which the appellant was charged is serious and a proper consideration of the evidence could result into a conviction. The failure to comply with Article 50 (2) (g) of *the Constitution* was purely that of the court.

8. Therefore, I order a retrial, quash the conviction and sentence. I order that the appellant be retried of the offence before a magistrate of competent jurisdiction other than Hon. P.Y. Kulecho. The appellant shall take plea before the Principal Magistrate at Webuye Law Courts on 5.2.2025.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF JANUARY 2025

R.E. OUGO

JUDGE

In the presence of:

Geoffrey Wafula Otunga - Appellant in person

Miss Matere -For the Respondent

Wilkister - C/A

