



**Emiriat alias Okuku Juma & another v Republic (Criminal Appeal E027 & E026 of 2022
(Consolidated)) [2025] KEHC 398 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 398 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL APPEAL E027 & E026 OF 2022 (CONSOLIDATED)
WM MUSYOKA, J
JANUARY 24, 2025**

BETWEEN

HARRISON JUMA EMIRIAT ALIAS OKUKU JUMA 1ST APPELLANT

HANNINGTON OUMA WANDERA 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from judgment of Hon. Mrs. L. Ambasi, Chief Magistrate,
CM, in Busia CMCCRC No. 1335 of 2018, of 15th June 2022)*

JUDGMENT

1. The appellant, Harrison Juma Emiriat alias Okuku Juma and Hannington Ouma Wandera, had been charged before the primary court, with the offence of robbery with violence, contrary to section 296(2) of the Penal Code, Cap 63, Laws of Kenya.
2. The particulars were that on the night of 24th and 25th August 2018, at Busibwabo area, in Bukhayo West Location, within Busia County, while armed with dangerous weapons, namely rungus and pangas, they robbed Christopher George Nyongesa, of a woofers, make Sayona, valued at Kshs. 13,000.00; a battery, make N70, valued at Kshs. 6,000.00; assorted mobile phones, valued at Kshs. 55,000.00; an amplifier, valued at Kshs. 20,000.00; 103 bottles of Kenya Cane spirit, valued at Kshs. 77,250.00; and 82 bottles of Legend spirit, valued at Kshs. 49,200.00; whose aggregate value was Kshs. 220,450.00; and at or immediately before or after the time of such robbery, used actual violence against the said Christopher George Nyongesa.
3. There was an alternative charge against the 1st appellant, of handling stolen goods, contrary to section 322(1)(2) of the Penal Code, with the particulars that on the 31st day of August 2018, at Busibwabo area, in Bukhayo West Location, within Busia County, otherwise than in the course of stealing, he



- dishonestly received or retained one speaker of a Sayona woofer, knowing or having reasons to believe it to be stolen property or property that had been unlawfully obtained.
4. They pleaded not guilty to the charges, and a trial was conducted. 6 prosecution witnesses testified.
 5. The complainant, PW1, Christopher George Nyongesa, testified that on the morning of 25th July 2018, at about 4.00 AM, he was attacked by the 2 appellants, as he went out to his toilet, at his residence. The 1st appellant cut him on the head, while the 2nd appellant beat him with a stick. The 2 appellants escaped after he raised alarm. He established that the items listed in the charge were missing. He later went to hospital and reported the incident to the police.
 6. PW2, Josephine Asale Otuom, was among those who heard and responded to the alarm raised by PW1. She went to the scene, met and saw the 2nd appellant. PW1 mentioned to her that the 2nd appellant was 1 of the persons who had attacked him. She was among those who escorted PW1 to hospital. PW3, Rita Nabwire, was the wife of PW1. She was being escorted to the toilet by PW1, when the 2 appellants attacked them with a panga and stick, and hit PW1 with the weapons. She realised that items had been stolen from their shop. She escorted PW1 to hospital.
 7. PW4, Dr. George Roy Oketch, produced the medical records prepared by his colleague, Dr. Ombajo, who had attended to PW1. PW1 had a deep cut on the head, a right swollen wrist joint and body pains, following an alleged assault by robbers. The injuries were classified as a fracture of the radius-ulna and injuries to the soft tissue. He was admitted in hospital for 2 days. PW5, No. 49607 Police Corporal Kaloki Musyoka, was the arresting officer; PW6, No. 62928, Police Corporal Januarius Abwao, was the investigating officer. He detailed the steps he took in the investigation of the case.
 8. The appellants were put on their defence, on 7th April 2021. They made sworn statements. The 1st appellant denied the charges. He said that he was nowhere near Ebusibwabo where the incident happened. He denied that the speaker said to have been in his possession but said the other 2 items were his. The 2nd appellant denied being at the scene on the day alleged and denied knowing the 1st appellant.
 9. In its judgment, the trial court found that the 2 appellants were sufficiently identified by the witnesses and were found in possession of some of the stolen items. The 2 appellants were convicted of robbery with violence, and the 1st appellant of handling stolen goods. They were sentenced to serve life in prison for the robbery with violence, while the 1st appellant was sentenced to serve 14 years for handling stolen goods.
 10. The appellants were aggrieved, and brought separate appeals, that were subsequently consolidated on 30th September 2024.
 11. In his petition of appeal, the 1st appellant grounds his appeal on arguments that the evidence was uncorroborated and was accomplice evidence; identification was not free from error; the Sayona speaker was recovered in an illegal raid; the defence testimony was not fully recorded, and was given superficial consideration; the ownership of the Sayona speaker was not established; the denial of possession of the speaker by the 1st appellant was not considered; the conviction on the alternative charge was wrongful; the testimonies of PW1 and PW3 were conflicting; the appellants' written submissions were not considered and the court changed the testimonies of the prosecution witnesses which did not tally with their written statements; and the court failed to properly analyse the evidence.
 12. The appeal by the 2nd appellant was founded on similar grounds.
 13. Directions were given on 30th September 2024, for disposal of the appeal by way of written submissions. Submissions had not been filed by either side, by 28th November 2024, when a date for judgment was allocated.



14. In my opinion, the issues for determination are whether the prosecution established its case beyond reasonable doubt; whether there was failure to record the evidence adduced by the appellants; and whether the appeal is merited.
15. The appellants claim that the trial court relied on uncorroborated and conflicting evidence from the prosecution. In the absence of written submissions, I cannot say for sure what the appellants have in mind. I, however, believe that they refer to the testimony of PW1, where he stated that the 2nd appellant had told him to get his stolen property from the 1st appellant. The 2 appellants denied knowing each other. The trial court relied on the testimony of PW1, to the effect that the 2nd appellant had pointed to the 1st appellant as the person who had his property. PW6 testified that PW1 conveyed that information to the police, and some of the items were recovered from the 1st appellant, after the 2nd appellant led the police to him, on 31st August 2018. The trial court did not rely only on the testimony of PW1, for the appellants had been positively identified by PW2 and PW3 also, and some of the stolen items were recovered from the home of the 1st appellant.
16. On PW1 and PW3 giving conflicting testimonies, I have read and re-read the testimonies recorded from the 2, and I am not persuaded that they conflict. If anything, the 2 testimonies corroborate each other. The 2 witnesses spoke about the attack at 4:00 AM, on the morning of 25th July 2018, when the appellants emerged and physically attacked PW1. The only issue is that PW1 did not mention that he was escorting PW3 to a toilet outside their house when the attack happened. Apart from that omission, all the other aspects of their testimonies are similar. I am not persuaded that that omission alone ought to be construed to mean that the testimonies of these 2 witnesses were so radically in conflict as to warrant the same being treated as unreliable.
17. On whether the trial court failed to record the full evidence led by the appellants in defence, and gave the same superficial consideration in the judgment, I do note, from the record, that the appellants denied being involved in the incident, and of knowing each other. That was recorded by the trial court, and was considered in the judgment, when the trial court recited or narrated the testimonies recorded from both the prosecution and defence witnesses and analysed the evidence. I note that the appellants have not pointed out the evidence that was allegedly not recorded, and I am unable to know what was left out as the appellants elected not to file written submissions.
18. There was also the submission that the trial court re-created evidence from the prosecution witnesses in cases where the witnesses departed from the text of their written statements. The appellants did not demonstrate that, as they did not file written submissions. I could not evaluate that claim, by considering the recorded testimonies against the witness statements, given that the witness statements of the prosecution witnesses were not filed in the court record, nor produced as prosecution exhibits.
19. On whether the offence of robbery with violence was established, I find guidance in *Johana Ndung'u vs. Republic* [1996] eKLR (Cockar CJ, Akiwumi & Shah, JJA) and *Dima Denge Dima & others vs. Republic* [2013] eKLR (Nambuye, Kiage & Murgor, JJA), on the constituent elements of the said offence, to provide basis for me to analyse the evidence recorded, to evaluate whether or not the charge was established against the appellants. It was pointed out, in both, that the presence of 1 or more, of the elements of the offence, in terms of the assailant or assailants being armed with dangerous or offensive weapons, or being more than 1 in number, or using actual violence on the victim, would be adequate to establish the offence.
20. The recorded evidence established that the appellants were armed with a panga and a stick. PW1 was assaulted with both, and incurred very serious injuries, which included a fracture of a bone, and required hospitalisation. The injuries inflicted pointed to the weapons borne and wielded being



- dangerous and offensive. The appellants were 2 in number. The elements of the offence were established, and the case of robbery with violence was proved.
21. Robbery is a form of theft, where force or violence is employed. There was proof of use of force and violence, but was theft established? There was a recovery of 1 of the stolen items. It was found with the 1st appellant. He admitted that it was not his. Of course, issues have been raised, with respect to the integrity of the recovery process. Whatever the case, the 2 were identified at the scene of the robbery by PW1, PW2 and PW3; and the failure to recover stolen items, or to prove that the recovered items belonged to the complainant, would not diminish the fact of the robbery. What would matter would be whether the trial court is persuaded, from the testimony of the complainant, that he or she lost property in an attack of the nature narrated by the prosecution witnesses. PW1 and PW3 were positive, in their testimonies, that shortly after that violent attack on PW1, assorted items of property were found to be missing from their premises. The trial court was convinced of that and that was adequate.
 22. Therefore, founded on what I have discussed above, I am persuaded that the appellants were properly convicted, as the offence of robbery with violence was proved beyond reasonable doubt.
 23. There is the conviction of the 1st appellant of the alternative charge. I agree that that was an error. The handling charge was an alternative to the main charge of robbery with violence. Once the main charge was proved, there was no need for the trial court to make a finding on the alternative. The alternative charge ought to be of consideration only where the main charge is not established.
 24. Overall, the appeal has no merit, except for the ground on the alternative charge. I hereby allow the same to that limited extent, so that the conviction, of the 1st appellant on the alternative charge, is hereby quashed.
 25. None of the appellants have made the sentence 1 of the grounds of appeal. I shall consider it, given the recent jurisprudence on the legality or constitutionality of the death sentence and life imprisonment. Under section 296(2) of the penal Code, the prescribed punishment for robbery with violence is mandatory death. In *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), the Supreme Court pronounced that the death penalty was unconstitutional. I am alive to the attempt in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) to confine *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) to murder cases.
 26. *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) stated a position and principle with relation to the death penalty. It does not matter that it is prescribed for murder, or for robbery with violence, or for treason. It is a cruel form of punishment, which cannot stand, in view of Article 25 of the Constitution of Kenya, 2010. The death penalty cannot be available as a sentence, or a form of punishment, in Kenya, for whichever offence, after the promulgation of the Constitution of Kenya in 2010 and the pronouncement in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ).
 27. It was with that in mind that the trial court did not impose the death sentence. Instead, it sentenced the appellants to life imprisonment on 29th June 2022. In *Julius Kitsao Manyeso vs. Republic* [2023] eKLR (Nyamweya, Lesiit & Odunga, JJA) life imprisonment was declared unconstitutional; while in *Evans Nyamari Ayako vs. Republic* Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA), it was declared that a sentence of life imprisonment should translate to 30 years. The effect of



Evans Nyamari Ayako vs. Republic Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA), is to cap it at 30 years.

28. In view of Evans Nyamari Ayako vs. Republic Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA), I hereby review the sentence imposed on the appellants, by way of setting aside the sentence of life imprisonment and substituting it with a definite imprisonment sentence, to be served for 30 years.
29. I note that the appellants were arrested on 31st August 2018 and arraigned on 3rd September 2018. They were admitted to bond, on 3rd September 2018. The bond for the 2nd appellant was approved, on 4th September 2018, and he remained out on bond until the bond terms were suspended on 18th September 2021. The conviction came on 15th June 2022, and sentence on 29th June 2022. The 2nd appellant was in remand custody for about 9 months and 15 days. The 1st appellant was in remand custody throughout, which translated to roughly 35 months and 18 days. The periods spent in custody, by both appellants, shall be reckoned in calculation of the time that they shall ultimately serve in prison.
30. The appeal herein is disposed of in those terms. Orders accordingly.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 24TH DAY OF JANUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Mr. Wanyama, Advocate for the appellants.

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.

