



REPUBLIC OF KENYA



KENYA LAW
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**Mwasambo v Republic (Criminal Appeal E002 of 2024)
[2025] KEHC 8935 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 8935 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E002 OF 2024
AN ONGERI, J
FEBRUARY 28, 2025**

BETWEEN

SAMSON MGHANGA MWASAMBO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. C. K. Kitinji
(PM) in Voi Criminal Case No. E505 of 2021 delivered on 13th January 2024)*

JUDGMENT

1. The Appellant was charged with robbery with violence contrary to Section 296(2) of the [Penal Code](#) and he was found guilty as charged by the trial court and sentenced to death.
2. The particulars of the charge were that on 16th February 2021 at Taita Rocks Hotel at Wundanyi in Taita Taveta County the Appellant jointly with others not before court robbed Granton Mwzighe of a motor vehicle registration number KBW 232Y make Nissan saloon white in colour, electronic equipment, laundry, foodstuff and drinks all valued at Kshs. 988,990/= the property of Taita Rocks Hotel and immediately before such robbery wounded the said Granton Mwzighe.
3. The Appellant was charged with an alternative count of handling suspected stolen property contrary to Section 323 as read with Section 36 of the [Penal Code](#) in that he was found in possession of a lender and 5 litres of Jik jerry can reasonably suspected to be stolen or unlawfully obtained.
4. The prosecution evidence in brief was that on the material day the complainant (PW1) who was working as a night watchman at Taita Rocks Hotel reported on duty at 5:45p.m and released the day watchman.



5. At 2a.m, PW1 saw a shadow which he mistook to be one of their clients. He rose and walked towards the br. He said a torch was shown on his face blinding him. He was hit on the forehead and he passed out.
6. PW3 an employee of Rocks Hotel said he was woken from his room and he found the night watchman had been injured. He called the OCS Wundanyi Police Station who sent police officers to the scene.
7. An inventory was taken and it was established that a motor vehicle registration number KBV 232Y, Nissan saloon together with assorted drinks and detergents had been stolen all valued at Kshs. 988,000/=.
8. PW3 said only a blender and a jerrycan of jik detergent were recovered.
9. The Appellant denied the charges and said in his evidence that he was picked from his house in Taveta by seven men and he was taken to Taveta Police Station and later to Mwatate Police Station and later he was taken to court and charged with the two charges.
10. The trial court relied on the doctrine of recent possession and convicted the Appellant with robbery with violence and sentenced him to death.
11. The Appellant has appealed to this court on the following grounds:-
 - i. That the learned trial Magistrate erred in law and fact by failing to appreciate that the charge sheet was bad for duplicity.
 - ii. That the learned trial Magistrate erred in law and fact in not considering that the Appellant's identification was not positive since the image on the CCTV camera did not capture his full facial features neither was it at close range.
 - iii. That the learned trial Magistrate erred in law and fact in failing to follow the right procedure for adducing video evidence.
 - iv. That the learned trial Magistrate erred in law and fact by failing to appreciate that the Appellant's identification was not positive since the evidence reveals that the Appellant was wrongly implicated in the commission of the offence.
 - v. That the learned trial Magistrate erred in law and fact in placing the Appellant at the scene of crime on circumstantial evidence failing to deduce that the prosecution case lacks ingredients of the offence.
 - vi. That the sentence imposed was both harsh and excessive since it was applied in mandatory terms as provided by the statute and failed to consider the appellant's mitigation and the facts and circumstances unique to the case.
12. The parties filed written submissions as follows:- No submissions by either party on cts
13. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at its own conclusion whether or not to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. The Court of Appeal in *Okeno vs Republic* [1972] EA 32 held that:

“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 vs Republic* (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M Ruwala v R* (1957) EA 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 finding and conclusion; 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 vs Sunday Post* [1958] EA 424.”

14. The issues for determination in this case are as follows:-
 - i. Whether the Appellant was sufficiently identified.
 - ii. Whether the prosecution proved the guilt of the Appellant to the required standard.
 - iii. Whether the trial court was right in relying on the doctrine of recent possession to convict the Appellant.
 - iv. Whether the appeal should be allowed.
15. On the issue of identification of the Appellant, I find that the Appellant was not sufficiently identified at the scene of crime.
16. The complainant did not know who hit him and there was no other eye witness to the robbery.
17. The importance of identification of an accused in a case of robbery with violence was indicated by the Court of Appeal in the case of *Suleiman Kamau Nyambura v Republic* [2015] eKLR where it stated that: -

“In addition, and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set out ingredient of robbery with violence is the need to positively identify the assailant/s in question.”
18. I find that the trial court relied solely on the doctrine of recent possession to convict the Appellant.
19. The Appellant was found with a blender and a jerycan of jik detergent which were suspected stolen goods.
20. I find that there is no evidence that the said items were among the goods stolen on the material day. The court of appeal in *Michael Kerue Wanjiru v Republic* [2019] eKLR cited *Anjonini v The Republic* (1976-1980) KLR 1566, Madan JA (as he then was) stated as follows:

“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in the possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification of the assailants; recognition of an assailants is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends on the personal knowledge of the assailant in some form or the other.”
21. I find that it is unsafe to convict the Appellant in the absence of proper identification. In *Donald Atiema Sipendi v R* [2019] eKLR, Mativo J stated;

“The positive identification of an accused is an essential element of any offence. It is a fundamental part of a criminal process eye witness testimony directly linking the accused to the commission of the offence is likely the most significant evidence of the prosecution’



22. The conviction herein is unsafe and I set aside and order that the Appellant be set free unless lawfully held for any other reason.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF FEBRUARY 2025 VIRTUALLY AND IN OPEN COURT AT VOI.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Maina

