



**Ochanda & another v Republic (Criminal Appeal E077 & E078 of 2023
(Consolidated)) [2025] KEHC 6759 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 6759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E077 & E078 OF 2023 (CONSOLIDATED)**

A. ONG'INJO, J

FEBRUARY 27, 2025

BETWEEN

CALEB OKOTH OCHANDA 1ST APPELLANT

GEORGE SAMUEL OTOM 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of Hon. C. N. C ORUO (PM) delivered on 23rd October 2023 in Rongo CR. Case No. E200 of 2023 Republic V Caleb Okoth Ochanda and Another)

JUDGMENT

Background

1. The Appellants were convicted and sentenced to serve 20 years in imprisonment for the offence of robbery with violence contrary to Section 296(2) of the [Penal Code](#) in Count 1 and for the 1st Accused person in Count 2 he was sentenced to serve 2years imprisonment for being in possession of public stores contrary to Section 324(2) as read with Section 36 of the [Penal Code](#). The sentences were ordered to run consecutively with effect from 2.5.2023 when the Appellants were arraigned in court.
2. The Appellants were aggrieved by the conviction and sentence and they preferred the appeals herein vide Petition of Appeal filed on 17th November 2023 for Caleb Okoth Ochanda on the following grounds:
 - a. That, the trial court erred in both law and fact by failing to comply with Article 50 (2),(g) and (h) of [the Constitution](#).
 - b. That, the trial court erred in both law and fact by not observing that the ingredients of the offence of robbery with violence were not proved to the required standard.



- c. That, the trial court erred in both law and fact by not observing that the case had grave contradictions which could not sustain a conviction.
3. The 2nd Appellant in his petition of appeal filed on even date raised similar grounds to those of the 1st Appellant.
8. The Prosecution's case was that the on 29th day of April 2023 the Complainant was at Climax Bar when at 11.30pm he hired the 1st Appellant to take him home on his motor bike .
- PW2,
PW3
PW4,
9. The Appellants were placed on defense and the 1st Appellant in his sworn statement said he was a boda boda rider but denied having committed the offence. He said that on 30th April 2023 boda boda riders went to his home and told him Robert had claimed he robbed him of Kshs.2000 and his phone and he was needed at the police station. That he went and met Robert but denied having been involved in the robbery and he was placed in cells.
10. The Appellant said the person who robbed the Complainant was known as Ras and he was not the one. He said no one saw him steal from the Complainant and Job did not testify. He said the items recovered were not dusted and he was not at the scene. He also said that his house was not searched to establish the items were recovered from his house.
11. In cross examination the 1st Appellant said he did not know the Complainant and he did not carry any customer. He said he only operated during the day. He also denied knowing his co-accused or even the witnesses who testified in court. The Appellant said in his defense that he left work at 9.00pm and went to sleep in his house. He said the chairman of boda boda at Ola Oil is Steven. That when he reported off from work he could not remember the person he left at the stage. He admitted that police officers including P. C Nyarango accompanied him to his house after boda boda riders had taken him to the station. He said he had no differences with the police.
12. The 2nd Appellant George Samwel Otom also gave sworn statement and denied having committed the offence. He said that he was working at a hotel in when on 30.4.2023 police officers went to summon him to go to the station. That at the station he was placed in the cells. He said he did not know the 1st Accused. He said he had never been referred to as Ras the person that PW1 said robbed him.
13. In cross examination he said he knew Texas Petrol Station and he also knew the Club that is opposite the petrol station known as Bank Lounge. He said on 29.4.2023 he was at home with his parent and siblings Ibrahim Victor. A2 said he did not know PW1 or even A1. He said police were in company of PW1 when they went to arrest him.
- This Appeal was canvassed by way of written submissions.
14. The 1st Appellant's submissions are neither in the CTS or in the file whereas the 2nd Appellant's submissions are undated and incomplete.
15. The Respondent's submissions are dated 14th November 2024. It was submitted that the offence of robbery with violence had been proved as those who robbed the Complainant were more than one being the 1st Appellant and one Ras whom he picked on the way after PW1 had requested to be taken home. It was submitted that the 1st Appellant and the said Ras took a different direction from the one to Complainant's home and on reaching Wachara started frisking his pockets and stole his phone, ATM



card, ID card, Voters card and Kshs.200/=. It was submitted that apart from robbing the Complainant the Appellants also threatened to stab him with a knife.

16. On issue of identification the Respondent submitted that the Complainant knew the 1st Appellant as his village mate and also knew him by the nickname 'baby' and he clearly recognized him. That it was for the reason that PW1 knew the 1st Appellant that he requested him to take him home. The Respondent therefore submitted that the ingredient of identification was proved.
17. For the 2nd Count the Respondent submitted that the 1st Appellant was found in actual possession of assorted police uniform in his house and not being a police officer he had no business having them. That since he had no explanation on how he came by them he must have stolen them.
18. Regarding the ground that the court erred by failing to comply with Article 50(2) (g) and (h) the Respondent submitted that the Appellants were adequately informed of their rights to legal representation of their choice and the ground cannot stand.
19. Concerning the ground that there were grave contradictions it was submitted that contradictions if any do not affect the substance of the charge and are thus inconsequential.

Analysis and Determination

20. In a first appeal, the duty of the court was stated in *Mark Oiruri Mose vs. R* (2013) eKLR thus;

“.... the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.”
21. Having considered the grounds of Appeal, and revisited the evidence tendered before the trial court afresh as well as the submissions by the rival parties, the issues for determination are whether the prosecution proved the charge beyond reasonable doubt.

Section 296(2) of the *Penal Code* provides:

- “(2) 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.”
22. The ingredients of this offence were aptly discussed by Cockar, C.J., Akiwumi & Shah, JJ.A. in the case of *Johana Ndungu vs. Republic* CRA. 116/1995, [1996] eKLR where the Court of Appeal in Mombasa stated as follows:-

“In order to appreciate properly as to what acts, constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is ‘use of or threat to use’ 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 afore -described 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;
or
- 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.”[See also *Oluoch v Republic* [1985] KLR].

24. In the Court of Appeal case of Criminal Appeal No. 300 of 2007, *Dima Denge & Others v Republic* (2013) eKLR, the learned Bench stated as follows:

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

25. In this case the 1st Appellant was hired by the Complainant to ferry him home on his motor bike but before they left Rongo Township he picked one by the name Ras who was unknown to the Appellant. The Appellant then was made to sit between the rider and the said Ras and instead of going towards the direction of the Complainant’s home the Appellant took the route to Wachara and on reaching Wachara the 1st Appellant and Ras started frisking his pockets and stole from him items listed on the charge sheet they did not however injure him. This court finds that one of the ingredients of robbery was proved by prosecution in that the assailants were more than one person when they stole from the Complainant.
26. On the issue of identification the Complainant said that he spoke to a village mate by the nickname Baby who agreed to take him home but on the way he took a different route and in company of one Ras they robbed him. The Complainant said that he had wanted his brother Job to take him home but Job was low on fuel and that is why he hired his village mate who agreed to take him home. The 1st Appellant confirmed that he was a bodaboda rider but denied having committed the offence. He did not say that he did not know the Complainant and he did not deny that they come from the same village. Further, upon other bodaboda rider taking the 1st Appellant to the station he led Officers to unoccupied house from where the Complainant’s mobile phone and National Identity Cards for the Complainant and Mercy Ouko were recovered in a brown wallet. This items have been robbery from the Complainant the previous day on 29.4.23. It is therefore clear that the Complainant knew the first Appellant very well and he recognized him as the perpetrator of the robbery with violence.
27. Regarding the second Appellant the Complainant said that the first Appellant on reaching Back Lounge the 1st Appellant took one man called Ras who sat behind the Complainant on the motor bike. In Cross examination the Complainant said he knew the 2nd Appellant at the station and could not identify him before. He said that the 2nd appellant threatened him with a knife and when he surrendered his possession they left. PW4 the Investigating Officer said that the 2nd Appellant initially had dreadlocks and that is why he was known as Ras and also another alias name called Doctor. Although in cross examination the 2nd Appellant said that on his arrest police were with PW1 it is not clear how identification was done because PW1 said that he met the 2nd Appellant at the station. The evidence of PW1 as to identity of the 2ndAppellant raises doubt to whether proper identification was done in those circumstances, the said doubt is resolved in favour of the 2nd Appellant and his conviction for the offence of robbery with violence is quashed and sentence set aside.



28. Regarding the 2nd Count of being in possession of public stores contrary to Section 324(2) as read with Section 36 of the [Penal Code](#) for which the 1st Appellant was convicted and sentenced to serve 2 years imprisonment the evidence of PW2 is that when the 1st Appellant led them to his house assorted police, KWS and NYS uniform 11 in number were recovered in his bedroom. On recovery, an inventory was prepared and the same was signed by the 1st Appellant as well PC Oluoch and PC Sam. Photographs were also taken of the items recovered. This court also finds that the offence on 2nd Count was proved beyond any reasonable doubt and the finding of the trial court cannot be interfered with.
29. From the record of the trial court it is clear that the Appellants were informed of their rights under Article 50 (20 (g) to choose and be represented by an Advocate but there is nothing on record to show that they suffered substantial injustice that required an Advocate to be assigned to them at the State expenses.
30. Since the 1st Appellant did not file submissions this court was not able to see any discrepancies in the prosecution case that rendered the conviction of the 1st Appellant unsafe.
31. Based on the above re-evaluation of the trial court's evidence and judgment as well as consideration of the grounds of Appeal and submissions this court finds that the Appeal by the 1st Appellant Caleb Okoth Ochanda in Criminal Appeal No, E077 of 2023 does not have merit and the same is dismissed. His sentence on the 1st and 2nd Count will however run concurrently from 2.5.23 when he was first arraigned in court. The Appeal by George Samuel Otom has merit and the same is allowed the Appellant will be set at liberty unless lawfully detained.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF FEBRUARY, 2025

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HON. JUSTICE A. ONGINJO

JUDGE

In the presence of:-

