



REPUBLIC OF KENYA



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**Omondi v Republic (Criminal Appeal E014 of 2023)
[2025] KEHC 6750 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 6750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CRIMINAL APPEAL E014 OF 2023
A. ONG'INJO, J
FEBRUARY 27, 2025**

BETWEEN

KEN BRIAN OMONDI APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against the Judgment of Hon. R.K. Langat (PM) and delivered on
3rd August 2022 in Rongo CR. Case No. E090 of 2020 Republic V Ken Brian Omondi)*

JUDGMENT

Background

1. The Appellant was convicted and sentenced to serve 15 years in prison for the offence of robbery with violence contrary to Section 296(2) of the [Penal Code](#)
2. The particulars of the offence were that the Appellant on the 12th Day of November 2020 at 19.20 hrs at Dago village in Kanyadieto Sub-Location of East Kamagambo in Rongo Sub-County in Migori County jointly with others not before the court unlawfully and intentionally while armed with panga robbed Tobias Odhiambo of Kshs. 800/= and a motorcycle Reg. KMFG796 P make bajaj boxer BM 100.
3. The Appellant was aggrieved by the conviction and sentence and he preferred the appeal herein vide Petition of Appeal dated 23rd October 2023 on the following grounds:
 - a. That, the sentence be revised to period served.
 - b. That, the trial court erred by admitting evidence that had no nexus to him and shifted the burden of proof from the prosecution.
 - c. That, the trial court erred in finding that the charge had been proved.



- d. That, the court erred by imposing an irregular punitive and harsh sentence.
4. The Prosecution's case was that the on 12.11.2020 the Complainant was at Opapo stage at 7.30pm when the Appellant who is his neighbor at home requested to be taken to Karabili centre. That the Appellant opted to be the one riding the motorcycle while carrying the Complainant. That they came across 2 people who were wearing police uniform and they were stopped. That the 2 people asked who was the owner of the motorcycle and the Appellant said it belonged to the Complainant. That the 2 people said they were officers from Kangeso and that one of them drew a panga and cut him on the head and neck. That the 2 people took him to the forest from where he managed to escape and went to report to the owner of the motorcycle. PW1 subsequently went to Rongo Sub- County hospital and he was treated as per the Treatment Notes Ex P 1. The matter was reported to police and P3 form was issued and duly filled Ex – P2.
 5. In cross examination PW1 said the Appellant was not among those who were wearing uniform and he did not also cut him but that he led police to where he had hidden the motorcycle in Marindo.
 6. PW2, the Clinical Officer who treated the Complainant Rongo Sub-County Hospital produced P3 form Ex P2. He said that the Complainant had history of assault with cut wound on the occipital region with 7 stitches in situ and a deep cut wound on the neck. He assessed injury as harm. He also produced Treatment Notes made by his colleague one Wycliffe as Ex P1
 7. PW3 P.C. Evans Arina of Opapo Police Post testified that on 12.11.2020 at around mid-night people went to the post in company of one victim and one suspect. He observed that the victim was bleeding on the head. He contacted Kamagambo Police Station who went and he handed both the victim and the suspect.
 8. In cross examination PW3 said that both the Appellant's family and the victim's family went to the post. He said there was no land dispute that was he was aware of. He said members of public informed him the Appellant attacked the Complainant and robbed him of a motorcycle. He also said that the Appellant was taken to the Post together with motorcycle and panga. He said there was nothing to show the panga belonged to the Appellant but he was informed he used it to attack the Complainant.
 9. PW4, IP Leonard Ogutu testified that the Appellant and the Complainant are both his cousins. That on 12.11.2020 he arrived home at mid-day and the Appellant's mother went and reported to him that the Appellant had a police uniform in his house. That he had planned to collect the uniform at night but when he went to the Appellant's house he did not find the uniform. That on the same night he learnt that the same uniform had been used to attack a boda boda rider who was also his cousin.
 10. PW4 said that at 11pm the Appellant arrived home and when asked where the motorcycle was he led them to where he had hidden it inside sugarcane plantation. That the Appellant told them he was with 2 accomplices but on visiting their houses they were not found and the uniforms were also not recovered.
 11. In cross examination PW4 said the Appellant told him he was given the uniform but he is not a government employee. He also said the Appellant told him his accomplices took the uniform. He said they did not assault the Appellant and in fact his presence saved him as he was about to be lynched. He also said that the Appellant's mother is the one who told him she saw police uniform in Appellant's house.
 12. PW5, P. C. Lokai investigated the offence herein. He said that on 13.11.2020 around mid-night he received a call from Opapo Police Post and it was reported that someone had stolen a motorcycle and injured the Complainant. That they rushed to the Post and picked the Appellant with others not



before court as well as the Complainant. He said they also found motorcycle Reg. KMFC796P and also recovered a panga and took both to the station.

13. PW5 said that he established that the Appellant with others not before court attacked the Complainant and injured him but he managed to escape and went to report to his brother. He said that the Appellant tried to go to the Complainant's home to ask for forgiveness. PW5 escorted the Appellant to hospital as he had been beaten by members of public. He produced the motorcycle and the panga as exhibits P1 and P2. He said the Appellant's accomplices were not traced.
14. The Appellant in his sworn statement denied having committed the offence and said that on 1st July 2020 he went to Homa-Bay and on return he went to the stage and met the Complainant who is his brother. That he asked the Complainant to take him home. That he is the one who was riding the Complainant's motorcycle and he carried his brother as pillion passenger. That when they were about to arrive at Dago junction he saw 2 police officers in uniform. That he asked the Complainant what he should do and he was told to proceed. That the police inquired who the owner of the motorcycle was and the Appellant told them it was the Complainant and they started assaulting him. That the said officers unleashed a panga and he realized they were not police officers and he drove off to save his life. He said he parked the motorcycle in a maize plantation and left to go home and report. That when he arrived home family members started attacking him saying he had planned to kill his brother. That they asked where the motorcycle was and he led them to where it was. That he was taken to the Police Station at around midnight and police from Kamagambo took him to hospital.
15. The Appellant denied having kept police uniform in his house, He said that the thugs did not attack him.
This Appeal was canvassed by way of written submissions.
16. The Appellant's submissions are dated 13th August 2024. He submitted that the guiding principle in the sentencing law is that a sentence of imprisonment imposed by the court should not exceed that which is justified as appropriate to the gravity of the crime considered in light of its objective in the circumstances.
17. The Appellant faulted the Trial Court for declining to have the charge withdrawn to promote reconciliation between him and the Complainant who is a very close relative.
18. In relation to the evidence on record the Appellant submitted that the evidence of the Complainant would be construed to mean that the medical evidence of PW2 had no connection to him and the evidence of PW3 that he was taken to the station with a motorcycle and panga could be invalid as there is no explanation how the motorcycle and panga were recovered. The Appellant said it was not logical for him to commit the offence and then shortly thereafter go to ask for forgiveness.
19. The Appellant further submitted that the criminal intention had not been proved because he escaped from the police imposters hid the motorcycle and went to report to the family members and subsequently led them to where he had hidden the motorcycle. He said that he was not an accomplice to those who attacked and injured the Complainant and he should be vindicated and be set free.
20. On sentence the Appellant submitted that the principle of proportionality and rehabilitation take the 1st priority as being in line with the main aims of penitentiary institutions to prisoners. He argued that there was no evidence pointing towards the culpability of the Appellant and should not have been sentenced. It was also submitted that the sentence of 15 years was harsh and excessive in light of the evidence and the circumstances of the case. He urged the court to set aside the sentence and substitute it with the very least punitive. The Appellant said he had been in custody for 4 years and that it was sufficient punishment.



21. The Respondent's submissions are dated 19th November 2024. It was submitted that the Appellant the motorcycle which was robbed from the Complainant was found in possession of the Appellant and there was proof that the Appellant collaborated with other people to commit the robbery.
22. It was also submitted that the Appellant was properly identified as the Complainant knew him as a neighbor.
23. The Respondent argued that the uniform that was found in the Appellant's house was given to his accomplice to commit the offence herein.
24. In regard to sentence the Respondent argued that for the offence of robbery with violence contrary to Section 296(2) of the *Penal Code* the and the sentence is not harsh.

Analysis and Determination

25. 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.”
26. 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.”
27. 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].

28. 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.”

29. In this case the Appellant was in company of the Complainant when according to them they came across 2 people who were in police uniform and who turned out to be thugs and who produced a panga and started cutting the Complainant. Although the prosecution in submissions claimed the Appellant collaborated with robbers that evidence in consideration of the circumstances of the offence are not strong enough to impute bad intention on the part of the Appellant. The allegation that the Appellant’s mother informed PW4 that she had seen police uniform in the Appellant’s house and that the said uniform was used by the Appellant’s accomplices to commit robbery against PW1 are hearsay as the Appellant’s mother did not testify and there was no other evidence to prove that the Appellant had the alleged uniform.

30. This court finds that the appeal has merit and is allowed. The Appellant to be released forthwith unless lawfully detained.

Right of Appeal 14 days.

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

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HON. JUSTICE A. ONGINJO

JUDGE

In the presence of: -

