



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthoni v Republic (Criminal Appeal E038 of 2024)  
[2025] KEHC 1328 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1328 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E038 OF 2024  
DR KAVEDZA, J  
FEBRUARY 26, 2025**

**BETWEEN**

**SAMUEL MACHARIA MUTHONI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by  
Hon. W. Lopokoyoit (S.R.M) on 30th May 2024 at Kibera Chief Magistrate's  
Court Criminal Case no. E061 of 2024 Republic vs Samuel Macharia Muthoni)*

**JUDGMENT**

1. The appellant was charged with the offence of robbery with violence contrary to section 296 (2) of the [Penal Code](#), Cap 63 Laws of Kenya. After a full trial, he was sentenced to death. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his petition of appeal, he raised grounds, which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He contended that his defence was not considered by the trial court. He argued that he was not appointed a legal representative as is a mandatory procedure for capital offences that attract the death penalty. He urged the court to quash his conviction and set aside the sentence or order a retrial of the matter.
3. The key ingredients for a robbery with violence charge are found in section 296(2) of the [Penal Code](#). It provides as follows-

“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”.



4. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt leading to a proper conviction and sentence.
5. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32)
6. The prosecution's case was as follows: PW1, Geoffrey Ontita a businessperson operating a gas retail and Mpesa shop, testified that he had known the appellant, a bodaboda rider identified as Sammy, for six months. On 8th January 2024, at approximately 6:00 am, the appellant, accompanied by other individuals, entered his shop and forcibly demanded his phone. The assailants assaulted him, striking his head and chest with fists and kicks, before seizing his Nokia C22, valued at KES 26,000, acquired through Mkopa (Mkopa Form PMFI 1 dated 4/9/23). His friend, Dalmas, was also attacked before the perpetrators fled. PW1 reported the incident to the police and subsequently sought medical treatment. He confirmed that visibility was clear due to daylight.
7. During cross-examination, PW1 acknowledged that the appellant was not found in possession of the stolen phone. He however maintained that the appellant restrained him while his accomplices assaulted him and took his phone. He reiterated having known the appellant for six months and clarified that the bodaboda stage was approximately 100 metres from his shop.
8. PW2 Richard Ontito, PW1's brother and business partner, testified that he purchased the stolen phone in 2022 and later gave it to PW1. On 8th January 2024, he received a call from PW1 reporting the attack and theft. He advised him to report to the police. He later observed that PW1 had sustained injuries to his eyes and ribs. During cross-examination, he clarified that PW1 called him using the shop's work phone, as the stolen phone was his personal device.
9. PW3, Dalmas Misire, a colleague of PW1, testified that he was familiar with the appellant, a bodaboda rider known as Sammy, also referred to as Samido. On 8th January 2024, at 6:00 am, while opening the shop, the appellant and his accomplices restrained PW1 and stole his phone. PW3 attempted to flee but was caught, and his Nokia C31 phone was also stolen. He observed that PW1 was bleeding from the eye. He stated that the appellant was later arrested at the bodaboda stage. He stated that he was not personally attacked.
10. During cross-examination, he confirmed that he had never conducted business with the appellant but had seen him multiple times on the stage. He affirmed having clearly identified him.
11. PW4, Dr. Kamau Mariga examined PW1 and completed a P3 form. PW1 presented with injuries to the eyes and swelling, assessed as one day old, consistent with blunt force trauma. The degree of injury was classified as harm. The P3 form was produced as a prosecution exhibit.
12. PW5 the Investigating Officer PC Gilbert Omanga testified that PW1 reported the incident, citing assault and theft of a phone in Kinyanjui. While PW1 was receiving medical treatment, a witness informed the police of the appellant's whereabouts. PW5 arrested the appellant at the bodaboda stage. He confirmed that PW1 sustained injuries from the attack. The Mkopa form for the stolen Nokia C22 was produced as a prosecution exhibit.
13. During cross-examination, he stated that the appellant was not found in possession of the stolen phone and was identified by the complainant.
14. In his defence, the appellant chose to remain silent.



15. After the trial, he was convicted and sentenced accordingly.
16. The appeal was canvassed by way of written submissions which have been duly considered.
17. The offence of robbery with violence under section 296(2) of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR* and *Oluoch v Republic [1985] KLR 549*)
18. The primary issues for determination are whether the appellant was positively identified and whether the prosecution proved its case beyond reasonable doubt.
19. On whether there was theft, the prosecution led evidence that established that PW1 and PW3 were attacked by the appellant and his accomplices, who forcibly took their mobile phones. PW1's phone, a Nokia C22, was stolen during the incident. The Mkopa form used during the acquisition of the phone was produced to confirm ownership of the phone.
20. Secondly, PW1 testified that he was assaulted during the robbery, sustaining injuries to the head and chest from kicks and punches. The attack resulted in visible injuries, particularly to the eye. PW4, the medical officer, corroborated this testimony by confirming that PW1 sustained injuries caused by a blunt object, classified as "harm" in the P3 form. This establishes that force was used in the commission of the robbery.
21. Thirdly, the prosecution's evidence indicates that the appellant acted in concert with others. This satisfies the legal requirement that robbery with violence may be committed by more than one perpetrator.
22. Fourth, PW1 and PW3 positively identified the appellant, whom they knew as a bodaboda rider near their shop. PW1 had been acquainted with him for over six months. The robbery occurred at approximately 6:00 am, in daylight, allowing for clear visibility. Their evidence remained consistent under cross-examination, confirming the reliability of their identification through recognition.
23. Given the direct and corroborated evidence of theft, the use of violence, and the presence of multiple assailants, the prosecution has proved the offence of robbery with violence under Section 296(2) of the *Penal Code* beyond reasonable doubt. The appellant's conviction is therefore justified and is upheld.
24. On sentence, the appellant was sentenced to death. Section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find that the sentence imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh.
25. In 2016, the judiciary developed the Sentencing Guidelines as a response to the challenges experienced by judges and judicial officers. The Guidelines were developed pursuant to section 35(2) of the *Judicial Service Act* 2011. The guidelines collated the principles of law that should guide courts in the exercise of their discretion so that sentences for analogous circumstances are delivered transparently and consistently.
26. Since the formulation of the SPGs of 2016, the criminal justice landscape around sentencing has evolved significantly, prompting NCAJ to review (The Sentencing Policy Guidelines 2023) the Guidelines to align with the emerging jurisprudence and make them more responsive to the justice



needs of Kenyans. The revised SPGs provide guidance in sentencing where the mandatory minimum and maximum sentences are concerned, as well as sentencing hearings.

27. Consequently, the evolution of law and jurisprudence should grow in tandem with *the Constitution* while acknowledging the judiciary guidelines on sentencing.
28. Flowing from above, it is equally my view that a sentence imposed on a convict has to meet the objectives of retribution, deterrence, rehabilitation, restorative justice, community protection, and denunciation. Therefore, it is no longer necessary or desirable to hold a convict for an indeterminate amount of time as this does not meet the objectives of the sentencing policy guidelines.
29. In this case, it appears that in determining the sentence, the learned trial magistrate's decision was primarily influenced by the mandatory nature of the applicable law. This jurisprudence has since shifted after the promulgation of *the Constitution* of Kenya, 2010 (See: Manyeso vs Republic Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) and (Evans Nyamari Ayako vs Republic Criminal Appeal No.22 of 2022 Kisumu Court of Appeal)
30. I hereby set aside the death sentence imposed and substitute it with a sentence of thirty (30) years imprisonment.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF FEBRUARY 2025**

**D. KAVEDZA**

**JUDGE**

In the presence of:

Mr. Mutuma for the state.

Ms. Shimilla for the appellant

Appellant – absent

Achode – Court assistant

