



REPUBLIC OF KENYA



**KENYA LAW**  
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**Odongo v Republic (Criminal Appeal E071 of 2024)  
[2025] KEHC 1748 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1748 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E071 OF 2024  
DR KAVEDZA, J  
FEBRUARY 26, 2025**

**BETWEEN**

**CHARLES OWINO ODONGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by  
Hon. M Maroro (SPM) on 15th November 2023 at Kibera Chief Magistrate's  
Court Criminal Case no. E963 of 2020 Republic vs Charles Owino Odongo)*

**JUDGMENT**

1. The appellant was charged and after a full trial convicted of three counts of the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. He was sentenced to life imprisonment for Count I, and the sentences for Counts II and III were held in abeyance.
2. Being aggrieved, he filed the present appeal challenging his conviction and sentence. In his petition of appeal, the appellant challenged the totality of the prosecution's evidence against which he was convicted. He contended that he had not been properly identified as the perpetrator of the offense and that vital witnesses and key evidence that were necessary to prove important facts were not adduced.
3. 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).
4. The prosecution called seven (7) witnesses in support of their case. PW1: Excellent Izabikora testified that on 11th September 2020 at 08:00 hours, while at his barber shop, the appellant entered with an accomplice. PW1, his employee, and two customers were present. The appellant brandished a firearm and ordered everyone to lie down while his accomplice conducted a search. When PW1 attempted to



- raise his head, the appellant stepped on him. The accomplice stole a Samsung A10S phone (valued at KES 22,000), cash, and earphones (worth KES 1,000) before escaping on a motorbike. PW1, assisted by customers, overpowered the appellant, who was later arrested. He recorded his statement on 13th September 2020 and identified the appellant in court.
5. PW2 Venant Ntarukimana an employee at Oleshapara Barber Shop, corroborated PW1's testimony. He stated that the accomplice stole Kshs. 8,200 in cash and a Samsung phone (valued at KES 18,000) from him before fleeing. He and others subdued the appellant and called the police, who arrested him and took him to Lang'ata Police Station. He identified the appellant in court.
  6. PW3 Kuresh Hassan Mohammed a customer at the barber shop, testified that the appellant's accomplice stole Kshs. 3,000 and his Samsung Core A3 phone. He recorded his statement the following day and identified the appellant in court.
  7. PW4 James Onyango a ballistics expert, examined the firearm and ammunition recovered from the appellant on 16th September 2020. He confirmed that the firearm was operational and the two bullets were compatible with a pistol. He prepared and produced his report in court.
  8. PW5 Quresh Hassan another customer present during the robbery, corroborated PW1's testimony. He recorded his statement at Lang'ata Police Station and identified the appellant in court.
  9. PW6 Corporal Fredrick Muya the investigating officer, testified that on 11th September 2020 at 20:30 hours, he was informed of a robbery at Oleshapara Barber Shop. Upon arrival, he found two officers already present. A search of the appellant yielded a wallet containing KES 3,000, a phone, and a homemade firearm loaded with two bullets. He interrogated the witnesses and transferred the appellant to Akila Police Station and later to Lang'ata Police Station. On 16th September 2022, he prepared a memo listing the exhibits for analysis, which he produced in court alongside the exhibits.
  10. In his defence, the appellant stated that on 11th September 2021, while heading home along Oleshapara Road, he saw people running towards him. He was apprehended and handed over to the police. He maintained that he was a victim of mistaken identity, asserting that he was merely hawking at the time. He further contended that PW6 did not dust the firearm for fingerprints to link it to him. He also claimed that his fellow hawkers, who knew him, refused to testify in court.
  11. The appeal was canvassed by way of written submissions by the parties which have been duly considered. The appellant was convicted of the offence of robbery with violence. 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”.
  12. 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)
  13. The primary issues for determination are whether the appellant was positively identified and whether the prosecution proved its case beyond reasonable doubt.



14. The prosecution relied on the testimony of PW1, PW2, and PW3, who stated that they were robbed of their possessions, including mobile phones, cash, and earphones. Specifically, PW1 lost a Samsung A10S phone valued at KES 22,000, cash, and earphones worth KES 1,000, while PW2 was robbed of KES 8,200 and a Samsung phone valued at KES 18,000, and PW3 lost KES 3,000 and a Samsung Core A3 phone.
15. During the robbery, the appellant, acting in concert with an accomplice, brandished a firearm and ordered all victims to lie down, using intimidation and physical force to subdue them. When PW1 attempted to raise his head, the appellant stepped on him, further demonstrating the use of violence. The appellant's accomplice fled on a motorbike with the stolen items, satisfying the legal requirement of multiple assailants.
16. A loaded homemade firearm was recovered from the appellant, who was subdued and arrested at the scene. PW4, a ballistic expert, confirmed that the firearm was functional. The appellant's possession of a firearm, classified as a dangerous and offensive weapon, along with his accomplice's coercion of the victims to surrender their property, satisfies the elements of robbery with violence.
17. On identification, the victims provided a detailed description of the appellant's attire on the day of the incident and positively identified him in court. Their testimony was consistent and corroborated, establishing the appellant's identity beyond reasonable doubt.
18. The appellant's defence which was considered by the trial court did not undermine the prosecution's strong evidence. I find the trial court rightly rejected it.
19. The Appellant has submitted that crucial witnesses were never called by the prosecution to prove their case. Particularly, he argues that fellow hawkers who witnessed the incident were never called to testify.
20. It is trite law that the prosecution need not call a multiplicity of witnesses to establish a fact. Section 143 of the *Evidence Act* provides that in the absence of any requirement by the provision of law, no particular number of witnesses shall be required to prove a fact. It has however been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an adverse inference as a result of failure to call that witness (see *Bukenya and Others v Uganda* [1972] EA 549 and *Erick Onyango Odeng' v Republic* [2014] eKLR).
21. From the totality of the prosecution's case, I hold the view that their evidence was not necessary and would neither add nor subtract from the prosecution case in light of the finding in line with the proviso to section 124 of the *Evidence Act*. That notwithstanding, the appellant could have called them as defence witnesses if indeed their evidence was crucial to the case. This ground therefore fails.
22. The Appellant's guilt was established to the required standard of proof beyond any reasonable doubt. Consequently, the appellant's appeal on conviction for the three counts of robbery with violence lacks merit and his conviction is upheld.
23. On sentence, the appellant was sentenced to life imprisonment. 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.
24. 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.

25. 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.
26. Consequently, the evolution of law and jurisprudence should grow in tandem with *the Constitution* while acknowledging the judiciary guidelines on sentencing.
27. 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.
28. 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)
29. I hereby set aside the sentence of life imprisonment imposed and substitute it with a sentence of thirty (30) years imprisonment on each of the three counts of robbery with violence to run concurrently.

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.

Appellant – absent

Achode – Court assistant

