



REPUBLIC OF KENYA



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**Ireri v Republic (Criminal Appeal E097 of 2024)
[2025] KEHC 3835 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CRIMINAL APPEAL E097 OF 2024
RM MWONGO, J
MARCH 26, 2025**

BETWEEN

ALEX RUGENDO IRERI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal arising from the decision of Hon. J.W. Gichimu (CM) in
the Runyenjes MCCR E025 of 2024 delivered on 26th August 2024)*

JUDGMENT

Background and the Appeal

1. The appellant was charged with the offence of robbery with violence contrary to section 295 as read with 296(2) of the *Penal Code*. The particulars of the offence were that on 25th December 2023, at around 2230hrs at Kiaragana sub-location within Embu East sub-county in Embu County, the appellant robbed a 6Kg K-gas cylinder valued at Kshs.4,500/=, the property of Alvan Mugendi, and immediately before and after the time of such robbery, assaulted the said Alvan Mugendi by stabbing him with a knife.
2. The appellant pleaded not guilty to the charge and the matter went to full hearing.
3. After hearing both the prosecution and defense cases, the trial court considered the evidence and found the appellant guilty and it convicted him. The trial Magistrate was satisfied that the appellant was properly identified as the perpetrator of the offence and sentenced him to suffer death.
4. Dissatisfied with the Judgment, the appellant filed a petition of appeal dated 12th September 2024 seeking for orders that the appeal be allowed, the conviction be quashed, the sentence imposed be set aside and the appellant be set at liberty. The appeal is premised on the following grounds:



1. That the learned trial magistrate erred in law and fact by failing to note that the ingredients of robbery were not proved to the required standard;
2. That the learned trial magistrate erred in law and fact by failing to note that the adduced prosecution evidence failed to corroborate what could have been the full investigation;
3. That the learned trial magistrate erred in law and fact by failing to consider the irregularities and illegalities of the prosecution's case;
4. That the learned trial magistrate erred in law and fact by failing to consider the circumstances of the case; and
5. That the learned trial magistrate erred in law and fact by relying on the prosecution's narrative that was covered in doubts.

The Evidence

5. The hearing proceeded with Seven (7) Prosecution Witnesses after which the Court found the accused had a case to answer. The defence case was presented by the accused who gave a sworn statement and was cross-examined.
6. The complainant testified as PW1. He stated that on the night of the incident, he was at home with his wife and son when he heard the gate open. When he went to check, he met the appellant who demanded something for Christmas. PW1 told him to return the next day and he left his wife talking to the appellant at the doorway. Soon, he heard his wife screaming and when he went to check again, he found the door had been barricaded. He forced the door open and the appellant stabbed him on the mouth and assaulted PW1's wife.
7. The appellant made away with a 6kg gas cylinder which was found 2 days later outside the house. PW1 reported the incident at Runyenjes Police Station before going to Runyenjes Level 4 Hospital for treatment. He stated that the appellant is known to him and he also recognized him that night because there was light outside the house. On cross-examination, he stated that prior to the incident, he had met the appellant at a bar and they had greeted each other.
8. PW2 was Rena Wawira, PW1's wife. She stated that the appellant visited them at night and he asked for something for Christmas. They told him to return the next day, and PW1 retreated back to the house. The appellant pushed her and she fell. She screamed for help and PW1 came to her aid. In the process, the appellant stabbed PW1 with a knife, then grabbed a 6kg meko gas cylinder and ran out with it. They reported the incident at the police station and then PW1 was taken to the hospital for treatment. Later, the gas cylinder was found outside the house and it was taken to the police alongside PW1's blood-stained clothes as evidence.
9. PW3 was Charity Ikembe, a neighbor, who stated that on the night of the incident, she saw a man running away with the 6kg gas cylinder from the home of PW1 and PW2. She went to the scene where she found PW1 bleeding from an injury on the mouth and hand. They all screamed for help and PW1 was taken to hospital. She stated that she only saw the silhouette of a man running with a gas cylinder but she couldn't identify him in court.
10. PW4 was C.M. (a minor) who gave sworn evidence following a voire dire hearing. He stated that he heard the appellant talking to his parents, PW1 and PW2, asking if there was chapati but they told him to return the following day. Soon afterward, he heard some commotion and when he checked, he saw his father and grandmother pushing the door. He returned to his room from where he saw the appellant through the window, running away while carrying a 6kg gas cylinder. His father was injured



on his mouth and hand while his mother was just lying on the ground by the door. His father was later taken to hospital. He stated that the appellant is a boda boda operator who is known to him.

11. PW5 was PC Lawrence Mwangi of Runyenjes Police Station who stated that the incident was reported at the police station on the night of its occurrence. That the 6kg gas cylinder was found outside the complainant's house and it was brought to the police station as an exhibit. The appellant was traced and arrested through the area Chief.
12. PW6 was Ann Githinji, a clinical officer at Runyenjes Level 4 Hospital who produced a P3 form. She stated that she attended to the complainant who presented with history of assault. She categorized the degree of injury as harm. She couldn't tell whether the injuries were caused by a blunt or a sharp object.
13. In his defence, the appellant testified as DW1. He stated that on the material day, he met the complainant and his wife at a bar and they spoke. The complainant promised to give him some work and they drunk alcohol together that night. Later, the complainant sent the appellant to buy liquor but he did not buy the complainant's preferred brand. At that point, they were all drunk and the complainant poured the alcohol and then left while threatening the appellant. The appellant denied having gone to the complainant's home that night, but was nevertheless arrested in connection with the incident. On cross-examination, he stated that he did not cross-examine the complainant about their encounter at the bar. He stated that he did not go to the complainant's home that night and none of the witnesses identified him.

Parties' Submissions

14. The appeal herein was canvassed by way of written submissions as directed by the Court.
15. The appellant submitted that he did not commit the offence and that the complainant was too drunk and could have sustained the injuries from a fall. He stated that he was wrongly implicated in this case especially since the stolen gas cylinder was found outside their house. That he met the complainant because he wanted to give him a job to buy alcohol but they argued about the quality of the alcohol. He urged the court to allow the appeal.
16. In its submissions, the respondent placed reliance on sections 295 and 296(2) of the *Penal Code* and the cases of *Jeremiah Oloo Odira v Republic* [2018] KEHC 2195 (KLR) and *Dima Denge Dima & Others v Republic*, Criminal Appeal No. 300 of 2007. The respondent's position is that it is enough to convict if one of the 3 elements of the offence is proved. It was the respondent's submission that the prosecution's evidence was not marred with any irregularities and that the evidence was direct. It urged that the conviction was safe and the sentence meted out was as stipulated in the law.

Issues for Determination

17. From the grounds of appeal and the submissions made, the issues for determination are as follows;
 1. Whether the offence was proved beyond reasonable doubt;
 2. Whether the death sentence should be reviewed.



Analysis and Determination

18. It is the role of this appellate court to re-examine and re-evaluate the evidence adduced in the trial court to reach its own finding. This was stated in the case of *Kiilu & Another vs. Republic* [2005]1 KLR 174, where the Court of Appeal held:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. 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 findings and 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.”

19. On the issue of proof beyond reasonable doubt, the elements of the offence are provided for under section 295 and 296(2) of the *Penal Code*. It provides:

“295: Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

20. In the case of *Charles Mwai Kimani v Republic* [2022] KEHC 1459 (KLR) the court cited the case of *Jeremiah Oloo Odira v Republic* (supra) where the learned Judge elaborated on the offence of robbery with violence as follows:

“Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

- i. The offender is armed with any dangerous or offensive weapon or instrument,
or
- ii. The offender is in the company of one or more other person or persons, or
- iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person” [Emphasis added]



21. If any of these elements is proved to the required standard, the appellant will be found culpable, given the wording of the relevant provision. This was the position of the court in the case of *Republic v. Dima Denge & Others* (supra) where the court stated:

“The elements of the offence under Section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction. This was considered at length by this Court in *Johana Ndungu v. Republic* Criminal Appeal No. 116 of 1995 (unreported);

“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the *Penal Code*. The essential ingredient of robbery under section 295 is [the] use of or threat to use actual violence against any person or properly at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed 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 sub-section.”

22. Keeping this in mind, we now assess the evidence adduced. PW1 and PW2 testified that the appellant is known to them; that he visited their home on the material night; and that they asked him to return the following day. They testified that the appellant assaulted PW2 and when she screamed, that PW1 went to her rescue and in the process, he sustained injuries. They stated that the appellant then forced his way into their house and made away with a 6kg gas cylinder. According to these witnesses, the stolen gas cylinder was found the following day outside their house. These witnesses corroborated one another.
23. PW3 testified that she saw the silhouette of a person running away with a gas cylinder but she couldn't tell who it was. PW4 heard the voice of the appellant and he also saw him through the window running away from the house with the gas cylinder. He said that when he heard commotion in the house, he saw that his parents had been attacked by the appellant. PW6 confirmed the injuries sustained by the complainant but she did not know whether they were caused by a blunt or a sharp object. PW2 said that the appellant had attacked and injured the complainant using a knife he picked from their kitchen.
24. In essence, the evidence was that the prosecution witnesses PW1, PW2 and PW4 saw the appellant stealing the 6kg gas cylinder and in the process of stealing the item, he assaulted PW1 and PW2. From the evidence adduced, this amounts to robbery with violence within the context of sections 295 and 296(2) of the *Penal Code*.
25. The defense offered by the appellant amounts to a mere denial. He provided a history of events of that evening and how he disagreed with the complainant about a consignment he had sent him to buy. He said that once they disagreed, PW1 and PW2 stopped drinking at the bar and they took a motorcycle home. He also took his own motor cycle and went home. He does not account for his whereabouts at the time when the incident occurred yet there is evidence that he was seen at the home of the complainant. This defense does not address or punch holes in the prosecution's case.
26. On the issue of sentence, once the appellant was found guilty, the trial court noted that he was a first offender, but that the offence was a serious one. The appellant was lawfully sentenced to death in accordance with section 292(2) of the *Penal Code*.
27. The appellant referred to the jurisprudence in the case of *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] KESC 2 (KLR) (*Muruatetu 1*), wherein the Supreme



Court held that the mandatory nature of the death penalty imposed under section 204 of the Penal Code is unconstitutional as it fetters the discretion of the trial court during sentencing.

28. Following this decision, the Court of Appeal in the case of William Okungu Kittiny v. Republic Kisumu Criminal Appeal No. 56 of 2013 (2018) eKLR referred to the findings of the Supreme Court in Muruatetu 1 and held thus:

“From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus, the sentence of death under Section 296 (2) and 297 (2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with Constitution.”

29. However, in Muruatetu 2 [2021] KESC 31 (KLR) the Supreme Court held:

“It should be apparent from the foregoing, that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the constitution.”

Accordingly, the death sentence is itself not unlawful.

Conclusions and Disposition

30. Ultimately, I find no basis for interfering with the conviction entered by the trial Court and the same is hereby upheld. Accordingly, the appeal is dismissed.
31. Further, the appellant here did not expressly, or even impliedly, challenge the sentence, and I also find no basis to interfere with the sentence. In any event, there is no prayer thereon.
32. Accordingly, the sentence of the lower court shall also remain as meted.
33. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 26TH DAY OF MARCH, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Appellant in person

Ms. Nyika for the state

Francis Munyao - Court Assistant

