



**Musungu v Republic (Criminal Appeal E081 of 2024)  
[2025] KEHC 3674 (KLR) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3674 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL E081 OF 2024  
DR KAVEDZA, J  
MARCH 25, 2025**

**BETWEEN**

**ERICK MALESİ MUSUNGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by  
Hon. W. Lopokoiyit (SRM) on 25th July 2024 at Kibera Chief Magistrate’s  
Court Criminal Case no. E1012 of 2022 Republic vs Erick Malesi Musungu)*

**JUDGMENT**

1. The appellant was charged and after a full trial convicted on two counts of offences: attempted robbery with violence contrary to section 295 as read with 297(2) of the *Penal Code* and being in possession of an imitation of a firearm contrary to section 34(1) of the *Firearms Act*. He was sentenced to death for Count I and seven (7) years imprisonment for Count II. However, the sentence imposed for Count II was held in abeyance.
2. Being aggrieved, he filed the present appeal challenging the totality of the prosecution’s evidence against which he was convicted. He urged the court to quash his conviction and set aside the sentence imposed.
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 three (3) witnesses in support of their case. PW1, Stephen Chege Odhiambo, testified that on 26th June 2022, while walking home with his friend, the appellant and another man on a motorbike confronted them, demanding their belongings. When PW1 refused, the appellant struck



his shoulder with a stick and brandished an imitation firearm. PW1 and his friend retaliated, disarming him, while the other man fled on the motorbike before the police arrived. PW1 later identified the appellant in court.

5. PW3, PC Matthew Ndatho, stated that while patrolling Kileleshwa, he was alerted to an incident on Laikipia Road. Upon arrival, he found the appellant being assaulted by a crowd. He calmed the situation and secured a motorcycle and a firearm at the scene. PW1 narrated the events, after which the victims recorded statements at the police station. Investigations revealed that the motorcycle was registered to Watu Credit. The imitation firearm and bullet were submitted to a ballistic expert. PW3 later produced these, along with an inventory memo, Watu Credit's logbook copy, and a sketch plan, in court. He also identified the appellant.
6. PW2, CPL Simon Muchori, a ballistics expert, testified that on 28th September 2022, he received a metallic object and a bullet for examination. The object had chambers, two barrels, and a firing pin. After testing, it was confirmed as a firearm, and the bullet was classified as ammunition. PW2 submitted his report as evidence.
7. In his defence, the appellant testified that on the material day, he had just dropped off a customer when two boys stopped him and asked him to take them to Kileleshwa apartments. As he ferried them, one of them told him to stop and proceeded to alight. He then realized that they had not paid him and began following them. Suddenly they attacked him saying that he was a thief. The police later arrived and he was arrested and charged.
8. 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 an attempted robbery with violence charge are found in section 297(2) of the [Penal Code](#). It provides as follows-
  - “(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 assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”
9. The prosecution presented evidence that the appellant, acting with an accomplice, attempted to rob PW1, Stephen Chege Odhiambo, and his companion using force and threats of violence. PW1 testified that on 26th June 2022, while walking home, they were confronted by the appellant and another individual on a motorbike. The appellant demanded their belongings, and upon refusal, he struck PW1 with a stick and brandished an imitation firearm to instill fear. However, PW1 and his companion resisted, managing to disarm him before the accomplice fled.
10. PW3, PC Matthew Ndatho, arrived at the scene and found the appellant subdued by a crowd. He secured a motorcycle and a firearm, later examined by a ballistics expert. Further investigations linked the motorcycle to Watu Credit.
11. PW2, CPL Simon Muchori, a ballistics expert, examined the firearm and confirmed it was an imitation firearm. His findings were documented in a forensic report produced in court.
12. The prosecution established that the appellant used violence, was armed, and acted with an accomplice, satisfying the elements of attempted robbery with violence under Section 297(2) of the [Penal Code](#).
13. On the charge of possession of an imitation firearm, PW2's examination confirmed the object had chambers, barrels, and a firing pin but was non-functional. His report was admitted as evidence.



14. Identification was sufficiently established, with both the complainant and investigating officer. Given the direct evidence and immediate arrest, the prosecution proved its case beyond reasonable doubt, and the conviction on both counts stands.
15. On sentence, the appellant was sentenced to death for Count I and seven (7) years imprisonment for Count II, where the latter was held in abeyance. 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 the sentence imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh.
16. Therefore, the appeal on the sentence succeeds. The sentence of death imposed in Count I is substituted with a sentence of twenty (20) years imprisonment in Count I. The sentence in Count II is upheld.
17. In the premises, the appellant is sentenced to serve twenty (20) years imprisonment in Count I, and seven (7) years imprisonment in Count II. The sentences shall run concurrently from 25<sup>th</sup> June 2022 the date of the appellant's arrest pursuant to section 333 (2) of the [Criminal Procedure Code](#).

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 25<sup>TH</sup> DAY OF MARCH 2025**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant present

Mutuma for the Respondent

Tonny Court Assistant.

