



REPUBLIC OF KENYA



**Njoro v Republic (Criminal Appeal E009 of 2023)
[2025] KEHC 5125 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CRIMINAL APPEAL E009 OF 2023**

RPV WENDOH, J

APRIL 30, 2025

BETWEEN

ALEXANDER NJORO APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant, Alexander Njoro was convicted by the Chief Magistrate Kapenguria for the offence of Robbery with Violence contrary to section 296 (2) of the *Penal Code*.
2. The particulars of the charge are that on 20/2/2023, at Makutano Township, in West Pokot County, jointly with another robbed Rose Jebor Chelangat of a mobile phone make Techno worth Kshs.2,800/=, and Kshs.15,800/= and immediately before or immediately after the time of robbery beat and injured the said Rose Jebor Chelangat.
3. The appellant denied the offence and the case went to full trial with the prosecution calling a total of five (5) witnesses. The appellant and his co accused made sworn statements in their defence.
4. Upon conviction the appellant and his co-accused were both sentenced to serve thirty (30) years imprisonment. The appellant is aggrieved by both the conviction and sentence and filed this appeal based on the following grounds found in the petition of appeal and the appellant's submissions:-
 1. That the offence of robbery with violence was not proved;
 2. That the appellant's identity was not full proof;
 3. That the key witnesses were not called;
 4. That the court did not have due regard to section 78A of the *Evidence Act*;
 5. That the sentence is excessive.



5. The appellant therefore prays that the conviction be quashed, sentence set aside and the appellant be set at liberty forthwith.
6. This is a first appeal and it is required of this court to re-examine all the evidence tendered in the trial court, analyze and evaluate it and arrive at its own conclusions, but bear in mind that his court neither heard nor saw the witnesses testify and should make allowance for that fact. This court is guided by the decision in *Okeno -V- Republic* (1972) EA 32.

The Prosecution Case:

7. Pw1 Peter Ayoti testified that on 3/2/2023 at 8.00a.m. he was called by a police officer known as Noor who asked how many sim cards he had registered. PW2 disclosed that he had two, one 0708XXX109 and the other 0700XXX844 which he had taken for his son who was below eighteen (18) years, JM.
8. PW2, Truphena Chepkorir. testified that on 3/3/2023, police summoned her to go to Kongelai Police Station and police from Kapenguria also joined. They asked for her identity card and how many sim cards she had. She disclosed that she had no. 0110XXX825 and 0768-XXX698; that 0768-XXX698 she had taken for her nephew who is still underage, one Erick Korir; that he used to leave sim with her whenever he went to school but this time, he had left it with their neighbour, Accused 1.
9. PW3 Rose Chebor Chelagat, a trader at Makutano testified that on 25/2/2023, she closed her business and about 9.00p.m. when on her way home, she met four (4) youths who stopped her, knocked her down, one sat on her chest, pinned her down as another hit her with a hammer. They took her phone, overall, post bank card, Kshs.1,8000/= ID card No.9XXXXX18 and demanded that she tell them her pin number. She reported to Makutano
10. Police Station, was treated in Hospital and issued with a P3 form. She obtained her Mpesa statement and found that there were withdrawals to phone 0700XXX844 of Kshs.5,000/= in the name of Peter Ayoti and withdrawal of Kshs.10,000/= to phone 0718XXX696 in the name of Truphena Cheseria, PW3 stated that he was able to identify the appellant who had dreadlocks and sat on her chest, that there were bright street lights.
11. PW3 also denied to have seen the accused and hit her with a hammer.
12. PW4 Sylvester Kibanda, a Clinical Officer at Kapenguria Hospital examined Rose Chelagat (PW3) on 25/2/2023 at 9.00p.m. He assessed injuries sustained by the complainant as harm.
13. PW5 Cpl. Ahmed Isher Abdile, was the Investigating Officer in the matter having taken over from Cpl. Mohammed Noor who was transferred. He testified that after the report of robbery was made, they commenced investigations; that PW3 reported that her mobile had been stolen and the robbers demanded to know the mpesa pin number which she gave them; that PW3 went to the police station with mpesa statement which she showed them and that a total of Kshs.15,000/= had been withdrawn from it. They liaised with
14. Safaricom to determine who the recipients of the money were. Tracking led them to Kacheliba where the Appellant was arrested because he received Kshs.10,000/= from PW3's phone on phone no. 0768XXX696 which was registered in the name of Truphena Cheseria (PW2) and that the co-accused received 5,000/= on phone 0700XXX844 registered in of Peter Mbakaya Ayodi who is PW1. PW5 stated that they also recovered the complainant's Identity card and that of Truphena Cheseria, PExh.3, a Saffron phone serial no. 892XXXX122/425XXXX326; but accused 2 had a phone Hoking 238 black serial no. 892XXXX123/4217XXXX18; PW5 produced the response from Safaricom to investigate



the phone numbers P.Exh.9. On further investigation it was established that PW2's (Truphena's) Identity card was used to register No.0768-XXX696.

15. When placed on his defence, the appellant stated on oath that he was arrested on 3/3/2022 while with his mother at the place they used to sell chips; that two people went there at 11.00a.m. and asked for the license; they took his flask alleging it was from Uganda. They arrested and charged him for an offence he knew nothing about.
16. In his submissions, the appellant argued that the production of the Mpesa records through the Investigating Officer was erroneous and offended section 78A of the *Evidence Act*; though PW3 never talked of being robbed of a phone hence the contents of the inventory were incorrect. The appellant denied signing it. The appellant also urged that crucial witnesses were not called, for example one Erick Korir who was said to be the owner of the Sim No. 0768XXX696 and should have come to confirm if he gave any phone to the appellant. He relied on section 148 and 150 of the *Criminal Procedure Code*.
17. It was also submitted that the identification of the appellant as having dreadlocks was never reported to the police and no parade was conducted to confirm his identity. He relied on the case of Kabogo s/ o Wangunyu 203 (K) KLR 50, where the court found that failure to mention or describe the assailant meant the witness was not sure of the attacker's identity.
18. The State opposed the appeal. It was submitted that the chain of events shows that the appellant was directly connected to the offence; that apart from being positively identified by PW3, his name 'Njoro' was called out during the robbery; that the appellant was found in Kacheliba in possession of the phone to which money was withdrawn from the complainants phone; that the appellant was in possession of the complainants identity card, her Post Bank ATM card all lost during the robbery; that proof of the appellant's identity was by both direct and circumstantial evidence which placed the appellant at the scene and that the doctrine of recent possession applied, having been found in possession of the complainant's property.
19. As regards the admissibility of the electronic evidence, the prosecution submitted that the document was duly certified and produced in accordance with Section 78 A of the *Evidence Act*.
20. Whether or not key witnesses were not called to testify i.e. the Liason Officer from Safaricom; that PW5 gave evidence on how they tracked down the appellant through mobile phones and that the person registered on the lines used were traced and they testified.
21. Counsel submitted that the defence did not at all shake the prosecution evidence which was watertight.
22. As to the sentence, it was the Respondent's submission that thirty (30) years imprisonment was very lenient.
23. The appellant faced a charge of robbery with violence contrary to section 296(2) of the *Penal Code*. The ingredients of the offence were aptly captured by Cockar CJ; Akiwumi & Shah JIA in the case of Johana Ndungu -V- Republic CR.A 116/1995(1996) eKLR where the court of Appeal in Mombasa stated thus:-

CR.A E065 /2022 Patrick Kirimi Jacobu Lanku -V- Republic. In order to appreciate properly as to what acts, constitute an offence under Section 296 (2), of the *Penal Code*, one must consider the subsection in conjunction with Section 295 of the *Penal Code - 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.”

24. Further in CRA 300/2017, *Dima Denge -v- Republic* (2013) eKLR the court observed 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.”
25. In this case, the complainant was attacked by four youths who visited violence on her. She was injured as confirmed by the evidence of PW4, the Clinical Officer.
26. In addition, the complainant’s property was stolen. The three elements that constitute the offence of Robbery with violence were all present though only one element needed to be proved.
27. The appellant has challenged the issue of identification; that PW3 cannot have identified him because she never gave a description of the attackers to the police.
28. From the testimony of PW3, and even the Investigating Officer. PW6, there is no indication that PW3 ever described the attackers to the police. The identification of the appellant was dock identification. PW3’s statement to the police was not referred to in cross examination so the court cannot ascertain what exactly she told the police about the attackers and whether it was recorded. This is a case where an identification parade was necessary.
29. The above notwithstanding, the appellant was arrested after he was tracked through mobile phone which he was found in possession after the arrest. That fact has not been disputed. PW3 found that money had been withdrawn from her phone and the Mpesa statement P.Exh.2 clearly showed which numbers the money was transferred to. According to PW5, the appellant was found in possession of phone No. 9768XXX696 registered in the name of Truphena Chepkorir Cheseria. The withdrawal was made on 26/2/2023 the day after the alleged robbery. PW2 the owner of the line confirmed that she had given it to her nephew Erick Korir, a minor, who was a friend to the appellant. Although the said Korir was not called as a witness, there is ample evidence from PW5 that it is the Appellant who had the said phone that had the line 0768XXX696 the property of Truphena.
30. In addition, PW3’s identity card, Post Bank card were amongst the items stolen during the robbery and were found in the appellant’s possession at the time of arrest. The appellant was arrested on 3/3/2023 about one week after the robbery and it is my view that the appellant was found in recent possession of the complainant’s property stolen during the robbery. The Court of Appeal discussed the doctrine of recent possession in *N’ganga Kahiga alias Peter Ngang’a Kahiga -V- Republic* CRA 272/2005 when it stated this “It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.”
31. In other words there must be positive proof;
 1. That the property was found with the suspect;
 2. That the property is positively the property of the complainant;



3. That the property was stolen from the complainant;
4. That the property was recently stolen from the complainant
32. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other”
33. In this case, the complainant was robbed on 25/2/2023; she identified her recovered identity card and ATM card in court. The recovery was made seven (7) days later and no possible explanation was given as to why the appellant was in possession of PW3’s personal documents or how he came by them.
34. Whether the electronic evidence was admitted contrary to section 78 A of the *Evidence Act*. Section 78A of the *Evidence Act* provides that electronic messages and digital material shall be admissible as evidence in any legal proceedings. Section 106A and B of the *Evidence Act* in addition provide for the conditions for admissibility of electronic records.
35. In summary, section 106A provides that the contents of electronic records may be proved in accordance with the provisions of section 106B Section 106B on the other hand requires any information contained in an electronic record (which is defined as the contents of a document or communication printed on a paper, or stored, recorded, copied in official or magnetic media produced by a Computer) is deemed to be a document and is admissible in evidence without further proof of the production of the original, providing the conditions set out in section 106 B (2) for admissibility of evidence are satisfied. Section 106B (4) further mandates the production of a certificate of authenticity of electronic evidence which is signed by a responsible person who was responsible for the computer on which the electronic material was created or stored. The certificate must uniquely identify the original electronic record, describe the manner of its creation, describe the particulars of the device that created it and certify compliance with conditions of sub section (2) of section 106 B.
36. Section 27A (3) of the Kenya information and Communication Act, a telecommunications operator may disclose the registration particulars of a subscriber in connection with the investigation of any criminal offence or for the purposes of any criminal proceedings.
37. PW5 produced the data relating to the appellants numbers but he was not an expert to analyze the said data nor did he produce a certificate as required under section 106B of the *Evidence Act*. No explanation was given as to why the Liaison Officer from Safaricom could not be called to produce the same. I will agree with the appellant that the electronic evidence was erroneously admitted in evidence.
38. However, the above notwithstanding, the appellant was found in possession of PW3’s property that was recently stolen from her in a robbery. These items placed the appellant at the scene of crime and this court is satisfied that the trial court correctly found that the defence was bare, lacked substance and did not at all dislodge the prosecution evidence. I find the conviction to be sound and I affirm it.
39. The appellant was sentenced to thirty (30) years imprisonment. He is lucky because there was no cross appeal. The sentence for robbery with violence is death. The sentence is lenient and the court will not interfere with it.
40. The appeal is unmerited. It is hereby dismissed.

DATED, SIGNED AND DELIVERED ON THIS 30TH DAY OF APRIL, 2025.

HON. R. WENDOH

JUDGE.

Judgement read in open court in the presence of



Mr. Majale for State /Prosecution Counsel

Appellant- present virtually

Juma/Hellen-Court Assistants

