



REPUBLIC OF KENYA



**KENYA LAW**  
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**Owino v Republic (Criminal Appeal E078 of 2022)  
[2025] KEHC 7301 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 7301 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E078 OF 2022  
WM KAGENDO., J  
APRIL 30, 2025**

**BETWEEN**

**DAVID OWINO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The Appellants herein, Noel Mbori Onyango and Dvid Owino were with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*.
2. The particulars of the offence are that the accused persons on the 5<sup>th</sup> day of August 2020 at Mikindani in Jomvu Sub County within Mombasa County, jointly while armed with dangerous weapons namely a panga and a hammer robbed Khadija Chunusi Masud of her mobile phone, make infnix black in colour of IMEI NO.35285xxxxxxxxx , CASH Kshs.46,400/- ornaments and flush disk , all valued at Kshs.65,899/-
3. The Accused pleaded not guilty to the charge. After a full trial, the Accused were found guilty, convicted as charged sentenced to 20 years' imprisonment. They have now appealed against conviction and sentence.
4. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.
5. Having carefully perused the record, this Court is now called upon to determine whether the offence of robbery with violence was committed, and if so, whether by the Appellants.



6. The trial Court summarized the evidence in its judgement quite well and this Court hereby adopts the same herein by way of reference.
7. The prosecution called 9 witnesses. PW1-The complainant testified she resides in Tudor and that in August 2020, she was residing in Mikindani. It was her testimony that on 05/08/2020, at about 2.00a.m, she was in her house sleeping when she was suddenly woke up and saw a person in her bedroom. The person then went to her bed while he was in a black mask, black T shirt and a pair of short. The person warned her not to scream or call for help. The person asked her if she was Khadija and told her to cooperate. He was armed with a panga.
8. It was her testimony that the curtains to her window were not drawn and therefore there was light coming into the room from outside as there are street lightings opposite her bedroom window. The person then demanded for money and her phone. She handed, him the phone and he asked for the pin to unlock the phone which she gave him. He unlocked the phone and went to mpesa and then asked for the Mpesa Pin which she gave him. It was her testimony that she had Kshs. 42,000/- in her Mpesa account and the person transferred" the money to his phone. He then took Kshs. 4,000/- which was in the drawer and a chain and a flash disk and other ornaments.
9. The person then locked her inside the bedroom and he went to the sitting room after threatening to kiII her. She managed to escape to the balcony through the bedroom door and locked herself there. She then called for help and the neighbours woke up and went to help her. The neighbour then called, safaricom and requested for reversal of the transaction and, the safaricom agent promised to reverse the transaction. She called her mother who came with her cousin and the caretaker. They then reported the matter to the police and they came with the police to the scene.
10. The police then broke the bedroom door and she went to the police station where she made the report and recorded her statement. It was her testimony that her phone has never been recovered" to date. She produced the receipt as proof of purchase of the same as exhibit. It was her testimony that she was later called to the police station to go and identify the person who robbed from her. An Identification parade was conducted and she identified one of the suspects whom she had seen in her bedroom who is the 2nd accused person herein. It was her testimony that the 2nd accused was armed with a panga on material date then robbed her.
11. PW3- Chief Inspector Mohamed Mbocha the OCS Mikindani Police station testified that on 05/08/2020, at about 2.00 a.m, a lady called Khadidja Chunusi from Mikindani went to the station and reported. that she had been invaded by people while in her house sleeping and robbed her of her belongings. The complainant told him that she could identify the persons. The case was reported vide O.B number 79 of the same day and assigned an officer to investigate. On 07/08/2020, the complainant managed to identify one of the suspects and he was arrested and charged and he is the one who led the police to the 2<sup>nd</sup> accused person. The two accused persons were then paraded for identification and they were positively identified and charged. It was his testimony that the 1<sup>st</sup> accused person then confessed to having committed the offence. He then followed due process in recording the confession as per the law and the 1<sup>st</sup> accused person then signed it and he also signed it. It was his testimony that Noel Mbori said that he was the one who persuaded David Owino to accompany him to commit the robbery. He then produced the statements of confession by both accused person as exhibits in this case.
12. Pw4-Inspector Leonard Namutali. testified that he is attached to Central Police Station and that he conducted identification parade on 07/08/2020 as from 1-625hours to 1630 hours. It was in regard to David Owino the 2<sup>nd</sup> accused person herein. He arranged a group of 8 people who are similar to the accused person in height and appearance. He testified that he asked the accused person if he was willing



to attend the identification parade and he answered in the affirmative and asked him if he wanted any representation but he said he did not. He then placed the accused person between person number 6 and person number 8 and called, the witness who identified him positively by touching on his left shoulder. The accused then said that he was satisfied with the process and signed the identification parade report and he also signed it. He produced it as an exhibit in this case.

13. PW5-CPL Mohamed Ramtu testified that he is from Mikindani Police Station and that on 7/08/2020, a lady called Khadija went to the station and stated that one of the suspects who had robbed her had been seen in Aldina area. He then mobilised some of the officers and they proceeded to the area. They found the suspect already arrested by members of the public. They rearrested him and took him to police station at Mikindani where they booked him via O.B number 6 of the same day. It was his testimony that the person they arrested was the 1<sup>st</sup> accused person herein. He positively identified him in the dock'
14. PW6- police Constable John Mwangi of Mikindani Police Station testified that on 07/09/2020, he was at the police station when his colleague told him that a suspect had been sighted at Suncity area and requested him to accompany him to arrest the suspect. They left the police station and proceeded to the scene where they managed to get the suspect and arrested him. He was called David Owino the 2<sup>nd</sup> accused person herein. They then took him to the police station and handed him over to the investigating officer.
15. PW7- Police Constable Ian Nahashon testified that he is attached to Safaricom Coast Regional Office and his duties included receiving data for phone calls, processing of Mpesa Statements. It was his testimony that on 15/09/2020, he received a request from a court order requesting for mpesa statement and subscriber details of the following numbers: 0726xxxxxx, 0727xxxxxx, 0728xxxxxx. They processed the request and forwarded the same to the officer. He produced the mpesa statement of Khadija of telephone number 0726xxxxxx, mpesa statement of Noel Mbori Onyango of number 0727xxxxxx- It was his testimony that Noel Mbori was the current user of the number in question and produced the subscriber details for Noel Mbori as exhibit'
16. PW8- CPL Emmanuel Kombe testified that he is from crime scene investigation unit CID headquarters Mombasa and that on 15/09/2020, at about 10.00a.m, he received a compact disk with a letter request form DCIO Jomvu. They were requesting that he processes the photographs in the compact disk taken from the scene. He took the CD to the lab and processed eight photographs from the CD. The 1<sup>st</sup> Photograph was showing the entrance to the main gate, the 2<sup>nd</sup> and 3<sup>rd</sup> photograph was showing broken door locks, the 4<sup>th</sup> shows the apartment- He produced the photographs together with certificate of photographic print as exhibits in this case.
17. Pw9- Police Constable Musa Amakobe testified that he is the investigating officer in this matter. It was his testimony that on 05/08/2020 at about 8.00 a.m, he was in the office when he was called by his in charge and assigned him a case of robbery with violence to investigate. He went through the O.B and called the complainant to the station who came in company of her brother. The complainant narrated to him what had happened. and told him that at about 2. 00 a.m, while she was asleep, she was attacked by people inside her house. They were armed and threatened to harm her. They demanded for her phone and pin and mpesa pin which she gave them and they transferred money from her phone and also stole some of her jewellery. She was rescued by the neighbours and she established that they had transferred money from her phone amounting to Kshs. 42,2001-. He obtained a court order to investigate the Mpesa statements and that of the suspect. He produced the court order as an exhibit. It was his testimony that on 16/08/2020, he received a phone call from the complainant and told him that with assistance of members of the public, they had managed to trace and arrest the 1<sup>st</sup> t accused



person. The 1<sup>st</sup> accused person was then arrested and a search was conducted and he recovered a wallet which had his identification card, voters card, and a mobile phone line and PUK. He prepared an inventory which he produced in court as exhibit. It was his testimony that he called for the receipt of the complainant's mobile phone which was stolen and he was given the same. He produced it as an exhibit- He testified that during investigation, the 1<sup>st</sup> accused person confessed to having committed the offence and implicated the 2<sup>nd</sup> accused person. The two accused persons then recorded their confessions in the course of investigation. He stated that identification parade was conducted in regard to the 2<sup>nd</sup> accused person and the complainant positively identified him. It was his testimony that the caretaker confirmed that the complainant was their tenant. He also visited the scene and took photographs of the scene. It was his testimony that as at the time he visited the scene, the wooden doors to the balcony had been broken. He stated that the complainant told him that she was robbed Kshs. 42001- in cash, and Kshs.42,2001-, a flash disk valued at Kshs. 25001-, jewellery valued at Kshs. 1,000/- and a phone valued at Kshs. 15,000/-. The total value of was Kshs. 65,899/-. From the Mpesa statement, there was reversal of the money which had been stolen from the complainant's phone.

18. The Appellants gave sworn testimony without calling witnesses. DW1- the 1<sup>st</sup> accused person testified that, on 05/08/2020, he received money in his mpesa account and later received a phone call from mpesa and the money was reversed. It was his testimony that the safaricom personnel then told him that the money had been erroneously sent to him and that is why it had to be reversed. After two weeks he was arrested and charged with offence before court.
19. DW2- the 2<sup>nd</sup> accused person testified that on the day he was arrested, he was woken up by three police officers who were armed. He was then told that he was a wanted criminal for the offence of robbery with violence. He was arrested and then forced to sign a statement. He was then charged with offence he is facing- during cross examination he admitted that the statement of confession was his and that he had signed. it and. that he did not protest during the recording of the same
20. Based on the above evidence the Appellants were found guilty as charged and accordingly sentenced.
21. The trial court properly analysed the evidence and the applicable in reaching a correct verdict.
22. However, there is a marked shift to the proposition that, if in the course of stealing, the offender only threatens to use violence on the victim, but no more than the threat, then the offence of robbery, and not robbery with violence, may be committed. Further, in such circumstances, the offence of robbery with violence cannot stand even if it is proved that the offender was armed with any dangerous or offensive weapon or instrument and/or the offender was in the company of one or more other person or persons as long as there was no evidence of actual use of violence. See Joseph Kaberia Kahinga & 11 others v Attorney General [2016] eKLR
23. Section 296 (1) of the *Penal Code* provides the penalty for one found culpable of robbery to be a sentence of up to 14 years imprisonment. The sentence for one convicted of robbery with violence goes up to a death sentence. As such, the offence of robbery is a lesser offence to that of robbery with violence.
24. I Find that the appeal on the conviction for the offence of Robbery with violence contrary to section 296 (2) of the penal code succeeds and I substitute the conviction to that of robbery contrary to section 296(1) of the penal code.
25. The determination on the appeal against the sentence shall await a Probation Report to be availed on a date to issue.

Orders accordingly.



**DATED SIGNED AND DELIVERED THIS 30TH DAY OF APRIL 2025 WENDY KAGENDO  
JUDGE  
IN THE PRESENCE OF THE APPELLANT IN PERSON MR NGIRI FOR THE STATE  
BEBORA COURT ASSISTANT  
SIGNED BY: HON. LADY JUSTICE WENDY MICHENI**

