



**Shebe v Republic (Criminal Appeal E001 of 2024)
[2025] KEHC 5675 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5675 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARSEN
CRIMINAL APPEAL E001 OF 2024**

JN NJAGI, J

APRIL 30, 2025

BETWEEN

ABOUD SHEBE APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. E052 of 2023 of the Senior Principal Magistrate's Court at Lamu Law Court-T. A. Sitati, SPM dated 29th August, 2023)

JUDGMENT

1. The Appellant herein was convicted for the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. The particulars of the offence were that on the 9th day of March, 2023 at around 1750 hrs at Swafaa area of Langoni location in Lamu Central sub county within Lamu County, with another before court while armed with a knife robbed Fred Mungera (herein referred to as the complainant) of Safaricom credit cards worth Kshs. 5,200/-, three packets of sportsman cigarettes worth Kshs. 900/- and cash money amounting to Kshs. 7,800/- and immediately before the robbery threatened to use actual violence to the said Fred Mungera.
2. The appellant was sentenced to suffer death. He was aggrieved by the conviction and sentence and filed the instant appeal vide a Memorandum of Appeal dated 4th February, 2024. The grounds of appeal are that;
 1. The trial magistrate erred in law and fact in finding that the prosecution had proved the charge of robbery with violence beyond any reasonable doubt.
 2. That the trial magistrate erred in law and fact in convicting him based on mistaken identity.
 3. That the Trial Magistrate erred in both law and facts by convicting him despite inconsistent, insufficient as well as contradictory evidence by the prosecution witnesses.



4. That the trial magistrate erred in law and fact in finding a conviction that was against the weight of evidence.
5. That the trial magistrate erred both in law and fact by relying on the inadequate police investigations.
3. The prosecution called 4 witnesses in the case at the close of which the trial court found the appellant to have a case to answer and placed him to his defence. The appellant defended himself and did not call any witness.

Case for the prosecution

4. The evidence of the complainant, Fred Mwangela Mikiao PW1 was that he was a shop keeper. That on the material day, 9th day of March, 2023, he was at his shop at 5pm when the appellant went over to him and asked to be given two cigarette sticks on credit. They totaled to Ksh. 30/-. The complainant gave him and the appellant went away. That the appellant returned and demanded more cigarettes on credit. The complainant declined to give him. The appellant insulted him and left. After a short while, the appellant returned to the shop in the company of his brother called Kitali. They were armed with knives. The complainant feared them and took refuge in a back room as the two ransacked the shop. That the appellant then held him by the throat, slapped him so hard that he fell on the shop floor and lost consciousness. He was taken to the hospital. After he was discharged, he reported the matter to the Lamu Police Station. He returned to the shop and found that the two had stolen from therein 3 packets of sports man cigarettes worth Kshs. 900-, cash amounting to Kshs. 7,800/- and airtime worth ksh.5, 200/-.
5. It was the evidence of Sabina Nkirote PW3 that the complainant herein was her shop assistant at one of her shops at Kijitoni area of Lamu town. That on the material day at between 5pm and 6 pm she was at one of her shops when she received a phone call from the complainant. During the phone call, she heard the complainant struggling to breathe while pleading for his life. She asked her fellow shop keeper, Kathure PW2, to rush to the shop of Mwangela and find out what was happening. She was left behind closing her shop. Kathure rushed to the place. She locked the shop and followed Kathure to the place. She found neighbours gathered outside her shop. Kathure was outside the shop. She saw the appellant and his brother called Kitali dashing out of the complainant's shop. The appellant was armed with a knife. She entered into the shop and found the complainant lying motionless on the floor. She made arrangements for a motor cycle to take him to hospital. She closed and secured it. The appellant showed up and threatened to cut her private parts if she pursued the case. She followed the complainant to King Fahad Hospital. He was resuscitated, treated and discharged. They reported at Lamu police station. The complainant inspected the shop and informed her that cash of Ksh. 7,800/-, airtime cards worth Kshs. 5,200/- and 3 packets of sportsman cigarettes were missing from the shop.
6. Hellen Kathure PW2 on her part told the trial court that she operates a shop near the shop of Nkirote PW3. That at the material time she was roasting groundnuts close to her shop when Nkirote received a call from the complainant who was struggling to speak. Nkirote asked her to rush to the shop of the complainant and find out what was going on. She dashed to the place. She found the appellant and his brother at the shop of the complainant. The appellant was strangling the complainant by the neck. When the appellant saw her, he hit the complainant and sent him tumbling to the floor with great force. He stormed out of the shop and she noticed that he was armed. The complainant was at the time semi-conscious. She raised alarm and the appellant and his brother fled from the scene just as Nkirote was arriving at the place. The complainant was taken to hospital. She followed him there. He



was treated and later discharged. They reported at Lamu police station. The complainant mentioned the things that were missing from the shop.

7. The investigating officer, PC Kimutai Sawek PW4 told the court that on the 9th day of March 2023 the complainant made a report of robbery with violence at their police station and he was assigned the case to investigate. The complainant informed him that the appellant and his brother raided his shop while armed with knives. That the appellant struck him hard that he lost consciousness. They stole cash Ksh. 7,800/- in cash, 3 packets of sportsman cigarette and airtime worth Kshs. 5, 200/-. He issued him with a P3 form.

Defence Case

8. When placed to his defence, the appellant stated in a sworn statement that on that fateful day he was at home. That at 5pm he decided to proceed to a field when he bumped into the complainant snatching cash from a small boy and he rebuked him and went his way. That on the following day he went to the complainant's shop while drunk. He gave him a Ksh. 500/- note. That the complainant wanted to take advantage of his drunkenness in order to defraud him of the money. That they had an exchange of words which attracted a large crowd. That by accident he lost his balance and struck the complainant's fridge and damaged it. He denied robbing the complainant.

Submissions

9. The appeal was canvassed by way of written submissions of the appellant and those of the respondent. The appellant submitted that the evidence of the prosecution witnesses was not corroborated. That the prosecution evidence was riddled with inconsistencies that should have been resolved in favour of the appellant.
10. It was submitted that PW2 said that she did not see the appellant stealing from the shop. That the appellant was not identified by the prosecution witnesses nor was there cogent evidence that he attacked the complainant.
11. It was submitted that section 296(2) of the *Penal Code* that provides for a mandatory death sentence falls foul of Articles 25 and 50(2) of *the Constitution* of Kenya, 2010. That the death sentence imposed on the appellant violates *the Constitution*.
12. The respondent on the other hand submitted that the charge against the appellant was proved beyond reasonable doubt. That the appellant was a person well known to the complainant as he was his regular customer. That the doctor PW5 confirmed that the complainant was taken to hospital while unconscious and that he had received injuries.
13. The respondent submitted that the prosecution had proved that the appellant robbed the complainant; that he was armed with a knife when he did so; that he was in the company of another person and he strangled the complainant in the course of the robbery. Therefore, that the charge against the appellant was proved beyond reasonable doubt.
14. It was submitted that the defence of the appellant was a mere afterthought which did not cast doubt on the prosecution case.
15. On sentence, the respondent submitted that the death sentence imposed on the complainant was fair in all the circumstances of the case. The respondent consequently asked the court to dismiss the appeal.



Analysis and Determination

16. This being a first appeal, this Court is, as a matter of law, enjoined to analyse and re-evaluate afresh all the evidence adduced before the lower court and to draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. In the case of *Okeno vs Republic* [1972] EA 32 the Court of Appeal set out the duty of a first appellate court as follows:

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya vs. Republic* (1957) EA. (336) and the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v R.* (1957) EA. 570). 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 finding and conclusion; it must make its own findings and draw its own 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, see *Peters v Sunday Post* [1958] E.A 424.”

17. I have perused the grounds of appeal, the record of the lower court, the judgment and the written submissions filed by both parties. The issues arising therein are: -

- a. Whether the prosecution proved its case beyond reasonable doubt.; and if so
- b. Whether the sentence imposed on the appellant is lawful.

18. The offence of robbery with violence is contained in Sections 295 and 296(2) of the *Penal Code* as follows:

“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.”

19. The ingredients of this offence were aptly discussed by the Court of Appeal in the case of *Johana Ndungu vs Republic*, CRA. 116/1995, [1996] eKLR where it was stated as follows: -

“In order to appreciate properly as to what acts, constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the 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.”

[See also *Oluoch v Republic* [1985] KLR].

20. In the case herein, the complainant told the trial court that the appellant attacked and assaulted him after he refused to sell him cigarettes on credit. That the appellant held him, started to strangle him and struck him with his hand so hard that he fell to the floor with a big thud that he lost his consciousness.
21. The assault on the complainant was witnessed by Hellen Kathure PW2 who reached the scene and found the appellant strangling the complainant. PW2 also witnessed the appellant striking the complainant thereby sending him tumbling to the floor. Nkirote PW3 reached the scene and found the appellant coming out of the complainant’s shop.
22. The evidence that the complainant was taken to hospital while unconscious was corroborated by both Kathure PW2 and Nkirote PW3. The complainant was examined at the hospital by a clinical officer who confirmed that the appellant had fainted and lost consciousness. He was found with painful head and neck on palpation.
23. The complainant, Kathure and Nkirote all said that they saw the appellant armed with a knife. They all said that he was in the company of his brother when he attacked the complainant. Nkirote said that she saw the shop ransacked when she entered inside. That she saw empty drawers. The complainant denied in cross-examination that the appellant gave him Ksh.500/= at the material time and denied that he wanted to defraud him of the money.
24. The trial court considered all this evidence and came to the conclusion that the ingredients of robbery with violence were proved against the appellant. The court stated that the appellant was a person well known to the three prosecution witnesses and that they recognized him. The court observed that the offence was committed in broad day light. More so that the appellant admitted that he was at the complainant’s shop at the material time.
25. I have on my part reviewed the evidence that was adduced before the trial court. I have no reason to differ with the findings of the trial court. It is clear that the appellant stole the stated items from the complainant. Nkirote entered into the shop immediately the appellant came out of the shop and found the drawers ransacked. The appellant admitted to have been at the shop of the complainant at the material time. The element of theft was proved against the appellant.
26. There is no doubt that the appellant injured the complainant in the course of stealing the property. The act of the appellant strangling and striking the complainant was witnessed by Nkirote PW2. The complainant was examined at the hospital and was found to have fainted and had a painful head and neck. The three witnesses saw the appellant armed with a knife. He was in the company of his brother when he stole from the complainant. From the foregoing, the ingredients of robbery with violence as set out in the case of *Johana Ndung’u* (supra) were proved against the appellant.
27. The appellant was a person well known to the complainant, Kathure and Nkirote. There was thereby no issue of mistaken identity.



28. The appellant said in his defence that he had an altercation with the complainant after the complainant wanted to defraud him of his Ksh.500/=. That he accidentally hit the complainant's fridge which got broken. The complainant denied in cross-examination that the appellant gave him Ksh.500/= and that he wanted to defraud him of the money. Nkirote PW3 said in cross-examination that the appellant smashed the fridge on the following day when he went back to the shop. It is then clear that the appellant was lying on him having broken the complainant's fridge on the day he was accused of robbing the complainant. There was no truth that the appellant quarreled with the complainant on the day of the theft because the complainant wanted to defraud him of Ksh.500/=. The appellant's defence must have been a fabrication. The cause of the beef between him and the complaint was that the complainant refused to give him more cigarettes on credit. The same had nothing to do with the appellant's note of Ksh.500/=.
29. In view of the foregoing I find the prosecution had proved beyond reasonable doubt the charge of robbery with violence against the appellant and in the premises the conviction is upheld.
30. The appellant was convicted in count 2 for the offence of conspiracy to commit a felony, namely robbery. I find this to have been a duplication of the offence of robbery with violence for which the appellant was convicted in count 1. The conviction in count 2 is thereby quashed.
31. The sentence for the offence of robbery with violence is death. The appellant was sentenced to death. The sentence was lawful.
32. The upshot is therefore that I do not find any merit in the appeal. Consequently, the appeal is dismissed.

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

J. N. NJAGI

JUDGE

In the presence of:

Miss Mkongo for Respondent

Appellant – present in person from GK Prison Malindi

Court Assistant – Ndonye

