**Marigu v Republic (Criminal Case E013 of 2024)**
**[2025] KEHC 10617 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 10617 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT CHUKA**

**CRIMINAL CASE E013 OF 2024**

**RL KORIR, J**

**JUNE 30, 2025**

**BETWEEN**

**PETER MWITI MARIGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal from original conviction and Sentence in Criminal Case No. E489 of 2022 delivered by Hon. Mbayaki Wafula (Principal Magistrate) on 30th April 2024 at Marimanti Law Courts.)***

## JUDGMENT

1. Peter Mwiti Marigu (Appellant) was charged, convicted and sentenced to death for the offence of Robbery with Violence contrary to Section 296(2) of the *Penal Code* at Marimanti Law Court in Criminal Case No. E489 of 2022. The particulars of the charge were that on the 7th day of October, 2022 at Turima Location in Tharaka South Sub-County within Tharaka Nithi County robbed Mutiiria Mbiti of Kshs.4000/- and immediately before the time of such robbery wounded the said Mutiiria Mbiti.

2. Being aggrieved by both conviction and sentence and filed the present Appeal against both conviction and sentence.

3. In his home made Petition of Appeal dated 29th July, 2024, the Appellant raised six grounds which I have paraphrased as follows:-

    i. That the charge sheet was defective;

    ii. The Prosecution case was not proven beyond reasonable doubt;

    iii. The trial Magistrate showed open bias against the Appellant;

iv. There were illegalities and irregularities in the trial.

v. The Appellant's defense was rejected; and,

vi. The sentence was excessive.

4. My duty as a first Appellant court is to rehear the case on the basis of the evidence that was before the trial court. This duty was aptly explained in the case of *Kiilu & Another-v- Republic* (2005) 1 KLR 174 where the Court of Appeal stated:-

> " 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 weight conflicting evidence and draw its own conclusions.
>
> It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusion. It must itself make its own finding. 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 advantage of hearing and seeing the witnesses."

5. I proceed to summarize and consider the evidence that was presented in the trial court.

**The Prosecution Case**

6. The victim of the offence Mutiria Mbuti (PW1), testified that he was at a local hotel in the local trading centre taking tea on 7th October, 2022 at about18.45 pm when the Accused entered the shouting *"Mbwa Matako"* at him. That the Accused took the tea and poured it, hit him on the forehead and also hit him with a plastic chair. That he ran out and the Accused pursued him; over powered him, sat on him and poked his right eye with a stick. That the Accused removed Ksh.4000/- from his right hand front pocket.

7. PW1 further testified that his brother Joseph Kirimi, took him to Marimanti Level 4 hospital from where he was referred to Meru where he was informed that the right eye would not see again and it was removed.

8. PW2 Joseph Kirimi testified that he was the complainant's brother and was present at the scene when the Accused attacked the complainant. He stated that he took the complainant to the Police Station to report the matter and were given the P3 form, then to Kibung'a Clinic where they were referred to Marimanti Level 4 hospital. He stated that the Accused took Ksh.4000/- from the complainant and that his brother the complainant was now blind on one eye.

9. PW3 Kenneth Mutwiri testified that he was from Marimanti Level 4 hospital. He filled the P3 form of Mutiria Mbiti (complainant) on 17th October, 2022. That the complainant who was first seen on 7th October, 2022 had a blood stained shirt and trouser, a wound on the head, bite mark on the left side of the face, and on the right shoulder, a raptured right eye and several bruises on the face. That he was stitched at Marimanti and referred to Meru for ophthalmology review. That the right eye was completely removed.

10. PW3 produced the Eye Clinic Report (Exhibit 1) and the P3 form (Exhibit 2) .

11. No. 11xxxx PC Wycliff Aberi (PW4) was the Investigating Officer who took over from PC Kaume who had initially investigated the case. He summarized the Prosecution evidence stating that the case was

reported at Kibung'a Police Station where witness statements were also taken. That according to the witnesses the complainant was assaulted and robbed of Ksh.4000/-. He stated that the Accused was charged for causing grievous harm to the complainant's right eye.

12. In a Ruling issued on 19th March, 2024, the trial court found a prima facie case and put the Accused on his defence.

**The Defence case**

13. The Appellant (DW1) testified that he was Peter Mwiti, a casual labourer. He told the court that he was at home with his children on 7th October 2022. That he had gone to work at 6.00 p.m and came back tired, bathed his kids and retired to bed. That he woke up in the morning and reported to the chief's office from where he was informed that he had been charged and that was how he found himself in court.

14. In cross-examination, DW1 stated that he did not know Mutiria Mbiti (PW1) Joseph Kirimi Mbiti and Peter Nkonge. That he only saw them in court and did not know why they reported that he had assaulted Mutiria and injured him in the eye.

15. As already stated, at the close of the trial, the trial court found the charge proved and convicted and sentenced the Appellant to suffer death which result triggered the present appeal.

**The law**

16. The Appellant was charged under Section 295 as read with Section 296(2) of the *Penal Code* which provides:-

> "295. 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.
>
> (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.
>
> (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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

17. In this case, the victim (PW1) testified that he was going about his business taking tea in a 'hotel' at around 6 pm when the Appellant walked in, insulted him and proceeded to attack him. He stated that he was assisted to the Police Station then to hospital by PW2. That he sustained serious injuries and was also robbed of Kshs.4000/- by the Appellant.

18. PW2 corroborated the evidence of PW1. He told the court that the Appellant attacked the complaint and the attack culminated in the loss of one eye which had to be removed.

19. The evidence of PW3 was that he filled the P3 form (Exhibit 2) and concluded that the injuries sustained by the complainant was grievous.

20. From the evidence above, I find it proven that there was an attack upon the complainant. The injuries detailed in the P3 form and already stated in the evidence of PW3 amounted to grievous harm.

21. Evidence of identification was given by PW1 Mutiria Mbuti who testified on the attack by the Appellant whom he also said stole Four Thousand shillings (4000/-) from him. He was at a local hotel around 6.45 pm. PW2 also testified that he was present and was the one who took the complainant to the police station or report and to the hospital for treatment.

22. The offence was committed at dusk meaning that darkness might have started to set in. I must therefore carefully examine the identifying evidence to rule out every possibility of mistaken identity. This was the caution given by the Court of Appeal in the case of *Reuben Anjononi and 2 others vs- Republic* [1980] eKLR where it held thus:-

> " Being night time the conditions for identification of the robbers in this case were not favourable. This was however a case of recognition not identification of assailants; recognition of an assailant is more satisfactory more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

23. Further in *Cleophas Wamunga vs. Republic* (1989) eKLR expressed itself as follows:-

> " Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger....."

24. In this case I have already observed that the assault occurred at dusk which time cannot be said to be completely dark. PW1 and PW2 knew the Appellant. He was not a stranger to them. PW1 testified that 'as I took tea the accused came while shouting..... *"mbwa matako"* at me. PW1 also testified that the Accused had earlier stolen his solar panel.

PW2 on the other hand testified that the complainant (PW1) was his brother while the Accused was their neigbour. To the mind of the court, this was a person well known to both the complainant PW1) and PW2. He was their neighbour.

25. The Appellant stated in his defence while under cross-examination that he did not know Mutiria Mbiti (PW1) and Peter Nkonge. That he only saw them in court and did not know why they reported that he had injured Mutiria in his eye.

26. The Appellant all along maintained that the charge was a fabrication. This was evident from his cross-examination of PW1 and PW2. PW1 stated in cross-examination.

> " I am telling the court the truth, there were eye witnesses. Joseph Kirimi, Peter Murogi saw you assault me. The owner of the hotel saw you assault me, but he is your brother and may fail to come."

27. PW2 on the other hand stated in cross-examination that he did not see the person who threw the seat and also stated in re-examination that

> " I am not lying to court. The charges are not a fabrication."

28. I have considered that Appellant's defence, the same was a mere denial and did not cast doubt on the Prosecution evidence that he entered the hotel and assaulted the complainant. He has not given any reason why PW1 and PW2 would fabricate a case against him.

29. The offence of robbery with violence carries with it three main ingredients. There has to be a theft, the offender has to be armed or uses violence or is in the company of others. In *Mohamed Ali vs. Republic* [2013] eKLR, the Court held as follows:-

> " Robbery with violence is committed in any of the following circumstances:
>
> a. The offender is armed with any dangerous and offensive weapon or instrument; or
>
> b. The offender is in company with one or more person or persons; or
>
> c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person....."

30. In this case, the evidence has shown that the offender was not in the company of others. He acted alone. The evidence has also shown that he attacked the complainant. He abused him, hurled a chair at him, wrestled him to the ground, bit him on the face and raptured his right eye using a rod. The complainant also sustained bruises and cut wounds. The examining medical officer formed the opinion that the injuries amounted to grievous harm and that the probable type of weapon used to cause the injury was blunt stone or rod. The above evidence satisfies the ingredients of use of violence.

31. I have however had misgivings whether or not there was theft or stealing in this case. The complainant testified that after the Appellant wrestled him to the ground, bit him on his face and injured his eye, also stole from him Ksh.4000/- which was in his right pocket and went away.

32. There was no further evidence tendered to show that the complainant actually had the money in his pocket which was stolen by the Appellant.

33. After testifying at length on the quarrel and fight between the Appellant and the complainant, PW2 stated:-

> " The Accused is the one who assaulted, injured the complainant and even took his Ksh.4000/-"

34. PW2 did not see the Accused remove money from the complainant's pocket and no other witness testified to having seen the Accused take the money from the complainant.

35. From the evidence of PW1 and PW2, there were other people in the 'hotel' including the owner. The question is, why did they not intervene to stop the assailant from viciously assaulting the complainant for so long? There was no evidence to suggest that the people present attempted to restrain the assailant or stop him from walking away with the complainant's money.

36. The Investigating Officer (PW4) testified that he took over the case from PC Kaume who was the one who investigated the case. He stated that witness statements were taken at Kigung'a Police Post. That the Accused had assaulted the complainant and stolen Kshs.4000/- from him. He stated

> "That P3 form was filed and subsequently accused was prosecuted and charged for causing grievous harm on the complainant's right eye."

37. It appears from the Investigating Officer's evidence that their main line of investigations was the grievous harm visited upon the complainant by the Appellant. It is not clear to the court when the charge under consideration changed from grievous harm to robbery with violence.

38. It is my finding therefore that the theft of Ksh.4000/- was not proven to the required legal standard. This means that the charge of robbery with violence was not proven.

39. I have however found that the Appellant attacked and assaulted the complaint viciously causing him grievous injury including the loss of his right eye. The medical doctor who examined him classified the injuries in the P3 form (Exhibit 2) as grievous harm.

40. Section 179 of the *Criminal Procedure Code* mandates court to convict for offences other than those charged.

Section 179(2) provides:

> " When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

41. In *Amos Ondiso Oraro & 3 Others vs. Republic* [1997] eKLR The Court of Appeal held:-

> " .....As was pointed out therefore by this Court in *Raphael Oyondi Omuside vs. Republic* , CA No.23 of 1991 (unreported), in altering the finding in an appeal against conviction and substituting therefore a conviction for an offence other than that charged, the High Court in its appellate jurisdiction can only act within the provisions of Section 179 to 191 both inclusive, of the *Criminal Procedure Code* and for the purpose of the present Appeal, such alteration and substitution were only possible under Section 179 of the *Criminal Procedure Code* which latter does not permit a substituted conviction of a major offence from a minor offence...."

42. Further in *Robert Mutungi Muumbi –vs. Republic* [2015] eKLR the court held that:-

> " an accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate, that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted."

43. In this case the correct charge would have been Section 234 of the *Penal Code* which provides:

> " 234. Any person who unlawfully does grievous harm to another is guilty of a felony and is liable to imprisonment for life."

44. I apply the provisions of Section 179(2) aforestated and substitute the charge with that of grievous harm contrary to Section 234 of the *Penal Code*. Considering the extent of harm which was aggravated, as per the medical evidence, I consider it just and fair that the Appellant serve a deterrent sentence.

45. In the end, I quash the conviction for robbery with violence and enter a conviction for causing grievous harm contrary to Section 234 of the *Penal Code*. I set aside the sentence of death and sentence the Appellant to serve 25 years' imprisonment.

46. The sentence shall be deemed to run from the date of his pre-trial custody being 31st October 2022.

Orders accordingly.

**JUDGMENT DELIVERED, DATED AND SIGNED AT CHUKA THIS 30TH DAY OF JUNE, 2025.**

**.....**

**R. LAGAT-KORIR**

**JUDGE**

Judgment delivered in the presence of the Appellant acting in person. Ms Rukunga for the Respondent, and Muriuki (Court Assistant).