Wainaina & another v Republic (Criminal Appeal E019 of 2025)
[2025] KEHC 11220 (KLR) (30 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11220 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL E019 OF 2025

DR KAVEDZA, J

JULY 30, 2025

BETWEEN

STEPHEN WAINAINA ..... 1ST APPELLANT

MICHAEL NZIOKA ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. Abdul (P.M) on 19th September 2024 at Kibera Chief Magistrate's Court, Criminal Case no. E744 of 2023 Republic vs Stephen Wainaina & Michael Nzioka)

JUDGMENT

1. The appellants were jointly charged and, after a full trial, convicted for the offence of robbery for violence contrary to section 296 (2) of the *Penal Code*, Cap 63 Laws of Kenya. They were each sentenced to serve fifteen (15) years imprisonment.

2. Aggrieved, they filed an appeal challenging his conviction and sentence. In their petition of appeal, they raised grounds, which have been coalized as follows: They challenged the conviction on a charge of robbery with violence, stating it was duplex and hence ambiguous, contrary to Sections 134 and 137 of CPC.

3. They contended that the prosecution had failed to prove the ingredients of robbery with violence to the required standard beyond reasonable doubt. They argued that the sentence imposed was harsh and manifestly excessive. They urged the court to quash their conviction and set aside the sentence.

4. Before delving into the specific re-evaluation of the evidence on record, I will deal with the preliminary issue raised by the appellants, namely: the charge sheet was defective for duplicity. The appellants contended that they were charged with the offence of robbery with violence contrary to section 295

as read with section 296 (2), which are two separate offences intertwined as one. They argued that as a consequence, their conviction on a defective charge sheet was unsafe.

5. The Court of Appeal in Paul Katana Njuguna v Republic [2016] eKLR considered the issue of duplicity where the appellant had been charged with the offence of robbery with violence contrary to Section 295 as read with section 296(2) of the *Penal Code*. The Court observed as follows;

> " Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the *Penal Code*? We observe that the offence under Sections 295 and 296 (2) was not framed in the alternative. So, following the decision in Cherere s/o Gakuli -v- R (supra), Laban Koti -v- R. (supra) and Dickson Muchino Mahero v R. (supra), the defect in the charge herein is not necessarily fatal."

6. In this case, the appellants understood the charge against them and participated in the hearing by cross-examining the witnesses. They did not raise any complaint before the trial court, and in the circumstances, I find that there was no miscarriage of justice on the ground that the charge was duplex.

7. The key ingredients for a robbery with violence charge are found in section 296(2) of the *Penal Code*. It provides as follows-

> " 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".

8. The issues for consideration by this court are whether the prosecution did prove its case beyond reasonable doubt, leading to a proper conviction and sentence.

9. As the first appellate court, it is the responsibility of this court to reassess, re-examine, and review the evidence anew to reach its own conclusion. However, the court must also take into account the fact that it did not witness the testimony of the witnesses firsthand and should give due consideration to that factor. (See Okeno v Republic [1972] EA 32).

10. PW1, Emma Wambui Ng'ang'a, a waitress at Blacky's in Kilimani, testified that on 27th April 2023 at around midnight, she was walking home with her friend Stella when they were accosted by the appellants. She stated that the two men began beating them with wires and only stopped when Stella gave them Kshs. 1,000. She further testified that they robbed her of her phone and more money, then fled. PW1 stated that she recognised both assailants, having seen them before in the Kilimani area, asking for money. She described the area as well-lit with street lights and confirmed that the attackers were wearing jackets and carrying wires. She sustained injuries to her legs and later reported the matter to the police and sought medical attention.

11. On cross-examination, PW1 stated that nothing was stolen from her, though she maintained she was assaulted without knowing the reason.

12. PW2, Stella John, corroborated PW1's account. She testified that one of the attackers uttered the words "tuwachinje", and after handing over Kshs. 1,000, one of them grabbed her, reached into her bra, and stole her phone and passport. Both she and PW1 raised an alarm, attracting police who gave chase but were unable to apprehend the suspects. She confirmed that the area was well lit and that they knew

the assailants, who often approached them asking for money after their night shifts. PW2 was not physically assaulted.

13. PW3, Dr Kamau Mariga, examined PW1 on 2nd May 2023 and confirmed that she had sustained two haematomas, one on her forearm and another on her thigh, consistent with blunt force trauma. The injuries were classified as "harm."

14. PW4, PC John Kandie, the investigating officer, testified that the matter was reported by PW2. He confirmed that PW1 was assaulted while PW2 was robbed of her Infinix Note 12 and Kshs. 1,000. He stated that the appellants were arrested on 20th May 2023 and charged. He clarified the distinct roles of each complainant, PW1 as the assault victim, and PW2 as the robbery victim.

15. In his defence, the first appellant, Stephen Wainaina, claimed he was drunk and arrested on 19th May 2023 without a reason. He alleged that PW1, who knew him, later falsely accused him. He denied stealing from Stella and questioned the absence of a phone receipt.

16. DW2, Michael Nzioki, testified that he was taken to the station for an ID parade, which was never conducted. He denied knowing the complainants before the trial and asserted that they were unable to identify their attackers.

17. The appeal was canvassed by way of written submissions, which have been duly considered, and there is no need to rehash them.

18. The key ingredients for a robbery with violence charge are found in section 296(2) of the *Penal Code*. It provides as follows-

> "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".

19. The issues for consideration by this court are whether the appellants were positively identified and whether the prosecution did prove its case beyond reasonable doubt, leading to a proper conviction and sentence.

20. The offence of robbery with violence under section 296(2) of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR and Oluoch v Republic [1985] KLR 549).

21. Both PW1 and PW2 confirmed that they were attacked by two individuals acting jointly. The witnesses identified the appellants, whom they knew by face and had interacted with before around the Kilimani area. Their consistent testimonies regarding the appellants' prior acquaintance rule out the possibility of mistaken identity and support a finding of common intention.

22. On the second element, PW1 gave clear testimony that she was whipped with wire cables and bled from the legs. PW3, Dr Kamau Mariga, corroborated this by confirming she sustained blunt force injuries, specifically haematomas on her thigh and forearm. The attack amounted to actual bodily harm and was inflicted during the commission of the offence.

23. As to the use of weapons, PW1 and PW2 testified that the attackers were armed with wire cables. Though not conventional weapons, such implements fall within the statutory definition of offensive weapons under Section 296(2), given their use to inflict harm or cause intimidation.

24. PW2's evidence on the theft was unchallenged. Her phone, an Infinix Note 12 worth Kshs. 21,500, and Kshs. 1,000 in cash was taken. Although PW1, during cross-examination, stated she was not robbed, her injuries and the circumstances show that she was a victim of the violence accompanying the theft, thereby implicating her under the doctrine of joint enterprise.

25. The identification was not only by recognition, but also took place in a well-lit area. The complainants had previous interactions with the appellants, and nothing suggests malice or error in identification. The lack of an identification parade does not render the recognition evidence unreliable in such circumstances.

26. The appellants' defences were largely unsubstantiated. DW1 admitted to knowing PW1 and did not deny the assault. DW2 raised procedural complaints but failed to cast doubt on the complainants' clear and consistent accounts. The trial court correctly found that the prosecution had proved its case beyond reasonable doubt.

27. Accordingly, the conviction for robbery with violence was proper and is affirmed.

28. On the question of sentence, the trial court imposed a custodial term of fifteen years' imprisonment. It is evident from the record that in doing so, the court took into account the gravity of the offence, the circumstances under which it was committed, and the pre-sentence reports. The court also exercised its discretion judiciously, bearing in mind the principles of proportionality and deterrence.

29. Sentencing is a discretionary function of the trial court, and appellate interference is only warranted where the sentence is manifestly excessive, illegal, or founded on wrong principles. None of these circumstances have been demonstrated by the appellants.

30. In the premises, the appeal is found to be lacking in merit and is dismissed in its entirety.

    Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30TH DAY OF JULY 2025

D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Chebii h/b for Mutuma for the Respondent

Karimi Court Assistant.