



REPUBLIC OF KENYA



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**Kibet alias Ali v Republic (Criminal Appeal E007 of 2024)
[2025] KEHC 11811 (KLR) (6 August 2025) (Judgment)**

Neutral citation: [2025] KEHC 11811 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E007 OF 2024
HI ONG'UDI, J
AUGUST 6, 2025**

BETWEEN

PIUS MAINA KIBET ALIAS ALI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment delivered on 21st May, 2024 by Hon. Khatambi (PM) in Naivasha Chief Magistrate's Criminal Case No. 2038 of 2018)

JUDGMENT

1. Pius Maina Kibet alias Ali herein referred to as the appellant was charged in the Chief Magistrate's court Naivasha Criminal Case No. 2038 of 2018 with 12 counts of Robbery with violence contrary to section 296(2) of the Penal Code but was convicted only on the 1st and 4th counts particulars of which are as follows;

Count 1

On the night of 15th July, 2018 at Naivasha township, in Naivasha sub-county within Nakuru County, the appellant jointly with others not before court, while armed with dangerous weapons namely guns, knives and iron bars robbed Fredrick Mwangi Muriuki of motor vehicle registration number KCB 368J make Toyota Hiace Matatu valued at Kshs. 1.9 Million, mobile phone make TECNO valued at 2,000/=, cash kshs.6,000/= all valued at kshs.1,908,000/= and at the time of such robbery used actual violence to the said Fredrick Mwangi Muriuki.

Count IV

On the night of 15th July, 2018 at Naivasha township, in Naivasha sub-county within Nakuru County, appellant jointly with others not before court, while armed with dangerous weapons namely guns, knives and iron bars robbed Dennis Mathenge Wachira of mobile phone make XIAOMI valued at



- 24,000/=, cash kshs.22,000/= and a laptop bag valued at Kshs. 2000/= all valued at kshs.48,000/= and at the time of such robbery used actual violence to the said Dennis Mathenge Wachira.
2. Thereafter, on 21st May October 2024 the appellant was sentenced to life imprisonment on both counts. She directed that the sentences were to run concurrently.
 3. Being dissatisfied with the conviction and sentence the appellant filed this appeal on the following amended grounds:
 - i. That, the Hon. Magistrate erred in matters of law and fact in that there was no prima facie case under section 296(2) of the Penal Code to found a conviction, a breach of Articles 25(c), 27(1), 47(1), 50(1), 157(11), and 159(2(e) of the constitution of Kenya 2010, s.107 Evidence Act and sections 216 and 329 of the CPC.
 - ii. That, the Hon. Magistrate erred in matters of law and fact by convicting the appellant yet failed to find that his identification was not positive.
 - iii. That, the Hon. Magistrate erred in law and fact as the appellant's cogent defense and mitigation were not given due weight and consideration for a fair trial under Articles 47 and 50 of the constitution.
 - iv. That, the sentence meted upon the appellant was harsh and excessive since it was not based on the unique facts and circumstances of the case.
 - v. That, modern jurisprudence has shown the courts exercising discretion in awarding sentences in line with circumstances presenting.
 4. The respondent filed grounds of opposition dated 4th April 2025 where it stated that the ingredients of robbery with violence were all proved and the defense of the appellant considered before conviction. Further, that there was positive identification of the appellant. Thus, it proved its case beyond reasonable doubt. He urged the court to uphold the conviction and sentence by the trial court.
 5. The prosecution case was founded on the evidence of five (5) witnesses. The incidents complained of occurred on 15th July, 2018. PW1 – Fredrick Mwangi Muriuki a driver with 2NK testified that on the said date he left for Nairobi from Nakuru at 10 pm and upon reaching Karai one of the passengers sitting next to him shoved a knife on his side and told him to park at the road side. Two other passengers came from the back of the vehicle, and he was beaten and taken to the back of the vehicle. Thereafter, the vehicle was driven into a bush and him together with the passengers were told to lie down. The said individuals started demanding money and phones from them. They took from him a Nokia phone (Kabambe), Kshs. 4000/= cash and another kshs. 4,000/= from mpesa. He stated that the culprits stayed with them for 30 minutes and he was able to see them very well especially the one who had sat next to him in the vehicle. He confirmed that one of the robbers was in court.
 6. PW2, Dennis Mathenge Wachira testified that on the material day he was travelling from Nakuru to Nairobi using 2NK vehicle and when they reached Karai area one of the passengers who had sat near the door produced a knife and stabbed him on the back. He then told everyone to lie down. The matatu was stopped and one of the passengers who had sat at the front was brought to the back to join them but there was another one seated next to the driver. Thereafter, the driver went off the road to the left and drove for about 1 hour when the vehicle was stopped in an open field. They were ordered to alight and the attackers started demanding money from them. He gave them kshs. 2000/= plus his mobile phone make Xiami valued at kshs. 24,000/=. He also borrowed money on his mpesa account (kshs. 20,000/=) and the attackers ordered him to send it to the driver's number.



7. Thereafter, the thieves left and one of the passengers drove the matatu since they had suspected the driver so he was put at the back. They went to the DCI Naivasha who they had earlier contacted with a mulika mwizi phone which one of the passengers had managed to hide in the grass. They recorded their statements and he went to Naivasha district hospital where he was treated. He produced his treatment documents, receipts, P3 form and an abstract for his lost phone and ID card. He stated that he could not tell whether the appellant was one of the thieves.
8. PW3, No. 51831 Sergeant Alex Ndombi attached to DCI Makadara in Nairobi testified that on the material date at around 11.30 pm while on duty together with two other officers they received a phone call from the DCIO Naivasha. He informed them that a matatu from 2NK sacco registration number KCB 368J travelling from Nakuru to Nairobi had been hijacked by some passengers who were also thieves. They went to the scene and found the passengers in a lot of fear lying down on the ground and the driver who had been stabbed on the ribs was bleeding. They took them to the police station where they recorded their statements and the injured ones were taken to Naivasha district hospital. He identified the driver's P3 form (PMFI-4).
9. They also took the details of the stolen phones from the passengers and upon request for call data, they identified an airtel number 0780 043 005 registered in the appellant's name. Further, the driver described the person who had sat next to him as medium built.
10. PW3 when recalled testified that the thieves had a knife and a gun and PW1 had a Techno phone and kshs. 6000/= . He stated that PW1 had been stabbed on the neck and he issued him with a P3 form. He also took the statements from the other passengers. After they obtained the airtel number 0780xxxxxx and details of the owner they sent his ID number to the Registrar of persons. The data recourse placed the appellant at the scene and that's when they charged him. He produced the ID for the appellant, report from the Registrar of persons and letter from the Criminal Research Bureau as Pexhibit 7(a), 7(b) and 8 respectively. He identified the appellant as the culprit.
11. PW4, Preston Oteya a doctor at Naivasha district hospital produced the P3 form for PW2 on behalf of Dr. Tabitha. He stated that PW2 came to the hospital with clothes which had blood stains. He told them that he had been stabbed on 15th July 2022 at night. He had an injury on the left shoulder and the probable weapon used was blunt and sharp. He was treated and discharged. He produced the P3 forms for PW2 and PW1 as PExh 2 and PExh 4 respectively.
12. PW5, Vincent Mabu a security manager at Airtel Kenya Networks Limited produced the court order requesting for certified communication data, call data records, KYC report and Certificate of Electronic Evidence (PExh 6a -6d) respectively.
13. PW6, No. 239179 Inspector Ali Ibrahim stationed at Naivasha police station conducted the identification parade on 16th August 2018. He stated that nine (9) people including the appellant were lined up and PW2 was unable to identify him but PW1 identified the appellant by touching him. The second identification parade was done on 17th August 2018 and still PW2 could not identify the appellant. The appellant was contended with the said process. He produced the identification parade form for PW1 and PW2 as P-Exhibit 6(a) and 6(b) respectively.
14. When placed on his defence the appellant in his unsworn statement stated that he was a businessman and he sold mali mali items. On the material day which was a Monday, he left his house and went to town to open his business and later on at around noon he went to see his friend Maina at Loliondo bar. He was arrested while still at the bar and taken to the police station where he found his photograph. The CID officers could not explain how they obtained the said photograph. He was ordered to take



the police to his house where they took away his clothes and bags. He was later informed that he had been arrested due to a highway robbery and was charged with said offence on 14th August 2018.

15. An identification parade was conducted and PW1 identified him but he was not satisfied because of a photograph that was at the DCI's office. He informed PW5 of the same and he stated that he would capture his concerns in the identification parade form. He stated that on the material day he worked from 8.00am to 7.00pm when he closed his business and went home where he remained till morning. He denied having committed the offence.
16. The appeal was canvassed by way of written submissions.

Appellant's submissions

17. These are dated 28th March 2025, where the appellant challenged the identification parade and stated that his photographs were at the time of his arrest displayed and may have been shown to the complainants before the parade. He submitted that PW2 could not identify him and PW1 stated that the robbers had knives which contradicts what is indicated in the charge sheet. He further submitted that the prosecution failed to invoke section 309 (sic) to adduce evidence in reply and no witness identified him at the scene of the robbery. He added that the pre-sentencing report did not have any adverse inferences made against him and he ought to have been acquitted under section 210 CPC. He placed reliance on the decision in *Roria v Republic* [1967] EA 583.
18. It was his further submission that despite the trial court listening to his defence, mitigation and relevant case laws, it went ahead and imposed on him a life sentence which was unfair under the circumstances of the case. He relied on several decisions including *Ali Abdallah Mwanza -Vrepublic*, Criminal Appeal No. 259 Of 2012 At Mombasa, a case of robbery with violence where judgment delivered on 27th September, 2018 held as follows:

“In this case it is obvious to us if the appellant were to serve the entire forty (40) years sentence with the above life expectancy of about sixty (67) years, the sentence would go beyond the life expectancy and in that case, it would appear manifestly excessive. We say so because the judge did not impose a death sentence or even a life sentence. When the judge imposed a term sentence, to us it would appear, was meant to be lower than life sentence. It is for the aforesaid reasons that we are of the view that if the trial judge had taken the above matters into consideration, perhaps she should have considered a lesser term than 40 years. In the circumstances we partially allow the appeal and substitute the sentence of 40 years with a term of 20 years from the date of conviction”.

19. He concluded by urging the court to allow his appeal and set aside the trial court's judgment and he be set at liberty.

Respondent's submissions

20. These are dated 4th April, 2025 and were filed by Dennis Atika prosecution counsel. He gave a background to the case before the trial court and submitted on the ingredients of the robbery with violence offence as laid down under section 296 (2) of the Penal Code and the case of *Johana Ndungu v Republic* [1996] eKLR. Counsel further submitted that their case was proved beyond reasonable doubt and PW1 and PW2 corroborated the evidence that indeed the appellant attacked the appellant on the material day. Also, that the medical reports confirmed the same.
21. He placed reliance on the decision in *Mutonyi v Republic* [1982] KUR 2002, where the court held that an important element in the definition of corroboration is that it affects the accused by connecting him



or tending to connect him to the crime confirming in some material particular not only the evidence that the crime has been committed but also that the accused committed it.

22. On the identification parade counsel submitted that PW1 was able to identify the appellant by touching him during the identification parade. Additionally, that on the day of the offence the appellant sat next to him throughout from Nakuru to Naivasha until when he attacked him. The identification parade form was produced as P. Exhibit no. 6.
23. He placed reliance on the decision in *R v Turnbull and Others* [1976] 3 All ER 549 Lord Widgery CJ stated as follows:

“Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution has reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger: but, even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

24. It is his submission that the defence was weak and it could not dislodge the evidence presented by the prosecution which was overwhelming and proved the case beyond reasonable doubt. That the appellant alleged that his photograph was available at the police station prior to his arrest and this therefore compromised the essence of the identification parade which was just a mere allegation that is not backed by any evidence
25. He concluded by urging the court to uphold the conviction and sentence against the appellant.

Analysis and Determination

26. Having carefully considered the evidence on record, grounds of appeal, both submissions and authorities cited and the law, I find the main issue for determination to be whether the appellants were identified as the perpetrators of the offences complained of.
27. This being a first appeal this court has the duty to re-evaluate and re-consider the evidence adduced before the trial court and come to its own independent conclusion as was held in the following cases:
 - i. *Okeno v Republic* (1972) E.A 32
 - ii. *Boru & another v Republic* [2005]1 KLR 649
 - iii. *Kiilu & another v Republic* [2005]1 KLR 174



28. The appellant was charged with the offence of robbery with violence contrary to section 295 of the penal code:

“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”.

Section 296(2) of the penal code provides:

“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”.

29. The position in law is that if any one of the ingredients stated in the definition accompanies the theft/stealing an offence under section 296(2) of the Penal Code is complete. From the evidence of PW1 and PW2 who were inside the matatu, it is very clear that them together with other passengers were violently attacked on the material night. The robbers who disguised themselves as passengers were armed with a knife. This is supported by the evidence of PW1 and PW2. PW2 testified that one of the robbers said he had a gun but he did not see it.

30. Secondly the attackers wounded PW1 and PW2 during the incident and P3 forms were produced by PW3 as (PEXB (6 (a) & 6 (b))) confirming their evidence. The attackers took away the items mentioned in the charge sheet and the appellant was located through the call data from the stolen phones and the same also placed him at the scene. PW5 produced P Exhibit 7a, 7b and 8 in support of the same. I am satisfied that the offence of robbery with violence was clearly proved by the prosecution.

31. The next issue for determination is whether the appellant was identified as having been among the people who committed this offence. PW1 testified that this incident went on for about 30 minutes and he was able to see the robbers very well and especially the one who had sat next to him in the vehicle. He positively identified him during the identification parade (P exhibit 6 (a)) conducted by PW6. PW2 stated that he could not tell whether the appellant was one of the thieves as he did not identify him during the identification parade (P Exhibit 6 (b)).

32. On his part, the appellant confirmed that an identification parade was conducted and PW1 identified him but he was not satisfied due to his photograph that was at the DCI's office. He said he informed PW5 of the same and he stated that he would capture his concerns in the identification parade form. The witness indicated that the issue of the photo was only raised after the appellant had already been identified at the identification parade. Other than that, the appellant did not challenge how the identification parade was conducted. PW6 had asked him whether he had a relative or friend he wanted to invite to witness the parade but he said he had none.

33. The learned trial Magistrate in her Judgment noted that the appellant alleged that his photograph was available at the police station prior to his arrest and the said information had been captured in the parade form. She stated that no evidence was led to prove that the photograph was made available to the witnesses. Further, that the identification parade in relation to PW1 and PW2 was conducted on the same day. Indeed, if the photograph had been made available both witnesses would have identified the appellant, but PW2 never identified him on the parade. This court concurs with the trial Magistrate on this. I find that this unproved allegation did not cast doubt on the prosecution case. The appellant



gave unsworn evidence and failed to call any witness and especially the friend he allegedly met at the bar to corroborate his defence. I am satisfied that the appellant was properly identified.

34. The appellant submitted on the harshness of the sentences meted out against him saying they were too harsh. The trial magistrate sentenced the appellant to life imprisonment on both counts. The court of Appeal in Malindi Court of Appeal Criminal Appeal No. 12 of 2021, Julius Kitsao Manyeso v Republic declared life sentence unconstitutional.
35. In *Kimengich & another v Republic (Criminal Appeal E121 of 2022) [2024] KEHC 7412 (KLR) (21 June 2024) (Judgment)* the court in reducing the sentence of 50 years imprisonment to 8 years held as follows;

“ 60. In *Peter Maina Kimani v Republic [2019] eKLR*, where the Petitioner jointly with others while armed with a panga and metal rod robbed a complainant of Kshs.4,000/- and a mobile phone valued at Ksh 3,500/=. These circumstances are similar to those herein. During resentencing, the court took into account the fact that Appellant was a first offender and that the sentence imposed must be commensurate to a convict’s moral blameworthiness. The Court set aside the life imprisonment, and substituted it with a sentence of 20 years imprisonment.”

36. The upshot is that the appeal against conviction fails. On the other hand, the appeal on sentence succeeds, I hereby set aside the life imprisonment sentence imposed by the trial court and substitute the same with twenty-five (25) years imprisonment, on each count. Sentences to run concurrently from the 13th August, 2018 which was the appellant’s date of arrest.
37. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 6TH DAY OF AUGUST, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI
JUDGE

