



**Ogola v Republic (Criminal Appeal 117 of 2023)  
[2024] KEHC 1791 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1791 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 117 OF 2023  
DR KAVEDZA, J  
FEBRUARY 22, 2024**

**BETWEEN**

**MICHAEL ODHIAMBO OGOLA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered by Hon. Mutua (SPM) on 20th January 2022 at Kibera Chief Magistrate’s Court Criminal Case no. 16 + 446 of 2016 Republic vs Michael Odhiambo Ogolla & another)*

**JUDGMENT**

1. The appellant jointly with another not before this court was charged with three counts of the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code, Cap 63 Laws of Kenya. After a full trial, he was sentenced to death. Being aggrieved, he filed an appeal challenging his conviction and sentence.
2. In his petition of appeal, he raised four (4) grounds which have been coalized as follows: He challenged the totality of the prosecution’s evidence against which he was convicted. He contended that his defence was not considered by the trial court. He urged the court to quash his conviction and set aside the sentence.
3. 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”.



4. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt leading to a proper conviction and sentence.
5. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate and reanalyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See *Okeno v Republic* [1972] EA 32)
6. The prosecution called four witnesses in support of their case. The prosecution's case as told by PW1 Peter Kenyatta Sauru (PW 1), John Karani Anyonga (PW 2), and Samuel Gichuhi (PW 3) on 30th December 2015 along with another individual, were traveling towards Kawangware in their vehicle when it was blocked by the appellant, who was riding a motorcycle. The appellant accused them of hitting a motorcyclist and driving away, but they refuted these claims. During the altercation, additional individuals, including the appellant's co-accused, arrived at the scene. They pulled the victims out of their vehicle and robbed them of their belongings. The assailants were wielding knives and threatened to set the vehicle on fire.
7. During the incident, PW1 was robbed of a Nokia mobile phone, Kshs. 5000, a wallet, and an ATM card. PW2 was robbed of a Samsung phone, an ATM card, and Kshs. 2600, and NHIF and NSSF cards. PW3 lost a Tecno phone and Kshs. 18,000 which he in cash. After the incident, the appellant asked PW1 for a token of appreciation for supposedly helping him prevent others from setting the vehicle on fire. However, they deceived him and took him to Muthangari Police Station, where he was charged. His co-accused was arrested a month later but died during the trial, resulting in his case being abated.
8. PW4 No. 63967 PC Peter Ojwang the investigating officer told the court that he investigated the matter and charged the appellant with four counts of robbery with violence. The appellant was however acquitted on one count.
9. In his sworn defence, the appellant told the court that he is a 'boda boda' operator, and stated that on the day in question, he witnessed a person being hit by a vehicle and took his intervention to help. He stated that he urged the public not to harm the occupants of the vehicle involved and instead accompanied them to the police station to report the incident. He maintained that he acted as a good samaritan and denied any involvement in the theft, arguing that the burden of proof lay with the prosecution to prove the case against him.
10. The appeal was canvassed by way of written submissions which have been considered. 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)
11. The issues for consideration by this court are whether the appellant was positively identified and whether the prosecution did prove its case beyond reasonable doubt. The evidence on record does prove that PW 1, PW 2, and PW 3 were stopped by the appellant and attacked by a group of assailants. The assailants accused them of knocking down a motorcycle a fact which was not true. The assailants were armed with knives and threatened to use actual violence by torching the motor vehicle. The appellant did not dispute that he was present at the scene and the PW 1, PW 2, and PW 3 were indeed attacked.



12. During the incident, the attackers took cash, mobile phones, and ATM cards. The appellant's identity was clear, and he was persuaded to go to the police station where the incident was reported. The prosecution presented evidence that the appellant went with PW 1 in an attempt to obtain money from him for allegedly helping him from the other assailants. It was during this attempt that the victim drove to the police station and filed a report, while the other attackers fled the scene.
13. From the material placed before the court, PW 1, PW 2, and PW 3 were very clear on the facts of the incident, and their evidence was not shaken on cross-examination. It is my considered view that the appellant was properly and positively identified and apprehended after the incident. I find the testimony of the prosecution's witnesses to be reliable direct evidence of visual identification against the appellant.
14. For consideration is whether force was used to rob the victims. It was the testimony of prosecution witnesses that the assailants were wielding a knife and others threatened to burn the motor vehicle. The threat of violence was therefore present. This court is satisfied that the prosecution proved that the appellant and his accomplices robbed and threatened to harm the complainants. His conviction for the offence of robbery with violence was therefore safe.
15. The appellant also argued that the trial court failed to consider his defence. In his defence, the appellant denied committing the offences and maintained his innocence. He maintained that he was a good Samaritan trying to help the complainants. From the record, the trial court considered the appellant's defence and found it to be unbelievable and an afterthought. The ground of appeal therefore fails. His conviction was proper.
16. On sentence, the appellant was sentenced to death. Section 329 of the Criminal Procedure Code, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence being provided for under the Act in which the offence is prescribed. In that regard, I find the sentence imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh.
17. Therefore, the appeal on sentence succeeds. The sentence of death is hereby vacated. I hereby resentence the appellant to 20 years imprisonment for counts I, II, and IV. The sentences shall run concurrently from the date of conviction.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024**

.....

**D. KAVEDZA**

**JUDGE**

In the presence of:

Nguongo for the Appellant

Ms. Ntabo for the Respondent

Omwoyo Court Assistant.

