



REPUBLIC OF KENYA



**Abongo v Republic (Criminal Appeal 30 of 2021)  
[2024] KEHC 4554 (KLR) (30 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 4554 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CRIMINAL APPEAL 30 OF 2021  
JN KAMAU, J  
APRIL 30, 2024**

**BETWEEN**

**ANTHONY NGOLA ABONGO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon M. L. Nabibya (SRM) delivered at Hamisi in Senior Resident Magistrate's Court in Criminal Case No 1277 of 2016 on 16th January 2018)*

**RULING**

**Introduction**

1. The Appellant herein was charged with 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).
2. He was tried and convicted by the Learned Trial Magistrate, Hon M. L. Nabibya, Senior Resident Magistrate who sentenced him to death.
3. Being dissatisfied with the said Judgement, on 26<sup>th</sup> October 2018, he lodged the Appeal herein. The same was dated 5<sup>th</sup> March 2018. He set out five (5) grounds of appeal. He incorporated three (3) Supplementary Grounds of Appeal dated 2<sup>nd</sup> January 2024 in his Written Submissions of even date.
4. His Written Submissions were filed on 10<sup>th</sup> January 2024 while those of the Respondent were dated and filed on 1<sup>st</sup> February 2024. The court therefore reserved its Judgment herein for the matter herein based on the said Written Submissions, which both parties relied upon in their entirety, for 30<sup>th</sup> April 2024.
5. However, at the time of writing its decision, it became apparent that there were several unexplained facts in the Government Chemist Report that was tendered in evidence during trial that made it difficult for this court to determine this matter.



6. It was therefore necessary for this court to obtain additional evidence to enable it arrive at a considered decision that was fair to all parties herein. Indeed, justice not only needed to be done but needed to be done to all parties as the sword of justice cut both ways.

### **Legal Analysis**

7. Notably, Section 358 (1) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya) provides as follows:-

“In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.”

8. Bearing in mind that an appellate court can take additional evidence either by itself or direct it to be taken by the subordinate court, this court deemed it prudent to take the additional evidence itself as provided in Section 358 (1) of the *Criminal Procedure Code* as that evidence would be deemed to have been taken by the Trial Court and/or subordinate court.

9. Indeed, Section 358(4) of the *Criminal Procedure Code* states that:-

“Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court.”

10. This court opted to take the additional evidence itself to enable it comprehend fully the scientific evidence that was adduced by the Government Chemist, Richard Kimutai Langat (hereinafter referred to as “PW 4”) as the questions it had could not be fully answered if the evidence was taken by another court. In addition, it would be expedient if this court took the additional evidence as the Appellant has been in custody since he was arrested on 26<sup>th</sup> December 2016.

### **Disposition**

11. For the foregoing reasons, the upshot of this court’s decision was that the Judgment in respect of the Appellant’s Petition of Appeal dated 5<sup>th</sup> March 2018 and lodged on 26<sup>th</sup> October 2018 be and is hereby deferred to await the taking of additional evidence on 12<sup>th</sup> June 2024 at 10.45 am.
12. The Government Chemist, Richard Kimutai Langat and/or any other Government Chemist be and is hereby summoned to attend court on the aforesaid for purposes of adducing additional evidence.
13. The Appellant’s counsel, Mr Mshindi be and is hereby at liberty to attend court on the said date for purposes of taking the aforesaid evidence on behalf of the Appellant herein as he represented him during the trial.
14. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 30<sup>TH</sup> DAY OF APRIL 2024**

**J. KAMAU**

**JUDGE**

