Wamalwa v Republic (Criminal Appeal E076 of 2024)
[2025] KEHC 11592 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11592 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E076 OF 2024

EN MAINA, J

JULY 31, 2025

BETWEEN

EDWARD WAFULA WAMALWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the judgment by Hon.Ole Keiwua(CM) in Kangundo Chief Magistrate's Court in Cr. No. E520 of 2022 Delivered on 27th August, 2024)

JUDGMENT

1. The Appellant herein Edward Wafula Wamalwa was charged with an offence of Robbery with violence contrary to Section 296(2) of the *Penal Code*.

2. The particulars of the offence being that on 1st may 2022 at about 0300hrs at Sofia Village in Tala location of Matungulu Sub county within Machakos County jointly with others not before court being armed with dangerous weapon namely panga robbed Alex Muinde Makumi of his mobile phone make Neon Pro, two speakers make pioneer, one blue tooth device and cash kshs 6000 all valued at kshs 19,500 and immediately before the time of such robbery injured the same Alex Muinde Makumi.

3. After hearing and analyzing the testimonies of the four prosecution witnesses and also the testimony of the appellant, the trial Magistrate found the appellant guilty on the charge of defilement, convicted him and sentenced him to death.

4. Aggrieved by the Judgment the appellant preferred this appeal which according to the Amended Petition is premised on the following grounds;

    1. The Learned trial magistrate erred in law and facts by not evaluating and analyzing the evidence in record as the charges were not proved against the appellant beyond reasonable doubt as provided by law.

2. The Learned trial magistrate is faulted for not finding that the there was no evidence to prove the charge of robbery.

3. The Learned trial magistrate erred in law and facts by failing to appreciate the defence tendered by the appellant hence contravened Section- 111 of the *evidence Act*.

4. The Hon. Magistrate erred in matters of law and fact by awarding a harsh and disproportionate sentence in total disregard to the particular circumstances of the case and the Judiciary sentencing policy guidelines.

5. The Appeal was canvassed by way of written submissions.

6. The Appellant submitted that that this was a case which has been coiled to become the Robbery with violence with no existing circumstances to prove the same. There was no any evidence tendered to the effect that the complainant was attacked by the other eye witness. The investigating officer did not mention on how he conducted the investigation and efforts to arrest other people mentioned. This is because the complainant was attacked by members of the community who were not willing to testify. Be it as it may, it is worth noting that no witness volunteered to testify on what transpired on the material day.

7. The Appellant also submitted that the appellant submits that Hon. Magistrate erred as the prosecution did not establish a prima facie case. The case was not proved beyond reasonable doubt as required in criminal proceedings.

8. The appellant also contended that the magistrate completely disregarded the appellant's defense by not assigning it any weight. The appellant was already prejudiced from unsafe mode of identification. In his sworn defense, the appellant was categorical that he on the material date he was tired and did not go out. He denied being employed by Muteti and he confirmed that the witness did not mention him in his first report.

9. For the Respondent it was submitted that the prosecution discharged its burden of proving the offence beyond reasonable doubt; that the three ingredients of the offence of robbery with violence were proved.

10. It was submitted that his defense did not create any doubt in the prosecution case and the trial court was right in disregarding it.

11. It is finally submitted that the death sentence meted was fair as there were aggravating factors which led to that being that the appellant and others were armed with dangerous weapons and serious injured the complainant who was admitted for two weeks and was still sick.

Determination

12. I have considered the Appeal, the Trial Court record and the submissions of parties on record.

13. This is a first Appeal and in the case of Okeno v Republic [1972] EA 32 the court 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 (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own

findings and draw its own conclusions. 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 the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

14. It is trite that all criminal offences require proof beyond reasonable doubt. Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372 stated as follows:

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

15. 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*. According to the Trial Magistrate, the Prosecution proved the case beyond reasonable doubt.

16. Based on the grounds of appeal, the issues that emerge for determination are as follows:-

    a. Whether the Prosecution proved the offence of Robbery with violence to the required standard

    b. Whether the evidence of identification sufficiently pointed to the Appellant

    c. Whether the Trial Court sentence of death penalty to the appellant failed to commensurate the offence charged.

Whether the Prosecution proved the offence of Robbery with violence to the required standard

17. According to the charge sheet, the Appellant was charged for the offence of Robbery with violence pursuant to Section 296 (2) of the *Penal Code*. Under the provision, it is provided that:-

> " 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.

18. As read with Section 295 of the Code where 'Robbery' has been defined as follows:-

> " 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"

19. What constitutes the offence of Robbery with violence was well captured in the case of Olouch vs. Republic (1985)KLR where the Court of Appeal stated as follows:-

> " ...Robbery with violence is committed in any of the following circumstances:
>
> The offender is armed with any dangerous and offensive weapon or instrument; or
>
> The offender is in company with one or more person or persons; or

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."

20. In the case of *Dima Denge Dima & Others vs. Republic, Criminal Appeal No. 300 of 2007*,it was stated that:

> "...The elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence."

The offender is armed with any dangerous and offensive weapon or instrument

21. PW1 testified that he heard noises telling him to open the door and he identified the voice of Edward Wafula who was an employee in the neighborhood. He saw five people with the help of security lights. They had pangas, slashers and other crude weapons. One Muteti attacked him with a panga by cutting him on his head and hands and the others joined in hurting him. He was carried to the bush to die but the neighbours took him to hospital for treatment.

The offender is in company with one or more person or persons

22. PW1 testimony revealed that he saw five people with the help of his security light and was able to identify Edward who was an employee in the neighbourhood.

offender wounds, beats, strikes or uses other personal violence to any person

23. PW1 testified that he was cut by a panga on his head and was taken to the push to die. PW3 Dr. Daniel Katua produced a p3 form where he stated that there was history of assault, injuries in the forearms, face and lower limbs. Head multiple cut wound, left side of head cut, cut wound on the left hip joint, upper limbs were swollen, fracture on the left tibia. He concluded that sharp and blunt objects were used to harm the complainant.

24. The Court is satisfied that the facts are conclusive to constitute an offence of Robbery with violence. PW1 was injured. The assailants who were five were armed with pangas and other crude weapons which they used to injure PW1 who sustained injuries assessed by Lilian from Kangundo Level 4 Hospital.

25. On Whether the evidence of identification sufficiently pointed to the Appellant, PW1 testified that with the help of security light he was able to identify the appellant amongst the 5 people who entered his compound. The appellant was an employee in the neighbourhood.

26. The evidence of PW1 is not of identification of the Appellant but of recognition of Appellant as was stated in the case of Anjonini & 4 Others vs. Republic [1980] KLR 59 the CoA held as follows:

> ".....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."

27. In Peter Musau Mwanzia v Republic [2008] KECA 92 (KLR) the CoA stated as follows;

> "We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a

relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question....."

28. The Court's view is that the facts clearly establish that the Appellant were properly identified by PW1.

29. The appellant in his testimony stated that the evidence on record did not touch on him and that he was charged for an offence he did not commit.

30. The appellant merely denies the charges without giving any conclusive rebuttal to the prosecution's case.

31. In the upshot, the Court finds that the conviction was based on sound evidence on record. The same is upheld.

32. On the issue of sentence, the Appellant was sentenced to serve the death penalty which he termed as harsh and excessive.

33. Under Section 296(2) of the *Penal Code* the offender shall be sentenced to death. The Trial Court sentenced the Appellant to death penalty. The sentence imposed by the trial court is therefore lawful.

34. Indeed, in Bernard Kimani Gacheru V Republic [2002] KECA 94 (KLR) the Court of Appeal restated that:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

35. Since the decision of the Supreme Court in Muruatetu II there has been pronouncement on the constitutionality of the mandatory sentence of death in respect to the offence of robbery with violence either by the Supreme Court or the Court of Appeal. The mandatory death sentence therefore, remains a lawful sentence. In view of the aforegoing and having upheld the conviction, I find that the sentence is also lawful and the appeal is dismissed in its entirety.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 31ST DAY OF JULY 2025.

E.N. MAINA

JUDGE

In the presence of:

Ms Nyauncho for the state

Appellant (virtually from Kamiti Max Prison)

Miriam- Court Assistant (Interpreter)