



**Otieno v Republic (Criminal Appeal 62 of 2018)
[2023] KEHC 374 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 62 OF 2018
NW SIFUNA, J
JANUARY 27, 2023**

BETWEEN

PAUL KENNEDY OCHIENG OTIENO APPELLANT

AND

REPUBLIC RESPONDENT

(From the conviction and sentence of Hon. M. Kinyanjui (SRM) in Kandara SRM COURT CRIMINAL CASE NO. 152 OF 2017, Delivered 20th November 2018)

JUDGMENT

Introduction

1. This is an appeal arising from the judgment of Hon M. Kinyanjui (Senior Resident Magistrate) in Kandara PM's Court Criminal Case No. 152 of 2017 wherein the Appellant who was charged with the offence of robbery with violence (contrary to section 296(2) of the penal code) was convicted and sentenced him to death. The Appellant has filed this appeal against the said conviction as well as the said sentence imposed by the trial court.
2. The facts of the charge were that on August 30, 2016 at Blue Post Thika-Gatanga road within Murang'a County, the accused jointly with others not before court, while armed with a dangerous weapon namely a pistol, robbed Kevin Muriira Nkiria of a motor vehicle Reg. No. KBP 447 Make Toyota Townace valued at Ksh 600,000= and assorted types of cartons of wines and spirits valued at Ksh 450,000= all totaling to Ksh 1,050,000= and immediately before such robbery threatened to use actual violence to the said Kevin Muriira Nkiria. Aggrieved by the said decision of the trial magistrate, the Appellant vide his undated Petition of Appeal filed on 10/12/2018 appealed against the conviction and sentence imposed on him by the trial court. He later through the law firm of F.N & Brian Advocates filed an Amended Appeal (christened "Amended Grounds Of Appeal"), but which interestingly lacks the prayers being sought by the Appeal. Although this is unorthodox, I will in the interest of



substantive justice overlook that defect, and read the initial Appeal as well as Amended Appeal which is also on record so as to decipher and distill the totality of the Appellant's Appeal herein.

The Duty of the Court on a First Appeal

3. This being a first appeal, this honourable court as a first appellate court is under duty to re-evaluate the evidence presented at trial and draw its own independent conclusions. This it is to do, while bearing in mind that it neither saw nor heard the witnesses testified at trial and that some trial issues such as the demeanor of witnesses are best left to the trial court. There many decisions on this point by superior court, one of which is *Okeno v. R* [1972] E.A 32. For that reason have in deciding this appeal re-evaluated, re-assessed and re-analysed the evidence that was adduced in the trial court, and which is on record, as the trial court availed in this appeal both a record of appeal and the original court file that has the original copy of the charge sheet, the handwritten record of the trial, and the record of exhibits produced at trial. I have also warmed myself that as I undertake this task, I did not see or hear the witnesses that testified at trial. Fortunately, enough no ground of appeal has turned on the demeanor of the witnesses or any of them.

The Trial In The Subordinate Court

The Prosecution's Case

4. At trial, the prosecution called a total of seven witnesses against the Appellant, and whose cumulative narration can be summarized as follows. That on August 30, 2016, a lady called whose name was later found to be Caroline, rang Kevin Muriira Nkiria the complainant herein who is a Sales Representative with Kapari Ltd a distributor of wines, spirits and beer. That in the said phone call she introduced herself as a new customer who wanted to buy from the complainant the said merchandise, and that she has shops in Kenol and Thika. That after that they agreed that they meet at Blue Post in Thika, he went to the office and loaded the ordered wines and spirits into a Toyota Townace M/V Reg No. KBP 447 F and after confirming with the said lady that she was waiting for him, he set off for Thika and met the said lady near Ndururumo Police Post, where she got into the vehicle and directed him to drive on towards the ACK Church on Gatanga road. When they reached the said church, she told him to stop and wait for her worker who was to assist to carry the goods and who will give him directions. The lady excused herself and left allegedly for her shops in Kenol. Shortly, the said boy (who later turned out to be the Appellant arrived and entered the vehicle. They drove on a rough road, and driving for a short while the said occupant whipped out a gun and commandeered and ordered the complainant to park the car by the roadside. Shortly, a Probox which had three occupants arrived and blocked the way of the Townace. Then three people came out of it and entered the townace tand told the complainant to close his eyes. That they harassed him, attempted to drug with a certain concoction, and also robbed him of his two phones and forced him to give them his M-Pesa PIN, which they used to withdraw money from his M-Pesa Account. That they then bound his limbs with cello-tape covered his mouth and even tied his limbs up. That after that robbery, they later abandoned him in the bushes then drove off in the two vehicles. That he later got help from a Samaritan and thereafter got help from a good Samaritan, who directed him to the Police and got get. Later the appellant was arrested and later arraigned him in court with the charge of Robbery with Violence. After a length trial, the appellant was convicted of the offence and sentenced to death.'

The Defence Case

5. It is noteworthy in his defence, the Appellant elected not to testify on oath, hence gave unsworn statement and did not call any witness(es). He in in the said unworn statement endeavoured, and



extensively so but unsuccessfully, to poke holes in the prosecution's evidence as well as faulting the manner in which investigations were conducted. Yet he had through cross-examination the said

This Appeal

6. The Appeal is against both conviction and sentence, and is ostensibly based on 10 grounds, as the Appellant initially acting for himself instituted this Appeal vide his undated Petition of Appeal of 6 grounds, but later through his current Advocates F.N Brian Advocates filed an Amended Appeal that has 10 Grounds of Appeal. The initial Appeal filed on December 10, 2016 lists the following grounds of appeal (Quoted Verbatim):
 1. I pleaded not guilty to the charge
 2. The death sentence imposed on me was excessive bearing the defense and mitigation factors I adduced before the trial court.
 3. The trial magistrate erred in both law and facts in failing to note that the prosecution did not supply me with copies of vital and relevant documents in question to challenge their evidence which the trial magistrate relied on like the memo form and documents from Safaricom communication data.
 4. The learned magistrate erred in both law and facts by relying on insufficient evidence.
 5. The parade was conducted in favour of the complainant and the members of the parade were well known to the complainant and I was denied my right to involve a friend.
 6. My defence was rejected without any reasonable explanations.
7. The petitioner's said amended appeal dated October 6, 2020 (and which is christened amended grounds of appeal) was filed on October 7, 2020, and lists the following grounds of appeal:
 1. The learned trial magistrate erred both in law and I fact in failing to note that the charges brought against the Appellant were defective within the meaning of section 214(1) of the *Criminal Procedure Code*.
 2. The learned trial magistrate erred both in law and in fact in failing to note that no evidence of the Appellant being armed with a dangerous or offensive weapon was produced in court, and/or no other person was arrested and charged, and that no evidence of threat or actual used of violence was presented in court to support the charge of robbery with violence within the meaning of section 296(2) of the *penal code*.
 3. The learned trial magistrate erred both in law and in fact in failing to note that the description of the Appellant was not given to the police in the first report.
 4. The learned trial magistrate erred both in law and in fact in relying on the evidence of a single identifying witness to convict the Appellant herein when the said evidence did not meet and satisfy the laid down legal threshold standards of pointing any guilt to the Appellant.
 5. The learned trial magistrate erred both in law and in fact in failing to note that the identification parade was not conducted in accordance with the provisions of the Police Force Standing Orders therefore arriving at a wrong decision of convicting the appellant.
 6. The learned trial magistrate erred both in law and in fact by not directing its mind to the effect of the prosecution's failure to avail essential witnesses such as representatives of the mobile phone service provider and those of the motor vehicle tracking company.



7. The trial magistrate erroneously convicted the Appellant by relying on the doctrine of recent possession whereas the evidence adduced over the same was not cogent enough.
8. The learned trial magistrate erred in law and in fact in failing to note that the evidence adduced before the court was circumstantial therefore not fulfilling the requirements set out in criminal liability.
9. The learned magistrate erred in law and in fact in convicting on the prosecution evidence which fell far short of the probative value to convict criminal law.
10. The mandatory death penalty imposed on the Applicant was arbitrary and unconstitutional as it did not take into consideration mitigation and varying degrees of gravity and culpability.

Issues For Determination In This Appeal

8. The issues for determination in this Appeal may be summarized as follows:
 - a. Whether the charge as drawn in the charge sheet defective is and cited a wrong provision of the law in a charge of Robbery with Violence.
 - b. Whether the offence of robbery with Violence with which the Appellant was charged was proved or not, and to the required legal standard of proof (i.e beyond reasonable doubt) and whether the totality of the evidence on record was sufficient to sustain the conviction.
 - c. Whether the Appellant was positively identified and connected to the robbery and whether the identification parade at which the complainant picked him out was properly conducted.
 - d. Whether the death sentence imposed on the Appellant is abolished, illegal and/or unconstitutional in Kenya; and whether the same was arbitrary, warranted and unjustified in the circumstances of this case.

The Parties' Submissions

9. This Appeal having proceeded by way of written submissions, each party filed their submissions and the same were highlighted on January 17, 2022 when the Appeal came up for hearing.

The Appellant's Submissions

10. The Appellant has in his written submissions filed through his advocate filed on March 15, 2022, challenged his conviction, arguing that the same was arrived at in error without being supported by the evidence on record. On the burden of proof, he argues that the prosecution failed to discharge its burden of proof as required under Section 107 of the *Evidence Act* (Cap 80 Laws of Kenya). Further that the case against him was not proved to the standard required in criminal cases, which is that the prosecution ought to have proved their case beyond reasonable doubt. That therefore according to him the case against him was unproved and that he was therefore wrongly convicted and ought to have been acquitted as according to him the totality of the evidence adduced by the prosecution against him in this case was not sufficient to sustain or warrant conviction.
11. He has further contended that the trial court misdirected itself on the ingredients of the offence of Robbery with Violence, key in this regard was his assertion that the prosecution in its evidence before court failed to discharge its burden of proof when it inter alia, failed to prove three elements of the offence of robbery with violence, being



- (a) That the accused was at the time of committing the robbery armed with a dangerous or offensive weapon or instrument
- (b) That he was in the company with one or more other person or persons
- (c) That at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used other personal violence victim.

Further that the alleged gun (pistol) was not recovered. Also that PW 7 No. 56883 CPL Simon Lubuya of Flying Squad Makuyu was allowed to produce electronic evidence without the Certificate required by the Evidence Act.

- 12. He has further submitted that the charge as framed in the charge sheet, was defective in that the accused should have been charged under Section 295 of the penal code (i.e the definition section that defines and creates the offence), rather than section 296 (2) which is the penal section that prescribes the penalty for the offence of Robbery with Violence for which the appellant was charged.
- 13. He has in his appeal further contended that the doctrine of recent possession, which the trial court applied in arriving at the conviction, does not apply to this case, in that he was not found in possession of the said Toyota Townace was never found in his possession. This I will address in my findings hereinafter.
- 14. He has also faulted the death sentence imposed on him, describing it as unlawful, arbitrary and unconstitutional. On this point he has argued that he is relying on the now famous Muruatetu Case (Francis Karioko Muruatetu & Anor V. Republic [2017] eKLR) as well as Maingi & 5 Others v. DPP wherein he firmly holds that Majanja J declared the death sentence unconstitutional. The Appellant has in the end urged this honourable court to allow this Appeal as well as quash his said conviction and set aside the death sentence imposed on him. And which his Advocate in his closing submissions faulted as not geared towards reforming the offender.

The Respondent's Submissions

- 15. The DPP has in its filed submissions on record hailed the Appellant's conviction and sentence as being properly arrived at, and the said death sentence as being not only lawful and constitutional under Kenyan law, but also as being befitting of the circumstances of this case as well as commensurate with the gravity of the offence of robbery with violence, for which section 296 (2) of the penal code (Cap 63 Laws of Kenya) prescribes a death sentence. Further that the Appellant was positively identified, and that the circumstances which favoured positive identification; there was sufficient light and there was conversation between the appellant and the complainant, as well as between the appellant and PW 3 and PW 4 the police officers who flagged down on the material day while he was driving the Toyota Townace.
- 16. The prosecution has in its submissions submitted that the robbery case against the appellant was proved beyond reasonable doubt on all the ingredients of the offence and through the identification evidence on record connected the appellant to the robbery and placed him at the scene. That the burden of proof was so ably discharged and the case proved beyond reasonable doubt.
- 17. Another point as argued by the appellant in his appeal is on whether the doctrine of recent possession applies to this case as purported by the trial magistrate in his judgment. While the appellant has in his appeal and in his submissions argued that the recent possession could not apply in this case, the prosecution has in its submissions argued that the doctrine applies as PW 3 and PW 4 testified that



they found the appellant driving the Toyota Townace that he and his accomplices had stolen from the complainant.

18. In the end, the prosecution has in its said submissions submitted that based on the evidence on record, the appellant's conviction was safe, and urged this court to uphold it. Regarding the appellant's appeal against sentence, the prosecution has in its submissions stated that the Supreme Court in *Francis Kariuki Muruatetu & 5 Others V. Republic* {2017} eKLR dealt with the constitutionality of mandatory sentences. I respectfully disagree with this interpretation of the Supreme Court's decision in that case. On this, the prosecutor like many other lawyers including the appellant's advocate on record have misinterpreted the said decision and therefore fallen into error. An error that has for long engineered a food gate for convicts, who have rushed to courts for appeals or review of their sentences. I should at the onset clarify that the said rush prompted the Supreme Court to later issue directions to the effect that that decision is applicable to murder cases only, and not any other cases. On this point see the case of *Andrew Amatala v. Republic* [2021] eKLR. Be that as it may, the prosecution has nevertheless in the end urged this honourable court to consider the aggravating circumstances in this case, and uphold the sentence; and that in the event the court is inclined to reviewing the appellant's death sentence, then it should be guided by Kenya's *Sentencing Guidelines* and impose a similarly deterrent sentence.

Analysis And Determination

19. I now proceed to make my determination first on the issues I have identified hereinabove as being the issues for determination in this appeal, and finally on the fate of this appeal as well as the orders that commend themselves to me for making. The said issues I have already enumerated herein thus:
- (a) Whether the charge as drawn in the charge sheet defective and cited a wrong provision of the law in a charge of Robbery with Violence;
 - (b) Whether the offence of robbery with Violence with which the appellant was charged was proved or not, and to the required legal standard of proof (i.e beyond reasonable doubt) and whether the totality of the evidence on record was sufficient to sustain the conviction;
 - (c) Whether the appellant was positively identified and connected to the robbery and whether the identification parade at which the complainant picked him out was properly conducted; and
 - (d) Whether the death sentence imposed on the appellant is abolished, illegal and/or unconstitutional in Kenya; and whether the same was arbitrary, warranted and unjustified in the circumstances of this case.

a. Whether the charge as drawn in the charge sheet defective and cited a wrong provision of the law.

20. The appellant has in his appeal contended that the charge on which he was convicted and sentenced, was defective. I have carefully perused the charge sheet. Notably, after the charge sheet setting out the offence charged as robbery with violence contrary to section 296(2) of the *penal code*, it set out the particulars of the offence as follows:

“Paul Kennedy Ochieng Otieno: On August 30, 2016 at Blue Post Thika-Gatanga road within Murang'a County, jointly with others not before court, while armed with a dangerous weapon namely a pistol, robbed Kevin Muriira Nkiria of a motor vehicle Reg. No. KBP 447 Make Toyota Townace valued at Ksh 600,000= and assorted types of cartons of wines and spirits valued at Ksh 450,000= all totaling to Ksh 1,050,000= and immediately before such robbery threatened to use actual violence to the said Kevin Muriira Nkiria.”



21. There are legal provisions as well as decisional law by superior courts on the test for determining whether a charge is defective, and more particularly for the offence of robbery with violence. I begin with section 134 of the *criminal procedure code*, which provides that:

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with particulars as may be necessary for giving reasonable information to the nature of the offence charged.”

22. As for the High Court, Ngugi J (as she then was) in *BND V. Republic* [2017] eKLR, while in laying down the test to be followed in determining whether a charge sheet is defective, stated as follows:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence charged should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence.

The answer from our decisional law is this: the test for whether a charge sheet is fatally defective is a substantive one: was the accused charged with an offence known to law and was it disclosed in a sufficiently accurate fashion to give the accused adequate notice of the charges facing him” If the answer is in the affirmative, it cannot be said in any way other than a contrived one that the charges were defective.”

23. Court of Appeal in *Joseph Njuguna Mwaura & 2 Others v. Republic* [2013] eKLR while considering what should be contained in a charge sheet in a case of robbery with violence, stated as follows:

“This issue has been dealt with by this court before in *Simon Materu Munialu v. Republic* [2007] eKLR (Criminal Appeal 302 of 2005). This court was confronted with the issue whether a charge sheet citing only section 296 (2) of the *penal code* was sufficient. This court in that appeal considered the submission that section 295 of the penal code creates the offence of robbery, but held that:

“...the ingredients that the appellant and for that matter any suspect before the court on a charge of robbery with violence in which more than one person takes part or where dangerous or offensive weapons are used or where a victim is wounded or threatened with actual bodily harm or occasioned actual bodily harm is section 296(2) of the *penal code*. It is these ingredients which need to be explained to such accused person so as to enable him know the offence he is facing and prepare his case. These ingredients are not in section 295 which creates the offence of robbery. In short, section 296(2) is not only a punishment section, but it also incorporates the ingredients for that offence which attracts that punishment. It would be wrong to charge an accused person facing such offence with robbery under section 295 as read with section 296(2) of the *penal code* as that would not contain the ingredients that are in section 296(2) of the *penal code* and might create confusion.

In our considered view, section 137 of the *criminal procedure code* would be complied with if an accused person is charged, as the appellant was, under section 296(2) because that section 137 requires one to be charged under the section creating the offence and in the case of robbery with violence under section 296(2), that section creates the offence by giving it the



ingredients required before one is charged under it and it also spells out the punishment. We reject that ground of appeal.” (Emphasis added)

24. The court further cited its decision in *Joseph Onyango Owuor & Cliff Ochieng Oduor vs R* [2010] eKLR, where it stated as follows:

“Similarly in *Joseph Onyango Owuor & Cliff Ochieng Oduor v R* [2010] eKLR (Criminal Appeal No 353 of 2008) the Court was again confronted with a similar situation. In that appeal, the appellants had submitted, as have the appellants in the present appeal, that section 296 (2) of the penal code does not create an offence but merely makes provision for the punishment for robbery with violence. The court had this to say on the issue:

“Mr. Musomba submitted that unless the aforementioned sub-section (section 296) is read with section 295 of the *penal code*, then reliance on section 296(2), above, without more will not disclose the commission of an offence. Section 295 of the *penal code* defines the offence of robbery. Section 296(1) and 292(2) of the *penal code*, have a common marginal note, namely “punishment of robbery”. In this country marginal notes are as a general rule, read together with the section. By the ejusden (sic) generis rule, section 296 (1) and 296 (2), have to be read together. Section 296(1), above, provides that a person who commits the felony of robbery is liable to imprisonment for fourteen years. So that when dealing with the offence under section 296(2) of the *penal code* one has to read the statement of the offence as referring to the aggravated circumstances of the offence, or the robbery provided for under section 296(1) of the *penal code*.”

25. It further observed that section 295 of the *penal code* is merely a definition section, and held as follows:

“Sections 296 (1) and 296 (2) of the *penal code* deal with the specific degrees of the offence of robbery and have been framed as such. We agree that this is the correct proposition of the law. Indeed, as pointed out in *Joseph Onyango Owuor & Cliff Ochieng Oduor v R* (Supra) the standard form of a charge, contained in the Second Schedule of the *criminal procedure code* sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the *penal code*. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

26. After carefully read contents of the charge sheet presented by the prosecution in the trial court, as well as the above cited authorities, I find that the section cited herein i.e section 296(2) of the *criminal procedure code* (Cap 75 Laws of Kenya) is the correct section for a charge of robbery with violence, such as was the case in the trial court. I further find that the particulars of the offence as stated in the said charge sheet are von all fours with the essentials of the offence of the said offence. For those reasons I firmly hold that the charge as presented to court was not defective. Further, the appellant’s contestation is an afterthought after he has been convicted, as he would have at the time of plea-taking objected to the charge. This is by dint of section 89 of the *Criminal Procedure Code*.



a Whether the Offence of Robbery With Violence With Which the Appellant Was Charged Was Proved to the Required Legal Standard

Elements of the Offence of Robbery with Violence

27. The Appellant has in his Appeal contended that the prosecution failed to prove the ingredients of the Offence of Robbery with Violence. The elements of the offence of robbery with violence were set out by the Court of Appeal in *Oluoch v. Republic* [1985] KLR, where it stated as follows:

“Robbery with violence is committed in any of the following circumstances:

- a) The offender is armed with any dangerous and offensive weapon or instrument; or
- b) The offender is in company with one or more person or persons; or
- c) 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”

28. In *Dima Denge Dima & Others v. Republic*, Criminal Appeal No. 300 of 2007:

“...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.”

29. In the instant the Accordingly, the prosecution proved beyond reasonable doubt that;

- (i) the offenders were armed with dangerous and offensive weapon or instrument;
- (ii) the offender were in company with one or more person or persons; and
- (iii) at or immediately before or immediately after the time of the robbery the offenders wounded, beat, strike or used other personal violence them.

30. Nonetheless, as the incident occurred at night, care should be taken to ensure the appellants were positively identified as the perpetrators of the offence. The court in *Wamunga v. Republic* (1989) KLR 424 at 426 had this to say:

“Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.”

31. From the prosecution’s evidence on record the appellant met the complainant and the appellant rode in the complainant’s vehicle in broad daylight, and for some time before the appellant and his accomplices bound the complainant’s limbs with cello tape and abandoned him in the bushes. That interaction was at such a proximity, and I do not find any element of a mistake in recognizing the appellant and picking him out at the identification parade conducted at the police station. The same goes for identification evidence by PW 3 (NO. 68439 PC Johanna Cheruiyot Rono) and PW 4 (NO. 84075 PC Bernard Yegon) the appellant’s fellow police officer, and who stated that they have known him for a long time as he was their Judo instructor at police college. From the complainant’s evidence in cross-examination, the abduction and robbery took about an hour, he stated that it was from about 1.00 PM to 2.00 PM. During which time the appellant whipped out a gun, and together with his accomplices



- commandeered the said vehicle. The complainant further stated that the team closed his eyes, forced him to drink a liquid that had a tablet, removed him from the townace vehicle he was driving, put him in a probox vehicle, covered him, took from him two mobile phone, forced him to give them his M-Pesa PIN, taped his eyes, hands and mouth, and later abandoned in the bushes.
32. On this point I am satisfied with the appellant's identification by the prosecution's witnesses. I do not find any element of mistake or delusion on the part of the witnesses in the identification of the appellant as one of the people who robbed him on the material day. The same goes for the evidence of PW 3 and PW 4, who are the police officers who flagged the appellant down while he was driving the complainant's stolen vehicle and who thereafter after they had entered the said vehicle drove with them as passengers, towards the police station. Indeed the obtaining circumstances favour positive identification and do not exhibit any particular difficulty in the identification of the appellant. Although the said gun was neither recovered nor produced in court as an exhibit, I am satisfied that there was a threat of use of use by the appellant and his accomplices, or justifiably reasonable apprehension thereof on the part the complainant.
33. Besides, the evidence by the prosecution beyond any reasonable doubt that when committing the said robbery, the appellant was armed with a gun, and was in the company of others. And that while committing the said robbery, the appellant not only threatened to use force, but that he immediately before and during the said robbery used actual force on his victim the complainant. Such force having been applied to the complainant, immediately before and during the robbery.
34. Before I tackle the ground of the constitutionality, lawfulness as well as aptness of the death sentence the subject of this appeal, I need to deal with the evidentiary weight to be attached to the appellant's unsworn statement that he gave when the trial court put on his defence.

The Appellant's Unsworn Statement at trial

35. Before I turn to the sentence imposed by the trial court, I should comment on the defence offered by the accused when he was in compliance with section 211 of the *CPC* put on his defence. It is noteworthy in his defence, that the appellant elected not to testify on oath, hence gave an unsworn statement and did not call any witness(es). He in in the said unsworn statement endeavoured, and extensively so but unsuccessfully, to poke holes in the prosecution's evidence as well as faulting the manner in which investigations were conducted. While he had through cross-examination attacked the credibility of the prosecution witnesses, it is curious that even with the seriousness of the charge against him as well as the gravity and magnitude of the sentence likely to by law be imposed on him if convicted, he chose to give an unsworn statement thereby carefully tucking away his story, and securely shielding as well as safely insulating himself from being subjected cross-examination. This had the net result of his evidence remaining unprobed and his credibility untested.
36. I am not in any way faulting the legality of his election to give an unsworn statement. What is alarming is the logic and appropriateness of giving an unsworn statement in answer to such serious charges and imminence of the most dreaded and terminal sentence such as death. Logically, his said election has had the unfortunate consequence that his story regarding the said robbery or allegation thereof, will forever remain untold, as he will never testify on it, given also that appeals are by law prosecuted by way of submissions on (oral or written). Having, from the filed record of appeal and the record in the original trial court file, known the prosecution's story, this honourable court would have wished to know his story as well. Unfortunately, this will never be told in that while the appellant has in his unsworn statement merely and technically attacked the prosecution's evidence and testimonies of its witnesses, he has not given his side of the story, including how he was arrested and brought to court.



Could there be anything he was hiding from court? After all the rendition of his unsworn statement was in the manner of closing submissions in the case.

37. In his unsworn statement rendered in the style of submissions concentrated on merely casting doubt on the testimonies of all and each of the prosecution witnesses and on technicalities, and choreographed in a manner that totally avoided to give his side of the story, for instance where he was at the time of the alleged offence (alibi) and whether he knows or has ever met the complainant. Including whether he knows the arresting officers, and who had in their evidence stated that he was their judo instructor at Police Training College hence knew him well. This is strange. However even as I say this, I am fully aware that the burden of proof in that case remained on the complainant and his witnesses to prove their case against the appellant, and he as an accused person was under no legal duty to prove his innocence and was entitled to even remain silent and let the trial court deliver its verdict on the prosecution case alone.
38. In my opinion, an unsworn statement is strictly speaking no evidence, as without being subjected to cross-examination, its veracity and the credibility of its maker remain untested, and so is who he is, his position in life, and even his character. As under section 154 of the *Evidence Act* (Cap 80 Laws of Kenya) a witness may in cross-examination be asked questions which tend:
- a. to test his accuracy, veracity or credibility;
 - b. to discover who he is and what is his position in life;
 - c. to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly incriminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.
39. Little if any premium should be accorded to its contentious and substance. This position has been taken umpteen times by superior courts on the strength, effect and evidentiary value to be attached to an accused's unsworn statement, Emukule J in *Mercy Kajuju & 4 Others v. Republic* [2009] eKLR had this to say on unsworn statement of an accused:

“The first point to start with in this case is the evidence of the appellant. He gave an unsworn statement, and called one independent witness Lucy Karimi (D.W.2) who gave sworn evidence. It is of course the right of an accused person to give evidence on oath and be liable to cross-examination. When an accused person elects to give an unsworn statement, he achieves two objects. Firstly, he escapes cross-examination so that the veracity of his statement is not tested by cross-examination. Secondly, he devalues the worth of his statement because little weight or credibility is attached to it.”

40. From the above analysis, I respectfully find that the offence of Robbery with Violence with which the appellant was charged in the trial court, was proved beyond reasonable doubt, hence there was enough evidence on record to support the conviction, and therefore the appellant was properly convicted. For that reason, the appeal on conviction fails, and I therefore hereby uphold the said conviction. The other limb of the appeal, and which I now embark on is on sentence. On this my rendition is as hereunder set out.

Was the Death Sentence Declared Unconstitutional or Abolished in Kenya?

41. The *Penal Code* prescribes a death sentence for the offence of robbery with violence. The trial court imposed the sentence as provided in law. I have perused the decision by the trial court and it is apparent



that the death penalty was imposed because according to the trial magistrate it was the only sentence prescribed in law at the time.

42. The appellant has in this appeal argued that the death sentence was by the Supreme Court's *Muruatetu decision* and certain High Court decisions declared unconstitutional and effectively abolished the death sentence in Kenya, and that therefore the trial court imposed an illegal sentence. Nothing can be further from the truth, as this as already stated herein is a gross misinterpretation or misunderstanding of the decision of the *Muruatetu decision*. The correct position and interpretation is that What the court did was to remove the mandatory nature of the death sentence in section 204 of the *penal code* for being inconsistent with the *Constitution*; and held that courts have the discretion to impose a sentence other than death in accordance with the circumstances of each case. Undeniably, the death penalty is still prescribed in law hence it is a lawful, legal and constitutional sentence that courts may impose for offences for which the law has prescribed- currently the offences of treason, Robbery with Violence, and murder; under sections 40 (3), 204 and 296(2) of the *penal code*, respectively. Death sentences under these legal provisions only, and for these offences only, are constitutional as the *constitution* in article 26 allows the taking away of life in execution of a lawful sentence of a court of law.
43. Indeed, the directions given by the Supreme Court on July 6, 2021 in the *Muruatetu Case* were *inter alia* that the said decisional law is not an authority to declare all mandatory or minimum sentences unconstitutional. Its application was limited to murder cases falling within its scope. Therefore, this being a case for robbery with violence, the increasing requests by the appellants such cases for review of sentence on the basis, the *Muruatetu decisions* are clearly misconceived. Notably each appellant or applicant for review has to argue his case on the basis of the law and facts of his case, and the courts have a latitude to make a decision according to the facts and circumstance of each particular case.
44. The question that begs for an answer in this case is whether there is any lawful reason to interfere with the discretion of the trial court in passing the death sentence. In *James Kariuki Wagana v. Republic* [2018] eKLR, Prof. Ngugi J (as he then was) observed that while the death penalty is the maximum penalty for both murder and Robbery with Violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. Further that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the appellant used excessive force, nor did he "unnecessarily injure the complainant during the robbery", and was not armed during the robbery. He therefore reduced the appellant's sentence of death to imprisonment for fifteen years, from the date of conviction.

This is indeed in Kenya's current Sentencing Policy, copies of which have been supplied to courts are readily available to judicial officers. I therefore direct that this judgment be availed to the trial court for noting.

45. In the appeal before me, all the ingredients of robbery with violence have been satisfactorily proved. The appellant, who was in the company of others, robbed the complainant, and in the course of the robbery, violence (force) was not only threatened but was also applied in binding the complainant's hands, mouth and eyes with tape. However, the appellant Paul Kennedy Ochieng Otieno was ostensibly a police officer then serving interdiction, was at the time armed with a dangerous weapon, namely a gun although he did not discharge any bullet, and no harm or grievous harm was caused to the complainant. Nevertheless, the mere sight of the gun seems to have actually scared the complainant to the bone marrow as he feared for his dear life. No wonder he even was forced hand over to his tormentors, his two mobile phones and further disclosed to them his M-Pesa PIN, which they used to withdraw money from his M-Pesa Account.



46. In the circumstances, while I have upheld the conviction, I find the sentence of death imposed on the appellant, excessive and unwarranted in the circumstances of this case. Even the aggravating factors that the trial magistrate cited in his judgment (for instance the fact of the appellant having been a police officer) do not provide adequate justification for the death sentence. The amount of force applied to the complainant was not sufficiently grave to warrant a death penalty. Although there was a threat of violence and some force subsequently applied on the complainant at the time of commission of the offence, this was in binding him up with cello tape, and neither resulted in death nor grievous or even notable harm, as no P3 form was produced in evidence. Exercising reason, these circumstances and factors at most warrant a deterrent custodial sentence, but certainly not a death sentence.
47. I have noted that the learned trial magistrate in his judgment on record remarked that he was imposing death, as mandatory sentence provided by law for the offence of robbery with violence. When he stated that “The law provides for a mandatory sentence and for that reason “I do sentence the accused to death” (Quoted verbatim). The learned trial magistrate by this statement appears to be of the persuasion that as the penal code has prescribed a death sentence for the offence of robbery with violence, his hands are tied. That is a misstatement of Kenyan law as it obtains currently, because the decisional law espoused in many of the decisions of superior court in Kenya, including the ones cited in this judgment, are for courts exercising discretion even in such cases, and frown upon provisions that curtail courts discretion in sentencing, ty of Kenyans, and such incidents are a betrayal of the public trust that Kenyans need to have in our Police Service. At the time of committing the offence, the appellant a police corporal was serving interdiction for desertion. Being a person trained in the use of guns, his being in illegal possession of a gun and actually using it in the robbery in question, makes him a dangerous person that should be kept away from the public by way of a custodial sentence. I say this because the Appellant has at paragraph 41 urged this court to give him a non-custodial sentence.
48. This is a case that deserves a reasonably proportionate, but deterrent sentence that will send a signal to would-offenders who may want to take the same route as the appellant. Just as said by the learned trial magistrate in her judgment, police officers need to know that they have a special responsibility of protecting the lives and property of Kenyans, and such incidents are a betrayal of the public trust that Kenyans need to have in our Police Service. At the time of committing the offence, the appellant a police corporal was serving interdiction for desertion. Being a person trained in the use of guns, his being in illegal possession of a gun and actually using it in the robbery in question, makes him a dangerous person that should be kept away from the public by way of a custodial sentence. Isay this because the Appellant has at paragraph 41 urged this court to give him a non-custodial sentence.
49. Finally, I set aside the death sentence imposed by the trial court and substitute it with a term of imprisonment for 20 (twenty) years to commence from the date of the sentence of the lower court, i.e December 9, 2018, so as to include the period already served.
50. In arriving at this sentence, I have also taken in consideration the mitigation that the appellant gave at the time of conviction. Therefore, this appeal succeeds partially in terms only of substitution of the death sentence with the custodial sentence hereinabove stated.

DATED, SIGNED AND DELIVERED AT MURANG'A this 27TH Day of JANUARY, 2023

PROF N. SIFUNA

JUDGE

Delivered in the Open Court

In the Presence of:



1. Ms Otieno for DPP
2. Mr Mutoro Advocate for the Appellant
3. The Appellant
4. Quinteen Ndubi (Court Assistant)
5. Jackline Njeru (Court Assistant)

