Migwi & 2 others v Republic (Criminal Appeal E047 of 2022)
[2023] KEHC 912 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KEHC 912 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL APPEAL E047 OF 2022

LN MUGAMBI, J

FEBRUARY 17, 2023

BETWEEN

HARRISON WANJOHI MIGWI ..... 1ST APPELLANT

JACKSON GICHANGI MUTHIKE ..... 2ND APPELLANT

LUKE MURIMI ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against conviction and sentence of the Senior Principal Magistrate's Court at Siakago (W. Ngumi, PM) dated 16th August, 2022 in Criminal Case No. 493 of 2019)

JUDGMENT

1. The appellants were charged with the offence of robbery with violence contrary to section 295 as read with Section 296 (11) of the *Penal Code*.

2. The particulars of the offence were that the appellant, on the 24th day of April , 2019 at Munyori Market in Mbeere South Sub-County within Embu County, jointly with others not before the court, while armed with dangerous weapon namely pistol robbed off David Njeru Mugo cash Kshs 80,000/- (Eighty Thousand) the Property of BPI Supermarket and at, during the time, or immediately before or after such robbery, used actual violence to the said David Njeru Mugo.

3. The alternative count to count 1 is grievous harm contrary to section 234 of the *Penal Code*.

4. The particulars being that on the 24th day of April, 2019 at Munyori Location in Mbeere South Sub-County Embu County jointly with others not before court, unlawfully did grievous harm to -

5. Count II is grievous harm contrary to section 234 of the *Penal Code*.

6. The particulars of the offence being that on the 24th day of April, 2019 at Munyori Market in Mbeere South Sub-County within Embu County jointly with others not before the Court, unlawfully did grievous harm to Robert Ireri Nyaki Alias Gitonga.

7. After a full trial, the appellants were found guilty in the counts. The In count 1 of robbery with violence they were sentenced to death. The sentences for grievous harm were put in abeyance.

8. At sentencing, the trial court went ahead and stated:

> " ...Muruatetu case was only limited to murder cases and hence the court finding itself in a situation where despite mitigation facts being measured and weighing...only one sentence is prescribed for in the case of robbery with violence and that is death by hanging. Having stated the above, I find that the only sentence is death by hanging as provided by the law. I note that the Court finds the accused guilty owing to the second and 3rd counts. The death sentence being the ultimate sentence, no other punishment can be meted. The sentences in the 2nd and 3rd counts are hence held in abeyance..."

9. The appellants appealed against the conviction and sentence based on the following grounds: -

    1. That the learned trial magistrate erred in both matters of law and fact by convicting and sentencing in a case that was not conclusively investigated and the Prosecutor's evidence was shoddy and unreliable.

    2. That the learned trial magistrate erred in both matters of law and fact by finding the appellant guilty of the offence of robbery with violence based on weapon (gun) that was recovered in the hands of other people sometime after accused were arrested and were in custody.

    3. That the learned trial magistrate erred in both matter of law and fact by failing to consider the appellant's sincere defence.

    4. That the learned trial magistrate erred by not observing that the case was poorly investigated and that there was need for forensic data report

    5. That the learned trial magistrate convicted the appellants on the basis of contradictory evidence.

    6. That the learned trial magistrate erred in law and in fact in considering issues that were not in evidence instead concentrated on extraneous issues and conjectures therefore arriving on wrong decision of convicting the appellants.

    7. The learned trial magistrate erred in law and facts by holding that the offence of robbery with violence was proved beyond reasonable doubt but failed to note that the ingredients under section 296 (2) were not proved.

    8. The learned trial magistrate erred in points of law and fact by failing to appreciate that the credibility and of the identification parade was utterly at stake as it completely faulted the procedures set out in force standing orders pertaining to an identification parade.

    9. The learned trial magistrate erred in points of law and fact by failing to consider the appellants plausible defence without considering that the same was not rebutted or rather displaced by the prosecution pursuant to the provisions of section 309 of the Criminal Procedure Code.

    10. That the learned trial magistrate erred in law and in fact by failing to appreciate that the nature of his arrest was inconsistent with guilt.

11. That no proper medical report was adduced to support the charge of grievous harm on the complainant.

12. That the trial magistrate erred in points of law and fact by failing to appreciate that the evidence adduced as a whole by the prosecution did not discharge the prosecution burden of proving its case beyond any reasonable doubt.

He thus prayed that this appeal be allowed.

10. This is a first appeal and as an appellate court, my duty is to re-evaluate the whole evidence and arrive at my own conclusions save for the fact that I must always remember that I had no opportunity to see or listen to the witnesses as they testified (See *Okeno v Republic* 1972 EA).

11. This was also reiterated in *Bakari Rashid v =s R* (2016) eKLR by the Court of Appeal which explained:

> "...On a 1st Appeal from conviction, the appellant is entitled to have the appellate court's all consideration and views on the evidence as a whole and its decisions thereof. As first appellate court, the High Court has a duty to rehear and reconsider the material evidence before the trial court. It must then make its own mind not disregarding the judgement appealed from, but carefully weighing and considering it..."

Summary of evidence

12. The prosecution evidence comprised of eleven (11) witnesses and documentary constituting the P.3 forms as well as the ballistic report that were produced before the trial court.

13. Each of the appellants gave sworn evidence in his defence.

14. This was a case involving a robbery at a Trading Centre Known as Munyori within Mbeere Sub-County. Four of the witnesses who testified before the trial Court, namely: PW2, David Mugo Njeru, PW3, Robert Ireri Nyaga, PW4, Beth Kanini and PW5- Immaculate Muthoni Mbaka gave a first-hand encounter with the robbery as they were present when it occurred. Two of the witnesses, PW 2, David Mugo Njeru and PW 3 Robert Ireri Nyaga were in fact shot and wounded while PW4- testified that she was slapped during the robbery by one of the robbers.

15. According to PW 2, David Njeru Mugo, the three robbers struck the BPI supermarket where he was working at around 7.30 P.M. They were all men and some customers were also being served. The robbers ordered everyone to lie down but he defied and jumped into the supermarket and entered the counter where PW 5 was serving the customers from. He slammed the counter door to close it but the robbers pushed hard. He put up a struggle until he was shot on the right arm. He said he was able to see the man who shot him. He described the ordeal and identification of the robbers as follows:

> "...I saw the person who shot me. It was the first accused. The second accused is the one who pushed and entered. He pulled the drawer and removed the money. After they finished, they threatened Mukami and she gave them money. As they were leaving at the door, they shot a boy who was watching. He is not an employee of the Supermarket."

16. He was rushed to Embu Level 5 Hospital where he was admitted for 3 days. He recorded a statement after he was discharged.

17. Subsequently, he was called to Kiritiri Police Station where an identification parade was conducted where he was introduced to a group of between 9-10 people and asked to see if there were any among them he may have seen on the date of the robbery incident. He stated:

> " ...I first identified the one who hurt me by shooting me...there was electricity light on the day the offence took place..."

18. In cross-examination he reiterated:

> " ...I identified the person who shot me as I saw him..."

19. Immaculate Muthoni Mbaka (PW 5) also testified that she was a cashier at the BPI Supermarket. She said when the robbers arrived and barked out the orders for everybody to lie down, Njeru (PW 2) immediately jumped into the counter where she was. She did not lie down and Njeru did not too. She described the encounter with the robbers thus:

> " ...3 men came in. One told us to lie down. I remained at the counter. Njeru came to where I was at the counter. One person stood at the door, one came to the counter and the other at the side...Njeru initially did not sit. The other person shot at Njeru on the hand..."

She then went on:

> " ...They are before the Court. The 2nd accused is the one who took the money. The 1st accused is the one who shot at Njeru. The 3rd accused was at the door. There were lights. They had not covered themselves..."

20. She stated that Kshs 80,000/- was the money that was stolen from the Supermarket that day.

Later she was invited to Kiritiri Police Station where she positively picked them out during the identification parade.

On cross-examination she indicated that it was her first time to encounter the appellants. She was also non-committal on the exact amount that was stolen and explained:

> " ...We lost about 80,000-100,00 0n that day..."

She also explained that the entire robbery lasted for about 30 minutes after which the robbers used a motor cycle to escape.

21. Beth Kanini (PW 4) was at the Supermarket as a customer. She was in the process of buying when suddenly she was slapped and fell down. She quickly gathered herself, stood up and ran out screaming. She said at first, she thought the slap was by a customer whom she was able to see. She stated:

> " ...It was the third accused. I did not see others..."

She was later called to go and record her statement at Kiritiri Police Station.

22. PW 3, Ireri Nyaga who was shot said he heard first heard a loud sound while sitting in a nearby hotel and came out only to bump into a man aiming a gun at him and who shot him on the cheek. He was able to recognize the sound as the one he had heard moments earlier. He attempted to rum but he collapsed. He was picked and later found himself at Kenyatta Hospital where he stayed undergoing treatment for almost 3 months. He was not able to identify anybody.

23. Chief Inspector Dorothy Ngaite Kamundi told Court that she was tasked by the DCIO, Chief Inspector Oludhe to conduct the identification parade. There were two witnesses who were to identify the suspects and she placed them apart from each other, one was kept at the office of the OCS and the other was taken outside the police Canteen. Members of the parade were prepared and she then briefed the appellants one by one including their right to have a family member, friend or Advocate being present during the identification. None of them volunteered any one. Eight people who were of similar general appearance as the appellant were paraded in respect of the 1st appellant first. 1st appellant picked stand in between position 4 & 5. Immaculate (PW 5) who was the 1st to identify came in and picked him out by touching. She left and the 1st appellant changed position to between 5th & 6th, then PW 2- David Njeru came in. He also picked the 1st appellant out. The process was repeated using different parade members in respect of the 2nd and 3rd appellants and those two were also picked out by the two witnesses. She asked the suspects if they were satisfied with the manner the parade was conducted and each said they were and had no complaints which she recorded in the parade forms. She signed the forms and submitted them to the DCIO. She produced the said identification forms in Court as P. exhibits 10, 11 and 12 respectively.

24. The owner of the Supermarket, Bernard Njeru Mbake (PW I) testified. He said he was a business man and apart from the supermarket business, he also supplied building materials in Munyori and Meka Market. He said on the date of the robbery he was not at the Supermarket but at home from he was attracted by screams at the shopping centre. He rushed there and found that his brother, David Njeru (PW 2) had been shot and blood was splashed all over. Immaculate (PW 5) also his sister was at the shop during the robbery. On entering the shop, he discovered the spent cartridge beneath the counter. Police Officers from Kiritiri came and took over the investigations. He estimated that almost Kshs 250,000/- was stolen that day.

25. Christine Mamai (PW 6) a Consultant Radiologist from Kenyatta National Hospital testified that Robert Ireri Nyaga (PW 3) was admitted at Kenyatta Hospital from 20/4/2019 to 9/8/2019 where among other treatment administered was internal fixation of the fracture of the jaw and surgical removal of the bullet. She produced his treatment records as well as the discharge summary as P. exhibits 3, 4 & 5.

26. On cross-examination she stated that she could not tell the whereabouts of the bullet of its surgical removal.

27. Jacinta Wakere (PW 7) produced the P.3 forms that were filled in respect of the injuries sustained by PW 2 and PW 3. She relied on treatment records to fill the P.3 form dated 20/9/2020 for Robert Ireri Nyaki (PW 3) which she produced as P. exhibit 2.

28. She produced the P.3 form filled by her colleague Dennis Mwenda in respect of PW 2- David Njeru as P. exhibit 1. In both, the degree of injury was grievous harm.

29. Molani Alfred Kahi (PW 8) a firearms examiner based at the DCI Headquarters produced ballistic report in respect of a spent cartridge that had been forwarded for examination. He findings were that the forwarded spent cartridge was a component part of ammunition in calibre 9x19mm and bore marks that were consistent with firearm discharge. Further laboratory analysis indicated it might have been fired from a pistol.

30. Sgt. Bifford Otieno (PW 9) told court that their counterparts in Ongata Rongai called the station and informed them that they had suspects who were connected to a robbery incident that had occurred at Kagio on May 15, 2009 against one Alice Wambui who was robbed Kshs 8000 and a mobile phone. They went for the suspects and upon interrogation, there was information they also

volunteered information that they had participated in the robbery at Kiritiri. They thus contacted their counterparts in Kiritiri who came for the suspects to continue with the investigations. On cross-examination the witness was pressed on the information received as a result of interrogation, to which he said:

> " ...They confessed they were involved in the case in Kiritiri. It is the 2nd accused person. I do not have any confession with me to that effect..."

31. The evidence of the investigating Officer- P. C. Samuel Kegege (PW 10) echoed information gathered from to piece together this case of which most of the witnesses had testified to already. On cross-examination he revealed that no confessions were made to him by any of the appellants.

32. The first appellant, Harrison Wanjohi Migwi testified in his defence that he is a welder and that on 20/5/2019; he was arrested while at his place of work and escorted to Baricho Police Station. He took issue with the identification report produced against him in court and explained that the circumstances under which the identification was done were weighed against him. He explained:

> " ...In the Station we were put between people. We were not given shoes and our clothes were dirty. Our clothes were not similar to those in parade. The people who were participating in the parade were not changed. They used the very same people. I did not commit the offence..."

On cross-examination, he was asked whether he heard the evidence of the Officer who conducted the identification parade as well as the other eye-witnesses account which he acknowledged.

The second appellant, Jackson Gichangi Muthike told the trial Court that he was a shoe seller at Nairobi Muthurwa Market. He said he did not know where Munyori (where the robbery was said to have occurred) was. He disputed his identification by the witnesses during the parade stating:-

> " ...I believe the witnesses were shown the photographs to identify me. The parade was conducted at Kiritiri Police Station. We were not identified together. Each of my co-accused had a separate parade. The participants of the parade that I was paraded with were not changed..."

33. The 3rd appellant, Luke Murimi Mwangi told the court that he earned a living through selling clothes at Kutus. He stated that he could not recall where he was on the date of the alleged robbery. However, he recollected that he was arrested on Saturday 25/5/2019 and taken all the way to Kiritiri Police Station. He then added:

> " ...We were taken photographs by police officers and I was told the photographs had been presented in the social media. It was easy for the persons who mentioned us saw the photos that were trending..."

Submissions

34. The appeal was disposed off by way of written submissions. At a glance, one would have thought that both submissions were in the file. However, upon close scrutiny as I wrote this judgement, I discovered that what was in the file from the State/Respondent's side did not relate to the case matter before me. The Case Number might have contributed to this confusion. This appeal is Number E047 of 2022 and has three appellants. The State submissions which were filed in this case related to Misc. Criminal Application Number E047 of 2022, from my reading of the submissions by the State, they related to a traffic case while this matter is about a robbery with violence case.

35. The submissions by Muchangi Gichugu for the appellants were properly filed. It is therefore a wonder that upon being served, the State did not move to correct this anomaly.

36. I will be referring to relevant portions of the Counsel's submissions as I delve into issues raised in this appeal.

Analysis

37. In the submissions by Mr. Muchangi he refers to several contradictions and omissions that made the prosecution evidence unreliable. For instance, in the evidence of PW 1, he submitted that he said he operated a supermarket and Mpesa Shop but he did not have any record or document with him, that he estimated the amount stolen to be Kshs 250,000/-, that he told court that the spent cartridge was recovered by a civilian one Benson Onsongo who was not called to testify. As for PW 2, that he said he was shot on the right arm which is not what was in his statement or investigation diary, that he said the person who shot him had a white mask.

38. With due respect to the Counsel for the appellants, it is important to appreciate that it is not every minor variation or contradiction that counts in determining the veracity of a testimony. The contradiction becomes fatal only when it fundamentally affects a material aspect of a case. Whether or not PW 1 had proprietorship documents in court or not will depend on many factors. Does the fact that he did not carry Supermarket ownership documents with him to court overturn the fact of a robbery which was attested to by different witnesses in this case?

39. On Counsel's submission that PW1 testimony was that the spent cartridge was recovered by Benson Onsongo, this was misleading. In his evidence in Chief, PW 1 said:

> "...I called the OCS Kiritiri and police officers came together with DCI Officers. Investigations began. On entering the shop, I saw a cartridge beneath the counter..."

40. It is thus clear that the spent cartridge was noticed in the presence of police officers. When the witness refers to Benson Onsongo of Gachuri in cross-examination, he clearly says, "he left with them" (meaning police officers). Further, Counsel alleges Benson Gachuri is a civilian, yet there is no indication in his cross-examination that he probed the capacity of that man who took the cartridge and left with the police officers. He assumes that this man was a civilian. The fact that the cartridge was all along under the control of the police is however evident.

41. In reference to PW 2, he referred to his testimony and said he contradicted his witness statement and investigation diary in reference to the hand that was shot. Neither the said witness statement nor the investigation diary was exhibited to cross-check this assertion by counsel.

42. The Court of Appeal has made it clear the nature of contradictions that should affect the credit of a witness. I have analysed whatever has been cited by counsel and in my view, it does not meet the test. In the the case of:

43. *Richard Munene v R* (2018) eKLR the Court of Appeal laid the test as follows: -

> "It is settled principle of law however that it is not every trifling contradiction or inconsistency in the evidence of prosecution witness that will be fatal to its case. It was only when such inconsistencies are substantial and fundamental to the main issues in question and thus created some doubt in the mind of the trial court that accused person will be entitled to benefit from it ..."

44. In yet another case of *Philip Nzaka Watu v Republic* (2016) eKLR the Court of Appeal said:

> "...When it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognized in many decisions of this court, some inconstency in evidence may signify veracity and honesty. Just as usual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question..."

45. It was further submitted that a confession by the accused was not produced and the same were mere allegations. Counsel was referring to a confession that never was. No confession in strict legal sense was relied upon by the Prosecution in these proceedings and the Investigating Officer, PW-10, P.C Samuel Kagege was clear that there was no confession when Counsel cross-examined him. Indeed, no confession. What the investigators did, according to evidence of Sgt. Blifford Otieno was to use information gathered in the course of investigation from the 2nd accused to conduct further investigations. The statement allegedly made by 2nd accused was not used as evidence against any of them as a confession perse. It was thus misconceived to say there was a confession by any of the appellants. The nature of investigations is that while under investigation, suspects can provide useful information that may be used in unravelling and detecting a crime. That is the essence of interrogation. Nothing stops investigators from using such information in gathering more evidence in a case as happened in this one.

46. In the Supreme Court Petition No. 39 of 2018- *Republic v Ahmamad Abolfadhi Mohammed & Anor* (2019) eKLR the Supreme court went at great length to distinguish what amounts to a confession vis-à-vis an admission before finally holding as follows:

> "...It is one thing to make a statement giving rise to an inference of guilt and another thing to confess to a crime. It is therefore evident that the distinction between a confession and an admission as applied in criminal law is not a technical refinement but one based on substantive difference of the character of the evidence deduced from each. This is also buttressed by the fact that the law relating to admissions is distinctly set out in part II (section 17-24) of *Evidence Act* and that of confessions is outlined separately in part III (sections 25-32) of the same Act..."

47. It went further and held:-

> "...Assuming for a moment the 1st respondent indeed led the police to recovery of RDX explosive, is that information admissible? ...Is information given by a suspect leading to discovery of material evidence generally admissible? We think it is. We agree with the appellant that it is a matter of general public importance that police are given the freedom to carry out investigations with a view to detecting crimes. We also agree with it that interviewing suspects is a standard operating procedure in criminal investigations. In such interviews police are entitled to confront suspects with any report they may have received about suspect's commission or involvement in the crime and demand an explanation. If it happens that the explanation is an admission of a material, ideally the police are required to invoke section 25 A of the *Evidence Act*. If they do not, bearing in mind the distinction between an admission and a confession as stated above, such admission is admissible in

evidence but, unlike a confession, it cannot on its own found a conviction. It would be absurd if admissions made in such circumstances were to be held inadmissible in evidence. It follows therefore that admissions, though not meeting the criteria set out in section 25A(1) of the *Evidence act*, are admissible. In the circumstances, we find that in its holding that 'information from an accused person leading to discovery of evidence is not admissible outside a confession' the Court of Appeal equated evidence proceeding from a suspect leading to discovery of evidence to a confession..."

48. Counsel for the appellants further cited the fact that Safaricom data was produced to prop the prosecution case. There is no rule of law that one must produce every piece of conceivable evidence in order to prove a particular fact. The measure should be the quality of the evidence tendered, not the copious nature of the evidence that ought to have been provided.

49. In the present case therefore of great concern to the court is the question whether there was/is evidence of sufficient quality to convince the court beyond reasonable doubt that all the ingredients of the offences charged were proved beyond reasonable doubt.

50. In the case of *Jeremiah Oloo v Republic* (2018) eKLR the Court, after referring to Section 296 (2) of the *Penal Code* that creates the offence of robbery with violence stated:

> "...Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft uses actual violence or threatens to use actual violence on the holder of the thing or property so as to either restrain or retain the stolen thing or so as to prevent or overcome any resistance thereto: Theft and the use of or threat to use actual violence.
>
> On the other hand, the offence of robbery is committed when robbery is proved and further if any one of the following ingredients is established:-
>
> i. Offender is armed with any dangerous or offensive weapon;
>
> ii. The offender is in company of one or more other person or persons or;
>
> iii. The offender at or, immediately before or after the time of robbery, wounds, beats, strikes or uses any other personal violence to any person.

51. The key issues in this appeal therefore are:-

1. If the Prosecution establishes theft coupled with any of the elements under section 296 (2) beyond reasonable doubt, then the offence of robbery with violence is proved and the other critical issue will be:-
2. Were the appellants involved?

52. From the recollections of PW 2, PW 3, PW 4 and PW 5 who were eye-witnesses to the robbery at B.I. P Supermarket at Munyori, there is irrefutable evidence that indeed the robbery occurred. The evidence of PW 5 who was the cashier was to the effect that she lost approximately Kshs 80,000/- to the robbers. Some money was in the Counter which the robbers removed and she was also forced to give whatever she was holding. I would accept the evidence of the estimated sum considering that she was not aware that the robbers would come so that she could have counted the exact amount and hand over after their arrival. Suffice is to say, the main factor was that money was forcefully taken, whether it was more or less is beside the point. There was taking of money by use of force.

Whether the elements of robbery with violence were proved?

53. PW 2 who had tried to resist the robbery by pushing the Counter door against them was shot in the arm. PW 3, a by stander was also shot by the robbers on their way out. They were more than one, (three to be specific) according to the eye-witnesses account as contained in the evidence of PW 2, PW 4 and PW 5. They were armed with a gun (pistol) which was used to inflict gunshot injuries on PW 2 and PW 4 as confirmed by medical evidence produced herein- P. 3 forms- P. exhibits 1 & 2 as well as those from Kenyatta Hospital produced by PW 6 in respect of injuries sustained by PW 3- P. exhibits 3,4 & 5. There was also the ballistic report confirming that indeed a gun had been used during the robbery as confirmed by the report on examination of spent cartridge collected from the scene- P. exhibit 6.

54. Based on the above evidence therefore, I concur with the finding of the trial court that the ingredients of the robbery with violence were proved beyond reasonable doubt.

55. The next question would be whether the appellants were the robbers? Was there participation proved beyond reasonable doubt?

56. It was evident that prior to this robbery none of the witnesses had ever met or knew any of the appellants. Evidence adduced was that of visual identification. The Court of Appeal in *Cleophas Otieno Wamunga v Republic* (1989) eKLR warned that such evidence must be scrutinized carefully and be satisfied that the circumstances of identification were favourable so as to minimize the risk of inaccurate identification.

57. Factors to consider may include whether the witness had an opportunity to see the perpetrator, probe what were the circumstances obtaining at the time, the lighting conditions, the time the witness took in observing the perpetrator, the state of mind and so on.

58. In the present case, the robbers walked into the B.I. P Supermarket at Munyori Market. They were three in number. They barked orders at the people inside the Supermarket to lie down. PW 2 and PW 5 did not comply. PW 2 resisted by jumping to the counter and pushing the counter door to deny the robbers entry but they pushed hard. He was facing them as they struggled. PW 5 was also all the while observing what was unfolding. Eventually, the 1st appellant shot PW 2 on the arm and subdued him. According to PW 5 on cross-examination, this incident lasted approximately 30 minutes. There was electric lighting throughout the ordeal. Both witnesses said that they noted that 1st appellant was brighter in complexion compared to the rest, (an observation noted by the trial court). Counsel for the appellant submitted that PW 2 had testified that the 1st appellant was masked, that submission was misleading and made out of context. I noted that the description of mask was made in reference to the day the 1st appellant was in court during the dock identification by the witness, not in relation to the date of the robbery.

59. Other than the direct oral account based on the witnesses' observation on the date of the robbery, an identification parade was also conducted whereby PW 2 and PW 3 were able to pick out the appellants from eight other men that were paraded with them during the identification parade.

60. Although the appellants testified in Court and attributed fault in the manner the identification parade was done, During the testimony of Identification Parade Officer CIP Dorothy Ngaite Kamundi (PW 11), she said she asked each of them if they were satisfied with the manner the parade had been done and each of them confirmed that they were satisfied. Indeed, on cross-examination the issue raised by the 1st appellant that they were dirty and wore no shoes during the parade was not raised by the defence. Even the question of prior photographs having been taken and circulated in the social media did not feature at all during her cross-examination. This defence therefore was post-scripted and the trial court

was justified in dismissing the defence and finding that there was sufficient evidence on record to justify a conviction for robbery with violence. I find that identification was accurate and free from error.

61. The Court imposed death sentence noting that there was no other sentence that it could impose in law. That reasoning is not in tandem with the evolving jurisprudence on mandatory sentences. The Court of Appeal has cleared the air on this and held that the discretion of the Court in sentencing cannot be fettered by the legislature and is tantamount to infringement of the separation of powers. Further, it deprives the Court the ability to determine the most suitable sentence in the circumstances of each case. The Court of Appeal sitting in Nyeri in Criminal Appeal No. 84 of 2015 - *Joshua Gichuhi Mwangi v Republic* said:-

> "... the imposition of mandatory sentences by legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what Constitutes appropriate sentence yet it does not adjudicate particular cases hence it cannot appreciate the intricacies faced by judges in their mandate to dispense justice...
>
> This being a judicial function, it is impermissible for the legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the judiciary in Article 160 of the Constitution. Further, the Judiciary has a mandate under Article 159(2)(a) and (e) of the Constitution to exercise judicial authority in the manner that justice be done to all and protect the purpose and principles of the Constitution. This includes provision of Article 25 which provides that right to fair trial is among the Bill of Rights that shall not be limited..."

62. The finding therefore that the hands of the Court were tied and could not impose any other sentence even if there were mitigating factors was thus not the correct legal standpoint in this country.

63. Having regard to the foregoing, I find no merits in the appeal against the conviction. However, I note prior to sentencing on 19/08/22, the appellants had been in remand from the date they were arraigned on 6/6/2019.

64. I set aside the sentence of death imposed on them and substitute it with 30 years' imprisonment for the offence of robbery with violence. The sentence shall take effect from the date they were sentenced by the Lower Court.

65. In regard to convictions for the offences of grievous harm, I will not impose any sentences. They were committed in the course of the said robbery and my view is that they are cognate offences of the main robbery with violence charge of which the appellants were convicted. I hold the sentence in abeyance.

JUDGMENT DATED AND DELIVERED VIRTUALLY THIS 17TH DAY OF FEBRUARY , 2023.

L.N. MUGAMBI

JUDGE

In the presence of:-

Coram:

Court Assistant: Kinyua

Appellant: Present

DPP for Respondent: M/s Gakuo

COURT

Judgment delivered virtually.

L.N. MUGAMBI

JUDGE