Mwangi v Rebublic (Criminal Appeal E001 of 2023)
[2023] KEHC 26636 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26636 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL E001 OF 2023

FN MUCHEMI, J

DECEMBER 19, 2023

BETWEEN

FRANCIS GITHOGO MWANGI .... APPELLANT

AND

REBUBLIC .... RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court Gatundu L. M. Wachira (CM), in Criminal Case No. 833 of 2019)

JUDGMENT

Brief Facts

1. The appellant lodged this appeal against the entire judgment of the Chief Magistrate Gatundu where he was charged and convicted of two counts of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code and was sentenced to death. The Judgement was delivered on 14th October 2023.

2. Being aggrieved by the decision of the trial court, the appellant lodged the instant appeal citing 5 grounds which can be summarised as follows:-

   a) The learned trial magistrate erred in law and in convicting the appellant without proof of the offence.

   b) The learned trial magistrate erred in law and in fact in convicting the appellant on a duplex charge whose particulars were in variance with the evidence adduced;

   c) The learned trial magistrate erred in law and in fact when he convicted the appellant on circumstantial evidence on the doctrine of recent possession which was not proved to the required standard;

d) The learned trial magistrate erred in law in meting out a harsh and excessive sentence.

The Appellant's Submissions

3. The appellant submits that the charge sheet is defective, duplex and ambiguous and thus difficult to understand. The appellant further submits that it is not clear from the charge whether he was facing charges under Section 295 or 296(2) of the Penal Code. He further relies on Section 135(2) of the Criminal Procedure Code and the cases of Sigilani vs Republic [2004] 2 KLR 480; Ajode vs Republic (2004) 2 KLR; Mwaura vs R (2013) eKLR and Joseph Njuguna Mwaura & 2 others vs R (2013) eKLR and submits that it would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296(2) as that would amount to a duplex charge which is prejudicial to him. Therefore in light of Article 27 and 28 of *the Constitution*, the appellant argues that he ought to benefit from this ambiguity.

4. The appellant relies on the case of Nuru & Another vs Republic [1960] EA 85 and Joseph Kariuki vs Republic (1985) KLR 507 and submits that one ought to prove theft of property to prove the offence of robbery with violence. The appellant argues that the prosecution did not prove by way of evidence in terms of receipts that he stole the victims' jacket, brown leather shoes and a spotlight. The appellant further argues that PW2 and PW3 testified that Kshs. 200 was stolen whereas the charges stated that the amount stolen was Kshs. 250/-. Furthermore, the money alleged to have been transferred through Mpesa transaction to one Maureen was not linked to the appellant. The appellant further states that the investigating officer, PW7 did not explain why the said Maureen who was tracked and arrested was later released and not called as a witness. The appellant relies on the cases of Alexander Nyachiru Marube vs Rep Criminal Appeal No. 159 of 1984 and Thomas Oluoch Okumu vs Republic, Nairobi High Court Criminal Appeal No. 589 of 2001 and submits that the prosecution witnesses' testimonies were filled with material contradictions on what was stolen and the value thereof.

5. The appellant further relies on the cases of Roria vs Rep EA 585 and Abdulla Bin Wendo & Another vs Rep (1953) 20 EACA 166 and submits that the trial court erred in relying on identification evidence at the scene that was faulty without interrogating the evidence of PW1, PW2, PW3 and PW4 who testified that they were asleep and all the lights were switched off. It was alleged that the witnesses used the light from the cell phone that the perpetrators had during the transfer of money for identification. The appellant contends that the witnesses testified that they were in different rooms but still attested to have witnessed the Mpesa transfer even though it was one single transfer. The trial court did not enquire into the type of phone used, nature of the said light and its intensity or brightness so as to satisfy herself that it was free from error. Furthermore, the appellant contends that the trial court did not examine closely that the identification is alleged to have been done at night, under difficult circumstances where the witnesses had apprehended fear.

6. The appellant submits that PW1, PW2 and PW3 testified that they were able to recognize his voice despite maintaining that the perpetrators were strangers to them. The appellant further relies on the cases of Simon Mbelle vs R (1 KAR 578); Duncan Muchui vs R (2013) eKLR; Choge vs R (1985) KLR; Karani vs R (1985) KLR 290 and Criminal Appeal No. 60 of 2013 Joseph Muchangi Nyaga & Another vs Rep. (2013) eKLR and submits that PW1 testified that the appellant and his co-accused's tones were low and that they spoke in Kikuyu language. Further that appellant spoke in Kiswahili but the witness could not tell the court what they were saying. The appellant thus argues that PW1 and PW3 could not master the voice of a person they were not familiar with under the traumatic conditions evidenced in the trial. The appellant further argues that PW3 confirmed that the prosecution did not interrogate him on the issue of the voice and thus possible errors and personal prejudices could have informed their evidence thus making it unsafe to rely on.

7. The appellant further contends that during the identification parade, none of them were requested to speak in order to test the issue of voice which casts doubt in the prosecution evidence.

8. The appellant further relies on the case of Ajode vs Rep (2004) 2 KLR 81 and submits that the prosecution witnesses did not give a description of the assailants when they made an initial report to the police. Therefore the appellant argues that without an initial description, subsequent identifications were suspicious as they were prone to personal bias and reconstructions making them prone to errors. The identifying witnesses merely described the perpetrators as short, brown with a goatee with or without a cap which the appellant argues were not sufficient details to lead to the arrest of the perpetrators. The appellant therefore relies on the case of J.O.O vs R [2015] eKLR and submits that the testimonies by PW1, PW2, PW3 and PW4 on visual and voice identification are not credible and believable for a safe conviction as the identification evidence was not proved beyond reasonable doubt.

9. The appellant further cites Sections 7(2) and 7(5) of the National Police Standing Orders 2011 and the case of Njihia vs Rep (1986) KLR 422 and submits that the identification parade was improperly conducted as the identifying witnesses were not at the scene and thus PW5, the police officer who conducted the identification parade was not being truthful in his testimony. The appellant further argues that the only identifying features reported by PW2 to the police were that one was shorter with a backpack with no cap. Thus the appellant argues that it was unrealistic how the members of the identification parade were chosen. The appellant further faults the parade on the issue of procedural irregularity as PW5 did not testify the measures he took to make sure the friends and relatives of the identifying witnesses did not participate in the parade.

10. The appellant relies on the cases of James Tinenga Omwenga vs R Criminal Appeal No. 143 of 2011; John Mwangi Kamau vs Republic (2014) eKLR; Ntelejo Lokwam vs Republic [2006] eKLR and Nathan Kamau Mugew vs Rep [2009] eKLR and submits that the witnesses ought to have first given a description of the assailants and before the identification parade was conducted. Failure to do so amounts to a dock identification which is generally worthless and courts ought not to place much reliance on such evidence.

11. The appellant submits that nothing was recovered from him and neither did the prosecution prove any link that the pangas recovered were his or were used in the crime scene. The appellant argues that the pangas were illegally produced as exhibits and thus cannot be relied upon by the court. Further, although PW7, testified that Maureen Mumbi Kirimi, the recipient of the Mpesa transaction via safaricom, was the appellant's wife, he did not produce any electronic data as required by Section 78A, 106 and 11 of the *Evidence Act*. Moreover, the appellant submits that the said Maureen was not called as a witness and no evidence was produced to show that she was related to him despite him telling the court that his wife was called Polyanne Gacheri.

12. The appellant further submits that the prosecution failed to prove that linked the two accused persons as joint offenders. He further argues that the arresting officers were not called as witnesses and there is no evidence to suggest that one was arrested as a result of incriminating evidence flowing from the other. The appellant argues that the police did not recover any stolen items from either of the accused persons and in the absence of a link between him and one Maureen, the recipient of the stolen money through Mpesa, the doctrine of recent possession fails. Moreover, the court had a duty to compel the attendance of the said Maureen to explain the possession or give an account of the stolen money.

13. The appellant relies on the case of Francis Karoiko Muruatetu & Another vs Republic [2017] eKLR and submits that the sentence of death imposed by the trial magistrate is harsh and excessive considering the overall circumstances of the case.

14. The appellant submits that he did not understand what mitigation was and thus could mitigate before sentence. The appellant further relies on the cases of Joseph Kaberia & 11 Others Petition No. 618 of 2010; Court of Appeal Eldoret Oprodi Peter Omukanga vs Republic Criminal Appeal No. 260 of 2019 and Shadrack Kipkoech Kogo vs R. Eldoret Criminal Appeal No. 253 of 2003 and submits that sentencing is at the court's discretion depending on the circumstances of the case. The appellant argues that the degree of aggravation in the instant case did not warrant the serious charges under Section 296(2) of the Penal Code and thus he ought to have been sentenced to 14 years imprisonment as that is the least severe punishment for the offence he was charged with.

The Respondent's Submissions

15. The respondent submits that the prosecution proved the elements of the offence of robbery with violence. The respondent states that the prosecution established that the appellant was in the company of his co-accused and was armed with dangerous weapons namely pangas, rungus and knives. On the issue of identification, the respondent submits that the identification of the appellant at the scene of the crime by the prosecution witnesses was proper as it met the legal threshold. The respondent submits that the appellant had switched on his mobile phone while transferring money from PW2's phone and she was able to see him clearly. Further, PW1 was able to see the appellant from the screen light despite being covered with a lesso. Furthermore, the trial court in its judgment, delved on the issue of the identification at length and arrived at its findings and as such the findings on identification are safe and ought not to be interfered with.

16. The respondent relies on the case of Erick Otieno Arum vs Republic KSM. C.A. Criminal Appeal No. 85 of 2005 (2006) eKLR and submits that the doctrine of recent possession is applicable and thus in pursuant of Section 111 of the *Evidence Act*, the appellant was required to explain on a balance of probabilities, how he was in possession of the jackets and shoes that belonged to the complainants and the pangas. The appellant did not offer any explanation of how he came into possession of the said items and therefore the respondent urges the court to uphold the findings of the trial court.

17. On Count III, the respondent submits that the prosecution proved the offence of rape. The respondent states that the victim was attacked by the appellant at 3.00 a.m while they were asleep. The appellant raped the victim in the presence of her brother whereas his co-accused went to the parents' bedroom. When the appellant was done, his co-accused also raped the victim. The respondent further submits that the perpetrators had a panga and therefore she did resist. The respondent produced medical evidence in form of treatment notes and the P3 Form which supported the fact that the victim was raped.

Issues for determination

18. The appellant has cited 5 grounds of appeal which can be compressed into four main issues:-

    a. Whether the charge was defective ;

    b. Whether the prosecution proved its case beyond any reasonable doubt;

    c. Whether the appellant was positively identified.

    d. Whether the sentence was harsh and excessive.

The Law

19. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.

20. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " 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 vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 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 finding and 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 vs Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the charge sheet was defective.

21. The appellant submitted that the charge was duplicitous for citing Section 295 and 296(2) of the Penal Code. The argument is that the charges against the appellant were two offences in one charge and thus the charge is ambiguous which is prejudicial to him.

22. The question of duplicity in charges was considered at fair length by the Court of Appeal in Paul Katana Njuguna vs Republic [2016] eKLR citing with approval the following principles as the correct law:-

> The test is whether the application of the test must depend to some extent upon the circumstances of the case and the nature of duplicity. Cherere s/o Gakuli vs Republic [1955] 622 EACA.
>
> The vice at which the rule against duplicity is aimed and is intended to counter is uncertainty and confusion in the mind of the accused in having to deal with charges which are mixed up and uncertain. Amos vs DPP [1988] RTR 198 DC.

23. The court of Appeal concluded as follows:-

> We appreciate that Section 296(2) of the Penal Code creates the offence of robbery with violence or aggravated robbery. In our view, the offence of robbery must first be demonstrated before proceeding to demonstrate the ingredients provided in Section 296(2)

of the penal Code. As a corollary to this proposition, an accused person facing those charges would in defence seek to demonstrate that no offence of robbery was committed and that the ingredients alleged under Section 296(2) were absent or were not demonstrated by the prosecution.

In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections, in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case he has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.

24. In the present case, the appellant was charged with robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. Section 295 is a definition section and it contains the ingredients of robbery and thus citing on Section 296(2) of the Penal Code in the charge without quoting Section 295 will not disclose the commission of the offence of robbery with violence. Section 295 of the Penal Code does not deal with the degree of violence being merely a definition section. Section 296(2) of the Penal Code deals with the specific degrees of the offence of robbery and have been framed as such. The record shows that the charge was read and explained to the appellant and he pleaded to it as required by law. The charge against the appellant herein was for stealing and there was violence in the process. For those reasons, it is not in doubt that the appellant from the time of plea was fully aware that he faced a charge of robbery with violence. Therefore the charge sheet does not contain duplex charges and neither is it prejudicial to him. As such, the charge sheet clearly framed the charge against the appellant and thus not defective.

Whether the prosecution proved its case beyond any reasonable doubt;

25. The elements of the offence of robbery with violence were set out by the Court of Appeal in the case of Oluoch vs Republic [1985] KLR:-

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

26. According to the case of Dima Denge Dima & Others vs 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 treated not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.

27. The term robbery has been defined in Shadrack Karanja vs Republic Criminal Appeal No. 119 of 2005 [2006] eKLR, the Court of Appeal stated as follows:-

> The same issue was raised in Moneni Ngumbao Mangi vs Republic Criminal Appeal No. 141/2005 (UR) and this court examined in detail the essential ingredients of the offence of robbery with violence under Section 296(2) of the Penal Code as analysed in Johana Ndungu vs Republic, Criminal Appeal No. 116 of 1995 (UR). After noting that the charge sheet in that case stated, as it does in this case, that the appellants "robbed" the complainant, the court continued:-
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>> The word robbed is a term of art and connotes not simply theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property.

28. PW1 testified that on 9/9/2019, his family and himself were asleep in their home. At about 3.00 a.m, he heard a loud bang and two men immediately entered the house. The men were armed with pangas and also picked a knife from a table in the house. They then entered PW1's bedroom and demanded for money. The witness further stated that there was a phone in the sitting room that was charging and the appellant took that phone as well as that of his daughter PW2. PW1 stated that the appellant and his co-accused ransacked his house. PW1's jacket, shoes, a torch and knife were taken.

29. PW2 testified that on the fateful day, at about 3.00 a.m she heard PW1, her father and PW2, her mother PW4 screaming. Her brother PW3 then went to the sitting room to check what was happening. He found two men there whereas the appellant asked for PW3's phone which she surrendered to him and gave him her MPESA pin on his demand. PW2 further testified that the appellant transferred Kshs. 200/- from her line to another line. Later PW3 obtained her MPESA statements discovered that the recipient was one Maureen Mumbi Kirimi. The witness further stated that the appellant was armed with a panga and he directed her to remove her clothes which she did as he was armed and he threatened her. The appellant then led her to PW2 bedroom and raped her in the presence of her brother PW3. In his evidence, PW3 the brother of PW2 corroborated the testimony of PW2 and added that the assailants asked him for money and he told them that he did not have any. The witness further testified that the appellant and his co-accused took Kshs. 250 from a wallet in his bedroom.

30. The prosecution witnesses evidence was that the appellant robbed PW1 and PW2 of money, a jacket, a mobile phone and shoes. Furthermore, the appellant PW1, PW2, PW3 and PW4 testified that the assailants were armed with pangas at the time of the incident. The incident took place at night and it is therefore necessary to assess the evidence of identification of the appellant as the person who committed the offence. The court in Wamunga vs 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. PW1 and PW2 testified that they were able to identify the appellant as he used the phone he had taken from PW2 to transfer money after he asked her for her Mpesa pin number. PW1 testified that despite being covered by a lesso, he could see the appellant with the aid of the light from the screen of PW2's phone. PW2 further testified that she saw the appellant with the aid of the light from the screen of the phone the appellant had taken from her when he asked for her to give him the Mpesa pin and proceeded to transfer money from her phone. The prosecution further led evidence that the assailants took 30

minutes in the house as they asked for money and ransacked the house. The period of 30 minutes is not a short time and that it is sufficient for the witnesses to identify the appellant given the circumstances that prevailed at the material time. In my view, the prosecution witnesses gave a consistent account of how they saw the appellant as he transferred money from PW2's phone. The light emanating from the screen illuminated on the appellant's face which in my view is sufficient for the witnesses to identify the person when they were called upon to do so.

32. It is trite law that for the evidence of identification to have probative value, the identification parade must comply with the laid down procedure. The Court of Appeal in David Mwita Wanja & 2 Others vs Republic [2007] eKLR emphasized on the importance of a properly conducted identification parade and expressed itself as follows:-

> The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders. See R vs Mwango s/o Manaa (1936) 3 EACA. There are a myriad of other decisions on various aspects of identification parades since then and we need only cite for emphasis Njihia vs R [1986] KLR 422 where the court stated at page 424:-
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> > It is not difficult to arrange well conducted parades. The orders are clear. If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.

33. Similarly the Court of Appeal in Samuel Kilonzo Musau vs Republic [2014] eKLR stated:-

> The purpose of an identification parade as explained in Kinyanjui & 2 Others vs Republic (1989) KLR 60 is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion.

34. Identification of a suspect in any criminal offence is always a pivotal question and whenever it arises, the trial court has to satisfy itself, before convicting. The evidence must be such that the threshold set by the rules and decided case law has been met. The evidence must leave no doubt that the suspect was positively identified. Mugania & 2 Others vs Republic & 2 Others (Criminal Appeal 21 of 2020 & E003 & E068 of 2021 (Consolidated) [2022] KEHC 167 (KLR) (4 March 2022).

35. In the instant case, the appellant faulted the identification parade on several fronts. He argued that the identifying witnesses, Jane Kamuru and Joel Kamuru were not at the scene of the accident yet they were the identifying witnesses. Furthermore, PW2 did not give any unique descriptive details to assist the police to organize the parade and that the witnesses did not, at the time of recording their

statements or prior to the parades give an initial description of the assailants. The appellant further contends that the police officer who conducted the parade only picked members from the public and none from those in custody and further that he did not pick members of similar age, size, height, class and general appearance. The appellant also argued that the police officer who conducted the parade did not explain the measures he took to prevent friends and family of the victims from participating in identification parade.

36. I have perused the court record and noted that PW5, the police officer who conducted the identification parade, got the appellant from custody and explained to him that he wanted to conduct an identification parade and the procedure that entails the exercise. The witness further asked the appellant if he wanted anyone present at the identification and he said that he wanted his wife but since his wife was in custody, he agreed to be all alone. PW5 went outside the station and got members of the public and arranged them inside the station. The witness further stated that he got eight members of the parade as listed on the parade form and called in PW2 to identify the accused. PW2 found the appellant between the 3rd and 4th parade members and identified him by touching him on the left hand. The witnesses were each housed in the office of the sub county commander so as not to interact with the witnesses. The appellant was content in the manner the parade was conducted and signed the parade form which PW5 produced in evidence.

37. PW7, the investigating officer testified that PW2 identified the appellant as the perpetrator during the identification parade. He further stated that the appellant and his co-accused declined to attend the parade when PW1 was called to identify them. The appellant was given a chance to participate in the parade but declined for reasons known to him. It is therefore my considered view that positive identification was proved and the identification parade was properly conducted.

38. The appellant has further submitted that the trial court erred by convicting him on charges based on circumstantial evidence on the doctrine of recent possession which was not established to warrant a safe conviction. The appellant argues that the police did not find any stolen items from him and that the prosecution failed to call one Maureen Mumbi Kirimi as the recipient of the Mpesa transaction to establish that she was related to him.

39. I have perused the court record and noted that the appellant was convicted based on direct evidence. The complainants saw the appellant and PW2 were able to positively identify him from an identification parade. Furthermore, PW7 testified that the appellant took the arresting officers to where he had hidden the pangas which were produced as exhibits. The witness further testified that none of the stolen items was recovered from the appellant. PW7 further testified that the police had used the Mpesa statement of PW2 to determine who the money had been sent to by the appellant and they discovered that the money was sent to one Maureen. The witness further testified that they tracked Maureen and she led them to the appellant who told the police that Maureen was his wife. PW7 further stated that when they arrested the appellant he had a small pouch whereby he placed the identity card for the said Maureen. In my view, this evidence connects the appellant with Maureen in that he knows her. He does not need to be related to Maureen in whatever way but the fact that he knew her and that he sent money to her is sufficient connection.

40. I have carefully perused the evidence on record. I am of the considered view that the prosecution proved the case of robbery with violence as required by the law. It is my finding therefore that the conviction was based on cogent evidence.

Whether the sentence was harsh and excessive

41. The appellant was sentenced in 2021 which is post Muruatetu petition of the Supreme Court whereas the apex court declared unconstitutional the mandatory nature or death sentence. However, the death sentence is still a lawful sentence where it is found to be deserving. The accused when called upon to give his mitigation, did not give any.

42. The value of the properties stolen was Kshs. 3,400/- which is a small amount in the general living standards. The trial magistrate does not seem to have considered this factor in sentencing though she had the discretion to do so. The accused was a first offender for there were no previous convictions presented to the court by the prosecution. It is my considered view that the trial magistrate failed to take into consideration several important factors in sentencing the appellant. This omission resulted in imposing a harsh and excessive sentence to the offender. For this reason, I am aware that this court is empowered to review the sentence of death meted to the appellant and will proceed to do so.

43. Consequently, I give the following orders:-

    a) That the conviction in both counts is hereby upheld.

    b) That the death sentence is hereby set aside and substituted with ten (10) years imprisonment on each count to run from 26th September 2019 being the date of arrest and that the sentences shall run concurrently.

44. This appeal is therefore partly successful.

45. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF DECEMBER 2023

F. MUCHEMI

JUDGE