



**Munyang'a v Republic (Criminal Appeal E002 of 2021)
[2022] KEHC 14908 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14908 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CRIMINAL APPEAL E002 OF 2021**

RK LIMO, J

OCTOBER 27, 2022

BETWEEN

JOHN MUTISYA MUNYANG'A APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against a conviction and sentence vide Kitui
Chief Magistrate Court Criminal Case No. 976 of 2014)*

JUDGMENT

1. John Mutisya Munyanga, the appellant herein was herein charged and convicted for the offence of robbery with violence contrary to section 296(2) of the *Penal Code* vide Kitui Chief Magistrate's Court Criminal Case No 976 of 2014.
2. The particulars of charge are that on the 28th day of April 2013 at National Bank (K) Ltd, Kitui Branch in Kitui County, jointly with others not before the court and another already before the court while armed with dangerous weapons namely pistol and kitchen knife robbed Yusuf Waziri of cash Kshs 205,000/- and at or immediately before or immediately after the of such robbery killed Yusuf Waziri.
3. The appellant pleaded not guilty but after trial where the prosecution present 10 witnesses, the trial court found him guilty and convicted him sentencing to serve 30 years' imprisonment. He was dissatisfied and filed this appeal and before I consider the ground raised, I will set out the summary of the evidence tendered at the subordinate court.
4. The robbery incident happened at daytime between 9-10 am and it involved a salesman operating a petrol station namely Oil Libya Petrol Station also known as Riverside Service Station within Kitui Town. As the salesman named Yusuf, now deceased after being shot during the robbery accident, was in the process of depositing his money at the ATM, National Bank in the company of a bank employee, robbers struck and robbed the late Yusuf after shooting him. The 3 robbers escaped using a motorbike



and members of public mainly *boda boda* riders gave chase for quite a while upon which two of the robbers, escaped on foot as the rider continued fleeing using the motorbike. Later, he abandoned the motorcycle and escaped on foot. Some of the riders were able to identify the assailants as they gave chase and the police later joined in the chase but were not able to get them that day. Later, one of the robbers, the appellant herein was arrested and arraigned. The following is the testimonies of the witnesses presented at the trial.

5. (PW1) Mohamed Iqbar Karim told the court that he was a business operating Oil Libya Petrol Station also known as River Side Service Station within Kitui Township. He stated that the deceased worked for him and that on the material day he conducted stock taking and reconciliation of his business operation and sent the deceased to bank Kshs 205,000/- National Bank. He stated that he sent the deceased to the bank at around 9.00am in the company of his driver Hasan Juma. That shortly after the two left to carry out the transaction, the witness received a call from the driver informing him that he was hearing gunshots from the banking area while he was at the parking area. He stated that he asked his driver to go and investigate and the driver informed him that the deceased had been shot but was still alive. He stated that he advised the driver to rush deceased to the hospital but he later learnt that the deceased had succumbed to the gunshot wounds.
6. PW2 Hassan Abdalla Juma told the court that he was a driver and PW1's employee and that on the material day, he took the deceased to National Bank Kitui to bank some money as per PW1's instructions. That upon arriving at the bank, the deceased alighted from their vehicle to the ATM to do the transaction as he proceeded to wait for him at the parking area. He added that while he waited, he heard gunshots coming from the bank's ATM and shortly after, he saw the bank's security running after two people while shouting for held as the two suspects ran towards Naivas Supermarket and disappeared. He stated that the security guard informed him that the deceased had been shot. He stated that they rushed him to Kitui District Hospital where he succumbed to the gunshot wounds.
7. PW3 Kelvin Makau Kivala informed the court that he was a *boda boda* operator and operated at a stage between Co-operative and Post Bank. He stated that he was familiar with the appellant having known him for about 1 1/2 years and that they also worshipped in the same church known as God's Voice to His People Church. That on April 27, 2015 (must be an error in recording of the date in the proceedings) the appellant borrowed the witness his motor bike registration number KMCX 153B stating that he needed to use it the following day to travel somewhere to negotiate a land transaction. The witness stated that he hesitated to give the appellant the motorcycle as he used it to go to church but the appellant persisted and he eventually agreed to give it to him. He stated that he was called the following day while in church by his colleague Mathew Muli Kithiki with information that his motor bike was involved in a robbery and that it was in the custody of police officers. He also stated that he tried calling the appellant after he got the report but his phone was out of reach.
8. He stated that he proceeded to Kitui Police Station in the company of his pastor and church administrator where he was informed by police that his motorbike had been used to commit a robbery at National Bank, Kitui Branch and that it had been recovered from Kihara area. He stated that he identified his motor bike at the police and left it at the station as it was to be used as an exhibit. The witness also stated that he had given the appellant a jacket which was grey in colour, the same was recovered by the police and produced in court.
9. The witness was recalled and he testified that he had been called to participate in an identification parade. That the parade was conducted outside the police station and involved a group of about ten people. That from the group, he was able to identify the appellant as the person whom he gave his motorbike registration number KMCX 153 B and that the motorbike had been seen being used in a robbery.



10. PW4 PC Maurice Ogada from Kitui Police Station, Crime Investigation Department told the court that he was in the office on the material day when the Officer Commanding Station, Chief Inspector of Police Alexander Korir called him and asked him to proceed to National Bank, Kitui Branch as there had been a report of a crime. That he proceeded to the scene in the company of his colleagues where they found the premises' watchman who told them of the robbery which had been committed by two people armed with a knife and pistol against a customer who was at the bank ATM depositing some money. The officer told the court that there was blood at the ATM's entrance and while they were still at the scene the Officer Commanding Station called the officers and told them to proceed to Kihara Area as it had been reported that two people on a speeding motor bike had been seen in that area. That the officers proceeded to Kihara Shopping Centre where they were assisted by members of the public who directed them to the direction where the motor bike had been seen heading. That the officers discovered a motorbike which seemed to have lost control and driven into a bush. That the motorbike was black in colour and that it was still hot when recovered which indicated that it had not been off for long. That shortly after, other police officers from the station including the OCS joined them and when the team went back to the road, two civilians, a man and woman who were working on a parcel of land told them that the person who had fallen from the motor bike had passed through their shamba heading to a bush and the officers followed the lead in search of the man and that on the way the officers found a brownish jacket on the ground, a cap similar to the ones worn by army officers together with a blue marvin. That the police officers continued the search and found a black leather shoe near a river. The officers searched for the suspect but in vain. The witness identified a brownish jacket to the court MFI-3, a cap MFI-4, a marvin MFI5 and a black leather shoe MFI-6.
11. PW5 Joseph Musembi Mbusya told the court that he was a security guard working with Kali Security Company and at the material time he manned National Bank, Kitui branch where he had worked for 22 years. The witness stated that he was at work on the material day when the deceased came to deposit some money at the bank's ATM. He stated that he accompanied the deceased to the ATM lobby to deposit the money and while the two were inside, two people came in and ordered them to sit down and keep quiet. That one of the men was holding a gun and he remained stationed the door while the other one went to the deceased while armed with a knife and ordered him to give him the money. He stated that a struggle ensued between the deceased and one of the robbers who told him to give him the money. He stated that the two struggled up to the ATM door where the other robber holding the gun shot the deceased and the two men then took the money and ran. The witness gave a description of the two robbers as follows, he stated that he recognized the one who was struggling with the deceased, he described him as short and plump. He also stated that he was wearing a brown jacket and a cap like similar the ones worn by army officers and that he was wearing black shoes. He stated that he did not get a good glance of the one who was holding the gun as he was afraid of looking at him. He however stated that he was able to notice that he was wearing a scarf and a marvin. He stated that he went and called for help after the robbers had left and he saw them running towards Naivas Supermarket where they hopped on a motorbike and sped off. That he assisted PW2 in carrying the deceased into the vehicle to be rushed to the hospital as he remained at the scene and waited for the police.
12. He stated that he was called to the police station on November 19, 2014 where he identified the appellant from an identification parade, adding that he knew the appellant as the two worked close to one another for a long time. He stated that the appellant operated a "mali mali" business at Kiembeni open air market which was opposite the bank's entrance. He told the court that he had even bought a lot of items from him, and that the appellant also paid school fees for his child at National Bank.
13. The witness was recalled to the stand on October 22, 2018 and he told the court that he was called by the police on May 19, 2014 to participate in an identification parade. He stated that the parade which



was conducted at Kitui Police Station involved a group of about ten people and that he was able to identify the appellant from the group as one of the people who robbed him.

14. PW6 Salwa Mohamed told the court that he was a medical doctor from Kitui District Hospital with a degree in medicine and surgery from Kampala International University. He stated that the deceased was taken into the hospital on the material day while in critical condition. That the deceased had two holes on both sides of the chest, he described them as entry and exit holes. He stated that doctors attended to the deceased and tried to save his life but in vain. That the family of the deceased took his body away for burial on the same day as per the Muslim faith but he conducted post mortem on the deceased by observing the injuries he sustained. The doctor concluded that the deceased succumbed to penetrating gunshot injury of the chest with possible damage to vital organs. He produced a post mortem report dated April 28, 2013 as prosecution exhibit 7.
15. PW7 Senior Superintendent Johnstone Musyoki Mwongela told the court that he worked as a ballistic expert with the Criminal Investigations Detective (CID) in Nairobi. He produced a report prepared by his colleague, Hassan whom he said was familiar to him having worked as his junior for over seven years but had since left service. The witness stated that a bullet had been taken to their office for examination to determine the calibre and type of gun it had been shot from. That upon examination, officer Hassan determined that the bullet was a forced ammunition of 9mm in calibre. That it was a damaged bullet on one side and that the damage had been due to the impact of the bullet on hard surface during the projection. The officer was also of the opinion that it had been shot from a far and from a pistol or machine gun. The witness produced the damaged bullet which was marked as prosecution exhibit 9, an exhibit memo marked as prosecution exhibit 8 and a ballistic report which was marked as prosecution exhibit 10.
16. PW8 Josephat Mutinda told the court that he operated *boda boda* business within Kitui Town and he was also the chairman of the Boda Boda Association. He testified that he received a call from a fellow boda boda rider, Wambua on the material day and told him to mobilize other riders by laying road blocks along the Naivas Supermarket back road as there had been a robbery at National Bank, Kitui and the suspects were escaping through that route. He stated that he prepared himself to give chase and about three minutes after he was called, he saw a black motorbike registration number KMCX 153 B carrying two passengers and being ridden at a high speed. He stated that he also saw his colleague Wambua on his own bike chasing after the motorbike. The witness stated that he recognized the appellant and that he was the one riding the motorbike. He stated that he was wearing clear glasses with a black stripe, a cap similar to the ones worn by police, a bluish marvin and a brownish jacket. He stated that he also saw and recognized one of the passengers as Boniface Mzeko. That he was joined by other riders and together, they chased after the motorbike for a while but stopped when Boniface Mzeko drew a pistol and aimed at them. He stated that after the riders stopped the chase, the motorbike slowed down and the two passengers jumped off and ran towards Isango. That the riders pursued the motor bike which sped off towards Kihara Area and they kept chase but they could not catch up with the rider because he was too fast and that when they reached Kihara Shopping Centre, they found the bike abandoned in a bush and they saw the appellant escaping on foot. He testified that the witness also stated that he saw a jacket, marvin and shoe which the appellant threw away as he escaped on foot. That they waited for the police to arrive and when they did, the riders informed them that the appellant had ran towards a nearby forest on foot. He stated that he was called to Kitui Police Station on November 19, 2014 to participate in an identification parade where he identified the appellant as one of the people he saw on the motorbike on April 28, 2013.
17. PW9 Inspector Julius Omari told the court that he as an investigator working at the Director of Criminal Investigation Officer offices in Kitui at the material time. He stated that he as requested



by CPL Nyamodo to carry out an identification parade on November 19, 2014. He stated that he informed the accused who was in custody at Kitui Police Station of the parade and he agreed to pick people from the cell who resembled him to participate in the parade. He stated that the appellant was positively identified by three people by touching him. The officer stated that the parade was conducted fairly and did not prejudice the appellant.

18. PW10 CPL Omolo Boniface Nyamodo informed the court that he as attached to the Kitui Central Sub-County General Investigations Department. He stated that he was on duty on the material day and that he as one of the officers who were called to the crime scene. He stated that he was able to recover one damaged bullet at the scene which he gave to Police Constable Sila who then forwarded it a ballistic expert for analysis. He proceeded that while the officers were at the scene, they received information that the robbers had escaped on a motorbike and that they were being chased by members of the public. That the police joined in the chase and that two of the robbers alighted at Jordan area while the rider of the motorbike rider proceeded to Kihara area. That upon reaching Kihara, the rider abandoned the motor bike and ran on foot and on the way, he removed a brown jacket, a camouflage cap, a navy blue marvin and one black shoe as he disappeared into a nearby forest. That the police pursued him into the forest but they did not catch him until January 17, 2014 when they apprehended him at Chini ya Mnazi bar following a tip that he was at the bar. The officer produced a certified copy of daily collections from Mohamed Igbal of Riverside Petrol Station as PEx 1, a log book and receipt from Makindu Motors as PEx 2 (a) and (b), a brown jacket as P Ex 3, a camouflage cape as P Ex 4, a navy blue Marvin as PEx 5, one right side shoe as P Ex 6, a motor bike registration number KMCX 153 (B) Skygo as P Ex 11
19. When placed on his defence, the appellant raised alibi as a defence stating that he was at home at the material time looking after his goats. He testified that on January 17, 2014, he was arrested at Kyuluni Bar where he had gone to purchase air time and that he was taken to the police station over allegations that he had robbed. He denied committing the offence.
20. The trial court evaluated the evidence and found that the appellant was positively identified by PW8 and PW3 from where he had borrowed the motorcycle use in the robbery. The trial court found that all the ingredients of the offence had been proved and convicted the appellant and sentenced him to serve 30 years in prison.
21. The appellant was aggrieved about the conviction and sentence and filed this appeal raising the following grounds.
 - i. That the learned trial magistrate erred in law and facts by finding that the prosecution had proved its case beyond reasonable doubt.
 - ii. That the learned trial magistrate erred in law and facts by convicting the appellant on the weight of the prosecution evidence whereby no evidence on collaboration to connect the appellant with the commission of the offence.
 - iii. That the learned magistrate erred in law and facts by passing the reasons for conviction on inconsistent and incredible evidence of ammunition found of the scene of crime not observing that the ballistic expert was not called at the scene and nobody was arrested at instantly time, day and month during the commission of this offence
 - iv. That the learned trial magistrate erred in law and facts when accepted with the parade conducted by Prosecution Witness No 9 and who was at the bank as the security guard and not view that PW9 on this evidence in chief told the court that he knew the accused even before the commission of this offence



- v. That the learned trial magistrate erred in law and facts while not considering the appellants sworn statement (defence) which clearly proved where about of the appellant at the day, time and month during the commission of this offence.
 - vi. That the learned trial magistrate erred in law and facts in failing to find that the case of robbery with violence contrary to sec 295 as read with section 296/2 of the Penal Code has never been proved beyond reasonable doubts as required by law.
 - vii. That the learned trial magistrate erred in law and facts by not on view that the case was not proved and the evidence tendered before court never on corroboration and was a day light robbery and which should be on corroboration for the meted sentence of robbery with violence contrary to section 296/2 of the Penal Code.
22. The appellant in his written submissions can be summarized as follows, the appellant contends that the case against him was founded on circumstantial evidence which did not prove that he was guilty of the offence of robbery with violence. He takes issue with the evidence tendered by PW3 stating that the same was not credible as there were no witnesses present or documentary evidence provided to prove that he was indeed given the motorbike by the witness. He also submits that there was another person who was charged on the same offence but he was acquitted but the trial court failed to evaluate the prosecution's evidence. He contends that he was framed. He has placed reliance on the case of *Sawe vs Republic* (2003) KLR where it was held that circumstantial evidence can be a basis of a conviction only if there are no other existing circumstances weakening the chain of circumstances relied upon.
 23. In his further submissions, the appellant submits that evidence by PW1 and PW2 was hearsay as the witnesses did not see the robbery taking place. He has also challenged the identification parade stating that the same involved people who previously knew him.
 24. The appellant has also pointed out that PW3 stated that he gave him his motorbike on April 27, 2015 when he was already in prison.
 25. The prosecution has opposed this appeal through written submissions.
 26. The prosecution submits that it satisfied all the ingredients of the offence upon which the appellant was charged. They contend that the deceased died from gunshot wounds and the appellant was placed at the scene of crime by PW3 and PW8 and that he was further identified during an identification parade and that it was proved that the robbers were armed with a knife and a gun during the robbery.
 27. This being the first appellate court, this court is required to examine and analyze all evidence adduced in the trial court and arrive at its own independent finding. This principle was upheld by the Court of Appeal in *Kiilu & Another v Republic* [2005] 1 KLR 174 where the court held that:

“An appellant in a first appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the appellate court's own decision in the evidence. The 1st appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions, only then can it decide whether the magistrate's finding 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.”
 28. The issues in this appeal are;



- a. Whether the prosecution proved the offence of robbery with violence to the required standard;
- b. Whether the appellant was positively identified.
- c. Whether the identification parade carried out on November 19, 2014 was conducted procedurally.

(a) Whether the Prosecution Proved the Offence of Robbery with Violence to the Required Standard

29. The appellant submitted that the prosecution failed to discharge the burden of proof in criminal cases as the offence of robbery with violence was not proved. For an offence of robbery with violence to be proved, certain critical ingredients must be present. These ingredients are reflected in the provisions creating the offence. The offence of robbery is defined in section 295 of the *Penal Code* while the ingredients what constitutes the offence of robbery with violence and the penalty thereof are prescribed under section 296(2) of the Code;

Section 295 of the *Penal Code* states;

“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

Section 296 (2) of the *Penal Code* states;

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

30. The Court of Appeal in the case of *Oluoch -Vs - Republic* [1985] KLR restated the ingredients of robbery with violence as set out under Section 296(2) as follows;

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

- a. the offender must be armed with any dangerous or offensive weapon or instrument; or
- b. the offender must be in the company of one or more other person or persons or;
- c. at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person...”

31. The evidence from PW5 Joseph Musembi Mbusya, was that he was at his work station at National Bank Kitui on the material day When the deceased came in to deposit some money having been dropped by PW2. That While he was in the process of making the transaction, two men, one armed with a knife while the other with a pistol entered into the ATM lobby and ordered them to sit down and keep quiet. That the one with the knife went to where the deceased was and asked him for the money and in the process a struggle ensued as the deceased refused to let go of it. That the deceased was shot by the other robber and the two took off with the money and escaped using a motorbike.



32. The element of violence is clear. It was well proved. The victim of the attack was shot and (PW6) Salwa Mohamed a medical doctor who attended to him confirmed that he died from gunshot wounds sustained during the attack. He produced a post mortem report marked as P Ex 7 and dated April 28, 2013 to that effect.

(b) Whether the Appellant was Positively Identified.

33. In *Republic vs Turnbull & Others* [1976] 3 ALLER 549 the court highlighted the questions to be asked when it comes to the identification of a perpetrator by the victim
- a. How long did the witness have the accused under observations?
 - b. What was the sufficiency of lighting?
 - c. Was the observation impeded in any way as for example by passing traffic of group of people?
 - d. Had the witness seen the accused before and if so, how often?
 - e. Were there any special features about the accused?
 - f. How much time elapsed between the original observation and the subsequent identification to the police by the complainant when first seen and the actual appearance?
34. There is evidence of direct identification of the Appellant by two people. The first one was PW5 who stated that he saw the Appellant in the ATM lobby as the robbery took place. He stated that he knew the Appellant having worked across the bank which was the place the appellant operated from for many years. He said it was more than ten years. His testimony was that the Appellant was a vendor at Kiembeni open air market which is located 50 meters directly opposite National Bank, Kitui and that the market and the bank are only separated by a road. Aside from seeing the Appellant at his place of business, the witness stated that he also bought items from the Appellant and further that the Appellant also used to pay school fees for his children at National Bank.
35. The incident took place at day time. The witness stated that he was able to see the Appellant well as the robbery took place. He described him as being the one who was armed with a knife and further that he was the who struggled with the deceased as he tried to take the money he wanted to deposit. The witness also stated that as the two struggled, the Appellant spoke to the deceased and asked him to give him the money. He stated that he was in a position to identify the Appellant and that besides seeing him, he was able to recognize him by his voice.
36. The second witness who identified the Appellant was PW8, Josephat Mutinda a boda boda operator who was involved in the chase after the robbery took place. He stated that he knew the Appellant and identified him as the rider of the motor bike the robbers used to get away from the scene. He stated that he knew him as he used to see him around in Kitui. He also described some items of clothing that the Appellant had on at the time which were a cap similar to the ones worn by police officers, a bluish marvin as well as a brownish jacket. These were the same items of clothing that PW5 also stated that the Appellant was wearing during the robbery.
37. According to the witnesses, the two knew the Appellant before the robbery took place. The robbery took place in the morning between 9-10 am. For PW5, he was in close proximity with the Appellant while the robbery and attack took place. As for PW8, he stated that he had already been warned of the robbers and the route they were plying hence he was waiting for them to pass ready to pursue them and he was able to see the Appellant



38. Aside from the direct identification, evidence tendered by the police who participated in the chase for the robbers after the report was made also narrow down on the identity of the Appellant as one of the perpetrators. PW4 PC Maurice Ogada and PW10 CPL Omolo Boniface Nyamodo found some items of clothing from Kihara shopping centre which had been discarded by the Appellant during the chase being a navy blue marvin, a camouflage cap, a brownish jacket and one black shoes. These items were discarded by the rider of motorcycle KMCX 153B which PW3 confirmed during trial that he gave to the Appellant the day before the robbery took place. PW3 also stated that he gave the Appellant the same jacket that was found dumped near Kihara Shopping Centre.
39. PW8 also confirmed that he saw the Appellant riding the same motor bike while fleeing the scene of the crime wearing the items of clothing that were found discarded following the chase. Those clothing were positively identified and produced in evidence.
40. The Appellant's assertion that PW3 testimony should be discredited as it is stated in the proceedings that he gave the witness gave the Appellant his motor bike on 27/4/2015 when was already in custody at the time, is only diversionary because the date captured (April 27, 2015) is an obvious typing error. He gave the Appellant his motorbike on 27/4/2013 and the robbery took place on 28/4/2013. The two were friends who attended the same church.
41. In his defence, the Appellant stated that he was home on the material day tending to his goats. He stated that he had been doing so for two years after his herds boy went missing on 21/2/2013. The dates do not add up. He also states that he was arrested in a bar where he had gone to buy credit, which is an odd thing to say, why buy credit in a bar? His defence in my view was evasive and did not shake the Prosecution's case.
42. The prosecution's case was not entirely circumstantial as alleged by the Appellant. The evidence presented was also direct because of visual and voice recognition.

Whether the Identification Parade Carried Out on November 19, 2014 was Conducted Procedurally.

43. The Appellant took issue with the identification parade stating that the persons who identified him in the parade were the same witnesses who testified in court. He also takes issue with the testimony of PW5 stating that the witness stated that the Appellant was between suspects number 7 and 8.
44. It is strange that the police undertook an identification parade as parades are not conducted in respect of people who are recognized but in respect of strangers, whom witnesses claim would recognize if given a chance. It is however interesting to note that the Appellant indicated that he knew the people who identified him and further stated that he was not satisfied because they identified him because he was a boda boda operator in Kitui a piece of information he left out of his defence where he stated that he was he did jua kali and mason jobs.
45. The Identification Parade was of less probative value in view of the fact that the appellant was well know by the witnesses who positively recognized him. I am not satisfied that evidence was negated by the fact that some of the witnesses did not record in their statements that they knew the assailants. The evidence of PW2, PW3, PW5 and PW8 in my view was sufficient to establish and prove all the ingredients of the offence upon which the appellant was charged and convicted. This court has re-evaluated the evidence as per the above discourse and the conclusion reached is not the trial court count was correct in retaining a verdict of guilt. The evidence against the appellant was simply too overwhelming and his defence was shallow and did not in any way poke holes on the prosecution's case on the prosecution's case.

The conviction of the appellant is therefore upheld.



46. On sentence, this court finds that the trial exercise its discretion and sentenced the appellant to 30 years instead of death sentence. I am unable to interfere with that discretion because there is no basis have been shown for me to interfere. The sentence is therefore upheld.

In sum this appeal is disallowed for lacking merit. The conviction and sentence imposed is upheld.

DATED, SIGNED AND DELIVERED AT KITUI THIS 27TH DAY OF OCTOBER, 2022.

HON. JUSTICE R. K. LIMO

JUDGE

