



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutunga v Republic (Criminal Appeal E010 of 2023)  
[2025] KEHC 2063 (KLR) (5 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2063 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CRIMINAL APPEAL E010 OF 2023  
MW MUIGAI, J  
FEBRUARY 5, 2025**

**BETWEEN**

**SHADRACK MUSEMBI MUTUNGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal from the conviction and sentence delivered on 9th February 2023  
by Hon., M.Otindo, Principal Magistrate in Machakos CMCRC no 164 of 2020)*

**JUDGMENT**

1. The Accused person was charged with four counts of offences. In count 1, he was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the [Penal Code](#).
2. The particulars of the offence are that on the 12<sup>th</sup> day of March 2020 at Muthini estate of Machakos township in Machakos Sub county within Machakos County, while armed with dangerous weapon namely, panga robbed Francis Ngolania Ntheke of his mobile phone make X TIGI serial number Imei 35713058xxxxxxx/35713058xxxxxxx valued at Kshs 6000 and at the time of the said robbery used personal violence to the said Francis Ngolania Ntheke.
3. In count two, he was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal code.
4. The particulars of the offence are that on the 11<sup>th</sup> day of March 2020 at Machakos township in Machakos Sub County while armed with dangerous weapon namely, panga robbed Hamisi Ramadhan Mwaniki of his ID card number xxxxxxxx and Kshs 50 and at the time of the said robbery threatened to use actual violence to the said Hamisi Ramadhan Mwaniki
5. In the alternative to count 2, he was charges with handling stolen property contrary to section 322 (1) as read with section 322 (2) of the [Penal Code](#).



6. The particulars are that on the 21<sup>st</sup> day of March 2020 at Muthini estate of Machakos Township in Machakos sub county within Machakos County otherwise than in the course of stealing, dishonestly retained one ID card registration number xxxxxxxx in the name of Hamisi Ramadhan Mwaniki , knowing or having reason to believe it to be stolen property.
7. In count three he was charged with preparation to commit a felony contrary to section 308 (2) of the [Penal Code](#).
8. The particulars are that on the 21<sup>st</sup> day of March 2020 at Muthini estate of Machakos Township in Machakos sub county within Machakos County, jointly with others not before court and not being at their place of abode had in their possession a panga, a knife and a bunch of master keys for use in the course of or in connection with robberies and burglaries.
9. In count 4, he was charged with being in possession of government stores contrary to section 324 (3) as read with section 36 of the Penal code.
10. The particulars are that on the 21<sup>st</sup> day of March 2020 at Muthini estate of Machakos Township in Machakos sub county within Machakos County was found in possession of government stores namely a pair of handcuffs s/no 04550 used by disciplined forces, such property being reasonably suspected to having been stolen or unlawfully obtained from the disciplined forces.
11. The accused person pleaded guilty to count 3 and not guilty to counts 1,2 and 4. When the facts were read out, he denied some of the facts and the plea was changed to not guilty in count 3.
12. On 24/1/2022, the prosecutor withdrew count 2,3 and 4. The charges were read afresh to him and he pleaded not guilty.

### **Hearing**

13. The prosecution called six witnesses while the defence called one witness.
14. PW1 was Francis Ngolania Ntheka who stays and operates a shop in Muthini estate Machakos stated that on 12/3/2020 at 5.00 a.m. he was in the kiosk, he saw someone who was looking keenly at the kiosk pass. It was not very dark, but there were flood lights on. He got interested and checked on him but he hid himself. He entered the shop but he was not settled and came out, by which time he saw him. When he saw him he went near him, about 2 meters apart and told PW1 to sell him airtime and because of his behaviour, PW1 told him he did not have. He asked for milk. He did not want to sell him but told him to give me money to which he gave him 50/=.
15. PW1 stated that he turned to go to the shop and that he had the X-tigi phone light on. When he was just about to put his phone on the table, he showed PW1 a knife, he held PW1's neck. He stated that when he saw the knife he tried to hold it, it cut his hand. He did scream. He told the court that he held him, he grabbed the X-tigi phone, and ran away. He stated that he bought it at Kshs. 6,000/=. He called his wife and later went to Machakos Level 5 hospital. I reported at Machakos police station. I was issued with a P3 form. It was filled and I produce in evidence.
16. He denied ever seeing the perpetrator before. He indicated that he was wearing a jacket stripped reddish, had a gap on the tooth. He was slender and tall. He was not very brown or black between black and brown. He stated that he was called for an identification parade on 2/3/202 where there were about 10 people. He saw his gap, his colour and slenderness. He identified the accused on the dock and stated that the phone was not recovered.



17. Upon Cross Examination, he stated that he was attacked on 12/03/2020 and the perpetrator is the accused person. He knew him when he identified him on the parade. He suffered injuries which he reported at the police station. He stated that he went to hospital on 12<sup>th</sup> March 2020 after reporting in the morning. He stated that the watchman was not at the shop but was around. The accused was arrested on 20/3/2020 and he was never told that the phone was recovered.
18. PW1 told the court that the watchman called him wife and told her that whoever attacked him, had been arrested. When he screamed the watchman came and the watchman said that the accused had disturbed him the whole night. His wife received a call while we were all in the house at 12.00 a.m. PW1 went to where he had been arrested with a maasai rungu. That the accused person was found with 2 phones, crow bar, pingu and those are what he saw in the car bonnet. He denied framing the accused person.
19. In re examination, PW1 stated that on 12/3/2020, it is the accused who robbed him.
20. PW2 Robert Mulwa Musau, a watchman, stated that on 20/03/2020 he was at work at Muthini estate. He worked from 6.00pm until 11.00 p.m., when he saw 3 men and a lady. They were armed with a panga. He hid myself and called patrol police officers from Machakos police station who came. There were security lights on, so he could see them. He was not able to identify them immediately. He stated that the police came immediately like after 5 minutes and he showed the police officers where the said people had entered. The people had come through the gate of the fenced estate. Police entered through the same way.
21. In that compound there are only 2 homesteads/Houses. He stated that the police came out with one of them and handcuffed him. They searched him. He had a panga, knife, handcuffs and a phone in his pockets. He identified the panga and knife that were found. He also identified the handcuffs and 4 phones, T8 which he said the accused person had. He told the court that the knife was hoisted at his waist and the handcuffs were in his jacket pocket. He also identified a matchbox. While the search was being done, the light was very bright, electricity light. He stated that the person who had the items was the accused whom he pointed. He stated that it took about 20 to 25 minutes to do the search. After the search, they put him in the vehicle and left. He stated that they were 4 and he did not know what happened to the 3.
22. Upon Cross-examination, he stated that he saw 4 people who were armed between 11.00 p.m. to 12.00 a.m. he denied hearing any screams. He did not see the 3 come out through the gate and did not know where they went to. He stated that Ngolania was his boss and he lost his phone. He called him to come and check if it was among the phones. He denied framing the accused person. He stated that he saw him for the first time on that day. That there was someone else who said the accused had robbed him.
23. In Re-examination he stated that what he had said about the arrest he could remember very well. According to him, one can't carry those weapons if they have good intentions. He stated that they were probably arrested before they could commit the crime.
24. PW3 was Inspector Gelfas Okoth who stated that on 21/03/2020 at around 4.00 p.m, he was asked by the investigating officer to do identification on one of the suspects who was in the cells. He informed the accused that he wanted to put him among other people for identification and he accepted. He brought 8 people, arranged them as per procedures of an identification parade. He stated that he brought the accused and asked him to choose his preferred position. He chose to stand between the 3<sup>rd</sup> and 4<sup>th</sup> person, he called a witness who came and he identified the accused by touching him.



25. He stated that the 2<sup>nd</sup> witness Hamisi Ramadhani, the accused did not change position, he was also identified. He asked the accused for any comment but he did not have any. He said he was satisfied and he signed the identification parade form. He indicated that he complied with the standing orders of Cap 46. He produced the identification parade, forms.
26. Upon cross examination, he stated that he did not know why investigating officer asked the complainant Francies Ngolanie to identify him .He not know if he was at the scene of crime. Hamisi was also a witness.
27. In Re-examination , he stated that his duty was just to do identification and anything else was duty of the investigating officer.
28. PW4 was Sgt. John Kemboi who stated that on 21/3/2020 he was on standby duties when he was called by DI Wanjohi who informed me there was a prisoner in cells. He checked the OB, took the particulars of the complainant, called him to record the statements with that of the witnesses. He took the suspect Shadrack who had been arrested in Muthini. The complainant recorded his statement and explained on 12/8/2020 while in his shop, he saw someone who stole from him, he cut his hand. He said that the suspect had been seen within the estate. The watchman recorded a statement. That he called police officers and the accused was arrested the suspect. He filled in the P3, and which was filled at Machakos Level 5, The suspect was found with the following items; a crow bar, panga, kitchen knife,4 phone.; a techno phone, imei 3568230xxxxxxx, twin sim 356823xxxxxxx. In addition, a Wiko phone S/No. 3594400xxxxxxx imei 251 and a Samsung S/No. 3599270xxxxxxx Twin sim whose Imei with same number last digit is a 5. It had 2 sim cards Airtel and Safaricom and one memory card. It also had one Safaricom sim and not inserted. He produced the phones and the 2 sim cards. The last phone had a sim card imei No. 892540210xxxxxxx. Airtel sim card had serial No. 892xxx xxx and 0066xxxx while the other Airtel line had no serial number.
29. Laslty, he stated that the last phone was an Xtigi S23 make with one sim card. Airtel sim card on the outside, the card is Safaricom Imei 314813xxxxxxx. The second imei is 354893xxxxxxx and Sim card Airtel S/No/ 8925xxxxxxx, 003xxxxxxx. He stated that all these phones were given to hum by the arresting officer after he found them on the accused. He was also found with handcuffs SNo. KP04xxx, matchbox, a national identification SNo. 7019xxxx ID No. xxxxxxxx in the name of Hamisi Ramadhan Mwaniki and keys.
30. He stated that the owner of the ID was contacted and he said he had lost it through robbery with violence. He did record a statement. There is another case in a different court. which the accused was found with.
31. He produced the following as exhibits;
  - a. a crow bar
  - b. panga,
  - c. kitchen knife
  - d. a techno phone, imei 3568230xxxxxxx, twin sim 3568230xxxxxxx.
  - e. Wiko phone S/No. 3594400xxxxxxx imei 251
  - f. a Samsung S/No. 35992707xxxxxxx Twin sim
  - g. Xtigi S23 make with one sim card.



- h. Airtel sim card S/No/ 8925xxxxxxx, 0035xxxx on the outside,
  - i. Safaricom sim Imei 314813xxxxxxx. The second imei is 354893xxxxxxx
  - j. handcuffs SNo. KP04xxx, matchbox,
  - k. a national identification SNo. 701xxxxx ID No. xxxxxxxx in the name of Hamisi Ramadhan Mwaniki
  - l. Keys
  - m. a paper bag which had 3 sweets and two paper forms from Airtel with no details , with 2 small torches, one orange and the other one blue
  - n. 3 sweets maricods
  - o. Unfilled form subscriber forms SNo. 103xxxx
  - p. red small shopping bag marked as P.exhibit 16.
32. He stated that he was the investigating officer. That the accused was arrested by police officer after being called by watchman. They were 4 but 3 ran away. The 2<sup>nd</sup> complainant also identified him as the person who robbed him violently. He identified the accused person on the dock.
33. Upon cross examination, he stated that the complaint made on 12/3/2020 where he reported that he was robbed and that the accused person was arrested on 21/3/2020. He did not get any photos that you had these exhibits. He stated that the accused robbed and injured the complainant. He had an Xtigi phone like the one in court, he did not know if he identified any of these phones. The serial number he gave is not for any of these phone. He did not know if there is any OB at any police station over these phones. He was found carrying the phones not using them. He told the court that he did not need to take finger prints. Ngolania was not there when you were being arrested.
34. In Re-examination he stated that as an investigating officer he can use the statements of witnesses as well as investigating elsewhere.
35. PW5, Cpl. Richard Opano stated that while working at Machakos police station, while on patrol at Muthini area within Machakos township on 21/03/2020, with 2 of his colleagues, at around 2.00 p.m. he received a call from one security guard who informed him that, near his place of work there were robbers inside a home. They rushed to the scene, they called the watchman who came and directed them to the scene which is a plot that had 2 occupants. He stated that when they got there they found the gate half open, they entered and found the accused at the fence of the scene but on the inside. The accused was wearing a black jacket with white stripes. When he saw them, he looked shocked.
36. Upon checking he was armed with a panga that had a wooden handle. He also had handcuffs, a knife with a blue handle and he had a long metal crow bar, blue in colour. They arrested the accused. Upon quick search, the suspect was found with 4 mobile phones a techno, Wiko, Samsung and Xtigi. They tried to interrogate him and he confessed to them that was with two others who managed to escape before they arrived. He had a bunch of keys. They arrested him and took him to Machakos police station. Thereafter, he recorded his statement and handed him over to DCI Machakos police station for further investigations because the scene area had so many incidents of robbery. He arrested the accused while he was with Cpl. Mwaniki, PC Muriuki. He identified the accused with the security lights. He also identified the accused on the dock.



37. Upon Cross-examination, he stated that he received a call from a watchman who stated that there were robbers, he did not given an exact number. He only found the accused the rest ran away. He stated that the accused also confessed he was among 3. He admitted that the accused had one panga, one knife, one crowbar and handcuffs and 4 phones. He handed all of them to DCI. He stated that one can hold a panga, crowbar, knife. They can be held by one hand. One person can have and use all of them. He did not know if any police station reported any missing handcuffs but according to him as a citizen one cannot have handcuffs. Yes, you had 4 phones. PW5 told the court that he did not say the phones were stolen items.
38. In Re-examination, he stated that he could not recall the date if it was 20<sup>th</sup> or 21<sup>st</sup>, but it was after midnight. The accused never said he was a tenant, they were hiding at the edge of the gate.
39. PW6 was Dr. Mativo, who works at Machakos Level 5 stated that he was standing in for Dr. Mutunga who was unwell. He referred to the P3 form filed by Dr. Mutunga on 2/4/2020 where he observed that clothes had been changed. The patient gave a history of assault. He observed the client had a cut wound on 2<sup>nd</sup>, 3<sup>rd</sup> finger. He had bruises on right knee. The injuries were 3 weeks old, a sharp object was used. The patient was given pain killers, antibiotics and dressing. The injuries were classified as harm. He produced the P3 in evidence.
40. Upon Cross-examination, he stated that he did not fill the P3 form and did not know the case.
41. The accused person was found to have a case to answer and was placed on his defence.

#### **Defence Case**

42. DW1 was Shadrack Musembi who stated that on 20/3/2020, he woke up and went to work where he worked as a matatu conductor. He left Machakos at 5.00 p.m. to Nairobi. I came back at around 9.30 p.m. he closed work and went to his house. On his way home, he passed through a club to pick take away. He met a friend there called Joseph with his girlfriend Mwendu who bought him alcohol until 12.30 p.m. He stated that they left the 3 of us. On the he told him he would pick a motorbike and Joseph told him to escort him to his house to know where he stays. We went until his house. He stated that he then left to go to my house.
43. Just a few metres he met a personal car that stopped in front of him. Two people came out and said they are officers. They told him sit down and called him a robber. He stated that he tried to explain that he was with a friend. We stated that he was put in their boot form there we started moving and he did not know where they were going. At around 2.30 a.m. they got to an estate called Muthini. The boot was opened. The gate security was called. He came and they told him he was the one who had been robbing them.
44. It was his testimony that two minutes later, the officer called another guard and he was asked to call the others. He said he will make a call. He called another lady who came. 10 more people were called and they came. He was introduced to them as the robber disturbing them. The guard said he was one of the 4 people who robbed him. The complainant was called Francis Ngolania. He came at around 3.00 a.m., he said he was robbed of his phone on 12/3/2020.
45. The accused person stated that he had 4 phones USSD, memory card. He could not identify any of the phones he had. The Accused person stated that he was put in the boot, taken round upto 4.00 a.m. when he got to the police station. He was in the cells upto the morning of 21/3/2020 when was called out. he found 3 people one Francis Ngolania, Mohamed Hamisi Ramadhan and Madam Nimo. The officer told them to identify if he was the one who robbed them. He then showed them the 4 phones, none of them identified any to be his. The officer then went and brought a panga, knife and a crowbar.



- He told them they were found with him. He denied having them when he was arrested. He asked them if they have seen him and they affirmed.
46. He told the court that he was taken to the cell and at 4.00 p.m. he was again called outside, he was taken to a room where he found two officers who asked for his name. He stated that he was told to sign which he did and when he asked why, he was told it was mandatory. On 22/03/2020 at 2.00 p.m. ,He was again called where he found the 3 and they were told to identify him which they did.
47. He stated that he was taken back to the cell and at 5.00 p.m. he was called out, he still found the 3 people. They were told to go identified him at a parade. I was put among 7 people with army T-shirts. I was told not to mix with them but stand beside them. Francis Ngolania came first, he identified him. He identified by touching his shirt, Ramadan came second he came holding an ID card. He said it had been lost and it was recovered by police officers. He stated that he was again taken to the cells. 10 minutes later he found Ramadhan Hamisi who was asked when he lost the ID card. He said he was robbed while from school. The accused stated that he was told that he was the one who had the ID card. He said he was not sure if it was me who robbed him. He said he did not report. He was told by an officer that it was the accused who had the ID card. On 23//2020, he was charged before court and taken to jail.
48. Upon Cross-examination, he stated that he was arrested on 20/3/2020 on a Friday, he was at work from morning at 9.30 p.m. He did not say the matatu he was working with. He did not mention the name of the club. He could not remember the number plate of the car that picked me. He did not know the others. It was at night, he was taken round for hours. He stated that the 4 phones were his. He admitted asking the the officer if it was wrong for him to carry weapons like knife and if the weapons were sharpened. He denied saying they were his weapons for defence. DW1 stated that the weapons were not shown to him at the time of arrest. He only saw them at police station. He stated that an officer was among the persons at an identification parade. Yes, the arresting officer said he found me at the scene and he was only in possession of the phones. He denied committing the offence.
49. That marked the close of the defence case.

### **Trial Court Judgment**

50. The court in its judgment found the accused person guilty and after mitigation he was sentenced to serve a life sentence as per section 296(2) of the Penal code.

### **The Appeal**

51. Dissatisfied by this judgment, the appellant filed a Petition of Appeal on 23.03.2023 seeking to have the conviction quashed and sentence substituted to a community based sentence on the grounds that;
- a. The learned Trial Magistrate erred in both fact and law by convicting him on evidence that did not meet the minimum threshold to uphold conviction.
  - b. The learned Trial Magistrate erred in both fact and law by not considering his sworn evidence
  - c. The Appellant was not accorded the right to a fair trial as per Article 50 (c) ,(j) and (k) of the Constitution of Kenya.
52. The appeal was canvassed by way of written submissions.



### **Appellant's Submissions Filed On 22.07.2024**

53. It was submitted that the prosecution for not prove that the Appellant was at the scene of crime to establish the ingredients of the offence as set forth in the case of *Wamai vs Republic* [2003] KLR 9EA 353 279. It was submitted that it was not disputed that PW1 lost his phone via aggravated theft on 12<sup>th</sup> March 2020 but that he was unable to pin point his phone from those allegedly salvaged from the appellant after his apprehension. That PW4 accepted that the serial numbers that PW1 availed to the police were not comparable to the phones recovered.
54. Secondly, it was submitted that the injuries PW1 stated that he sustained while he tried to get hold of the knife the aggressor had yet PW6 revealed that the injuries were three weeks old . The Appellant contended that lack of consistency on the age of the injuries crows the credibility of PW1 and therefore dislodges the probative value of the evidential fact.
55. Whilst relying on the case of *Feisal Mohamed Ali vs Republic* [2018] e KLR, It was submitted that failure to produce an inventory of the recovered items was prejudicial to the prosecution case. PW4 confirmed that there was no inventory.
56. Fourth, it was submitted that there was lack of proper identification as the robbery took place on 12<sup>th</sup> March 2020 at 5.00am and this the assailant could not be identified in line with the principles in *R vs Turnbull* [1976]. The Appellant denied knowing PW1. The Appellant avered that he was not informed of the reasons for the parade and neither was he enlightened to have an advocate or friend present before conducting the parade as stipulated in the police standing orders. Reliance was placed on the cases of *Kipwenei Arap Masonik & 2 others vs R* (1930) 12KLR, *R vs Mwangi S/o Manaa* (1936) 3 EA CA 29, *R vs Eria Sebwa* (1930) EA 174 (U), *Edward Kigauthi vs Republic* (2020), *Simon Kilonzo Musau va Republic*.
57. The Appellant submitted that he gave a compelling defence which was not considered. In addition, he stated that the lack of legal representation acted in breach of Article 50 (2) of *the Constitution* of Kenya, 2010 taking into account the gravity of the charges.
58. Lastly, it was submitted that the judgment that the Trial court relied on proceedings and other facts that were not in the proceedings in its judgment. That “ the man showed him a knife, held him by the neck , grabbed the phone and ran away, he later went to machakos Level 5 hospital for treatment.’

### **Respondent's Submissions Dated 28.06.2024**

59. Makena Mburu, Counsel for the Respondent submitted that the threshold for conviction for an offence set out in the case of *Oluoch vs Republic* [1985] KLR and *Dima Denge Dima & Others vs Republic, Criminal Appeal no 300 of 2007* had been proven. That PW1 stated that he was attacked at his shop by a person who was armed with a knife and his phone X tigi was stolen. That he was cut in the process and the injuries were corroborated by PW6, the doctor who produced the P3 form.
60. Secondly, it was submitted that the defence did not displace the prosecutions case as it only referred to the events of the date of his arrest on 20<sup>th</sup> March 2020 and not the events of 12<sup>th</sup> March 2020.
61. Thirdly, it was submitted that the Appellant was given ample time to challenge the evidence adduced by the prosecution and this was supported by the proceedings. It was contended that the conviction and sentence against the appellant was sufficient and appropriate given the offence he was charged with.



## Determination

62. I have considered the Trial Court record, the Appeal and the submissions of the parties and find that the issues for determination are;

- a. Whether the prosecution proved its case beyond reasonable doubt.
- b. Whether the sentence should be set aside.

63. The duty of this court as a court where the first appeal has been filed was elucidated in the case of Jonas Akuno O’kubasu v Republic [2000] eKLR where the court stated that:

“It is correct that on first appeal the appellant is entitled to have the appellate court’s own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering .”

64. The Appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the [Penal Code](#). The said sections provide as follows;

“295. 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) provides that:

If the offender is armed with any dangerous weapon or instrument, or is in company with other 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

65. The ingredients of this offence were aptly discussed by Court of Appeal in the case of Johana Ndungu vs. Republic CRA. 116/1995, [1996] eKLR where the stated as follows:-

“In order to appreciate properly as to what acts, constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is ‘use of or threat to use’ actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore-described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved, will constitute the offence under the subsection

- i. If the offender is armed with any dangerous or offensive weapon or instrument;  
or
- ii. If he is in company with one or more other person or persons; or
- iii. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”



[See also *Oluoch v Republic* [1985] KLR].

66. The same Court in the case of *Criminal Appeal No. 300 of 2007, Dima Denge & Others v Republic* (2013) eKLR, the learned Bench stated as follows:

“the elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.” See *Kanuu v Republic (Criminal Appeal E065 of 2022)* [2024] KEHC 6586 (KLR)

67. Similarly, *Mrima J.* in the case of *Kipsang v Republic (Criminal Appeal E008 of 2023)* [2024] KEHC 249 (KLR), the court stated as follows;

21. From the foregoing provisions, the offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the aspect of violence.
22. Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft, the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto.
23. Two things must, therefore, be proved for the offence of robbery to be established. They are theft and the use of or threat to use actual violence.
24. Once the offence of robbery is proved on one hand, the offence of robbery with violence, on the other hand, is committed when robbery is proved and further if any one of the following three ingredients are also established: -
  - (a) The offender is armed with any dangerous or offensive weapon or instrument, or,
  - (b) The offender is in the company of one or more other person or persons, or
  - (c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.
25. This Court is alive to the confusion which has lingered over time in distinguishing the offence of robbery from that of robbery with violence.
26. To this Court, the confusion is real. The description of any of the two offences leads to the other. Indeed, that was one of the findings by an expanded Bench of the High Court in *Joseph Kaberia Kahinga & 11 others v Attorney General* [2016] eKLR which called for law reform to address the ambiguity.
27. Be that as it may, for purposes of establishing the offences pending any law reform which is far too long overdue, the difference between the two offences ought to relate to the circumstances under which they are committed and the gravity of the injuries sustained. This Court will, therefore, adopt an intermediate approach. The approach is that whereas both offences connote



theft and violence, for the offence of robbery with violence to be established, there must be evidence of actual use of violence on the person of the victim and not a threat to such violence.

28. Therefore, if in the course of stealing, the offender only threatens to use violence on the victim, but no more than the threat, then the offence of robbery, and not robbery with violence, may be committed. Further, in such circumstances, the offence of robbery with violence cannot stand even if it is proved that the offender was armed with any dangerous or offensive weapon or instrument and/or the offender was in the company of one or more other person or persons as long as there was no evidence of actual use of violence.”

68. I will now proceed to look at the elements of robbery with violence elucidated above separately. First is the question of being armed with any dangerous or offensive weapon or instrument. Pw1 told the court that the Appellant had a knife and it is when he confronted him that he was cut with the knife. It is when he was called by PW2 that he found the Appellant with a 2 phones, crow bar, pingu and Pw2 contended that he saw the Appellant with a panga when he was in the company of three others and after his arrest, when a search was done, he was found with a knife, handcuffs and a phone in his pockets as well as a matchbox .
69. PW5 told the court that the Appellant had with a panga that had a wooden handle. He also had handcuffs, a knife with a blue handle and he had a long metal crow bar, blue in colour. PW4 produced all the weapons among others as exhibits before the court. The only common weapon that was seen by the complainant that was also seen by the other witnesses is a knife at the time of commission of the crime, which is a dangerous weapon. I therefore find that the first element was proved.
70. The second element is if he was in company with one or more other person or persons. PW1 who is the victim was attacked by one person. He only mentioned the Appellant. On the other hand, PW2 stated the Appellant was in the company of 3 others. PW5 stated that the Appellant told him that he was in the company of two others. At this juncture, the information is contradictory but looking at the evidence of the complainant, the Appellant was alone. I therefore find that the second element was not proved beyond reasonable doubt.
71. The third element is whether at or immediately before, or immediately after the time of the robbery, the complainant was wounded, beaten, struck or any other form of violence was used. I have looked at the P3 form that was produced by PW6, it indicated that the Upper limbs had a cut wound on the right index/middle finger and wound care was done. That the lower limbs; Bruise on the right knee following a fall and that the injuries were caused by a sharp object. I note that PW6 stated that the injuries were three weeks old, the P3 form was filled on 2/4/2020 and the incident took place on 12/3/2020. That means that the injuries would be three weeks old. The Appellants contention that the injuries were three weeks old as a reason for this court to allow the appeal fails. This corroborates the evidence of PW1. I therefore find that the third element was proved.
72. As stated earlier, the elements of robbery with violence are to be considered disjunctively and one element is sufficient to found an offence of robbery with violence. The evidence of the Appellant was not corroborated by any evidence or witness. He should have called the people he was in the company of if indeed he was out with his friends after work. He should have called the driver of the motor vehicle he worked as a conductor to come and give an account of what happened during the day. He was placed at the scene and admitted to have been carrying the dangerous weapons. The Appellant also contends that the 4 phones found on him were his but has not produced any evidence of proof of membership to



that effect. On the other hand, the Complainant stated that his phone was stolen but of all the phones found in the Appellant's possession, none of them belonged to him.

73. I have considered the appeal and the Appellant contends that the failure to produce an inventory was fatal. This court is guided by the finding of the court in the case of *Stephen Kunani Robe and Others v Republic* [2013] eKLR where the court stated that:

“The purpose of an inventory is to keep record of exhibits recovered during investigations. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence.”

74. PW5 listed orally items he recovered from the appellant during arrest. The items were produced in court and identified by PW1 and PW2, I find that to prove the existence of the items.

75. On the issue of the identification parade, the Appellant contends that that he was not informed of the reasons for the parade and neither was he enlightened to have an advocate or friend present before conducting the parade as stipulated in the police standing orders. The importance of a properly conducted identification parade was discussed by the Court of Appeal in *David Mwita Wanja & 2 others vs. Republic* [2007] eKLR where it 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 v Mwango s/o Manaa* (1936) 3 EACA There are a myriad 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: -

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”

76. The correct procedure of conducting an identification parade is provided for under Chapter 42 paragraph 7 of the National Police Service Standing Orders. Sub paragraph 5 provides that;

“Where a witness is asked to identify an accused or suspected person, the following procedure shall be followed—



- (a) the accused or suspected person shall always be informed of the reasons for the parade and that he or she may have a counsellor or a friend present when the parade takes place;
- (b) the police officer-in-charge of the case, although he or she may be present, shall not conduct the parade.
- (c) the witness or witnesses shall not see the accused before the parade;
- (d) the accused or suspected person shall be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as him or her;
- (e) where the accused or suspected person is suffering from any disfigurement, steps shall be taken to ensure that it is not specially apparent;
- (f) not more than one accused or suspected person shall appear on an identification parade;
- (g) the accused or suspected person shall be allowed to take any position he or she chooses and shall be allowed to change his or her position after each identifying witness has left if he or she so desires;
- (h) care shall be exercised that witnesses do not communicate with each other;
- (i) where the witness desires to see the accused or suspected person walk, hear him or her speak, see him or her with hat on or off, this shall be done, but in this event the whole parade shall be asked to do likewise;
- (j) the conducting officer shall ensure that the witness indicates the person identified, without the possibility of error by touching;
- (k) at the termination of the parade, or during the parade, the officer conducting it shall ask the accused or suspected person if he or she is satisfied that the parade is being or has been conducted in a fair manner and make a note in writing of his or her reply thereto in form p.156;
- (l) when explaining the procedure to a witness the officer conducting the parade shall tell him or her that he or she shall see a group of people which may or may not include the person responsible, and the witness shall not be told, "to pick out somebody" or be influenced in any way whatsoever;
- (m) a careful note shall be made after each witness leaves the parade, to record whether he or she identified the accused or suspected person and in what manner;

77. The procedure for conducting an identification parade was highlighted in *R v Mwangi s/o Manaa* [1936] 3 EACA 29 and *Ssentale v Uganda* [1968] E.A.L.R 36 as follows: -

- a. The accused has the right to have an advocate or friend present at the parade;
- b. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;



- c. Witnesses should be shown the parade separately and should not discuss the parade among themselves;
  - d. The number of suspects in the parade should be eight (or 10 in the case of two suspects);
  - e. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;
  - f. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and
  - g. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.
78. It was Pw3's testimony that he informed the Appellant that he wanted to put him among other people for identification and he accepted. He brought 8 people, arranged them as per procedures of an identification parade. He stated that he brought the accused and asked him to choose his preferred position. He chose to stand between the 3<sup>rd</sup> and 4<sup>th</sup> person, he called a witness who came and he identified the accused by touching him. He asked the accused for any comment but he did not have any. He said he was satisfied and he signed the identification parade form.
79. The Appellant in his testimony told the court that he was placed among 7 people in army uniform. Upon cross examination, he stated that an officer was among the people in the parade. It is not clear what actually happened. The accused person was asked to call a friend but he stated that he could not remember their phone numbers. I find that the identification parade was properly conducted. The conviction is upheld.

### Sentence

80. As regards the sentence, the punishment for a person who is found guilty of robbery with violence under section 296(2) of the *Penal Code* prescribes a mandatory death sentence up. The Trial court called for a pre-sentence report that indicated that the Appellant was first time offender and his family members stated that they did not know of his whereabouts until they were confronted by the probation officer.
81. Aburili J in the case of *Chivoli v Republic (Criminal Appeal E037 of 2023) [2024] KEHC 858 (KLR)* in discussing this sentence stated as follows;
- “The Supreme Court in the case of *Francis Karioko Muruatetu & Another v Republic (2017) eKLR* declared the mandatory death sentence for murder under Section 204 of the *Penal Code* to be unconstitutional for the reason that it deprived courts of the inherent discretion to impose a sentence other than the death sentence in an appropriate case, having regard to the circumstances of each case. Secondly, that the mandatoriness of death sentence also denied the convicted person the opportunity to mitigate before being sentenced.
10. Subsequently, the Court of Appeal in *William Okungu Kittiny v Republic [2018] eKLR* applied the *Muruatetu* case mutandis mutatis to the mandatory death sentence for robbery with violence under the provisions of section 296 (2) of the *Penal Code* and declared the said section to be unconstitutional on



the same reasons stated by the Supreme Court in the Muruatetu case. The Court of Appeal stated as follows:

“...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of *the Constitution*, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court Particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the *Penal Code*. Thus the sentence ... is a discretionary ...”

11. In the premises, a trial court can in an appropriate case, impose a sentence other than the death sentence in a case of robbery with violence. This is because sentencing is in the discretion of the trial court although such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.

12. In the case of Shadrack Kipchoge Kogo v Republic Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows:

“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant fact or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

13. Similarly, in the case of Wanjema v Republic (1971) E.A. 493 the court stated that:

“An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

14. The Supreme Court in the Francis Karioko Muruatetu supra decision gave the following guidelines to be applied by courts in considering the convicts for re-sentencing:

“

71. As a consequence of this decision, paragraph 6.4 - 6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are



applicable in a re-hearing sentence for the conviction of a murder charge:

- a. age of the offender;
  - b. being a first offender;
  - c. whether the offender pleaded guilty;
  - d. character and record of the offender;
  - e. commission of the offence in response to gender-based violence;
  - f. remorsefulness of the offender;
  - g. the possibility of reform and social re-adaptation of the offender;
  - h. any other factor that the Court considers relevant.
72. We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

“25. Guideline Judgments

25.

1. Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.”



15. The Court of Appeal in *William Okungu Kittiny v Republic* [2018] eKLR stated:

“...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of *the Constitution*, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu’s case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the *Penal Code*. Thus the sentence ... is a discretionary ...”

16. According to The Sentencing Policy Guidelines, 2016 (“the Guidelines”) published by the Kenya Judiciary, the sentence imposed must meet the following objectives in totality;

- (a) Retribution: To punish the offender for his/her criminal conduct in a just manner.
- (b) Deterrence: To deter the offender from committing a similar offence subsequently as well as discourage other people from committing similar offences.
- (c) Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
- (d) Restorative justice: To address the needs arising from criminal conduct such as loss and damages.
- (e) Community protection: To protect the community by incapacitating the offender.
- (f) Denunciation: To communicate the community’s condemnation of the criminal conduct.

82. this court is guided by the finding in the case of *Bernard Kimani v Republic* [2000] eKLR the court stated that:

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



are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist .”

83. The Appellant has pleaded for leniency indicating that he has now changed. The pre-sentencing report also indicates that he was a first time offender and that he was arrested on 21/03/2020 and according to the Trial court proceedings, has been in custody ever since.

### **Disposition**

84. I therefore direct as follows;

- a. The Appeal on conviction fails and is dismissed.
- b. The Appeal on sentence succeeds, the sentence is quashed and set aside and is substituted with an order directing that the Appellant be imprisoned for fifteen years from the date of his arrest in line with section 333(2) of the *Criminal Procedure Code*.
- c. It is so ordered

**JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 5/2/2025 VIRTUALLY/PHYSICAL CONFERENCE**

**M.W.MUIGAI**

**JUDGE**

