



**Kinyua v Republic (Criminal Appeal E080 of 2023)
[2025] KEHC 3138 (KLR) (Crim) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3138 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL E080 OF 2023

AB MWAMUYE, J

MARCH 13, 2025

BETWEEN

PETER MWITA KINYUA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Judgment, Conviction and Sentence of the Hon. H.M. Nyaga (CM) delivered on 11th November, 2022 in Criminal Case No. 3170 of 2015)

JUDGMENT

1. The Appellant, Peter Mwita Kinyua, was charged with three (3) counts of Robbery with Violence contrary to Section 295 as read together with Section 296 (2) of the [Penal Code](#). On the first count, it is alleged that on the 19th September, 2015 at Umoja Makadara District within Nairobi County, the Appellant, jointly with others not before Court, while armed with dangerous and offensive weapons namely pistols, robbed one James Ndae Chege of an unknown amount of money, and at, or immediately before, or immediately after the time of such robbery, used actual violence by shooting dead the said James Ndae Chege.
2. On the second count, the particulars are that on the 19th September, 2015 at around Umoja, Makadara District within Nairobi County, the Appellant jointly with others not before court, while armed with dangerous and offensive weapons namely pistols robbed one Mary Wanjiru of Kes.15,000/- and at or immediately before or immediately after the time of such robbery used actual violence on the said Mary Wanjiru.
3. On the third count, the particulars are that on the 19th September, 2015 at Umoja Makadara District within Nairobi County, the Appellant, jointly with others not before court, while armed with dangerous and offensive weapons namely pistols, robbed one George Kimani Macharia of Kes.2,000/-



and at, or immediately before, or immediately after the time of such robbery used actual violence to the said George Kimani Macharia.

4. The Appellant pleaded not guilty to all the three (3) counts. The prosecution called 8 witnesses; the Appellant was put to his defence. The Appellant was subsequently convicted and sentenced to suffer death in respect of counts one (1) and two (2) respectively. The sentence in count three (3) was held in abeyance.
5. Having set out the background to the matter, this Court's duty is to evaluate and scrutinize the evidence and proceedings on record and reach its own independent conclusion as espoused in David Njuguna Wairimu V Republic [2010] where the court of appeal held: -

“The duty of the first appellate court is to analyze 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 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.

6. Having looked at the Appellant's Petition of Appeal, his Written Submissions and those of the Respondent, it appears to this court that the issues that had been placed before it for determination were as follows:-
 - a. Whether or not the Appellant's right to fair trial was infringed upon;
 - b. Whether or not the Prosecution proved its case beyond reasonable doubt;
 - c. Whether or not the Appellant was properly identified and;
 - d. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.
7. The court dealt with the said issues under the following distinct and separate heads.

I. Right to fair trial

8. Ground one of the Appellant's amended grounds of appeal is dealt with under this head.
9. The Appellant invoked Article 50(2)(j) of *The Constitution* of Kenya, 2010 and relied on the case of Thomas Patrick Gilbert Chepmimondeley vs Republic [2008] eKLR where it was held that in order to satisfy the requirements of a fair trial guaranteed under *the Constitution*, the prosecution is under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statement of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items.
10. It was his contention that after plea taking, the trial court did not issue orders for him to be supplied with witness statements.
11. From the trial court's record the matter came up for mention on the 16.12.2015 where the Appellant was present but did not inform the court that he had not been supplied with the witness statements. The matter came up for another mention on 22.03.2016 where the Appellant asked to be supplied with the witness statements of which the Court ordered that he be supplied with the statements at his



- own cost. On 14.06.2016 the matter was coming up for hearing but the Appellant stated that he had not yet received the statements and the hearing was consequently adjourned and the Appellant given the last opportunity to get the statements.
12. On the 29.09.2016, the matter came up for hearing and the Appellant indicated to court that he was ready to proceed.
 13. Furthermore, at some point during the trial, the Appellant had counsel on record and his counsel made an application to recall the witnesses which was allowed but limited to cross examination only.
 14. It is therefore a correct position when the Appellant to asserts that he was not accorded a fair trial.
 15. In the premises foregoing, Ground No.1 of the amended Petition of Appeal is not merited and the same is hereby dismissed.

II. Proof of Prosecution Case

16. In analyzing the ingredients of the offence of robbery with violence, it is important to start with the text of the law. The Appellant was convicted with the offence of robbery with violence. Section 296 (2) of the *Penal Code* provides that:-

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in the 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.”

17. The ingredients of this offence were aptly discussed by Cockar, CJ, Akiwumi & Shah, JJA in the case of *Johana Ndungu Vs. Republic* CRA. 116/1995, [1996] eKLR where the Court of Appeal in Mombasa stated as follows:-

“In order to appreciate properly as to what acts, constitute an offence under Section 296 (2) of the penal Code, one must consider the subsection in conjunction with Section 295 of the *Penal Code* 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.”

18. Similarly, in the Court of Appeal in Criminal Appeal No. 300 of 2007, *Dima Denge Dima & Others Vs. 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.”



19. In the case herein, PW1- George Kimani, stated that he worked at a guest house in Umoja called Sunset Guest House. On the fateful day at around 3.00 am, two men came and asked for a room and as he was showing them the room, he felt a pistol on his head. The two men ordered him to lie on the bed and they tied his hands at the back and feet. They took his wallet which had money in it.
20. The two men went out and PW1 heard a woman screaming which was followed by a gunshot. He then heard footsteps of people running away. After a few minutes he heard a woman calling and he responded. The woman came to where he was and untied him. The woman was a guest in one of the rooms and she informed him that her husband had been shot. He went to the room and saw a man lying on the floor in a pool of blood. He had a bullet hole on his head and chest.
21. PW1 further stated that the Appellant was one of the assailants and he is indeed the one who ordered him to lie down and he is the one who took away his wallet which had Kes. 2,000/-
22. PW4- Beatrice Saliku also testified that she worked at Sunset Hotel Umoja and on the said date at about 3.00 am three men came and started harassing PW1. She hid when she saw them harassing PW1. She saw that they had a gun and so she hid. As she was hiding, she heard 3 gunshots. The men then ran out of the hotel. She stated that the appellant was one of the three men.
23. PW6- Mary Wanjiru stated that she had booked a room at Sunset Guest House with James Chege (the deceased). At about 3.00 am, she heard a commotion in the verandah then she heard their door being pushed. The door was opened and one man entered. He switched on the light and two more men entered after him. The first man had a gun in his hand and told her to be quiet. The three men told the deceased to be quiet and the appellant was one of the three men. The appellant was wearing a reflector jacket and holding a riding helmet in his hand.
24. She further stated that the appellant hit her on her chin and the gunman shot the deceased thrice. The three men then left in a hurry. During the incident the 3rd man took her handbag which had Kes. 15,000/- cash and her phone.
25. On the ingredients of the offence, I am satisfied from the evidence adduced that the Appellant was in the company of two other men at the time of the incident; they were armed with a dangerous weapon, being a pistol and that at the time of the robbery, they beat/used violence on PW1 and PW6 and even went ahead to shoot dead the now deceased person. To this extent, I am convinced that the prosecution proved all the three ingredients for the offence. That notwithstanding, the prosecution was required to prove only one limb of the offence of robbery with violence as was stated in the case of *Dima Denge Dima & Others Vs. Republic* [Supra].
26. It is therefore this court's finding that indeed the prosecution proved the elements of the offence of robbery with violence beyond any reasonable doubt.

Whether the appellant was positively identified -

27. In *Francis Kariuki Njiru & 7 others v Republic* [2001] KECA 58 (KLR) the Court of Appeal stated that: -

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see *R. v. Turnbull*[1976]63 Cr. App. R.132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police



at the earliest opportunity or at all. This Court, in *Mohamed Elibite Hibuya & Another v. R.* Criminal Appeal No. 22 of 1996 (unreported), held that

: "... it is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence.

Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal - this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."

28. In the present case, PW1 stated that he saw the two men clearly. The lights were on and that the Appellant was one of the assailants. It was the appellant who ordered him to lie down.
29. PW1 further stated that the Appellant had a boda boda helmet on but the visar had not covered his face. He saw his face clearly and even described that he had his right eye almost closed and the other was normal.
30. PW1's testimony was corroborated by that of PW4, the cleaner in the said guest house. She also pointed out that the Appellant was among the men who entered the guest house that night. She noted that the Appellant had a deformed eye and was wearing a motorcycle attire and a reflector jacket.
31. PW6 narrated how the Appellant and two other accomplices forced their way into their guest room. They switched on the lights, and after a brief conversation, the Appellant and one accomplice held the deceased up and the third man shot him.
32. PW6 positively identified the Appellant as having been wearing motorcycle attire and had a deformed eye.
33. The Court of Appeal in *Michael Nganga Kinyanjui Vs. Republic* [2014] eKLR quoted from *Cleopas Otieno Wamunga V. R.* Criminal Appeal No. 20 of 1982 (UR) that:-

"Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the Court must warn itself of the special need for caution before convicting the defendant on reliance on the correctness of the identification. The way to approach the evidence was succinctly stated by Lord Widgery, C.J. in the well known case of *Republic V. Turnbull* [1970] 3 ALL E.R. 549....."

"...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way..? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police?"

34. All witnesses at the guest house confirmed that the were lights in the premises. PW1 stated that he had spent sufficient time with the Appellant while escorting him and his accomplice to view the



available room. In the deceased's room, when the Appellant and his accomplices entered, the lights were switched on. The incident took some time according to PW6. The men spoke to the deceased telling him that they had been looking for him and that he had sold out one of them.

35. All the three eye witnesses pointed out that the accused had a unique physical feature, a deformity on his eye. I am persuaded that there was sufficient lighting in the premises and that the eye-witnesses had sufficient capacity and cognizance to positively identify the accused person.
36. In addition, barely a month later, PW6 was summoned to identify the appellant in an identification parade of 8 members of similar characteristics, where she was able to positively identify the appellant.

Whether the sentence was harsh and excessive under the circumstanceDIVISIOPN -

37. In Nelson Ambani Mbakaya Vs. Republic (2016) eKLR, the Court of Appeal stated that:-

“Sentencing of an accused person after conviction involves the exercise of discretion by the trial court. That discretion must of course be exercised judiciously rather than capriciously, depending on the circumstances of each case. As what is challenged in this appeal is essentially the exercise of discretion by the trial court, this Court is normally slow to interfere with that exercise of discretion unless it is demonstrated that the trial court acted on the wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.....”

38. Similarly, in Mkirani Vs Republic (Criminal Appeal E010 of 2021) [2021] KEHC 377 (KLR) (17 December 2021) (Judgment), Mativo J. (as he then was) stated:-

“Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly, the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously.....”

39. I have considered the issue of harsh sentence as raised by the Appellant. The penalty under section 296(2) of the *Penal Code* is death.
40. However, the recent judicial development from this Court, the Court of Appeal and the Supreme Court has changed the tides in as far as mandatory statutory sentences are concerned. It is on this basis that I accept the invitation by the Appellant to intervene on the sentence.
41. In the Muruatetu Case, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down section 204 of the *Penal Code* to the extent that it prescribed mandatory death sentence upon conviction for murder.
42. The reasoning in Muruatetu Case respecting section 204 of the *Penal Code* (the penalty section for murder), has been extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases and probably all other similar mandatory death sentences. That was in William Okungu Kittiny v R [2018] eKLR.
43. Further, Section 329 of the *Criminal Procedure Code*, gives judges and magistrates, in appropriate cases to consider mitigation and mete out a sentence that fits the offence committed despite another sentence



being provided for under the Act in which the offence is prescribed. In that regard, I find the sentence imposed shatters all hopes of the appellant for rehabilitation or having another chance to start afresh.

44. Therefore, the appeal on sentence succeeds. The sentence of death is hereby vacated. I hereby substitute the same with a term of 30 years on both counts to run concurrently. Further, and in line with the provisions of Section 333(2) of the *Criminal Procedure Code*, I direct that the sentence shall run from the date the appellant was first in custody.

45. Orders accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 13TH DAY OF MARCH , 2025.

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BAHATI MWAMUYE

JUDGE

In the Presence of:

Counsel for the Appellant – Unrepresented appears in Person from Kamiti

Prosecution – Mr. Chebii

Court Assistant – Ms. Neema

