Kariuki v Republic (Criminal Appeal E052 of 2023)
[2025] KEHC 3078 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3078 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E052 OF 2023

E OMINDE, J

MARCH 6, 2025

BETWEEN

JOSEPH KIMANI KARIUKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant was charged with the offence of Robbery with Violence contrary to Section 296(2) of the *Penal Code* in Eldoret Chief Magistrates' Criminal Case No. 3484 of 2019. The particulars of the offence were that on 25th June 2013, at Musembe location along the Eldoret Webuye Highway, in Lugari County within Kakamega Sub County, jointly with others not before court, while armed with a dangerous weapon, namely AK 47, he robbed Justus Masakhwe Ayenga of a motor vehicle registration no. KBU 474E make Nissan X Trail, two mobile phones of make Nokia E63 and HTC, cash Kshs. 40,000/-, ATM cards for Bank of Africa, National Bank of Kenya, Bank of America, BB&T Bank and three ATM cards for Kenya Commercial Bank, driving licence, one pocket wallet containing other personal documents all valued at Kshs. 1,580,250/- and at the time of such robbery threatened to use violence against the said Julius Masakhwe Ayenga.

2. The Appellant was convicted and sentenced to life imprisonment vide Eldoret Chief Magistrates' Criminal Case No. 3437 of 2013. He then filed an appeal in 2016 vide Eldoret High Court Criminal Appeal No. 82 of 2016 and following the disappearance of the trial court file, Justice H.A Omondi (as she then was) ordered for a retrial on 23/10/2019. The appellant pleaded not guilty and the matter proceeded for retrial. Upon considering the evidence on record and the testimonies of the witnesses, the trial court convicted the appellant of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*. The appellant was given an opportunity to mitigate and after considering his mitigation, the trial court sentenced him to 25 years' imprisonment.

3. Being aggrieved with the conviction and sentence, the appellant instituted the present appeal vide a Petition of Appeal filed through the firm of Messrs Seneti & Oburu Advocates on 07/05/2024. The appeal is premised on the following grounds;

    i. That the learned trial magistrate erred in law and fact by failing to find that there was no description of features made to the police by PW1 on his first report under OB/NO. 31/25/6/2013.

    ii. That the trial magistrate failed to observe that the Appellant was not presented in court on 28/10/2019 as directed by the Honourable High Court Judge when ordering for a retrial instead the Appellant was presented to court on 14/11/2019.

    iii. That the learned trial magistrate erred in law and fact by convicting the Appellant on reliance of an identification parade conducted without following the due procedure of the law.

    iv. That the learned trial magistrate erred in law and fact by not complying with section 333(2) of the *Criminal Procedure Code*.

    v. That the learned trial magistrate erred in law and fact by disregarding the fact that the appellant had an alibi.

    vi. That the learned trial magistrate erred in law and fact by failing to realize that essential exhibits were not tendered in evidence by the prosecution during trial.

Prosecution evidence at the trial court

4. PW1 was the complainant, Justus Masakhwe Ayenga, a preacher based in Bungoma with King Jesus Faith Ministry. He testified that on 25/06/2013 he was travelling from Nakuru and passed through Kapsabet to collect a dog. He was using a Nissan X Trail, registration no. KBU 474E. He picked the dog and when he arrived at a place known as Tairi Mbili, he stopped at the stage to check on the dog. He stated that it was around 7.30 p.m. and it hadn't gotten pitch dark. He confirmed the dog was okay and he was then approached by two young men. One told him he was a student at Eldoret University and they requested a lift as one was heading to Webuye and another to Bungoma. They boarded the vehicle and upon arriving at a place called Musimbi, they found the road under construction. The witness stated that he saw two men as the road converged into one lane. Suddenly, a vehicle came from behind and overtook them, and the man seated at the front knocked the dashboard, telling him to stop and informing him that this was a robbery. The man seated behind strangle-held the complainant's neck the complainant and the one who was seated to the left took over the vehicle.

5. The complainant testified that the vehicle that overtook them was a Noah and a girl with a gun alighted from the vehicle. Another man also alighted from the Noah and boarded his vehicle. One of them took charge of the vehicle and they ordered him to lie down. The lady asked him how much money he had and he replied that he had Ks. 100,000/- but had used some. The person next to him started ransacking him and they pulled out the money he had on him and started counting it, it was Kshs. 40,000/-. He stated that inside the car, they were talking while they were driving the vehicle and he was seeing them as they were moving on and further that there was sufficient light and he was able to see the occupants.

6. That they took his phones and ATM cards and began driving towards Bungoma. Then they suddenly turned and began heading back towards Eldoret. At Kipkaren they took a tarmacked road and headed towards a quarry intending to drop the complainant there and on noting that there were people there, they decided against dropping him at the quarry. He stated that while debating whether they should kill him, they tied him up using his charging cable with which they tied is hands and his belt with

which they tied his legs and stuffed pieces of newspaper in his mouth. They took him to a maize field and dumped him there. He later on struggled to walk and at around 10 pm he found a path. He came across a homestead that had no gate and he requested for help. He was given a phone, called his wife and was directed to the nearest police station. He was later able to record his statement at Lumakanda police station and when asked if about the tribe of the robbers by the Duty Officer he told him one of them was called Kimani.

7. PW1 testified that he was later called by the police and told that his phone a Nokia E63 had been recovered. That he had written his name written on the back cover and the battery with indelible ink. He went to the station and confirmed it was his phone but it didn't have the sim card. He was then sent to Lumakanda Police Station for an identification parade. He went and was not able to identify anyone in that parade. One month later he was again summoned to Lumakanda Police Station and for two identification parades. The first one was for ladies only. He went round and requested the parade participants to say the name 'Kimani' and he was able to identify the lady. He described her as tiny, light skinned with a hoarse voice. That he had marked her voice well and it remained in his mind. He was asked to leave the parade was re-arranged in his absence and he was again asked to identify his attacker. There were now two ladies with the same light skinned complexion. He again identified the same lady.

8. Another identification parade was done a month later which he attended and in this parade, he was able to identify Kimani who he said was the accused before the court. That he had seen Kimani before he entered the vehicle and he had a prominent forehead that stood out in the sense that it was big with what he would call corners, he had marked his height, he was able to recall the arrogance that Kimani exhibited on the fateful night, and besides, he had spent a fairly long period of time with him. Everyone at the parade was asked to speak and he was also able to identify Kimani's voice which he said was clear to him. That this voice was clear to him because the accused was speaking as he gave out orders. That he is the one who strangle held the complainant and that in the vehicle his accomplices kept calling him Kimani. That in this parade too he was asked to leave and the parade re-arranged and again he was able to identify Kimani again. However, the vehicle was never recovered.

9. In cross-examination, he testified that he had stated in his statement that the robber was called Kimani but the same was not indicated in the statement and he does not know why. He stated that he went to the identification parade and was able to identify the appellant from the forehead and that he had never seen any person with a forehead similar to the accused because the accused head seemed to have what he would call "corners" and that the appearance of the accused head was boxlike Further, that he had ownership documents for the vehicle and they were presented to court but they got lost while in the custody of the court. He confirmed that he identified him by his looks as he had spent one and a half hours with him in the vehicle and he saw him very well and they were also talking as he drove hence his ability to recognize the voice.

10. PW2 was Innocent Wanjala Wafula. He recalled that on July 2013, he operated a pool table and there was a young man who used to attend to the same at the AP Camp in Bungoma. The young man came with a Nokia phone and told him he wanted to sell it to him but he told him he wasn't interested. The owner of the club was interested and bought it for his manager. He later helped him transfer contacts and they continued with life. Later on, he received a call by the club owner, Michael, who told him that the police were looking for him to talk about the phone. He met the officers from Lumakanda police station and they informed him that the original owner had been robbed and they were investigating the matter. Additionally, that he remembered the name of the appellant as he was constantly being called out by the other robbers. He stated that there were three parades and he was able to identify the person who took his phone, the lady who was part of the gang and that he identified the appellant during the parade of 31/08/2013.

11. PW3 was Sgt Paul Limo. He testified that at the material time he was based at Lumakanda Police Station. That on 26/07/2013, he was asked by his DCIO to join PC Rotich, an investigating officer as there had been a case of robbery with violence against the complainant reported on 25/06/2013. He recounted the particulars of the event and stated that he accompanied the investigating officer to Kakamega on 26/07/2013 as they had received a tip off that one of the phones that the complainant had been robbed of was in use. Their investigations led to the arrest of Injisi Edward Ngusa and they took him to the police station. the complainant then came and identified the phone and confirmed the same as his with a receipt. That on 29/09/2013, he accompanied C.I Ndubi, Sgt. Mungare and P. C Cherotich to Eldoret town and their investigations led them to arrest Sharon Chemutai. With her aid, they managed to arrest the appellant and took them to Lumakanda Police Station. They interrogated him and he told them that the vehicle had been sold to one Ken at Malaba border for a price of Kshs. 200,000/- and they caused it to be taken to Uganda. He testified that several different Identification parades were subsequently conducted and the complaint was able to identify the lady accomplice Sharon in one parade and the accused in another parade.

12. He testified that in the initial trial, the phone, a receipt for the said phone, the motor vehicle sale agreement, the log book and the exhibits were produced in court. That they were however not able to retrieve the same from the Court for purposes of the re-trial. He testified that it is the accused who said he was going to Bungoma and he is the one who was seated at the back seat and he is the one who strangled the complainant with the aim of disabling him. He testified the accused as being the mastermind of the robbery. He had copies of the Identification Parade Form for the applicant which he produced as PMFI-2. He testified in cross examination that at the time of arrest the accused gave his name as Kamau but they later got his correct names as Joseph Kimani Kariuki alias Kim and that is why his statement and the OB Report of 11/30/8/2013 bears the name Joseph Kamau Kariuki.

13. PW4 was Robert Fernandez, a motor vehicle dealer based in Eldoret. He testified that he sold the subject motor vehicle Nissan X-Trail Registration Number KBU 474E red in colour to the complainant for a deposit of Kshs. 1,000,000/- and a balance of Kshs. 550,000/- was to be paid in instalments. He produced the agreement they signed for the sale of the motor vehicle. He stated that the complainant called him on 25/06/2013 and informed him that the vehicle had been stolen. There was no tracker on the vehicle and eventually, the complainant paid the balance of the purchase price.

14. PW5 was PC Joseph Mugure who testified that he took over the investigations of the case on 19/06/2020 when a re-trial was ordered by the High Court. He stated that the exhibits in the case had been tendered in the initial trial but for this trial, he wrote to the court administrator to avail the same but they were never available. He recounted the events of the material date as reported to him by the complainant and produced a copy of the Sale Agreement for the motor vehicle and PExh3 and a Copy of the Identification Parade Form with respect to the accused as PExh2. He stated that the belt with which the complainant was tied up was PExh1 and that the accused person was one of the robbers.

15. In cross examination, he stated that the name on the ID Parade Form is indicated as Joseph Kamau Kariuki alias Kim because there was an initial confusion and error to the name because the police usually capture the name as presented by the concerned person and that is the name the accused gave and having received the documents with the name as initially captured he could not change it. That the correct name of the accused was subsequently determined and captured as per the charge sheet. That the dirctions for a re-trial were given on 28th October 2019 and he was charged on 14th November 2019 two weeks later. He clarified in re-examination that he accused in the ID Parade was identified as Joseph Kimani Kariuki and the name Kamau was indicated as therein an error

16. PW6 was Corporal Edward Ndemo who testified that he was assigned to investigate the loss of exhibits from court in court files no. 3437/2013 and 356/2013. He wrote to the court administrator Eldoret Law Courts on 01/02/2022 and was supplied with the particulars of the Executive officer in charge of the exhibits safe. He traced the officers being Joseph Mmera and Isaiah Mmbona. Isaiah Mmbona was the one in charge of the exhibits and upon investigations. That together with Joseph Mwera, they went to the Exhibit Store and confirmed from the Exhibits Register that there was an entry of the exhibits in the Register but they could not be traced. He named the exhibits as Mobile Phone Nokia E63 entered as Exh1, Mobile Phone reception as Exh2, A Logbook and Transfer Form as Exh3, a duplicate Copy of a Sale agreement as Exh4, an ID Parade form for Sharon as Exh5 and ID Parade Form for Kimani as Exh6. The witness testified that these exhibits were stolen from the exhibit store with a bad intention. He produced the DCI Report on the same as PExh3 and stated that the officer in charge of the exhibits was the one to explain but he was no longer alive.

17. The prosecution closed its case and upon considering the evidence tendered in court and the testimonies of the witnesses and the submissions made by the accused and the Prosecution, the trial magistrate put the appellant on his defence.

Defence evidence at the trial court

18. The appellant testified as DW1. He gave a sworn testimony of defence and did not call any witnesses. He stated that he is a businessman and farmer by occupation. He stated that he was arrested in Njoro in Nakuru County. That on 25/06/2013 he travelled to Kirinyaga at around 6.30 pm to visit his cousin. He then returned to Nakuru County and on 27/06/2013 he travelled to Uasin Gishu County where he had a salon at Langas and continued with his business activities until 27/08/2013. That on that day, he closed his business and went for a drink at Paradise bar. As his beer was opened, the bottle top fell on a glass of a man seated at the next table. That he did not know they were police officers. That a commotion erupted and a fight ensued. That the men arrested him and took him to Eldoret Central Police Station and this is where he knew who they were. They told him he will learn the lesson of his life and that indeed he has because up to now he is still in court. He testified that he was taken to Lumakanda Police Station on 28/08/2013 and on 02/09/2013, he was brought to court and charged. He denied the commission of the offences and produced a PSV receipt as proof that he had travelled to Kirinyaga. The same was marked as DExh1.

19. In cross examination he states that the salon he worked in then belonged to his cousin one David Ndungu who has since died and that he did not have proof of his death. That he travelled to Kirinyaga in a Nissan Matatu whose conductor and driver he did not know and that he would not avail the maker of the PSV receipt to court but that does not mean he was lying and has manufactured the receipt. That he travelled from Nakuru to Eldoret after coming from Kirinyaga in a private car registration number KBN 324G that belonged to his boss Mr. Ndungu Francis Gitau who is the same said David Ndungu and that David is his other name. That she had a neighbour at Langas known as Irene who has since moved to an unknown place. That the two police officers who threatened him were PC Wachia and PC Wekesa whom he reported to the OCS and and the matter was ecorded in the OB and later he reported to the Independent Police Oversight Authority (IPOA) on 2nd March 2019 in file number 3437/013 but he never asked the court that he be allowed to go to the Police Station to get the relevant OB excerptThe appellant made an application to give further evidence which was allowed by the court. That he paid for his beer in cash and he has no receipt of payment. He produced his ID, a copy of the inventory, the OB Nos. 31/25/6/2016 & 11/30/8/2013, statements of the prosecution witnesses, the judgement in HCCRA NO> 82/2016 and closed his case.

Judgment of the trial court

20. The trial magistrate considered the evidence tendered in court, the testimonies of the witnesses and the submissions of the parties and, as aforementioned convicted the appellant of the main charge and sentenced him to 25 years' imprisonment vide a judgment delivered on 21/06/2023.

Hearing of appeal

21. The parties prosecuted the appeal through written submissions. The appellant filed his own submissions on 07/11/2024 which were subsequently adopted by Messrs Oburu Nathan Mageto Advocate who subsequently came on record for the Appellant whereas the prosecution filed submissions on 11/02/2025 through prosecution counsel S.G Thuo

Appellants' submissions

22. The Appellant submitted that his rights to a fair trial were violated. He stated that the High Court in HCCRA No 82 of 2016 gave directions that the appellant appear before the Eldoret Chief Magistrate/ Senior Principal Magistrate for plea and trial directions on 28th October, 2019 but as per the record of the proceedings he was arraigned in court on 14/11/2019, 18 days after the date ordered. As it was a retrial, all the rights of an arrested person pursuant to Article 49 of *the Constitution* were available to him. Further, that the inordinate delay in producing him in court for plea taking was never explained by the prosecution to the trial court. He reiterated that the delay in producing him was a violation of his right to a fair trial.

23. The appellant raised the issue of the exhibits in the first trial having disappeared, posing the question as to why Joseph Mwera was never charged due to the disappearance. Further, that the prosecution failed in its duty and he should not be punished for the its shortcomings. He submitted that without the said exhibits, it cannot be established beyond reasonable doubt that PW1 possessed a motor vehicle which was stolen from him. In fact, PW1's ownership would have been proved through production of a logbook, which was never done. He urged that the disappearance resulted in a violation of his rights to a fair trial.

24. The appellant submitted that the prosecution was under a duty to prove his identification beyond reasonable doubt. That PW1 purports to have identified the appellant because he had spent a considerable time with him in the car. He disputed this, submitting that it is not possible to drive while looking at the back unless when one is reversing. He pointed out that PW1 stated that he did not know the name of the appellant but heard it when it was called out by another one of the perpetrators. He faulted this by stating that Kimani is a common name among the members of the Agikuyu ethnic group, therefore, there was much more evidence needed to prove that the name was indeed the accused persons.

25. He cited the case of Terekalli and others vs Republic (1952) VOL 19 PG 259 and urged that PW1 never convinced the court that he had positively identified the Appellant. There was also inconsistency in the manner the offence was committed, giving an example of the testimony on how the road became one lane and posing the question as to how the complainant was overtaken on a one lane road. He cited the case of Joseph Ngunao Nzaro v Republic Criminal Application No. 44 of 1987 (1991) 2 KAR and the case of Robia vs Republic (1967) E.A 583 at 584G in support of this submission. The appellant urged that the evidence of PW1 in regards to the identification required corroboration, which was never provided.

26. The Appellant submitted that the prosecution stated that he ought to be treated as a first offender and he was called upon to mitigate on the sentence but the trial court failed to take into account the 10 years he had spent in custody pending the determination of the case. He urged that upon determining the period of imprisonment to impose upon an offender, the court must then deduct the period spent in custody in identifying the actual period to be served. He cited the case of Ahmad Abolfathi Mohammed & Another vs Republic [2018] eKLR, Criminal Appeal No 135 of 2016 in support of his submissions, additionally stating that the sentence meted out by the trial court failed to appreciate the facts of the case including that he was not positively identified, that the vehicle was never proved to be the property of PW1, that he was a first offender, and that the 10 years spent in custody were never factored in. He urged that he was a youth and ought to have been afforded a chance to redeem himself. He prayed the court to allow the appeal.

Respondents' Submissions

27. Learned counsel for the State submitted that as this is the appellants' second appeal, the mandate of this court is by virtue of Section 362 (i)(a) of the *Criminal Procedure Code*, limited to consideration of issues of law only. Further, that this position has been reiterated by this Court in many of its decisions including in Adan Muraauri Munaara v Republic [2010] eKLR.

28. In response to the allegation by the appellant that he was arraigned in court for fresh plea taking on the 14/11/2019 instead of 28/10/2019 as decreed by the high court that ordered the retrial, counsel urged the court to take judicial notice that this period was during the height of the Covid 19 Global pandemic when normal court operations had been seriously curtailed physical gatherings and consequently, movements in and out of the counties had been banned. During this time, the appellant was in the custody of the prison authorities and there was a general segregation of inmates to prevent an outbreak. He pointed out that it is also possible that signals from the prison to avail inmates for plea taking sometimes took long to be effected. He urged that the appellant can have recourse in a civil constitutional court and not the current criminal one on this issue.

29. On the failure to produce the vehicle that had been stolen, counsel urged that this matter was canvassed at great lengths and sufficient explanations about the missing exhibits were settled. He stated that it is worth noting that the incident happened in the year 2013 and this retrial kicked off nearly 10 years later leading to the unfortunate loss of the said exhibits, a fact that was explained at length

30. Learned counsel for the state submitted that it is not disputed that the offence was committed at night and, that it is also not in dispute that the appellant was picked by PW1 in an identification parade. The only issue here is whether the identification was proper. He urged that where the evidence against an accused is based on identification, this court in the case of Cleophas Otieno Wamunga v Republic [1989] eKLR, urged caution. Additionally, that the need for caution was also reiterated by the Court of Appeal for Eastern Africa in the case of Abdallah Bin Wendo v R 20 EACA 166. He pointed out that according to PW1 the ordeal lasted for considerable amount of time within which he was able to observe the physical attributes of the appellant to include his complexion, the shape of his head, his Kikuyu dialect and name Kimani. This testimony remained steadfast in the heat of intense cross-examination.

31. Counsel submitted that this matter commenced on the 14/11/2019 when the appellant was arraigned for the re-trial as the earlier case had already been determined. The appellant was immediately released on bond but he jumped bail leading to cancellation of his /bond terms and therefore he cannot be heard to rely on the authority in Ahmad Abolfathi Mohammed.

32. On the issue of sentence, counsel urged that the circumstances where an appellate court can interfere with the sentence of the trial court were well quoted in Nillson v Republic [1970] E.A 599 following the reasoning of the court in Ogalo s/o Owuora v Republic [1954] 21 EACA 270. He stated that Section 296(2) of the *Penal Code* prescribes the death penalty as the sentence for the crime of robbery with violence. Further, that the Supreme Court gave directions in the case of Francis Karioko Muruatetu & Ano v Republic Petition No 15 &16 (Consolidated) of 2015 (commonly known as Muruatetu II) stating that the decision in Muruatetu I were never intended to apply to all cadre of cases of mandatory minimum or maximum sentences. Counsel submitted that considering that clarification from the Supreme Court vide SCOK Petition E018 of 2023 Republic vs Joshua Gichuki Mwangi & Ors the court should show some spine and enhance the sentence to the only one prescribed under the law, urging the court to enhance the same to death penalty.

Determination

33. In light of the submissions made by the State that this is a second appeal and that the Court therefore must confine itself to matters of law only, it is necessary to point out at this early stage as this is an appeal after the matter was sent for retrial. In these circumstances then this then is a first appeal and not a second appeal. In this regard the procedure that is applicable is as was stated by the Court of Appeal in the case of Kiilu & Another vs. Republic [2005] 1KLR 174 as follows:

> " 1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.
>
> 2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."

34. The above said, the issues that the Court then needs to determine are as follows;

    a. Whether the prosecution proved the case beyond reasonable doubt

    b. Whether the accused right to a fair trial was infringed by dint of the fact that he was not arraigned I court immediately the High Court ordered for his re-trial.

    c. Whether the Court should enhance the sentence from 25 years to the death penalty

    d. Whether the Section 333(2) of the CPC is applicable

Whether the prosecution has proved the case beyond reasonable doubt

35. Section 295 of the *Penal Code* defines the offence of Robbery as follows:

    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.

36. Section 296 of the *Penal Code* provides for the punishment for Robbery as follows;

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

2) 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.

37. The three elements of the offence of Robbery then are that the offender is armed with a dangerous or offensive weapon; the offender is in the company of one or more persons and the offender wounds, beats, strikes or uses any personal violence against any person. In the case of Dima Denge Dima & Others vs Republic, 2013 eKLR, the Court of Appeal explained the application of Section 296(2) with respect to the proof of each of these elements 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."

38. In the instant Appeal, I have considered the evidence adduced by the prosecution witnesses as herein above summarised. I have also read the impugned judgement of the Hon Magistrate. I note that the Hon Magistrate in the said judgement appreciated what the three elements requiring proof in a robbery with violence case is, properly laid them out, was alive to and noted the fact that the elements are to be read disjunctively and proceeded to analyse the evidence with all these in mind and applied them appropriately

39. I have considered the Hon Magistrate's analysis of the evidence that informed his finding that the evidence adduced by the prosecution supported a charge of robbery with violence contrary to Section 296(2) as charged. I find that the said analysis was very well done and the same was solely based on the evidence on record and not on any extraneous factors and/or circumstances.

40. Further to my observation as above, this court also notes that even though the evidence on how the robbery was committed is that of the complainant only, the same is very well corroborated in every material particular by the evidence of the police officers who were involved in this case in one way or another as their evidence as herein summarised demonstrates. Further, the Court also notes that even with effluxion of time in light of the fact that the matter went for re-trial in the year 2019, which is 6 years after the robbery was committed in 2013, the complainant's testimony was steady and consistent and did not at all change in any material particular even under intense cross examination by the appellant as the trial court record demonstrates.

41. In light of the above and without belabouring the point by regurgitating the evidence afresh I will simply state that I have also considered the evidence in its totality as herein summarised am I satisfied that the same has not just satisfied one element of the three ingredients that would be required to prove the charge beyond reasonable doubt, but it has in fact satisfied all three elements. I therefore find no plausible reason at all to fault the finding of the Hon Magistrate based on his analysis of the evidence on proof of robbery.

42. I note from the Grounds of Appeal filed that the appellant has faulted the Hon Magistrate's finding in the issue of identification for the reasons herein above summarised based on his submissions. The Court of Appeal in Peter Mwangi Wanjiku v Republic [2020] eKLR addressed the aspect of single identifying witness as follows: -

13. Section 143 of the *Evidence Act* provides that a court can convict on the evidence of a single witness. The said section reads, "No particular number of witnesses shall in the absence of any provision of law

to the contrary be required for the proof of any fact." Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness.

43. The Court, in the case of Wamunga v. Republic (1989) KLR 424 at 426 stated as follows:

> "Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

44. In Mailanyi vs Republic [1986] KLR 198, the court held:

1. Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.

2. When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.

3. The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.

4. Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.

45. And finally in R -vs- Turnbull & Others (1973) 3 ALL ER 549, the Court stated thus:

> ... 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? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

46. Given the above, I have considered the evidence as herein summarised as well as the finding of the Hon Magistrate on the issue of the identification of the appellant. Again, being satisfied that in his analysis of the evidence that informed the finding on the issue of identification the Hon Magistrate was very well attuned to and his analysis was in conformity with the salient requirements set out in the authorities herein above cited. Of special significance is that that I note that the Hon Magistrate in his judgement considered at length the following evidence of the prosecution witnesses which are key in reaching a determination that the assailant was positively identified. The complainant's testimony that the appellant had a peculiar shaped head which type of head he had never seen before. He described the appellant as having a large forehead and that his head is box shaped giving an impression that it has corners.

47. This testimony came on the appellant's peculiar looking head through and through in the examination in chief of the complainant as well as in his re-examination and in his testimony of his identification of the appellant at the ID Parade. The complainant's also testimony as to the length of time that he was with the appellant from the time he asked for and the complainant gave him a lift, the amount of time that they rode together engaged in conversation. The complainant's testimony the part the appellant played in the robbery and that he appeared to be the one in command of the gang from the manner in which his accomplices addressed him, that it is the appellant who was issuing commands and the arrogance he belied through it all. The complainant testimony that in all these scenarios, he saw the appellant well and heard his voice well too and that the voice stayed in his head. In light of my finding as I find no reason to fault not only the analysis of the evidence by the Hon Magistrate but also the finding as informed by that analysis.

48. On the Ground that the Identification Parade was conducted without following the due procedure of the law, the Court notes that the accused did not elaborate on what his objection to the Identification Parade as conducted was. The court further notes that the accused in his defence did not at all testify on the issue of the parade. He did not state whether he was subjected to a parade or not and that if he was, the discrepancies that he noted that are contrary to the law as he now states in his Appeal. The prosecution case on the other hand as testified by the complainant is that the complainant identified the appellant in the 3rd Parade that was conducted at Lumakanda Police Station. That he identified the accused through his physical features and from his voice. He stated that after his 1st identification of the appellant, he was asked to move out, the parade participants were re-arranged and he was asked to go in and he was able to identify the appellant again.

49. In the case of Kinyanjui & 2 Others v Republic [1989] KLR, the court stated:

> "The purpose of an identification parade is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion."

50. Further in Njihia v Republic [1986] KLR 422, the Court of Appeal stated thus 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."

51. In the instant case, as already herein above stated, the complainant had had the opportunity to interact with the accused at great length, observed him well and even memorized his voice. In this regard, as envisaged by the court in the above case, it is safe to make a finding that even without the identification of the appellant at the parade, there is clear evidence of the identification of the appellant as already demonstrated. But further to the above, there appellant has not adduced any evidence to sufficiently challenge and or controvert this aspect of the prosecution evidence and I shall therefore not disturb the same.

52. The appellant also stated as one of his Grounds that the alibi he had raised was not considered by the court. Notwithstanding this assertion, I note that the Hon Magistrate in his judgement considered the issue of the appellant's alibi at length and after a very well-reasoned analysis of the evidence on the appellant's defence of alibi dismissed the same as an afterthought and rightly held while relying on the decision of the Court of Appeal for East Africa in Rv Ahamad Bin Abdul Hafid (1934)EACA 76 that a defence of alibi should be raised at the earliest opportunity possible to enable the prosecution and the investigating agencies conduct the necessary investigations to determine the authenticity of the alibi claim.

53. In noting that the Hon Magistrate in his analysis concentrated majorly on the PSV receipt produced in support of the appellant's contention that he had travelled to Kirinyaga on the date the robbery was committed and on the appellant's assertion that the police officers who arrested him promised to fix him because of an altercation they had in a bar, of greater significance is that this court notes that the appellant's had stated that he had travelled Kirinyaga to visit a cousin. The said cousin from Kirinyaga in my very well considered opinion is even more of a key witness to the appellant's alibi defence than the PSV ticket that the appellant sought to rely on as proof of travel. This cousin is only equal in importance in my view to the appellant's employer/cousin who he testified that he travelled to Eldoret with but has since died. This cousin was not availed to court to corroborate the appellant's claim. The appellant did also not give any reason as to why he could not be availed and particularly since he was very specific that his employer/cousin had since died. Given the above it is my finding that the Hon Magistrate correctly directed himself on the appellant's defence of alibi and I shall therefore see no reason to impugn his finding.

54. Finally, on the Ground that the trial magistrate did not consider the fact that crucial evidence was not tendered at the trial and more specifically that evidence in support of the fact that the complainant did own the motor vehicle that was stolen was not availed, suffice it to say that in the impugned judgement, the Hon Magistrate clearly addressed the issue at length and including the loss of the exhibits in the hands of the Court Administrator. He cited various authorities that emphasised the fact that lack of exhibits are not fatal to a prosecution case. In associating myself fully with the authorities therein cited, I also add that none of the ingredients of robbery with violence contrary to Section 296(2) of the *Penal Code* are tied to exhibits recovered from a complainant.

55. The reverse is actually the case in the sense that because one of the ingredients of the offence is that at the time of the robbery, the offender was armed with a dangerous weapon, the onus then is upon the prosecution to demonstrate that the offender was so armed. This then is where the availability or otherwise of exhibits becomes crucial because the weapons recovered from the offender are the exhibits that the prosecution will need to produce in court to prove this particular ingredient of robbery. But even over and above this, proof of only one ingredient of the offence of robbery is sufficient to make a finding of guilt, which ground the court has already determined as above, in this case, even without that which the appellant refers to as "crucial evidence" the prosecution was able to avail evidence that in my very well considered opinion satisfied all the three ingredients of the charge beyond reasonable doubt. I am satisfied that the evidence is credible, cogent and reliable. In this regard, the evidence of ownership cannot be said to be "crucial" such that a conviction cannot be sustained in its absence.

Whether the appellant's right to a fair trial was infringed

56. On this ground, I am persuaded by the submissions by the Counsel for the State and the Court does take judicial notice of the fact that in the wake of the global Covid-19 pandemic, all known systems including the Judiciary itself were severely disrupted and even grounded to a halt at some point for very long periods of time. It should further be noted that the accused was a convict and in the custody of the

Prison authorities that also had to undergo one lockdown after another. Under such circumstances, availing an accused to court in good time was a herculean task and that is if the courts themselves were available to handle the matter. In these prevailing conditions, I am of the finding that availing the appellant to court within 2 weeks of the High Court's pronouncement did not fundamentally breach the appellant's right to a fair

Enhancement of sentence

57. The prosecution in their submissions stated that the prescribed mandatory sentence for the offence of robbery with violence contrary to Section 296(2) is the death sentence. That as envisaged under Article 50(2)(p) of *the Constitution*, this prescribed punishment has not at all changed to allow the appellant to benefit from a lesser sentence. That notwithstanding this mandatory provision, the trial court sentenced the appellant to imprisonment for a term of 25 years. He therefore submitted that this Court "should show some spine" and enhance this sentence to the death sentence that is prescribed by law. In the case of J.J.W. v Republic [2013] eKLR tis Court held as follows on enhancement of a sentence by the High Court;

> " It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."(Emphasis mine)

58. Also in the case of Sammy Omboke & Another v Republic [2019] eKLR the jurisdiction of the first appellate court on enhancement of sentences was discussed and the Court held thus;

> " In the instant appeal, there was no cross-appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by court that the sentence meted upon then (sic) could be enhanced; and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-appeal and notice and or warning the judge had no jurisdiction to enhance the sentence." (Emphasis mine)

59. In the instant case, there is no cross appeal filed by the prosecution and further the appellant was not warned that his sentence may be enhanced. In this regard then the prosecution's application for enhancement in their submissions is misconceived. It is trite law that submissions are not pleadings and so an inference cannot be made therefrom that it was the intention of the prosecution all along to have the appellant's sentence enhanced without the necessary pleadings in place

Application of Section 333(2) of the *Criminal Procedure Code*

60. I have perused the trial court's proceedings on sentencing. In meting out the sentence, amongst that which the Hon Magistrate considered before determining the sentence in his own words is "…. the fact that the accused herein has been in remand incarceration for 10 years…" This being the case then obviously the term of 25 years' imprisonment is inclusive of and did factor in the period of time that the appellant spent in remand custody. In this regard, Section 333(2) of the CPC is not applicable.

61. In light of the conclusions herein reached by this Court on all the Grounds of Appeal raised by the appellant, it is my finding that the appellant's Appeal on both the conviction and sentence is devoid of merit. The said Appeal is therefore now hereby dismissed in its entirety and both the conviction and sentence upheld.

62. Right of Appeal 14 days

READ DATED AND SIGNED AT ELDORET ON 6TH MARCH 2025

E.OMINDE JUDGE