



REPUBLIC OF KENYA



**Mutua & another v Republic (Criminal Appeal E149 of 2023)
[2025] KEHC 2858 (KLR) (Crim) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
CRIMINAL APPEAL E149 OF 2023
AB MWAMUYE, J
MARCH 6, 2025**

BETWEEN

KAZEE MWENDWA MUTUA 1ST APPELLANT

KELVIN ODHIAMBO WONDER 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal against the Judgment, Conviction and Sentence of the Hon. H. A. Mwangi (PM) delivered on 19th January, 2023 in Criminal Case No.1628 of 2022)

JUDGMENT

1. The Appellants, Kazee Mwendwa Mutua and Kelvin Odhiambo Wonder, were charged with the offence of Robbery with Violence Contrary to section 296(2) of the penal code. The particulars of the offence as stated on the Charge Sheet were that on the 9th April, 2022 at Muthaiga square in Nairobi County, the appellants jointly robbed Edward Kimeu Musau of a Samsung mobile phone make A12 valued at Kes. 18,000/- and at the time of such robbery threatened to use actual violence to the said Edward Kimeu Musau.
2. The Appellants pleaded not guilty. The prosecution called 2 witnesses. The Appellants were put to their defence. The Appellants gave unsworn testimony. The Appellants were subsequently convicted and sentenced to suffer death.



3. 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.

4. I have considered the Trial Court's proceedings, the Petition of Appeal, the Appellant's submissions and the Respondent's submissions and I identify issues for determination as follows: -

- a. Whether the elements of the offence of robbery with violence were proved beyond reasonable doubt as required in law;
- b. Whether the appellants were positively identified;
- c. Whether the sentence was harsh and excessive under the circumstances.

Whether the elements of the offence of robbery with violence were proved beyond reasonable doubt as required in law

5. 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 of 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 of 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.”

6. Under this section, therefore, the Prosecution is required to prove one of the following in order to successfully establish the offence charged:

- i. That the offender was armed with any dangerous or offensive weapon or instrument; or
- ii. That he was in the company with one or more other person or person; or
- iii. That at or immediately before or immediately after the time of the robbery, he wounded, beat, struck or used any other violence to any person.

7. In the present case, PW1 stated that on the fateful day he had come from Muthaiga square after delivery and was headed to town when he got another order. He stopped to look at the order and when he pulled out his phone, the 2nd appellant snatched his phone. He held him and he saw the 1st Appellant coming to attack and he released the 2nd appellant and the two took off. He further stated that he started looking for them with the aid of other riders when they heard screams. He checked and noticed that it was the Appellants who had been apprehended by some construction people who took the phone and gave it back to PW1.



8. During cross examination, PW1 stated that the 1st Appellant stole the phone and ran away with it but did not touch him at all.
9. PW2 produced the receipt of the phone showing that it indeed belonged to PW1.
10. In *Dima Denge Dima & Others Vs. Republic, Criminal Appeal No. 300 of 2007* the Court stated stressed this point when it 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.”
11. On the ingredients of the offence, I am satisfied that the 1st Appellant was in the company of the 2nd appellant at the time of the incident. To this extent, I am convinced that the prosecution proved one of the ingredients for the offence. Based on the *Dima Denge Dima & Others Vs. Republic [Supra]*, the prosecution need only prove one of the three elements.
12. It is therefore not true that the ingredients of the offence were not proved beyond reasonable doubt.

Whether the appellants were positively identified

13. On the issue of identification, PW1 did not specify the time of the offence. It can however, be deduced that it was daytime as he was still at work and he also mentions the presence of people at a construction site. Being daylight, the conditions for a positive identification were favourable.
14. The Complainant also testified that he held onto the 2nd appellant immediately he snatched the phone. This gave him a good opportunity to see his physical attributes. He also saw the 1st appellant approach him waiting to attack him. The appellants were arrested shortly after and the phone retrieved from them by some construction workers. All these point to favourable conditions for a positive identification.
15. In *WAMUNGA V R [1989] KLR 424* where the Court of Appeal at page 426 had this to say:

“it is trite law that 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”
16. I find that the appellants were positively identified and the evidence tendered by the prosecution proved the case against the appellants beyond reasonable doubt.
17. Consequently, the appellant’s appeal on conviction for the count of robbery with violence lacks merit and his conviction is upheld.

Whether the sentence was harsh and excessive under the circumstances

18. 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.....”

19. 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.....”

20. I have considered the issue of harsh sentence. The penalty under section 296(2) of the *Penal Code* is death.
21. 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.
22. In the *Muruatetu Case*, the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck out section 204 of the *Penal Code* to the extent that it prescribed mandatory death sentence upon a murder conviction.
23. The reasoning in *Muruatetu Case* respecting section 204 of the *Penal Code*, which section provides for the penalty for the offence of 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*.
24. From the foregoing and considering the aggravating circumstances of the offence, and the fact that the complainant was not harmed at the time the offence, I hereby set aside the death sentence imposed by the trial court and substitute it with a sentence of fifteen (15) years imprisonment. 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 appellants were respectively first in custody.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 6TH DAY OF MARCH, 2025.

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BAHATI MWAMUYE

JUDGE

