**Mwaka v Republic (Criminal Appeal E272 of 2023)**
**[2025] KEHC 2747 (KLR) (Crim) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2747 (KLR)

**REPUBLIC OF KENYA**

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

**CRIMINAL**

**CRIMINAL APPEAL E272 OF 2023**

**AB MWAMUYE, J**

**MARCH 6, 2025**

**BETWEEN**

**RICHARD SIMIYU MWAKA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal against the Judgment, Conviction and Sentence of the Hon. A. Mwangi (PM) delivered on 26th January,2023 in the Chief Magistrate's Court at Makadara in Criminal Case No.2233 of 2017)***

## JUDGMENT

1. The Appellant, Richard Simiyu Mwaka, was 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 13th October, 2017 at Matopeni Estate in Embakasi Sub-County within Nairobi County jointly with others while armed with offensive weapons namely knives and stones, robbed Hura Magaiwa Magera a Techno phone valued at Kshs.1,500/= and cash Kshs.3,500/= and immediately before and after the time of such robbery used actual violence to the said Hura Magaiwa Magera.

2. The Appellant pleaded not guilty. The prosecution called 6 witnesses; the Appellant was put to his defence. The Appellant gave a sworn testimony. The Appellant was subsequently convicted and sentenced to death.

3. The Appellant, being dissatisfied with the judgment, has raised several grounds of appeal, which include the contention that the prosecution's case was marred with inconsistencies and contradictions, that his defence was not adequately considered, that he was denied his constitutional right to legal

representation, and that the mandatory death sentence imposed is unconstitutional and violates his fundamental rights.

4. The Respondent, on the other hand, urges this court to uphold the conviction and sentence, arguing that the prosecution's case was watertight and that the ingredients of the offence were fully met.

5. The Appeal was canvased by way of written submissions.

6. 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 appellant 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.

7. 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;

   i. Whether the ingredients of robbery with violence were established;

   ii. Whether there was sufficient evidence linking the Appellant to the offence;

   iii. Whether the Appellant's defense was properly considered;

   iv. Whether the Appellant was denied his right to legal representation at the state's expense; and

   v. Whether the sentence imposed was lawful and constitutional.

8. On the first issue, the Appellant was convicted of the charge of robbery with violence. The starting point is the legal provision. The offence of robbery with violence is a creation of Sections 295 and 296(2) of the *Penal Code*. It is axiomatic that in considering the offence of robbery with violence under section 296 (2) of the *Penal Code*, regard must be had to section 295 of the *Penal Code* which defines robbery in the following terms:

> " 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."

9. In Moneni Ngumbao Mangi v. Republic, CR APP No 141 of 2005 (Mombasa) the Court stated that:

> " The word "robbed" is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property".

10. To prove the offence of robbery with violence, the element of stealing must be proved coupled with one or all of the other elements set out in section 296(2), namely that the offender was armed

with a dangerous or offensive weapon or instrument; was in the company of one or more others; or immediately before or immediately after the time of the robbery he wounded, beat, struck or used other personal violence on the victim. In Johana Ndungu V. Republic, CR. APP. No. 116 of 1995 the Court extrapolated the position as follows:

> " In order to appreciate properly as to what acts, constitute an offence under section 296(2) one must consider the sub-section in conjunction with s. 295 of the *Penal Code*. 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. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s. 296(2) ..." (Emphasis added).
>
> (See also Ganzi & 2 Others V. Republic (2005) 1KLR 52).

11. The Court of Appeal in Oluoch v Republic [1985] KLR set out the essential elements of the offence as follows:

    i. The offender is armed with any dangerous and offensive weapon or instrument;

    ii. The offender is in company with one or more persons;

    iii. At or immediately before or immediately after the robbery, the offender uses actual violence on the victim.

12. In the instant case, PW1 testified that on 13th October 2017, while walking home with his brother, they were attacked by a gang of six people, including the Appellant, who hit him on the mouth, causing him to lose four teeth, stabbed him on the head, and robbed him of his phone and cash. The medical report (P3 form) corroborated his injuries. The Appellant contends that there were contradictions and inconsistencies on the record especially the evidence of PW1 and the P3 form. I have carefully addressed my mind to the record and noted there are no discrepancies.

13. The Trial Court found the Complainant's evidence to be truthful. This in itself would be sufficient to prove robbery with violence since our case law is now clear that the Prosecution need only prove one of the ingredients. However, here, the Prosecution also proved the use of personal violence on the Complainant. Again, the Complainant testified that he suffered injury and the Appellant was one of the people who attacked him.

14. In *Dima Denge Dima & Others Vs. Republic, Criminal Appeal No. 300 of 2007* the Court 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."

15. On the ingredients of the offence, I am satisfied that the Appellant was in the company of five other people when they attacked and robbed PW1. All the elements of the offence are present. There was more than one person and they used physical violence on PW1 and robbed him of his phone and cash. It is therefore not true that the ingredients of the offence were not proved beyond reasonable doubt. On my own analysis and consideration, the offence of robbery with violence has been proven beyond reasonable doubt and the conviction by the Trial Court is upheld.

16. On the second issue as to whether there was sufficient evidence linking the Appellant to the offence, identification is crucial in cases of robbery with violence. In Patrick Opondo Opollo & Another v

Republic Criminal Appeal No. 23 of 2014, the Court emphasized the need for courts to scrutinize the conditions of identification to ensure its reliability.

17. In Francis Kariuki Njiru & 7 others v Republic Criminal Appeal No. 6 of 2001, the Court of Appeal held that identification evidence must be carefully examined, particularly where the incident occurred at night.

18. In this case, PW1 testified that the area was well lit by security lights and that he recognized the assailants, as they were his neighbors. Further, PW2 corroborated PW1's evidence, stating that she saw the accused running from the scene. Additionally, the appellant was positively identified during an identification parade. Moreover, PW5, a police officer, corroborated the evidence that the appellant was a known neighbor of the complainant, strengthening the reliability of the identification. While the appellant argues that no descriptions were recorded by the police, raising doubts about the reliability of the identification, this does not outweigh the compelling recognition evidence provided. Recognition is considered more reliable than identification of a stranger (See Anjononi & Others v Republic [1980] KLR 59). Considering this, the prosecution presented sufficient evidence linking the Appellant to the crime, and the trial court did not err in its findings.

19. On the third issue, the Appellant denied involvement and alleged that he was arrested arbitrarily while walking home, a position not corroborated by any evidence. However, his defense did not effectively challenge the evidence against him, particularly in light of the positive identification by PW1 and corroborative evidence from PW2 and PW5. The trial court observed that the prosecution's case remained unshaken by the defense and, held that the defense was a mere denial. The Court of Appeal in David Mwangi Wanjohi & 2 Others v Republic [1989] eKLR emphasized that a mere denial cannot displace strong identification evidence.

20. The trial court carefully evaluated the evidence, and its findings were well reasoned. There was no failure of justice in how the Appellant's defense was handled.

21. The Appellant argues that his right to legal representation under Article 50(2)(h) of the *Constitution* was violated. The said provision states that an accused person has the right "to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result."

22. Article 50(2)(h) of the *Constitution* guarantees the right to legal representation at state expense if substantial injustice would otherwise result. The *Legal Aid Act*, 2016, in Section 43, mandates courts to inform accused persons of this right.

23. In David Njoroge Macharia vs. Republic [2011] eKLR, the Court of Appeal stated that: -

> " Under the new Constitution, state funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense, if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the *Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2 (6). Therefore, provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must

be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission."

24. In Republic vs Karisa Chengo and 2 others [2017] eKLR, the Supreme Court expressed that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more but that "in accordance with the language of the *Constitution*, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result". The Supreme Court went on to say that the right to legal representation is not limited to cases where the accused person is charged with a capital offence; that the operative words in Article 50 (2) (h) are "if substantial injustice would otherwise result...." and that "the protection embedded in Article 50 (2) (h) goes beyond capital offence trials".

25. In all criminal trials, it should be a standard procedure for the accused to be informed prior about their right to legal representation. This is mandated by the *Constitution*. In the present case, it is unclear from the record whether the trial court made the Appellant aware of these rights. Nevertheless, aside from the fact that these issues were not addressed in the trial court, the way the Appellant cross-examined the prosecution witnesses and his overall conduct during the trial indicate that no injustice, let alone substantial injustice, stemmed from the trial court's failure to inform the appellant of his rights under Articles 50(2)(g) and 50(2)(h) of the *Constitution*. Therefore, the trial court's omission in notifying the appellant of his rights should not serve as grounds for invalidating his trial. Ultimately, I am convinced that the conviction is justified, and I see no reason to alter it.

26. On the last issue regarding the sentence, the principles guiding interference with sentencing by the appellate Court were properly set out in S vs Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that: -

> "A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

27. Similarly, in Mokela vs The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that: -

> "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

28. The Appellant submits that the mandatory nature of the death sentence under section 296(2) of the *Penal Code* is unconstitutional. The decision in Francis Karioko Muruatetu & Another v Republic [2017] eKLR, the Supreme Court held that the mandatory death sentence for murder was unconstitutional. While Muruatetu's case (Supra) dealt with murder under section 204 of the *Penal*

*Code*, courts have since applied its principles to other mandatory sentences, including robbery with violence.

29. In William Okungu Kittiny v Republic [2018] eKLR, the Court of Appeal held that Muruatetu's case applies to section 296(2) of the *Penal Code* and that courts must exercise discretion in sentencing offenders. The Court went on to state that: -

> "From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the *Penal Code*. Thus, the sentence of death under Section 296 (2) and 297 (2) of the *Penal Code* is a discretionary maximum punishment. To the extent that Section 296 (2) and 297 (2) of the *Penal Code* provides for mandatory death sentence the Sections are inconsistent with Constitution..... "The decision of the Supreme Court only discouraged persons from filing petitions to the Supreme Court but the decision does not prohibit courts below it from ordering sentence re-hearing in a matter pending before those courts. By Article 163 (7) of the *Constitution*, the decision of the Supreme Court has immediate and binding effect on all other courts. The decision of the Supreme Court opened the door for review of death sentences even in finalized cases."

30. Given that the trial court imposed a mandatory death sentence, this court must intervene and reconsider an appropriate sentence. This court must therefore re-evaluate the sentence imposed. While the offence of robbery with violence is serious, the appellant's personal circumstances, the time he has served, and the need for rehabilitation must be considered.

31. From the foregoing, having found that the Trial Court erred in law by imposing a mandatory death sentence to the Appellant and the rational exercise of discretion pursuant to the principles in Muruatetu case, while the appeal on conviction is upheld, and the appeal on sentence is allowed by substituting the death sentence with a determinate term of 30 years to run from the date of first custody.

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

**.....**

**BAHATI MWAMUYE**

**JUDGE**