Muturi & another v Republic (Criminal Appeal E076 & E077 of 2024 (Consolidated)) [2025] KEHC 10676 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10676 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E076 & E077 OF 2024 (CONSOLIDATED)

MA ODERO, J

JULY 18, 2025

BETWEEN

ROBERT MAINA MUTURI .... 1ST APPELLANT

SAMSON NJUGUNA NYAMBURA .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The Appellants Robert Maina Muturi (hereinafter the 1st Appellant) and Samson Njuguna Nyambura (hereinafter the 2nd Appellant) both filed appeals challenging their conviction and sentence by the Principal Magistrate sitting at Othaya Law Courts. The Court directed that the two appeals E076/2024 and E077/2024 be consolidated and heard as one. The lead file is High Court Criminal Appeal No. E076/2024.

2. The two appellants were jointly charged in the lower court with the offence of Robbery With Violence Contrary To Section 296(2) Of The Penal Code.

3. The particulars of the charge were that:-

   > "On the 6th day of October 2023 at Maroa Trading Centre in Nyeri South Sub-county within Nyeri County being armed with offensive weapon namely a knife robbed Alex Wahome Macharia of Kshs. 5,000/= and immediately before time of such robbery used actual violence to the said Alex Wahome Macharia"

4. The appellants both pleaded 'Not Guilty' to the charge and their trial commenced on 6th November 2023. The prosecution called a total of six (6) witnesses in support of their case.

5. The complainant Alex Wahome Macharia told the Court that on 6th October 2023 he was at Finns Club when the two appellants whom he knew before approached him. They asked the complainant why he is not buying anything. The complainant did not respond. The 1st appellant pushed him to the ground and the 2nd appellant kicked the complainant and punched him in the stomach. The 1st appellant had a knife in his hand which he used to stab the complainant in the left buttock. The complainant who was on the ground bleeding from his wounds shouted for help.

6. PW2 Joseph Wambugu Gaturu told the court that on the material night he was at his shop which was close to Finns Place in Maroini. PW2 says he outside his shop was attending to a customer when he heard a commotion. He saw the two appellants attacking the complainant. The witness stated that he knew the three men as fellow villagers.

7. PW2 states that he saw the 1st appellant with a knife in his right hand which he used to stab the complainant on the left buttock. The complainant was on the ground screaming with blood oozing from his left side. As people approached to assist the complainant the two appellants ran away. A boda boda rider was called and came to take the victim to hospital. PW2 then closed his shop and went home.

8. PW3 Gerald Kibicho is a boda boda rider who lived in Chinga. He told the court that on the night of 6th October 2023 he was at home when PW2 phoned him and informed him that a man had been stabbed. PW3 rushed to Maroini Trading Centre where he found his neighbour lying on the ground bleeding. He put the victim on his motor bike and rushed him first to Kiaguthu Police Post where they reported the incident. PW3 then took the victim to Gichichie Health Centre and later to Othaya Sub-County Hospital. At 2.00am the witness took the complainant to his home and the complainant's mother paid him his fare of Kshs. 500/=.

9. Pw4 Ken Njagi was a clinical officer based at the Othaya Sub-County Hospital. He testified that he examined the complainant at the hospital. The doctor filed and signed the P3 form dated 7th October 2023 which he produced in court as an exhibit Pexh 5.

10. PW5 William Mwangi Maina told the court that on the material

day at about 9.00pm he was at Maroini Shopping Centre, where he had gone to buy potatoes. PW5 met the complainant Alex Wahome whom he knew as a cousin at the veranda. A fight broke out involving the two appellants and the complainant. The witness states that he saw the 2nd appellant punch the complainant whilst the 1st appellant who had a knife in his hand stabbed the complainant. On the buttocks. The two appellants then ran away.

11. PW5 stated that a boda boda rider was called and PW3 came.

Together with PW5 they took the complainant first to the police

station to report the matter and then to Gichichie Health Centre where the complainant received first aid. They then took the complainant to Othaya Sub-County Hospital where his wounds were treated. At 2.00am they delivered the complainant back to his home.

12. PW6 PC Edwin Mutembei was the investigating officer. He told

the court that upon conclusion of police investigations, the two appellants were arrested and charged.

13. At the close of the prosecution case the Appellants were found to have

a case to answer and were placed on their defence. Both appellants gave an unsworn defence denying the charge. They called four (4) witnesses in Defence.

14. On 27th August 2024 the learned trial magistrate delivered her

judgment in which she convicted the two appellants of the charge of Robbery with Violence. After hearing their mitigation the court sentenced each appellant to death. Being dissatisfied by both their conviction and sentence the appellants filed this appeal.

15. The Grounds of Appeal were stated to be as follows:-

> "1. That, the trial magistrate erred in both matters of law and fact by failing to consider that this matter was just a framed up by pw2 the shopkeeper he used the complainant to frame up.
>
> 2. That, the trial magistrate erred in law and fact by failing to consider that the circumstances surrounding the commission of the offence was difficult as it was at night.
>
> 3. That, trial magistrate erred in law and fact by failing to consider that the prosecution did not prove the intensive source of light at the scene of crime for identification.
>
> 4. That, the trial magistrate erred in law and fact by failing again to appreciate that I was not the one who stabbed and stolen from the complainant.
>
> 5. That, the trial magistrate erred in law and fact by failing to consider that the circumstances of the incident was difficult and identification of the attackers was not proved as the law requires beyond reasonable doubt.
>
> 6. That, the trial magistrate erred in law and fact by failing to consider that prosecution tendered contradicted and uncorroborated evidence.
>
> 7. That, the trial magistrate erred in law and fact by convicted and sentenced me to death without making consideration that there was no any exbit found in my possession.
>
> 8. That, the trial magistrate erred in law and fact by failing to consider that the alleged blood stains found on the complainant cloths was not done the D.N.A analysis to establish the ownership of the blood stain.
>
> 9. That, the trial magistrate erred in law and fact by convicting I the appellant without considering that the complainant did not gave the description of his attackers and I was not aware of the incident since I never went at large.
>
> 10. That the trial magistrate erred in law and fact by imposing unconstitutional death sentence.
>
> 11. That, the trial magistrate erred in law and fact by rejecting my evidence which was not challenged by the prosecution side, without cogent reasons to do so. Since I cannot remember all what transpired during the hearing of my case, I kindly beg this hon. court to furnish me with my court record and a copy of the judgement."

Analysis And Determination.

16. I have carefully perused the record of Appeal, I have considered the Memorandum of Appeal as well as the written submissions filed by the Appellants and by the ODPP.

17. This being a first appeal it is the duty of this court to review and analyze the evidence afresh and come to its own conclusions bearing in mind that this High Court did not see or hear the witnesses testify.

18. In the case of OKENO -VS- REPUBLIC [1972] E.A 32, the Court of Appeal, stated as follows:-

> " It is the duty of a first appellate court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."

19. The two Appellants faced a charge of Robbery with violence Section 296(2) of the *Penal Code* which creates this offence provides as follows:

> " 2 If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more 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."

20. Therefore in order to prove an offence under Section 296(2) the prosecution must adduce evidence sufficient to prove the following three (3) elements of this charge namely:-

    (i) The offender is armed with any dangerous or offensive weapon or instruments.

    (ii) The offender is in the company of one or more other person or persons.

    (iii) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses any violence to any person.

21. The first question to be determined is whether a robbery incident did

    in fact take place on the night of 6th October 2023 as alleged by the Complainant.

22. The complainant told the court that on the night in question he was at

    the Maroini trading Centre outside Finns Place. At about 9.00pm the two appellants approached him and asked why he was not buying anything. The complainant did not respond. The 1st Appellant (whom the complainant referred to as 'Jaba') then pushed the complainant and he fell to the ground. The 2nd appellant (whom the complainant referred to as 'Sam') punched the complainant in the stomach. The 1st appellant who had a knife in his hand then stabbed the complainant in the left buttock. The 1st appellant removed from the complainant's left trouser pocket Kshs. 5,000/= which he had earned from doing casual work.

23. The complainant told the court that he sustained injuries and was

    bleeding due to the assault and stabbing. He identified in court the torn and blood stained clothes which he was wearing on that day. These included light blue pair of jeans with a tear on the left back pocket and blood stains on the back, a yellow pair of under pants with a cut on the left rear, blue/ white shirt with blood stains on the lower end. These items were all handed over to police and were produced in court as exhibits Pexh 1, Pexh 2 and Pexh 3. It is worth noting that the clothes were blood stained and that both the trouser and yellow pant had a tear at the left rear corresponding with where the complainant claimed to have been stabbed on the left buttock.

24. . PW3 Gerald Kibicho was a boda boda rider who was called to

    the scene. He confirms that upon arrival he found the complainant lying on the ground bleeding. He confirms that the complainant was wearing a pair of blue jeans and whitish shirt. The witness positively

identified the clothes which the complainant was wearing that night. PW3 rushed the complainant to hospital where he was treated.

25. . PW4 Ken Njagi was a clinical officer attached to the Othaya Sub-

County Hospital. He told the court that he examined the complainant. PW4 filled and signed the P3 form which he produced in court as an exhibit PExh 5.

26. The doctor noted that the clothes which the complainant was wearing

at the time of examination were blood-stained. He also noted that the complainant had a deep cut wound on the left buttock which wound was stitched. The evidence of the doctor corroborates the complainant's evidence regarding the injuries which he sustained on the night in question.

27. The robbery incident was witnessed by Pw2 Joseph Wambugu

Gaturu and PW5 William Mwangi Muia. Both witnesses told the court that they were at Maroini trading Centre on the 6th October 2023. They state that at about 9.00pm the two appellants accosted the complainant. The two witnesses state that they saw the 1st appellant punch the complainant who fell to the ground and the 2nd appellant hit the complainant in the ribs. Thereafter the 1st appellant stabbed the complainant on the left buttock using a knife he had in his hand.

28. PW5 stated that he saw the 1st appellant remove money from the left back trouser pocket of the complainant.

29. Both PW2 and PW3 gave a clear and consistent account of the events

that occurred on that night. They both positively identified the bloodstained clothes which the complainant was wearing. PW5 in the evidence states that

> " He [complainant] was bleeding. His clothes were soiled with blood. Alex wore a light blue jean, he had a blue and white printed shirt."

PW5 confirms that he accompanied the complainant to the police station to report the incident and later to hospital.

30. From the evidence of all these witnesses there can be no doubt that a

robbery incident did occur on the material night. The witnesses have all stated that the complainant was assaulted by two (2) people and stabbed in the course of the robbery, thus elevating the incident from a simple robbery to a robbery with violence as envisaged by Section 296(2) of the *Penal Code*. I find that the complainant was indeed robbed as he stated on the night of 6th October 2023 at Maroini Trading Centre.

31. Having established that the complainant was robbed on the night in

question the next crucial question would be the 'identity' of the

attackers. Was the evidence adduced during the trial sufficient to confirm the identity of the persons who committed the offence?

32. The complainant himself identified the two appellants as the men who

robbed him. The complainant stated that both appellants were fellow villagers and were well known to him. In his evidence the complainant stated as follows;-

> " I knew the persons; they were Jaba and Sam. Jaba spoke to me first, he is from my area, we usually greet each other. I have known Jaba for a year. I heard his voice. I am familiar with Sam, I also used to greet him. I have known him for a year."

33. Therefore from the above it is quite clear that the assailants were

persons whom the complainant knew well - he was able to 'recognize' the two, and identified them by their names and in the case of the 1st Appellant he was identified by his nickname.

34. In the case of ANJONINI & Others -vs- REPUBLIC [1980] KLR

the court stated as follows:-

> " This however was a case of recognition, not identification of the assailants, recognition of an assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."

35. Similarly the other eye witnesses PW2 and PW5 both identify the

appellants as the men who robbed the complainant. In his evidence PW2 says

> " I saw them well..................
>
> I knew the people as Jaba and Samson. Jaba is my customer, he buys cigarettes. He uses my mpesa shop. Samson similarly buys cigarettes and uses my Mpesa shop. I have known Jaba and Samson from 2020-2021 when I opened my shop..............."

36. On his part PW5 in identifying the appellants says

> " I knew Robert Maina Muturi is a friend to my father, he is a mason. I have known him for about 2 years. I know Samson Njuguna Nyambura, he is a friend to my father for about 10 years. Robert is the 1st accused person. Samson is seated next to Robert on the dock. I am 20 years [old]......................."

37. It is clear from this evidence that the appellants, the complainant and

the witnesses were persons who knew each other well. They all lived in the same village and had interacted for a long period of time. There was clear evidence of recognition which as the court stated in the "Anjonini case" is "more assuring"

38. The Appellants have challenged the reliability of their identification

on grounds that the incident in question took place at night when obviously it was dark and visibility would have been poor.

39. It is quite correct that the incident described by the complainant is said

to have occurred at 9.00pm. Obviously it was dark. How then were the complainant and the witnesses able to see and recognize the appellants? What source of light if any was available to and in visual identification?

40. The witnesses all state that there were security lights in the area which

enabled them to see and identify the appellants. It must be

remembered that this was a trading centre. Obviously the businesses in that centre were not being conducted in the dark.

41. The complainant in his evidence told the court that he was able to see

well aided by the security lights in the area. PW2 was a trader at Maroini. He told the court that he has a shop and an Mpesa stall at the centre. PW2 says there are security lights outside Finns Club where the incident occurred thus he was able to see well. PW3 the boda boda rider did not himself witness the robbery incident but he confirmed that there were security lights at the trading centre thus one could see well.

42. Similarly PW5 told the court that there were security lights at the shop

and from Finns club. PW5 says that

> " In the shop there was electric light. I could see very well. The security light at the club was from solar energy. There was very good light I could see well."

43. I have noted that the learned trial magistrate did in her judgment

address this issue of lighting at the scene she correctly noted that the security lights enabled the witnesses to clearly see what was happening and enabled them to identify the appellants. The trial magistrate also correctly noted that the appellants spoke to the complaint before attacking him and being persons whom the complainant knew well, he was also able to identify their voices.

44. It is pertinent to note that the complainant and his witnesses all described in detail the role which each appellant played in the robbery. They all stated that it was Jaba (1st appellant) who pushed the complainant to the ground. That it was Sam (2nd appellant) who punched the complainant in the abdomen. The eye witnesses all unanimous that it was the 1st appellant who had the knife and who stabbed the complainant in the left buttock. The fact that the witnesses were able to state with such clarity the role which each appellant played convinces me that there was sufficient light in the area to aid positive identification.

45. As stated earlier the appellants were persons who were well known to

the witnesses – they were fellow villagers. The prosecution witnesses all gave consistent evidence and all remained unshaken under cross-examination. I find that the appellants were positively identified as the persons who robbed the complainant.

46. The Appellants both gave unsworn defences and called three (3) witnesses. They both denied any involvement in the robbery incident.

47. The 1st appellant in his defence claimed that the police asked him to pay a bribe of Kshs. 40,000/= in order to have the case against him withdrawn. It is curious that the 1st appellant never put these very damning allegations to the investigating officer (Pw 6) when cross-examining the officer. It is quite clear that this allegation of bribe-seeking is a mere afterthought and is not true.

48. PW4 Boniface Wang'ombe Gathekia, one of the defence witnesses told the court that on the evening in question he and the 1st appellant were at the shopping center taking drinks at Finns Club. They discussed some work which DW4 wanted the 1st appellant to do for him. DW4 states that at 8.00pm, the 1st appellant left and went home whilst the witness left later at 9.00pm.

49. DW4 did not follow the 1st appellant to confirm that he actually went to his home. He has no way of knowing whether the 1st appellant returned to the center later with the 2nd appellant. The evidence of DW4 is of little assistance to the court.

50. On his part the 2nd appellant claimed in his defence that the charges levelled against the two were framed by one Joseph Wambugu [PW2] using the complainant. Firstly why would PW2 want to frame the appellants on a robbery charge. This is the same 'Wambugu' whom the 1st appellant in his defence stated, he had met at Finns Place, shared a drink with and discussed some work which PW2 wished to have done. According to the 1st Appellant his meeting with PW2 was very cordial. No disagreement arose between the two. There is no evidence of any grudge which PW2 had against any of the Appellants.

51. Secondly why would the complainant accept to be used in this convoluted scheme to frame the appellants – what did the complainant have to gain by framing them. Once again no evidence was adduced to show that the complainant harboured a grudge against any of the appellants, that would motivate him to seek to frame the Appellant on a false charge.

52. The learned trial magistrate did consider the defence of the appellants.The trial court did consider the appellants claim that the prosecution case was riddled with inconsistences. The appellants relied on the fact that the prosecution witnesses gave different evidence regarding the colour of the clothes the complainant was wearing at the time of the robbery – some described the jeans as blue and other said the jeans were light blue. Again the appellants appeared fixated on the fact that some witnesses described the appellants shirt as blue/white whilst others described it as white.

53. I do agree with the trial court that these were minor inconsistencies which were not material to the prosecution case.

54. In the case of RICHARD MUNENE -VS- REPUBLIC [2018] eKLR, the court held as follows:

> "Contradictions, discrepancies and inconsistencies in evidence of a witness go to discredit that witness as being unreliable. Where contradictions, discrepancies and inconsistencies are proved they must be resolved in favour of the accused.
>
> It is a settled principle of law however, that it is not every
>
> trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issue in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from." [Own emphasis]

55. In the case of TWEHANGANE ALFRED -VS- UGANDA [2003] UGCA 6 the Court of Appeal of Uganda observed as follows:-

> "With regard to contradictions in the prosecution's case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case" [Own emphasis]

56. Finally on this point in the case of ABEL MAINA WERU -VS- REPUBLIC [2021] eKLR the court held that

> " The appellant also argued that the prosecution evidence was contradictory and inconsistent. In any criminal trial where several witnesses testify there are bound to be contradictions or some inconsistencies. Such inconsistencies and/or contradictions may be ignored if they do not go to the root of the prosecution case, otherwise they should be resolved in favour of the accused." [Own emphasis]

57. The inconsistencies pointed out by the appellants are in my view trifling and inconsequential as they did not go to the roots of the prosecution case. The colour of the complainant's shirt was not in my view a material fact and did not go to the root of the prosecution case. It is also true that people perceive and describe colours differently. Of importance is that the complainant's blood stained clothes were in fact produced in court as exhibits and were positively identified by all the prosecution witnesses.

58. The 1st appellant also raised in the trial court a claim that his right to a fair hearing was violated as he was not informed of his right to have legal representation given the serious nature of the offence they faced.

59. In response to this allegation the trial court rightly cited the case of MOKAYA -VS- REPUBLIC [2024] eKLR, wherein considering this right to legal representation the Hon. Lady Justice Okwany stated as follows:-

> " 16. The Appellant submitted that his right to legal representation was infringed as he was neither informed of the said right nor accorded legal representation by the state. The Respondent, on the other hand, argued that the failure to inform the Appellant of his right to representation was not fatal to the Appellant's case."
>
> 17. Article 50 *the Constitution* provides for the right of an accused person as follows:-
>
> 50. Fair hearing
>
> (2) Every accused person has the right to a fair trial, which includes the right -
>
> > (g) to choose, and be represented by an advocate, and to be informed of this right promptly.
> >
> > (h) to have an advocate assigned to the accused person by the State and State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
>
> 18. My understanding of the above provision is that the right of an accused person to be assigned an advocate is not absolute and is only a requirement where substantial injustice may occur in the absence of such representation. In David Macharia Njoroge v R (2011) eKLR the court held thus:-
>
> > "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. 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."

19. In Karisa Chengo & 2 Others vs. R. Cr. Nos 44, 45 & 76 of 2014, the court stated:-

> It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. *The Constitution* is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the David Njoroge Macharia case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. However, substantial injustice only rises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.

20. In the instant case, I note that even though the trial court did not inform the Appellant of his right to legal representation, such failure was not fatal or prejudicial to the Appellant's as the record shows that he understood the charges brought against him and that he competently cross examined all the prosecution witnesses. It's also noteworthy that the Appellant was not charged with a capital offence whose penalty is death so as to necessitate the mandatory requirement for legal representation. I find that the trial court conducted a fair trial and that the Appellant did not suffer any injustice due to lack of legal representation." [Own emphasis]

60. Similarly in this case as the trial court noted both appellants clearly understood the charges which they faced. The trial was conducted procedurally and the Appellants both participated actively in the trial and both exhaustively cross-examined the witnesses. I find that the failure to inform the appellants of their right to legal counsel was not prejudicial to them.

61. Finally I am satisfied that the prosecution did prove the case against the appellants and all ingredients of the offence of Robbery were proved beyond reasonable doubt. It was proved that the offence was committed by two (2) people. One of the attackers was armed with a dangerous weapon namely a

knife and thirdly in the course of committing the offence the complainant was violently attacked and injured. The learned trial magistrate wrote a very well reasoned and exhaustive judgment convicting the two appellants for the offence of Robbery with Violence contrary to Section 296 (2) of the *Penal Code*. I find that this conviction was merited and was sound and I uphold the same.

62. Following their conviction the appellants were accorded an opportunity to mitigate. The trial magistrate then delivered a sentence ruling in which she convicted the two appellants to death.

63. It is trite law that the decision on what nature of Sentence to impose lies exclusively within the jurisdiction of the trial court. As a general rule an appellate court would be loath to interfere with the sentence imposed by a trial court unless said sentence is unlawful or manifestly excessive.

64. In the case of BERNARD KIMANI GICHERU -VS- REPUBLIC [2002] eKLR the Court of appeal stated as follows;-

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that he sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist." [Own emphasis]

65. The basis upon which an appellate court will move to interfere with the sentence imposed by the trial court are well settled and were espoused by the Court of Appeal in the case of OGOLLA S/O OWUOR -VS- REPUBLIC (1954) EACA, as follows:-

> " The court does not alter a sentence unless the trial Judge has acted upon wrong principles or over-looked some material factors. To this we would add a third critereon namely "that the sentence is manifestly excessive, in view of the circumstances of the case"

66. The appellants have submitted that the mandatory death sentence imposed upon them by the lower court is unconstitutional. This is not however the correct position as the law currently stands. Section 296(2) provides that upon conviction an accused "shall" be sentenced to death. The sentence is couched in mandatory terms.

67. There has been much back and forth in the courts in Kenya regarding the mandatory death sentence. In Petition No. 15616 of 2015, FRANCIS KARIOKO MURUATETU & Another -vs- REPUBLIC, the Supreme Court of Kenya stated as follows;-

> " To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40(3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297(2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented and fully argued and escalated to the courts of Appeal if necessary at which a similar outcome as in this case be reached. Muruatetu as it now stands cannot be directly applicable to those cases."

68. By so saying the SCK upheld the mandatory death sentence in cases of Robbery with violence. In keeping with the principle of 'Stare decisis', this decision is binding on all courts.

69. In the recent case of DANIEL NJENGA CHEGE -VS- REPUBLIC [2025] eKLR the Court of Appeal in upholding the mandatory nature of the death penalty for Robbery with Violence stated as follows;-

> "The appellant was sentenced to death after the trial court considered his mitigation. This sentence was upheld by the High Court. Section 296(2) of the *Penal Code* provides that a person convicted of the offence of robbery with violence shall be sentenced to death. The penalty for this offence is couched in mandatory terms. The directions of the Supreme Court issued on 6th July 2021 in Francis Karioko Muruatetu & Another -vs- Republic Katiba Institute & 5 Others (Amicus Curiae) [2021] eKLR reiterated that mandatory minimum sentences imposed in the statutes have not been invalidated. The Apex Court further clarified that the exercise of discretion in meting out a sentence was only applicable to murder cases where it is not expressly provided in statute." [Own emphasis]

70. In view of the above the imposition by the trial magistrate of the mandatory death sentence on both appellants upon conviction was lawful. The hands of this court are tied and it has no authority to interfere with said sentences on Appeal.

71. Finally I find no merit in this appeal. The same is dismissed in its entirety.

DATED IN NYERI THIS 18TH DAY OF JULY 2025

....

MAUREEN A. ODERO

JUDGE