



**Mwema v Republic (Criminal Appeal E067 of 2023)  
[2025] KEHC 12551 (KLR) (9 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12551 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL APPEAL E067 OF 2023  
RC RUTTO, J  
SEPTEMBER 9, 2025**

**BETWEEN**

**PHILIP MWEGA MWEMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against sentence only of life imprisonment delivered in a judgment dated 5/5/2022 by Hon. V. Kachuodho (SRM) in Thika CM's Court Criminal Case No 3946 of 2019)*

**JUDGMENT**

1. The appellant herein was charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the charge were that the on 28/12/2015 at Ngeleya Centre of Gatanga District within Muranga County, he robbed John Kamau Kabue of one safari boot brown in colour, mobile phone make Nokia C3 and its charge, one pair of spectacles of black lenses and brown frame all valued at Kshs. 56,000/= and cash money Kshs. 5,000/= and at the time of robbery wounded the said John Kamau Kabue.
2. He pleaded not guilty and the matter proceeded to trial. During the trial, the prosecution presented its evidence through four witnesses while the appellant gave unsworn testimony and did not call any witnesses. Upon evaluating the entire evidence, the trial court found the appellant guilty, convicted and sentenced him to life imprisonment.
3. Aggrieved by the finding of the trial court the appellant lodged this appeal against the conviction and sentence. The appeal was premised on the following grounds, that:
  - i. The trial court convicted and sentenced the appellant of the offence charged notwithstanding that the prosecution failed to prove the case beyond a reasonable doubt.



- ii. The trial court convicted and sentenced the appellant of the offence charged, notwithstanding the plausible defence of the appellant was not given due consideration, where his defence was not displaced by the prosecution as required by law in Section 212 of the Criminal Procedure Code.
  - iii. The trial court convicted and sentenced the appellant of the offence charged, notwithstanding, the vital ingredients of the offence charged were not proved as stipulated by law.
4. Later, the appellant conceded to the conviction, amended his appeal and narrowed the grounds to a single issue. He urged that the trial court erred in law by failing to observe that the sentence imposed was unconstitutional as it contravenes the principles assessed in *the Constitution* thereby contravening Articles 25(a) and 29(1) (f) of *the Constitution*.
  5. This appeal was canvassed by way of submissions. The appellant submissions were dated 7<sup>th</sup> August 2024 while the respondent's submissions were dated 18<sup>th</sup> October 2024.

### **Appellant's Submissions**

6. The appellant submitted that section 296(2) of the Penal Code had no place in modern day Kenya and was irrelevant as it defied Articles 25(a), 28 and 29(f) of *the Constitution*. That excessive punishment does not serve the interest of justice or society and minimum mandatory sentences reduced the court's discretion in sentencing as they left no room for examination of the circumstances of the case. He further submitted that such a system prejudiced the right to dignity under Article 28 of *the Constitution*. That a life sentence was a degrading punishment and did not consider the doctrine of rehabilitation.
7. The appellant also argued that life sentence had been declared unconstitutional and the trial court erred for imposing such sentence which amounted to a violation of human rights. That *the Constitution* provides for the right to freedom and security which includes the right not to be treated or punished in a cruel, inhuman or degrading manner. It was submitted that the sentence was harsh and contrary to Article 25(a), 28 and 29 (f) of *the Constitution*. To buttress this, the appellant relied on the case of European Court of Human Rights in *Vinter and Others vs The United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10 2016 iii ECHR317).
8. It was submitted that the life sentence without any prospect of release or possibility of review was degrading and inhuman punishment and it was now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release. That without such prospect, there was a greater risk that an offender would never atone for his offense, and whatever he does in prison, however exceptional towards progress of rehabilitation, his punishment remains fixed and un-reviewable.
9. The appellant finally submitted that a life sentence ought to now be interpreted to mean 30 years as held by the Court of Appeal in *Evans Nyamari Ayako VS Republic*, Criminal Appeal No. 22 of 2018 at Kisumu and the decision was binding on this Court. That the life sentence was repugnant to the doctrine of rehabilitation that stands for accused persons being offered a second chance to become law abiding citizens. He thus conceded that he was not interfering with the conviction but with the sentence only which was unconstitutional. The appellant also referred this court to Court of Appeal decision in *Fred Michael Bwayo*, Criminal Appeal No. 130 of 2007. The appellant thus urged this Court to substitute the life sentence with an imprisonment term of 20 years.



## **Respondent's Case**

10. The Appeal is opposed and the Respondent submits that the prescribed penalty under Section 296(2) of the Penal Code is death Sentence and that the life imprisonment sentence imposed was lawful and proper and took into consideration the appellant's mitigation.

11. The State relied on the case of Bernard Kimani Gacheru v Republic (2021) eKLR where the court observed that: -

“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 the 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,”

12. Further Reliance was placed on the case of Shadrack Kipkoech Kogo v R. Eldoret Criminal Appeal No 253 of 2003 wherein the Court of Appeal stated that: -

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered”.

13. The respondent thus urged the Court not to disturb the sentence and to dismiss the Appeal.

## **Analysis and Determination**

14. The duty of the first appellate court in criminal cases was restated in the case of Charles Mwita v Republic, C. A. Criminal Appeal No 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that: -

“In Okeno v R [1972] E.A. 32 at page 36 the predecessor of this Court stated: - “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R [1957] EA. 336) and to the appellate court's own decision on the evidence”.

15. In this instant appeal, this Court will not delve into re-examination of the evidence since the appeal is on the single issue of sentence, the appeal on conviction having been withdrawn. It is common ground that the appellant was convicted for the offence of robbery with violence and sentenced to life imprisonment.

16. The gist of the appellant's case is that the life sentence is unconstitutional and should be set aside and be substituted with a 20 years imprisonment sentence. On the other hand, the respondent submits that sentencing is an exercise of a court's discretion and as the sentence provided for robbery with violence under section 296(2) of the Penal Code is death, the life sentence was not excessive and the same was meted out in exercise of discretion. It urges us to dismiss the appeal.



17. To determine this appeal, there is need to briefly expound on the contemporary jurisprudence around this issue. For along time, it was accepted that the mandatory death penalty was the only sentence for conviction for robbery with violence. This seemed to change with the dawn of Francis Karioko Muruatetu & Another v Republic [2017] eKLR, in which decision, the Supreme Court held that the mandatory nature of the death penalty for murder offences was unconstitutional and that the Court has discretion to impose any other penalty that it deems fit considering the particular circumstances of each case. This decision seemed to have unshackled the courts to exercise their sentencing discretions.
18. This was evident when in William Okungu Kittiny v R [2018] eKLR, the Court of Appeal interpreted the Muruatetu decision, above, to extend to the charge of robbery with violence holding as follows:

“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.”
19. This Court of Appeal decision in William Okungu case opened the re-sentencing window for those who had been sentenced to mandatory death sentences for robbery with violence convictions. Courts also began meting out discretionary sentences. It must have been in such circumstance that the appellant herein was given a life sentence.
20. Subsequently, thereafter, the Supreme Court in Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Muruatetu 2) noted the practice the jurisprudence the Court of Appeal had established in William Okungu case and sought to clarify its earlier decision. It set out guidelines to be applied by courts when exercising sentencing discretion in the re-sentencing applications for convictions for murder. It was categorical that: “(t)he decision of Muruatetu and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code”. With that decision, the apex Court closed the ‘apparent discretionary door’ that had been opened for convicts of robbery with violence.
21. That decision’s import was that for conviction for robbery with violence, the only sentence known in law is the mandatory death sentence. (See also the case of Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) in which the Supreme Court has affirmed the constitutionality of mandatory sentences holding that it is only the legislature that can legislate to remove mandatory sentences provided in Statute).
22. It is upon this background, that I now examine the appeal before me. Outrightly, it emerges that the appellant having been sentenced to life imprisonment for a conviction of robbery with violence, that sentence is an illegal. The right sentence should be a death sentence. The respondent did not address this issue save for saying that the life sentence was not excessive compared to death. What is this Court to do in the circumstances?
23. I have no doubt that the right sentence ought to be imposed. However, meting out a death sentence is an enhancement of a life imprisonment. It is trite law that for any enhancement of a sentence, an appellant must be given prior notice. This notice may be in the form of an appeal, a cross-appeal or a notice of enhancement. I have examined the record before me and there is clearly no cross-appeal or notice of enhancement. Consequently, I have no basis to enhance and/or interfere with the sentence herein.



24. The upshot is that this appeal against sentence only is without merit and the same is dismissed.  
Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 9<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**RHODA RUTTO**

**JUDGE**

In the presence of;

..... Appellant

..... Respondent

Selina Court Assistant

