



**Letante & 3 others v Republic (Criminal Appeal 4 of 2021)
[2024] KEHC 2386 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CRIMINAL APPEAL 4 OF 2021
CM KARIUKI, J
MARCH 7, 2024**

BETWEEN

**JAMES SAPACHE LETANTE 1ST APPELLANT
DATIYO NAMPASO MITAMI 2ND APPELLANT
SAMUEL KARANJA MWANGI 3RD APPELLANT
SIMON NJUGUNA MATHENGE 4TH APPELLANT**

AND

REPUBLIC RESPONDENT

*(Being the conviction and sentence from the judgment dated 18th January 2020
by Hon. E. Ocharo Momanyi (SRM) in Nyahururu CMCR No. 1326 of 2016)*

JUDGMENT

1. The 1st, 2nd, 3rd, and 4th Appellants (hereinafter collectively referred to as “the Appellants”) who were the 1st, 3rd, 4th, and 5th Accused in the trial court together with four others were charged with the following offenses: -
2. Count 1: Robbery with Violence contrary to Section 296 (2) of the Penal Code
3. The particulars are that on the 23rd day of May 2016 at about 11.20 pm in the Losogwa area within Laikipia County jointly with others not before the court being armed with dangerous weapons namely firearms robbed Jane Nderitu Wangari, a 21-inch television set made by Samsung, gas cooker and cylinder burner make Sony, DVD make Sony, Infinix and Samsung phones, one iron box, assorted clothing all valued at Kshs. 700,000/- and immediately before such robbery threatened no use actual violence to the said Jane Nderitu Wangare.
4. Count 2: Robbery with Violence contrary to Section 296 (2) of the Penal Code



5. The particulars are that on the 1st day of June 2016 at about 9.30 pm at Shamanei Village, Laikipia Sub-County within Laikipia County jointly with others not before the court being armed with dangerous weapons namely firearms robbed Paul Ndungu Muchendu Kshs. 100,000/- and immediately before such robbery murdered the said Paul Ndungu Muchendu.
6. Count 3: Robbery with Violence contrary to Section 296 (2) of the Penal Code
7. The particulars are that on the 1st day of June 2016 at about 9.30 pm at Shamanei Village, Laikipia Sub-County within Laikipia County jointly with others before the court being armed with dangerous weapons namely firearms robbed Agnes Nyachomba Ndungu Kshs. 20,000/- and immediately before such robbery threatened to use actual violence to the said Agnes Nyachomba Ndungu.
8. Count 4: Robbery with Violence contrary to Section 296 (2) of the Penal Code
9. The particulars are that on the 1st day of June 2016 at about 9.30 pm at Shamanei Village, Laikipia Sub-County within Laikipia County jointly with others before the court being armed with dangerous weapons namely a firearm robbed Michael Munongoki Maina Kshs. 5300/- and immediately before the time of such robbery threatened to use actual violence to the said Michael Munongoki Maina.
10. Count 5: Robbery with Violence contrary to Section 296 (2) of the Penal Code
11. The particulars are that on the 1st day of June 2016 at about 10.00 pm at Nyahururu Township within Laikipia County jointly with others not before the court being armed with dangerous weapons namely firearms robbed Joseph Ndungu Njoroge his motor vehicle reg no. KBH 095Z valued at Kshs. 350,000/- and immediately before such robbery threatened to use actual violence to the said Joseph Ndungu Njoroge.
12. Count 6: Attempted Robbery with Violence contrary to Section 297 (1) as read with Section 297 (2) of the Penal Code
13. The particulars are that on the 11th day of June 2016 at Huhoini Location in Oljoro-orok in Nyandarua West Sub-County within Nyandarua County jointly with others before the court being armed with dangerous weapons namely a G3 rifle loaded with 18 live ammunitions of 7.62mm attempted to rob one Lucy Njeri in her residence.
14. Count 7: Being in possession of a firearm contrary to Section 4a (1) (a) of the Firearm Act, Cap 114 Laws of Kenya (in respect to the 1st Appellant)
15. Particulars are that on the 11th day of June 2016 at Huhoini Location in Oljoro-rok in Nyandarua West Sub County within Nyandarua County was found being in possession of a G3 rifle., a specified firearm without a license or permit or other lawful justification.
16. Count 8: Being in possession of ammunition contrary to Section 4 (1) (2) (1) read with Section 3 (2) (a) of the Firearm Act CAP 114 Laws of Kenya
17. Particulars are that on the 11th day of June 2016 at Huhoini Location in Ol-joro-rok in Nyandarua West Sub County within Nyandarua County jointly had in their possession 10 live ammunition of 7.62mm without holding a firearm certificate.
18. Count 9: Being in possession of live ammunition contrary to Section 89 (1) of the Penal Code (with respect to the Appellant)
19. The trial court read their conviction as follows:-
 - i. Counts 2, 3, and 8 – the Appellants were found guilty



- ii. Count 4 – the 3rd and 4th Appellants were convicted
 - iii. Count 5 - the 1st and 3rd and 5th Appellants were convicted
 - iv. Counts 6 and 7 - the 1st Appellant was found guilty
 - v. Count 9 was disallowed for duplicity
 - vi. Consequently, the trial court sentenced the Appellants as follows:-
 - vii. Counts 2 and 3 – The appellants were sentenced to death
 - viii. Count 4 – the 3rd and 4th Appellants were sentenced to life imprisonment
 - ix. Count 5 – the 1st, 3rd and 5th Appellants were sentenced to life imprisonment
 - x. Counts 6 and 7 – the 1st Appellant was sentenced to life imprisonment
 - xi. Count 8 – the Appellants were sentenced to 10 years imprisonment
20. Being aggrieved by the conviction and sentence of the trial court, the Appellants filed their respective petitions dated 12th May 2020 and later filed amended grounds of appeal alongside written submissions dated between 16/01/2023 and 17/01/2023. The grounds of appeal raised by the Appellants can be summarized as follows: -
- i. That the learned trial magistrate erred in law and fact by holding that the offense of robbery with violence was proved against the Appellants but failed to note that the elements of the offense were not proved against the Appellants.
 - ii. The learned trial magistrate erred in law and fact when he relied on the evidence of purported visual identification to convict the Appellant but failed to note that the circumstances were not conducive for positive identification since the perpetrators were all strangers.
 - iii. The learned trial magistrate erred in both law and fact in finding that the identification parades conducted by PW11 and PW12 were properly procured while there were glaring irregularities and procedural technicalities were flawed.
 - iv. That the learned trial magistrate erred in both matters of law and fact in shifting the burden proof to the Appellant and failed to evaluate conclusively the appellant's defense of alibi alongside the prosecution evidence and defense was not given adequate consideration.
21. Appellants' Submissions
22. The Appellants each filed separate written submissions.
23. In summary, they asserted that the prosecution case was primarily based on the identification evidence of a single identifying witness PW1 who was attacked at night while alone. They stated that the circumstances for identifications were difficult as it was at night, she was alone and scared and it was impossible to identify a stranger with the little time she had. They also asserted that PW1 did not give a description of the assailants in her first report to the police. They also castigated the identification evidence by the other witnesses including PW3 and PW8.
24. Reliance was placed on *Kamau v Republic* [1975] EA 199, *Anjononi vs Republic* [1980] KLR 59, *Joseph Muchangi Nyaga, and Another vs Republic* [2013] eKLR
25. The 1st Appellant stated that the trial magistrate erred in connecting the recovered spent cartridges including the one retrieved from the deceased body to the dun recovered from the Appellant according



to the evidence of PW14. He reiterated that the trial magistrate erred when he opined that the Accused could be guilty in Count II since he was in possession of a G3 rifle and that the recovered cartridge from the body of the deceased was fired from that rifle yet PW14 stated that he was shot by an AK47 rifle. That the G3 rifle which was not connected to the case uses 7.62mm by 51mm ammunition while the AK47 uses 7.62mm by 39mm.

26. He also averred that possession of a firearm was not proved against the Appellant because the court did not receive direct evidence from members of the public who arrested him and that the gun was recovered from members of the public and not him. The 1st Appellant asserted that the court disregarded his alibi evidence that he was not at the scene of the crime on the material day he was at his job as a potato broker.
27. The 2nd Appellant stated that he was not armed with a dangerous weapon or instrument and that PW1 did not state the role that he played in the actual robbery. Further, there was no motion that at or immediately after the time of the robbery the complainant was wounded or beaten, and therefore the offense of robbery with violence was not proven against him. He stated that when he was arrested, nothing stolen was recovered from him and no identification parade was conducted therefore his arrest had no nexus to the robbery in question. Moreover, it was averred that the 2nd Appellant in his defense stated that he was working at Laikipia University on 21/6/2016 and did not commit the offense in action.
28. The 3rd Appellant submitted that the identification parade was convoluted and that the names on the record were not his. That the identification parade was done after he appeared in court thrice in the presence of the complainants and that the parade was done on 20/4/2023 when he was not in attendance.
29. The 4th Appellant contended that the identification parades conducted by PW11 and PW12 were fatally flawed and could not support a conviction and sentence. He stated that there was no advance description of the Appellant and that the witnesses in their initial statements did not record to have identified the Appellant nor did not lead the police to arrest the Appellant. There were a lot of irregularities in the ID parade conduct and the rules on the conduct of identification parades were flawed. Additionally, it was stated that his alibi evidence was not considered and that he was only arrested when he went to the police station because his wife had been arrested for being underage.
30. Respondent's Submissions
31. From the record, I could only trace the respondent's submissions with respect to the 1st Appellant who was charged with the following offenses: -Count 1 to 5- robbery with violenceCount 6 – attempted robbery with violenceCount 7 – being in possession of a firearmCount 8 – being in possession of ammunition; andCount 9 - Being in possession of live ammunition.
32. The prosecution called a total of 17 witnesses and produced 18 exhibits in support of its case. The Appellant was acquitted in count 1 under Section 210 of the criminal procedure code because the evidence did not place him at the scene of the crime. He was then put on his defense and gave unsworn evidence and was convicted and sentenced on 5th May 2020 as follows:-Count 2 to 3 – sentenced to deathCount 4 – acquittedCount 5 to 7 – sentenced to life imprisonmentCount 8 – sentenced to 10 years imprisonmentCount 9 – disallowed due to duplicityThe sentence in count 2 was executed while the others were held in abeyance.Count 2 and 3
33. It was stated that The police officers recovered spent cartridges including one retrieved from the deceased's body and PW14, a firearms expert made a finding that the cartridges were matched and were fired from exhibit 1 which was recovered from the Appellant as per the prosecution witnesses,



particularly PW7 and PW17. Further, PW3 identified the 1st Appellant and testified that he saw him from the front and he had a gun which she identified as the one in court and recovered from the Appellant.

34. Count 6,7 and 8

35. The prosecution submitted that PW6 told the court that she was attacked by two thugs who were armed and that members of the public responded to her alarm and chased the thugs away. PW7, a police officer from Nagano Police Station was among those who responded to the alarm and recovered a firearm, exhibit 1 with 8 rounds of ammunition. PW 7, PW11, PW15, and PW17 gave evidence that the Appellant was rescued by the police shortly after the incident at another location where there was an attempted robbery.

36. It was also averred that when placed on his defence, the Appellant did not discredit not displace the prosecution's evidence. His evidence was unbelievable, unreliable, and did not hold.

37. Issues, Analysis and Determination

38. This being a first appeal, this Court is under a duty to re-evaluate and re-analyze the facts and evidence that resulted in the decision of the trial court and reach its own independent decision on the same. As stated in the case of *Okeno v Republic* [1972] E.A. 32:-

“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 the appellate court's own decision on the evidence. The first appellate court must weigh conflicting evidence and draw its conclusions. (*Shantilal M. Ruwala v. R.*[1957] EA 57). It is not the function of a first appellate court merely to scrutinize the evidence to see if there is some evidence to support the lower court's findings and conclusions; it must make its findings and draw its conclusions. 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. See *Peters v Sunday Post* [1958] EA 429.”

39. Count 2 and 3

40. The ingredients of this offense were aptly discussed by Cockar, C.J., Akiwumi & Shah, JJ.A. in the case of *Johana Ndungu vs. Republic* CRA. 116/1995, [1996] eKLR where the Court of Appeal in Mombasa stated as follows:-

“To appreciate properly what acts, constitute an offense under Section 296 (2) one must consider the subsection in conjunction with Section 295 of the PC. 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. Thereafter, the existence of the afore-described ingredients constituting robbery is presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below, and any one of which if proved, will constitute the offense under the subsection:

- (i). If the offender is armed with any dangerous or offensive weapon or instrument;
or
- (ii). If he is in company with one or more other person or persons; or



(iii). If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”

41. (See also *Oluoch vs. Republic* [1985] KLR).
42. Similarly, in the Court of Appeal case of Criminal Appeal No. 300 of 2007, *Dima Denge & Others vs. Republic* (2013) eKLR, it was stated as follows:

“ the elements of the offense under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to find an offense of robbery with violence.”
43. Accordingly, the Appellants were jointly convicted in counts 2 and 3 for the offense of robbery with violence arising from the same transaction. The particulars of count 2 are that on the 1st day of June 2016 at about 9.30 pm at Shamanei Village, Laikipia Sub-County within Laikipia County jointly with others not before the court being armed with dangerous weapons namely firearms robbed Paul Ndungu Muchendu Kshs. 100,000/- and immediately before such robbery murdered the said Paul Ndungu Muchendu.
44. The particulars of count 3 are that on the 1st day of June 2016 at about 9.30 pm at Shamanei Village, Laikipia Sub-County within Laikipia County jointly with others before the court being armed with dangerous weapons namely firearms robbed Agnes Nyachomba Ndungu Kshs. 20,000/- and immediately before such robbery threatened to use actual violence to the said Agnes Nyachomba Ndungu.
45. The Appellants asserted that the learned trial magistrate erred in law and fact by holding that the offense of robbery with violence was proved against the Appellants but failed to note that the elements of the offense were not proved against the Appellants. Further, they contended that the prosecution’s case was primarily based on the identification evidence of a single identifying witness i.e. PW1 who was attacked at night while alone. They stated that the circumstances for identification were difficult as it was at night, she was alone and scared and it was impossible to identify a stranger with the little time she had.
46. Count 2 related to PW1’s husband who was shot dead during the robbery and Count 3 related to PW1. PW1 narrated the incident that happened at their homestead on the material night. She testified that she was with her husband, house girl, and child when they were accosted at about 8.30 pm by a person wielding a big gun as they arrived at their matrimonial home. PW1 stated that the gate was wide open and the security lights were on. PW1 began screaming then she saw another person at her car window with an axe. The husband began hooting then one with the axe broke the window on the driver’s side and the other one shot her husband in the right eye and blood spilled out from her injured husband who fell on her chest.
47. She then opened the doors for the thugs who ordered her at gunpoint to give them all the money they had including what was in her husband’s pockets. They demanded more money and she gave them Kshs. 20,000/- from her handbag which was at the back of the car. The thugs then left her husband who by then had succumbed to the gunshot injury.
48. PW1 stated that she ran to her mother-in-law’s house which was about 20 metres away but found no one. She then went into the forest for about 20 minutes then she heard people talking near her car. On trying to approach the car, she then realized that it was the same people who had attacked them



- that were talking. The security lights were on and she saw 4 people, the same gun and a red motorbike which ferried the thugs away.
49. She described the persons who attacked them and later participated in an identification parade and identified the attackers. She also identified the 2nd Appellant as the one who had the gun and the 3rd Appellant as the one who had the axe in court. She also identified the gun she saw as exhibit 1 present in court and stated that the attackers had maasai shukas.
 50. PW8 the complainant in count 4 testified that they were attacked in his bar on the same night that PW1 and her deceased husband were attacked. It was stated Both incidents happened within an interval of 1 hour and that the attackers informed them of the robbery they had just committed which was the attack on PW1 and her deceased husband to intimidate them to hand over their money. He stated that the 3rd and 4th Accused were the ones who were bragging about the robbery they had committed. He also testified that the attackers were in Maasai shukas and was later able to identify them in an identification parade. His account was corroborated by PW2 who was a customer in the bar on the material night. Furthermore, as they were running away from the attack at the bar they were confronted with the scene of crime at PW1's homestead.
 51. The identification parades for the 3rd and 4th Accused were conducted by PW11 and PW12. The two were positively identified by PW1, PW2 and PW8. The same was corroborated by PW17 who was the investigating officer.
 52. PW1 stated that although they were attacked at night, she saw the Appellants as they attacked her and her family using the security lights that were lit outside. She also asserted that her car lights were on. Further, she was able to observe the attackers as she was hiding in the forest. It was stated that they had no masks covering their faces and that the 2nd Appellant had a mark that was visible during the incident and the identification parade. Moreover, PW8 and PW2 also identified the 3rd and 4th Appellant in their respective identification parade.
 53. In considering the evidence of identification where an incident occurs at night, the court needs to assess such evidence thoroughly to satisfy itself that the source of light was sufficient to enable the victim to properly see his assailant(s). This was the guiding principle in the case of Hassan Abdallah Mohammed vs. Republic [2017] eKLR where the Court stated that:

“Visual identification in criminal cases can cause a miscarriage of justice and should be carefully tested.”
 54. Similarly, the court in Wamunga vs. Republic (1989) KLR 424 at 426 stated: -

“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 favorable and free from the possibility of error before it can safely make it the basis of a conviction.”
 55. (See also Nzaro vs. Republic (1991) KAR 212).
 56. Consequently, PW1 together with her deceased husband were attacked by the assailants at close range. Her husband was shot while next to her and she was asked to give all the money she had at gunpoint. She then ran to the maize plantation and hid for about 20 minutes and then saw the assailants who had not left yet.



57. Apart from the security lights which were on, her car lights were also on. She averred that through those lights she was able to see the attackers who did not have masks covering their faces. She identified the 3rd and 4th Appellant in an identification parade and the 2nd Appellant in court. I concur with the trial magistrate's holding that the evidence of the witnesses was clear and credible and that their testimonies corroborate each other. It is clear that the Appellants were involved in a spate of robberies on a fateful night linking the witnesses to each other.
58. Further, PW8 who was also attacked on the same night, about an hour apart, stated that the attackers alluded to the robbery at PW1's home. PW8 asserted that the lights were on at his bar enabling him to see the attackers, particularly the 3rd and 4th Appellant. He testified that the assailant who had the gun told them, "Kama hutatoa pesa tutakuacha maiti kama vile tumewacha pale juu." I agree with the trial magistrate that evidently this reference was made in reference to the incident in counts 1 and 2. Similarly, PW8 reiterated that the attackers had maasai shukas and he also identified the 3rd and 4th Appellants as the ones who boasted about the incident in counts 2 and 3.
59. The 1st Appellant was tied to the case by the fact that when he was arrested, a G3 rifle was retrieved from him by members of the public and later handed to the police which rifle was forensically linked to the shooting of PW1's husband by PW14, a firearms examiner.
60. Moreover, having had a chance to thoroughly scrutinize the identification parade report produced in court with respect to the 3rd and 4th Appellants and I find no error that could occasion any prejudice to the Appellants in how the parades were conducted. I have also considered the defense mounted by the Appellants in the light of the evidence on record, the defense cannot possibly be true. Their evidence of alibi is also unreliable and cannot suffice.
61. It is my considered opinion that the evidence on record squarely places the Appellants as the persons who attacked and robbed PW1 and ended up murdering her husband. I find that the conditions for identification of the Appellants on the material night were sufficient and that the intensity of the light was favorable for PW1 to identify the respective Appellants. I concur with the trial magistrate's holding in his judgment that:-
- "..... The husband of PW1 was shot dead. The evidence of the witnesses as above analyzed is clear and credible. The testimonies corroborate each other. The incident happened when the security lights and the lights of the car in question were on and therefore visibility was clear.
- In my analysis of the evidence above, I find that corroboration has been achieved by the testimonies of prosecution witnesses. The witnesses' testimonies are consistent as stated above. I find no gaps in the testimonies of the prosecution witnesses. It therefore follows that the requirements of Section 124 of the *Evidence Act* have been satisfied.
- The testimony is not discredited by the defense. The 1st, 3rd, 4th, and 5th Accused persons are equally placed at the scene. The 3rd, 4th, and 5th Accused persons have been positively identified to have caused the attack. It is my finding that the 1st, 3rd, 4th, and 5th Accused persons committed the offense as charged in counts 2 and 3."
62. In the end, I am satisfied that the prosecution proved their case against the Appellants with respect to counts 2 and 3 beyond any reasonable doubt. The Appellants were rightly convicted, hence their appeal against conviction on counts 2 and 3 fails.
63. Count 4



64. The complainant in count 4 was PW8, Michael Munongoki Maina. The offense therein was robbery with violence. PW8 testified that he was in his bar on the fateful night when he was accosted by two thugs, one of them brandishing a gun. He stated that there were 4 customers in the small bar which is about 10ft by 10ft and the lights were on during the attack. Further, the attackers bragged about the robbery they had just committed and used the same to intimidate PW8 into giving them money. He confirmed that the attackers were in Maasai shukas.
65. It was his testimony that the thug who collected the money at the counter was the 4th Appellant and he was able to see him clearly as he gave him the money. The one who stood at the door of the bar was the 3rd Appellant. He was also the one holding the gun. He asserted that after about 30 minutes he went out and came across the scene of the crime at PW1's homestead and learned about the attack on PW1 and her deceased husband. He also narrated an account of his attack to the police. Later, PW8 identified the 3rd and 4th Appellant during identification parades.
66. PW2 who was a customer and present during the attack corroborated PW8's testimony. He was also able to identify the 3rd and 4th Appellants.
67. I do not doubt in my mind that the 3rd and 4th Appellants were present as perpetrators of the offense of robbery with violence at PW8's bar. Relying on the analysis above, I also concur with the trial magistrate's assertion that their testimony did not puncture the prosecution's evidence. I therefore uphold the trial court's conviction of the 3rd and 4th Appellant on count 4.
68. Count 5
69. The complainant in count 5 was PW3, Joseph Ndung'u Njoroge, a taxi operator in Nyahururu. He testified that he was taking PW5, a customer home when they were strategically attacked just after crossing the railway line. He stated that he had slowed down when he saw someone in the vehicle in front of him wielding a gun. They were ambushed by the thugs and thrown into the back seat. He stated that he could see the thugs through the car lights as the door was periodically opened and they had not covered their faces with masks.
70. Pw3 identified the 4th Appellant in an identification parade and also in court. He also identified the 1st Appellant as the person who had the gun and the 3rd Appellant as the one who sat next to him in the backseat of the car. He identified the 3rd Appellant during the ID parade and also in court.
71. Additionally, PW5 who was his customer corroborated his testimony and added there were security lights at the scene coming from Kisima Secondary School which was nearby. He stated that he saw 3 attackers and they were in maasai shukas which is similar to the attackers in counts 2,3 and 4.
72. It is my considered opinion, that the 1st, 3rd and 4th Appellant were positively identified as the attackers in count 5. The victims were able to identify them using the car lights and the security lights from the nearby school. The attackers also sat next to the victims in the car enabling PW8 to see them in close proximity. I also find that the prosecution proved beyond reasonable doubt that the 1st, 3rd and 4th Appellant committed the offense of robbery with violence and therefore upheld their conviction by the trial magistrate.
73. Count 6 and 7
74. These counts were in relation to the 1st Appellant. The complainant therein was PW6 who testified that she was accosted by 2 people who were armed but members of the public came to her rescue. PW7 was among the 1st responders to the scene of crime and his evidence was corroborated by that of PW10,



PW14, PW15, and PW17. The 1st Appellant was rescued from the scene by police officers i.e. PW7 and PW15 where he was being attacked by the crowd and nearly lynched.

75. Accordingly, I concur with the trial magistrate that the 1st Appellant was squarely at the scene of the crime and that the evidence against him was consistent and credible and therefore upheld his conviction on this count by the trial magistrate.

76. Count 7

77. The 1st Appellant was in possession of a G3 rifle which was retrieved from him by the mob and handed over to the police. The witnesses in count 6 above testified on the same and the firearm and ammunition were later linked to the crimes above especially counts 2 and 3. I therefore find that the 1st Appellant was rightly convicted on the same.

78. Count 8

79. The evidence in this count emanates from counts 6 and 7 above. A gun and ammunition were recovered from the 1st Appellant when he was arrested. Counts 2 and 3 were also linked by the ammunition that was recovered and the bullet retrieved from PW1's husband. the Appellants were rightly convicted in counts 2 and 3 and I therefore uphold their conviction in this count for the offence of being in possession of ammunition without any legal authority.

80. Notably, in the case of *Twehangane Alfred vs Uganda* (Cr.App.No.139 of 2001(2003) UGCA, it was held that it is not every contradiction that warrants the rejection of evidence. The court delivered itself thus:

“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.”

81. I hold that any minor discrepancies noted in the prosecution’s case were not fatal to the prosecution’s case against the Appellants. Accordingly, the appeal on conviction fails.

82. With respect to the trial court’s sentencing, the trial magistrate sentenced the Appellants as follows: -Counts 2 and 3 – the Appellants were sentenced to death.Count 4 – the 3rd and 4th Appellants were sentenced to life imprisonment.Count 5 – the 1st, 3rd and 5th Appellants were sentenced to life imprisonment.Counts 6 and 7 – the 1st Appellant was sentenced to life imprisonment.Count 8 – the Appellants were sentenced to 10 years imprisonment.

83. The trial magistrate further held that considering the law, principles of sentencing, and case law, sentences in count 3,4,5,6,7 and 8 be hereby held in abeyance. That means that the sentence in count 2 against the Appellants be executed as authorized by law.

84. In *James Kariuki Wagana vs Republic* [2018] eKLR, Prof. Ngugi J (as he then was) observed that while the penalty of death is the maximum penalty for both murder and robbery with violence, the court has the discretion to impose any other penalty that it deems fit and just in the circumstances. He further observed that the death sentence should be reserved for the highest and most heinous levels of robbery with violence or murder. He noted that while force had been used in the case before him, it could not be said that the Appellant used excessive force, nor did he “unnecessarily injure the Complainant during the robbery” and was not armed during the robbery.



85. While the Supreme Court in the Muruatetu decision held that the mandatory nature of the death sentence is unconstitutional it did not outlaw the death sentence. Therefore, considering the aforementioned decisions, I find that the death sentence meted out in this case was appropriate considering the circumstances of the same which led to the death of PW1's husband and there is no lawful reason to interfere with the trial court's discretion on passing sentence.
86. In the circumstances, I find that the sentence meted by the trial court was appropriate and lawful. From the foregoing, I find the prosecution proved its case beyond reasonable doubt against the Appellants. I will therefore not interfere with the conviction and sentence.
- i. Appeal on conviction is dismissed and conviction upheld.
 - ii. Appeal on sentence is dismissed in respect of counts 2,3, and 8, and the same sentences are affirmed but counts 3 and 8 are suspended.
 - iii. With respect to counts;
 - Count 4 – the 3rd and 4th Appellants were sentenced to life imprisonment.
 - Count 5 – the 1st, 3rd, and 5th Appellants were sentenced to life imprisonment.
 - Counts 6 and 7 – the 1st Appellant was sentenced to life imprisonment.The life imprisonments are substituted with thirty (30) years imprisonment but are suspended as appellants are sentenced to death in counts 2 and 3.

DATED, SIGNED, AND DELIVERED AT NYANDARUA ON THIS 7TH DAY OF MARCH 2024.

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CHARLES KARIUKI

JUDGE

