**Muia v Republic (Criminal Appeal E020 of 2022)**
**[2024] KEHC 9698 (KLR) (24 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9698 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL E020 OF 2022**

**MW MUIGAI, J**

**JULY 24, 2024**

**BETWEEN**

**BONIFACE MUTUA MUIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal against the conviction and sentence of the Chief Magistrate's court at Mavoko (Hon. B. Kasavuli -PM) delivered on 03/03/2022 in Criminal Case No.108 of 2020)***

**JUDGMENT**

## Background

1. The 1st and 2nd Appellants were jointly charged before the Chief Magistrate's Courts at Mavoko in Criminal case No. 108 of 2020 with the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal code.

2. On the 28th day of September 2019 at Mining Area at Athi River sub –county within Machakos County, jointly while armed with crude weapons namely rungu's and metal bars robbed John Kyalo a cash of Kshs 3200 and a motor cycle registration number KMEL 795 N make SKY GO black in colour valued at kshs 95,000 and immediately before the time of such robbery used actually violence against the said John Kyalo

3. On 25/2/2020 before Hon. C.C.Oluoch (CM), the Appellant pleaded not guilty to the charges hence the case proceeded to hearing the prosecution case.

4. In Prosecution case, 5 witnesses testified.

**Prosecution**

5. The hearing commenced before PW1, John Kyalo stated that he lived in Machakos and used to do boda boda work in Athi River KMEL 795L was his motor cycle. On 28/9/19, he met Jonathan and the accused, they exchanged some small talk and then he went. In the evening a client sent him packaging papers which he delivered to the client. A woman in an Mpesa shop stopped him and he saw Jonathan and his co accused near the Mpesa. The woman asked him to carry her to the slaughter area so he asked Anthony to remain behind.

6. He further testified that when he came back he found Jonathan and his co accused who all boarded his motor cycle. Jonathan wanted to be dropped at Vannillas and as they were approaching Antipack, Jonathan told him not to pack at the gate. Suddenly he heard something hitting him hard on the head and shoulder and realized he was under attack from Jonathan and his co accused. He slowed down and dropped the motor cycle. Jonathan held his hands as his co accused hit him severally on the legs. He fell down and they also hit his head. They robbed him of his phone, motor cycle keys, remote, wallet and kshs 3,200. They went away with the motor cycle. He then crawled to the neighbour's fence, stood up and walked to Namanga Road where he found a motor cycle rider whom he pleaded with to drop him to Makadara Estate. He was then taken to hospital and to the police.

7. He stated that he knew Jonathan since 2016 as he used to sell Muguka. The other one he saw him on the day of the incident at 7 am. The robbery occurred at 7pm it was dark and bushy road.

8. On cross examination by accused 1 he stated that he was the one who recorded his witness statement and knew how he was arrested. He did not know if the phone details were documented and that he knew him by physical appearance. He was injured on the head, leg and knees. He was treated at Athi River, Kitengela medical and Machakos Level 5. The documents from hospital is stamped. He has a driving licence and insurance.

9. On cross examination by accused 2 he stated that he knew him as Jonathan Muema alias Rasta who used to sell him muguka at Makadara. The scene was dark but he had seen him because he carried him before he attacked him. Accused one started beating him and accused two held his hands. The crime occurred on 28/9/19 and p3 form was filled on 7/10/19. He lost his motor cycle, wallet, keys, kshs 3200 helmet and wallet. Muema's sister is not a witness in the case because she was not a witness to the robbery. He has known him since 2016 and even gave him cigarrete in the morning when they met.

10. PW2 Anthony Robert Kimeu testified that on 28/9/2019, he came from work in the evening when he went to the police station and met PW1 and as they were chatting, PW1 was called by his client and he requested him to escort him to deliver packaging bags to his client. Two men came and asked PW1 if he could ferry them and he told them to wait for him to take the other client first. He went and came back to carry the two men. He carried them and they left. PW1 came after an hour, bleeding from his head brought by another boda boda. They went to the Police station and then he was taken to the hospital. PW1 was bleeding on the forehead he received 1st aid and was referred to Kitengela Medical for CT scan but wasn't available. They had to go to Machakos hospital

11. He further testified that he knew one of the men that PW1 had carried. He was known as Rasta

12. On cross examination by accused one he stated that he did not witness the incident. He only saw him that day and did not know his name neither did he accompany PW1 as his bodyguard. They were the last people he saw PW1 carrying and told him that he was attacked by the people he carried last. He stated that here was street light at the place they boarded.

13. On cross examination by accused two he stated that the incident occurred on 28th on the way to Namanga road. He knew this accused because he used to sell Muguka at Makadara Area. He accompanied PW1 as a friend not as a body guard. He was not at the scene when he was arrested and did not know what led to his arrest.

14. PW3 Musau Kimuli testified that he was a village elder of railways. On 29/9/2019 at night his neighbor woke him up to tell him that his son had been robbed of his motor cycle. They went to the ground with 'Nyumba Kumi' looking for the suspect Jonah. For about two months he could not be found but they heard he was at Manaija. They organized with two police officers and on 19/2/20 they went to the homestead where the suspect was said to be. They arrested him and brought him to the police. Jonah told them that he was with Nzioka when the robbery occurred. At the police station the complainant was able to identify Jonah. Muji Kumi also called that they had seen Nzyoka and he went arrested him and took him to the police station. The complainant and the witnesses identified him

15. In his evidence, he stated that he met the man at around 6 to 7 pm. PW1 did not know the man before he met him. He stated that when he met the man when he was with his conductor called Francis who is aware of the incident and how a deal was stuck to go to Namanga. He stated that his conductor used to help him to operate between Kajiado and Kitengela and he is called Francis who could have accompanied them to Namanga.

16. On cross examination by accused one he stated that he knew Jonah as he used to sell miraa. It was Jonah who mentioned his name. They held a meeting as Nyumba kumi to find out who had injured their subject. Jonah was the one who linked the accused one to the case as he started that he was with him during the robbery

17. On cross examination by the accused two he stated that he was with the police and taxi driver when he named the accused 1 and he was the one who led to the arrest of accused 1. He did not have any recording of their conversation. The complainant's first report was robbery and assault

18. PW4, No. 88421 CPL Carolina Siati stated that on 28/9/19 at 9pm the complainant came to the police station with head injuries and said he was a rider of motor cycle KMEL 795N Skygo black in colour and that while he was riding the same, he met the two accused whom he had known very well and they asked him to take them to a certain place, while on their way near Savanah Cement, he was hit by a hammer on the shoulders and he fell down. The accused persons continued beating him. They robbed him of Kshs 3000, itel phone, wallet. He was unconscious for about half an hour then he work up and went to Namanga road where a boda boda rider helped him and took him to the place he had left his friend and they then went to the police station.

19. They referred him to hospital where he was treated. A p3 form was filled. He went with the village elders to Mananja Village where they found the 1st accused and arrested him. He told them that he participated in the offence and they sold the bike in Emali. On 23/2/2020, the 2nd accused was arrested by the village elder and taken to the chief's camp where he arrested him. He obtained the logbook from the complainant. He then charged them.

20. On cross examination by the 1st accused he stated that the complainant said he knew his attackers well. He was the investigating officer and visited the scene of the crime. He did not record anything from him

21. On cross examination by accused two he stated that he arrested him in Mananja village. He did not record anything from him. His relative said he had heard that the accused had committed a crime in Athi river. They did not record any witness statement because they denied being his relatives. He was the one who led to the arrest of accused one.

22. PW5 John Mutunga testified that he was a doctor attached to Machakos Level 5 hospital. He produced a P3 form for John Kyalo. He was injured on 28/9/19 and sustained injuries, blunt injury to the head, multiple blunt injuries to the head, shoulder joint- left and right, blunt injury to both knees. The injuries had been stitched. The degree was grievous harm and a blunt object was used.

23. On cross examination by accused one he stated that the brain CT scan showed the victim was bleeding from the brain. He was not the one who conducted the CT scan

24. On cross examination by the accused two he stated that the victim had been treated before 17/10/19 when he examined him. The stamp was not for level 6 hospital. He had worked in that hospital for 17 years. CT was done by Dr. watiti. It was not a fabrication.

25. The Prosecution counsel closed the prosecution case.

**CASE TO ANSWER**

26. Upon considering the evidence of the prosecution witnesses and the defence written submissions, on 21/1/22 Hon. B. Kasavuli (PM) was persuaded that a prima facie case had been established by the prosecution against each Appellant to place them on their defence.

27. The 1st and 2nd Appellants chose to give a sworn statement.

**Defence Case**

28. In his evidence, DW1, Emmanuel Nzioki Muinde stated that he lived at Katani. He stated that on 23/2/2020, a Sunday worker came from his site and he went to Athi River to check on his parents. While at Makadara stage, he met 3 men who demanded to know who he was. They asked for his ID but he did not have it.They took him to the Chief's office and asked him if he knew him but he said he did not. He was later charged with a case which he knew nothing about. He stated that the case was a fabrication and a case of mistaken identity.

29. On cross examination he stated that he Complainant identified him on the dock

30. DW2, Boniface Muia testified that he comes from Mananje. That on 19/2/2019 he went to work at the trench and he heard his wife calling. He found 4 men who arrested him and took him into their motor vehicle. They molested him and took him to the police station. A man came and was asked if he was the assailant but he said he was not because he had been attacked by a Rastaman. He was taken to the cells and the main this time said he was the assailant.

31. According to the accused, he was assaulted by the police officers who used pliers on his private parts in bid to have him confess. He declined and was charged with an offence that he knew nothing about. He also did not know his co accused and saw him in court for the 1st time. The complainant said the scene was dark and there was no identification parade done

32. On cross examination he stated that witness statements were read to him and that the complainant stated that he was attacked by a rasta man.

**Trial Court's Judgment**

33. In his judgment, the learned trial magistrate was not satisfied that the case had been proved beyond reasonable doubt as against the 1st accused person. He therefore acquitted the 1st accused under section 215 of the CPC. However he was satisfied that there was sufficient evidence against the 2nd accused and convicted him of the offence of robbery with violence

34. In mitigation, 2nd Appellant stated that he had a wife and children who relied on him. Upon considering the Appellants mitigation he sentenced the accused to death penalty

**Appeal**

35. Aggrieved by both the conviction and sentence, the Appellant appealed citing the following grounds:-

    (1) That the learned trial magistrate erred in law and in fact while convicting the appellant with findings that the circumstances at the alleged scene of crime were conducive for pw1 and pw2 that the positively identified the appellant without considering 1st report with description were not tendered into record while there was no identification parade that was required since the evidence was by way of recognition

    (2) That the trial magistrate erred further in law and in reliance with evidence of PW3 and PW4 without putting into consideration the credibility of their evidence was left in doubt unsafe to base the appellant's conviction

    (3) That the magistrate lost direction in evidence and rejected the appellant's defence which same was not displaced by the prosecution side as per section 212 of CPC.

36. The Appellants have urged this court to quash the conviction and set aside the sentence.

**Appellant's Submissions**

37. On behalf of the Appellant it is submitted that based on grounds 1,2 and 3 of the appeal there was no sufficient evidence to convict the Appellant.

38. According to the Appellant, The Appellant submitted that the prosecution did not prove the appellant as guilty beyond any reasonable doubt as required by law. The prosecution failed on their duty to amend the charge sheet to read with the names as PW1 and PW3 were referring to let the same read with alias.

39. According to the Appellant, section 214 of the CPC was violated. It is clear from the record that no amendment or any substitution of charge sheet was made to clear doubts of who the accused persons were.

40. The appellant submitted that identification by recognition was relied on by the witnesses and it was not clear whether they gave the description of the attackers to the police in their first report and that evidence of visual identification in criminal cases usually causes a miscarriage of justice if not carefully tested as law.

41. Reliance was made to the case of Kariuki Njiru and & others v R and the case of Maitanyi v R (1986) KLR 198. It was submitted that identification parade was necessary to be organized.

42. Reliance was placed to the case of James Tinega Omwenga vs R on the importance of identification parade and the case of Simiyu & Another vs R(2005)1 KLR 193.

43. It is submitted that the Appellants were not properly identified since no identification parade was conducted.

44. He relied on the case of David Mwita Wanja & Others vs R (2007) still to lay emphasis on the importance of identification parade

45. As regards the defence, it was submitted that the appellant's defence was not considered and that the trial magistrate totally failed to evaluate the whole evidence adduced to come up with findings.

46. Reliance was made to the case of Ouma vs R (1986) KLR 619 on the court's duty to have in mind an accused's defence. Further the defence of alibi, the case of Saidi vs Republic(1963) EA6.

47. It is therefore submitted that the prosecution did not prove the case against the Appellants beyond reasonable doubt hence the conviction should be quashed and sentence be set aside.

**Prosecution Submissions**

48. Prosecution submitted that trial court was right in relying on the evidence by the prosecution witnesses and that the demeanour of the witnesses were that of a credible ones

49. On proof beyond reasonable doubt, it was submitted that ingredients of robbery with violence were clearly stated in the case of Oluoch vs Republic as the offender is armed with any dangerous and offensive weapon or instrument, the offender is in a company with one or more persons and at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.

50. According to Counsel, the ingredients of robbery with violence were satisfied Counsel urged this court to uphold the conviction and sentence.

**Determination**

51. I have carefully considered the Trial Court evidence on record, Trial Court's Judgment, Memorandum of Appeal and written submissions filed on behalf of the respective parties.

52. This Court being the 1st Appeal Court, its duty is as set out in the case of Pandya vs. Republic [1957] EA 336 as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

53. In the case of Kiilu & Another vs. Republic [2005]1 KLR 174 the Court of Appeal stated thus;

    1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.

    2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and 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.

54. The Appellants had been charged with the offence of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The Trial Magistrate found that the Appellant was properly identified by the complainant. According to the Trial Magistrate, the Prosecution proved the case beyond reasonable doubt.

**Burden of Proof**

55. Article 50 (2) (a) of *the Constitution* provides that that an accused person is presumed to be innocent until the contrary is proved.

56. It was held by Viscount Sankey L.C in Woolmington vs. DPP [1935] A.C 462 pp. 481 that in criminal cases, the burden of proof lies with the prosecution.

57. As was stated by Nyakundi J. in Republic vs. Ismail Hussein Ibrahim [2018] eKLR:-

> " ...the prosecution has the duty to prove all the ingredients of the offence beyond reasonable doubt and there is no burden on the part of the accused to proof his innocence at any one given time. The law only permits very few statutory exceptions where an accused person can be called upon to give an explanation in rebuttal. However, this does not shift the burden of proof from the prosecution"

**Standard Of Proof**

58. According to Lord Denning on what is proof beyond reasonable doubt in Miller vs. Ministry of Pensions, [1947] 2 ALL ER 372 stated that:-

> " That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

59. Based on the grounds of appeal, the issues that emerge for determination are as follows:-

a. Whether the Prosecution proved the offence of Robbery with violence to the required standard

b. Whether the evidence of identification sufficiently pointed to the Appellants

c. Whether the Trial Court sentence of death penalty to the appellant failed to commensurate the offence charged.

**Whether the Prosecution proved the offence of Robbery with violence to the required standard**

1. According to the charge sheet, the Appellants were jointly charged for the offence of Robbery with violence pursuant to Section 296 (2) of the Penal Code. Under the provision, it is provided that:-

> 2. If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

2. As read with Section 295 of the Code where 'Robbery' has been defined as follows:-

> " 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"

60. What constitutes the offence of Robbery with violence was well captured in the case of Olouch vs. Republic (1985)KLR where the Court of Appeal stated as follows:-

> " ...Robbery with violence is committed in any of the following circumstances:
>
> a. The offender is armed with any dangerous and offensive weapon or instrument; or
>
> b. The offender is in company with one or more person or persons; or
>
> c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person."

61. In the case of *Dima Denge Dima & Others vs. Republic, Criminal Appeal No. 300 of 2007*,it was stated that:

> " ...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."

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

62. PW1 testified that when he came back he found Jonathan and his co accused who all boarded his motor cycle. Jonathan wanted to be dropped at Vannillas and as they were approaching antipack, Jonathan told him not to pack at the gate. Suddenly he heard something hitting him hard on the head and shoulder and realized he was under attack from Jonathan and his co accused. He slowed down and dropped the motor cycle. Jonathan held his hands as his co accused hit him severally on the legs. He fell down and they also hit his head. They robbed him of his phone, motor cycle keys, remote, wallet and kshs 3,200. They went away with the motor cycle. He then crawled to the neighbour's fence, stood up and walked to Namanga Road where he found a motor cycle rider whom he pleaded with to drop him to Makadara Estate. He was then taken to hospital and to the police.

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

iii. PW1 and PW2 stated that the appellant and another person boarded PW1's motor cycle.

iv. The offender wounds, beats, strikes or uses other personal violence to any person

63. According to PW1 ,PW2, PW5, PW1 was badly injured. PW5 John Mutunga, testified that he was a doctor attached to Machakos Level 5 hospital. He produced a P3 form for John Kyalo. He was injured on 28/9/19 and sustained injuries, blunt injury to the head, multiple blunt injuries to the head, shoulder joint- left and right, blunt injury to both knees. The injuries had been stitched. The degree was grievous harm and a blunt object was used.

64. The Court is satisfied that the facts are conclusive to constitute an offence of Robbery with violence. PW1 was injured. The assailants who were two were armed with hammers with they used to injure PW1 who sustained injuries assessed by Dr Mutunga as grievous

65. harm as per P3 Form produced as exhibit.

**A. Whether the evidence of identification sufficiently pointed to the Appellants**

66. It is submitted by the Appellant that they were identified on the dock. According to the Appellants, PW1 and PW2 evidence was inconsistent hence there was need to have an identification parade conducted.

67. Mativo J. in Donald Atemia Sipendi vs. Republic [2019] eKLR had this to say:-

> " 33. Our system of justice is deeply concerned that no person who is innocent of a crime ought to be convicted of it. In order to avoid that, a court must consider identification testimony with great care, especially when the only evidence identifying the accused as the perpetrator comes from one witness. Because the law is not so much concerned with the number of witnesses called as with the quality of the testimony given, the law does permit a guilty verdict on the testimony of one witness identifying the accused as the person who committed the crime. A guilty verdict is permitted, however, only if the evidence is of sufficient quality to convince the court beyond a reasonable doubt that all the elements of the crime have been proven and that the identification of the accused is both truthful and accurate..."

68. On identification in R. vs. Turnbull & Others [1973] 3 AllER 549 it was held that:

> "...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

69. In Nzaro vs. Republic (1991) KAR 212, the Court of Appeal held that evidence of identification by recognition at night must be absolutely watertight to justify conviction. See FRANCIS KARIUKI & OTHERS VS. R, CR.A NO. 6 OF 2001.

70. The Court's view is that there was proper identification by recognition of the Appellants due to the following reasons:

    i. On 28/8/2019, PW1 met with Jonathan and Co Accused person at 7 am. They exchanged greetings and shared a cigarette.

    ii. At 7pm same day he went to Little Rock where he found a customer woman at Mpesa shop. He met Jonathan and as he took the woman on his motorcycle Jonah asked to come along and PW1 refused.

iii. PW1 stated that he came back and met Jonah, the appellant together with Nzyoka and they requested to be carried on the motorcycle. He carried them on the motor cycle towards Anti Park and as he approached the gate Jonah told him not to park at the Gate After a while, the appellant told PW1 to stopped and suddenly they attacked him

iv. PW1 was clear that he had known the appellant as Jonathan since 2016 and that he even used to buy Muguka from him. He was called Jonathan Muema alias Rasta because he allowed rasta hairstyle.

71. The evidence by PW1 is corroborated by PW2 who confirmed that the appellant together with another person boarded the appellant's motorcycle.

72. The evidence of PW1 is not of identification of the Accused persons but of recognition of Accused person (s ) as was stated in the case of Anjonini & 4 Others vs. Republic [1980] KLR 59 the CoA held as follows:

> " .....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."

73. In Peter Musau Mwanzia vs Republic [2008] eKLR the CoA stated as follows;

> " We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him thus to put a difference between recognition and identification of a stranger. He must show, for example, that the suspect has been known to him for some time, is a relative, a friend or somebody within the same vicinity as himself and so he had been in contact with the suspect before the incident in question....."

74. The Court of Appeal in Samuel Kilonzo Musau vs. Republic [2014]eKLR thus:

> " The purpose of an identification parade, as explained in Kinyanjui & 2 Others Vs Republic (1989) KLR 60, "is to give an opportunity to a witness under controlled and fair conditions to pick out the people he is able to identify, and for a proper record to be made of that event to remove possible later confusion...."

75. The Court's view is that the facts clearly establish that the Appellant were properly identified by PW1 and PW2 by recognition. There was no case of mistaken identity. PW4 stated that the Appellant had admitted to committing the offence and had sold the motor- cyle at Emali but no confession under section 25A *Evidence Act* was taken and thus the evidence was inadmissible.

76. In the upshot, the Court finds that the conviction was based on sound evidence on record. The same is upheld.

**Sentence**

**B. Whether the sentence meted out was commensurate the offence charged**

77. Under Section 296(2) of the Penal Code the offender shall be sentenced to death. The Trial Court sentenced the Appellant to death penalty.

78. Indeed, in Bernard Kimani Gacheru vs. Republic [2002] eKLR, the Court of Appeal restated 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."

79. This Court is bound by the jurisprudence on sentencing by the Supreme Court in Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR hereinafter (Muruatetu No.2) that the decision of (Muruatetu No 1) and these guidelines apply only in respect to sentences of murder under Sections 203 and 204 of the Penal Code.

80. However, there are Sentencing Guidelines 2016, that refer to aggravating and compelling and mitigating reasons to be considered in sentencing.

81. Guided by the decisions and Guidelines of Sentencing, the period spent in custody and evidence in mitigation before the Trial Court, in the interest of justice to review the sentence.

82. The Appellant in his mitigation stated that he has a wife and children who depend on him and thus prays for leniency and non-custodial sentence.

83. In Aden Abdi Simba vs. The DPP Petition No. 24 of 2015, where nobody was injured in the incident and the items were recovered, the court sentenced the accused to 15 years imprisonment. In Paul Ouma Otieno & Another vs. Republic [2018] eKLR the appellants were armed with guns, hence the court noted that it was a serious offence hence a sentence of 20 years' imprisonment would adequately serve the interest of justice.

84. In the case of Cyrus Kavai *Onzere vs Republic C.A.Cr Appeal 166 of 2016* Kisumu C.A. Karanja Tuiyott J.Ngugi JJA the Appellant appealed against sentence only he was sentenced to death penalty on conviction of robbery with violence c/s 296 Penal Code. The Court made reference to Muruatetu 1 on the ratio decidendi that death penalty was unconstitutional without hearing to determine the appropriate sentence. Death penalty was/is out of sync with progressive Bill of Rights and in light of global death penalty jurisprudence; it was harsh, unjust and unfair. However, the appeal failed as the constitutional issue was raised for the 1st time in the 2nd appeal.

85. In Mohammed Salim & Yusuf Kibor vs republic C.A Cr App 251 of 2018 CA Eldoret Sichale Ochieng Korir JJA the Appellants were charged convicted sentenced for robbery with violence C/S 296 Penal Code and rape c/s 10 of *Sexual offences Act*. They were sentenced to 15 years for gang rape and death penalty for robbery with violence. The Court of Appeal reiterated the Supreme Court's decision on unconstitutionality of death penalty and referred to the case of William Okungu Kittiny vs Republic 2018 (C.A.) that applied Muruatetu 1 mutatis mutandis to Section 296 (2) & 297 (2) of the Penal Code.

86. In this case, the complainant did not recover his stolen items however his injuries were classified as grievous harm by the doctor PW5 as shown by P3 Form produced as exhibit in the Trial.

87. Based on the current interpretation of the law and case-law and Sentencing Guidelines 2023 the period spent in custody and evidence in mitigation before the Trial Court, in the interest of justice the Court review the sentence in light of recent binding jurisprudence. The sentence of death penalty is reduced to 30 years imprisonment.

**Disposition**

88. In the premises, the conviction by Trial Court is upheld. I hereby set aside the sentence imposed on the Appellant of death penalty, and substitute therefore to thirty (30) years imprisonment to run from the date when he was charged in Court pursuant to section 333(2) of the Criminal Procedure Code.

It is so ordered.

**JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS HIGH COURT ON 24/7/2024 (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

MS KABURU ODPP- PRESENT

GEOFFREY/PATRICK – COURT ASSISTANT(S)