



REPUBLIC OF KENYA



**Malelu v Republic (Criminal Appeal E030 of 2022)  
[2024] KEHC 8121 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8121 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL E030 OF 2022**

**JM OMIDO, J**

**JULY 4, 2024**

**BETWEEN**

**JAMES MUSYOKA MALELU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgement, conviction and sentence in Thika CMCC  
No. 6539 of 2017, Republic v Anthony Kalungu Mutua & 5 others, delivered  
by Hon. E. N. Riany, Senior Resident Magistrate on 31st March, 2022)*

**JUDGMENT**

1. This appeal emanates from the judgement of Hon. E. N. Riany, Senior Resident Magistrate delivered on 31<sup>st</sup> March, 2022 and the subsequent conviction and sentence on the same day in Thika CM's CR. No. 6539 of 2017 R v Anthony Kalungu Mutua & 5 others.
2. The Appellant James Musyoka Malelu was charged together with five others with two counts of robbery with violence contrary to Section 296(2) of the Penal Code, Cap 63 Laws of Kenya. He was subsequently convicted and sentenced to death on each of the two counts. The Appellant was the second accused person in the lower court case.
3. As is instructive from the charge sheet, the particulars of the offence in the first count were that on 19<sup>th</sup> December, 2017 at Membley area in Ruiru Subcounty within Kiambu County, the Appellant while armed with a dangerous weapon namely a pistol, jointly with his five confederates robbed Rajpal Katana Kazungu of cash Ksh.100,000/- and immediately after or before the time of such robbery used actual violence to the said Rajpal Katana Kazungu.
4. The particulars of the offence in the second count were that on 19<sup>th</sup> December, 2017 at Membley area in Ruiru Subcounty within Kiambu County, the Appellant while armed with a dangerous weapon



namely a pistol, jointly with the other five persons with whom he was charged robbed Frankline Mugambi Mugo (hereinafter referred to as “the deceased”) of cash Ksh.400,000/- and immediately after or before the time of such robbery used actual violence to the said Frankline Mugambi Mugo, injuring him, subsequent to which he succumbed to the injuries on 6<sup>th</sup> January, 2018 while undergoing treatment at the Aga Khan Hospital.

5. The nine cited grounds of appeal presented by the Appellant vide the Petition of Appeal dated 12<sup>th</sup> April, 2022 upon which he seeks to upset the conviction and sentence can be restated as issues as follows:
  - i. Whether the failure to call police officers who took part in the operation that resulted in the arrest of the Appellant can be used to make an adverse inference to the prosecution case where there was no plausible reason for the prosecution to do so.
  - ii. Was there a possibility that it is the police officers who took part in the operation that committed the acts of robbery and caused the death of the deceased.
  - iii. Was there sufficient evidence to prove that motor vehicle registration number KCH 904D Toyota axio had a bullet hole and that the deceased was shot while in the said vehicle while the Appellant was in possession thereof, in the wake of the fact that the said vehicle was never availed as an exhibit.
  - iv. Was there sufficient evidence adduced to place the Appellant at the scene of crime at the time of the robbery.
  - v. Was there sufficient evidence to prove that the Appellant caused the death of the deceased.
  - vi. Did the Learned trial Magistrate properly analyze and consider the Appellant’s defence.
  - vii. Was there sufficient evidence adduced by the prosecution witnesses to prove that the Appellant committed the offences he was convicted on.
6. The court directed that the appeal proceeds by way of written submissions and both parties filed their respective submissions.
7. I have perused the petition of appeal, the submissions by the two sides and the record in its entirety.
8. This court has a legal duty to re-analyze, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify (see *Okeno v Republic* [1972] E.A, 32 at 36; *Pandya vs Republic* [1957] EA 336; *Shantilal M. Ruwala v Republic* [1957] EA 570; and *Peter vs Sunday Post* [1958] EA 424.
9. PW1 Katana Kazungu Rajpal’s testimony was that on 19<sup>th</sup> December, 2017, he was in the company of the deceased and the two proceeded to Cooperative Bank TRM Branch where PW1 received cash Ksh.100,000/- from the deceased, being part of the purchase price of Ksh.2,400,000/- for the sale of land.
10. On their way back, the two were accosted and stopped by five men who claimed to be police officers and who started questioning them. The five had a motor vehicle Toyota Axio whose registration number was KCH 904D, into which they forcefully put PW1 and the deceased, who was carrying cash in his hands, after ejecting them from their vehicle. They were armed with a firearm, handcuffs and a walkie talkie. The vehicle then drove off along Thika Superhighway during which period the men beat up PW1 and the deceased and robbed both of them of cash.



11. PW1 stated further that moments later, a shootout ensued between the robbers and police officers and the officers from Ruiru Police Station saved the two from the robbers, who jumped out of the car and ran away leaving the two behind, with the deceased sustaining a bullet injury. The witness said that the robbers were the six accused persons before the lower court.
12. The witness on cross examination stated that he was later asked to identify the suspects in two identification parades conducted on 14<sup>th</sup> January, 2018 in which the witness identified the Appellant and 3<sup>rd</sup> accused persons in the lower court case and on 6<sup>th</sup> February, 2018 in which he identified the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> persons.
13. The second prosecution witness Christine Gatiria Gitari (PW2) told the court that in June 2017, he referred the deceased to Mirema area where there were plots of land on offer for sale as the deceased wanted to purchase land. The deceased called PW2 on 14<sup>th</sup> December, 2017 and told her that he was going to pay the outstanding balance of the purchase price for the land that he had purchased but was getting difficulty in reaching through his cellphone, the advocate who was handling the transaction.
14. On 19<sup>th</sup> December, 2017, PW2 was informed that the deceased had been shot and was in Plainsview Hospital. She then organized for the deceased to be transferred to Aga Khan Hospital. He had a bullet wound on the left side of the neck.
15. None of the six accused persons before the lower court were known to the witness.
16. The third prosecution witness was Fredrick Owino Osando (PW3). The witness told the court that he, jointly with NIC Bank, owned motor vehicle registration number KCN 433A Toyota Axio. He proceeded to Ruiru Police Station on 20<sup>th</sup> December, 2017 at the request of a police officer one Omondi where he was shown his vehicle and was informed that the same had been involved in a robbery with violence incident.
17. At the station, the vehicle had a different registration number – KCH 904D. It also had a different certificate of insurance depicting the registration number that he saw at the station. The witness produced the original log book and his certificate of insurance for the vehicle as PExh5 and PExh7 respectively.
18. The witness explained that he had hired out the car for one week from 16<sup>th</sup> December, 2017 to one Pastor Anthony Mutua (whom he pointed out in the trial court as the first accused person) who made a payment for the same through Mpesa on 18<sup>th</sup> December, 2017 of Ksh.15,400/-. The witness stated that he knew Mutua on 15<sup>th</sup> December, 2017 through a friend who was a taxi driver and that Mutua told him that it is his (Mutua's) brother who would use the vehicle during the hire period. The witness identified the Mpesa statement that depicted the transactions, that was produced as PExh3.
19. PW4, Kamau Chege, an Advocate of the High Court of Kenya told the court that on 19<sup>th</sup> December, 2017, he was acting for both the deceased, who was a purchaser in a land transaction, and the seller who was PW1. He met both parties at a parking area at TRM along Thika Road. The three then proceeded to Cooperative Bank TRM Branch where payments were done.
20. The witness then went to the site of the property where he was to meet another person, one George, who was interested in purchasing a plot in the area. At the site, PW4 met George in the company of one Wanjau, whom PW4 described as a friend. The three then left in George's car and proceeded to Art Café where they met the beneficial owner of the property one Lee Muchiri ("Muchiri"). The four men then went to TRM for negotiations. The deceased called PW4 and informed him that he would shortly meet them.



21. PW4 stated that a while later, the deceased called George and when George handed over the phone to PW4, the witness heard the deceased and PW1 pleading while seemingly in distress, wailing and crying, stating “mniwache, mniwache mimi sina pesa” and “msiniumize”, respectively. Being alarmed at what was transpiring at the other end, Muchiri immediately called the OCS Kasarani Police Station and reported the matter.
22. A while later, PW4 and the others were informed that there had been a robbery and that the deceased had been shot during the incident and had been rushed to hospital. PW4 later saw the deceased at Plainsview Hospital, whereafter he was transferred to Aga Khan Hospital for further treatment.
23. The prosecution called Chief Inspector of Police Wilson Kakali (erroneously indicated to be of the rank of Corporal in the typed proceedings) as PW5. The witness stated that he conducted two identification parades on 14<sup>th</sup> January, 2017 and three others on 6<sup>th</sup> February, 2017.
24. In respect of the first parade, the suspect Sylvester Mbotela Isiku (the third accused person in the lower court) took a position between members number 2 and 3 in a parade that had a total of nine members and that the witness – PW1 – positively identified the suspect by touching him.
25. On the same day, using the same members of the parade, PW5 conducted another parade in which the Appellant herein was the suspect. PW5 told the court that the witness in the parade – PW1 – positively identified by touching the Appellant herein who had opted to take a position between members number 5 and 6 of the parade.
26. The witness further stated that with regard to the third parade conducted on 6<sup>th</sup> February, 2017, the suspect Geoffrey Muhia Mutune (the sixth accused person in the lower court) took a position between members number 6 and 7 in a parade that had a total of nine members and that the witness – PW1 – positively identified the suspect by touching him.
27. Again, using the same members of the parade as in the case of the sixth accused person, a fourth parade was conducted in respect of the second suspect Fredrick Kyalo Mutiso (the fifth accused person in the lower court) who took a position between members number 4 and 5. PW1 witness did not identify the suspect.
28. The sixth parade that was conducted on 6<sup>th</sup> February, 2017 concerned Fredrick Kyuma Mbuta (the fourth accused person in the lower court matter). PW5 stated that PW1 positively identified the suspect, who took a position between the 6<sup>th</sup> and 7<sup>th</sup> members, by touching him. The same members of the parade as those in the fourth and fifth parades were used.
29. The witness stated that among those charged before the lower court, it is only the first accused person who was not subjected to an identification parade.
30. Police Constable Fredrick Okoth (PW6) told the trial court that he was on patrol on 19<sup>th</sup> December, 2017 when he heard gunshots from Membley area. Together with other officers, PW6 rushed to the direction of the gunshots and on arrival found a white motor vehicle registration number KCH 904D, Toyota Axio that had a bullet hole on the right front window. The vehicle was taken to the police station.
31. The officer later met the deceased while the latter was being treated at a hospital. He conducted investigations on the ownership of the motor vehicle that was recovered at the scene whose real registration number was KCN 433A and established that it was registered in the joint names of PW3 and NIC Bank.



32. The last prosecution witness was Dr. John Mathaiya, the County Pathologist Kiambu County. The witness testified and produced on behalf of Dr. Johansen Oduor an autopsy report that was prepared by the latter after he conducted a post mortem report on the body of the deceased on 8<sup>th</sup> January, 2018. The death occurred on 6<sup>th</sup> January, 2018 and the cause of death was stated to be due to complications secondary to a spinal injury caused by a bullet.
33. In the lower court's ruling delivered on 22<sup>nd</sup> November, 2021, the Court found that a prima facie case had been established against all the six accused persons and they were all placed on their defence.
34. All the six accused persons gave sworn evidence and each denied having committed the offences that they were charged with. In his defence, the Appellant told the trial court that he worked as a taxi driver. He denied ever giving to the first accused person copies of his driving licence and identity card but stated that the same were taken by the investigating officer at the time that he was arrested. He denied ever being in possession of the Toyota Axio that was used in the robbery.
35. The first accused person before the trial court Anthony Kalungu Mutua told the trial court in his defence that he had a tour company and would connect his company to car hire clients and earn commissions. He stated that a mechanic who repaired his pastor's car, one Alex, recommended the Appellant, through one Mutungi, as a customer who was interested in hiring a car. He then secured a car on hire basis from PW3, through PW3's business partner one Dennis. He stated that the Appellant paid for the car by remitting the money to him (the first accused) and also gave him copies of his national identity card and driving licence as supporting documents for the car hire transaction.
36. The first accused person called David Ngugi Mbugua and James Waithaka Wairagu as witnesses. The evidence of the two defence witnesses was in precis that they knew the first accused person well and they further knew that he was in car hire business. They both stated that on many an occasion they had given the first accused person their cars to hire out the same for them and they would then pay him commissions.
37. In his defence, the Appellant stated that he had worked as a taxi driver at Westlands area since 1989. He stated that on 12<sup>th</sup> January, 2017, a person posing as a customer called him on phone and asked for directions where the Appellant would be found. The person then went to Madona House where the Appellant was and greeted him. At that instance, a car arrived and the men who alighted apprehended the Appellant and took him to Ruiru Police Station where he was informed that he was a suspect of the offence of robbery with violence.
38. The Appellant admitted to knowing the first accused person before the trial court but stated that he only transacted with him in business as he would send the first accused person to customers in Kilimani and Kileleshwa areas and that the first accused person would then pay him. He stated that he did not know the other accused persons.
39. The Appellant admitted to have transacted with the first accused person and in particular that he sent to him cash by Mpesa. He however denied that the first accused gave him or secured for him a car in a hire arrangement. He stated that he sent to the first accused person Ksh.27,000/- on 18<sup>th</sup> December, 2017 but stated that he had received Ksh.30,000/- from a client who required taxi services for a month and remitted Ksh.27,000/- to the first accused after referring the customer to him, retaining his commission of Ksh.3,000/-. He stated that it was not unusual for taxi drivers to refer clients to other drivers in the business.
40. The third to the sixth accused persons before the lower court denied committing the offences that they were charged with. They further denied knowing the Appellant prior to being arraigned.



41. I have considered the grounds of appeal, the filed submissions, the evidence adduced before the trial court and the lower court's record in its entirety, I have above deduced the issues that I am now tasked to determine which culminate in the question whether the prosecution proved the two counts of the offence of the robbery with violence against the Appellant beyond reasonable doubt and whether the sentences meted upon the Appellant were appropriate.
42. Inevitably, this court in determining the issues stated above must first satisfy itself that the ingredients of the offence of robbery with violence were proved against the Appellant in respect of the two counts, beyond reasonable doubt, as is the requirement in law.
43. The offence of robbery with violence is provided for under Section 295 and 296(2) of the Penal Code as follows:
  - “ 295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.
  - 296(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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”
44. From the provisions above, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: (i).The offender is armed with any dangerous or offensive weapon or instrument; or (ii).The offender is in the company of one or more other person or persons; or (iii).The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.
45. Any of the above three findings is sufficient to convict an offender under Section 296(2) of the Penal Code.
46. Based on the evidence on record, particularly that of PW1 who distinctly gave a recollection of what unfolded on the 19<sup>th</sup> of December, 2017 at Membley area, it is clear and undisputed that PW1 and the deceased were attacked by a gang of robbers who were at least five in number and who were armed with a firearm and who then robbed the two of the cash that they had. PW1 stated that at the time of the robbery, the attackers used violence by beating up both PW1 and the deceased.
47. The evidence of PW1 therefore satisfies me that the offence of robbery with violence was committed as against PW1 and the deceased for the reasons that the attackers were more than one in number, about five men; were armed with a dangerous and/or offensive weapon namely a firearm; and at the time of the robbery used personal violence against PW1 and the deceased by beating them up.
48. The prosecution did not need to prove that the deceased was shot by the robbers or that it is the robbers who caused his demise. It was satisfactory to show that the attackers were more than one in number, robbed PW1 and the deceased of their cash and used personal violence against them by beating them up at the time of such robbery..



49. The Learned trial Magistrate therefore reached a correct finding on the above issue when she held as follows:

“In the course of the robbery, PW1 and the deceased were assaulted by the 5 and the late Frankline Mugambi shot which eventually led to his death. His evidence demonstrated that (a) that the assailants were armed with any dangerous or offensive weapon namely a pistol; (b) that the assailants were more than one in number; and (c) that at the time of the robbery the complainant and the deceased were assaulted. I was satisfied that the prosecution proved that an offence of robbery with violence was committed on the material date.” (Emphasis mine).

50. What then is left for this court to determine is whether the Appellant was one of the attackers that robbed PW1 and the deceased.

51. On this issue, the Learned trial Magistrate, while determining the same, observed as follows:

“For A1, the availed evidence reveals that he is the one who gave out the vehicle that was used to commit the offence herein. PW3 testified how he handed over his vehicle to A1. In turn, the same was received by A2. The Mpesa statements even confirmed this. The defence by A2 that the pictures of the person in the car was not him cannot hold as even A1 incriminated him. Mpesa statements were also availed. This is a vehicle that was used to commit the offences herein with the number plate having been changed and a fake one used as per the adduced evidence. These were people who clearly planned the robbery herein to an extent of even getting new insurance cover for the vehicle. It is thus clear that A2 was in possession of the vehicle as at the time of the alleged offence.”

52. Relooking at the evidence of the prosecution, PW1 stated that he was in the company of the deceased when they were blocked by motor vehicle registration number KCH 904D, a white Toyota Axio, whose real registration number investigations later revealed to be KCN 433A registered in the joint names of Fredrick Owino Osando (PW3) and NIC Bank.

53. The officers who investigated this matter traced PW3 and lined him up as a witness. In his testimony, PW3 told the court that indeed the vehicle was jointly registered to him and NIC Bank.

54. PW3 explained that he had hired out the vehicle to the first accused person in the trial court for a week from 16<sup>th</sup> December, 2017 and the witness produced an Mpesa statement (PEXh3) that showed that the first accused person made a payment for the car of Ksh.15,400/- on 18<sup>th</sup> and 20<sup>th</sup> of December, 2017.

55. The Mpesa statement, which was produced as an exhibit shows that PW3's cell phone number +254726\*860 **received cash from the first accused person's number +254723\*094**. He stated that he met the first accused person through a mutual friend who was a taxi driver, one Dennis. He pointed out before the trial court the first accused person as the one to whom he hired his vehicle. PW3 stated that the first accused person took possession of the car.

56. PW3 produced the original log book and certificate of insurance for the vehicle (PEXh5 and PEXh7 respectively).

57. Upon being cross examined, PW3 stated that the first accused person was his friend and that he first met him through Dennis on 15<sup>th</sup> December, 2017 when the witness went to collect his vehicle in order to hand it over to the first accused person on the hire arrangement.



58. In his sworn defence, the first accused person Anthony Kalungu Mutua told the court that he ran a tour operator business and produced as DExh1 a certificate of his training in the field. He stated that the Appellant was introduced to him and he hired out a vehicle to the Appellant on 5<sup>th</sup> June, 2021 (2017?) and that the Appellant paid for the same through Mpesa. He produced an Mpesa statement highlighting transactions that he had with the Appellant.
59. The first accused person admitted to having had transactions with PW3. He admitted that he introduced the Appellant to PW3 and that the Appellant hired the vehicle from PW3 for which the first accused person received Ksh.20,000/- from the Appellant and remitted Ksh.16,300/=. The first accused person produced as DExh3a and 3b copies of the Appellant's identity card and driving licence, which documents he stated the Appellant gave him when he hired the car.
60. In his defence, which I have considered, the Appellant denied ever being in possession of the vehicle and stated that he sent to the first accused person Ksh.27,000/- on 18<sup>th</sup> December, 2017 out of the amount of Ksh.30,000/- that he had received from a client who required taxi services for a month, retaining his commission of Ksh.3,000/-.
61. Having considered the trial court's record, I will now discuss whether the identification parade for the Appellant was satisfactorily conducted and in accordance with the National Police Service Standing Orders.
62. The police officer who conducted the identification parade pursuant to which the Appellant is said to have been positively identified by PW1 was cross examined on whether he used the same members of the parade as those in the preceding parade that PW1 had participated in as a witness to identify the third accused person and his answer was in the affirmative. That position is confirmed from the identification parade forms which clearly show that members of the parades that were conducted on 6<sup>th</sup> February, 2017 were the same. In my considered view, the fact that PW4 used the same members of the parade for the identification of the two (the 3<sup>rd</sup> accused person and the Appellant) was most unsatisfactory and fatal, particularly in respect of the Appellant, whose parade was conducted after that for the third accused person.
63. The reason for my persuasion is that when the first parade was conducted in respect of the third accused person, the witness (PW1) who was to identify him (or who identified him) had the opportunity of seeing the other members of the parade. That then means that when the next parade was conducted for purposes of identifying the Appellant, the participating members of the parade were already known to PW1 having appeared in the parade for the third accused person. That then meant that it was possible to notice a new member or new entrant in the parade conducted for the Appellant.
64. The proper manner would have been to get completely new and/or different members to take part in the parade for the Appellant. In my view then, the identification exercise regarding the Appellant was not properly conducted and its outcome greatly prejudiced the Appellant. The evidence of identification regarding the Appellant as emanating from the identification parade was therefore inadmissible.
65. Having said that, although it was stated in evidence that PW1 positively identified the Appellant, I reach a finding that the parade that was conducted in respect of the Appellant did not comply with the National Police Service Standing Orders and its outcome is in the premises vitiated and therefore inadmissible. The above analysis of the manner in which the parade was conducted leads me to a conclusion that no proper identification could be achieved in light of the above flaws in the process undertaken by the officer.



66. But then, there is on record the other evidence of PW3 that was corroborated by that of the first accused person before the trial court that it is the Appellant who hired the vehicle from PW3, a transaction that was facilitated by the first accused person as it is him who took the vehicle and handed it over to the Appellant. There is also evidence that proves that the vehicle was never returned to the owner until after it was involved in the robbery.
67. The first accused person supported this fact further by producing copies of the Appellant's identity card and driving licence being the documents that he retained when he handed over the vehicle to the Appellant. The transaction was corroborated by the Mpesa statement that the first accused person produced that showed that he received cash from the Appellant being charges for hiring the vehicle.
68. The strength and consistency of the circumstantial evidence supporting the car hire transaction that resulted in the vehicle ending up in the hands of the Appellant in my view proves beyond reasonable doubt that the Appellant was in possession of the vehicle at the time of the attack on PW1 and the deceased and was therefore one of the robbers.
69. The evidence without doubt placed the Appellant at the scene of the crime. The events as presented by the evidence particularly on the Appellant's possession of the motor vehicle form a close-knit chain without any breakage or interruption. His defence that the cash that he sent to the first accused person through Mpesa was for a different transaction is in the premises clearly an afterthought, calculated as an attempt to discount the evidence placing him at the scene of the robbery while in possession of the vehicle. The evidence of the police officers who took part in rescuing PW1 and the deceased was in the premises of no probative value and the Appellant's argument that the failure to call those officers dented the prosecution case does not hold water.
70. In my view, the circumstantial evidence that I have analyzed above is incapable of explanation upon any other reasonable hypothesis than that of the guilt of the Appellant. It is trite law that where circumstantial evidence is inconsistent with the innocence of an accused person and cannot be explained with any other reasonable hypothesis than that of his guilt, then the accused is to be convicted.
71. It is clear from the judgement of the trial court that the Learned trial Magistrate convicted the Appellant on the strength of circumstantial evidence. My analysis of the evidence brings me to the same page as the trial court. The Magistrate's findings cannot therefore be faulted as she reached the logical inference, which I have also reached, with no other possible scenario or hypothesis, that the Appellant was in possession of the vehicle at the time of the robbery and was therefore one of the robbers.
72. The Appellant, as I understood him, proffered the position that there was no evidence that the vehicle had a bullet hole or that the deceased was shot while in the vehicle and urged that there was therefore no proof that the deceased sustained the fatal injury while in the car that was caused by the Appellant or his confederates and that as such, there was no proof that he was a victim of the offence of robbery with violence. He stated that there is a possibility that it is the police officers who shot the deceased during the shootout.
73. An adverse inference cannot in the premises be drawn that had the officers testified their evidence would have been unfavourable to the prosecution case, as was submitted by the Appellant.
74. My respectful view is that even if that position by the Appellant was to subsist – that the deceased may have been shot by the police during the shootout with the attackers – the fact that the Appellant and the deceased were beaten up during the attack by the five or so men, who then proceeded to steal from them, amounts to the offence of robbery with violence, notwithstanding who may have shot the



- deceased. I have above enumerated the ingredients of the offence of robbery with violence and need not restate the same.
75. The Appellant also challenged the sentence. While sentencing the Appellant and the first accused person, the trial Magistrate rendered herself as follows:
- “Mitigation considered. (The first and second) Accused persons sentenced to death for (sic) each count.”
76. The Appellant herein was sentenced by the trial court to suffer death on each of the two counts, which was irregular as there cannot be more than one death sentence handed down to a convicted person. The proper manner, if a sentence of death was appropriate in the case, would have been to sentence him to death on the two counts but order that the death sentence in count 2 be held in abeyance.
77. Be that as it may, it will be remembered that at the time of sentencing, the Supreme Court of Kenya had given directions in the case of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (amicus curiae [2021] eKLR (popularly referred to as Muruatetu II) (Koome CJ & P, Mwilu DCJ & VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ)* with respect to mandatory sentences, where it was clarified that the decision in *Francis Karioko Muruatetu & another v Republic [2017] eKLR (Muruatetu I) Maraga CJ & P, Mwilu DCJ & VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ*, had arisen from proceedings relating to murder, under Section 204 of the Penal Code, Cap 63, Laws of Kenya, and the position stated in the said decision was therefore intended to apply only to mandatory sentences with respect to murder cases.
78. However, as the law is dynamic, there have been subsequent pronouncements particularly the very recent case of *Imutoka v Republic (Criminal Appeal 121 of 2019) [2024] KECA 259 (KLR) (8 March 2024) (Judgment)* in which it was held, that the reasoning and findings in *Muruatetu I (supra)* that resulted in the ratio that the mandatory nature of the death sentence as applicable for the offence of murder applies to the death sentence in the case of robbery with violence. In that case, the Appellant's appeal on sentence was allowed and the sentence of death set aside and substituted with the term of twenty (20) years that the Appellant had already served.
79. Having the foregoing in mind and considering the mitigation that was offered by the Appellant that he is a family man, 66 years of age and hypertensive and further that he is remorseful and a first offender and sought for leniency and considering further that the deceased lost his life in circumstances that were orchestrated by the Appellant and his confederates, a sentence of thirty (30) years imprisonment would have been appropriate, in my view, on each of the two counts.
80. In the result, for the reasons stated above, the appeal on conviction fails and is dismissed. The appeal on sentence is allowed and the death sentences in count 1 and 2 are hereby set aside and substituted with sentences of thirty (30) years imprisonment on each of the two counts. As the offences were committed in the same transaction, the sentences shall run concurrently from 22<sup>nd</sup> December, 2017 being the date that the Appellant was charged and took plea and considering further that he remained in custody throughout his trial before the lower court.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 4<sup>TH</sup> DAY OF JULY, 2024.**

**J.M. OMIDO.**

**JUDGE**

Appellant: Present, virtually.

Mr. O. Omondi holding brief for Mr. D. Omondi for the Appellant.



Mr. Gacharia for the Respondent.

Mr. Anyona watching brief for the family of the deceased.

Ms. Njoroge – Court Assistant.

