Kamunyu v Republic (Criminal Appeal E019 of 2021)
[2023] KEHC 2623 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2623 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E019 OF 2021

LW GITARI, J

MARCH 16, 2023

BETWEEN

MARTIN MUKUNDI KAMUNYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is a first appeal filed by the appellant against his conviction and sentence in Chuka Senior Resident Magistrate Court criminal case No 1413 of 2019. The appellant was charged with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. It was alleged that on September 28, 2019 at Kathoge location within Tharaka Nithi County jointly with others not before court robbed off Kshs 5,000/= cash, phone make Tecno K7 valued at Kshs 9,780/ = and immediately before the time of such robbery used violence and injured the complainant, one Zakayo Mugambi Matuma.

The Appellant Pleaded Not Guilty And A Full Trial Was Conducted.

2. After going through full trial, the appellant was found guilty of the said offence, convicted accordingly, and sentenced to death.

3. Aggrieved by the said decision of the trial court, the appellant instituted this appeal on the grounds that the trial court:

    a. failed invoke and adhere to the provisions of article 50 of the *Constitution*;

    b. failed to appreciate that the appellant was suffered incapacity to effectively and efficiently defend himself;

    c. failed to appreciate that the appellant suffered fundamental medical issues and/or serious impairments that affected his reactions/ responses and which misled the court into misreading

and/or misinterpreting the accused's general demeanour, reactions and responses before the court leading the court to misdirect itself and rendering a wrong verdict and an excessive sentence.

d. based its decision on observations that were greatly subjective and had no probative value;

e. failed to take into consideration the circumstances of the alleged offence;

f. misdirected itself thereby arriving at the wrong conclusions; and

g. passed or meted against the appellant a sentence that was manifestly excessive and unfairly oppressive considering the facts and circumstance of the alleged offence.

4. The appellant thus prayed for his appeal to be allowed by quashing his conviction and suspending and/or setting aside his sentence.

5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. The appellant filed his written submissions dated June 20, 2022 on July 27, 2022. It was his submission that he was not accorded a fair trial as the trial court allegedly failed to adhere to some key provisions of article 50 of the *Constitution*. In particular, the appellant stated that he was not accorded adequate time and facilities: to prepare a defence; to choose and be represented by an advocate or informed of this right promptly; and to have an advocate assigned to him by the State and at the State expense. He further submitted that he was denied: his right to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence; his right to adduce and challenge evidence; and his right to refuse to give self-incriminating evidence. It was argued that since the charge that the appellant was facing was a capital offence, it ought to have been treated more seriously and cautiously by the trial court considering that the appellant is a mere primary school drop out with minimal education and exposure.

7. It was further submitted that the appellant suffers from a medical condition referred to as vasovagal syncope which condition allegedly contributed to the appellant's reactions during trial, which reactions mislead the trial court into misreading and/or misinterpreting the appellant's general demeanor and responses before the court. The appellant submitted that trial court was greatly subjective in its observations in dismissing the appellant's evidence as a sham and an afterthought thus leading to wrong findings and conclusions.

8. Finally, the appellant submitted that in view of the circumstances and the manner in which the appellant's trial was conducted, justice was not served for the appellant and consequently, the sentence meted against him was reached on the basis of a faulty trial process rendering it excessive. The appellant relied on the cases of *Nicholas Mukila Ndetei v Republic*; *Teddy Kinambuka Inyangala v Republic* [2020] eKLR; *Benson Ochieng & France Kibe v Republic* [2018] eKLR and prayed that the appeal be allowed.

The Respondent's Submissions

9. The respondent filed its written submissions dated September 15, 2022 on September 16, 2022. In response to the appellant's contention that he was greatly disadvantaged for being a layman and that he was not able to adequately prepare and articulate his defence, it was the respondent's submission that the proceedings in the trial court were conducted in a language that the appellant understood, that is Kiswahili, and that the appellant was accorded ample time for him to prepare his defence. The

respondent pointed out that the appellant was placed on his defence on June 15, 2021 and the defence hearing was scheduled for June 28, 2021, that is 13 days later, on which date the appellant indicated to the court that he was ready to proceed.

10. On the contention that the appellant was not accorded a fair trial as he was not assigned an advocate by the state, the respondent submitted that before the provisions of article 50(h) of the *Constitution* could be invoked, burden of proof fell on the appellant to demonstrate that he would suffer injustice on account of lack of legal counsel. It was the respondent's submission that in any case, the appointment of counsel would not have produced different results at the trial.

11. In response to the ground that the appellant lacked the capacity to understand, probe, and challenge the prosecution's evidence, the respondent submitted that the appellant was duly supplied with all the evidence that the prosecution relied upon and that at no point during the trial did the appellant raise concerns about not understanding the nature of the prosecution's evidence.

Issues For Determination

12. I have considered the appellant's appeal as well as the respective submissions by the parties. The main issues for this court to determine are:

    a. Whether the appellant was accorded a fair trial;

    b. Whether the sentence meted out against the appellant was appropriate in the circumstance

Analysis

13. This being the first appellate court, this court is duty bound to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial court had the advantage of seeing and hearing the witnesses and observing their demeanor and so the first appellate court must give allowance of the same. This was well put in the well-known case of *Okeno v Republic* [1972] EA 32 where the court stated as follows:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala v R* (1975) EA 57). 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; it must make its own findings and draw its own 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."

14. On the same subject, the Court of Appeal in *Kiilu & another v Republic* [2005] 1KLR 174 stated that:

> " 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."

15. Guided by the aforementioned authorities, below is an analysis of the main issues raised in the instant appeal.

Whether The Appellant Was Accorded A Fair Trial

16. As stated herein above, the appellant herein was charged with the offence of robbery with violence. In the case of *Olouch v Republic* (1985) KLR, the Court of Appeal stated as follows in respect of what constitutes the offence of robbery with violence:

> " ...Robbery with violence is committed in any of the following circumstances:
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> a. The offender is armed with any dangerous and offensive weapon or instrument; or
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> 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."

17. In the case of *Dima Denge Dima & others v Republic*,criminal appeal No 300 of 2007, it was stated that:

> " ...The elements of the offence under section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found a conviction. This was considered at length by this court in *Johana Ndungu v Republic* criminal appeal No 116 of 1995 (unreported;)
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> "In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or properly at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed 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 offence under the sub-section."

18. In the present case, the prosecution called a total of 3 (three) witnesses. PW1 was Joseph Mwenda Mirebu, a clinical officer from Chuka District Hospital. She filled the P3 form for Zakayo Mugambi who reported to have been assaulted by someone well known to him on September 28, 2019 at around 10 p.m. On physically examining him, PW1 noted redding of the right eye, and a bruise on left mid-finger. He treated him one hour after the assault and formed the opinion that the injuries were inflicted by a blunt object. He classified the degree of injury as harm and produced the treatment notes and P3 form as P.Exhibits 1 and 2 respectively.

19. PW2 was Zakayo Mugambi Mutuma, the complainant in this matter. He stated that he was a lorry driver and that he knew the appellant since they were children. It was his testimony that on the material day on September 28, 2019 at Gathoge market at 10.00 pm, he was at Winjoy Bar where he had been sent by his sister to pick money. He saw 3 (three) men among them the appellant. The said men approached him and dragged him outside the bar. PW2 allegedly identified the appellant and one Dennis Murimi. PW2 further claims that the men started assaulting him. He started screaming and that is when the assailants ran away. Members of the public went to assist him. According to him, he got injured on his index finger on the left hand and his right eye. He further stated that the assailants took away from him Kshs 5,000/= which was his salary that he had been paid by his employer as well as his Techo K7 mobile phone valued at Kshs 9,870/=.

20. On cross examination, the complainant testified that he knew the accomplices as the appellant's cousins and that the appellant told them, "cuzo mushikeni vizuri nimtoe hizi zingine."

21. PW3 was PC Elvis Biwott attached at Chuka Police Station. He stated that he took over the case from CPL Kandie who went on a transfer. It was his testimony that PW2 reported the incident on the material day and was sent to hospital for treatment since he had injuries. That on November 9, 2019, the appellant was arrested and charged in court.

22. The trial court consequently found, in its ruling that was delivered on June 15, 2021, that the prosecution had established a *prima facie* case against the appellant and he was placed on his defence. The court explained the provisions of section 211 of the *Criminal Procedure Code* and the appellant opted to give unsworn evidence without calling any witness.

23. On July 28, 2021, the appellant gave his defence. He alleged that he was being implicated of the offence as his father had a land dispute with the family of the complainant. The trial court in its judgment held that having heard the defence by the appellant, it was inclined to declare the same as a sham and an afterthought. The trial court noted that the appellant never adduced any evidence to substantiate his claim that there was land dispute between his family and the complainant.

24. The appellant has complained that his trial was not fair as article 50 (2) (c), (h), (j) and (k) of the *Constitution* was contravened. The stated provision of the law states as follows:

> "(2) Every accused person has the right to a fair trial, which includes the right—
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> a. ...
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> b. ...
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> c. to have adequate time and facilities to prepare a defence;
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> d. ...
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> e. ...
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> f. ...
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> g. ...
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> h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
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> i. ...
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> j. to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
>
> k. to adduce and challenge evidence;"

25. The hearing of the appellant's case before the trial court proceeded on January 29, 2020, July 28, 2020, and June 15, 2021. On all the said dates, the appellant indicated to the trial court that he was issued with the witness statements and that he was ready to proceed with the hearing of the case. He further indicated that he understood Kiswahili well. His claim that he was not informed in advance of the evidence that the prosecution intended to rely upon is, in my view, unsubstantiated and hence not justified.

26. On the allegation that the appellant was not given adequate time to prepare for his defence, it is noteworthy that the trial court gave its ruling whether the appellant had a case to answer on June 15, 2021 and the defence hearing was scheduled on July 28, 2021. The appellant therefore had a grace period of one and a half months to prepare for his defence, which time, in my view, was adequate.

27. It is also worth noting that the appellant was given an opportunity to cross-examination all the witnesses that testified against him. As such, he cannot claim that he was denied an opportunity to adduce and challenge the prosecution's evidence.

28. Finally, on the issue of whether the appellant was entitled to have an advocate assigned to him at the expense of the State, the Court of Appeal in the case of *Thomas Alugha Ndegwa v Republic* [2016] eKLR stated as follows in this regard:

> " 10. This court in the case of *David Macharia Njoroge v R*, (2011) eKLR analyzed the applicability of article 50 of the *Constitution* and held:
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> > "State funded legal representation is a right in certain instances. Article 50 (1) provides that an accused shall have an advocate assigned to him by the State and at state expense. Substantial injustice is not defined under the *Constitution*, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of article 2 (6). Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.
> >
> > We are of the considered view that in addition to situations where „substantial injustice would otherwise result.? persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided."
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> In *David Macharia Njoroge v R*, (supra), this court considered the right to free legal counsel at state expense for the first time in Kenya and expounded on the principle of "substantial injustice".
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> 11. More recently, this court in the case of *Karisa Chengo & 2 others v R*, CR Nos 44, 45 & 76 of 2014, stated:
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> > "It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The *Constitution* is crystal clear that an accused person is entitled to legal representation at the State?s expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the *David Njoroge Macharia case* (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result? and to include all situations where an accused person is charged with an offence

> whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise."

29. From the foregoing legal authority, it is clear that the right to legal representation at state's expense is a fundamental human right and essential to the realization of a fair trial. However this right is not absolute and there are instances where the same can be limited. The approach adopted by the court when considering whether an accused was able to bear the costs of legal representation from their own resources, was expounded in the case of *Thomas Alugha Ndegwa v Republic* (supra) which cited with authority the South African case of *Legal Aid Board v The State*, (363/09) [2010] ZASCA 112 (September 21, 2010], in which Ponnan JA stated the following:

> " Section 3B makes plain that it is in fact the court's enquiry. It follows that the employment of terminology such as 'burden or onus of proof is particularly unhelpful and would serve to obfuscate rather than elucidate the enquiry. In those circumstances it would be wholly inappropriate for a court to saddle an accused person with an onus and to decide the matter on the strength of whether or not that has been discharged. That is not to suggest that persons such as the respondents would be free to adopt a supine attitude. On the contrary, particularly where, as here, the information sought is peculiarly within their knowledge, they have as much - if not more - of an obligation as the State to assist the court's enquiry. Failure in those circumstances to assist the court may well be fatal to their quest for legal assistance at State expense. For, if the court is left in the dark as to one's personal circumstances it can hardly properly undertake the postulated enquiry. Were that to be the case it must perforce decline to issue the directive contemplated by s 3B(I). In this case Borchers J observed that 'the court has not the administrative machinery to investigate the correctness of the information supplied'. That may be so. But that ignores the court's power to subpoena witnesses and documents or to place witnesses such as the respondents under oath and if necessary for them to be subjected to cross examination. Those are formidable weapons in the judicial armoury that must, where necessary, be employed by a court to enable it to discharge its constitutional mandate.

30. In Kenya, section 43(1) of the *Legal Aid Act* sets out the duties of the court before which an unrepresented accused person is brought before it. Such a court is required to promptly inform the accused person of their right to legal representation; promptly inform them of their right to have an advocate assigned to them if substantial injustice is likely to result; and to inform the National Legal Aid Service to provide legal aid to the accused person.

31. The *Constitution* places a duty on the court where the accused is tried to inform him of the right to legal representation by an advocate at State expense if substantial injustice would otherwise result. The trial court is mandated by the *Constitution* to inform the accused of this right promptly. This is a right to a fair trial. It is one of the rights under the *Constitution* which may not be limited. Article 25 of the *Constitution* provides:

> " 25. 25. Fundamental rights and freedoms that may not be limited;

> Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—
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> (a) freedom from torture and cruel, inhuman or degrading treatment or punishment;
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> (b) freedom from slavery or servitude;
>
> (c) the right to a fair trial; and
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> (d) the right to an order of habeas corpus."

The Court of Appeal in *David Njoroge v Republic* (supra) expanded the constitutional requirement that legal representation be provided at State expense in cases where substantial injustice must result and to include where an accused person is charged with an offence whose penalty is death.

The appellant contends that he is a layman, a primary school dropout who was not able to adequately and appropriately prepare, articulate and present his defence. The appellant was never at any stage of the proceedings informed of his right to legal representation. I find that the right of the appellant to fair trial was limited. He faced a serious charge whose maximum sentence is death penalty. A look at the proceedings will show that the appellant did not realize the seriousness of the charge. The appellant was prejudiced due to the failure by the trial court to promptly inform him of his rights. This is a matter which in my view would have lead a different outcome had the accused been represented by a counsel during the trial. The proceedings before the trial magistrate were null and void 'ab intio' as the right of the accused were violated. I would have stopped at this stage and ordered a retrial but I realize that the accused would be prejudiced as the prosecution will in that exercise seek to fill gaps which were evident in their case.

32. I will at this stage consider whether the charge against the appellant was proved beyond any reasonable doubts. The only eye witness to this incident was the complainant. There was no denial that the appellant was well known to the complainant. I however find that this case was determined purely on the word of the complainant against that of the appellant. It is trite that it is the prosecution which had the burden to prove the charge against the accused person beyond any reasonable doubts. It had a duty to present a watertight case against the appellant in view of the serious charge he was facing. In this regard I will consider the following:

a. Complainant's testimony:

   The testimony of the complainant was not corroborated though there is evidence that there were witnesses who would have been called to affirm the testimony. Corroboration is defined as 'evidence which confirms or supports a statement, theory or finding.'

   In this case there were witnesses who would have been called by the prosecution and were not called. The complainant testified that he was sent by his sister called Joyce to a club to pick money. This sister was not called as witness to confirm that he had sent the complainant to the bar at that hour of the night. The complainant then went to the bar and sat at the counter waiting to be given the sales book. This means there was a person in the bar who was not called as a witness. Finally the complainant testified that he screamed when he was attacked and members of the public went to assist him. He even gave the name of one as Denis Murimi. He was not called as a witness.

I am alife to the fact that the prosecution has the sole discretion to decide the number of witnesses it wishes to call. It is also trite that no particular number of witnesses is sufficient to prove a case. Section 143 of the *Evidence Act* provides:-

> " No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

It is now well established in decisions of this court and the Court of Appeal that failure by the prosecution to call witnesses who are material to the case, may lead to an inference that had they been called, they would have adduced adverse evidence to the prosecution's case.

The Court of Appeal in *Bukenya & others v Uganda* criminal appeal No 903/2014 which was quoted with approval by the Court of Appeal in *Suleiman Otieno Aziz v Republic* Criminal Appeal No 7/2014, it was held that the court may draw an adverse inference from the prosecution's failure to call important witnesses arises in cases where the evidence called is barely adequate. The Court of Appeal in *Denald Majiwa Achilwa & 2 others v Republic* criminal application No 34/2006 explained the proposition thus:-

> " The law as it presently stands is that the prosecution is obliged to call witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however the evidence adduce barely establishes the prosecution case, and the prosecution withholds a witness, the court in an appropriate case is entitled to infer that had the witness been called his evidence would have tendered to be adverse to the prosecution's case."

In this case the evidence in my view was barely adequate. Although the evidence is that of recognition, that was barely the evidence. There is no corroboration to the evidence of PW1. Secondly there was no prove that the complainant possessed the items which he alleged were stolen from him. He was at pains to explain where he got the money. He did not have any evidence that he owned a mobile phone. Of concern is the fact that the appellant was arrested on November 9, 2019 which was one month and eleven days later. No attempt was made by the prosecution to explain the delay in arresting the appellant if at all he had been identified. I find that failure by the prosecution to adduce evidence to corroborate the testimony of the complainant left gaps in the case and such gaps raised serious doubts in the prosecution case. This is not helped by the testimony of PW3 who told the court that the complainant reported a case of assault. This is stated as much on the P3 form. The trial magistrate made subjective observation which was of no probative value and arrived at wrong findings and conclusion. On sentence, the learned trial magistrate held that;

> " In the circumstances I sentenced the accused to death as prescribed under section 296(2) of the *Penal Code*."

It is now well settled following numerous pronouncements by this court and Court of Appeal that sentencing remains the exercise of discretion by the trial court.

The Court of Appeal in *Benard Kimani Gacheru v Republic* (2002) eKLR stated that-

> " It is now settled law, following several authorities by this court and the High Court that sentence is a matter that rests in the discretion of the trial court. Similarly sentence must depend on facts of each case. On appeal the appellate court will not easily interfere with the

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."

In MM1 v Republic (2022) eKLR Justice Ondunga as he then was held-

"The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

Similarly, in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

The above authorities are stating that sentencing is at the discretion of the trial court and the appellate court will not interfere with the sentence unless it be shown that the sentence is manifestly excessive, the trial court overlooked some material factor or took into account some wrong material or the trial court acted on a wrong principles.

The trial magistrate found the appellant guilty of the offence of robbery with violence. The sentence imposed was lawful and I would have found no reason to interfere with the sentence.

33. Having stated this I have to consider whether the conviction was safe. I have stated that the evidence of PW2 the complainant was barely enough and failure by the prosecution to call witnesses to support it must lead this court to make an inference that had they been called they would have adduced adverse evidence in the prosecution's case. Failure to call the witnesses left gaps in the prosecution's case and with gaps doubts in the case.

The conviction was therefore not safe and cannot be upheld. The rights of the accused to a fair trial were violated as the right to legal representation at State expense was not honored by the trial court. The doubts in a prosecution must always go to the benefit of the accused. The conviction of the appellant was not safe and cannot be upheld.

For these reasons I find that the appeal has merits. I allow the appeal, set aside the conviction and sentence, set accused at liberty unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 16TH DAY OF MARCH 2023.

L.W. GITARI

JUDGE