Mugwanga v Republic (Criminal Appeal 12 of 2013)
[2023] KEHC 2627 (KLR) (24 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2627 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL 12 OF 2013

WM MUSYOKA, J

MARCH 24, 2023

BETWEEN

INEYA MUGWANGA ALIAS BODO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from judgment and decree of Hon. GA Mmasi, Acting Principal Magistrate, in Vihiga PMCCRC No. 487 of 2012, of 4th January 2013)

JUDGMENT

1. The appellant had been charged before the primary court, together with another, of the offence of robbery with violence, contrary to section 296(2) of the *Penal Code*, Cap 63, Laws of Kenya. The particulars were that on 18th day of May 2012, at Bendera market within Vihiga County, jointly with others, while armed with dangerous weapons, to wit iron bars and knives, he robbed Dalton Asava Munganyi, of a motorcycle registration number and mark xxxx, make Kingbird, frame number LRYBCJLB8A0800091, Engine Number 156VM18A 800091, valued at ksh 73, 600.00, the property of Jane Mmbone; and a mobile phone Nokia 101, valued at ksh 3, 000.00, the property of Dalton Asava Munganyi; and immediately before the time of such robbery wounded the said Dalton Asava Munganyi. His co-accused faced an alternative charge of handling the said motorcycle at Mbale township on 23rd May 2012. He pleaded not guilty to the charge, and a trial was conducted. 6 prosecution witnesses testified.

2. The complainant, PW1, Dalton Asava, a motorcycle boda boda operator, operating the motorcycle registration number and mark xxxx, make Kingbird, frame number LRYBCJLB8A0800091, Engine Number 156VM18A 800091, belonging to Jane Munganyi, testified that he was approached by a person who was carrying a metal bar in a paper bag, on 18th May 2012, who wanted to be ferried to Chavakali. They agreed on the fare, and set off for Chavakali. On the way, he asked to be taken to

Bendara, and at some point asked PW1 to stop, which he did, and when he stopped, he was hit on the head with the metal bar, and lost consciousness. He came to in hospital. He was discharged on 28th May 2012. He realized that the motorcycle had been stolen, and he had also lost a Nokia 101 mobile phone, and ksh 2, 500.00 in cash. A suspect had been identified, the appellant herein, and he identified him at Vihiga Police Station. The mobile phone was not recovered, but he produced documents relating to its purchase. He stated that the motorcycle was recovered, which he identified in court. He produced documents relating to his treatment at hospital. He identified the appellant as the person who robbed him, saying that he had been seeing him at Mudete, but said he had not seen his co-accused. PW2, Jane Mmbone, was the mother of PW1, and the owner of the motorcycle. She testified that PW1 left home on 18th May 2012, and went out to do boda boda work, but never returned home that evening, and also on the next day, 19th May 2012. She later got information that he had been attacked by thugs, and robbed of the motorcycle. She got information that he was at Bendera. She went there, found him with bloodstained clothes, and took him to hospital. She produced documents relating to the ownership of the motorcycle. She stated that the accused also informed her that he had also been robbed of a mobile phone, which was recovered on 23rd May 2012. The motorcycle was also recovered, and she identified it in court.

3. PW3, Gibon Onyango Awino, was a police officer stationed at the DC's office at Mbale. He was on duty on 21st May 2012, when a report was made to him by Stanley Mugitsu, that, on 18th May 2012, PW1 had been robbed of a motorcycle, was wounded in the robbery and had been taken to hospital. He got information that a motorcycle, resembling that PW1 was robbed of, was operating in the Chavakali area. He laid a trap, pretended to be scouting for a motorcycle to buy, he negotiated the price with the seller, and he paid him ksh 8, 000.00, whose serial numbers he recorded, and invited him to Mbale for the balance, and he came and they arrested him, with the money that he had given him earlier. The person they arrested, who was selling the motorcycle, and to whom he had paid the money, was the co-accused of the appellant. Upon searching him, they found in his possession an identity card bearing his name. They took him to Vihiga Police Station, and they thereafter arrested the appellant at his house at Mudete.

4. PW4, John Kaguthi, was a physician or doctor, at Vihiga District Hospital, who attended to PW1, when he was brought to him on 1st June 2012, for examination. He had been injured 12 days prior, and his history was that he had lost consciousness for 12 hours. He had a stitched wound on the back of his head, which was still healing. He also had soft tissue injuries on his chest and abdomen. He produced medical records.

5. PW5 was an Inspector of Police, Judith Kola Nyongesa, a Deputy Officer Commanding the Vihiga Police Station. She conducted an identification parade on 28th May 2012, for the purposes of the identification of the appellant. She gave details of what she did. She informed him of the parade, and enquired from him if he wanted to participate in the parade, which he answered in the positive. She also asked him if he wanted a friend or an Advocate to be present at the parade, to which he said that he did not wish to have anyone present. She presented 8 persons, as indicated in the identification parade form. She asked the appellant if he had objections to the 8, and he said he had no objection. He was placed at position 7 between parade members numbers 6 and 8. PW1 was waiting outside, and was brought in after the parade had been mounted. He came and identified the appellant. Thereafter, the parade was rearranged, and PW1 was asked to identify his assailant, and he picked the appellant by touching him. At the end of it, the appellant said that he had no issues with the manner the parade was conducted, whereupon he signed the identification parade form.

6. PW6 was a Police Constable, Michael Kerich, number 72654, attached to Vihiga Police Station. He was the investigating officer for the case. He detailed the steps that he took in the course of his investigations,

which included taking over the matter from PW3, organizing the identification parade, and obtaining the documentation relating to the motorcycle and the treatment of PW1. He was also the one who recovered the metal bar from the house of the appellant. He confirmed that nothing else was recovered from the house of the appellant. He said that he was the one who searched the co-accused of the appellant, and recovered the money and the motorcycle.

7. The appellant was put on his defence. He made a sworn statement. He testified on how he was arrested on 23rd May 2012, at the place where he used to sell chang'aa. He denied the offence. He said that he could not recall where he was on 18th May 2012.

8. In its judgment, the trial court framed three issues: whether the appellant and his co-accused were jointly with others not before court; whether they were armed with dangerous weapons, being iron bars or knives; whether they wounded PW1; and, in the alternative, whether the co-accused was found in possession of the motorcycle, knowing that it was stolen. The court found that the person who robbed PW1 was the appellant, as PW1 had testified that he was robbed by a sole individual. The court also found that he was armed with a dangerous weapon, a metal bar, which he used to wound PW1. The co-accused was acquitted of the charge of robbery with violence, but was convicted of the alternative charge of handling a stolen item. After mitigation, the appellant was sentenced to death, while his co-accused was sentenced to 3 years in jail.

9. The appellant was aggrieved, and brought the instant appeal, founded on several grounds. He states that the trial court convicted on the basis of a shaky identification, as the circumstances were difficult and unconducive; the provisions of section 200 of the *Criminal Procedure Code*, Cap 75, Laws of Kenya, were not complied with; the provisions of Article 49(f)(i)(h) of *the Constitution* were not enforced; the identification parade was not carried out in accordance with section 46(h) of the police force; and that his alibi defence was improperly rejected. In the grounds he indicated that he was applying for the availing of the occurrence book for 19th May 2012 and certified copies of the court proceedings.

10. It is not clear whether directions were ever given for the mode of disposal of the appeal, but the record is clear that the appellant placed written submissions before the court. He also addressed the court, on 15th October 2013, where he relied on his written submissions, and invited the court to also consider pages 9 and 10 of the trial record. The respondent did not file written submissions, and relied on the trial record. The proceedings of 15th October 2013 were before Chitembwe and Wasilwa JJ, who rendered a judgment on 11th December 2013, dismissing the appeal. The appellant was aggrieved, and lodged an appeal, at the Court of Appeal, being Kisumu Criminal Appeal no 23 of 2016, which was allowed, on a technicality, on 19th March 2021, on grounds that Wasilwa J had no jurisdiction over criminal appeals, being a Judge of the Employment and Labour Relations Court. The matter was remitted to the High Court for re-hearing, and that is how I came to be seized of it. I mentioned the matter on 28th July 2022, in the presence of the appellant, when he informed me that he was ready with his written submissions. The respondent, through Counsel, invited me to allocate a date for judgment, as she was not going to file written submissions.

11. The appellant, without leave of court, filed supplementary grounds of appeal. They are undated. He raises issues around identification, first report, recognition, identification parade, circumstantial evidence, inventory of the exhibits, essential witnesses not called, defence not considered, the sentence being excessive and legal representation not being provided.

12. Filed simultaneously with the supplementary grounds of appeal are written submissions, dated 28th July 2022. I have carefully scoured through the record, and I have come across the written submissions that the appellant referred to on 15th October 2013, when he presented his appeal before Chitembwe

and Wasilwa JJ. The same raises the same issues as those raised in the supplementary grounds: the identification parade, contradictions and inconclusive evidence. I shall, therefore, proceed to determine the instant appeal based on the original grounds of appeal, the supplementary grounds of appeal and the written submissions of 2022, but guided by the said written submissions.

13. In the said written submissions, the appellant argues 5 grounds, around identification, circumstantial evidence, essential witnesses not being called, his defence not being considered and consideration of sentencing principles. I shall consider each of the 5 grounds as argued in the written submissions in turn.

14. On the first ground, identification, the appellant has divided it into several sub-grounds, which include evidence of the first report, circumstances under which the identification was made, mistaken recognition, unscrupulous unfairness at the identification parade and contradictions or discrepancies or inconsistencies with respect to identification. On the first report, he submits that PW1 made the first report at Iguhu District Hospital, on 19th May 2012, where he said that he had been attacked by unknown persons, and that he did not give a description of his assailants. He cites *Terekali and another v Rex* [1952] EACA, on first report and embellishments. On the circumstances of identification, he submits that the incident allegedly occurred at 7.00 PM, when it was quite dark, and he cites *Maitanyi v Republic* [1986] eKLR; identification was by a single witness, and it was not corroborated, and he cites *Chila v Republic* [1976] EA; the encounter between PW1 and his assailant was fleeting, as the assailant sat as a pillion passenger on the motorcycle ridden by PW1, and he cites *Simiyu and another v Republic* [2005] KLR 192; contradictions in the testimony of PW1 on identification, the testimony of PW6 on identification, the description of the suspect by PW1 in his oral testimony, and the testimony of PW2 on identification; and with respect to PW1 being able to recognize the appellant when he had stated that he had carried him only once on his motorcycle. The other aspect of the submissions on identification relate to the identification parade where PW1 allegedly picked the appellant. The complaint is that the suspect was identified twice in 2 different identification parades; that of the 2 parades, there is a report of only one; the second identification parade was mounted after PW1 had already seen the suspect in the first parade; it is not clear whether the procedure used for the first parade influenced the conduct of the second parade; position 6 and 8 could not be the same in both parades; there was no evidence that the appellant was positively identified by PW1 for lack of records; that the suspect was not asked whether he was satisfied with the parade, and the answer indicated in the report was irrelevant; and no extra record was provided to show the height, lifestyle, age and general appearance of the parade members to show whether they matched the appearance of the appellant. He cites *Nathan Kamau Mugure v Republic* CRA 63/08, on conduct of identification parades.

15. I will start with the matter of the first report. The appellant appears to argue that the fact that the first report did not describe the assailants or did not identify them by name, should be sufficient to disqualify any other evidence that the assailant might have been identified nevertheless. He argues that PW1 made his report while at Iguhu Hospital, and he had said that his assailants were unknown, and he did not give their description to the police when they interviewed him. I note that PW1 had lost consciousness after he was hit on the head, and he did not come to until 1½ days. The police appear to have had interviewed him shortly after he had regained consciousness, and it is probable that he had not fully come round, to be in a position to fully recall the events immediately prior to his loss of consciousness. The circumstances of the reportee at the first report must be taken into account. PW1 was, however, clear that he was not the one who made the first report, for it was made by others while he was in hospital, and any description of the assailant or assailants must have been made by the reportees.

16. Regarding the circumstances under which the alleged identification happened, the appellant submits that it was dark, and identification done under those circumstances could not be foolproof. The

incident happened at 7.00 PM, a halfway zone between daytime and nighttime, when it was neither daytime nor nighttime, and the lighting at that time would be rather hazy, but still good enough for identification, so long as the parties come to close quarters. In the instant case, PW1 was operating a boda boda, and it is alleged that the appellant was a pillion passenger on that motorcycle. He is not alleged to have jumped on the motorcycle without the notice of PW1, but rather that he approached him, as a customer would, they negotiated the fare, and arrived at an understanding on the destination and the amount, before the passenger climbed on to the motorcycle. It would appear that they travelled for quite some distance, before the passenger asked that they make a detour, and before he again asked that the motorcycle be stopped so that he could disembark. The two sides came to close contact, at the point the passenger approached PW1, and in the course of the negotiations, which I find was sufficient for PW1 to see the passenger closely to be able to either identify him later or to recognize him from prior contacts. Regardless of the hour of night or insufficiency of the lighting, PW1 and his passenger came to very close contact, sufficient for him to be able to identify him. I, therefore, find that the circumstances were favourable for the purposes of identification of the passenger that approached him, that he negotiated with and that he eventually carried on his motorcycle. After all, at that hour, the motorcycle would have had its lights on, and that would have helped one way or other in identification. It cannot, therefore, be argued that the contact between the 2 was fleeting, after all, according to PW1, the appellant was not a stranger, but a person that he had been seeing around.

17. On single eye witness evidence, the trial court has, no doubt, a duty to consider the same scrupulously, as against all the other evidence, particularly where the same is not corroborated. Was there corroboration in this case? The police, upon the arrest of the appellant, took the precaution of mounting an identification parade, to confirm the identification, and PW1 picked the appellant at the parade. The officer organizing the parade rearranged the parade after the first identification, and PW1 still picked the appellant. That supported the earlier identification, that was based on the eye contact at the scene between the appellant and PW1.

18. The other submission is on inconsistencies. One of them is around PW1 being recorded as saying that he had seen his attackers, and the other saying that at the scene he did not see anybody. I have looked at the record, and it is clear that PW1 said that the appellant alighted from the motorcycle, and then hit him with the metal bar. During cross-examination, he is recorded as saying that he did not see anybody, that can only mean that other than his assailant, he did not see anyone else at the spot where he dropped the appellant, and where the appellant attacked him. It is submitted that PW6 testified that PW1 had told him that it was Hannington, the co-accused of the appellant, who had wronged him, and, therefore, suggesting that it was the said Hannington, and not the appellant, who had assaulted him. That, of course, would be contradictory to the prosecution case, that it was the appellant who had robbed PW1, and that Hannington was only found in possession of the stolen item. PW1 himself testified, he was the victim of the robbery, and he was very emphatic that it was the appellant, and not Hannington, who assaulted him and stole from him. The inconsistency in the evidence of PW6, on what he might have been told by PW1, would be immaterial. On the description of the appellant in page 8 line 16 and page 9 line 6, as dark and of average height, and dark and not tall, respectively, is not inconsistent, for his complexion is described as dark in both statements, and his height is described as not tall. A person said to be of average height, would be a person who cannot be said to be tall nor short, but whose height lies in between the 2 extremes. On PW2 being told by PW1 that his attacker was Ainea, I agree, that that was inconsistent with the testimony given by PW1 himself, that he did not know the appellant by name, but then PW2 was testifying after the name of the appellant had been known.

19. The *Criminal Procedure Code* does not deal directly with the question of inconsistencies and contradictions, but the courts have interpreted section 382 thereof, on revision, to say that whether

inconsistencies or contradictions are to affect the decision, will depend on whether they are so fundamental as to cause prejudice to the appellant, or they are so inconsequential as to have no effect to the conviction and sentence. In *Joseph Maina Mwangi v Republic* [2000] eKLR (Tunoi, Lakha & Bosire JJA), it was said :

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of Section 382 of the *Criminal Procedure Code*, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."

20. Similar sentiments were expressed in *Twehangane Alfred v Uganda* [2003] UGCA, 6, (Mukasa-Kikonyogo DCJ. Engwau and Byamugisha JJA) where it was said:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

21. And in *Dickson Elia Nsamba Shapwata & another v The Republic*, Cr. App. no 92 of 2007 (unreported), the Court of Appeal of Tanzania said as follows:

> "In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter."

22. It was said in *John Cancio De SA v VN Amin* [1934] 1 EACA 13 (Abrahams CJ & Ag P, Sir Joseph Sheridan CJ & Lucie-Smith Ag CJ):

> "Probably every judge has had occasion at some time or other to regard discrepancies as showing veracity, and to regard uniformity as showing fabrication, but it depends upon the nature of the discrepancies and the uniformity. If two people allege that they made a journey together from Kampala to Nairobi and they differ on such details as the time the train stopped at Eldoret, what they had for lunch and dinner, and whether it rained on the journey and where, it would be more reasonable to argue a difference in memory than that the journey was never undertaken. But if one says they made the whole of the journey by rail, and the other says they went to Entebbe by car and thence by air to Nairobi, it would be more reasonable to argue that the journey never took place than that one or both suffered from a defective memory."

23. And in *Philip Nzaka Watu v Republic* [2016] eKLR (Makhandia, Ouko & M'Inoti JJA) , it was said that:

> "The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self-contradictory in material particulars or which is a mere amalgam of inconsistent versions

> of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

24. Based on the above statements on the law on discrepancies, inconsistencies and contradictions, it is my finding that the same, in this case, if any, were minor, and did not go to the core of the matter. The principal witness was PW1. He was fairly consistent in his testimony on what befell him, and who did what to him. PW2 and PW6 only rendered narrations of what he told them, the inaccuracy of which renditions, if at all, cannot be blamed on him. What is recorded by the trial court, of the oral testimonies, depends on the questions asked, the answers given to those questions, and the manner the trial court records what it hears, and, very often, it does not always exactly reflect the actual statements made by the witnesses, nor bring out the contexts within which the statements were made. I agree with *Dickson Elia Nsamba Shapwata & another v The Republic*, Cr. App. no 92 of 2007 (unreported), do not just pick out one sentence in the proceedings, and run with it, in isolation of the other recorded evidence.

25. On recognition of the appellant by PW1, it is submitted that the same was mistaken, going by what he allegedly informed the police when he was at the hospital. I have dealt with this elsewhere. PW1 was fairly clear in his evidence that the appellant was not a stranger to him. He did not know his name, prior to the events the subject of the trial, but he was familiar with him, for he used to see him at both Mudete and Chavakali. So, when the appellant approached him, on 18th May 2012, asking to be dropped at Chavakali, PW1 was not dealing with a stranger, it was only that he did not know his name. Under those circumstances, it cannot be that PW1 was mistaken with respect to his recognition of the appellant.

26. Regarding the identification parade, the appellant complains that the same was not done scrupulously in compliance with the law governing such parades. He submits that there were 2 parades. In fact, there was only one. After PW1 picked the appellant in the first instance, so as to be sure, the parade officer rearranged the same parade, by way of changing the positions of the parade members, and invited PW1 to make a second identification, and he went on to pick the appellant a second time. If the outcomes had been different, it would have made sense to complain that 2 parades were done. Whether we go by the first picking or the second one, the outcome would still be the same. The appellant does not deny his signature on the identification parade form, which indicated that he consented to the parade, and he did not object to or complain about the process. Furthermore, he has not complained that he was not afforded a chance to bring in a friend or Advocate as his witness to the exercise. The parade officer was clear in her evidence, that she afforded him that chance, and he did not take it. Consequently, I have no record before me, other than that by the parade officer, which the appellant has not challenged in any meaningful way.

27. The second ground is about the metal bar or crowbar that was allegedly used to attack PW1. The same was produced in court. The challenge is around how it was recovered from the alleged premises of the appellant. No inventory was apparently prepared and presented in court of the recovery. However, the failure or omission to prepare an inventory of a recovery of certain evidence from the premises of a

suspect, and its production in court, is not fatal. It is not a mandatory requirement of the law that an inventory ought to be prepared of such recoveries, and presented in court, as evidence of the recovery. Preparation of such inventories is a police procedure, to guide detectives in criminal investigations, and it is not a mandatory process. On whether the same was properly recovered from the residence of the appellant, or properly presented in court, is really not fatal. There is adequate evidence that PW1 was savagely attacked with a weapon, which inflicted severe injuries on his head, leading to loss of consciousness for 1½ days, requiring hospitalization for 1 week. He testified that he saw the appellant carrying a metal bar wrapped in a green paper and carried in a green paper bag, when he was mounting his motorcycle. After the appellant disembarked from the motorcycle, PW1 saw him, the appellant, hit him with it, before he lost consciousness. Lack of evidence on recovery of the weapon or its production in court, would not be fatal, in face of such a clear testimony.

28. The third ground is on witnesses who were not called to testify. The appellant has in mind the police informers who led to his arrest, and also Stanley Mugitsu, who allegedly made the initial report and played a role in the arrest. The law makes an exception when it comes to calling of informers as witnesses, primarily as such informers play a critical role in the war against crime, and their exposure, in criminal trials, could be a threat to their lives, and could undermine detection and prevention of crime. The principle in criminal trials is that the prosecution is not bound to call each and every individual who is likely to know something or other about the facts, provided that the prosecution presents enough witnesses to prove the facts that support their case against the accused. It is not the number of the witnesses that matters, but the quality of their evidence. The informers in this case were working together with PW3 and PW6, and the witnesses who testified largely testified on the events that the said informers would have testified on, and the omission, to call them, did not fundamentally affect the credibility of the evidence adduced.

29. The fourth ground is about the defence of the appellant not being considered. In his sworn defence statement, the appellant narrated events relating to his arrest on 23rd May 2012. The offence was committed on 18th May 2012, and he said that he could not recall where he was on that date, the 18th May 2012. The appellant offered no defence at all that the trial court could have considered, and the trial court cannot be faulted on that account.

30. The final ground relates to sentence. The appellant invites the court to consider sections 24(b)(ii) and 26(2) of the *Penal Code*, section 333(2) and 354 (a)(iii)of the *Criminal Procedure Code* and Articles 19(2), 20(3)(b), 24(1)(e), 50(2)(p) of *the Constitution*, alongside the decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ)on mandatory sentences being unconstitutional. He invites the court to consider a less severe sentence. *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ) has declared the death penalty as inhuman and unconstitutional, and the High Court has followed it up with decisions on the same with respect to the offence created under section 296(2) of the *Penal Code*. The sentence herein was imposed before the determination in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), and consideration ought to be given.

31. Based on everything that I have discussed above, it is my finding and holding that the appeal before me, on conviction, is not merited, and I dismiss it, and affirm the conviction. Based on the decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), I set aside the death sentence imposed, and I shall proceed to exercise discretion, based on the principles set out in *Francis Karioko Muruatetu & another*

v Republic [2017] eKLR (Maraga CJ & P, Mwilu DCJ &VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), to consider the sentence to impose in substitution of the death sentence.

32. I note from the trial record, that the appellant was afforded an opportunity to mitigate after his conviction. He took advantage of the chance, for he made a statement in mitigation. He said that he was a family man, with a wife and children, and asked the court to exercise leniency. The prosecution invited the court to treat him as a first offender. The trial court was conscious of the fact that he was a first offender, but expressed that its hands were tied by the sentence imposed by the law. I believe I should not have the appellant mitigate a second time. After all, am not sitting as the trial court. I shall consider sentence based on his mitigation of 4th January 2013.

33. The maximum penalty for simple robbery is 14 years in jail. Where discretion has to be exercised for a sentence for robbery with violence, that has to be taken into account, for robbery with violence is the aggravated form of simple robbery. I note that the injuries inflicted on PW1, in the course of the robbery, were life threatening. He lost consciousness for 1½ days, and was in hospital for slightly over 1 week. I note that the appellant is a first offender, and prayed for leniency. Consequently, I hereby sentence the appellant to 30 years in prison for robbery with violence, contrary to section 296(2) of the *Penal Code*. Section 333(2), of the *Criminal Procedure Code*, shall be reckoned, with respect to calculation of sentence.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24th DAY OF March 2023

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.

Inea Mugwanga alias Bodo, the appellant, in person.

Ms. Kagai, instructed by the Director of Public Prosecutions, for the respondent.