



REPUBLIC OF KENYA



**Ochieng v Republic (Criminal Appeal 87 of 2017)
[2019] KEHC 10891 (KLR) (17 June 2019) (Judgment)**

Neutral citation: [2019] KEHC 10891 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL 87 OF 2017
RE ABURILI, J
JUNE 17, 2019**

BETWEEN

HUMPHREY OTIENO OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against conviction and sentence from the judgment in the Principal Magistrate's Court at Ukwala in Criminal Case No. 355 of 2016 dated 12.9.2017 by Hon G. Adhiambo Senior Resident Magistrate)

JUDGMENT

Introduction

1. The appellant herein Humphrey Otieno Ochieng and another not before court were jointly charged with 3 counts of the offence of robbery with violence contrary to section 295 as read with 296 (2) of the *Penal Code*. The particulars of the offence were that on the January 14, 2016 at about 7.30pm at Sigomere Shopping Centre, Ugenya sub-county within Siaya County being armed with a dangerous weapon namely AK-47 rifle, they jointly robbed one David Ezekiah Otieno of one Samsung mini laptop, cash amounting to Kshs 23,855, Hard Disc make Toshiba valued at Kshs 11,000 all totalling to Kshs 67,855 and at the time of such robbery used actual violence to the said David Ezekiah Otieno.
2. The particulars of the 2nd count of robbery with violence were that on January 14, 2016 at about 7. 30 pm, the appellant and his co-accused while at the Sigomere Shopping Centre, Ugunja sub-county within Siaya County being armed with dangerous weapons namely AK47 riffle fully robbed Mohammed Ali Mc Odongo of two mobile phones make Tecno and Neon Tablet all valued at Kshs 11,399/= and at the time of such robbery used actual violence against the said Mohammed Ali Mc Odongo.



3. On the 3rd count, it was alleged that on January 14, 2016 at about 7. 30 pm the appellant and his co-accused while at Sigomere shopping centre, Ugunja sub county within Siaya county while being armed with a dangerous weapon namely AK 47 riffle jointly robbed Everlyne Achieng off her Tecno PS mobile phone and cash amounting to Kshs 200 all totaling to Kshs 13,200, during which time the appellant and his co-accused used actual violence against the said Everlyne Achieng.
4. Both the appellant and his co-accused pleaded not guilty and the matter proceeded to full trial after which the trial magistrate found the appellant guilty of the charges facing him in count 1 and 2 and proceeded to convict him. The trial magistrate however acquitted the appellant's co-accused. The trial magistrate subsequently sentenced the appellant to life imprisonment.
5. Aggrieved by his conviction and sentence, the appellant filed the instant appeal on the September 15, 2017 in which he raised two grounds of appeal namely:
 - a. That the learned trial magistrate erred in law and fact in relying in the evidence procured by the prosecution witnesses, as the whole evidence was insufficient in law to warrant a sound conviction.
 - b. That I cannot recall all that transverse during the trial hence pray for the trial proceedings to adduce sufficient ground of appeal.
6. The appellant further filed supplementary grounds of appeal in which he contended that:
 - a. The learned magistrate erred in law and fact in concluding that criterion for visual identification was satisfied.
 - b. The learned magistrate erred in law and fact in placing reliance on evidence which was not captured in the respective witness statements.
 - c. The learned magistrate erred in both law and fact by failing to properly comprehend the evidence adduced.
 - d. The learned trial magistrate erred in law and fact in convicting the appellant against the weight of evidence on record.
 - e. The learned magistrate erred in failing to appreciate that the evidence proffered against the appellant was contradicting, insufficient and had glaring gaps thereby convicting the appellant on inadequate and discredited evidence.
 - f. The learned magistrate erred in failing to appreciate that no proper investigations were carried out in the case.
 - g. The learned magistrate erred in law and fact in concluding that the identification parade was duly conducted.
 - h. The alibi evidence adduced was not properly considered.
7. During the hearing, Mr Ochanyo Ochanyo advocate representing the appellant submitted that PW1 failed to give a description of his assailants before the trial court whereas there was no evidence placed before the trial court, by PW4 in particular, showing that the appellant had brought the Microsoft Lumia phone alleged to have been stolen into PW4's shop.
8. Mr. Ochanyo further submitted that there was no connection between the appellant and the rifle used in the robbery. It was his submission that evidence adduced by the prosecution was insufficient to warrant a conviction and further that a proper identification parade was not carried out.



9. Mr. Ochanyo further addressed this court on the appellant's sentence of life imprisonment asserting that the sentence was in violation of the Supreme Court holding in the case of *Francis Karioko Muruatetu & another v Republic* [2017] e KLR.
10. Opposing the appeal, Mr. Okachi the Senior Principal Prosecution Counsel submitted that the prosecution proved its case beyond doubt and that PW1 was able to identify the appellant at the scene of crime which was well lit and further, during an identification parade that was professionally carried out.
11. Mr. Okachi further submitted that the weapon of robbery was also recovered and properly identified by the investigating officer as the one recovered from the appellant's hiding place. He further stated that the life sentence meted out on the appellant was within the statutes and was commensurate with the circumstances of the offence.
12. It was submitted on behalf of the appellant that none of the prosecution witnesses, specifically PW1, PW2 and PW10 was able to identify their assailants and further that there was no evidence of any transaction between PW4 and the appellant showing that the appellant had taken an item for repair at PW4's shop as alleged.
13. It was further submitted that no proper investigations were carried out in the case specifically regarding the rifle recovered by PW5 and PW6 that was said to be used by the appellant in committing the crime.
14. It was submitted that the death sentence meted out on the appellant was excessive in light of the appellant's mitigation before the trial court as well as Article 26 (3) of *the Constitution* and the case of Francis Karioko Muruatetu (supra) as cited by this court in Criminal Appeal No. 113 of 2016 David Ochieng v Republic.

Determination

15. I have considered the trial court record of proceedings and the appellants' grounds of appeal. I have also heard and considered the submissions of Counsel for the appellant and the Respondent's counsel Mr. Okachi.
16. As the first appellate court, I am aware that I am under a duty to reconsider and re-evaluate the evidence on record, bearing in mind that I did not see or hear the witnesses, and reach my own independent conclusion -See *Okeno v R* [1972] EA. 32 and Mohamed Rama Alfani & 2 Others v Republic, Criminal Appeal No. 223 of 2002.
17. The evidence before the trial court was as follows: PW1 Davis Otieno Were testified that on January 14, 2016 at around 7. 30 pm he was at an Mpesa shop within Sigomere shopping centre where he had an appointment with Everlyne who had requested him to assist her in installing skype application on her phone. He testified that he had gone to the said Mpesa shop to relieve Imelda who was working there. PW1 told the trial court that Everlyne found him at the Mpesa shop at around 7.00 pm. It was his testimony that the Mpesa shop was being run by a group of teachers and as he was the group's secretary, he was at the centre of most transactions together with the chairman Ali Mohammed.
18. PW1 testified that Ali had travelled from Kisumu to join him at the shop and as it was approaching 7. 30 pm, he was at the Mpesa Shop with Ali Mohammed and Everlyne. He said that at that time he had his Samsung mini laptop, his bag, external disc, documents, modern stamp pad and rubber stamp. It was his testimony that at that time two men whom he thought were usual customers entered the Mpesa shop and approached him where he had sat with Everlyne. He said that one of the men stood at



the entrance of the extension while another one moved close to them then ordered them to stop doing whatever they were doing.

19. PW1 testified that the shop was made out of a metallic container and that they had created an extension beside the Mpesa shop which extension was attached to the Mpesa shop. He said that the two men were talking in Swahili and so he thought that the two men were police officers. It was his testimony that the man who went to where they were seated ordered them to surrender what they had and stand. PW1 testified that they were reluctant and the man who was standing next to them told the other man who stood aside to show them a thing at which point the man who was standing at the entrance unzipped his jacket, withdrew a gun, cocked it and then pointed at (PW1's) belly. It was his testimony that the man who was next to them directed them into the Mpesa shop and that he heard the cracking sound of a gun. PW1 stated that there was some little light.
20. PW1 testified that there were shops to the right on the Ugunja Mumias Road which shops were opposite the Mpesa shop so the security lights from the shops which were in front of the Mpesa shop radiated into the extension. He said that he and Everlyne walked into the Mpesa shop where they found Ali answering a call. PW1 testified that they were ordered to sit which they did but Everlyne remained standing. It was his testimony that at the time the electricity lights were on in the Mpesa shop and that the robber who was talking had entered the Mpesa shop with them while the other one remained at the door of the Mpesa shop holding the gun.
21. PW1 told the trial court that the robber who did not have a gun ordered Ali to surrender the phone he was using and Ali complied after which Ali was ordered to open the chest of drawers and to remove the monies that were inside the drawers which Ali complied after which they were then ordered to empty their pockets. He further testified that all that time, the unarmed man was the one who was doing the talking. PW1 further testified that he gave out his wallet containing his identify card, ATM card and Kshs700 to the unarmed man. He further stated that all the items that were being robbed off them were being stuffed in his laptop bag which contained his laptop. He said that Everlyne was also asked to surrender what she had and that Everlyne surrendered money and a phone. PW1 testified that he gathered courage and requested the robbers to give him his identity card and the robber who was armed responded by telling his unarmed accomplice to return PW1's national identity card.
22. PW1 testified that the robber emptied his wallet and threw his (PW1's) empty wallet at him. He said that at that time, the robbers explained that they meant no harm and that they were only doing their job. He said that the robber who was unarmed asked them if they thought they (the robbers) were joking so that they could test the gun and show them that the gun was really working. He said that they told the robbers that there was no need and that they should just take what they wanted. He further said that the robbers left and walked towards the Ugunja route and since they did not know what to do, and that by good luck some cash money was left behind as well as the Mpesa phone.
23. PW1 testified that they could not do their accounts at that time because they had no idea as to where the robbers were and after about five minutes, Everlyne left running then he and Ali proceeded to his house to keep the little amount of money that remained at the shop after the robbery. He said that the sum of money that remained at the shop was about Kshs 30,000 and that they reported a loss of about Kshs 12,000. PW1 narrated how they went to the Sigomere Police Station where they reported the matter where the police told them that the information they gathered was that one of the phones was switched off at Madongo, along the Mumias route while the other one was switched off along the Ugunja Busia route. It was his testimony that later in April, 2016 Sergeant Hamisi of Sigomere Police Station and one Vincent visited his shop saying that they wanted to assist them to trace their lost items so they gave out their phone numbers and the IMEI number of the phone that was robbed off him which IMEI number he said he retrieved from the box of the Microsoft Lumia. He further stated that



- three days later, he was called to the Sigomere Police Station where he was told that the phones had been located and a week later, he was alerted that the phones and the laptop had been traced.
24. PW1 stated that he was told that the tablet that belonged to Ali was at the Sigomere Police Station and that his phone together with the mini laptop were at the Ugunja Police Station. He stated further that Ali availed himself at the Ugunja Police Station and positively identified his tablet and that the following day, he went to the Ugunja police station together with the box bearing the serial number of his phone and a copy of the receipt of purchase of the said laptop and on reaching the police station, the phone was shown to him but he said that it looked different as it did not have a cracked screen when it was robbed off him. It was his testimony that the serial number on the phone matched the serial number of the box he availed to the police station and that he positively identified his Samsung mini laptop which, on switching it on, had been formatted.
 25. It was his testimony that he told the police that they could recognize the robbers if they saw them and that they were taken to the Siaya Police Station and each one of them participated in an identification parade wherein he was able to identify one of the robbers, the appellant herein, whom he said was the one armed with a gun. It was his testimony that he did not know the 1st accused before and that they were scared during the robbery so throughout the robbery, their eyes were fixed on the 1st accused. PW1 testified that the 2nd accused was not part of the team, but that the other robber was slender. He identified a phone make Microsoft Lumia 435 as the phone that was robbed off him and further identified the box indicating the IMEI number of the phone was 356492067531979. He further identified his Samsung mini laptop that had been recovered and stated that he had used the said laptop for long and that at the hinges, there was a part that had begun to loosen up. He went on to state that though he had a very old copy of the receipt, he was able to get the initial serial number and some figures that were visible were matching.
 26. On cross examination, PW1 reiterated his testimony in chief and stated that he did not avail the certificate of registration of the group that owned the Mpesa shop but that given time, he could avail the said certificate. He further stated he did not know the exact requirements of acquiring a license to operate an Mpesa as the line was sublet to them. PW1 further stated that darkness was just setting in at the time of the robbery but it was not so dark and as such, he could see silhouettes without the help of artificial light and that he needed artificial light to see clearly.
 27. PW1 stated that he recorded his statement on 25th 2017, 5 months after the robbery took place on January 14, 2016 on which day he had reported the same to the police. He reiterated that he recognized some of the robbers which he stated in his statement. PW1 further testified that they were robbed off Kshs 12,000 at the Mpesa shop and about Kshs 38,000 that had not been availed in court. It was his testimony that prior to the identification parade, they were asked if they would identify the robbers. He stated that the parade members were around ten inclusive of the suspect and insisted that he mastered the appellant's face during the robbery and recognized him by his facial looks.
 28. PW2 Mohammed Ali Mc Odongo testified that on January 14, 2016 at about 7. 00 pm he was at Mpesa shop together with colleague David Were and one Everlyne whom Davis was assisting to install some application on her phone. He stated that as he was making a phone call, he saw David and Everlyne being led inside the structure by some two men and he thought that the two men were customers. He said that he went on making the phone call.
 29. It was his testimony that at the time, the electricity lights were on then one of the two men who had escorted David and Everlyne into the shop ordered him to disconnect the call and hand over the phone to him which he complied with and handed over his neon smart tab after he was shown a gun by the other man. He further testified that the man who took his phone told him that they were there to do



their job and then told his accomplice to show him the thing, which prompted the accomplice who was dressed in a big jacket to open it a bit and show PW2 a gun. PW2 stated that he had no alternative but to hand over the phone. He further testified that the robber who had the gun stood at the door and the one who did not have a gun entered into the structure where he was with Davis and Everlyne. He said that he was also to hand over the Tecno phone that was charging and he complied by handing it over to the robber who did not have a gun. He went on to state that the robbers told him to hand over money which he did by picking up some money from the till that he handed over to the robber who did not have a gun.

30. PW2 stated that the robbers also robbed David of his wallet which they returned when Davis asked for his identity card and after they had taken the money from the said wallet. He stated tht the robbers robed David of his laptop and Everlyne of her mobile phone. He testified that they reported the incident to the Sigomere Police Station and that later in May, 2016 on a Sunday afternoon, he received a phone call from the Sigomere Police Station directing him to avail himself at the police station for purposes of viewing a phone that was recovered. He said that the same day, his friend David Were was also called to the Ugunja Police Station where he positively identified the laptop and phone that was robbed off him.
31. It was his testimony that they were called to the Siaya CID Office for purposes of participating in an identification parade with a view to finding out if they could identify the persons who robbed them in January during which identification parade he was able to identify one of the robbers who robbed them in January, the appellat here. He stated that when the robbery took place, a 75 watts' bulb was on and that the appellat was the one armed with a gun during the robbery. He went on to state that he had never seen the appellat before but insisted that he recognized him on that material night.
32. On cross examination, PW2 stated that the gun resembled the gun carried by the police officer in court. It was his testimony that he had two statements one which was dated May 30, 2016 in which he indicated that he identified the robber and a further statement recorded in Siaya after the identification of the suspect in an identification parade. It was his testimony that the participants of the parade could have been 9 or 10 but he did not count them and further that he could not recall the positions in which the appellat stood but noted that the appellat stood in different positions on the two occasions.
33. PW2 stated that on the night of the robbery, they reported a loss of Kshs 52,000 and the following day, after carrying out an audit, they found out that they had lost close to Kshs 23,000. He testified that he was the one who handed money to the robbers and that the money that was left behind was Kshs 38,000 which money he said was for trading. He further stated that nobody requested them to avail the money as an exhibit.
34. It was his testimony that he saw the appellat's face and mastered it as it was the one he was concentrated on as the appellat was carrying a gun. He insisted that he saw appellat's complexion, height and face and that he was very particular about the appellat's face.
35. PW3 Derrick Machongu Nyabuto testified that in late January, 2016 he was at his work place in Busia when he received a call from his friend Humphrey Ochieng, the appellat here, telling him that he wanted to dispose off of a laptop and so he (PW3) should avail himself to view the laptop. He testified that the following day, he went to the appellat's house within Busia GK Prison quarters where he checked the laptop, a Samsung mini laptop, which the appellat told him that he had forgotten the password.
36. It was his testimony that he informed the appellat that he (PW3) would find out if there was any customer interested in purchasing the laptop so he left with the laptop to his workshop where he managed to retrieve the password and also found that the laptop had a faulty hard drive and a faulty



- ROM. He testified that he then replaced the parts that were faulty and upgraded the system and subsequently tried to find people who could buy the laptop but he did not succeed so he decided to hold on to it.
37. PW3 stated that in late January, he travelled to Kisii and left the said laptop in Kisii then travelled back to Busia. He testified that by then, he had not paid the appellant any money for the said laptop and that the appellant told him that the laptop was not his and that the owner of the laptop was harassing him to avail the money for the sale of the laptop.
38. It was his testimony that later in March 2016, one Kepha rung him and told him that he had a machine that he wanted to be repaired and when they met, Kepha introduced himself as the appellant's friend whose mission was to collect proceeds for the sale of the laptop. PW3 stated that he offered to hand over another computer to Kepha as security as he tried to get money for the laptop to which Kepha responded by taking the desktop which he said he would leave at the appellant's house. He stated that after that day, he never heard from Kepha again and that the desk top was returned to his place of work in his absence so he could not tell whether it was Kepha or the appellant who returned it though he never heard from the two.
39. It was his testimony that there was a time that he got money for the laptop and when he rung Kepha, he could not reach him so he decided to hold on to the money and to pay Kepha whenever Kepha would resurface. He stated that on May 25, 2016 while he was at his place of work, flying squad officers and other Administration Police Officers approached him and informed him to produce the laptop that he had specifically been given in January, 2016 which he revealed was in Kisii.
40. PW3 testified that he disclosed to the police the person who had given him the laptop after which the police officers went with him to his house in Busia where they did a search and subsequently took him to Busia Police Station and later to the Ukwala Police Station and he was taken to court the following day after which they were taken to Siaya where they found an Identification Parade and he was told to identify the person who sold him the laptop while the other people with him were told to identify the persons who sold them phones.
41. It was his testimony that he told his father to avail the Samsung laptop at the Siaya Police Station. He further identified the appellant who he stated was his immediate neighbour before the appellant relocated to the Busia Prison Quarters. He stated that the appellant had been his neighbour for two years.
42. On cross examination, PW3 stated that the appellant was his friend and that there was no bad blood between them. He further stated that he had never had any financial differences with the appellant and that he and the appellant even used to lend each other money though he could not recall the last time they lent each other money. He further stated that Kepha was not before court and further stated that he only saw Kepha once. He said that he was in communication with the appellant when Kepha came and the appellant told him that Kepha could collect the money. PW3 admitted that one could verify the same if the call data was retrieved and further admitted that he had not been shown any call data and that he had not seen the need to retrieve the call data.
43. PW4 Rashid Ibrahim testified that on January 14, 2016 as he was at his shop, a customer requested for touch replacement for a smart phone because the touch on his phone was broken. He testified that he checked the phone and saw that it was a Microsoft Lumia 435 and informed the person that replacing the touch of the said phone would cost Kshs 1,500. It was his testimony that the customer tried to bargain on this price but he PW4 was adamant and so the customer left only to return after about one week and the client availed himself at PW4's shop again asking if PW4 had replaced the touch but PW4 said that he told the client that he left even without paying the deposit so he could not repair the phone.



44. PW4 testified that the client disappeared for one week and resurfaced again. PW4 testified that he kept the phone and as time went by, there came a time when one of his friends, Salim Shiundu, did not have a phone, who met the costs of repairing the phone and he handed over the phone to Salim who went and repaired the phone elsewhere and then availed it to PW4.
45. It was his testimony that on May 25, 2016, police officers from Busia Police Station went to his shop searching for the said Microsoft lumia phone and he explained to them how the phone ended up at his shop after which he was taken to the Busia Police Station where he found Salim. He further stated that they were taken to the Ukwala Police Station and placed in custody as the investigations were being conducted and that at the police station, they were informed that the phone make Microsoft lumia was stolen property obtained as a result of a robbery with violence incident.
46. PW4 testified that they later participated in the identification parade to see whether he would identify the person who brought the phone to him and that during the identification parade, he identified the person who took the phone to him as the appellant. It was his testimony that the parade members were of the same height and they looked alike so he had to go round the parade carefully. He stated that the appellant used to be masculine and looked like a weight lifter with a scar on his head.
47. He further testified that he did not know the appellant before the appellant took the phone to his shop and further that it was very difficult for him to forget people's faces especially when he was dealing with the people in relation to gadgets and money. He insisted that it was the appellant who took the phone to his shop.
48. On cross examination, PW4 reiterated his earlier testimony and told the court that he does repair of phones and also replaces phone accessories. He testified that he did his business in the name of Wireless Communication and his business premises was situated in Busia town at Hill Crest building and further that his other shop was at Opakasi Plaza. It was his testimony that he did not have any trade license before court and that the value of the phone in question was Kshs 12,000.
49. PW4 stated that he waited for the client to bring money after which he had planned to issue the client with the receipt. He confirmed that he did not have written records to confirm what he was saying but he said that the records were at his shop. He further stated that the Microsoft lumia phone was not in his records because the appellant had not made any payments and that he left the records showing when he received the phone at his shop. He further stated that one of the members of the parade was old while the other members of the parade were middle aged. He stated that most of the parade members were of dark complexion.
50. PW5 No.xxxx Sergeant Lewis Njoroge of DAPC Office Ugunja sub-county testified that on May 25, 2016, he was on patrol duties with his colleagues APC Peter Gitaru, APC Shadrack Wanjala and APC Benard Sambu among others, within Mchira village when they received information from an informer that there was a robber who was in possession of a firearm. He testified that they proceeded to the home of the said robber and found the said robber going round his compound. It was his testimony that they surveyed the alleged robber for some time then caught him unawareness.
51. PW5 testified that they identified themselves to the alleged robber and told him that they needed to do a search at his house after which they entered the house of the suspect together with the suspect and on doing a search, they recovered an AK 47 rifle under the mattress. He testified that they asked the suspect where the ammunition was and the suspect said that it was in the pocket of his jacket which jacket was within his clothes. He stated that after recovering the ammunition, they arrested the suspect for possession of firearm without license. He went on to state that the suspect said that he was using



- the rifle together with 2 other people after which the suspect offered to take the police officers to the two people one of whom he said was Maurice and the other whom he said was Erick.
52. PW5 testified that the suspect took them to the houses of Maurice and Erick but they only found Maurice at his house who said that he knew nothing about the rifle. It was his testimony that they proceeded to the house of Erick where they also arrested Erick and took the three suspects to the Ambira Chief's camp where they alerted the CID Officers who collected the suspects. PW5 identified Maurice as the 2nd accused and stated that Erick was not before the court. He stated further that the suspect they found in possession of the rifle was not before court.
 53. On cross examination, PW5 stated that he could not disclose the name of his informer. He confirmed that he and his colleagues who did the recovery of the rifle were below the rank of an inspector. He stated further that the confession was made before an inspector. He stated that in operations involving rifles, one must act very fast and stated that the suspects who were arrested in relation to the recovered rifle were charged with different offences. He then stated that given time, he could avail the case numbers. He confirmed that he did not recover anything from Maurice even though Maurice was mentioned as an accomplice.
 54. PW6 No.xxxx APC Shadrack Simiyu Wanjala of Ugunja sub-county police headquarters corroborated and reiterated PW5's testimony. In addition, he further stated that upon searching the suspect's house, they managed to recover one AK rifle in a sack and also recovered 3 ammunition 7.62mm X 39mm. He stated that the suspect alleged that the gun was not his and that he was only a custodian of the gun. He said that the suspect stated that the gun was being used by other people that is Morris alias Toto and Erick Otieno both of whom they managed to arrest.
 55. It was PW6's testimony that at the time of the arrest, other security agents had already been alerted of the arrest so they availed themselves and the suspects were handed over to the other security agencies at Ambira AP Camp who thereafter took over the investigations.
 56. On cross examination, PW6 stated that he could not give out information about the informer for security reasons. He further stated that the rifle was found between the mattress and the bed while the ammunitions were found in the pocket of the jacket.
 57. PW7 No.xxxx Chief Inspector Nzioka Singi of Murunga Police Station testified that on May 25, 2016 he was at the Naivasha Police Station and that he was then the in-charge of the investigations department where his boss called him at around 10.00 am and instructed him to proceed to the Naivasha Medium Prison where there was a suspect who was suspected to have committed an offence in Kisumu.
 58. He testified that while in the company of Sergeant Mulunga and PC Kimathi, they went to the Naivasha Medium Prison where they asked to meet the in charge Mr. Koitabut who told them that he was already aware that one of his officers Humphrey Otieno Ochieng was suspected to have committed an offence in Nyanza. PW7 testified that Mr. Koitabut called the said officer who introduced himself to them by stating his name and service number.
 59. PW7 testified that the suspect was only 3 weeks old at the Naivasha Medium Prison. He further stated that they went to the house which Humphrey shared with a friend and searched but only managed to get the suspect's phone which upon going through, found that many people had rung the suspect which the suspect was able to explain.
 60. PW7 testified that they subsequently took the said Humphrey to Naivasha Police Station where they interrogated him and he revealed that he was aware that the people who had rung him were hard core criminals who committed offences within Nyanza. It was his testimony that the suspect was



subsequently picked by officers from Nakuru as those from Siaya were taking too long to go and pick him. PW7 identified the appellant as the suspect he was referring to.

61. In cross examination, PW7 stated that according to the report, during the robbery, the appellant was the one who used the gun and so they were searching for the said gun, ammunicions, handcuffs or even spent cartridges but they did not find them. He admitted that in the course of their duties, they use guns but that he could not tell whether the appellant only used guns for official duties.
62. PW8 No.xxxx Chief Inspector Nyakundi of Siaya county police headquarters testified and produced an identification parade form in relation to an identification parade he conducted on 30.01.2016 at 11.00 am upon the request made the county criminal investigations officer Mr. Ongara who briefed him to conduct an identification parade for two suspects one of them being the appellant herein.
63. It was his testimony that he went to Siaya Police Station where he prepared the seven members of the parade including the suspect thus making the parade to have 8 members. He said that with the consent of the appellant, he conducted the parade. It was his testimony that he had two witnesses, one of whom was Davis Otieno of P.O. Box 39, Sigomere. He stated that the suspect placed himself between member number 3 and 4.
64. PW8 testified that after that he called the first witness Davis Otieno Were, the witness identified the appellant positively by touching him. He stated that after that he asked the appellant to change his position and the appellant placed himself between member number 6 and 7 after which PW8 called the second witness Mohammed Ali who also identified the suspect positively by touching him.
65. PW8 further testified that after that, he asked the appellant if he was satisfied with the manner the identification parade was conducted to which the appellant answered in the affirmative. It was his testimony that the members of the parade were almost of the same size, same complexion, same height and same age as that of the suspect. He further stated that the parade was conducted in an open place within the cells and the witnesses were removed from a separate room away from the cells and further that he informed the suspect of the purpose of the parade and the suspect did not raise any objection. PW8 produced the identification parade form of Humphrey Otieno Ochieng as P Exhibit 3.
66. On cross examination, PW8 testified that he asked the appellant to call a friend or counsel and the appellant said that he had none which information he said was indicated in the identification parade form. He said that he did not state the information to the court as he was testifying in examination in chief because the information was already in the parade form. He insisted that the members of the parade were almost of the same complexion, almost of the same age and almost of the same height. He said that the members of the parade were from the cells while the other one was from outside. He said that whatever he was saying was credible because the cells had several suspects and therefore he was able to get the members of the parade from the cells. PW8 stated that the occurrence book was available and it could be availed upon the request of the court. He insisted that he was not lying and stated that the documents could speak on behalf of the maker.
67. PW9 No.xxxx Chief Inspector Mark Rop Sirorei attached to the DCI Siaya County testified and produced the identification parade form in respect of the appellant which was conducted on 27.05.2016 at the Siaya Police Station upon the request of the investigating officer Chief Inspector Tarus. He testified that the investigating officer had a suspect in police custody and also had one witness, Rashid Ibrahim Noah.
68. PW9 testified that the suspect consented to the identification parade being conducted on condition that the parade members did not constitute 3 suspects from the cells. He said that the suspect was asked whether he had a lawyer or a friend who he wanted to be present at the time the identification parade



- was being conducted and the suspect said that he wanted his sister Juliet Atieno Ochieng to be present during the identification parade and the suspect availed his sister Juliet Atieno Ochieng.
69. He further testified that he had 8 members of the parade all of whom were drawn from the police cells, and all of whom resembled the suspect and who were of the same age, height and physical appearance. It was his testimony that he told the suspect to choose the position where he wanted to stand and the suspect chose to stand between member number 5 and 6. He further testified that the suspect's sister, Juliet Atieno Ochieng was present during the whole process.
 70. PW9 testified that he called the witness and informed him that there was a group of people and that the person he was looking for might or might not be among the said group. It was his testimony that the witness identified the suspect Humphrey Otieno Ochieng, the appellant, positively, by touching him on the shoulder. He further testified that the suspect confirmed that he was satisfied with the manner the identification parade was conducted and further that he asked Juliet Atieno Ochieng if she was satisfied with the manner the identification parade was conducted but she said that she was not satisfied and she alleged that there was a witness who left the parade square and that it appeared as if the first witness communicated with the witness who had identified the suspect.
 71. It was his testimony that what Juliet alleged did not occur as he only had one witness who identified the suspect. He further stated that the other parade was conducted by the Chief Inspector Kitari. PW9 identified the appellant as the suspect who was identified and who also signed the identification parade form on May 27, 2016. He said that the other parade was conducted by his colleague in relation to another suspect. He said that his witness and that of chief inspector Kitari did not communicate as they were not at the same place. He said that his witness was at the CID General investigations office when the other parade was being conducted. He produced the identification parade form in respect of Humphrey Otieno Ochieng dated May 27, 2016 as exhibit 3c.
 72. On cross examination, PW9 stated that he could not know whether the complainant while reporting the matter said that he recognized the robbers. He further stated that he had a variety of people because there were many people in the cells so he got people who resembled the accused and that the cells records confirm that there were many people.
 73. PW10 Everlyne Achieng Omondi testified that on January 14, 2016 at around 7.30 pm she was at an Mpesa shop within Sigomere Market where she had gone to meet a teacher by the name Davis Were and she was carrying her phone. She said that as soon as she entered the Mpesa shop, she sat with Davis at the door and that in less than two minutes, two men arrived at the shop and approached her and Davis. She stated that one of the men had a gun.
 74. It was her testimony that the electricity lights were on where they were seated and so she could clearly see what was going on. She further testified that the man who had a gun pointed the gun at them and asked them if they were seeing the gun then they answered in the affirmative. She further testified that the man with the gun took her phone make Tecno P5, the laptop of teacher Davis Were as well as the phone of Davis Were make Microsoft. She said that after that, the man who had a gun ordered them to get inside the Mpesa shop where Ali was where he ordered them to remove everything they had and that at that moment, the gun man pointed the gun at Davis Were telling him that if he thought it is a joke, all his intestines would pour on the ground.
 75. PW10 further testified that Davis was pulled up and ordered to remove everything he had of which Davis complied and produced his wallet and money but she said that she could not tell how much money he produced. It was her testimony that the gun man told her to remove everything that she had and since her phone had already been taken away, she handed over the Kshs 200 and earphone to the gun man. She testified that the gun man moved to where Ali was and told him to produce all the



money he had at the Mpesa shop which Ali did. It was her testimony that the robber took the phone that Ali was holding together with the phone that was being charged.

76. PW10 testified that the gun man carried the laptop, Davis' phone, two phones belonging to Ali, the money that was at the Mpesa shop, her phone, earphones and her Kshs 200. It was her testimony that the gun man took Davis' bag which had a disc and then put the items he had robbed them off after which he gave the bag to his accomplice. She further testified that the two robbers escaped into a bush behind the Mpesa shop and that after that, she reported the matter at Sigomere Police Station and applied to block her phone.
77. It was her testimony that she saw the robbers well during the robbery and recognized them. She further stated that later, a police inspector collected them from Sigomere Police Station and took them to the Siaya Police Station where she identified one of the robbers that she recognized, the appellant's co-accused who she stated was the one carrying the gun and the one she identified at the parade.
78. PW11 No.xxxx Chief Inspector Anastacia Kitari of the CID Office Siaya County Headquarters testified that she conducted an identification parade in respect of Humphrey Otieno Ochieng, the appellant herein. She said that she was the one who conducted the identification parade after she was approached by the investigating officer Chief Inspector Kirwa Tarus on May 27, 2016 to do an identification parade.
79. It was her testimony that after receiving the request from the investigating officer, she prepared herself by getting the identification parade members who were nine in number and ensuring they resembled the suspect Humphrey Otieno in body size, in complexion and they were all bare footed. She stated that the parade members were about the same age as Humphrey and so they were neither old nor young and further that at that time she was preparing the parade members, she prepared them in an enclosed place far away from her witness.
80. PW11 testified that after arranging the parade members, she called the suspect Humphrey Otieno Ochieng and briefed him about the parade, the reason for the parade and why he was participating in the parade and the suspect had no problem with participating in the identification parade. It was her testimony that she asked the suspect if he desired to have a friend, a person or advocate present during the parade to which he stated that he wanted his sister Juliet Atieno Ochieng to be present during the identification parade.
81. She testified that she called the said Juliet Atieno Ochieng and then told the suspect to choose the position he wanted to stand and he opted to stand between member number 1 and 2. She further testified that she asked the suspect if he was comfortable with the position he had chosen as well as his clothing and he answered in the affirmative.
82. She testified that she called the witness Derrick Machoka Nyabuto who identified the suspect by touching him on the shoulder. She produced the identification parade form dated May 27, 2016 in respect of Humphrey Otieno Ochieng as P Exhibit 3d and said that while she was arranging the parade members in the headquarters, the witness was at the place where the CID Officers stayed in a certain room.
83. On cross examination, PW11 stated that she could not recall the number of people who were in cells on that day but she said that many people were in cells because there was an operation so it was easy to get people.
84. PW12 No.xxxx Chief Inspector Kirwa Tarus of DCIO Office Gem Sub-County testified that on January 14, 2016 at around 7. 40 pm, a report was made that an offence of robbery had been committed within Sigomere shopping centre within Sigomere police station area. He stated that three victims



who were affected by the said robbery recorded their statements which were forwarded to him for investigations.

85. It was his testimony that on May 25, 2016 as they were still investigating the said robbery, one of the robbery suspects was netted within Ambira area and its environs following a tip off from an informer. He further testified that during the robbery that took place on January 14, 2016 there were some items which were robbed off the victims some of which included mobile phones namely, one Microsoft mobile phone, neon mobile phone black in colour and one Tecno mobile phone together with some cash and one Samsung mini laptop black in colour.
86. He testified that the information he received was that the suspect who was arrested went as far as disclosing where some of the aforesaid items were sold. It was his testimony that on May 25, 2016, they proceeded to Busia where some of the items which were robbed off the victims of this case had been sold and further that the informer gave them direction where they managed to arrest one suspect at a certain building within Busia which suspect confessed to them that a mini Samsung laptop was sold to him and even gave them the name of the person who sold him the Samsung mini laptop as well as the direction as to where the person worked.
87. PW12 testified that they proceeded to the Busia border where they recovered a Microsoft mobile phone and that the person whom they found in possession of the Microsoft mobile phone disclosed who sold the mobile phone to him and where the person who sold him the mobile phone worked. It was his testimony that they traced the suspect at the Naivasha GK Prison where he had been transferred from Busia GK Prison where he was working as a prison warder.
88. He further testified that the suspects who were arrested were subjected to an identification parade where various complainants who had been robbed within Ugunja and Siaya county and most of the suspects were positively identified by the complainants in various cases. In the instant case, PW12 testified that one of the suspects was positively identified by two of the victims while another was just known physically so he was not subjected to parade identification because one of the victims not only knew him physically but also by his names.
89. He testified that the two suspects were charged with the offence of robbery with violence which suspects he identified as the 1st and his co-accused before the trial court. It was his testimony that David Machogu said that he bought the Samsung mini laptop from the appellant whom he was able to identify. He further testified that Ibrahim Rashid Noah identified the appellant as the person who sold him the Microsoft mobile phone for which the complainant availed a receipt of purchase bearing IMEI No.356492067531979 which was the same as the phone itself and the said phone and receipt of purchase of the phone were produced as exhibits 1a and 1b respectively.
90. It was his testimony that the complainant also identified the Samsung mini laptop as the laptop that he was robbed off and further provided documents proving ownership. He produced the Samsung mini laptop model NDW1025 as exhibit 2 and stated that the suspects were not known to him prior to this incident.
91. On cross examination, PW12 testified that the complainants generally described the people who robbed them but did not do an extensive description. It was his testimony that at the time of the robbery it was somehow dark but the victims of the robbery said that they could recognize and identify the robbers if they came across them. He confirmed that there was no receipt to show that the appellant sold the items but that the persons who purchased the items gave them the appellant's names as well as disclosed where the appellant worked and later they identified the appellant in an identification parade. It was his testimony that they did not recover anything from the appellant at the time of the arrest.



92. Placed on his defence, the appellant gave sworn testimony called one witness. It was the appellant's testimony that on January 16, 2016 he was working at the Korinda Prison. He testified that he woke up at 5. 00 am as usual and went on the morning run up to 6.00 am. after which he returned to his house, bathed and took breakfast with his wife at around 7.00 am.
93. He stated that after that he went to sleep until around 10. 30 am when he woke up and started preparing to go to work which he left for at around 12. 45 pm and he worked until 7. 15 pm and then returned home where he ate supper, waited until 9. 00 pm then watched 9. 00 pm news after which he went to bed.
94. It was the appellant's testimony that on May 13, 2016, he received the letter transferring him to the Naivasha Medium Prison where he commenced work on the 16th and stated that since he was yet to secure a house, one of his friends whom he previously met at the college hosted him in one room adjacent to his house. He further stated that he worked until 25.05.2016 when he woke up early and went to the early shift that was starting at 6.00 am.
95. It was his testimony that he worked at the centry box until 1. 15 pm then returned the firearm to the armory though he could not leave as the senior discipline officer told him that the in charge of the prison wanted to see him. He further testified that as he was conversing with the in-charge, four people entered the office, introduced themselves as police officers from the Naivasha CID Headquarters and that they were at the said prison to collect him and take him to the Naivasha CID Headquarters where the people told him that they had received information from Siaya that he had an unlicensed firearm and ammunitons which allegations he told the police were untruthful.
96. It was his testimony that the only firearm he had that day was the one which was given to him at the armory and that he had returned it. The appellant testified that the police did not believe him and they returned him to the prison office from where he was escorted to the house where he lived and all his uniforms including the one he was wearing were taken away from him, a search conducted and nothing recovered.
97. He testified that he was taken to Naivasha Police Station from where he was collected and taken to the Kisumu Police Station where he stayed until the May 26, 2016 when he was picked and taken to Siaya Police Cells where he said he stayed until May 31, 2016 when he was taken to court. On cross examination, the appellant stated that on January 14, 2016 he was at his house with his wife. He further confirmed that he did not talk about the January 14, 2016.
98. DW2 Victor Shapil Emusole testified that he was an officer working at the Meru GK Prison and previously worked with the appellant at the Busia Prison. He told the court that on that day, they were supposed to report to work at 12.45 pm. That after the sporting activity, they took a break and went to their quarters to relax waiting for 12. 45 pm so that they could report to work.
99. It was his testimony that they reported to work at exactly 12. 45 pm and had a break at 1915hrs when they normally handed over duty to the night guards. He further stated that after handing over duties they normally returned to their quarters till the following day. In cross examination, DW2 stated that on January 14, 2016 he reported to work at 12. 45 pm and had a break out at 1915hours. He further stated that as at January 14, 2016 he was living alone so he was alone at his quarters. He stated further that he met the appellant at around 11. 00 am because sometimes they chatted.

Determination

100. I have considered the grounds of appeal, the submissions for and against the appeal and the entire evidence adduced before the trial court. The main issue for determination in this appeal is whether the



prosecution proved its case against the appellant beyond reasonable doubt and therefore whether all the elements of the offence of robbery with violence were proved beyond reasonable doubt.

101. What constitutes the offence of robbery with violence was well stated in the case of *Oluoch v Republic* (1985) KLR where the Court of Appeal stated as follows:

“...Robbery with violence is committed in any of the following circumstances:

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

The offender is in company with one or more person or persons; or

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.”

102. It is also trite law that proof of any one of the above ingredients of robbery with violence is enough to sustain a conviction under Section 296 (2) of the *Penal Code*. 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 three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”

103. Taking into consideration the above elements of the offence of robbery with violence, the questions arising from the above framed issue and the grounds of appeal and submissions by the appellant are:
- a. Whether the evidence adduced against the appellant was sufficient to sustain his conviction for the robbery with violence
 - b. Whether the appellant was properly identified
 - c. Whether the sentence meted out on the appellant was harsh and excessive

Whether the evidence adduced against the appellant was sufficient to sustain his conviction

104. It is the appellant’s case as presented in his petition of appeal and submissions that the evidence adduced against him was not sufficient to sustain his conviction. The appellant submitted in his supplementary grounds that there were contradictions, insufficiency and glaring gaps in the evidence adduced by the prosecution.
105. From the evidence summarized above and as detailed by the trial magistrate, both PW1 and PW2 identified the appellant as one of the persons who robbed them on the material night. PW3 testified that the appellant’s face stuck with him as the appellant carried the gun.
106. The witness stated that albeit it was dark, there was light from some bulbs. Further, both PW1 and PW2 were able to identify the appellant when they were taken through an identification parade as evidenced in exhibits 3a and 3c respectively.
107. It was the appellant’s submission that the evidence preferred against him was contradictory and insufficient and contained a lot of gaps. However, the appellant failed to point out what part of the prosecution evidence was contradictory. In the case of *Cyrus Maina Gakuru v Republic*, Criminal Appeal No.58 of 2014, the High court stated as follows:

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of



evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains."

108. In the case of *Twebangane Alfred v Uganda* (Cr.App.No.139 of 2001(2003) UGCA it was held that it is not every contradiction that warrants rejection of evidence. I am satisfied that the contradictions in the instant case, if any, were not pointed out by the appellant to warrant the trial court's rejection of evidence.
109. This leads me to the other ground raised by the appellant in his submissions that the investigations were shoddy. The evidence adduced by the prosecution witnesses was in my view very elaborate and consistent with an investigation that was very deep and well undertaken, considering that the appellant was arrested about 4 months after the alleged robbery, after the police carried out thorough investigations that linked him to the offence.
110. The appellant was under no obligation to rebut the evidence adduced by the prosecution witnesses as he enjoys the constitutional rights to remain silent and not to give any self-incriminating evidence. He however opted to give evidence distancing himself from the assertions by the prosecution witnesses, which defence is a semblance of an alibi (that he was not at the scene of crime at the material time the robbery is alleged to have been committed.)
111. The trial court addressed the appellant's defence in comparison to the evidence adduced by the prosecution witnesses and noted that it did not shake the testimony of the prosecution witnesses.
112. I have considered that defence and compared it against the prosecution evidence. I find that even without the defence proffered by the appellant, which defence was in my humble view rightly rejected by the trial court and which I equally find to be evasive and which simply ignored the evidence adduced by the prosecution witnesses, the appellant's defence was in my view incoherent and an afterthought
113. It is trite that an alibi must be raised at the earliest instance so as to enable the prosecution respond to it. This was not the case with the appellant. Nonetheless, I find that the trial court considered the appellant's alibi and found it wanting which I equally do.

Whether the appellant was properly identified as one of the robbers on the material night

114. It was submitted as a supplementary ground of appeal by the appellant that he was not properly identified.
115. PW3 who was found to have handled the Samsung mini laptop robbed from PW1 testified that he got the same from the appellant who was trying to sell the laptop. It was his testimony that the appellant was his friend whom he was familiar with and that the appellant had invited him at his quarters within Busia prison to view the aforementioned laptop.
116. Taken through an identification parade, which I find was procedurally carried out, without prejudicing the appellant's right to fair trial, as shall be discussed below, PW3 was able to positively identify the appellant as the one who gave him the Samsung laptop to sell as was evidenced by the identification parade form produced as exhibit 3d.
117. PW4 who was found to have handled the Microsoft Lumia phone (exhibit 1a) that was proven to have been stolen from PW1 as its IMEI matched that on the receipt (exhibit 1b) provided by PW1, testified that the appellant had taken to him the phone in an attempt to have the touch screen repaired but



- could not raise the money required to repair it leading PW4 to surrender the same to his friend Salim Shiundu who repaired the said touch screen.
118. This evidence of PW4 corroborated PW1's testimony that he had difficulties identifying the mobile phone presented to him in court as he remembered that his had a broken touch screen. This evidence was not challenged in any way. It remained watertight and clearly showed that the appellant was properly and positively identified by the prosecution witness as the one who committed the offence of robbery with violence as charged.
119. The appellant claimed that the identification parade was not properly carried out on him. For the evidence of identification to have probative value, the identification parade must comply with the laid down procedure.
120. The correct procedure of conducting an identification parade is provided for under chapter 42 paragraph 7 of the *National Police Service Standing Orders*. The rules include the following:
- i. The accused has the right to have an advocate or friend present at the parade;
 - ii. The witness should not be allowed to see the suspect before the parade and the suspects on parade should be strangers to the witness;
 - iii. Witnesses should be shown the parade separately and should not discuss the parade among themselves;
 - iv. The number of suspects in the parade should be eight (or 10 in the case of two suspects);
 - v. All people in the parade should be of similar build, height, age and appearance, as well as of similar occupation, similarly dressed and of the same sex and race;
 - vi. Witnesses should be told that the culprit may or may not be in the parade and that they should indicate whether they can make an identification; and
 - vii. As a recommendation, the investigating officer of the case should not be in charge of the parade, as this will heighten suspicion of unfair conduct in the courts.
121. The Court of Appeal in *David Mwita Wanja & 2 others v Republic* [2007] eKLR emphasized on the importance of a properly conducted identification parade and expressed itself as follows:
- “The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this Court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders.”
122. In the instant case, the evidence of identification parades carried out to identify the appellant was adduced on behalf of the prosecution by PW8, PW9 and PW11 and further contained in Exhibits 3a, 3c and 3d respectively.
123. PW8 testified that he prepared the seven members of the parade including the suspect thus making the parade to have 8 members. He further stated that with the consent of the appellant, he conducted the parade after which he asked the appellant if he was satisfied with the manner the identification parade was conducted to which the appellant answered in the affirmative. It was his testimony that the



- members of the parade were almost of the same size, same complexion, same height and same age as that of the appellant. He further stated that the parade was conducted in an open place within the cells and the witnesses were removed from a separate room away from the cells and further that he informed the appellant of the purpose of the parade and the appellant did not raise any objection.
124. On the part of PW9, he testified that the appellant consented to the identification parade being conducted on condition that the parade members did not constitute 3 suspects from the cells. He further stated that as to whether the appellant had a lawyer or a friend who he wanted to be present at the time the identification parade, the appellant chose his sister Juliet Atieno Ochieng. It was his testimony that he had 8 members of the parade all of whom were drawn from the police cells, and all of whom resembled the suspect and who were of the same age, height and physical appearance. It was his testimony that he told the suspect to choose the position where he wanted to stand and the suspect chose to stand between member number 5 and 6.
125. PW11 testified that she got the identification parade members who were nine in number and ensured they resembled the appellant in body size, complexion and were all bare footed. She stated that the parade members were about the same age as the appellant. It was her testimony that she prepared the parade members in an enclosed place far away from her witness and that the appellant's sister Juliet Atieno Ochieng was present during the identification parade.
126. Taking all the above into consideration, it is my opinion that the identification parades carried out to identify the appellant all complied with the rules herein provided and were thus above board.

Whether the sentence meted out on the appellant was harsh and excessive

127. The appellant submitted that the sentence imposed on him was excessive and manifestly harsh considering the circumstances of the offence and also taking into consideration the Supreme Court decision in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.
128. The punishment for robbery with violence is provided for in section 296(2) of the *Penal Code* that provides that upon conviction, the offender shall be sentenced to death.
129. In the case of *Joseph Ochieng Osuga v Republic* [2021] eKLR this court stated that the power to interfere with a sentence imposed by the trial court is limited by precedent except where certain conditions are met. This court proceeded and cited the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR where it was stated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

130. The Supreme Court in the case of *Francis Karioko Muruatetu & another vs Republic* [2017] eKLR while dealing with the mandatory nature of the death penalty in Murder cases under Section 204 of the Penal Code held that the mandatory nature of the death penalty was unconstitutional. The Court clarified in the said judgement that the death penalty itself remains lawful and constitutional.



131. The reasoning in Muruatetu Case in respect of Section 204 of the Penal Code (the penalty section for murder), was extended by the Court of Appeal to the mandatory death penalty in robbery with violence cases in the case of *William Okungu Kittiny v R* [2018] eKLR.
132. Accordingly, this is a case that this court can interfere with the sentence imposed. However, before I do that, I shall call for a report from the probation officer Siaya County, to guide the court in resentencing.
133. In the end, I find this appeal against conviction to be devoid of merit. It is hereby dismissed. The appeal against sentence shall be considered after a probation officer's pre-sentence report and mitigation are received and considered by this court. Mention on 15/7/2019.

Dated, Signed and Delivered at Siaya this 17th Day of June, 2019

R.E. ABURILI

JUDGE

