



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoki v Republic (Criminal Appeal E019 of 2022)  
[2025] KECA 1515 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KECA 1515 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL E019 OF 2022  
JM MATIVO, PM GACHOKA & GV ODUNGA, JJA  
SEPTEMBER 19, 2025**

**BETWEEN**

**ALEX MAINA NJOKI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Naivasha  
(R. Mwongo, J.) dated 4<sup>th</sup> May 2021 in HCCRA No. 63 of 2015)*

**JUDGMENT**

1. This is a second appeal from the conviction and sentence of the trial court delivered in Engineer CMCR No. 546 of 2013 on 24<sup>th</sup> April 2015 and upheld by the Naivasha High Court in HCCRA No. 63 of 2015 on 4<sup>th</sup> May 2021. The appellant, Alex Maina Njoki, was charged with the offence of attempted robbery with violence contrary to section 297 (2) of the Penal Code. The particulars of the offence were that on 14<sup>th</sup> September 2013 at BlueLine bar Weru Trading Centre in Nyandarua County, while armed with a dangerous pistol namely a home-made pistol and a grill wire, the appellant attempted to rob Jane Njeri Kanyiri a mobile phone and cash, and, immediately before the time of such attempted robbery, beat the said Jane Njeri Kanyiri.
2. The appellant was arraigned before the trial court. He pleaded not guilty. After a full trial, the learned magistrate convicted him of the offence. He was sentenced to death. Aggrieved, the appellant filed an appeal before the Naivasha High Court. In the end, Mwongo, J. upheld the conviction in his judgment dated 4<sup>th</sup> May 2021. However, regarding the sentence, the learned Judge noted the jurisprudence then prevailing arising from the Supreme Court decision in the oft-quoted Francis Karioko Muruatetu & Another. At the time, Courts had interpreted the judgment to mean that the mandatory death sentence was unconstitutional to the extent that it took away the discretion of a judge in sentencing. Accordingly, he set aside the sentence and ordered that a date for resentencing would be fixed after



hearing the mitigation. However, the legal tectonic plates moved, causing serious ramifications in the sentencing regime. In what is now commonly known as *Murautetu 2*, the Supreme Court gave directions to the effect that the judgment applied to murder cases only. Accordingly, the learned Judge set aside his earlier order and reimposed the death sentence.

3. The appellant is dissatisfied with those findings. He filed his notice of appeal dated 2<sup>nd</sup> March 2022. He also filed his memorandum of appeal dated 2<sup>nd</sup> March 2022 that raised six grounds disputing the findings of the High Court. We have taken the liberty to summarize those grounds as follows: that the evidence of the prosecution was marred with inconsistencies and discrepancies; that the evidence of identification of the perpetrator fell short of the standard of proof; and that the ingredients of attempted robbery were not proved beyond reasonable doubt. The appellant thus prayed that his appeal be allowed, his sentence be set aside and he be set at liberty.
4. The appeal was heard on 14<sup>th</sup> May 2025. The appellant was present and represented by learned Counsel Mr. Owuor, while the respondent was represented by Senior Assistant Director of Public Prosecution, Mr. Omutelema. The appeal was heard by way of submissions.
5. Though the appellant failed to file his written submissions before the hearing of the appeal, his counsel made oral submissions. Learned counsel informed this Court that the appeal was purely on the legality of the sentence. The Court drew his attention to the *Muruatetu* case (*supra*). However, the advocate insisted on proceeding with the appeal on sentence only.
6. The appellant's advocate submitted that according to the provisions of section 389 of the Criminal Procedure Code (*sic*), the sentence for attempted robbery with violence carried a maximum sentence of 7 years imprisonment. He complained, however, that the appellant was instead sentenced to death. Urging this Court to revert the sentence to 7 years, he urged this Court to set him at liberty since he was in custody from April 2015. Counsel fortified his submissions by relying on the holding in *Boniface Juma Kisa vs. Republic* Criminal Appeal No. 268 of 2009 and *Evanson Muiruri vs. Republic* Criminal Appeal No. 77 of 2007.
7. The respondent opposed the appeal. It filed its written submissions dated 9<sup>th</sup> May 2025. Learned counsel submitted that all ingredients of the offence of attempted robbery were proved beyond reasonable doubt. On the sentence, the respondent submitted that on the strength of the decision of the Supreme Court in *Republic vs. Joshua Gichuki Mwangi* Petition No. E018 of 2023, the sentence of death was lawful. Lastly, addressing section 389 of the Penal Code, learned counsel submitted that section 297(2) of the Penal Code provided the punishment for the offence committed by the appellant. Section 389 was therefore inapplicable. He prayed that the appellant's appeal be dismissed.
8. Our obligations as a second appellate court was elaborated in the case of *M'Riungu vs Republic* [1983] KLR 455 as follows:

“Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the decision of the trial or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached the same conclusion, which would be the same as holding the decision is bad in law.”
9. Though the appeal was confined to the question of sentence only, we shall rehash the evidence that was adduced, as the appellant has an interesting argument based on section 389 of the Criminal Procedure Code. The record before us captures the evidence as follows: PW1 Jane Njeri Kanyiri, the complainant



herein, testified that on the night of 14<sup>th</sup> September 2013, she was working as a barmaid at Weru. She was in the company of Ann Wanjiku PW2. The lights in the establishment were on at that time. As she was closing the bar at 10:00 p.m., the appellant walked in wearing a blue mask over his head. He closed the door and ordered PW1 to hand over the phone and money. Defiant, PW1 responded that she did not have them. Angered with her response, the appellant hit PW1 with a toy pistol. He then ransacked her, pushed her out of the counter and commanded her to lie on the floor.

10. The appellant then started beating PW2. He also beat PW1 with a whip. PW1 screamed, prompting the appellant to viciously flog her. He then threatened to kill her and PW1 kept quiet. Suddenly, the watchman, Maina Njora alias John Maina Jora PW3, walked into the scene. He was also beaten by the appellant and ordered to lie down. PW3 complied.
11. Thereafter, the appellant went to the counter searching for money but couldn't find any. In the process, PW1 arose, grabbed him and banged him against the counter, causing the appellant to release and drop his toy pistol. The victims then alerted the members of the public who came to their rescue. The appellant was then assaulted by the irate public and administration officers on patrol arrested him. PW1 continued that the appellant was subsequently surrendered to the police officers at Kinangop Police Station. The following day, PW1 recorded her statement and was issued with a P3 form that was filled out at Engineer District Hospital.
12. PW2 testified that she was working at Blueline bar in Weru Trading Centre on 14<sup>th</sup> September 2013 at around 10:30 p.m. in the company of PW1 when they were closing the bar. The counter lights were on. Suddenly, a man wearing a mask on his head walked in carrying a whip. They were enjoined to lie down and hand over their phones and money. The man, identified as the appellant, hit PW2, forcing her to lie down.
13. While on the floor, PW2 overheard PW1 and the appellant arguing over money for approximately 30 minutes. PW3 then walked. Then the appellant was grabbed after a commotion. PW2 later opened the door and screamed. Members of the public entered the establishment and started beating the appellant. Later, AP officers whisked the appellant away. PW2 recalled seeing the pistol after they accosted the appellant.
14. PW3 testified that on the fateful night, he was in his living quarters adjacent to the bar that PW1 and PW2 were working at. He heard commotion in the bar and went to check what was happening. PW3 pushed open the door and found the appellant wearing a mask over his face. He ordered PW3 to give him his phone and money. He then removed a pistol, touching his head with it. He lay down. The appellant then asked PW1 to hand over the money. PW1 then gave him the keys to remove money from the store to which he ordered PW1 to get the money.
15. PW3 recalled that a scuffle ensued between PW1 and the appellant and the gun fell to the ground. The appellant was then arrested and handed over to AP officers. They managed to take recognition of the appellant when they removed his mask in the electric-lit bar. He thereafter recorded his statement at Kinangop Police Station.
16. PW4 Dr. Maingi, a doctor working at Engineer District Hospital, testified that PW1 was seen on 17<sup>th</sup> September 2013 by his colleague Kamau Joseph. His observations were that she had inflammation on her upper back. Her left forearm was swollen and painful. She also suffered pain in her left foot with swelling. The degree of injuries was classified as harm. She was treated with painkillers and antibiotics. He produced his colleague's P3 form in evidence.
17. PW5 APC Dennis Ogaro from Weru AP Post testified that he was at his assigned post when he heard screams on 14<sup>th</sup> September 2013 at around 10:30 p.m. He rushed in that direction in the company



- of APC Tanui. They found a crowd at a Blueline bar carrying stones. They saw the appellant on the ground. He was wearing a mask. He was bleeding. They recovered a toy pistol and a string wire. Thereafter, they called police officers from Kinangop Police Station who took the appellant away.
18. PW6 PC George Odongo from Kinangop Police Station testified that on 15<sup>th</sup> September 2013, he was at the station at 12:10 a.m. He was instructed by the OCS to attend to the crime scene following reports of the offence. On arrival, PW6 found PW5 guarding the suspect, identified as the appellant. PW6 described that he was lying on the floor with visible injuries inflicted on his head. He was wearing a bloody mask that was produced in evidence. He also produced the homemade gun and wire in evidence. PW6 interrogated witnesses, gathered evidence and preferred the present charges against the appellant after he was arrested and remanded at Kinangop Police Station.
  19. PW7 CI Florence Karimi testified that on 9<sup>th</sup> December 2013, he received an exhibit from PW6 which was an imitation of a firearm. He examined the exhibit and found that it was a homemade gun made of wood and metallic material and covered with black masking tape. It resembled a conventional handgun comprising of an open chamber, barrel, trigger and trigger guard, pistol grip cocking handle and incorporating a sticker under tight spring tension. PW7 formed the opinion that the exhibit was not capable of firing a bullet but was an imitation firearm as defined under the *Firearms Act*. He prepared and signed the report dated 31<sup>st</sup> January 2014 that was produced in evidence.
  20. At the close of the prosecution's case, the trial court opined that the prosecution has established a prima facie case against the appellant. He was placed on his defence. His unsworn testimony was that on 14<sup>th</sup> September 2013, he was drinking in the company of a girl in Blueline bar. On settling the bill, the appellant handed the waiter Kshs. 1,000.00 who refused to give him his change of Kshs. 500.00. The watchman intervened and started beating him up. They then stole his money, screaming "Mwizi! Mwizi!" He denied committing the offence maintaining that he had been framed.
  21. The ingredients to the offence of attempted robbery with violence are that the offender assaulted a person, committed with intent to steal, while armed with a dangerous or offensive weapon or instrument, or in the company of more than one person, or at or immediately before or after the time of the assault, the offender wounded, beat, struck or used any other personal violence to any person. Did the prosecution establish beyond reasonable doubt these crucial ingredients?
  22. According to PW1 and PW2, on the night of 14<sup>th</sup> September 2013, they were working at Blueline bar located in Weru. They had switched on the lights from the establishment. Just as they were about to close the bar, a man who was identified as the appellant, walked in wearing a blue mask over his head. He closed the door and ordered PW1 and PW2 to hand over their phones and money. The appellant was carrying a homemade pistol and a whip. He used the pistol to hit PW1 while PW2 was hit and lay on the ground.
  23. The appellant and PW1 got into an altercation since the appellant demanded for money. In the process, the appellant beat PW1 with a whip. She was viciously beaten and threatened with death. Hearing the commotion, PW3 walked into the crime scene. He was also ordered to surrender his belongings and lie down. While the appellant was looking for money, PW1, PW2 and PW3 managed to accost him, screaming for help. In the process, the appellant dropped his phantom pistol. The screams attracted the attention of members of the public who assisted them but, in the process, assaulted the appellant.
  24. Gathered from the evidence above, which was subject to cross- examination but not dislodged, we find that the appellant was positively identified as the assailant. Though the offence occurred at night, the same took place in an establishment that was well-lit. He was properly and positively identified by PW1, PW2 and PW3 when they removed his mask from his face. The appellant was at the scene for



about 30 minutes where he interactively engaged PW1 while PW2 watched. PW3 later joined in and witnessed the commotion.

25. It is also discernible from the evidence adduced that the appellant brazenly attacked PW1 and inflicted physical injuries on her body. PW4 produced PW1's P3 form which disclosed that she had inflammation on her upper back. Her left forearm was swollen and painful. She also suffered pain on her left foot with swelling.
26. PW1 was assaulted by the appellant with intention to steal money and phones. He was armed with a whip and a toy pistol, which given the circumstances of the offence, was an offensive weapon. He also used personal violence to assault PW1. We are therefore in agreement with the concurrent findings of the two courts below that the appellant was properly convicted of the offence of attempted robbery with violence. As already stated, the appellant is only appealing against sentence but it was necessary to consider the facts in view of the arguments on the sentence.
27. The appellant was sentenced to death by the trial court considered his mitigation. The High Court however directed the trial court to fix a date for re-sentencing after a hearing on mitigation. Section 297 (2) of the Penal Code provides that if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death. The sentence provided therein is couched in mandatory terms.
28. The appellant urged this court to invoke the provision of section 389 of the Penal Code which provides:

“Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.”
29. As rightfully pointed out by the respondent, the provision is only invoked where no punishment is provided. In this case, section 297 (2) of the Penal Code gives a punishment of death. Section 389 of the Penal Code is therefore not applicable to the facts and circumstances of this case.
30. Furthermore, the Supreme Court of Kenya emphasized in the case of Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) that mandatory sentences were lawful and cannot be interfered with. We are therefore unable to interfere with the sentence which as passed by the trial court, was legal. Accordingly, the appellant's appeal on sentence lacks merit and it is hereby dismissed.

**DATED AND DELIVERED AT NAKURU THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**J. MATIVO**

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**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCIArb.**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**



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**JUDGE OF APPEAL**

*I certify that this is a True copy of the original*

*Signed*

Deputy Registrar

