



**Nyaga v Republic (Criminal Appeal E026, E058 & E060 of 2023  
(Consolidated)) [2025] KEHC 14160 (KLR) (7 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14160 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
CRIMINAL APPEAL E026, E058 & E060 OF 2023 (CONSOLIDATED)**

**EM MURIITHI, J**

**OCTOBER 7, 2025**

**BETWEEN**

**EVANS KINYUA NYAGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. L.W. Kabaria  
(PM) in Gichugu criminal case No. 1443 of 2018 delivered on 16/12/2022)*

**JUDGMENT**

1. The appellant herein was charged with robbery with violence contrary to section 296 [2] of the Penal Code. The particulars were that on the 4<sup>th</sup> day of July 2018 at Timber Village of Baragwi Location within Kirinyaga County jointly with others not before court, while armed with crude weapons, namely iron bar, robbed one Pius Ndung'u Kamau a mobile phone of model TECHNO-W3 valued at about Ksh. 10,000 and a wallet of unknown value, and at or immediately before or after the time of such robbed injured Pius Ndung'u Kamau.
2. He faced a 2<sup>nd</sup> count of handling stolen goods contrary to section 322 [1] [2] of the Penal Code. The particulars were that on 11/7/2018 at the same place, otherwise than in the course of stealing, dishonestly received or retained a mobile phone of make TECHNO W-3 IMEI 358264078882570 valued at Ksh. 10,000 knowing or having knowledge to believe it to be a stolen property of Pius Ndung'u Kamau.
3. He denied the charges, but upon full trial, he was convicted and sentenced to death.

**The Appeal**

4. On appeal, the appellant raised 4 grounds of appeal as follows:



1. The learned trial magistrate erred in law and fact by convicting the appellant but failed to note that, the essential ingredients of the offence of Robbery with Violence under section 296 [2] of the Penal Code were not proved against the appellant.
2. The learned trial magistrate erred in law and fact by convicting the appellant basing his conviction on circumstantial evidence of recovered stolen items but failed to note that, in the charge sheet, no serial numbers were indicated, the item [PHONE] was not proved to belong to the complainant [ownership] and that the court did not consider the time factor when recovery took place. And the court failed to note that, the evidence adduced did not satisfy the three test which must be satisfied to prove circumstantial evidence.
3. The appellant's defence was not considered.
4. The death sentence was imposed without the court exercising its discretion. This violated the appellant's constitutional rights as enshrined under Article 50 [2] [P] and [Q] of *the Constitution*. Additionally, it contravened Section 216 and 329 of the Criminal Procedure Code, as well as the 2023 Sentencing Policy Guidelines on mitigation.

### **Duty of Appellate Court**

5. The duty of this court as the first appellate court is to re-evaluate the evidence on record and draw its own independent conclusions, bearing in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. [See *Okeno v R* [1972] EA 32].

### **Evidence**

6. PW1 Michael Nguu Kiama, testified that, "I live in Kabatiro village. I am a farmer. I know the 1<sup>st</sup> accused, I had given him some work, he was brought to me by Simon Mugo to do some work for me. This was in July 2018. The 2<sup>nd</sup> accused I came to know him in court. I had not seen him before. In the month of July 2018 from the 1<sup>st</sup> I needed people to work in my farm. I wanted to plant French beans. There is someone I used to work with called Simon Mugo. He brought Evans Kinyua to me. I gave them a week for a month. The same week Evans came with a phone a Techno. It was yellow in color; it's like khaki colour, a Techno. He told me that he did not have food or somewhere to sleep. He wanted to sell the phone. I told him I had just bought a new phone for my wife but I could help him. We exchanged phones mine with his and then I add him some money. So, we did the exchange. He gave me his phone the Techno, I gave him mine and EMES phone and I added him some money Kshs 1,000. He gave me the Techno phone. After that we did not meet again. After about three months the police came for me. They found me in my home area Kabatiro. The police told me that there was a phone I was using that I should tell them where I got it from. I told them I did not know the name of the person that sold it to me but the person who brought him to me I knew so we could go to his house so he shows us the home of the person that sold me the phone. We went with the police to Kutus town to the home of Simon Mugo, he was arrested and we were taken to Kianyaga police station. He was asked if he knew the home of Evans Kinyua. He said he did not know his home but he knew his friends. There are some friends of Kinyua two of them who ride bodaboda in Kutus. They were picked up by police. One said he knows Evans home. They went with police officers and he was arrested. At that time, I was in police cells. I saw him when he was brought to police cells. He was brought to the cells in the morning. I had been given some work to sweep outside. I found him outside with a police officer. I told the police officer this is the one who brought me the phone. Immediately he was taken to the OCS to record a statement. When I saw him with a police officer he had already been arrested. He was told to record his statement and while he was recording his statement, the OCS called me and



told me to listen to the statement. I heard what he had recorded. It is just what I had recorded in my statement so I was released. I did not know where he had gotten the phone from. If I see the phone again I would recognize it. This is the one, a Techno the one I was arrested with [referring to a Techno black with a brown/grayish cover-marked MFI-1] I had the phone to about two months it is my wife who was using it. Her phone number is 0704 531711. It is my wife who was using the phone; the line is registered to me. It is the 1<sup>st</sup> accused who gave the phone. My wife Viola Wanjiku saw him give me the phone. I do not know the 2<sup>nd</sup> accused.”

7. On cross examination, he stated that, “He initially told me the problems he had that he had problems with shelter and food [asked whether he was selling or a phone or whether he has just asked PW1’s help for food and shelter]. Yes, I gave you Kshs.1,000 [put to him that he did not sell the phone to him he only asked him to hold it as security]. No he did not tell me that.”
8. PW2 Dorcas Karemi Nyaga testified that, “I come from Thimba in Muchungwa. I am a businesswoman. Pius Ndung’u was my husband. I do not know the 1<sup>st</sup> accused. I do not know the 2<sup>nd</sup> accused. On the 4<sup>th</sup> July 2018 my husband left home in the morning. He was going to Thika there is a brother he had stood for as surety in court so he was going to court. At about 10:00 am he called me and told me they had been given another date so he was done for the day. He told me that since it was still early he was going to pass by his cousin in Makuyu to see his ailing mother. We did not speak again until about 3:00 pm. I was calling him about some work we were doing there is something I needed. He told me he would make a call for someone to deliver what he needed which he did. We spoke again at 7:00 pm, he told me he was still in Makuyu but he was about to leave he would be escorted to the road. We did not speak again. I waited for him at about 10:30 pm I felt sleepy but I decided that since it was raining I call him so that I know if he had arrived so I wait for him but unfortunately, I found I did not have credit. I borrowed some credit but before I was done I heard a scream on the road. My home is near the road. I felt fear in my body [breaks down] but I decided to go outside and look because there was a worker who had slept over because they were done later. I called the worker he answered. I asked him if he had heard anything. He said he was asleep he did not hear anything. I told him I had heard screams from the road and my husband had not arrived. As we were talking we heard voices on the road. I told him let us open the gate and look. When we opened I saw there were people that had a pull cart [mkokoteni]. I decided to use light from my torch I saw my husband lying on the road blood everywhere I recognized him from the clothes he was wearing in the morning. I did not touch him. I just started to scream. The ones who had the mkokoteni I also came and saw him and also began to scream. Neighbours came and took him to hospital in Kianyaga. He was not talking. When we got to hospital we were referred to Kianyaga. I could not tell where he was injured. He had blood all over his face so I thought he must have been injured on the head. My neighbours rushed him to Kianyaga. I had a small child in the house. I ran back to get the child while they rushed to Kianyaga. A neighbour came for me in his car. By the time we got to Kianyaga he was in an ambulance. The hospital said they were not able to treat him when we got to Kianyaga he was admitted to the hospital. In the morning of the 5<sup>th</sup> July we had been told to go with money so that we take him to Nyeri for a scan of the head. In the morning I looked for money and got what was needed. I went to Kianyaga at around 1000 am there is a friend of his who had also come so we take him to hospital. Before we could pay the money, the doctor told me they wanted to attend to him first and that is when my husband passed away. He passed away before we could take him to Nyeri. The people who had heard about it came to Kerugoya and took over with the preparations. I was later called to go to Kianyaga police station where I recorded my statement. We later went with police officers to my home, they did their investigations and told me that would call me when they needed me. We started the burial arrangements and buried my husband. Later, I do not recall the month I was called to the station and I was told there were some people who had been arrested with my husband’s phone. The neighbours also told me it had been broadcast on the



radio. His phone was a Techno. It is not quite black it looks like that laptop behind [pointing at the courts laptop goldish in color] I came to the police station they told me they were still investigating and eventually we were called to court. [Referred to MFI-1 breaks down again] This is my husband's phone. A post mortem was done in Kibuthi. I was present, we were told that he was hit badly on the head and his skull was fractured [akapasuliwa kwa kichwa] here behind [touching the back of her head]. I had not seen the accused persons before; I came to see them in court.”

9. The witness was not cross examined.
10. PW3 Justus Chomba Gicobi testified that, “I live in Thumaita village. I used to work for Pius Ndung’u. Last year I started working for him in March 2018 until this month, I left work two weeks ago. I used to cook 'ngumu' and 'miviringo'. On the 4<sup>th</sup> July 2018 at about 10:00 pm we finished our work at about 8 pm we were working many of us. After we were done with work I did not go home because we live far the others left. After I had eaten I went to sleep. At about 10:00 pm, the wife of the owner of the home she is called Dorcas she woke me up. She told me she had heard something unusual on the road as if someone had been attacked there. Because baba Alfa, Pius Ndung’u had been away all day I asked her if he had returned. She told me not yet. I suggested we call him. Before we could do that, we heard a sound from outside the gate as if someone was in pain. We decided to open the gate. When we opened we found it was Pius Ndung’u. He was like from here to that cabinet [pointing to a cabinet in the courtroom about four meters away] we were able to see him because we were using light from the phone. He was bleeding on the head. We started to shout, people came and he was rushed to hospital in someone’s car. The next day we got the report that he had passed away. I did not accompany them to hospital because there was no one to leave at home. The next day we were told he had died. Later we were called to the DCI to record a statement. I do not know the accused persons.”
11. PW4 John Kamau Karanja, testified that, “I live in Kianyaga. I am a driver. I do not know the accused persons. I knew Pius Ndung’u he is my uncle. On the 4<sup>th</sup> July 2018, I was called by someone called Chomba at 11 pm, while I was in my home. He told me to go and take my uncle to hospital that he had been attacked by robbers. I went and took my vehicle: we picked him from the trench where he was lying and put him in the car. He was unconscious. He was just bleeding from the ears and the nose. We took him and put him in the vehicle and brought him to Kianyaga Sub County hospital. They did first aid then we were given an ambulance and we took him to Kerugoya. We were many of us there was Muchiri and many other people. When we got to Kerugoya he was admitted then his wife mama Alfa also arrived. They started to treat him; we left there at about 1 am. I had left my vehicle in the hospital. I came and took it the next morning. I went to see him, he was still alive but he was not talking. I came and told his wife I had gone and seen him. She was also going because they were to take him for a scan. They are the ones who later came and told us he had passed on. From there we started making burial arrangement. I came to see the accused persons here in court.”
12. The witness was not cross examined.
13. PW5 Jackson Mburu Mwangi, testified that, “I live in Makuyu Murang’a County. I am a businessman. Pius Ndung’u is my brother, our fathers are brothers, we are cousins. On the 4<sup>th</sup> July 2018, I was called at about 4pm that I had visitors at home they had come to see my mum. I was at work, I hurried up and arrived home at about 5pm. Pius Ndung’u and a son of mine George Mbugua arrived at about 6pm. We stayed together for a while until 7pm then Pius told me it was time for him to go home. I asked him to sleep over because it was night. He called his wife to ask her about it. When they spoke, he wanted to give me the phone we speak with his wife so I could ask her if it was in order for him to sleepover. I spoke to her, she said since it was still early let him just go home. So, I gave my son to take him to the highway to the stage along Thika-Nyeri highway. Shortly thereafter my son came back and told me Pius had boarded a vehicle. At about 10 pm he called me and told me he had arrived in Kianyaga. I



told him God was good. I told him to say hello to his family. But at 1:00 am I received a call from his wife who told me that Pius had been attacked by robbers that he had been taken to hospital but here was some money needed so that he could be taken for a head scan Kshs 40,000. I told his wife let us wait for morning so that we see how to get the money. In the morning at 6:00 am I called his wife, I told her to send someone to hospital to find out how he was doing so that if there was something else needed we take care of it at once. She sent a young man called Kamau to check on Pius. I tried to call her after that I was not able to get through to her. I finally managed to talk to her at 5:00 pm that is when she gave me the news that Ndung'u had passed on. After that I gathered my family and told them what had happened and we arranged to come and see the family. We found the burial arrangements had been made and scheduled for the 12<sup>th</sup> in Kiambu. However, on the 8<sup>th</sup> police officers were sent to my home and they came and told me to come to Kianyaga and record my statement which is what I did. We came with my son and other people who had brought us. I recorded my statement and then we continued with burial preparations.”

14. The witness was not cross examined.
15. PW6 Dr. Ndirangu Karomo, a medical officer currently working at ACK Mt. Kenya hospital in Kerugoya, produced the post mortem report as an exhibit. On observing the external part of the body of the deceased, there was a laceration or cut above the left orbit [showing the top of the left eyebrow] about 4 cm long stitched with two nylon sutures, a large depression on the left forehead with gross swelling of the scalp that is the skin covering the skull and blood noted on the upper limbs. In the internal appearance of the body, there was a massive subscapular hematoma that is bleeding under the skin of the skull, a fractured frontal left parietal temporal bones with the point of impact noted there and an epidural hematoma that is bleeding on the surface of the brain. He formed the opinion that the cause of death was cardiopulmonary arrest, the heart and lungs stopped secondary to severe head injury inflicted by blunt force trauma.
16. The witness was not cross examined.
17. PW7 Fredrick Kareithi from the Safaricom Security Department Liaison office and performing data extraction and analysis, produced the call data for IMEI 358264078882570 and the certificate as exhibits. He testified that, “On 30<sup>th</sup> July 2018, we received a request letter from DCI Kirinyaga East Ref No CID/SEC/4/4/6 Vol 6112 dated 20<sup>th</sup> July 2018 [referring to MFI-3] they requested for call records for MSISDN which were four in number but the one in question was 0724011740. They alleged that they were investigating a murder case and requested the following; 1]. The IMEI paired to that number and its MSISDN history 2]. Incoming and outgoing call data as at 20<sup>th</sup> June 2018 to 20<sup>th</sup> July 2018 and lastly, they requested for subscriber details and current location. The letter was duly signed by Ebby Mutari DCIO Kirinyaga East. On this letter, I would like to clarify what is IMEI. In full it is International Mobile Equipment Identification. It usually has fifteen digits, every handset has its own unique serial number which is globally identified. I have also mentioned MSISDN in full. It is Mobile Subscriber Integrated Digital Network, it is also a unique number which cannot be shared or we cannot have such two numbers at a time. I have also mentioned about location. This is found by BTS. We have Base Trans receiver stations commonly referred to as boosters. This usually helps in transmission of calls. I extracted the call data for MSISDN for 0724011740. I extracted from the period 20<sup>th</sup> June 2018 to 19<sup>th</sup> July 2018. The phone was active until 5<sup>th</sup> July 2018 as from 5<sup>th</sup> July 2018 to 19<sup>th</sup> July 2018. All the phones were directed to voicemail. The same MSISDN was registered under Pius Kamau ID Number 6203858. I also supplied the investigating officer with the same. On the location, the last call which was made on the 5<sup>th</sup> July 2018, the phone was transmitted by BTS Kianyaga the location is Kianyaga. I wish to produce the call data as an exhibit in this case [call data report produced as P.Exh.4 was called by MSISDN 0701 780 038. We also received another request from the DCI Kirinyaga East which reached



us on the 7<sup>th</sup> September 2018 the reference is CID/SEC/4/4/6 VOL 6115 dated 8<sup>th</sup> August 2018. It was a request for three IMEIs but the one in question, 358264078882570 they were also investigating a murder case. They were requesting for the MSISDN currently paired to that IMEI. Secondly, they requested for outgoing and incoming call data as from 4<sup>th</sup> July 2018 to 8<sup>th</sup> August 2018. Lastly, they requested for registered details of the MSISDN paired to that IMEI. I extracted the same. I extracted the call data for the IMEI 358264078882570 for a period between 4<sup>th</sup> July 2018 to 17<sup>th</sup> August 2018. As from 4<sup>th</sup> July 2018 to 5<sup>th</sup> July 2018, the IMEI was being used by 0724 011 740, the same was registered under Pius Kamau, ID No 6203858. The phone started being used again on 11<sup>th</sup> July 2018 by MSISDN 0704 531 711. The same was registered under Michael Kiama ID No 24408001. The phone was being used by the same MSISDN until 17<sup>th</sup> August 2018. On the 17<sup>th</sup> August 2018 the phone was being used at Karie. I made a certificate in respect an under Section 65[8] as read with part 7 and section 106 of the *Evidence Act*. I have stated that the documents attached are true computer print outs which related to the IMEI 358264078882570 and 0724 011740. [Reads out the entire certificate]. [Referred to P. Exh 4 - call made on the 5<sup>th</sup> July] the call was made at 6:13 am. It was made to 0701780038. This request was for MSISDN 0724011740 that was being use by the deceased is this phone that called that number.”

18. The witness was not cross examined.
19. PW8 Simon Mugo Ngari testified that, “I live in Koroma in Ngaru. I am a farmer. I know the reason I am in court. What I know is where Kinyua found me. He asked me for work I told him I can get him a small job where I was working I went and introduced him to another young man we were working with. I told him he will give him work. I took him to Michael Nguo Kiama. I stayed with him for three days. On the 3<sup>rd</sup> day he came with a phone. He spent the night at Michael’s. He is the one who had rented a house to me. Kinyua was my friend, we had met in jail, he had been arrested for having bhang. On the 3<sup>rd</sup> day he came with a phone. I asked him whose it was. He said it is his. In the morning the phone had no charge. He showed everyone in the plot and Michael asked him to sell him that phone. He said he can sell it to him for Kshs 3,000. When they did the transaction, I was not there I had gone home which was after three weeks. After that when the work was done he moved away. On the day he was arrested after about two weeks, the first person who was called Chege to check if the phone was working was arrested first. He was asked who the number that called him belonged to he said it was Michael then Michael was arrested. When he was arrested he really looked for me. I had gone to town at around 6:30 pm that is when I heard myself called behind the house where miraa is sold. I went to see who was calling me. I found the police officer called Wangila is the one who was calling me and the person who had been sold to the phone called Michael. We came with him we were put in the cells. Then Kinyua was looked for and found. We were released then told to come to court. I was released here me and Michael when we came to court. I was arrested together with Michael he is not here in court. The person who came looking for work the one who had the phone is called Kinyua. He is that one on that side [pointing out the 1<sup>st</sup> accused] Yes, we meet in jail in 2014. The day he came looking for work was not the first time I saw him. We were together in 2014. I saw him again in 2016.”
20. On cross examination, he stated that, “Yes, I am the one who took you to Michael. The phone I saw it when you had it, today I have not seen the phone. If it is shown to me I can identify it. It is Michael who was brought to court with it. Yes, I know the phone.”
21. On re-examination, he stated that, “[Shown the phone MFI-1] Yes that is the phone I am talking about.”
22. PW9 PC Benjamin Wangila a DCI police officer based at Kasarani Nairobi County, testified that, “Formerly I was attached to DCI Kirinyaga East office. On the 5<sup>th</sup> July 2018, we received a report to the station vide OB 33/5/7/2018 made by Dorcas Karimi about a murder incident that had occurred on



the night of 4<sup>th</sup> July 2018 within Timba village on the outskirts of Kianyaga town. It was reported that one Pius Kamau had been assaulted and brutally injured by unknown people. He was reported to have been rushed to Kianyaga hospital by his wife and neighbours where they were referred to Kerugoya hospital but he succumbed to his injuries on the morning of the 5<sup>th</sup>. After receiving the first report, I accompanied the then Deputy DCIO Chief Inspector Walter Asiyu and our police driver Aman Mohammed to that Timba village and we were shown where he was inside a trench that was near the road and opposite his home. In that trench we could see some metallic pieces, there was also blood spots but which appeared soaked in rain water. We entered the home of the deceased and interrogated his wife Dorcas Karimi and some workers in that home they used to work for his home bakery. The wife showed us some clothes which she told us the deceased was wearing when he was attacked. They removed the clothes and kept them before taking him to hospital. The clothes are here with an umbrella which was also soaked in blood and damaged. This is a cap soaked in mud [produced as P. Exh 8] this is a handkerchief soaked in blood [produced as P. Exh 9]. This is a checked shirt blood stained [produced as P. Exh. 10] this is a checked trouser torn soaked in blood and mud with a brown belt [produced as P. Exh. 11a and b respectively] This is a torn blood stained vest [produced as P. Exh. 12], there was this brown jacket [produced as P. Exh. 13, black umbrella P Exh.14]. In that trench where the deceased was allegedly picked we found these metal parts which we established came from the umbrella that was damaged. We gathered these items and went with them to the station and summoned several witnesses and one of them was the wife to the deceased Dorcas Karimi. We interrogated her and wrote her statement and she alleged that on the fateful night at around 10:40 pm. She had heard some screams for help from outside her gate and she woke up one employee who had slept in her son's house called Joseph Chomba. She woke up that worker and they went outside the gate they lit their mobile phone torches and saw the deceased lying in a trench groaning faintly. That together they cried out for help from neighbours who came to the scene and the assisted her take her husband to Kianyaga hospital for treatment. She told us that at the scene they only found his ID and umbrella but his mobile phone make Techno and wallet were missing. We summoned several other relatives of the deceased from Gatundu and Murang'a where the deceased had visited on that fateful day. We recorded their statements to the effect then on the 20<sup>th</sup> July 2018, we disseminated a requested letter to Safaricom for the call data records for the deceased. The request letter was referenced CID/SEC/4/4/6/VOL VI112 [letter dated 20<sup>th</sup> July 2018 MFI-3 produced as P.Exh.3] the phone number we were requesting for the data of is 0724 011740. We had been informed from the wife of the deceased's statement that it belonged to the deceased. On the 30<sup>th</sup> July 2018 we received a reply to that letter from Safaricom and the letter was referenced WSREF10139876 that data revealed to us the IMEI number for the deceased's handset which was no 358264078882570. The model was Techno W3 and on doing the analysis of the call data we established that the deceased's phone number that I have given was used on that night at 4:27 am and at a few minutes after 6 to contact another phone number 0701780038. At this particular hour when the deceased's phone was being used it had already been stolen from the scene so we took interest in the number contacted and at the same time the deceased was already at Kerugoya hospital fighting for his life [call data MFI-4 produced as P. Exh. 4]. On the 4<sup>th</sup> September 2018 we disseminated another letter referenced CID/SEC/4/4/6/VOL VI/VOL 120 again to Safaricom with the intention of establishing the new use of the mobile phone the then current user of the deceased's handset [letter MFI-5 produced as P. Exh. 5]. On the 7<sup>th</sup> September 2018, I received a reply to the second letter and from the reply we established that the deceased's phone was being used by one Michael Mbuu Kiama of mobile phone number 0704 531711 and his ID number was 24408001. From the same data we also discovered that Michael Mbuu Kiama had started using the phone on the 11<sup>th</sup> July 2018 that was about five days after it was stolen from the deceased. We got this from the call data in the reply of Exh. 5. Yes the call data was produced as P. Exh. 6. It was for IMEI No 358264078882570. The model was Techno W3. The phone is here [produced as P.Exh.1]. Following that revelation, we launched a hunt for Michael Nguu who



we arrested on the 6<sup>th</sup> October 2018 in Karia village, Mwea west Sub County. We found him with the phone which we seized from him which he kept as an exhibit. After interrogation he revealed that he had purchased the phone from a person little known to him but he took us to a man known as Simon Mugo Ngari who is alleged to have linked the two to the business. We arraigned the two before court and held them on an order pending investigations and, on the 9<sup>th</sup> October 2018, we submitted another request letter to Safaricom referenced CID/SEC/4/4/6/B VOL 1/126. We were requesting for the call data records for the phone 0701780038 that is the number that had been contacted using the deceased phone on the morning of the 5<sup>th</sup> July 2018. We received a reply on the 11<sup>th</sup> October 2018 and the records revealed that the number was registered to one Lilian Kangangai who was later on established to be the mother of the 1<sup>st</sup> accused. On the 16<sup>th</sup> October 2018, we launched another operation and managed to arrest the 1<sup>st</sup> accused Evans Kinyua Nyaga within Kianyaga town. We escorted him to Kianyaga police station and interrogated him and during our interrogation he confessed having sold that phone to Michael Nguu Kiama and he confessed to having committed that robbery saying that he and his accomplice Cyrus Munene Mwangi came across the deceased on the night of 4<sup>th</sup> July 2018 while they were traveling on a motorbike owned by the second accused. They were headed to Timba village that they came across the deceased entering his home and attacked him. He states in his confession that it was the 2<sup>nd</sup> accused who attacked the deceased with a metal rod and he confessed that as they left the scene he picked up the phone of the deceased and went with it. On that same date we arrested the 2<sup>nd</sup> accused within Kiandai although on interrogation he denied having robbed the deceased. He also denied having been within Kianyaga that night. In an effort to try and establish the location of the 2<sup>nd</sup> accused on that night we submitted another request to Safaricom referenced CID/SEC/4/4/6/B/VOL 1/27 for the call data record for the number 0748607989 which number we were given by the second accused we believed it to be his registered phone number. We however never received a reply to that request letter from Safaricom. Having exhausted our investigations, we forwarded our file to the ODPP Kerugoya seeking his guidance in the matter he sent us a letter that is in the file. The letter we sent with the duplicate letter was referenced CID/SEC/4/4/6/VOL III/126 dated 23<sup>rd</sup> October 2018 the reply we received is referenced KRG/ADV/6/2020 dated 25<sup>th</sup> October 2018. In this letter the ODPP recommended that we arraign the two accused charging them with the offence of robbery with violence which we complied with and charged the two. The persons we charged are the two sitted in the dock. The deceased person's phone number was 0724011740. The last calls were two one made at 0427 hrs in the morning of the 5<sup>th</sup> July 2018 and the second was made at 6:13 am in the same morning of 5<sup>th</sup> July 2018. Both were made to one contact 0701 780038. The data revealed that the phone was registered to Lilian Kangangi of ID No. 13564989. This is the mother to the 1<sup>st</sup> accused Evans Kinyua Nyaga.”

23. On cross examination, he stated that, “Yes, I followed up to know whether you did what you said you did and you did a confession in front of the OCS Chief Inspector Samanda and you confessed to having stolen the phone from the scene. No, you did not tell me that the 2<sup>nd</sup> accused brought you the phone. You said you and the second accused were headed to Kiandai and the second accused hit the deceased with an iron rod. The confession was recorded by Chief Inspector John Samanda. I was not even in the office. He is the one who recorded the confession voluntarily. I never forced him to say anything. He admitted being on the scene and called his mother with the phone and he picked the phone from the scene. He said the asked the 2<sup>nd</sup> accused later whether he had dropped anything at the scene. He said no. that is how he went with that phone and he confessed to selling the phone to Michael Nguu Kiama. He admitted all that.”
24. DW1 Evans Kinyua Nyaga, the appellant herein testified that, “I live in Gichugu. I am a casual labourer. I want to tell the court that since the month of July 2017 I was in the Kianjiru area. I was looking for



casual work where it would be found. I got a job to go to the quarry with a lorry after that I got another job in Kutus and the place I got a job that is how I got into construction work. That is where I met Cyrus. He told me he needed me that I was good we had met. That he had tried to call me on phone using my earlier line but he could not get me. He told me he wanted me to help him. I asked him what kind of help he wanted. He told me he wanted me to loan him Kshs 1,000. I told him I cannot lend him that money because the money he was asking for is the only money I had. But I felt pity on him because he is someone I know. I told him he has to give me something as security so that he can remember to return my money to me. He told me it is ok he will get it by 10. He left me with a phone as I waited for the construction workers to come. After he gave me the phone he left me waiting for the construction workers but none came that day. I left and went to town. I met with a young man called Simon. I asked him where I can get work. That is when we went to a man called Michel but when we got there it was late. That day Simon left me still sleeping. I woke up and met Michael and I went with him to his place of work. He told me we cannot start working until the boss sent money. He told me we go and see if the French beans they had planted need water. We found them still damp. He proposed dates he wanted me to come and water them. That day it was clear no work could be done and Michael had told me on which date we would water the plants. He asked me to assist him with the phone I had. I told him I was hungry and I need money I asked him for Kshs 1,000. He gave it to me and also assisted me with another phone that I could use in search of work. I told Michael to keep the phone safely because it was not mine. It is only that I had loaned the Kshs 1,000 I would return to him the Kshs 1,000 so that he gives me back the phone. He told me it is ok if I find the money I go for the phone. We were not able to meet after that because work became quite a bit. The day I went home I went to visit my parents even I got home I was arrested but I did not know why. I was taken to the station and I was told what was going on. I told them what had transpired but even after telling them all that I was charged.”

25. On cross examination by the 2<sup>nd</sup> accused, he stated that, “Yes, there is a time I was in Kianjiru. That was in the month of July. I rented a house. I don’t recall the name of the landlord. It is possible for me to forget his name because we had no other interactions. I was paying rent Kshs 700. After I was arrested, I can’t tell where my documents went [asked for a receipt in proof of rent payment]. After I was arrested I sent someone to check on my things they were never found. Yes, I worked in a lorry that was working in the quarry. I was a turn boy. I don’t recall the registration number of the lorry. I was working with I remember the numbers 222. I don’t recall the registration number of the lorry. We used to call the owner Karanja that is the name I know him by. I used to be paid per trip Kshs 400. The driver we used to call him chief that is the name I knew him by. I don’t have evidence I received any payment form Karanja. It is not true that I was in hiding in Kianjiru organizing crime. When I worked in Kutus I was still living in Kianjiru. I met with the 2<sup>nd</sup> accused in Kutus along the bridge as you head to Kirinyaga University. I don’t remember the date. We just came upon each other we had not agreed to meet. Yes, he asked me to loan him Kshs 1,000 no one witnessed it. We were just the two of us. I told him to give me something as security so that he comes back for it as he comes for his property. He went into his phone and left me a handset it is like a Smartphone. I was not selling a phone when I was arrested. The phone I gave to Michael had been left to me by my co-accused. I gave Michael the phone at about 4pm. I don’t recall the date. I cannot confirm whether it is the phone that caused my arrest. Yes, I recall the testimony of the Safaricom officer. Yes, he said the phone was in use the night of the robbery while Pius was still in hospital. There is no time I made a call on it. When my phone got lost, I gave the co-accused the number he can reach me through. My mother is called Lillian. Her phone number I had written it elsewhere. The night I met the co-accused he told me he had been trying to reach me on phone. Yes, I met the 2<sup>nd</sup> accused on the bridge during the day. There is nowhere I was found with property belong to the late Pius. In 2017 that is the time I lived in Kianjiru. When I moved to Kutus from Kianjiru it was 2018. It is not true that I had stolen his gas cylinder. It is not true there is a time bodaboda riders wanted to lynch me for stealing a woofer. It is not true that there is a boundary



dispute between my family and the family of the 2<sup>nd</sup> accused. It is not true I ran off when he came with his cousins to look for his gas cylinder. It is true there is a time I was in Kerugoya remand. I don't recall the date but was around 2016. It is only Symo that I came to know while there. I was there on a charge of having cannabis. He took me to go to a place there was casual work. It is not true I was selling a phone. It is not true that I vowed to take revenge on him after the near lynch. There is no phone I was arrested with. I did not use it. Unless it is the co-accused who called, I don't know if my mother knew Pius. It is not true that I am a robber that I have a network of people we rob and kill people in."

26. On cross examination by the prosecutor, he stated that, "Yes, my mother is Lilian Kangangi. Yes, her phone number is something like 0701 780038. Yes, I know Michael Nguu Kiama. I also know Symo that is the name I know. Symo and I were in Kerugoya GK when I had another case of cannabis. I was not convicted witnesses did not come. I was acquitted. Yes, I had the cannabis. Yes, Symo also had a case where I don't remember what it was about. The cannabis one is the only other case I have unless you count this one. [Referred to a document] The signature on it is mine. Yes, I signed it on 16<sup>th</sup> October 2018 at 12 noon. Yes, that is the time I recorded my witness statement at the police station. No, you were not present when I recorded my statement. The handwriting on it is not mine but the signature is mine. Yes, I was working in a lorry. Yes, I wrote that we went to kibimbini for work on that 4<sup>th</sup> July 2018 then returned at 8 pm. What is written that I walked it is them who wrote. At that time, I lived in Kianjiru. That statement they added things to it. No, it is not true that I boarded a motorcycle the rider was Munene. It is true Munene and I are neighbours. It is not true that it was not the first time he carried me. It is not true that we headed into Kiandai. That statement is altered. Yes, the statement is written that on the way we saw a man about thirty years old. Yes, it is written the Munene complained that the man had blocked him. Yes, it is written that Munene got off the bike and removed a rod and began to assault the man. Yes, it is written that I marched to support it. Yes, it is written that I told Munene we stop beating him and leave but Munene kept beating him. Yes, it is written in the statement that I saw Munene go into the man's pockets and remove things form it then we left. That is what is written in my statement. They wrote in the statement that I saw a phone that had a torch on the ground and picked it. It is written that Munene took me home after that but I did not pay him. Yes, I know Munene it is true he drinks alcohol and is very harsh when drunk. Yes, it is true I later on met Simon who took me to Michael to give us some work. Yes, it is true I was hungry and asked Michel to give me money in exchange for money and he gave me the money and another phone. Yes, it is true I was later arrested on the way to my mother's phone. There is no phone call I made that night. I heard the man Munene beat up died. The phone was a Smartphone. I did not fully confirm it was a Techno. Munene and I have never disagreed. No, I have not framed him. It is true I was with him. It is not true that on the night I was with Munene is the night Pius was beaten and killed. There is no night I was with Munene. I was forced to sign the statement. Yes, the one who recorded the statement was here in court. No, I did not ask him about that. There is nowhere the 2<sup>nd</sup> accused and I worked together to do the act we are charged with. There is a question I asked the investigating officer he did not answer me because he didn't conduct proper investigations. It is not true that I am a notorious criminal as counsel says. No, it is not true that here is a grudge between me and the 2<sup>nd</sup> accused. I have not lied about him. It is true what I have said about him here. The statement was changed. The 2<sup>nd</sup> accused has my mother's number. I had left the number with him. I am the one who gave Michael the phone."
27. In re-examination, he stated that, "What I can say is that what was written they were helping out the 2<sup>nd</sup> accused because he had money. The DCI took him aside and questioned him out of my earshot. I could not hear what they were saying."



## Submissions

28. The appellant faulted the prosecution for failing to meet the required standards to prove the offence, and cited Daniel Muthoni M'Arimi v Republic [2013] eKLR and Musa Ahmed v Republic [2016] eKLR. He cited Andrea Obonyo & Others v Republic [1962] EA 542, Abanga alias Onyango v Republic, Criminal Appeal No. 32 of 1990 [UR], Joseph Odhiambo v Republic [Cr. App. No. 4 of 1980], Kinyua v Republic [2002] 1 KLR 256 and Isaak Anjelimo Makana, Eliakim Kindigo Boge and Peter Lepeta Longialan [Cr. App. No. 29 of 2016] in urging that the doctrine of recent possession requires corroborative evidence. He urged that the failure to produce an inventory undermined the evidence that the phone recovered from PW1 belonged to the complainant, and cited Samuel Mwangi Macharia and Another v Republic [2015] eKLR, Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] eKLR, Langat v Republic [Criminal Appeal E015 of 2023] [2024] KEHC 4406 [KLR] and Suleiman Juma alias Tom v Republic [2001] KEHC 825 [KLR]. He urged that the doctrine of recent possession was misapplied, as the stolen phone was neither adequately identified nor proven to belong to the complainant. He faulted the trial court for failing to grant him the full benefit of mitigation, thereby violating his rights under Article 50 of *the Constitution*, and cited Oprodi Peter Omukanga v Republic [Criminal Appeal 260 of 2019] [2023] KECA 430 [KLR], Hinga v Republic [Criminal Appeal E047 of 2023] [2025] KEHC 16703 [KLR] [17 January 2025] and Warui v Republic [Criminal Revision E172 of 2024] [2024] KEHC 12385 [KLR] [14 October 2024].
29. The respondent urged that it had proved beyond reasonable doubt all the elements of the offence as set out in Oluoch v R [1985] eKLR and Dima Denge Dima v Republic [2013] eKLR. It urged the court to dismiss the appeal and uphold the sentence in view of the fatal, intentional and unlawful injuries inflicted on the deceased, and cited Republic v Mwangi; Initiative for Strategic Litigation in Africa [ISLA] & 3 others [Amicus Curie] Petition E018 of 2023] [2024] KESC 34 [KLR] [12 July 2024] [Judgment].

## Analysis and Determination

30. From the grounds of appeal as framed, the issues for determination are whether the evidence led by the prosecution witnesses was devoid of any contradictions to prove the offence beyond reasonable doubt, whether the appellant's defence was considered and whether the sentence was unconstitutional.

## Proof of the offence

31. The elements of robbery with violence, which the prosecution needed to prove beyond reasonable doubt are stipulated under section 296 [2] of the Penal Code as follows:

“[2] If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

32. PW8 introduced the appellant to PW1 for some farm work. It was PW1's testimony that, “The same week Evans came with a phone a Techno. It was yellow in color; it's like khaki colour, a Techno. He told me that he did not have food or somewhere to sleep. He wanted to sell the phone. We exchanged phones mine with his and then I add him some money. So, we did the exchange. He gave me his phone the Techno, I gave him mine and EMES phone and I added him some money Kshs 1,000. After that



we did not meet again.” He subsequently learnt that the phone had been stolen following the arrest of the appellant.

33. On the material day, PW2 anxiously waited for her husband the deceased, to arrive home from Thika, to no avail. She last spoke to him when he was at PW5’s residence in Makuyu, where PW5 confirmed that they parted ways with the deceased and he began his journey back. As she prepared to call the deceased to enquire about his whereabouts, she was startled by screams on the road, and together with worker, PW3 went investigate. She stated that, “I decided to use light from my torch I saw my husband lying on the road blood everywhere I recognized him from the clothes he was wearing in the morning. He had blood all over his face so I thought he must have been injured on the head. Later, I do not recall the month I was called to the station and I was told there were some people who had been arrested with my husband’s phone. His phone was a Techno. It is not quite black it looks like that laptop behind [pointing at the courts laptop goldish in color]. [Referred to MFI-1 breaks down again] This is my husband’s phone.”
34. PW4, a nephew of the deceased, took the deceased to the hospital in his vehicle. He stated that, “We picked him from the trench where he was lying and put him in the car. He was unconscious. He was just bleeding from the ears and the nose.”
35. PW5, a cousin to the deceased, spoke to him at 10 p.m when the deceased confirmed that he had arrived safely at Kianyaga.
36. The doctor noted that the body of the deceased had a laceration or cut above the left orbit [showing the top of the left eyebrow] about 4 cm long, stitched with two nylon sutures, a large depression on the left forehead with gross swelling of the scalp that is the skin covering the skull and blood noted on the upper limbs. In the internal appearance of the body, there was a massive subscapular hematoma that is bleeding under the skin of the skull, a fractured frontal left parietal temporal bones with the point of impact noted there and an epidural hematoma that is bleeding on the surface of the brain. He formed the opinion that the cause of death was cardiopulmonary arrest, the heart and lungs stopped secondary to severe head injury inflicted by blunt force trauma.
37. PW7, from the Safaricom Security Department Liaison office, explained that MSISDN refers to the Mobile Subscriber Integrated Digital Network, a unique number which cannot be shared, while IMEI denotes International Mobile Equipment Identification, a 15-digit number uniquely assigned to each handset and globally recognized. He testified that, “I extracted the call data for MSISDN for 0724011740. I extracted from the period 20<sup>th</sup> June 2018 to 19<sup>th</sup> July 2018. The phone was active until 5<sup>th</sup> July 2018 as from 5<sup>th</sup> July 2018 to 19<sup>th</sup> July 2018. The same MSISDN was registered under Pius Kamau ID Number 6203858. On the location, the last call which was made on the 5<sup>th</sup> July 2018, the phone was transmitted by BTS Kianyaga the location is Kianyaga. I extracted the call data for the IMEI 3582264078882570 for a period between 4<sup>th</sup> July 2018 to 17<sup>th</sup> August 2018. As from 4<sup>th</sup> July 2018 to 5<sup>th</sup> July 2018, the IMEI was being used by 0724 011 740, the same was registered under Pius Kamau, ID No 6203858. The phone started being used again on 11<sup>th</sup> July 2018 by MSISDN 0704531711. The same was registered under Michael Kiama ID No 24408001. The phone was being used by the same MSISDN until 17<sup>th</sup> August 2018. On the 17<sup>th</sup> August 2018 the phone was being used at Karie. This request was for MSISDN 0724011740, that was being used by the deceased is this phone that called that number.”
38. PW9, accompanied by the then Deputy DCIO Chief Inspector Walter Asiyo and police driver Aman Mohammed, visited the scene and were shown the trench opposite the home of the deceased, where the body was found. At the scene, they saw some metallic pieces, blood spots diluted by rainwater and metal parts of a damaged umbrella. Inside the house of the deceased, they recovered a black blood



stained umbrella, a mud stained cap, a blood stained handkerchief, a checked shirt and torn trousers both stained with blood and mud, a brown belt, a torn blood stained vest and a brown jacket.

39. PW2 informed them that the Techno mobile phone of the deceased and his wallet were missing. Investigations revealed that the deceased's handset, a Techno W3 with IMEI 358264078882570, and his phone number 0724011740, was used on that night at 4:27 am and shortly after 6.00 a.m to contact phone number 0701780038, belonging to Lilian Kangangi, the appellant's mother. Subsequent inquiries revealed that PW1 of mobile phone number 0704 531711 used the handset on 11/7/2018, and on interrogation, PW1 disclosed that he had purchased the phone from the appellant. Upon arrest, the appellant admitted selling the phone to PW1 and confessed to the robbery, naming Cyrus Munene Mwangi, the 2<sup>nd</sup> accused, as his accomplice, who was subsequently arrested.
40. In his sworn defence, the appellant contended that the phone was given to him by the 2<sup>nd</sup> accused, Cryus, as security for a Ksh.1,000 loan. He later met PW8, who took him to PW1 for farm work. It was then that PW1 borrowed the phone and gave him Ksh.1,000 for food. He denied any involvement in the crime, though he confirmed that his mother was named Lilian Kangangi and her phone number was 0701780038. He affirmed on cross examination that, "Yes, it is true I later on met Simon, who took me to Michael to give us some work. Yes, it is true I was hungry and asked Michel to give me money in exchange for money, and he gave me the money and another phone. I am the one who gave Michael the phone."
41. It is this court's finding that the prosecution proved the offence beyond reasonable doubt with corroborative and consistent evidence.

### **Identification of the appellant**

42. This case was purely based on circumstantial evidence and the doctrine of recent possession. It is trite that for an inference of guilt to be drawn from circumstantial evidence as a basis of a conviction, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. [See *R v Kipkering Arap Koskei & Anor* [1949] 16 EACA 135], because mere suspicion, no matter how strong, cannot found a basis for conviction. [See *Sawe v R* [2003] KLR 364].
43. The burden of proving the facts which justify the drawing of the inference of guilt based on circumstantial evidence is always on the prosecution, which must establish its case beyond reasonable doubt. [See *Wambua & 3 Others v R* [2008] KLR 142 [C.A]].
44. In *Isaac Ng'ang'a Kahiga & another v Republic* [2006] KECA 137 [KLR], the Court of Appeal stated that:

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."



45. In *Athuman Salim Athuman v Republic* [2016] KECA 697 [KLR], the Court of Appeal held that;
- “As regards the doctrine of recent possession, we do not think there is any substance in the assertion that it is not applicable if an accused person has been identified. The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver.”
46. The Court of Appeal in *William Oongo Arunda* [Hitherto referred to as *Patrick Oduor Ochieng*] v *Republic* [Criminal Appeal 49 of 2020] [2022] KECA 23 [KLR] [21 January 2022] [Judgment] cited with approval the holding of the Supreme Court of Uganda in *Bogere Moses & Another v Uganda*, Cr. App. No. 1 of 1997 that:
- “It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable, while the latter solely depends on the credibility of the eyewitness.”
47. This Court respectfully considers that the doctrine of recent possession is may be part of the web of circumstantial evidence in which the appellant is entangled, which supports an inference of his involvement in the robbery, in the absence of a satisfactory explanation exonerating him.
48. The appellant was positively identified by PW1 and PW8 at the dock. PW1 satisfactorily explained how he had come into possession of the stolen phone, which was positively identified as the property of the deceased by PW2 and PW8. Conversely, the explanation rendered by the appellant was not satisfactory. The uncontroverted evidence on the identification of the appellant was properly corroborated by the doctrine of recent possession.
49. The court, therefore, infers that the circumstances leading to the recovery of the recently stolen phone belonging to the deceased, right from its use by the appellant to contact his mother on the material night to its eventual tracing to PW1, are incompatible with the appellant’s innocence and incapable of explanation upon any other reasonable hypothesis than that of his guilt. In addition, there are no other co-existing circumstances which would weaken that inference.
50. Possession is defined under Section 4 of the Penal Code to include: “...not only having in one’s own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place [whether belonging to or occupied by oneself or not] for the use or benefit of oneself or of any other person.”
51. The court thus finds that PW1 was in possession of the stolen phone, within the meaning of section 4 of the Penal Code, with the full knowledge and consent of the appellant, and that possession falls within the meaning of section 4 of the Penal Code.

### **Consideration of the appellant’s defence**

52. The appellant’s defence that he had procured the phone from the 2<sup>nd</sup> accused was duly analysed by the trial court when it observed that, “I return now to his defence, to wit that he only had the phone because the 2<sup>nd</sup> accused gave it to him. Looking at it against the evidence adduced by the prosecution, I



find the defence shallow and a sham. Indeed, reading his cross-examination, it is apparent the 1<sup>st</sup> accused cannot take a position as to what the 2<sup>nd</sup> accused did and when!”

53. The court finds that the appellant’s defence was a hollow denial and an attempt to exonerate himself and impute blame to the 2<sup>nd</sup> accused.

### Sentence

54. The sentence prescribed for the offence of robbery with violence under section 296 [2] of the Penal Code is death, which is the sentence that was consequently imposed by the trial court on the appellant.

55. The procedure for challenging the constitutionality of other capital sentences, was laid down in *Muruatetu Directions [Muruatetu II]*, *Muruatetu & another v Republic; Katiba Institute & 4 others [Amicus Curiae]* [Petition 15 & 16 of 2015] [2021] KESC 31 [KLR] [6 July 2021] [Directions], as follows:

“ 11. The ratio decidendi in the decision was summarized as follows:

69. Consequently, we find that section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment”.

We therefore reiterate that, this court’s decision in *Muruatetu*, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.

12. Likewise, our orders set out in the previous paragraphs specifically directed the Attorney General to prepare a detailed professional review “in the context of this judgment....with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the Petitioners herein”, and no other case. We stated fairly clearly too, at paragraph 111 of the Judgment, the extent to which our holding was applicable as follows:

It is prudent for the same court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the Petitioners. For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two Petitioners herein. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the Petitioners in this case.”

13. Further, at paragraph 71 of the Judgment, the court nullified paragraphs 6.4-6.7 of the Judiciary Sentencing Policy Guidelines which were to the effect that courts must impose the death sentence in all capital offences in accordance with the law. In view of our holding in the Judgment in question, those paragraphs were no longer applicable.



14. It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the court.
15. To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 [3], robbery with violence under section 296 [2], and attempted robbery with violence under section 297 [2] of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”
56. As held in *Republic v Manyeso* [Petition E013 of 2024] [2025] KESC 16 [KLR] [11 April 2025] [Judgment], any departure from the decisions of the Supreme Court must be justified by serious consideration of the facts of the case, as follows:
- “61. By express provision of *the Constitution* under article 163 [7], requiring courts below to abide by decisions of the Supreme Court, a constitutional duty is imposed on all those courts. Failure to adhere to precedent set by the apex court and indeed superior courts may disrupt the uniformity, consistency and predictability of decisions. In *Wanjohi v Kariuki & 2 others* [Petition 2A of 2014] [2014] KESC 26 [KLR] Rawal, DCJ in her concurring opinion observed that the principles set by this honourable Court in the course of its constitutional adjudication are principled and well considered. Therefore, an argument to consider a departure from these principles or to distinguish either restrictively or un-restrictively must be weighed against the most serious inclinations of justice and social utility. As such, any departure from the decisions of this court by a lower court must be based on well-reasoned distinction of the facts.”
57. This Court cannot, therefore, set a term of imprisonment to substitute or to be deemed as equivalent to the sentence of death or life imprisonment decreed by the Statute, as held by the *Manyeso* decision at paragraphs 67 and 68 as follows:
- “67. Article 94 of *the Constitution* provides that legislative authority is derived from the people and, at the national level, is vested in and exercised by Parliament, while every court within the constitutional framework has the authority to determine the constitutionality of a statute. Article 165[3] [b] grants the High Court original jurisdiction to determine the question whether a right or fundamental freedom under the Bill of Rights has been denied, infringed, violated or threatened. The Court of Appeal, when acting within its appellate jurisdiction, is empowered to scrutinize and interpret the constitutionality or otherwise of a statute, the issue equally having been canvassed at the first instance before the High Court. The court's role with regard to the



constitutionality of a statute is therefore confined to its interpretation and adjudication.<sup>68</sup> Courts cannot therefore extend their determination to rectifying or amending the statute in question, as this would contravene the doctrine of separation of powers, which delineates the functions of the judiciary, legislature, and executive. Courts must exercise caution when crafting remedies to avoid overstepping their judicial mandate and intruding upon legislative functions by prescribing or enacting amendments. When courts recognize the need for legislative intervention, it is both proper and imperative for them to recommend such measures to the appropriate authorities for adoption.”

58. The Court may also not apply the ratio in Muruatetu I case to other capital offences other than murder in other statutes, as discussed in Republic v Ayako [Petition E002 of 2024] [2025] KESC 20 [KLR] [11 April 2025] [Judgment], with the Supreme Court outlawing such action as follows:

“ [52] In the Muruatetu II Case we reiterated that the rationale in the Muruatetu I Case was only applicable to the mandatory death penalty for the offence of murder under Section 203 as read with 204 of the Penal Code. Further, we disabused the notion that the rationale could be applied as is to other offences with a mandatory or minimum sentence.

[53] In the Republic v Mwangi Case, we explained as follows:

[52] We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu Case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu directions in this instance.”

[54] It is therefore abundantly clear that it was not open to the Court of Appeal to apply the ratio decidendi in Muruatetu I in the instant matter.”

59. Consequently, the Court must find that the sentence of death in this case may not be substituted with any other form of sentence. Needless to state, the appellant is at liberty to file a constitutional challenge on the constitutionality of the death sentence on robbery with violence cases as counselled in Muruatetu II.

## Orders

60. Accordingly, for the reasons set out above, the court finds that the appellant’s appeal has no merit, and it is dismissed. The outcome is to be recorded in Criminal Appeals Nos. E058 and E060 of 2023 also filed by the appellant from the same criminal trial.

Orders accordingly.

**DATED AND DELIVERED THIS 7<sup>TH</sup> DAY OF OCTOBER 2025.**

**EDWARD M. MURIITHI**

**JUDGE**



Appearances:

Appellant in person.

Mr. mamba for the DPP.

