Mburu v Republic (Criminal Appeal E113 of 2021)
[2025] KEHC 15489 (KLR) (Crim) (21 October 2025) (Judgment)

Neutral citation: [2025] KEHC 15489 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E113 OF 2021

MW MUIGAI, J

OCTOBER 21, 2025

BETWEEN

EZRA MUIRURI MBURU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising from the conviction and life sentence imprisonment Criminal Case No. 69 of 2019 at the Chief Magistrates' Court Milimani Judgment by Hon. Z. Abdul –SRM on 14th October 2021)

JUDGMENT

Background

1. The accused person herein Ezra Muiruri Mburu was charged with the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code.

   Particulars of the offence being that on 26/5/2018 at Nairobi City while armed with a dangerous weapon namely a butcher's knife robbed Edwin Mbugua Kamande of Ksh 1,045,200/- and at the time of such robbery wounded the said Edwin Mbugua Kamande. The prosecution called 6 witnesses.

trial court hearing

2. PW1 Edwin Mbugua Kamande testified on 26/5/2018 he was Cash Officer at Tusky's Supermarket Magic Branch and Supervisor of Cashiers and Packers. On the said day he made the 1st collection of Ksh 1,004,000/- by 6 pm and the said amount was placed in the Strong Room. At 6.45pm, He left Back Office and went to the Till he met Cashiers who wanted coins and Brian his Colleague had taken the sales.

3. PW1 collected money from tills and went to the Strong Room to count. He took the stairs and as he removed the keys to open the door, the lift [door]opened which was directly facing the door to the Strong Room. He saw a man carrying a bag who got out a panga and put it on his neck and held the bag that he was carrying and asked him for money and keys.

4. He identified/recognized the man as Ezra a general worker who used to do packing at the same supermarket. The Accused scratched his neck and PW1 struggled with him, he cut him on the left side of the head and PW1 screamed and dropped the bag. The Accused asked him for the keys and threatened to kill him. The Accused person took him to a room and locked it. The Accused person asked for keys to the Strong Room and told PW1 to remove everything he had in his pockets.

5. He took some money and PW1 did not count it. He had a booklet but did not have the keys.PW1 later realized he left the keys with Brian to get change. He was locked in the room and the Accused left.

6. Later, he peeped and saw him coming and PW1 locked from inside the room. He called the Branch Manager Mbuthia and told him that Ezra attacked him and took money and keys. In his mind he thought Ezra was in the Strong Room taking the money.

7. PW1 later left the room, went downstairs to Customer Service and reported the matter to the Assistant Manager Francis, that Ezra attacked him and he was upstairs. Doors were closed Police Officers came and went to the Strong Room and PW1 explained what happened.

8. There were blood stains where PW1 was taken. They all left and PW1 went to Avenue Hospital for treatment. The following day, PW1 went to Kamukunji Police Station and recorded Statement and he was issued with P3 Form. PW1 presented Treatment Notes and P3 Form marked MFI 1 & 2 in Court.

9. PW1 said the following day, he went to work and with the Auditor, Branch Manager & Assistant Branch Manager, they reconciled Accounts and the amount was Ksh 1,045,000/-. PW1 presented Reprint Receipts 80 copies and Reconciled Sales marked MFI 3 & 4 in Court.

10. PW1 confirmed that the Accused was not found within the supermarket on the date of the attack, on the day, lights were on and PW1 was able to see Accused clearly. Customers were still inside and the Staircase & Lift are next to each other on Ground Floor, the Strong Room was on 4th Floor and 5th Floor was the Kitchen where Staff take their meals. PW1 identified Accused Ezra in the dock he stated they had no disagreement. PW1 was suspended for 1 month as the matter was under investigation. He did not know how the Accused person was arrested. He did not give the blood stained clothes to the Police.

11. PW2 Joan Nelima MusundI testified, a Co worker at Tuskys Magic Express as Cashier. On 26/5/2018 while at work at around 8 pm she asked for permission to go to the wash rooms on 4th Floor, her till was on Ground Floor and she took the stairs. On 2nd Floor, she met the Accused going down stairs in a hurry he was running. The Accused was an employee at the same Supermarket as a Packer. She asked him where he was going and he did not answer her. She was able to see him using the electricity light and knew him as a colleague for not less than a year.

12. She saw him enter a vacant room and she did not know where he had disappeared to. PW2 peeped through the window and saw him on a slab on 1st Floor heading to the end of the building and he went round the building and he was carrying a black bag.

13. When she realized he disappeared she went to the washroom and then back to the till. She found doors locked and a colleague told her that the Accused robbed Chief Cashier some money and injured him. She told him that she saw the Accused escape through the window. He informed the Manager. The Accused was on duty on the material day. PW2 identified the Accused in Court.

14. PW3 Francis Kamau Assistant Manager Tuskys Supermarket Magic Express testified on 26/6/2018 at 8 pm PW1reported to him that he met the Accused on 4th Floor and robbed the money he was carrying. The Supermarket had 5 Floors when money is collected from tills it is kept in an office on 4th Floor awaiting collection. He directed security guards to lock up all doors as they did not know where the Accused's whereabouts. PW1 was bleeding from the forehead he called [the] security Manager who called Police. The Police came and went up 4th Floor and found blood stained Floor and photographs were taken. They did not find the Accused as PW2 told him that he had jumped through the window.

15. They called Internal Audit team who upon investigations it was disclosed Ksh 1,045,200/- was stolen as shown by receipts MFI 3. PW3 said the Accused was not assigned any Till as each worked on the Till on a rotational basis. The Accused was at Till 4. He identified him in Court as employee who worked and he assigned him duties. He had worked for 7 months.

16. PW4 Robert Philip Oliech Senior Auditor with Tuskys.On 26/5/2018 at 9pm while at home he was called by Manager Raphael Mutindu and informed him of a robbery that occurred at Tuskys Magic Express. The next day he went to the Branch and investigated the receipts and found funds missing was Ksh 1,045, 200/-. He prepared the Audit Report Exhibit 5, he used the Cash Count Sheet & receipts Exh 3.

17. PW5 PC Benson Kitheka, the Investigation Officer from Kamukunji Police Station testified that on 27/5/2018 he was allocated a case of robbery with violence. He visited the scene, PW1 reported incident of being attacked by the Accused who was an employee and sustained injury on the head inflicted by butcher's knife. There were blood stains on the Floor.

18. The Manager gave him the Accused person's phone number, He called the number and the phone was switched off. He gave PW1 the P3Form and obtained photographs of the scene. The amount stolen was Ksh 1,045,000/-.

19. They tracked the Accused through Safaricom in Machakos and never got another signal. On 11/1/2019 he got information of the Accused person's whereabouts and he liaised with Corporal Abdalla from Nyahururu to Marmanet Police Post and picked the Accused and brought him back to Kamukunji Police Station. He was arraigned in Court. The money was never recovered. He produced the Exhibits.

20. PW6 SGT Peter Ndei from Nairobi Area Scenes of Crime testified that on 7/1/2020 he was presented with photographic material CD at DCI Headquarters from PW5 and was requested to process. He processed 5 photographs and Certificate signed on 8/1/2020 and produced in Court as Exh 6 (a) – (e)

21. DW1 Ezra Muiruri Mburu gave unsworn Statement that on 26/5/2018 being an employee of Tuskys, he reported to work at 11 am in the 2nd shift, he was in the packing section up to 8 pm. The Chief Cashier sent him to help a certain lady customer to carry some items and she was going to Odeon and he escorted her. He came back and went to the Staff entrance and found doors locked and he was surprised as it was not closing time.

22. He could see what was happening there were customers and Supervisors and staff at the customer exit holding some metal. He wanted to explain why he wanted to use the door. When it was opened customers started coming out and 1 hawker a lady grabbed his hand and took him aside and told him, the people inside wanted to teach him a lesson.

23. He was shocked that PW1 said he robbed him yet PW1 sent him to escort a customer. The lady advised him not to go in. He boarded a matatu and went home. He was framed in this case. That night

colleagues called him to share the money others told him not to hide as he would be found. He locked himself inside the house for 1 week as he feared for his life.

24. His friend from Machakos called him to go and work at the site he went but it was not every day , he later went to his rural home. He was arrested on 11/1/2019 and escorted to Marmanet Police Post and thereafter to Kamukunji Police station and arraigned in Court on 15/1/2019.

25. The Accused person stated that the Company advertised positions 1 month earlier he applied and PW1 who also applied and was furious and he went ahead and framed him. Ksh 70,000/- should not be left in the till at any one-time PW1 was to collect it. The Recollection Sheet shows that money was left in the till machines and last collection was at 9.53 pm, no one explained why the money was not collected when required and it meant the suspected robber was still in the Shop 2 hours later.

26. PW1 should have been the suspect and charged. He explained that each door had security guards exit and entry and staff entrance and staff were not allowed to in with bags and the guards were all over the shop None of them testified and the CCTV was not availed .

27. The Trial Court delivered judgment on 14/10/2021 and convicted the Appellant from/on evidence on record. Later upon mitigation he was sentenced to life death penalty which was later committed to life imprisonment.

Petition To Appeal Filed Dated 29/10/2021

28. The appellant being aggrieved by the proceedings, judgment conviction and sentence by Hon. Z. Adul (SRM) appeal against the same on the following grounds. inter alia

    1. THAT the leamed trial magistrate erred in law and fact in convicting the appellant relying on circumstantial and uncorroborated evidence.

    2. That the learned trial magistrate erred in relying on hearsay evidence of prosecution witnesses.

    3. That the learned magistrate erred in law and in fact in failing to consider the appellants submissions, before entering and delivering his judgement.

    4. That the learned magistrate erred in-law and in fact in not finding that the sentence meted out was grounded on an irregular conviction and hence lacked merit and/or legal foundation.

    5. That the learned Magistrate erred in law and in fact in failing to find that here had been gross inconsistency of witness testimonies and which inconsistency ought to have been exercised in favour of the accused.

    6. That the learned Magistrate erred in-law and in fact in convicting the accused on biased testimony which manifestly lacked any Independent witness, leading to an unfair trial.

Appellants Written Submissions

29. Error in Reliance on a Single Identification By

    Recognition under Stressful Conditions.

    PW-1 On Page- 9 Second Paragraph that.

    > " I used the stairs and The evidence pertaining to the unfolding of the attack was testified by as I was getting out my keys to open the door the lift opened which was direct to the door to the strong room. I saw a person carrying a Back and got out a Panga. He put it on my neck and held the bag that I was carrying. He asked me for money and Keus. This person

was Ezra and was a general worker and used to do parking at the same supermarket. I knew him. He scratched my neck and I struggled with him.",

30. When cross-examined in regard to source of lighting

PW-1 deposed that,

> " lights were on and I was able to see the accused clearly."

In Wamunga v. Republic [1989] KLR 424, the Court of Appeal held that "where the only evidence against a defendant is that of identification, that evidence must be watertight to justify conviction." Similarly, in Maitanyi v. Republic [1986] KLR 198, the Court underscored the need to consider the quality of lighting, the duration of observation, and the mental state of the witness during the identification.

Risks of Familiarity and Assumption-Based Identification.

31. PW-1 claimed to recognize the attacker as the appellant, a general worker at the supermarket. (Page -9, 2nd Paragraph) However, courts have warned against the dangers of assumption-based identification, particularly where familiarity exists.

32. In R vs Turnbull [1976] 3 All ER 549, the court provided guidelines for assessing identification evidence, noting that:

> Recognition may be more reliable than identification of a stranger, but mistakes in recognition of close relative and friends are sometimes made."

33. In Republic vs Eria Sebwato [1960] EA 174, it was held that

> " where evidence of identification is given by a single witness, it must be tested with the greatest care."

This principle applies squarely here, as the identification relied on one witness under stressful conditions with no supporting evidence to eliminate reasonable doubt.

34. *The Constitution* is explicit under Article 50(2), which provides that,

> " Every accused person has the right to a fair trial, which includes the right... (b) to be informed of the charge with sufficient detail to answer it."

35. The Court of Appeal in Nairobi, in a similar matter, upheld this principle in Yongo v. R (1983) eKLR, stating:

> " In England, it has been said: An indictment is defective not only when it is bad on the face of it, but also when it does not accord with the evidence before the committing magistrates- either because of inaccuracies or deficiencies in the indictment, or because the indictment charges offenses not disclosed in that evidence or fails to charge an offense which is disclosed therein. For such reasons, it does not accord with the evidence given at the trial."

36. The Court of Appeal in Benard Ombuna V Republic, 2019] eKLR addressed the issue of a defective charge sheet in the following terms:-

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence"

37. Article 50(2)(p) of *the Constitution* emphasizes that, in the event of a conviction, the sentence should reflect the least possible terms. Life imprisonment does not align with this constitutional directive as well as per outlined case law precedents in Republic v. Kizito Mwere (2017) eKLR.

38. In Joseph Ndunda Munyambu vs. Republic (2017) Eklr. This case addressed the issue of the proportionality of sentences in relation to the crime committed. The Court stressed that sentencing should not be excessively harsh and should balance both deterrence and rehabilitation, particularly where the accused is a first-time offender.

Failure to Properly Consider Alibi Evidence

39. When placed on defence it was clearly stated by the appellant that despite being an employee with the management of Tuskys Magic, I reported on duty on the date in question and was deployed at the packing Section and worked until 8.00 P.m. At Page-52, Lines 6-16, 7 ,the appellant revealed evidence that,

> " I was in the parking section and worked upto 8 PM. Chief Cashier who is the complainant sent me to help a customer to carry some items. It was a lady and she was going to Odeon while I escorted her. I went back to work and was at the staff entrance and I knocked .....I went to the said entrance and found doors locked and got surprised because it was not yet closing time."

Respondents Written Submissions.filed On 17/6/2025

40. Issues arising for determination

    a. Whether the ingredients of offence of Robbery with violence were established.

    b. if there is sufficient evidence linking the Appellant to the charge herein?

    c. The Defence of the Appellant.

Whether the Ingredients of the offence of Robbery with violence were established?

41. It was held in the case of Dima Denge & Others vs

    Republic (2013) KLR, The Court of Appeal Criminal Appeal No. 300 of 2007, the prosecution needed only to prove one of the elements. The court held that.

> " The elements of the offence under Section 296 (2) are three in number is sufficient to found an offence of robbery with violence."

    If there was sufficient evidence linking the Appellant to the charge herein?

42. In the case of Patrick Opondo Opollo and others vs Republic. Criminal Appeal No.23 OF 2014, the question of identification and recognition of the attacker by the victim is very crucial. The court must examine the conditions that existed at the time and place of the robbery and their favourableness or otherwise to positive identification or recognition as alleged by the complainant.

43. In Francis Kariuki Njiru And Seven Others Vs Republic, Criminal Appeal No.6 Of 2001, the court of Appeal stated that evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from error. The surrounding circumstances must be considered.

44 PW1's evidence was that he was able to identify the attacker during the incident. He identified the appellant as electricity lights were on and therefore could clearly see him. He further testified that the appellant was someone he had worked with for about a year, PW2 placed the appellant of the scene of crime of the stated that of around 8pm os she was taking the stairs, on reaching the second floor she met the appellant going downstairs in a hurry. Further that she could identify him because the electricity lights were on and he had known the appellant for more than a year. She also testified that the appellant at that time was carrying a black bag which corroborates PW1's testimony.

45. We submit that even though there was single identification, the conditions favouring positive identification were clear and there was no need for corroboration. The same was held in the case of Patrick Njogu Wachira v Republic [2016] KEHC 5734 (KLR) where the court stated;

> " .... the trial court was satisfied with the evidence that the complainant knew the 1st appellant and the conditions in which he was recognised were favourable: my own evaluation of evidence does not lead me to any contrary opinion. There is nothing to suggest that the conditions favouring positive identification were difficult such that there was need for such other evidence to corroborate the complainant's testimony. I cannot find any fault with the learned magistrate's reliance on the complainant's sole evidence on recognition of the appellant as his assailant; the learned magistrate directed himself correctly on the facts."

Defence by the Appellant.

46. The appellant in his Defence claimed that he was framed by PW1 because they had both applied for a similar position.

47. This allegation was brought out during defence hearing and was never posed to the witness when he gave his testimony. We therefore urge you to find the same is a mere denial, an afterthought which does not disprove the prosecution's evidence.

Whether the charge sheet was defective

48. The appellant contends that the charge was defective as the scene of crime was captured as Nairobi city and not the actual building or place. The test of whether a charge is defective or not is substantive and the court should be satisfied that the defect did not lead to a miscarriage of justice. We rely on the Court of Appeal case of Peter Sabem Leitu v Republic (Criminal Appeal 482 of 2007) [2013] KECA 270 (KLR) (Crim) where the court held:

> " The question therefore is did this defect prejudice the Appellant as to occasion any miscarriage of justice or a violation of his fundamental night to a fair trial?. We think not. The charge sheet was clearly read out to the Appellant and he responded. As such he was fully aware that he faced charge of robbery with violence. The particulars in the charge sheet

mode clear reference to the offence of robbery with violence as well as the done the offence is alleged to hove occurred. These particulars were also read out to the Appellant on the date of taking pleg."

Sentence

49. The appellant has invited this court to interfere with the sentence, if it trite law that the Court does not alter a sentence unless the Trial Court has acted upon wrong principles or overlooked some material factors.

50. In the case of Muruatetu & another vs Republic: Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) (2021) KESC 31 (KLR) (6 July 2021) (Directions) the supreme court held that

> " 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, of which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

51. The Court of Appeal in the case of William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) v Republic (Criminal Appeal 49 of 2020) (2022) KECA 23 (KLR) (21 January 2022) applied the decision in Muruatetu & another v Republic (supra) when it held that;

> " As regards sentence, and as already noted, on 6th July 2021 the Supreme Court in Francis Karioko Muruatetu & another vs. Republic: Katiba Institute & 5 others (Amicus Curiae) directed that the judgment of the Court in that case cannot be the basis for stating that all provisions of the law prescribing mandatory or minimum sentences are unlawful. The implication thereof is that upon conviction, courts must pass the mandatory sentences that are prescribed. We are therefore unable to interfere with the sentence meted out by the trial court and upheld by the High Court in this matter."

52. It is our submission that the trial court erred in prescribing a sentence other than the one set out in law which is a death penalty. Section 296(2) 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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

Analysis & Determination

53. The Court considered the Trial Court record, Petition of Appeal and detailed submissions made herein on behalf of the Appellant and the Respondent. This appeal lies on whether the prosecution proved its case against the Appellant, to the required legal standard, and in particular, whether the Prosecution proved all the essential ingredients of the charge of robbery with violence contrary to Section 296 (2) of the Penal Code and the trial court meted out the appropriate sentence.

54. As first appellate court, the court is obligated to re-evaluate the evidence afresh, and make its own conclusions bearing in mind that it did not have the advantage of hearing and observing the demeanor of the witnesses as elaborated in the case of Okeno vs. Republic [1972] E.A.32.

55. It is trite that all criminal offences require proof beyond reasonable doubt. In Peter Wafula Juma & 2 Others v Republic [2014] eKLR; Court referred toViscount Sankey L.C in the case of H.L. (E)* WOOLMINGTON V DPP [1935] A.C 462 pp 481 on legal burden of proof in criminal matters, See also Lord Denning in Miller vs. Ministry of Pensions (1947) 2 All ER, 372

56. Daniel Njenga Chege v Republic (Criminal Appeal 98 of 2019)[2025] KECA 1207 (KLR) (4 July 2025) (Judgment) CoA Nku observed;

> 54. The ingredients to the offence of robbery with violence were set out by this court in Johana Ndungu v Republic 1996 eKLR
>
> "In order to appreciate properly as to what acts constitute an offence under section 296(2) of one must consider the subsection in conjunction with section 295 of the PC. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute the offence under the subsection:
>
> 1. If the offender is armed with any dangerous or offensive weapon or instrument; or
> 2. If he is in company with one or more other person or persons; or
> 3. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."

57. This Court considered the evidence on Trial Court record and considers evidence of PW1 & PW2 as direct evidence implicating the Accused person/Appellant on the events unfolding on 26/5/2018 at Tuskys Supermarket. PW1 was at the stairs lift near the Strong Room when a man carrying a bag he identified as accused emerged and accosted him with a panga on his neck and they struggled and he was held in the strong room and locked in and left with the bag. PW2 on her way to her house met the accused running down floor with a bag and escaped through the window.

Identification

58. In R. vs. Turnbull & Others [1973] 3 All ER 549 it was held that:

> "...The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the accused under observation? At what distance: In what light: Was the observation impeded in any way? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

59. The facts on record as per evidence of PW1 are that on 226/5/2018 PW1 saw a man carrying a bag who got out a panga and put it on his neck and held the bag that he was carrying and asked him for

money and keys. He identified/recognized the man as Ezra a general worker who used to do packing at the same supermarket.

60. The Accused placed the panga on his neck scratched his neck and PW1 struggled with him, the Accused cut him on the left side of the head and PW1 screamed and dropped the bag. The Accused asked him for the keys and threatened to kill him. The Accused person took him to a room and locked it. The Accused person asked for keys to the Strong Room and told PW1 to remove everything he had in his pockets. He took some money.

61. The lights were on and PW1 was able to see Accused clearly there was no obstacle. From these detailed facts, the Accused and PW1 were in close proximity, for the Accused to talk to PW1, place the panga/knife on PW1, demand keys and money from PW1 and ransack PW1 pockets for money and finally lock him in a room. There was sufficient activity and engagement to allow PW1 recognize Accused as Ezra who worked in Tuskys Supermarket as a Packer. The light was sufficient to identify the Accused by recognition in spite of stressful condition of fear of violence visited upon him by Accused person as allegedly difference. If there was doubt on identification it ought to have been tested through cross examination of PW1 by Accused person or Advocate.

62. The Trial Court Record confirms ample cross -examination but the cross examination did not controvert the Evidence of PW1 or cast reasonable doubt. PW1 confirmed the Accused person worked with him for 1 year which was sufficient to identify one's features/physique and/or voice and more so they engaged in a struggle all the while lights were on.

63. Secondly, PW1's evidence that the Accused accosted him that night is corroborated by PW2 who was headed to Wash rooms same day/night at 8pm and whilst going up the stairs on reaching 2nd Floor saw Ezra, the Accused and Co employee running down the stairs with a bag and left through the window. Later PW2 learnt that a robbery occurred and reported she saw the Accused person. The evidence of PW1 & PW2 placed the Appellant at the scene of crime on 26/5/2018 near the Strong Room.

64. The ingredients of robbery with violence are informed by the fact of the Accused positive identification by recognition by PW1 as the person who accosted him with a weapon; panga/knife on his neck and injured him as confirmed by treatment Notes P3Form and Photographs of bloodstained floor. In the process of the altercation, the accused stole the money PW1 had on him and in the bag

65. The money missing for the day was confirmed by Auditor PW4 from receipts and Audit Report produced as exhibit in Court. The evidence of PW1 & PW2 corroborated each other as to placing the Accused at the scene of the fateful day/night.

66. Lack of providing CCTV Footage or the evidence by security guards testifying raised by Accused in his Defense does not cast doubt on prosecution case because the Accused person admittedly an employee of the same establishment Tuskys Supermarket naturally knew where CCTV was placed and could possibly avoid areas the CCTV covered, he may have known whether at the time it was operational or not. With regard to Security guards, he knew as an employee how to pass without raising suspicion, or more so areas to avoid contact or surveillance.

67. Thirdly, it is not for the Defense to instruct on the evidence to be adduced and witnesses to be called by Prosecution. The Defence may call Defence witnesses and/or produce Defence exhibits. Section 143 of the *Evidence Act* provides;

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

68. In Samuel Kagiri Njuguna v Republic [2016] eKLR the court held that all that the prosecution is required to do is to call such a number of witnesses as it thinks is sufficient to prove its case. If crucial witnesses are left out the Court will consider the evidence on record and impact of lack of evidence of the crucial witness.

69. These facts direct evidence of PW1 & PW2 among others were not controverted by the Accused/ Appellant in his Defense of Unsworn statement.The facts of the case are straightforward as there was overwhelming direct evidence of PW1 & PW2 leading to Appellant's conviction.

Alibi Evidence

70. The Appellant raised the issue on appeal that the Trial Court failed to properly consider the alibi defense. The Appellant provided a detailed alibi that placed him elsewhere at the time of alleged offense. He was at the Parking Section of the Supermarket until 8 pm and assisted a customer to carry goods to Odeon before the incident. The Appellant deposed that the Trial Court failed to give this evidence due consideration. The Trial Court record confirms the Appellant's defense was outlined in the Trial Court judgment Pg4 where the Trial court stated the accused's submissions were duly considered.

> 212. Evidence in reply
>
> If the accused person adduces evidence in his defence introducing a new matter which the prosecutor could not by the exercise of reasonable diligence have foreseen, the court may allow the prosecutor to adduce evidence in reply to rebut that matter.

71. The option to be taken by Prosecution to verify the alibi or not is not within the purview of the Trial Court, the Trial Court is an umpire and cannot take sides nor instruct either the Prosecution or Defence on how to conduct their case. The Court record does not reflect an application by the Prosecution seeking more time to confirm or dispute the alibi. The Trial Court considered the evidence on record as a whole and legal reasoning and finding.

72. The Court of Appeal in Charles Anjare Mwamusi vs R CRA No. 226 of 2002 stated that:

> " An alibi raises a specific defense and an accused person who puts forward an alibi as an answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.

73. Kimotho Kiarie V. Republic (1984) KLR 739 at page 745 paragraph 25."

In Kimotho Kiarie vs Republic [1984] eKLR, the Court mandates;

> " That an alibi raises a specific defense and an accused person who puts forward an alibi as answer to the charge preferred against him does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the Court a doubt that is not unreasonable."

74. In the case of Amber May -Vs-Republic [1979]eKLR, the Court of Appeal held at page 3 that:

> " It is material in the case. It is right, however, that the jury should be told that a statement not sworn to and that tested by cross-examination has less cogency and weight than sworn evidence. From all this we are satisfied that an unsworn statement is not evidence as that

expression is generally understood. It has no probative value, but should be taken into consideration in relation to the whole of the evidence."

75. The Appellant provided unsworn testimony in defense not tested through cross examination on its veracity and the credibility of the Accused person/witness. That automatically lowers its probative value and more so does not controvert the Prosecution case. An Alibi defense ought to be raised at the earliest opportunity and/or Prosecution upon Accused declaring alibi defense apply to the Trial Court for time to verify the same. However, in the instant case the Prosecution would not cross examine the Accused person as he put forward unsworn statement/defense. The defense did not cast doubt on the Prosecution case.

Defective Charge(s) Information

76. The issue of defective charge sheet should be determined as a preliminary point during trial. The Prosecution must give notice of the offence the accused person is charged and the particulars of the offence informing the charge offence presented by law. The offence must be provided in law and the charges must not be ambiguous so as to prejudice or embarrass the accused or contrary to be fair hearing. See the case of B N D vs Republic [2017] eKLR J. Ngugi J (as he then was now JA),

77. Section 134 of the Criminal Procedure Code provides that every charge or information shall contain and shall be sufficient if it contains a statement of the specific offence or offences the accused is charged with together with such particulars as may be necessary for giving reasonable information as to the nature of the offence.

78. In Isaac Nyoro Kimita & another vs. R [2014] eKLR echoed those sentiments as follows:

> " In this case we are dealing with an alleged defective charge on account of how it was framed. We, therefore, need to decide whether or not the allegation in the particulars of the charge that the appellants "jointly" defiled the complainant, made the charge fatally defective. To determine this issue what, in our view, is of crucial importance is whether or not the use of that term in any way prejudiced the appellants.

79. Section 382 CPC provides;

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before ordering the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings

80. In Benard Ombuna v Republic [2019] eKLR on defective charge, the Trial Court held;

> To me, the variance of the particulars and the charge sheet is a technicality which can be cured under Article 159(d) of *the Constitution*. I therefore find that the offence of attempted defilement as defined in Section 9(1) (2) of the *Sexual Offences Act* has thus been committed.

The High Court held; by Thuranira LJ and later by Nyamweya LJ. HCCR No. 199 of 2013 (18/3/2015)

> I therefore agree with the submissions by the Appellant that the charge in the main count is defective. The charge is that of attempted defilement while the particulars of the offence reflect actual defilement..... I substitute the conviction for attempted defilement to that of indecent act with a child.

The Court of Appeal on Defective charge held;CR Appeal No. 27 of 2018

> 15. In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.....

81. In the instant case, The Appellant contended that the charge was defective as the scene of crime [Tuskys Supermarket Magic Express Branch Ronald Ngala Street] was captured as Nairobi City and not actual building or place contrary to Article 50 (2) (b) of *the Constitution* that mandates every person to be informed of the charge with sufficient detail to answer it.

82. The Trial Court record confirms all witnesses made reference to Tuskys Supermarket and the Accused person/Appellant also made reference to Tuskys Supermarket. Infact both Prosecution and Defense seemed in agreement that it was Tuskys supermarket where the employees/witnesses and Accused person/appellant all worked. There was no prejudice occasioned or confusion nor controversy as to place/building where crime occurred to prevent/ prejudice the Appellant prepare the Defense.

If it was a challenge or obstacle to Appellant's Fair Hearing under Article 50 2(b) Constitution of Kenya, he ought not to have pleaded to the charge and sought through a Preliminary objection, or amendment of the charge/Information in compliance with Section 134 CPC. Although it was not raised during trial this court finds it was to the Appellant the statement of offence did not cause any prejudice it is not found to succeed as a legal ground of appeal. The particulars of offence were sufficient to enable the Appellant understand the charges and prepare for defence.

Sentence

83. The Supreme Court in emerging jurisprudence and binding precedent considered the mandatory death penalty sentence in Francis Karioko Muruatetu & another v Republic [2017] eKLR (Muruatetu 1) held in part;

> a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of *the Constitution*.

84. In Julius Manyeso Kitsao vs Republic Malindi Criminal Appeal 12 of 2021 cited in Herman Mwero Mwavughanga vs Republic Criminal Appeal 111 of 2022 C.A. Mombasa that considered the issue

of indeterminate sentences -life imprisonment and found comparative jurisprudence compelling and held;

> We are equally guided by the holding of the Supreme court of Kenya and in the instant appeal, we are of the view that having found the sentence of life imprisonment unconstitutional, we have discretion to interfere with the sentence.[reduced to 35 years]

85. In the instant case Article 50(2)(p) of *the Constitution* provides that in the event of a conviction, the sentence should reflect the least possible term. Life imprisonment does not align with this constitutional directive as was considered in Republic v. Kizito Mwere (2017) eKLR. & Joseph Ndunda Munyambu vs. Republic (2017) Eklr. These were before Muruatetu 2 in 2021 thereafter, William Oongo Arunda /Patrick Oduor Ochieng vs Republic 2022 eKLR, where Muruatetu 2 directions were that Muruatetu 1 did not outlaw mandatory sentences but ensured mitigation is considered and circumstances of the case to arrive at appropriate sentence whether mandatory sentence or not.

Other than murder cases, the other cases were to proceed from Trial Court then on appeal and /or 2nd appeal in terms of sentencing and mitigation ought to be part of trial proceedings.

86. In light of the above consideration in sentencing mandatory death penalty and mandatory life sentence have been declared unconstitutional where the Trial Court's hands are tied without consideration of the specific circumstances of the case and /or taking into account the elaborate and comprehensive Judiciary Sentencing Policy Guidelines in determining appropriate sentence.

87. High Court Petition 3 of 2018 Stephen Kimanthi Mutunga vs Republic Kisumu Criminal Appeal No.56/2013 KSM CoA William Okungu Kitiny versus Republic.

Michael Kathewa Laichena & Martin Mugambi Karindi vs Republic Petition 19 of 2017 Meru High Court where Hon D Majanja J considered aggravating circumstances and mitigating circumstances of the case and reduced life sentence to 16 years imprisonment.

88. In the instant case, The Trial Court sentenced the Appellant to life imprisonment as only punishment provided for. The mitigation on record is that the appellant is a 1st offender 30 years old at the time of sentencing, remorseful and had a family wife and 2 young children, he was remorseful and sought leniency and had learnt his lesson. The aggravating factors were that he used a weapon, panga /knife, he cut PW1 on the head and caused harm, the money was lost not recovered and he absconded and was arrested 2 years later. These circumstances merited the appropriate sentence possible as the Trial Court stated the life imprisonment was the only sentence.

Disposition

89. The appeal is dismissed on conviction, the Trial court's judgment of 14/10/2021 is upheld.

In line with the binding precedent on death penalty and life imprisonment,

90. This Court sets aside life imprisonment and in place sentences both Appellants to 20 years imprisonment w.e.f 15/1/2019 upto 14/10/2021 [2 years 8 months]when The Trial court sentenced the Accused person /Appellant, the Pre- sentence period in custody to be included in computing the term of sentence as provided under Section 333 (2) CPC.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT IN CRIMINAL DIVISION OF HIGH COURT-MILIMANI ON 21/10/2025.

M.W.MUIGAI

JUDGE