



**Wambui alias Tin & another v Republic (Criminal Appeal E102 & E103 of 2023  
(Consolidated)) [2025] KEHC 16056 (KLR) (7 November 2025) (Interim Judgment)**

Neutral citation: [2025] KEHC 16056 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL E102 & E103 OF 2023 (CONSOLIDATED)  
AK NDUNG'U, J  
NOVEMBER 7, 2025**

**BETWEEN**

**MARTIN WANGUHI WAMBUI ALIAS TIN ..... 1<sup>ST</sup> APPELLANT**

**TIMOTHY MWENDA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Original Conviction and Sentence dated 11/12/2023  
in Nanyuki CM Criminal Case No E497 of 2023– V. Masivo, SRM)*

**INTERIM JUDGMENT**

1. The Appellants, Martin Wanguhi Wambui alias Tin (1<sup>st</sup> accused during trial) herein 1<sup>st</sup> Appellant and Timothy Mwenda (2<sup>nd</sup> accused) herein 2<sup>nd</sup> Appellant were convicted after trial of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars were that on 01/04/2023 at about 20:30hrs at Riverside bridge of Timau township, Buuri west subcounty Meru County jointly with another not before court robbed Godfrey Muthomi mobile phone make Redmi valued at Kshs.23,000/- and cash Kshs.4,500/- all valued at Kshs.27,500/- and at the time of the said robbery threatened to use actual violence on the said Godfrey Muthomi.
2. They were dissatisfied with the conviction and the sentence hence their appeals to this court.

**1<sup>st</sup> Appellant grounds of appeal**

- i. The learned magistrate erred convicting him without considering that the prosecution did not prove the case beyond reasonable doubt.



- ii. That he was not accorded a fair trial as provided under Article 49(h) and 50(2) of *the Constitution* as the complainant had frequently requested to withdraw the case which was rejected by the prosecution.
- iii. The learned magistrate erred by failing to note that the mandatory death sentence meted against him was harsh, exorbitant and unconstitutional.
- iv. The learned magistrate erred convicting him on unverified evidence as there was no receipt of the alleged stolen phone.
- v. The learned magistrate erred convicting him by relying on a single witness evidence.
- vi. The learned magistrate erred by quashing his defence of alibi without cogent reasons thus failing to weigh the defence case against the prosecution's evidence.
- vii. That the learned magistrate erred convicting him and failed to note that the complainant alleged that it happened on 01/04/2023 hence he took a whole week before reporting the matter which shows that he just lost his phone and got an afterthought to blame him.
- viii. The learned magistrate erred by failing to note that he was a first offender and had no previous records.

**Amended grounds of appeal for 2<sup>nd</sup> Appellant**

- i. That the leaned magistrate erred by failing to consider that identity of the attacker was not proved as law requires and identification parade was not conducted.
  - ii. The learned magistrate erred by relying on the evidence of the recent possession of the stolen property without considering that he was not in possession of it.
  - iii. The trial magistrate failed to note that he was not arrested because of the present charge hence his constitutional rights were prejudiced.
  - iv. The learned magistrate erred by failing to consider that the alleged stolen phone was not found with him and no receipt was produced to corroborate.
  - v. The learned magistrate erred convicting him without considering his plausible defence which was not challenged by the prosecution.
3. The appeals were consolidated and canvassed by way of written submissions. to be canvassed by way of written submissions. The gist of the arguments by the Appellants was that identification of the attackers was not proved as required by law since the offence took place at night in difficult circumstances according to the evidence on record. Additionally, PW1 failed to give description of his attackers to the police hence a case of mistaken identity and also failed to report at the earliest time possible as he took 7 days to report. was not positively identified.
4. The 2<sup>nd</sup> Appellant faults the trial court also failed to warn itself on dangers of finding a conviction on inadmissible evidence and evidence of possession of stolen property. That his conviction was based on being in possession of the stolen phone though he was not found with the phone. That he did not know Kevin Mutunga and saw him for the first time in court and it is not true that he was with the 1<sup>st</sup> accused. That PW3, Godfrey Mungathia was the one who was found in possession of the phone and he testified on cross examination that Martin was the seller. The investigating officer also testified that the phone was recovered from PW3 and PW3 named the 1<sup>st</sup> accused as the seller. That he did not steal



- the alleged phone, he was not found in possession and the complainant did not produce the receipt to corroborate his claim. That the evidence against him was that he was on the lookout though he did not know the complainant and the 1<sup>st</sup> accused.
5. He asserted that he was not accorded a fair trial contrary to Article 50(2) of *the Constitution* and section 150 of the Criminal Procedure Code. The trial court also failed to comply with section 169 of the Criminal Procedure Code.
  6. The Respondent's counsel on the other hand submitted that the prosecution proved two elements of the offence of robbery with violence thereby attaining the evidentiary threshold as the complainant testified that he was held on a chokehold by one man while the other man took the money and mobile phone from his pocket and one was on the lookout. As to identification, he submitted that the 1<sup>st</sup> Appellant was identified at the scene as he was complainant's neighbour and he was well known to him. There was also sufficient light so he could clearly see him as he was right in front of him. With respect to 2<sup>nd</sup> Appellant, he submitted that the complainant testified that he was able to identify two attackers being 1<sup>st</sup> and 2<sup>nd</sup> Appellant and he not only identified him at the scene but was able to identify him before court. PW3 also testified that he bought the mobile phone from the 1<sup>st</sup> Appellant who was in company of the 2<sup>nd</sup> Appellant. That though the trial court did not convict on the evidence of identification, the trial court took into consideration the fact that the 2<sup>nd</sup> Appellant was in possession of the phone alongside the 1<sup>st</sup> Appellant and therefore, there was no doubt of his involvement.
  7. On the Appellants' contentions that their defences were not considered, he submitted that the 1<sup>st</sup> Appellant only gave an account of his arrest and steered of from his whereabouts at the time of the offence and only testified on cross examination that he was at home at the alleged time which was uncorroborated. The 2<sup>nd</sup> Appellant also testified on the events of the day when he was arrested. With respect to sentence, he submitted that the trial court considered both mitigating and aggravating factors hence the sentence of death was proper as the aggravating factors outweighed the mitigating factors.
  8. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
  9. I have therefore considered the submissions and the authorities relied by the parties. I have also read through the record of the trial court in order to evaluate all the evidence placed there and arrive at my own conclusions regarding the same. I have borne in mind however, that I neither saw nor heard the witnesses myself, and I have given due allowance for that fact.
  10. The case before the trial court was that on 01/04/2023 after work at 8:00pm and while crossing the bridge on his way home, PW1 met three people who approached him. One grabbed him from the back and was unable to identify him. He strangled him while the 2<sup>nd</sup> attacker took the phone from his pocket while the 3<sup>rd</sup> attacker was on the lookout. He recognised the 2<sup>nd</sup> attacker, Martin (1<sup>st</sup> Appellant) who took his phone Redmi 10c and Kshs.4,500/-. Martin was his neighbour. They threw him on the ground. He testified that he was able to visually identify the third attacker. He told his mother and brother about the ordeal and asked his brother if he had seen Martin. He asked around about a phone on sale and his friend Kevin Mutunga reported to him that Martin attempted to sell a Redmi 10c phone to him. He reported on 07/04/2023 and he was latter called by police and he was told the phone was recovered from Nganga who was a buyer. Nganga knew the seller. He went to the station and identified the phone. He identified the 1<sup>st</sup> Appellant. He identified the 2<sup>nd</sup> Appellant as the guy who was on the lookout.



11. On cross examination, he testified that there was security light at the bridge and he was able to identify the 1<sup>st</sup> Appellant who took his phone. The attackers were unarmed. That Nganga recorded that Martin offered to sell the phone to him. That the 1<sup>st</sup> Appellant had pleaded for the matter to be withdrawn since they are neighbours. He saw 2<sup>nd</sup> Appellant who was on the lookout.
12. PW2 testified that on 02/04/2023 while at work, he met his friend Martin who offered to sell a Redmi phone since he was aware that he had lost his phone. He declined his offer since he had replaced the phone. Martin did not show him the phone he was selling. He promised to look for a buyer for him. Godfrey informed him that he was looking for a phone on sale. He testified that the 1<sup>st</sup> Appellant was well mannered. He did not see the phone that 1<sup>st</sup> Appellant intended to sell to him.
13. PW3, Godfrey Mungathia testified that on 06/04/2023 while at his shop, two youths sold to him a black Redmi phone. They negotiated on price and agreed on a purchase price of Kshs.2500/-. The 1<sup>st</sup> Appellant was the seller and his accomplice was the witness. They claimed financial problem and that is why they were selling. He kept the phone at his shop and he was later visited by the police over the said phone. He identified the 1<sup>st</sup> Appellant who was familiar to him hence the trust. His witness or the person who had accompanied him was the 2<sup>nd</sup> Appellant. He identified the phone.
14. On cross examination, he testified that he was familiar with both the Appellants as they were from his town. Even though it was not usual for them to sell to him items, he did not suspect them. That he was found in possession of the said phone though he was not aware that it was stolen.
15. PW4, the investigating officer testified that on 07/04/2023, the complainant reported that robbers took away his Redmi 10 c phone and Kshs.4,500/-. The scene of the robbery was the Timau River Bridge which was common for mugging and so there was a huge street light due to insecurity. He narrated that he only recognised one of the attackers, Martin. He testified that Martin was well known to him and so PW4 arrested him on 08/04/2023 within Timau market. Martin denied committing the offence but he charged him as he was the only person who was identified. On 10/04/2023 with PW1 and another witness, they recovered the phone from PW3 who named 1<sup>st</sup> Appellant as the seller. PW3 also mentioned the 2<sup>nd</sup> Appellant who was in company of the 1<sup>st</sup> Appellant during the sale. PW1 positively identified his phone. He identified the 1<sup>st</sup> Appellant. He rearrested the 2<sup>nd</sup> Appellant who was in custody for another offence.
16. He testified on cross examination that no weapon was used.
17. The 1<sup>st</sup> Appellant in his sworn defence testified that on 01/04/2023, he went to work as usual and returned home at 2:00pm due to bad weather. That he was arrested on 07/04/2023 while at his workplace. He denied committing the offence.
18. On cross examination, he testified that on 01/04/2023 at 8:30pm, he was at home alone. That there were neighbours who could confirm this though none was his witness. That the complainant was his neighbour so he was familiar to him. That he has never disagreed with him, had no business rivalry with him and he had no reason to give false evidence against him.
19. The 2<sup>nd</sup> Appellant testified that he could not recall the happenings of 01/04/2023. That he was arrested on 07/04/2023 at a bar.
20. On cross examination, he testified that on 01/04/2023, he was at work and at 8:30pm, he was at his home alone. That he did not bring the neighbours to confirm this. The complainant was not familiar to him and the complainant had no reason to falsify evidence against him.
21. That was the totality of the evidence before the trial court.



22. Section 296(2) of the Penal Code provides as follows;

“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.”

23. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of *Oluoch v Republic* [1985] KLR where it was held:

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

- a. The offender is armed with any dangerous and offensive weapon or instrument; or
- b. The offender is in company with one or more person or persons; or
- c. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person  
.....”

24. The use of the word or in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the Penal Code. The prosecution duty was therefore to establish any of the above ingredients and to show the court that the Appellants robbed the complainant.

25. The complainant narrated how he was attacked by a group of young men. One man held him on a chokehold while the 1<sup>st</sup> Appellant took his phone and cash from his pocket. The third person was on the lookout. After robbing him, they threw him on the ground.

26. These circumstances as put forth by the witness establish the offence of robbery with violence within the parameters in were proved.

27. On the question whether the Appellants committed the offence, the trial magistrate found that the 1<sup>st</sup> Appellant was identified at the scene and the circumstances surrounding identification at the scene were favourable as there was street light as PW1 testified which was corroborated by PW4. Further, PW1 and the 1<sup>st</sup> Appellant were neighbours hence they were familiar to each other. With respect to identification at the scene of the 2<sup>nd</sup> Appellant, the trial court found that the same was wanting as they were not familiar and there was no identification parade that was carried out. Further, PW1 only mentioned Martin to the investigating officer as one of his attackers as PW4 testified hence PW4 contradicted PW1 that he identified the 2<sup>nd</sup> Appellant at the scene. He however linked the 2<sup>nd</sup> Appellant with the offence on account that PW3 evidence that he bought the phone from 1<sup>st</sup> Appellant who was in company of the 2<sup>nd</sup> Appellant remained unshaken. That 2<sup>nd</sup> Appellant had physical control of the phone as PW3 identified him as an accomplice of 1<sup>st</sup> Appellant and a witness. They all negotiated for the purchase price which means that the 2<sup>nd</sup> Appellant had physical control of the phone. He found that the doctrine of recent possession was applicable in the circumstances of this case.

28. In the celebrated case of *R v Turnbull* [1976] 3 ALL ER 549, the court laid down the key considerations that a court ought to put into account in resolving the question of identification of an



accused when the same is disputed. Our courts have, as will be seen later in this judgement, followed and expounded on these parameters over time. The court stated;

“...the judge should direct the jury to examine closely the circumstances in which identification by each witness came to be made. How long did the witness have the accused under observation” At what distance” In what light” Was the observation impeded in any way, as for example by passing traffic or a press of people” 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 (sic) 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”

29. In this appeal, PW1 testified that he recognised the 1<sup>st</sup> Appellant, Martin who was his neighbour. He reported to his mother and brother and asked his brother if he had seen Martin. PW4 also testified that when a report was made, PW1 reported that he recognised one of the attackers, Martin. PW1 testified that there was a huge street light at the scene so he was able to recognise the 1<sup>st</sup> Appellant. This was corroborated by PW4 who testified that the area was prone to mugging hence the huge street light. The 1<sup>st</sup> Appellant on cross examination by the prosecution’s counsel testified that he knew the complainant since they were neighbours and there was no bad blood between them for the complainant to frame him.

30. This court is alive to the stringent legal requirement that the circumstances of identification of a suspect in a criminal case must be such that the identification is free from error. There is the further distinction between identification of a person already known to the witness before (recognition) and the identification of a stranger. In both cases, the court must consider whether conditions of identification are difficult.

31. In the case of Faith Muthoni M’ngondu & 3 others v Republic [2018] eKLR, the Court of Appeal addressing itself to the principles applicable where identification of a perpetrator is disputed stated;

“The guiding principles that the learned Judges took into consideration when addressing the appellants’ challenges to their identification/recognition at the scene of the robbery are the same principles we are enjoined to apply in determining the same issue as now placed before us. These have now been crystallized in a long line of cases. See Cleophas Otieno Wamunga versus Republic [1989] KLR; Paul Etole & Another versus Republic [2001] eKLR; and Francis Kariuki Njuru & 7 Others versus Republic Criminal Appeal No. 6 of 2000 (UR). They may be summarized as follows:

- (i) Evidence of visual identification in criminal cases can bring about miscarriage of justice. It is for this reason that a court is enjoined to examine such evidence carefully to minimize such danger.
- (ii) Whenever the case against the defendant depends wholly or to a great extent on the correctness of one or more identification of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of such identification/recognition.
- (iii) The court has an obligation to examine closely, the circumstances in which the identification by each witness come to be made.



- (iv) The court also had a duty to remind itself of any specific weaknesses which may have appeared in such identification evidence.
- (v) It is true that recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognize someone whom he knew, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.
- (vi) Evidence relating to identification has to be scrutinized carefully and should only be accepted upon if the court is satisfied that the identification was positive and free from any possibility of error.
- (vii) Among the factors surrounding evidence of identification/recognition that a court is required to inquire into is whether the witnesses gave either the description or the names of the attackers to either the police or persons who come to the scene of the attack soon after the attack and at the earliest opportunity”.

32. In the case of *Wamunga v Republic* (1989)KLR 426 cited by the Court of Appeal above, the court had put it plainly thus;

“It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction”

33. There is ample evidence that the 1<sup>st</sup> Appellant was known to the complainant. There is corroborated evidence that at the scene there was a huge public lighting owing to the fact that the area was a mugging spot. The complainant saw and recognised the 1<sup>st</sup> Appellant who was a neighbour. The evidence is not shaken in cross examination nor displaced by the alibi defence offered by the 1<sup>st</sup> Appellant. That alibi fell short of the standard set in *Erick Otieno Meda v Republic* [2019] KEHC 4959 (KLR) where the court observed as follows in considering alibi defence;

- (a) An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused’s point of view.
- (b) An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
- (c) The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
- (d) The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See *Mhlungu v S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014) (emphasis added)

34. The alibi was neither corroborated nor introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.

35. On the evidence on record, am satisfied that the 1<sup>st</sup> Appellant was recognised at the scene of crime by PW1 as one of his attackers and the trial court was spot on in its indepth analysis of the evidence and in its conclusions on this issue.



36. Additionally, PW3 was found with the stolen phone and he testified that the 1<sup>st</sup> Appellant, whom he knew very well sold the phone to him. PW2 also testified that the 1<sup>st</sup> Appellant had offered to sell to him a Redmi phone. All this evidence taken cumulatively proves with no doubt that the 1<sup>st</sup> Appellant was among the robbers who robbed the complainant.
37. With respect to identification of the 2<sup>nd</sup> Appellant at the scene, just as held by the trial court, I find it wanting. PW4, the investigating officer testified that PW1 only mentioned Martin but did not mention any of his other attackers. PW1 did not also testify whether he knew the 3<sup>rd</sup> attacker or whether he had seen him elsewhere before. The trial court's finding on the identification of the 2<sup>nd</sup> Appellant was, on the basis of the evidence on record, correct. His identification at the scene was not free from error.
38. The trial court however found that the case was proved against the 2<sup>nd</sup> Appellant on account that he was in company of the 1<sup>st</sup> Appellant during the sale of the phone to PW3 and while applying the doctrine of recent possession, he found that the case against the 2<sup>nd</sup> Appellant was proved.
39. The 2<sup>nd</sup> Appellant in his submissions denied the involvement in the offence and that he was not found in possession of the said phone and the person who was found in possession was made a prosecution witness. He denied knowing the complainant and PW3.
40. As to whether the 2<sup>nd</sup> Appellant was in possession of the stolen phone, Section 4 of the Penal Code defines possession as follows:
- (a) be in possession or have in possession includes not, only having in ones 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 of any other person.
  - (b) If there are two or more persons and anyone or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them."
41. For the doctrine of recent possession to be invoked, the following factors must be proved as was held in the case of *Arum v. Republic* [2006] 2 E.A. 10 as quoted by the Court of Appeal in the case of *Gideon Meitekin Koyiet v Republic* [2013] eKLR. It was held as follows;
- “Before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved, that is, there must be positive proof, first, that the property was found with the suspect, secondly, that the property is positively identified as the property of the complainant, thirdly, that the property was stolen from the complainant, and lastly the property was recently stolen from the complainant.”
42. The court in *Isaac Ng'anga Kahiga alias Peter Ng'anga Kahiga V R, Nyeri Criminal Appeal No 272 of 2005* further emphasized that;
- “...The proof as to time 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”.



43. As to what entails possession, the court in *Maina wa Kinyatti v Republic* [1984] KECA 22 (KLR) stated thus;

“Control let alone full control of the object or article in possession of the accused is not necessary nor is it a requirement of that definition. It is enough if the prosecution proves anyone of the following:

- (i) The accused was in actual personal possession of the publication; or,
- (ii) He knew that the publication was in the actual possession or custody of another person; or
- (iii) he had the publication in any place (regardless of whether the place belongs or is occupied by him or not) for the use or benefit of himself or another person.

Being in personal possession includes actual holding or having the publication in one’s custody. Knowledge that the publication is in the actual possession or one’s custody or of another person may be inferred from the circumstances and/or proved facts of the particular case.”

44. The evidence on record is that PW3 testified that the 1<sup>st</sup> Appellant was in company of the 2<sup>nd</sup> Appellant. The witness stated “His (referring to the 1<sup>st</sup> Appellant) witness or the person who accompanied him on this sale was A2”. They negotiated on the price and they settled at Kshs.2,500/-. That they claimed financial problems as the reason for selling. He identified the 2<sup>nd</sup> Appellant as the 1<sup>st</sup> Appellant’s accomplice. He testified on cross examination that he was familiar with both the Appellants as they are from his town.

45. The Court of Appeal in *William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) v Republic* [2022] KECA 23 (KLR) quoted with approval 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 eye witness.”

46. The pertinent question is whether within the parameters defined in law as above and juxtaposed with the evidence on record, possession was positively proved against the 2<sup>nd</sup> Appellant.

47. The ready answer is that the evidence of PW3 appears to exonerate the 1<sup>st</sup> Appellant. Read holistically, that evidence points to the 2<sup>nd</sup> Appellant as just one who accompanied the 1<sup>st</sup> Appellant during the sale and who was a witness to the sale.

48. A witness is variously defined in the Oxford English dictionary as;

“a person who sees an event, typically a crime or accident, take place.

“observer, onlooker eyewitness, spectator, viewer..

49. Faced with this evidence, however strongly the trial court felt that the 1<sup>st</sup> Appellant was in cahoots with the 2<sup>nd</sup> Appellant, and it is very likely they were, without tangible evidence of illegal possession, and



with the outright evidence of PW3 referring to the 2<sup>nd</sup> Appellant as a witness, clear doubts arose as to the possession of the 2<sup>nd</sup> Appellant and the court ought to have visited the benefit of doubt on the 2<sup>nd</sup> Appellant.

50. Regarding sentence, the Appellants were sentenced to death. In our laws, that sentence is legal. Section 296(2) of the Penal Code mandates the death sentence for anyone convicted of robbery if they were armed with a dangerous or offensive weapon, with one or more other people, or if they used violence against a person during the robbery. This is an aggravated form of robbery, as the basic offense of robbery (Section 296(1)) carries a penalty of 14 years' imprisonment.
51. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in *S v. Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

52. Similarly, in *Mokela v. The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

“It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy *carte blanche* to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.”

53. The Court of Appeal of East Africa in the case of *Ogolla s/o Owuor v. Republic*, [1954] EACA 270, pronounced itself on this issue as follows:-

“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors.”

54. Locally the law has been settled by the Court of Appeal in the case of *Shadrack Kipkoech Kogo - v - R. Eldoret Criminal Appeal No.253 of 2003* where the court stated;

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R.* (1989 KLR 306)”



55. Further exposition of the applicable principles is found in *Bernard Kimani Gacheru v. Republic* [2002] eKLR where the court of Appeal rendered itself thus;

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

56. A review of the lower court record does not reveal an infraction on the part of the trial court in sentencing. Both Appellants were given an opportunity to offer mitigation and they did. The court in an elaborate ruling considered the mitigating factors which were that the Accused persons were 1<sup>st</sup> offenders and their personal circumstances. The court enumerated and considered the aggravating factors. The court applied the sentencing guidelines and purposes of punishment. No basis is laid before this court upon which I can interfere with the sentence imposed.

57 From the foregoing, the appeal by the 2<sup>nd</sup> Appellant has merit and is allowed. The conviction upon him is quashed and sentence set aside. He is set at liberty forthwith unless otherwise lawfully held under another warrant. The appeal by the 1<sup>st</sup> Appellant has no merit and is dismissed in its entirety.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF NOVEMBER 2025.**

**A.K. NDUNG’U**

**JUDGE**

