REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HIGH COURT CRIMINAL APPEAL NO. E017 OF 2022

KEVIN WEKESA MUPALLA……

…..APPELLANT

VERSUS

REPUBLIC……

RESPONDENT

(An appeal from the conviction and sentence in CRC No. E547 of 2021 delivered on the 22.2.2022 by Hon. S.O. Mogute P.M)

JUDGMENT

1. Kevin Wekesa Mupalia, the appellant herein, was convicted and sentenced to death for the offence of Robbery with Violence, contrary to section 296 (2) of the Penal Code. The particulars of the offence are that, on the 21st day of March 2021, at Makutano zerozero in Bungoma Sub-County, Bungoma County, he robbed Elijah Mogaka of a Techno Spark 4 mobile phone valued at Kshs.12,900/-, spectacles worth Kshs. 1500/-, and cash of Kshs. 100/-. The property belonged to the said Elijah Mogaka, and immediately after the offence, he assaulted Elijah Mogaka. Being dissatisfied with the conviction and sentence, he has lodged this appeal seeking to have both overturned.

2. The appellant pleaded not guilty and the prosecution called five witnesses. The appellant gave a sworn statement.

3. The appellant's memorandum of appeal and the supplementary grounds of appeal dated 13th July 2024 state as follows;

a. **THAT the trial Court erred in law and in fact in relying on inconclusive evidence of identification of a single eyewitness under difficult conditions and uncorroborated.**
b. **THAT the trial court erred in law and in fact in convicting the appellant, relying on the evidence of unproduced exhibits (the phone and receipts).**
c. **THAT the trial court erred in law and fact in not making a finding that theft was not proved in the instant case, since the prosecution failed to prove ownership and positive identification, in not producing the phone and receipts, and failure to make an inventory, compounded with contradictive identification of the phone.**
d. **THAT the trial court erred in law and in fact in not appreciating the appellant's defence that overwhelmed the prosecution's case.**
e. **THAT the trial Court erred in law and in fact in not making a finding that the mandatory nature of the sentence under section 296(2) of the Penal Code is unconstitutional, thus the conviction sentence is not proportionate to the circumstances of the case.**

4. The appeal was canvassed by way of written submissions. The appellant raised only two grounds, (a) and (e). He argued as follows: the incident is alleged to have occurred at 10:00 p.m. Pw1 did not clarify to the court the distance of the security light he used to identify the attacker. He neither described the attacker to his rescuers nor to the court. The appellant, coming from a bar, was therefore intoxicated, and his ability to observe and positively identify could not be deemed reliable. The phone allegedly recovered from the appellant was not tendered as an exhibit in court. Pw4 referred to it in his statement as Exhibit Number 2, but it was only marked as MFI (2); thus, the court cannot rely on evidence of an unproduced or improperly produced exhibit, according to Article 50(4) of the Constitution of Kenya, 2010. The appellant cited the following cases: Bernard Gitonga Karanu vs Rep (2019) eKLR, Maitanyi vs Rep (1986) eKLR, James Chege Wanja & Another vs Rep (2014) eKLR, Wamunga vs Rep (1989) eKLR, and Titus Wambua vs Rep (2016) eKLR, to support his argument that the complainant was intoxicated. He further argued that the recovery officer did not prepare a properly filled and signed inventory to prove that the alleged phone was recovered from the appellant, nor that the evidence was obtained legitimately. There was also conflicting evidence, as Pw2 stated that the appellant was arrested with a grey phone, whereas Pw1 claimed his phone was blue. Therefore, the doctrine of recent possession does not apply. Regarding ground (e), it was argued that the sentence imposed on the appellant was manifestly disproportionate to the circumstances, and the elements of robbery with violence were

not established. The elements of being armed with an offensive weapon and being in the company of others were neither proven nor reflected in the charge. The appellant relied on the decision in petition No. 5 of 2022 (as consolidated with constitutional petition No. 6 of 2022), Shaban Salim Ramadhan, where the court held that the mandatory nature of the death penalty under sections 296(2) and 297(2) of the Penal Code is unconstitutional. Reliance was also placed on the case of James Kariuki Wagana vs Rep (2018) eKLR, where the court set aside a death sentence imposed on a convict charged with Robbery with Violence and sentenced him to 15 years imprisonment.

5. The respondent submitted that all elements of the offence of robbery with violence were proved beyond reasonable doubt. Pw1's evidence was well corroborated; during the theft, he was attacked and injured, and the stolen item was recovered from the appellant, whom Pw1 identified, hence the application of the doctrine of recent possession. It was further submitted that the appellant's defence was a sham and did not contest the evidence presented by the prosecution. The appellant did not raise an alibi defence. The trial magistrate carefully analysed his defence. There was no indication of bias towards the prosecution by the learned trial magistrate. Regarding rights violations, the appellant was not informed of his rights to legal representation, contrary to the provisions of Article 50 (1) (2) (g). Based on all the evidence against the appellant, justice can only be served through a retrial unless the court is persuaded otherwise.

ANALYSIS AND DETERMINATION

6. The duty of this court is to evaluate and scrutinise the evidence and proceedings and to reach its own decision, bearing in mind that it did not hear or see the witnesses who testified.

7. **Pw1** testified that on 21st March 2021, at 10:15 pm, he was carried by the appellant on a motorbike to a bush, where he was strangled and robbed of his phone, a Techno Spar, and spectacles. He reported the incident at Kanduyi police post, and while at the police station, the appellant was brought in by other boda boda riders. He identified him as the person who had robbed him. His phone was recovered from the appellant the same night. He was able to identify the appellant using security lights at Kanduyi. **Pw2** testified that on 21st March .2021 at 10:00pm, he was at Kanduyi when the appellant took his motorbike and returned it to him at midnight. The appellant told him he had gone home to pick up his phone. On his way home, he learnt from other riders that his motorcycle had been involved in a theft. He told them that the appellant had gone with his motorbike. They arrested the appellant and took him to the police station. A grey phone was recovered from the accused. **Pw3** testified that on 22nd March 2021, he was at Kanduyi police post. He received a report from Pw1 that a boda boda rider had robbed him of his Techno Spar phone, which was blue in colour, and spectacles. As he processed the report, the appellant was brought in by boda boda riders. A Techno phone was recovered from him. **Pw4** recalled that on 23rd March 2021, she was assigned to investigate the case. Pw1 narrated how he had been robbed the previous night. She

issued Pw1 with a P3 form. Pw1 had been robbed of his blue Techno phone, spectacles, and Kshs 100. Pw4 produced the phone as exhibit no. 2. **Pw5** filled the P3 form of Pw1. He testified that Pw1 had injuries on his neck, left side, and front side, and he was in pain. Pw1 also had an injured eye. He assessed the degree of injury as harm.

8. The appellant gave a sworn statement. He testified that on 22nd March 2021, he was working in Kanduyi. He had a disagreement with a boda boda rider. After closing his shop, he headed home. On the way, he was attacked by boda boda riders who claimed he had assaulted one of them. He was taken to Kanduyi Police Post. He remained there until 10.00 pm, then was moved to Bungoma Police Station. He was later charged in court. He denied possessing the phone or riding a motorcycle.

9. Having considered the evidence and the submissions filed by the appellant and the respondent, the issues for determination are;

i. *Whether the court erred in convicting on the evidence of a single witness*
ii. *Whether the prosecution failed to prove its case beyond a reasonable doubt*
iii. *Whether the trial court did not consider the appellant's defence*
iv. *Whether the mandatory sentence under section 296(2) of the Penal Code is unconstitutional*.

10. On whether the trial court convicted on the evidence of a single witness. The law relating to identification by a single

witness is by now well settled. The Court of Appeal in **Peter Mwangi Wanjiku v Republic [2020] eKLR** addressed the issue of a single identifying witness as follows: -

> *"Section 143 of the Evidence Act provides that a court can convict on the evidence of a single witness. The said section reads, "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." Nonetheless, this does not remove the obligation of the trial court to test the evidence of a single witness. As was held in Mailanyi vs Republic [1986] KLR 198:1.Although it is trite law that* a fact may be *proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.2.When testing the evidence of a single witness a careful inquiry ought to be made into the nature of the light, available conditions and whether the witness was able to make a true impression and description.3.The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.4.Failure to undertake an inquiry of careful testing is an error of law and such evidence cannot safely support a conviction.*

11. In **Wamunga vs Republic (1989) KLR 426**, the Court of Appeal stated as under*:*

> *" 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".*

12. In this case, Pw1 described the assailant as having a box haircut. He testified that he was able to see the appellant because of the security lights in the Kanduyi area. Pw1 informed boda riders at Kanduyi about the robbery before proceeding to report the incident at the police station. Pw2 testified that upon discovering that his motorcycle had been used in the commission of the offence, he, along with other riders, apprehended the appellant, who had the motorcycle around 10:00 p.m. when the alleged offence occurred. shortly after, while Pw1 was lodging his report, the appellant was brought to the police station, where Pw1 immediately identified him as the assailant. The identification of the appellant took place on the very night Pw1 was robbed, when the appellant's features were still vividly imprinted in Pw1's memory. Therefore, I find that the appellant was positively identified as the perpetrator of the offence.

13. It was also the appellant's case that the prosecution failed to prove its case to the required standard. To establish the offence of robbery with violence, the element of theft must be demonstrated alongside one or more of the other elements

listed in section 296(2) of the Penal Code, namely that the offender was armed with a dangerous or offensive weapon or instrument; was in the company of one or more others; or immediately before or after the time of the robbery, he wounded, beat, struck, or used other personal violence against the victim.

14. In ***Johana Ndungu V. Republic, CR. APP. No. 116 of 1995*** the Court stated as follows:

> *"In order to appreciate properly as to what acts, constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s. 295 of the Penal Code. 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. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s. 296(2) …" (Emphasis added).(See also Ganzi & 2 Others V. Republic (2005) 1KLR 52).*

15. The Court of Appeal in **Oluoch v Republic [1985] KLR** set out the essential elements of the offence as follows:

i. *The offender is armed with any dangerous and offensive weapon or instrument;*
ii. *The offender is in company with one or more persons;*
iii. *At or immediately before or immediately after the robbery, the offender uses actual violence on the victim.*

16. Pw1 gave a clear testimony that his phone and spectacles were stolen. He positively identified the appellant, who was arrested immediately after the incident within the locus in quo. Furthermore, Pw1, Pw2, and Pw3 were consistent in stating that the appellant was found in possession of the complainant's phone, which had been stolen only a few hours earlier. Pw4 produced the phone retrieved from the appellant as Exhibit No. 2.

17. The prosecution also led evidence that during the robbery, the appellant used actual violence on the victim. Pw1 testified that he was strangled and sustained injuries. Pw1 was taken to hospital. Pw4, who attended to the complainant at Bungoma District Hospital, testified that Pw1 had injuries on the neck and his eye was also injured. He produced the P3 form as Pexh 4. He noted that the severity of the injury was harm.

18. The appellant, in his defence, offered only a bare denial and failed to provide any substantial or credible explanation for being in possession of the complainant's phone. His reference to a dispute with a boda boda rider did nothing to clarify how the stolen phone ended up in his hands.

19. Consequently, I find that the prosecution proved its case to the required standard. The appellant's defence was a mere denial and could not displace the case mounted against him.

20. Although the appellant contends that the trial court relied on the doctrine of recent possession, that assertion is unfounded.

21. Finally, I turn to consider whether the mandatory sentence under **section 296(2) of the Penal Code** is unconstitutional and the appellant is entitled to 15 years imprisonment. The appellant cited the case of **James Kariuki Wagana v Republic [2018] eKLR,** where the sentence of death was reduced to 15 years imprisonment.

22. However, the **Supreme Court in Republic v Ayako [2025] KESC 20 (KLR)** was of the view that courts are mandated to interpret, not revise, statutory sentences. The Court emphasised that altering penalty provisions is the exclusive function of the legislature and that existing statutory sentences must be applied as enacted. The Supreme Court in **Republic v Ayako [2025] KESC 20 (KLR)** stated:

> *"In Muruatetu I, faced with a similar question of ascribing a term sentence to life imprisonment... We, therefore, held that while life imprisonment ought not necessarily mean a prisoner's natural life, it is for the Legislature to prescribe what constitutes life imprisonment and the parameters applicable, if at all. In that connection, we did, as the Supreme Court, recommend that the Attorney General and Parliament ought to commence an enquiry on this issue, and develop legislation on what constitutes a life sentence. Despite making this recommendation on 14th December 2017, and making an order that the Judgment be placed before the Speakers of the National Assembly and the Senate to, among other things, set the parameters of what constitutes life imprisonment, we note*

this recommendation has not been given consideration by the two offices of Parliament.

In view of the foregoing, we find that the Court of Appeal ought not to have proceeded to set a term sentence of thirty (30) years as a substitution for life imprisonment, as the effect would be to create a provision with the force of law while no such jurisdiction is granted to it. The term of thirty years was arrived at arbitrarily without involvement of Parliament and the people. In consequence, we find that the Court of Appeal ventured outside its mandate and powers."

23. The conclusion is that the appeal lacks merit and is therefore dismissed. The conviction and sentence are hereby affirmed. The appellant has a right of appeal within 14 days.

Dated, Signed and Delivered at BUNGOMA this 5th day of November 2025.

R.E. OUGO

JUDGE

In the presence of:

Kevin Wekesa Mupalia/Appellant

Miss Matere For the Respondent

Wilkister -C/A