IN THE COURT OF APPEAL AT NYERI

(CORAM: KANTAI, ALI-ARONI & ACHODE, JJ.A.) CRIMINAL APPEAL NO. 69 OF 2016

BETWEEN

JOHN MAINA IHIGA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(*Being an appeal against the Judgment of the High Court at Nyeri (A. Mshila, J.) delivered on 28th July, 2016*

in

H.C. CRA No. 245 of 2011.)

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JUDGMENT OF THE COURT

This is a second appeal from the original conviction and sentence of the appellant, **John Maina Ihiga**, who was charged with two (2) counts of robbery with violence contrary to **section 296(2)** of the **Penal Code**. It was alleged that he and two (2) his co-accused had on 15thday of October, 2010 at Lusoi village in Nyeri County, while armed with a dangerous weapon, namely an iron rod, had robbed Mary Wangui Ndereba of a motor vehicle registration mark KAC 592 B Datsun 1200, Kshs.1500 and a mobile phone, make Nokia and at or immediately before or immediately after the time of the robbery used actual violence to the said person. The allegation of in Count II is that that on 4th January, 2011 at the same place, while armed with a hammer, he robbed the same person of Kshs.500, and that he had

immediately before or immediately after

the time of such robbery assaulted the same person. The prosecution called 9 witnesses after which the trial court found the appellant and his co-accused to have a case to answer; the appellant gave an unsworn statement where he denied committing the offences; he was convicted and sentenced to death on both counts while his co-accused were acquitted. He appealed to the High Court at Nyeri but the appeal was found to have no merit and was dismissed by **Mshila, J.** who corrected the trial magistrate's findings holding the death sentence on the 2nd count to in abeyance.

Section 361 (1)(a) of the **Criminal Procedure Code** limits our mandate on a second appeal to a consideration of issues of law only; we must resist the temptation to revisit the facts of the case which have been tried and re-evaluated on first appeal - see

Stephen M'Irungi & Another vs. Republic **[1982 – 88] 1 KAR**

360 where that mandate was recognized as follows:

> "***Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.***"

We visit the facts briefly to satisfy ourselves whether the two courts below carried out their mandate as required in law.

Mary Wambui Ndereba (**Wambui – PW1**) was entering her house on 15th October, 2010 at 8.30 p.m. when she came face to face with her former employee, the appellant. He had covered his face but she saw him well because there was bright electricity light in the house, he spoke to her at length and she had seen him in the same clothes he was wearing. He had an iron bar and he asked her to say her last prayers as he had come to kill her. He ordered her to hand over her phone which she did; he searched and took cash Kshs.1500 from her pocket; he took car keys and drove away in PW1's husband's motor vehicle after telling her where she would find the it at Naromoru. The next day 16th October, 2010 the appellant called her and told her that he had left the stolen vehicle at Jikaze and it was indeed recovered from there. She reported the robbery to police and told them who the robber was. Nothing much seems to have happened until 4th January, 2011 when at about noon Wambui visited her farm and upon return she found the doors to the house wide open. On entering the bedroom she found cash Kshs.500 missing from a drawer and this made her raise the alarm which attracted the attention of those working at the farm including **Peter Kariuki** (**Kariuki- PW2**) and **Patrick Maina Gichuki** (**Maina – PW3**) who came to the home. On entering the bathroom, she was hit on the head with a hammer by the appellant, making her fall to the ground. She stood up and followed the appellant while crying out for help. Kariuki and Maina reached the scene, and they saw the appellant who threatened them with the hammer; they knew him as he had worked with them at Wambui's farm in

September, 2010; the appellant ran to a bush but was apprehended by villagers

who had been attracted to the commotion at Wambui's home. The appellant was taken to Kiganjo Police Station; Wambui was admitted at Outspan Hospital for 1one (day,) and a P3 Form was filled and the same produced into evidence. The iron bar the appellant used in the first incident and the hammer used in the second incident were both recovered and produced as evidence. Also produced into evidence were blood-stained clothes Wambui wore in the second incident and Kshs.500 recovered from the appellant when he was arrested.

Kariuki, who is Wambui's neighbour and who was working at her farm on the said 4th January, 2011 confirmed being attracted by Wambui's call. When he reached her home, he was confronted by the appellant, whom he knew very well; the appellant threatened him with the hammer as he was running away. Many neighbours converged and apprehended the appellant, who was hiding in a nearby bush, still armed with the hammer.

Maina confirmed those events.

Simon Ndereba Muriuki (**Muriuki - PW4**), Wambui's husband, was called by his wife on 15th October, 2010 at 9.30 p.m. and informed that his car had been stolen by their former employee. When he went home the next day, his wife informed him that the appellant had called to say that he had left the stolen car at Jikaze, from where it was recovered. He identified photographs of the car in court. On 4th January, 2011 Muriuki left home in the morning only to learn that his wife had been robbed and injured by the appellant. He rushed home with police officers

and found the

appellant had been apprehended by members of the public. He identified the hammer which belonged to him.

APC John Gatuma of Lusoi Administration Police Camp on 4th January, 2011 at about midday, upon receiving information, rushed to the scene where the appellant had been apprehended by members of the public. He arrested him, and recovered a hammer, and cash. He interviewed Wambui who identified the appellant as the person who had attacked her.

PC Waswa Chivatsi of Kiganjo Police Station was on duty on 16th October, 2010 when he received information that the stolen car had been found abandoned at Jikaze. He went there and recovered the car. He preferred charges against the appellant after the second incident. He produced various items as exhibits in the case.

Corporal John Mugo, a Scenes of Crime Officer, Nyeri, produced various photographs of the stolen car and a report.

The last prosecution witness was **Dr. James Waweru** of Nyeri Provincial Hospital, who produced P3 Form for Wambui, which showed that she had suffered a deep cut wound on the scalp, which the doctor categorized as “harm”.

Upon being put on his defence the appellant stated in an unsworn statement, that on 4th January, 2011 he went to Naromoru where he met the lady who had employed him; she served him tea but then raised alarm claiming that he had robbed her; many people gathered, they beat him up forcing him to

escape

but he was arrested by police officers who took him to Kiganjo Police Station.

As we have seen, the appellant was convicted and sentenced, and his first appeal was dismissed, findings which have provoked this second appeal.

There are six (6) grounds of appeal taken in Supplementary Grounds of Appeal drawn for the appellant by **S.K. Njuguna Advocates**. The two courts below are faulted for failing to analyse evidence on identification of the appellant; that the Judge on first appeal erred in law in confirming the appellant's conviction which was based on uncorroborated evidence of a single identifying witness; that the charges were not proved beyond reasonable doubt; that the Judge erred by finding that the death sentence was mandatory *"...implying therefore that the Appellant could not receive any other or lighter sentence..."* that the sentence of death meted out was harsh and excessive considering all the circumstances of the case.

When the appeal came up for hearing before us on 15th June, 2025 the appellant was present in Naivasha Prison and was represented by learned counsel **Mr. Samuel Njuguna**, while the respondent was represented by learned State Counsel **Miss Kaniu**. Both sides had filed written submissions, which they fully relied on.

It is submitted by the appellant in respect of grounds 1, 2, 3 and 4 (these were urged together) that identification of the appellant by Wambui in respect of Count 1 was not free from

any possibility

of error; that the appellant had covered his face, and it was at night. The case of ***Karaton ole Lesarau vs. Republic*** **[1988] eKLR** is cited for the proposition:

> **"*In a case such as this one which depends solely on identification by a single witness, we cannot over-emphasise the obligation on the part of the trial court to assess and analyse the evidence of identification with meticulous care.*"**

It is submitted further that Wambui did not describe the clothes the appellant was wearing that night.

The appellant submits that voice identification by Wambui was not tested; that such evidence was not watertight. The case of ***Karani vs. Republic*** **1985 KLR** adopted in ***Joseph Muchangi Nyaga & Another vs. Republic*** **[2013] eKLR** is cited for the proposition:

> **"*Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the Appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification.*"**

It is submitted that the appellant was not properly identified in respect of Count II; that Wambui, Kariuki and Maina had a very short time to identify the appellant.

On grounds 5 and 6 of the appeal, it is submitted that we should interfere with the sentence because the appellant has

been

in custody since his arrest on 4th January, 2011 and that we should reduce the sentence to the time already served.

The respondent submits that Wambui was able to identify the appellant on the night of 15th October, 2010 because there was bright electricity light; that she knew him well as a former employee; that he spent ample time with her to enable positive identification; that there was recognition and the case of ***Anjononi & Others vs. Republic*** **[1980] eKLR** is cited in that regard.

It is submitted in respect of Count II that the identification of the appellant by Wambui was corroborated by Maina and Kariuki, who both came face to face with the appellant on 4th January, 2011 as he fled the scene after attacking Wambui; that they knew him before. It is submitted by the respondent that the offence of robbery with violence was proved to the required standard.

It is submitted that the sentence meted out was proper in the circumstances of the case, and we should dismiss the appeal.

We have considered the whole record, submissions and the law. As already stated, our mandate is to address issues of law only.

The appellant complains that he was not properly identified either on the incident on 15th October, 2010 or the other incident on 4th January, 2011.

The record shows that Wambui was confronted at 8.30 p.m. on 15th October, 2010 by a person she knew as a former

employee. Although he had partly covered his face with a piece of cloth she

identified him and described the clothes he wore, which she had seen him wearing before. She described that there was bright electricity light in the kitchen where he first confronted her; that he spoke to her for a while, making demands for phones and money; that he later ordered her to move into the house from the kitchen, and it was him who switched on lights in the main house. The lights consisted of bulbs and fluorescent tubes and they also spent considerable time in the house. He informed her where she would find the car the next day.

The High Court on first appeal considered the danger of relying on a single identifying witness to found a conviction. Upon re-evaluation of the evidence the Judge found that there was circumstantial evidence that linked the appellant to the commission of the offence. This was because there was evidence by Wambui that he appellant, after spending a considerable time in the house with her took car keys; he later called her and told her where the car was and when the police went to the location they indeed found the car abandoned with keys in the car. The Judge found that the circumstantial evidence pointed to the guilt of the appellant which linked him to the commission of the crime.

It has long been the law that the court should warn itself of the danger of relying on a single identifying witness to found a conviction. This is the way this Court put the position in ***Maitanyi 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 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."***

We agree with the High Court that the totality of the evidence against the appellant established to the required standard that it was he who attacked and robbed Wambui of a phone, money and a car on the night of 15th October, 2010. He spent considerable time with her; he spoke repeatedly to her while threatening her and robbing her; it is even he who was switching on lights in the house; she saw and described the clothes he wore which he had worn before as he worked for her; he was an employee who had left employment a few days earlier; there was no possibility of mistaken identity; it was a case of recognition and as per this Court's holding in **Anjononi & Others** (supra):

> ***"…recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other."***

We also agree with the High Court that the conviction on Count II was well founded. The robbery took place at midday on 4th January, 2011 when the appellant, who had not bothered to cover his face or conceal his identity in any way, hit Wambui with a hammer; she chased after him, and he came face to face with Maina and Kariuki, who knew him very well as they had worked together for Wambui at her farm. He threatened them with the hammer, but when he attempted to hide in a nearby bush, he was flushed out by members of the public who had been attracted to the commotion at Wambui home. He was arrested while still in possession of the hammer, which belonged to Wambui's husband.

The appellant complains that the death sentence handed to him was harsh and excessive in the circumstances.

First, we agree with the Judge who held the sentence on Count II to in abeyance, as the appellant could not suffer death twice.

Section 296(2) of the Penal Code prescribed the death sentence for capital robbery.

The Supreme Court of Kenya in **Petitions No. 15 of 2015** and **16 of 2015** was dealing with petitions challenging the mandatory death sentence on offences under section 203 as read with section

204 of the Penal Code. That Court found that it was

unconstitutional for Parliament to provide a minimum sentence and courts should be allowed to award sentences according to circumstances of a case. That case (consolidated) came to be known as "**Muruatetu 1**" and that Court pronounced itself in "**Muruatetu 2**" (**Francis Karioko Muruatetu & Another vs. Republic & Others [2015] eKLR [2021] KESC 31 (KLR) (6 July 2021) (Directions))**
where it was clarified that the decision in "Muruatetu 1" only applied in respect of sentencing in murder cases; that all offenders subjected to the mandatory sentence were entitled to re-hearing on the issue of sentencing, amongst other findings. That Court also found that death sentence was still a legal sentence in Kenya.

The appellant was convicted of an offence under section 296(2) of the Penal Code. He was sentenced to death. That is the sentence provided.

We find no merit in this appeal, which we accordingly dismiss.

Dated and delivered at Nyeri this 11th day of December, 2025.

S. ole KANTAI
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JUDGE OF APPEAL

ALI - ARONI
.....
JUDGE OF APPEAL

L. ACHODE
.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR