

**IN THE COURT OF
APPEAL AT
NYERI**

(CORAM: W. KARANJA, JAMILA MOHAMMED, & KIMARU, JJ.A.)

CRIMINAL APPEAL NO. 14 OF 2018

BETWEEN

LTANKIYAN LEMARLENI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an appeal against the judgment of the High Court of
Kenya at Meru (Chitembwe, J.) delivered on 9th November
2017*

in

**HCCRA No. 54 of
2015)**

**JUDGMENT OF THE
COURT**

Background

1) Ltankiyan Lemarleni (the appellant) was charged at the Chief Magistrates' Court at Isiolo with three (3) counts of robbery with violence contrary to **section 295** as read with **section 296 (2)** of the **Penal Code**, one (1) count of attempted robbery with violence contrary to **section 297** of the **Penal Code**, one (1) count of being in possession of a firearm contrary to **section 4 (2) (g)** as read with

subsection (3) (2) (a) of the **Firearms Act**, and one (1) count of possession of ammunition contrary to **section 4 (2) (a)** as read with **section 3 (2) (a)** of the **Firearms Act**.

2) The particulars were that on 27th March 2013 at the Learata area in Samburu County, while armed with a rifle and in the company of others not before the court, the appellant robbed several passengers in a public service vehicle of money, mobile phones, and other personal items using and threatening to use actual violence against them.

3) The prosecution's case was based on the testimony of eight (8) witnesses.

Kipayo Lesin (PW 2), Francis Kibaki Leporumarei,(PW3), Nixon Likalopi, (PW4), Samson Njebere, (PW6) and Miko Lesir, (PW7), recounted that on 27th March 2013, at the Learata area in Samburu County, they were aboard a public service vehicle registration number KBE 334Y which was stopped by three men, one of whom was armed with an M-16 rifle. **PW2, PW3, PW4, PW6** and **PW7** identified the appellant as the man carrying the firearm. They testified that the appellant demanded money, threatened to shoot, and assaulted some of the passengers.

4) **PW2** testified that he struck the appellant with a *rungu* and in the process he was disarmed and taken to Wamba Police Station. **SP Lawrence Nthiwa, (PW1),** a firearm examiner, confirmed the gun to be functional and capable of firing. **IP Saidi Hiribaa (PW8),** who was at the time stationed at Wamba Police Station, confirmed the

appellant's arrest at the scene and the recovery of firearm and ammunition.

- 5) **Dr. Antony Lokoitip (PW4)**, a medical doctor produced the P3 form filled by **Dr. Fred Ndoki** who examined **Miko Lesir (PW7)** who was allegedly assaulted by highway robbers. **PW4** testified that the P3 form read that **Miko Lesir** sustained injuries on both hands. His upper joint was soiled with blood and there was blood on the neck and shoes. The further injuries sustained were on the right pillar, left arm, left forearm, left wrist and left foot. The right earlobe was badly bruised and blood stained. **PW5** testified that the injuries were inflicted using a blunt hard object. The degree of injury was assessed as harm.
- 6) In his defence, the appellant gave unsworn testimony in which he raised an alibi. He claimed that on the material day he was grazing cattle near Kalama Park with a companion, **Loas Longima (DW2)**, and denied involvement in the robbery. **DW2** testified and corroborated the testimony given by the appellant.
- 7) The trial court found the appellant's alibi defence implausible in light of the consistent eyewitness testimony and the physical evidence linking him to the crime. The court convicted him on all the counts and sentenced him to death.
- 8) On first appeal, vide **Meru Criminal Appeal No. 54 of 2015**, the High Court (**Chitembwe, J.**) confirmed the conviction and sentence.

The court held that the identification evidence was reliable; that the alibi had been

properly rejected; and that the trial was fair. The court also dismissed the appellant's complaint that his rights under **Article 50** of the **Constitution** had been infringed, noting that although he was unrepresented, he actively participated in the proceedings, cross-examined witnesses and called a defence witness.

9) In this second appeal, the appellant contends that the High Court failed to re-evaluate the evidence as required by law; that the conviction was based on insufficient and contradictory testimony; that the alibi defence was disregarded; that the sentence was harsh and unconstitutional; and that his rights to legal representation and to life under **Articles 50** and **26** of the **Constitution** were violated.

Submissions by Counsel

10) When the appeal came up for hearing, the appellant was represented by learned counsel, **Ms. Mutegi**, while the respondent was represented by **Ms. L. E. Oloo**, the learned Principal Prosecution Counsel. Both counsel relied entirely on the written submissions without any oral highlights.

11) In the written submissions, **Ms. Mutegi** contended that the appellant was wrongly convicted of the offence of robbery with violence and related offences, reiterating that both the trial court and the High Court failed to properly evaluate the evidence on record and

to give due weight to the
appellant's alibi defence. Counsel maintained that on the material day

the appellant was grazing cattle with DW2 near Kalama Park, and was mistakenly arrested and that the prosecution made no effort to rebut this defence. Counsel relied on the decision of this Court in **Victor Mwendwa**

Mulinge Vs. Republic [2014] eKLR in support of the argument that the

burden of dislodging an alibi when pleaded rests with the prosecution. Counsel further contended that the evidence presented by the prosecution was insufficient, inconsistent, and riddled with contradictions, making it incapable of sustaining a conviction.

12) Lastly, counsel contended that the High Court failed to consider that his right to legal representation under **Article 50(2)** of the **Constitution** was violated since he was not provided with counsel during trial, and that by upholding the mandatory death penalty, he was subjected to inhuman and degrading punishment contrary to **Article 26** of the **Constitution**. He posited that as per **James Kariuki Wagana Vs. Republic [2018]**

eKLR, the death penalty should be reserved for the most heinous and aggravated cases of robbery with violence or murder, and that in the circumstances herein, the appellant neither caused death nor inflicted unnecessary injury. He, therefore, maintained that the High Court erred by affirming the sentence meted upon the appellant by the trial

court, and contended that the appellant's conviction ought to be quashed, sentence set aside and he be set at liberty.

13) In response, **Ms. Oloo** opposed the appeal and contended that the appellant's conviction was safe and supported by overwhelming evidence. Counsel submitted that the trial court and the High Court properly considered the evidence of the prosecution witnesses who consistently testified that the appellant, armed with an M-16 rifle, in the company of others, robbed passengers of money and personal belongings while threatening and using actual violence. Counsel further submitted that the recovery of the firearm and ammunition together with the ballistics report confirming that they were functional further corroborated the witnesses' accounts. Counsel further submitted that the identification of the appellant was clear, having been made in broad daylight and by several witnesses who were victims and who had sufficient opportunity to observe him.

14) On the alibi defence, counsel submitted that the two courts below did not err when they dismissed it as an afterthought. Counsel asserted that the alibi defence was outweighed by the direct and credible evidence of the prosecution.

15) Regarding the appellant's right to legal representation, counsel submitted that the appellant was informed of his right to legal representation, chose to proceed without one, and actively participated

in his trial by cross-examining witnesses and even calling a defence witness. Counsel thus asserted that no prejudice was suffered.

16) Lastly, as regards the sentence imposed upon the appellant, counsel contended that robbery with violence is a grave offence that warranted the penalty imposed, and that the mandatory death sentence applicable at the time was properly awarded. In sum, therefore, counsel maintained that the High Court did not err in affirming both the conviction and sentence and urged this Court to find the instant appeal devoid of any merit and proceed to dismiss it in its entirety.

Determination

17) We have considered the record, the rival submissions, the authorities cited and the law. The mandate of this Court in a second appeal is restricted by **section 361** of the **Criminal Procedure Code** to matters of law only. This Court will therefore not interfere with concurrent findings of fact, unless it is shown that the courts below misdirected themselves, considered irrelevant factors, failed to consider material evidence, or reached plainly wrong conclusions. See

Michael Ngara Paul v

Republic [2021] eKLR.

18) The issues that present themselves for determination in this appeal

are whether the conviction of the appellant was safe in law;
whether the

appellant's constitutional rights were violated; and whether the death sentence was lawfully and proportionately imposed.

19) As regards the issue of conviction, we associate ourselves with the findings of the High Court that the evidence presented by the prosecution was strong, consistent and well corroborated. The witnesses (PW2, PW3, PW4, PW6 and PW7) all of whom were passengers in motor vehicle registration KBE 334Y, had the opportunity to observe the appellant in broad daylight. They identified him as the man armed with the rifle and described how he demanded money and assaulted them. Their accounts were corroborated by the recovery of the firearm which was positively confirmed to be a firearm within the meaning ascribed to the term under the **Firearms Act** on examination by a ballistics expert (PW1).

20) This Court in the case of **Odhiambo & Another vs Republic [2005]**
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KLR 176 explained the ingredients of the offence of robbery with violence as follows:

“The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution

must choose and state which of those elements distinguishes the charge from the one defined in section 295.”

21) In **Suleiman Kamau Nyambura v Republic [2015] KECA 806 (KLR)**,

this Court held thus:

“Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction under Section 296 (2) of the Penal Code. See Oluoch vs Republic (1985) KLR 549. In addition, and what is crucial in a criminal trial is also the requirement to prove in addition to there being one of the set-out ingredients of robbery with violence is the need to positively identify the assailant/s in question.”

22) In the circumstances herein, all three elements were present. The appellant had a rifle, he was in the company of two others, he robbed the passengers and caused physical injuries to PW7. In addition, he was positively identified by witnesses (PW2, PW3, PW4 PW6 and PW7). He was apprehended at the scene of the robbery after being subdued. We, therefore, find that the appellant’s conviction rested on firm evidential ground and the High Court did not err by upholding the said conviction.

23) As to the alibi defence raised by the appellant, the law is that an accused bears no burden to prove his alibi; rather, the prosecution must disprove it. See **Kimotho Kiarie v Republic [1984] KECA 65 (KLR)**. We however

hasten to note that courts must weigh the alibi against the totality of the prosecution evidence. In this case, the alibi was contradicted by

direct and credible testimony of several witnesses given under favourable conditions of identification. The rejection of the alibi was therefore legally sound.

24) As regards the alleged violation of the appellant's rights under **Article 50** of the **Constitution**, we are alive to the provisions of **Article 50(2)(h)** which provides that an accused person has the right to have an advocate assigned to him at State expense if substantial injustice would otherwise result. In the circumstances of this appeal, the record reflects that upon the trial court ruling that a *prima facie* case had been established against the appellant, he was duly informed of his right to legal representation. His response was that he could not afford the services of counsel.

25) In **Republic vs Karisa Chengo and two others [2017] eKLR**, the

Supreme Court of Kenya expressed itself as follows:

“[13. The right to legal representation at state expense, where the interests of justice demanded, had not commenced with the promulgation of the Constitution of Kenya, 2010. It was a global right that had been in place for some time. The International Covenant on Civil and Political Rights (ICCPR) adopted on December 16, 1966, for instance, provided under article 14(3)(d) that legal assistance was to be assigned to a party in any case where the interests of justice so required, and without payment in the case of a party who lacked the means to pay for it. Kenya was a party to that Convention having acceded to it on May 1, 1972.

[14]. Article 50(2)(h) had not defined what substantial injustice meant. The Court of Appeal in David Macharia Njoroge v Republic [2011] eKLR had

held that substantial injustice resulted to persons accused of capital offences with loss of life as the penalty if they had no counsel during the trials. That position had the effect of limiting

the right to legal representation in criminal trials only to cases where the accused person was charged with a capital offence. The operative words in article 50(2)(h) went beyond capital offence trials.

[15]. The Legal Aid Act in its preamble stated that its focus was to give effect to articles 19(2), 48, 50(2)(g) and (h) of the Constitution to facilitate access to justice and social justice. Section 3 of the Act specifically set out the objectives of the legislation as to provide affordable, accessible, sustainable, credible and accountable legal aid services to indigent persons in Kenya in accordance with the Constitution. Section 43 of the Act placed a duty on the court to inform an unrepresented accused person promptly of the accused's right to legal representation and a duty to promptly inform the accused of the right to have an advocate assigned to him or her if substantial injustice was likely to result. Section 43(6) thereof however provided that lack of legal representation was not a bar to the continuation of proceedings against a person.

[16]. The right to fair trial involved fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where it was called for by the interests of justice, as well as the obligation on the part of courts and tribunals to conform to international standards in order to guarantee a fair trial to all. Free legal assistance would be accorded to a person who did not have sufficient means to pay for it, and that representation was also to be given where interests of justice so required.

[17]. In determining whether substantial injustice would be suffered in criminal matters, a court ought

to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which included:

- a. the seriousness of the offence;**
- b. the severity of the sentence;**
- c. the ability of the accused person to pay for his own legal representation;**
- d. whether the accused was a minor;**
- e. the literacy of the accused; and**
- f. the complexity of the charge against the accused.”**

26) That said, the absence of such representation is not in itself fatal, unless it can be demonstrated that substantial injustice was occasioned. The record before us demonstrates that the appellant actively cross-examined the prosecution witnesses and proceeded to call a witness in support of his defence. He therefore, in our view, fully participated in his trial and no prejudice or substantial injustice has been shown to have resulted from the lack of legal representation. This ground of appeal accordingly fails.

27) On the question of sentence, **section 296(2)** of the **Penal Code** expressly prescribes the death penalty as the lawful sentence upon conviction for robbery with violence. The trial court having convicted the appellant was bound to impose the mandatory sentence provided by law. Equally, the High Court having upheld the appellant's conviction was, in our view, correct in upholding the sentence. While we appreciate that the appellant was indeed armed with a military-grade rifle, acted in concert with others and subjected the passengers

to violence, we are cognizant that the

incident did not result in any fatalities, and although some injuries were sustained, they were not of a grievous nature. That notwithstanding, and whereas this Court has previously varied the death penalty meted upon persons found guilty of the offence of robbery with violence in line with the case of **Francis Karioko Muruatetu & another v Republic [2017]**

eKLR, the Supreme Court vide Directions issued on 6th July 2021 observed that the decision of **Muruatetu** and the subsequent guidelines applied only in respect to sentences of murder under **sections 203 and 204** of the **Penal Code**.

28) Further, the Supreme Court pronounced itself as follows in the case of

Republic vs Mwangi; Initiative for Strategic Litigation in Africa

(ISLA) & 3 others (Amicus Curiae) (2024) KESC 34 (KLR):-

“To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40(3), robbery with violence under section 296(2), and attempted robbery with violence under section 297 (2) of the Penal Code that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.”

29) In the circumstances, this Court is unable to interfere with the sentence

meted upon the appellant by the trial court and upheld by the 1st appellate court.

30) The upshot is that we find that that the conviction of the appellant was sound in law and was supported by credible and corroborated evidence. The sentence meted against him was as prescribed by the law and, therefore, the High Court did not err by upholding both the conviction and the sentence. This appeal is therefore devoid of any merit and is hereby dismissed in its entirety.

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

W. KARANJA

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**JUDGE OF APPEAL
JAMILA MOHAMMED**

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

*I certify that this is
a true copy of the
original*

Signed
DEPUTY REGISTRAR