

**IN THE COURT OF  
APPEAL AT  
NYERI**

**(CORAM: W. KARANJA, M'INOTI & GACHOKA,  
JJ.A.) CRIMINAL APPEAL NO. 120 OF  
2020**

**BETWEEN**  
**JOSPHAT MUTWIRI.....APPELLANT**  
**AND REPUBLIC**  
.....  
**RESPONDENT**

*(An appeal from the judgment by the High Court of  
Kenya at Meru (F. Gikonyo, J.) dated 21<sup>st</sup> April 2020*

*in*

**HCCRA No. 126 of 2018)**

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**JUDGMENT OF THE COURT**

1. Josphat Mutwiri, the appellant herein, was charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. The particulars of the offence were that on 9<sup>th</sup> August 2016, at around 5:00 pm, while in the Ngambura area within Isiolo County, the appellant robbed James Muthuri Mwirigi of a motorcycle, registration number KMDS 081F, make Dayun, worth Kshs. 89,000.00 and at the time of such robbery, wounded the said James Muthuri Mwirigi.
2. The appellant also faced an alternative count of attempted

murder contrary to section 220 (a) of the Penal Code.

The

particulars of the offence were that on the same day and in the same place as in the main count, the appellant unlawfully attempted to cause the death of James Muthuri Mwirigi by hitting him severally on the head with a metal rod.

3. The appellant was arraigned before the Isiolo Chief Magistrate's Court in *CMCCRC No. 448 of 2016* to answer to the charges. He pleaded not guilty to both counts. After a full trial, the appellant was convicted on the main count and acquitted on the alternative count. Upon considering his mitigation, the trial court sentenced him to death.
4. Dissatisfied with the findings of the trial court, the appellant appealed to the Meru High Court in *HCCRA No. 126 of 2018*. *Gikonyo, J.*, in his judgment dated 21<sup>st</sup> April 2020, dismissed the appeal on conviction. He however substituted the appellant's death sentence with that of life imprisonment. It is those findings that have precipitated the present appeal.
5. The appellant filed his notice of appeal dated 7<sup>th</sup> May 2020, memorandum of appeal of the same date and a supplementary memorandum of appeal dated 1<sup>st</sup> September 2025. The appellant raised 11 grounds in total

disputing the findings of the first appellate court.

6. We have taken the liberty to summarize those grounds as follows: that the evidence of the prosecution was marred with contradictions and insufficiencies; that the alleged stolen item was not recovered in the appellant's possession and consequently, no nexus was established between the appellant and the commission of the offence; that the prosecution failed to discharge its burden of proof to the required standard; that his defence was improperly rejected; and that the sentence meted out was unconstitutional, harsh and excessive as it violated his constitutional rights set out in Article 25 (c) of the Constitution. For those reasons, the appellant prayed that his appeal be allowed, his conviction be quashed and his sentence be set aside.
7. The appeal was heard virtually on 3<sup>rd</sup> September 2025 by way of written submissions. The appellant was present. He was represented by learned counsel Mr. Gikonyo. Principal Prosecution Counsel, Miss. Mengo was present on behalf of the respondent.
8. The appellant relied on his written submissions and a list of authorities dated 1<sup>st</sup> September 2025. In a brief oral

highlight, Mr. Gikonyo argued that the prosecution failed to discharge its

burden of proof, that is beyond reasonable doubt, as the evidence adduced before the trial court was riddled with significant inconsistencies. He explained that the complainant testified on different dates as he was recalled to testify afresh when the case started *de novo*. He argued that the complainant gave varied testimonies on the events of the fateful day. He further argued that since the complainant gained consciousness five days after the commission of the offence, he was not in a position to ascertain that his motorcycle had been stolen by the appellant. In any event, the motorcycle was neither recovered from the appellant's possession nor taken for forensic evaluation to determine whether it had his fingerprints. He fortified this submission with the case of **Moses Githinji Mbaya vs. Republic** [2014] KECA 1251.

9. Lastly, learned counsel submitted that the sentence imposed under section 296 (2) of the Penal Code fettered the court's discretion to sentence the appellant. Further, the provision violated the appellant's right to a fair trial. He relied on the case of **Kiprotich vs. Republic** [2023] KECA 1546 (KLR), urging this Court to draw inspiration from it, and sentence the

appellant to 15 years imprisonment in place of the  
life

imprisonment. In so doing, he urged this Court to consider the period the appellant had been in custody.

10. Miss. Mengo, on her part, filed written submissions on behalf of the respondent, dated 4<sup>th</sup> August 2025. Opposing the appeal, she submitted that contrary to the appellant's submissions, no contradictions existed in the prosecution's evidence. She lauded the prosecution witnesses, stating that they gave credible and consistent testimonies. Relying on the case of ***Kavai vs. Republic*** [2024] KEHC 11358 (KLR), she argued that the prosecution had proved that the appellant committed the offence that he was charged with to the required standard of proof and that the ingredients of the offence were established beyond reasonable doubt.
11. Turning to the sentence, Miss. Mengo submitted that the life sentence given by the High Court, in substitution for the death sentence, was lenient and well deserved. She observed that the judge had taken into account the aggravating circumstances as well as the appellant's mitigation and sentencing principles set out in our jurisdiction. She cited the decisions in ***Bernard Kimani Gacheru vs. Republic*** [2002] eKLR and ***Ogolla s/o***

**Owuor vs. Republic** (1954) EACA 270 to submit that  
the

appellant failed to demonstrate to this Court that the two courts below had acted on wrong principles.

12. Lastly, Miss. Mengo submitted that the two courts below considered the appellant's defence but properly found that it did not shake the evidence of the prosecution. For those reasons, she prayed that the appellant's conviction be affirmed and his sentence be upheld.

13. This is a second appeal. Our bounden duty is set out in section 361 of the Criminal Procedure Code to only confine ourselves to matters of law. This Court in **Karani vs. R** [2010) 1 KLR 73

further elaborated our role in the following terms:

***“This is a second appeal. By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as a matter of law.”***

14. To prove the charges leveled against the appellant, the prosecution marshaled six witnesses. We shall abridge the

evidence as follows: **PW1**, James Muthuri Mwirigi, the complainant, testified that he was a *bodaboda* rider operating

a black motorcycle registration number KMDS 081F. It was valued at Kshs. 89,000.00 and registered in his father's name. He testified that he ordinarily operated from the '*Kambi ya Juu*' stage.

15. His evidence was that on 9<sup>th</sup> August 2016 at 4:00 p.m., a teacher from Machakos Nursery School called him. He requested his services to take him to a place called *Bula Pesa*. However, on reaching the school, **PW1** found that the teacher had already secured the services of another motorcycle operator. He therefore proceeded to the town centre in Isiolo.
16. On reaching Milimani area, near Holiday Inn, **PW1** was stopped by the appellant. The appellant asked **PW1** to ferry an item to Gambela. They agreed on a fee of Kshs. 1,200.00. He added that he knew the appellant as a neighbour and that, indeed, at times the appellant gave him odd jobs. Having agreed on the fee, the appellant hopped onto **PW1**'s motorbike as a pillion passenger. He was taken to his home, where he retrieved a black jacket.
17. In the course of the journey, the appellant fueled **PW1**'s motorbike for a sum of Kshs. 150.00. On reaching a bushy area in *Matutatua* at around 4:30 p.m., the appellant

requested

**PW1** to stop the motorcycle. The appellant alighted. He informed **PW1** that they had arrived at the collection point of the item. Suddenly, he warned **PW1** that he had seen armed robbers in the direction that he pointed at. **PW1** could not see anyone. It was at this point that the appellant struck **PW1** on the neck twice with a metal object. **PW1** fell. The appellant pinned him to the ground and stabbed him in the mouth with a knife. In the process, the appellant plucked **PW1**'s teeth with a knife. The appellant also stabbed him on the head and chest. After the painful ordeal, the appellant grabbed the motorbike and sped off. In the process, he ran over **PW1** who fell unconscious.

18. **PW1** recalled that he gained consciousness five days later at around 11:00 a.m. His clothes were bloodstained. He slowly walked to the road where he found a good Samaritan on a motorcycle. The good Samaritan rushed him to Isiolo General Hospital. It was here that he sent word to his parents through a rider that he was in the hospital. He disclosed to his parents, when they went to see him, that it was the appellant who committed the offence.

19. **PW1** was treated at the said hospital and was later transferred to Meru General Hospital, where he received further treatment for 14 days. He further testified that on 22<sup>nd</sup> August 2016, **PW1** was summoned by the police to participate in an identification parade. He pointed out the appellant as the suspect in a line of nine people by touching him. Thereafter, **PW1** identified his motorcycle from a pile of them within the police station using the engine number, as the plates had been removed. **PW1** was informed that the motorcycle was found at *Pepo la Tumaini* by Muthetia, a pro box operator.
20. He further testified that though he had recovered, he could not perform heavy tasks. He maintained that he held no grudge against the appellant. He also remembered that on one occasion, the appellant borrowed his motorcycle and returned it intact.
21. **PW2** Salesio Mwirigi M'Thurania testified that **PW1** was his son and that he bought the motorcycle for his son at a sum of Kshs. 89,000.00. It was a Dayun make registration number KMDS 081F. **PW1** used it as a motorcycle operator working at *Kambi ya Juu*. He continued that when he returned home on 9<sup>th</sup>

August 2016, his wife grew wary, informing him that **PW1**

could not be traced and that he was last seen the previous day.

22. Immediately, **PW2** launched a search party after confirming **PW1**'s disappearance. He reported this disappearance at Kula Mawe police station and later at Isiolo Police Station. On 14<sup>th</sup> August 2016, Elis, **PW1**'s colleague, informed him that **PW1** was in Isiolo General Hospital. **PW2** went to the hospital. He found **PW1** and noted his head was visibly swollen, his upper teeth were missing and his tongue was swollen. His head had stab wounds and was blood stained. **PW1** narrated to him what had transpired, pointing out that the appellant was the culprit.
23. **PW2** further testified that he had known the appellant for five years as a *bodaboda* operator and he sought the assistance of his neighbours to look for the appellant. They found him in his house and locked him up. He recalled that the area residents wanted to lynch him but administration police officers rescued him and took him to Isiolo Police Station.
24. **PW2**'s further evidence was that the stolen motorcycle was

traced at *Pepo la Tumaini* area and that it was positively identified by **PW1**. Though the number plate had been removed, they were both able to identify the motorbike from

the chassis number as recorded in the logbook. He maintained that no grudge existed between his family and the appellant. When cross-examined, he denied that there was a grudge between him and the appellant over a debt.

25. **PW3** Isaack Koome Mwirigi, the complainant's brother, testified that before the incident, **PW1** worked as a motorcycle operator at *Kambi ya Juu* stage. The motorcycle was purchased by their father. On 22<sup>nd</sup> August 2016, **PW3** received reports from the police that **PW1**'s stolen motorcycle had been traced at *Golan Pepo la Tumaini* area at around 5:00 a.m. It was ferried to Isiolo Police Station. It was identified through the chassis number from the logbook as the number plate had been removed.

26. When **PW1** was traced at the hospital, **PW3** visited him together with the family. He observed that **PW1** had been injured on his head, mouth and tongue. **PW1** disclosed to him what had transpired. He knew the appellant as a *bodaboda* rider and worked with **PW1** doing odd jobs occasionally. He maintained that the family never held a grudge against the appellant.

27. **PW4** Dr. Daudi Dabaso, a clinical officer at Isiolo County Referral Hospital, filled the complainant's P3 form after seeing him at the facility on 1<sup>st</sup> December 2016. He testified that the complainant was admitted at the hospital on 14<sup>th</sup> August 2016 and discharged on 22<sup>nd</sup> August 2016 following the incident.
28. On examination, **PW4** noticed that **PW1** had a swollen face with a broken jaw fracture on his right side and had lost seven teeth. The gum on the upper side of his mouth was bleeding and swollen. He had bruises on his chest and left hand. His left hip was tender and swollen. His opinion was that sharp and blunt objects caused the injuries. He assessed the degree of injury as grievous harm. **PW4** produced the P3 form and the complainant's discharge summary.
29. **PW5** CIP David Ng'etich conducted the identification parade at the behest of CIP Kavoo, the investigating officer. **PW5** found nine participants of similar height and appearance to the appellant who was placed between the 3<sup>rd</sup> and 4<sup>th</sup> persons. He explained to the appellant the purpose of the parade.

30. Thereafter, **PW1**, who was waiting in the CID office, was taken to the parade. He stated that **PW1** did not see the appellant before the parade was conducted. He cautioned **PW1** that the

suspect may or may not be in the parade. At the parade, **PW1** identified the appellant as the suspect by touching him on the shoulder. **PW5** confirmed that the appellant was satisfied with the parade and had no complaints. He filled out the identification parade form that was produced in evidence.

31. **PW6** ASP Abel Kavoo, the investigating officer, testified that **PW1**'s mother reported on 10<sup>th</sup> August 2016 that **PW1** was missing. On 14<sup>th</sup> August 2016, he received reports that **PW1** had been found and was admitted at Isiolo General Hospital in a bad condition. **PW5** swiftly went to Isiolo General Hospital. He found that **PW1** had missing teeth. His mouth emitted a foul smell. He was unable to talk. He recalled that **PW1** was transferred to Kirua Hospital for treatment. In that period, the appellant was arrested.
32. **PW6** further testified that he interrogated the witnesses, recorded their statements and preserved the evidence. He directed **PW5** to conduct the identification parade. The appellant was positively identified as the perpetrator. He produced photographs of the stolen motorcycle found in a bush. He confirmed that its number plates had been removed. He produced the logbook, transfer documents

and receipts.

33. At the close of the prosecution's case, the trial court formed the opinion that the prosecution had established a *prima facie* case against the appellant. He was placed on his defence. **DW1**, the appellant herein, denied committing the offence. He testified that on 14<sup>th</sup> August 2016, he met **PW2** and **PW3**. **PW2** demanded for Kshs. 4,500.00 on account of an unsettled debt. The appellant was then asked to accompany them to *Kambi ya Juu* Administration Police Camp to record a statement regarding the debt. He was then taken to Isiolo Police Station. He was later charged on 16<sup>th</sup> August 2016. He believed that he had been framed for failing to pay the debt owed to **PW2**.

34. To put the appeal in context, we start by interrogating section 296 (2) of the Penal Code which provides that the offence of robbery with violence is committed in any of the following circumstances: where there is stealing of a thing, and the offender is either armed with a dangerous or offensive weapon or instrument; or the offender is in company of one or more other person or persons or 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 [See **Johana Ndungu vs.**

**Republic** [1996] eKLR.]

35. There is no doubt that **PW1** was viciously attacked and left for dead. The elephant in the room is whether, from the evidence adduced, the appellant was properly identified as the perpetrator of the crime. In other words, did the prosecution establish all the ingredients of the offence? To answer the question, we shall, at the risk of repetition, revisit the evidence of **PW1**, the star witness and the complainant. This way, we shall determine whether the ingredients of the offence were proved beyond reasonable doubt.

36. In his evidence, **PW1** informed the trial court that he was a motorcycle operator following the generosity of his father, **PW2**, who purchased a black Dayun motorcycle registration number KMDS 081F for a sum of Kshs. 89,000.00. On that fateful evening, while on duty, **PW1** met the appellant on his way to the town centre in Isiolo. He collected the appellant at Milimani area near Holiday Inn. The appellant asked him to ferry an item for him to Gambela at a fee of Kshs. 1,200.00.

37. **PW1** picked the appellant. They then went to the appellant's home to collect a black jacket. Thereafter, they

proceeded to Meru stage. On reaching a bushy area in *Matutua* at around 4:30 p.m., **PW1** stopped the motorcycle. The appellant

alighted. He informed **PW1** that they had arrived the collection point of the item. The appellant deceived **PW1** that he had seen armed robbers.

38. As **PW1** was looking out for the robbers, the appellant struck him on the neck twice with a metal rod and fell. The appellant then pinned **PW1** to the ground and started plucking his teeth with a knife. He stabbed the appellant on the head and chest. The appellant then ran over **PW1**'s leg with the motorbike and left him unconscious. The complainant would gain consciousness five days later at 11:00 a.m. He later received treatment. His disappearance was reported by **PW2** to **PW6**.

39. Come 22<sup>nd</sup> August 2016, **PW1** was summoned by the police to participate in an identification parade. He pointed out the appellant as the suspect in a line of nine people by touch. Thereafter, **PW1** identified his motorcycle from a pile of them within the police station using the engine number, as the plates had been removed.

40. It is not in doubt that from the evidence, **PW1** knew the appellant very well. They worked in the same industry as motorcycle operators. He also knew him as a neighbour, a

fact affirmed by **PW2**, the complainant's father. The offence

occurred during the day. **PW1** gave a vivid account of how he met the appellant and that they were together for hours before being vicious assaulted. In these circumstances where **PW1** knew the appellant so well before the robbery, it was superfluous to conduct an identification parade. The Court in **Githinji vs. Republic** [1970] EA 231 held the same view as follows:

***“Once a witness knows who the suspect is, an identification parade is valueless.”***

41. **PW1** was subjected to a meticulous cross-examination. He, however, remained consistent and credible. This was a case of recognition rather than identification. This Court in **Anjononi and others vs. The Republic** [1980] KLR 59 at 60 has said this on the issue of recognition.

***“The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was however, a case of recognition, not identification of assailants; 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.”***

42. Though the appellant argued that **PW1**'s evidence was marred with inconsistencies, that is not apparent from the record before us. **PW1** gave a gruesome and graphic account of the events that occurred leading up to his rescue five days after the offence had been committed. The evidence before the trial court was watertight. It proved that the appellant stole the motorbike while armed with dangerous and offensive weapons, namely a knife and a metal rod, and inflicted serious injuries on the complainant immediately before or immediately after the robbery.
43. The appellant argued that the weapons were not produced in evidence. Having reanalyzed the evidence in detail, we are satisfied that the appellant was properly identified as the perpetrator of the offence, and it is immaterial that the weapons were not produced in evidence, as **PW1** positively recognized the appellant as the person who had attacked him and the medical evidence proved that he suffered injury at the time of the robbery.
44. The appellant also criticized the findings of the two courts below stating that the stolen item was neither found in his possession nor taken for forensic analysis. He argued that no

tenable evidence was adduced before the trial court to demonstrate that the stolen vehicle was recovered in *Pepo la Tumaini* area. This was neither **PW1**'s area of work operation nor his place of abode. We have considered this argument, but just like the first appellate court, we are satisfied that **PW1**, with the assistance of **PW2** and **PW3**, was able to identify the stolen motorcycle in the police yard using the engine details in the logbook. A photograph of the motorcycle was also adduced in evidence. That evidence sufficiently proved that the motorcycle was stolen and the evidence of **PW1** tied the appellant to the theft, which was done violently.

45. Ultimately, we come to the inescapable conclusion that the appellant has raised no merited grounds of appeal and we are satisfied that this is a safe conviction. Accordingly, we affirm the findings on conviction and dismiss the appeal in that regard.

46. On the question of the sentence, we note that the appellant was sentenced to death by the trial court. Those findings were set aside by the High Court and substituted with a sentence of life imprisonment. We note the provisions of section 297 (2) of the Penal Code which provide 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 assault, he wounds, beats, strikes or uses violence to any person, he shall be sentenced to death.

47. **The decision of the Supreme Court in the case of Francis Karioko Muruatetu & Another vs. Republic, Katiba Institute & 5 others [2021] eKLR**

[**Muruatetu 2**] held that the

mandatory death sentence prescribed under Section 296 (2) of the Penal Code for the offence of robbery with violence is still legal.

48. In this case, the appellant's sentence was commuted to life imprisonment. That is an unlawful sentence. The proper sentence would have been death and until the law is amended or the Supreme Court pronounces itself otherwise, there is no room for a court to impose a different sentence.

49. However, we note that in this appeal, the respondent did not file a notice to enhance the sentence, and the appellant was not warned of the consequences of proceeding with the hearing of the appeal and that if the appeal on conviction failed, the sentence would be substituted with a death

sentence. We note,

further, that the State did not file a cross-appeal against the validity of the said sentence. Accordingly, we shall not interfere with the sentence.

50. In view of the foregoing, we find that the appellant's appeal both on conviction and sentence lacks merit and is hereby dismissed in its entirety.

Orders accordingly.

**Dated and delivered at Nyeri this 11<sup>th</sup> day of December 2025.**

**W. KARANJA**

**JUDICIARY**

.....  
**JUDGE OF APPEAL**

**K. M'INOTI**

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**JUDGE OF APPEAL**

**M. GACHOKA C. Arb, FCI Arb.**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**