



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**CRIMINAL APPEAL NO. E002 OF 2024**

**JAMLECK KATHURI GITURO.....APPELLANT**  
**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original conviction and sentence by Hon. L.W Kabaria (PM) in Gichugu criminal case No. E162 of 2022 delivered on 29/12/2023)*

**JUDGMENT**

- [1] The appellant herein was charged with robbery with violence contrary to section 296 (2) of the Penal Code. It was alleged that on the 14<sup>th</sup> day of October, 2021 at Karia shopping centre, Kabare location, in Kirinyaga East Sub-county within Kirinyaga County, robbed Dorothy Eudias Karimi Mwangi Ksh. 200,000/= and immediately before and after such robbery injured the said Dorothy Eudias Karimi Mwangi.
- [2] He denied the charges but upon full trial, he was convicted and sentenced to 20 years imprisonment.

**The Appeal**

- [3] On appeal, the appellant raised 8 grounds of appeal as follows:
1. *The learned trial Magistrate erred in fact and law by convicting the Appellant in the absence of proof beyond reasonable doubt of the ingredients in support of the charge against the Appellant.*
  2. *The learned trial Magistrate erred in fact and law in holding that on 14<sup>th</sup> October, 2021 the complainant had Ksh. 200,000/= in her shop, in the complete absence of evidence in support of the same.*
  3. *The learned trial Magistrate erred in fact and law by holding that on 14<sup>th</sup> October, 2021 the Complainant had Ksh. 200,000/= which was stolen by the Appellant while the evidence adduced by the Prosecution was only to the effect that the complainant had Ksh. 32,630/= only on the said day which she never alleged was stolen at any time.*
  4. *The learned trial Magistrate erred in law and fact by disregarding the consistent testimony of PW2 and DW3 who were together at the complainant's shop on 21<sup>st</sup> October, 2021, to the effect that the complainant had told PW2 and DW3 together*

*with other people that the Appellant had only wanted to rob her before he ran away.*

5. *The learned trial Magistrate erred in law and facts and misdirected herself by finding that the Appellant was armed with a knife on 21<sup>st</sup> October, 2021 while in the complainant's shop in the absence of forensic evidence that the Appellant had at any time been in contact with the said knife.*
6. *The learned trial Magistrate misdirected herself by disregarding evidence presented to the fact that the complainant sold water melons at her shop and she had knives in her shop for that purpose.*
7. *The learned trial Magistrate erred in law and fact by ignoring the inconsistencies in the evidence of the prosecution witnesses and inconsistencies between the testimony on the complainant and the P3 Form.*
8. *The judgment and sentence of the learned trial Magistrate was against the weight of the evidence adduced.*

### **Duty of Appellate Court**

- [4] The duty of this court as the first appellate court is to re-evaluate the evidence on record and draw its own independent conclusions, bearing in mind that it neither saw nor heard the witnesses and should make due allowance in that respect. (See **Okeno v R (1972) EA 32**).

### **Evidence**

- [5] **PW1 Dorothy Eudias Karimi Mwangi**, the complainant herein, testified that, *“I live in Karia. I am a business woman. I know the accused, he is called Jamleck Kathuri. He comes from the same town. His family were my customers. They used to come to my shop to make purchases. Even he used to come to my shop to withdraw cash and take groceries when he was sent by his grandmother. He is someone I know very well. I have a permit to show I run a shop. It is a single business permit from the County Government of Kirinyaga. This permit is for the year 2021 (marked PMFI-1 serial No 27428) I also have a certificate as an Equity agent, my agent number is 010172 (marked PMFI2). I have a letter from Co-operative bank dated 14<sup>th</sup> April 2016 (marked PMFI-3) It's an appointment as a Co-operative Bank agent. I have an agent number I don't use it much. This is a certificate of recognition as a KCB Agent, Agent no 51096 and this one is an Mpesa certificate (marked PMFI-5). This other one is a statement of the money I was operating with that month across all those accounts. It is my operating money (Co-operative bank statements from the 1<sup>st</sup> to 25<sup>th</sup> October, statements from equity bank, KCB and Mpesa marked PMFI-6). On the 14<sup>th</sup> October 2021 Jamleck Gathuri came to my shop at 10 am. He told me he wanted to withdraw Kshs 20,000 from Mpesa. I told him he required to bring his original identity card. He told me he is going to pick it. He came after some twenty minutes. He told me the person who registered his line for him was coming. He went and sat at a neighbors. He stayed there for a long time I asked him a*

few times how come he had not withdrawn the money yet he told me he was still waiting for the person who registered the line. Jamleck stayed there from 10:30 am. It was a Thursday a market day in Kutus so everyone locked their shops I was left alone. I was heavily pregnant about two weeks due so I was mostly staying inside my shop only going outside occasionally. At about 2:30 pm Jamleck entered the shop I was at the counter. The neighboring shops were all closed went round to a place where I sell clothes I sat on a stool I sat on it, he told me he wanted to pick clothes so he can go and shower and dress as he waits for the person who registered the lines. He picked clothes totaling Kshs 300. He went outside to look for slippers then came back again. He told me to pack the clothes for him. I stood up so that I pick a shopping bag to pack for him, just as I was about to enter the counter, I was taken hold of by the neck. He wanted to stab me in the head I blocked my head with my hand, he stabbed my hand with a knife on the top of the palm the knife went out through to the other side of the palm. It was a long knife with a black handle. This is the knife. I saw it when I fell to the ground I picked it and came with it to Kianyaga police station (knife marked PMFI-7). The knife fell to the ground when he stabbed me he did not realize it because I picked it from the ground. I fell and by the time I stood up he had done what he was doing and left. I saw him enter the counter. When he came into the shop and he is someone I knew I went to the other side without locking the counter. He stole Kshs 200,000. It is money I was to pay workers at the Thiba dam advances with. I saw him take the money he had tucked it into his armpit. There is nothing I could do I was heavily pregnant. I tried to scream but because he was holding my throat I was not able to scream well. I was injured on the left hand here (pointing to the upper part of the palm). I called my husband he was working at Kiburia Girls he did not pick my call he was in a meeting. My brother called him later and we agreed to meet at the police station. I was told to first go and seek treatment then I come back. This is the T-shirt I was wearing it has blood stains on it (court is shown a white T-shirt marked MFI-8, bloodstained) The blood was from my hand. This is the muffin the accused was wearing a black one (black muffin marked MFI-9) The muffin fell to the ground but he did not realize it he left the shop running and after he disappeared for five months. He returned after that. I went to Kianyaga hospital. I was treated. I have documents (treatment notes PMFI-10) the wound was cleaned, stitched and tied up. An x-ray was done. (X-ray request form marked PMFI-11) I have the film I forgot it but I have kept it well I can keep it. The x-ray showed that the knife went in straight it did not hit a nerve or bone. This is the P3 form. It was filed here in Kianyaga. (marked PMFI-12). I have recovered but I cannot do heavy work I cannot wash clothes. After this incident the accused disappeared, he came back after five months from home. He is the one before the court. I know him very well. He is the one who can tell us the reason he came to the shop he was my customer. He is the one who can tell us why he did this or if someone sent him. His intention was not to buy clothes. If that was his intention he would have bought and left his intention was to come and steal from me. We had never differed before.”

[6] On cross examination, she stated that, *“My business is known as Dotty Entrepreneurs. It is my name in short. I have rented the business premises. It is about  $\frac{3}{4}$  of this courtroom, it is a large shop. I can’t say its size in feet. It has partitioning, it has two partitions, the Mpesa side and the clothes. The fruits are not many. On one side I have Mpesa the other side new clothes and outside I sell shoes. The partitions are wire partitions, there is a small door but I do not lock it. Yes, there is a door. Yes, the Mpesa side is also where I have the Co-operative and KCB agents. I also use it for general sale of items. I have known the accused since 2014 nine years. Yes, I have known him since his childhood. No before that incident he had never withdrawn any money from my Mpesa. I did not say he was registered for Mpesa someone had registered for him using their own line. Yes, he selected his own clothes totaling 3300. He had fit, he would fit we agree on costs then pile them together. I sell fruits, I had bananas and melon that day though I had not cut the melons. I do sell fruit juices but that day I had not made any juices. I make them using fruits. I usually prepare them in the house. I had left the knife at home. I live in Karia it is not near the shop. When I saw the accused he was wearing jeans, flowered shirt. Yes, I had looked at him for quite a while because I was at the shop at 8 am but he left and came back. I did not see the knife initially. The knife was in his trousers. He took hold of me from behind. He held my neck. I did not expect it he held my throat I could not scream. I fell luckily, I fell on the side. It is not true that the knife is mine, the one who makes the fruits is outside. I was not making any fruits my husband used to prepare the fruits before leaving for work. There were employees constructing Thiba dam. I don't know the companies. They used to come and withdraw with their ATM cards. The agents withdraw using ATM cards, I have all the machines. I don't know what an ATM is. What I know is that ATMs are the machines we use as agents. It was the 14<sup>th</sup> the money was to pay advances. I was paying them as an agent. They used to come withdraw the money. It was the day I paid workers. The Kshs 200,000 from my statement you will see is almost million shillings. Students from Kiamwathia and Gatugura deposit their school fees there. I also load float for other agents so I usually have the cash. From the 11<sup>th</sup> October I had not banked any money I was just keeping it because I knew I will have my clients. On the 11<sup>th</sup> I deposited 52,000 to two clients each. On the 9<sup>th</sup> I deposited Kshs 120,000 for one Pauline then there is 40,000 for the month of September. The withdrawals were not many. Yes, I didn’t get the money in a lumpsum. I had arranged the money in Kshs 100,000 in one thousand notes. The loose money he didn’t take. The charges are not trumped up. My husband also knows I had the money because there is nothing I do without his knowledge. I arranged the money that day. My husband leaves for work in the morning. Yes, the money was there that night. There is somewhere I hid it then in the morning I removed it so that I transact. Yes, we have a safe. I removed it from the safe because by 9 am they had started withdrawing the money. It will take me time to determine how much was withdrawn that day because I have to compute for KCB and Equity. I need a week to compute the figures. From the time I opened the business that day to the time I was robbed Co-operative bank there were nil withdrawals, KCB*

*withdrawals were Kshs 9,000, deposits Kshs 7,000, Mpesa withdrawals Kshs 29,150, deposits Kshs 4,800, Equity withdrawal zero, deposit Kshs 59,000. When I compute the deposits minus withdrawals it comes to Kshs 32,630. Yes, that is the money I had in cash. The money I had in bundles was Kshs 100,000 twice that I had not touched, the money I touched was the money in the drawers. I said in the drawers on side were two bundles of Kshs 100,000 each a total of Kshs 200,000 then there was money I had not calculated that was in the drawer. No other than money there is nothing else the accused took from me. Yes, when he came he was wearing a trouser and a shirt. Yes, he left dressed the same way.”*

- [7] *In re-examination, she stated that, “In my shop I have a KCB, Mpesa, Equity and Co-operative agent. I also have a portion where I sell clothes I also sell fruits. No, I do not separate the process from the different business. Yes, the accused stole money Kshs 200,000. I had arranged the money in bundles of Kshs 100,000. The loose cash and coins I had not counted. On that day the total deposits were Kshs 59,000. Yes, it is money I received in cash. Withdrawals were Kshs 26,350. I did not put the Kshs 59,000 with the Kshs 200,000. Yes, I had Kshs 59,000 over and above the Kshs 200,000 from the 59,000 withdrawals were Kshs 26,350 leaving Kshs 32,650. It was separate from the Kshs 200,000. The Kshs 32,000 was not stolen by the accused. That knife belongs to the accused. I don’t know where he had kept it. I don’t work for Strabag, it’s that they used to come withdraw cash in my agency, there were those who came for Equity others Mpesa I took all as my customers. Yes, it is an agency not an ATM machine, we have small machines like this calculator you can use an ATM card to withdraw money even Mpesa agents come to buy float there at my shop.”*
- [8] **PW2 Catherine Wangari Githinji**, testified that, *“I live in Karia in Kabare. I work as an attendant in a petrol station in Karia. I know the complainant she runs a business in Karia. On the 4<sup>th</sup> October 2021 at about 2:30 pm I was at work. I was attending to a client then I saw Jamleck running head towards the field coming from Dorothy’s direction. People went towards Dorothy’s I followed. Dorothy came out bleeding in the hand. She started explaining what has happened. When I saw Jamleck running he was not carrying anything. Dorothy told us Jamleck has stolen from her and stabbed her. She didn’t tell us how much. Her brothers came and helped her close the shop and took her to hospital. She was bleeding on the right hand. I don’t remember if it was the right or left hand. I know Jamleck, he is here in court. I have not spoken to him since that incident. Dorothy’s shop is two shops away from mine. It is like from here to where the courts fence is, it is nearby. Yes, you can hear someone talk from her shop. She said she screamed but I did not hear it. There is a radio that was playing in the petrol station I did not hear the screams. I saw Jamleck entering her shop and I saw him running away.”*
- [9] *On cross examination, she stated that, “Yes, I know Jamleck’s home it is near the field. I saw him run towards a path I can’t tell whether he went home or not. Yes, his home is near that field. Dorothy’s shop from the little I know it has a small shed outside where she sells fruits, when you enter she sells clothes there is also a side where the shop is.*

*Yes, the shop is one but she had partitioned. It is a house but she has constructed a shed to sell fruit and shoes. Yes, she had fruits outside that day there were watermelons there. She also sells bananas. I don't recall well what she was selling that day. I found people helping her lock up the shop. No, I have not said she had melons that were sliced I said I found people helping put things back in the shop and Dorothy was outside narrating what had happened. I don't recall what the accused was wearing I don't know if he was wearing a jacket or not. I did not see him carry anything in his hands."*

[10] In re-examination, she stated that, *"I did not say I found melons anywhere. She usually sells watermelons and bananas I don't know if she had melon slices there that day."*

[11] **PW3 Jane Mwihaki Njagi**, testified that, *"I live in Karia. I run a shop there. I know Dorothy she is my neighbour she runs a business in Karia we are one shop apart. I also know Catherine she sells in a nearby petrol station. We follow each other the petrol station myself and Dorothy in a different plot. I have been there for almost three years. I know the accused he is a neighbor and his parents are my friends. On the 14<sup>th</sup> October 2021 I was in the shop. I had just arrived I wanted to sell dishes I went outside then I heard the sound of glasses in Dorothy's house. I knew she was pregnant I decided to go check on her. As I went near I saw the accused running out of her shop, he was wearing a jacket. I saw him running holding on to his jacket. I went and found Dorothy standing near the entrance. The jacket was not zipped he was running holding the jacket, I don't know why he was holding the jacket like that. When I got to where Dorothy was she told me the young man wanted to rob her but he had run away with some clothes. She was bleeding in her hand that was the only part she was bleeding from. I spoke to her I asked her what happened she told me the young man wanted to rob her that he had carried away her clothes she told me it is the accused who stabbed her with a knife. I did not see the knife though she was holding a knife she usually has one she uses to slice melons with. I did not know it was the same knife. I went to the accused's aunty she told me she had earlier seen the accused but she did not know where he went. We went to check for him but we found a black marvin Dorothy told us it is what he was wearing that is the one (referring to MFI -9) Dorothy was also carrying a knife a small one not a large one. I cannot identify the knife she was holding it. We were advised to report the matter. She came then I later recorded a statement. Yes, we later returned to Dorothy's shop. She told me the accused came and selected some clothes that is where the quarrel started."*

[12] On cross examination, she stated that, *"I found Dorothy bleeding in the mouth. I arrived at the same time as another neighbor. Yes, usually sells melons at that place. I don't know if she had sliced melons that day I did not check. Yes, I found Dorothy carrying a knife yes, she usually has a knife to peel fruits with. I did not hear her talk about lost money I found her trembling she only said he stole clothes. She sells clothes she also sells fruits."*

[13] In re-examination, she stated that, *"Yes, the shop has many things. Yes, she is also a KCB and Mpesa agent. I don't know whether when I found her she had confirmed she*

*had lost money. I only heard about the money the next day. No, I did not see Dorothy cut a melon she said she was stabbed by the accused with the knife.”*

[14] **PW4 James Kariuki Ombati**, a Clinical Officer working at the Kianyaga sub county hospital, produced the treatment notes, the P3 form, x-ray request and x-ray film as exhibits. He told the court that *“I have with me treatment notes for a Dorothy Eudias Karimi Mwangi, 34 years old. I attended to her on the 14<sup>th</sup> October 2021 at around 4:14 pm at the sub-county hospital. She came with complaints of pain and bleeding in the left hand. There was history of alleged assault by a person well known to her by a sharp object sustaining injuries on the left hand. The incidence took place at Karia village Kabare location at around 2:40 pm. On examination she was in fair general condition she was wearing a white T-shirt torn at the shoulder with blood stains. The patient had a deep cut wound on the left hand about 4cm by 4cm deep. It was actively bleeding and the edges were smooth an indication that the injury was from a sharp object. I made a diagnosis of a cut wound secondary to assault stitching and dressing was done. The patient was given tetanus injection and she was discharged home on oral painkillers. Because of the depth the wound we sent her for an X-ray to rule out bone involvement. I have the x-ray request. The x-ray was one and I have the x-ray film is this one, it was done at Kerugoya Level Five hospital on 15<sup>th</sup> October 2021 at 8:28. From the same there was no bone involvement it was just a soft tissue injury. (X-ray film marked MFI-13). The X-ray was reviewed on the 15<sup>th</sup> October 2021 by my colleague because I was not on duty it confirmed it was normal. I wish to present her P3 form I filled it on 14<sup>th</sup> October 2021, on examination she was in pain. There was tenderness on the neck on light palpation, on the upper limbs she had a deep cut wound on the left hand it was fresh and actively bleeding. The approximate time of injuries 0-24 hours, the injury was classified as harm. I signed it.”*

[15] On cross examination, he stated that, *“The x-ray request form was filled by me on the 14<sup>th</sup> October. LMP means last menstrual period date. Yes, the x-ray was one on the 15<sup>th</sup>. Yes, I filled the P3 form on the 14<sup>th</sup> there was no hurry to fill the P3 form it is actually procedural. She had been treated and she had the P3 form with her so we filed it. If the X-ray showed bone involvement then nothing would have changed in the P3 form but for the treatment. If the fracture is stable then it can be classified still as harm this is one that does not result in permanent disability in the patient. I believed that would be the case. This is a fracture that is not displaced and with it can heal without disability. If the x-ray showed an unstable fracture, the P3 form was already filled. P3 cannot be changed the x-ray was to rule out any further injury. There are things that require further investigating that is why we sent the client for further investigation. I don’t think there is anywhere indicated that a P3 form should be filled after a patient has healed.”*

[16] In re-examination, he stated that, *“I did not know the patient I only attended to her. I did not know the circumstances of the case. I filled the P3 form because I had attended to the patient and she came back with the P3 form because we treated her*

we filled the P3 form. I had personally assessed the wound and found it was a soft tissue injury it is only that it was safer to send her for further examination.”

[17] **PW5 PC Clement Wachira**, the investigating officer in the matter, testified that, “On the 14<sup>th</sup> day of October 2021 at about 3:30 pm I was on duty in the crime office when the complainant was referred to me by the report office. She had previously reported bleeding and she was referred to Kianyaga District Hospital she was treated and came back. She informed me that she had been robbed of Kshs 200,000 while in her shop by a person well known to her. I issued her with a P3 form and referred her back to the hospital. I also got her contacts and got in touch with her the following day. The next day accompanied by another officer and the police driver, I went to the scene. She showed me the drawer where she had kept the money. I also carried several certificates as evidence. There was one from Co-operative bank, KCB bank bank statements from the two banks and Mpesa. She gave me others from the administrator of the Mpesa and also a single business permit from Kirinyaga County Government. I interrogated different people. She gave me a certified copy of a statement from Equity Bank. There was a certified copy of a statement from Co-operative Bank a/c no 01198489169100. The statement for Equity Bank Kutus is for a/c no 0100164328614 for Dorothy Eudias Karimi Mwangi. The KCB one is for a/c no 1179965264 for Dorothy Eudias Karimi Mwangi. When the complainant issued me with this document I enquired to see if she had this kind of money and from the Equity account she had received Kshs 141,120 from her customers from 8<sup>th</sup> October to 14<sup>th</sup> October. From the Equity statement the complainant on the 14<sup>th</sup> October there were transactions of Kshs 46,000, 12,000 and Kshs 1,000 all the three were done on the 14<sup>th</sup> October. In Co-operative on the 14<sup>th</sup> October there was no transaction. In Mpesa there were transactions from the 9<sup>th</sup> up to 11<sup>th</sup> the complainant had received Kshs 293,000 in deposits. I am therefore telling the court that the complainant was handling a large amount of money. I wish to produce the documents marked as evidence (mfi-6 produced as P.Exh 6, business permit mfi-1 produced as P. Exh. 1). The business permit shows that the complainant was operating a business in Karia that was licensed (mfi -2 and mfi-3, certificate from KCB to Mtaani mfi-4 produced as P. Exh. 2, 3 and 4 respectively, contract for Mpesa agency in the name of JTech communications P. Exh. 5). I interrogated different people at the shopping center and two confirmed seeing the accused running away from the complainant’s shop. They and the complainant accompanied me to the police station. When I recorded her statement the complainant informed me she had left the knife used to stab her at the front office which I retrieved from the report office and a blood stained t-shirt and woolen hat muffin (knife produced as P. Exh. 7, T-shirt as P. Exh 8, muffin P. Exh. 9). I recorded the statement of the complainant and her witnesses and informed the complainant to inform me when she sees the suspect. The incident happened at about 1:30 pm in broad daylight. The accused was known to the complainant they are neighbours. The accused entered the shop and informed the complainant he wanted to buy some clothes. He selected some clothes and gave to the complainant and as the complainant wrapped them for him he went to the

cash drawer and took Kshs 200,000. When the complainant tried to intervene, he took out a knife took hold of her and injured her with the knife. The suspect ran away and the complainant raised alarm a neighbour went to check and saw the accused running away. The complainant after going home told me the accused had left for an unknown destination. I told her to keep checking. After five months she called and informed me he had resurfaced. I gave her an arrest order that she took to Karia police post. He was arrested and brought to Kiyanaga police station. He was charged with robbery with violence. The complainant told me she had set aside to bundles of Kshs 100,000 and kept them aside intending to pay workers from Thiba dam the following day who were to receive advances. That is the money the accused stole. The accused is the one before the court.”

[18] On cross examination, he stated that, “I recorded my statement after the accused was arrested. In the column date my statement is not dated. Yes, I interrogated several people and two confirmed seeing the accused running away from the shop. Yes, the complainant had kept aside Kshs 200,000 to pay workers from Thiba dam. In her KCB statement she had received more than Kshs 141,000 which-was in her possession. She had kept the Kshs 200,000 aside. Thiba dam was being constructed by Strabag construction. She did not show me anything to show she was their agent. No, she did not show a salary payroll. She had kept it aside intending to use it to pay salaries. It was in the cash box she showed me where she had kept the money wrapped in rubber bands. Yes, there were other monies in the cash box she has kept the Kshs 200,000 aside she was not trading it. At the scene on the 15<sup>th</sup> October that is when she spoke about the Kshs 200,000 when I visited the scene. She was also selling vegetables and fruits. I did not see watermelon I saw oranges and cabbages. Yes, part of the shop she operated a green grocer. There were also clothes. It was all one room subdivided with a counter where she had the cash box the other side there were clothes and fruits were in between. The knife was brought to the police station by the complainant on the day she reported. I don’t know if at other times the complainant had paid workers from Thiba dam. On such transactions you give your ATM and you are given money you are supposed to withdraw. It was cash being held by an agent to serve customers from various banks and one of them was Thiba dam. Let us say a customer resides in Karia and they don’t want to go to Kutus so the worker would prefer to go to an agent. Yes, you withdraw from your account. She is accredited by three banks. She was anticipating Thiba dam workers would go to other outlets and withdraw their money that was paid in the middle of the month as salary advance. She benefits by getting commission from the various banks. It is not true that I came up with this figure on the 15<sup>th</sup> to justify the arrest of the accused. I don’t recall if he took anything else from that shop. Yes, the accused selected clothes went to the counter and picked money the complainant tried to restrain him and she was attacked. Yes, he was restrained as he was getting money.”

[19] In re-examination, he stated that, “The money belonged to the complainant. She was anticipating that the next day Thiba dam workers would visit her Mpesa outlet and

*withdraw money from their accounts. Yes, this is part of the money she would use in the transactions. The knife I got it from the report office the complainant handed it over when she made her report. She explained that it was the knife used to attack her by the assailant. She had a bandage on the hand and later handed in her P3 form and treatment notes.”*

[20] **DW1 Jamleck Kathuri Gituro**, the Appellant herein testified that, *“I live in Karia. I am a student at Mitunguu Technical. I want to tell the court it was a Thursday 14<sup>th</sup> October 2021 I went to Karimi’s shop in Karia in the afternoon hours. There was a jacket that was in fashion that I wanted to buy. Asked her she showed me one. The one she had was small. I took one to fit I went outside to fit it because inside her shop there is no mirror. As I went outside I felt myself held from behind. I found I had an injury on the finger. I wondered what had injured me. I was hit by the edge of the window my cap fell off. Karimi has divided her shop there is an area for utensils, another for clothes. When I was choosing the jacket Karimi was inside the shop. What I picked was small she left the shop and gave me another one. I fit the one she gave me. Her shop has many items. She has clothes she has partitioned it so it is dark so I was going outside to look at myself. I was held from behind I felt myself injured on the hand. I was hit on the head the cap I was wearing fell off. I was wearing a jacket when I went to her shop so my jacket and cap fell off. Yes, she has fruits on the display outside. She had sold a customer juice while I was there so she was selling from outside but preparing the fruits from inside the shop. Even the fruits she cuts from inside. There is somewhere inside she had her appliances, a basin, cups, blender and knives. I left that place running and I went to my grandmothers. After that I went to my friends. Later I was called by my grandmother I was told the brothers of the complainant were at home with pangas they were banging on my door. Yes, so I decided to disappear first. I was in the shamba when the Nyumba Kumi elder came for me they came and arrested me I was taken to her shop they called a private car I refused to enter and told them to call the police they called the police. I did not enter her shop. I was a student at Kiamiciri then day school. I was not in school that day. I had been sent home for lack of school fees.”*

[21] On cross examination, he stated that, *“Yes, it is true I was in the complainant’s shop on that day. Yes, I had gone to buy a jacket. Yes, I did not buy a jacket. Yes, it is true I wore one and I went outside. Yes, I left the place running after I was cut. I was running because I found myself stabbed and held from behind I did not want to look behind and see. There is nothing I had done. No, I did not run and stay away a whole day. I was arrested at 2. Yes, I went to my grandmothers then I left and went to another home. I went to hospital. Yes, I had not said so earlier. Yes, I have not brought any hospital documents. Yes, after I was arrested I was taken to her shop we went and sat to talk in her shop but she refused. When I was picking the second jacket Karimi had left the other side of the shop she was next to me she is the one who gave me the bigger jacket. I don’t know what she was doing on the other side. Yes, she was pregnant then. When someone is pregnant has many issues. No, I was not afraid of Karimi. I was hit by the edge of the*

*door the muffing fell down. I had no intention of going back there. I found myself stabbed and she had come at me from behind I wondered what I had done. I stayed in the shop 3-4 minutes. Yes, I told Karimi let me go outside and see how this jacket looks like. It is Karimi who took hold of me. I don't know the reason why. I ran away because I was stabbed and I wondered why she was holding me. She later went to my aunts and she told her. I didn't know her I used to be sent to her shop. Yes, Karimi has an Mpesa shop. I don't know about her being a Co-operative or Equity agent. I had been sent home due to lack of school fee. I had my own money to buy clothes. I had Kshs 800. The money I had was left in the jacket that I left in her shop. The Nyumba Kumi elders are the ones that told me Karimi wanted us to talk. Yes, they took me to Karimi's we did not talk she refused. I did not take off with her money I took off with her jacket because of the situation I had been stabbed. I didn't take back the jacket I have not taken it back to date. Her brothers went home and broke my door and scared my grandmother that is the reason I kept away from home because I didn't know their intentions."*

[22] In re-examination, he stated that, *"There is nothing else belonging to Karimi that I left the shop with other than the jacket. I left my hat and jacket in her shop the jacket had money in it Kshs 800."*

[23] **DW2 Caroline Wambui Muriithi**, testified that, *"I live in Karia I am a business person. My business is in Karia. I have a shop and a pool table. The accused is my nephew, his mother is my sister. On the 24<sup>th</sup> October 2021 at about 2:30 pm I was outside my shop when a lady called mama Njeri came. She told me Karimi was calling me. Karimi is the owner of a shop that is also in Karia. Her shop is along the tarmac hers is inside the farms. It is about 200 meters from my shop. I found Karimi outside her shop she told me Jamleck had wanted to steal from her she did not tell me more I did not find Jamleck there. I called Jamleck's mother and I informed her. Then I went back to my shop. At about 5 pm because Jamleck lives with my mother she sent for me saying there was a disturbance at home. I went home and found two of Karimi's brothers were at home looking for Jamleck that they wanted to show him their sister was valued. They said if they had found him they would have burnt his house down. I called his mother and told him about it. Yes, I saw like it was a dangerous situation because they were murmuring at the road saying they would kill Jamleck. Yes, Karimi has a business she sells fruits, clothes she has an Mpesa and also a general shop. I have never heard about her paying people that worked in the dam. I heard about the Kshs 200,000 when she came to record her statement at the police station."*

[24] On cross examination, she stated that, *"I was not there when she recorded her statement. I heard about it later from the witnesses she had. The witnesses are my friend's we live in the same area. Karimi was my friend but since that incident we have not had a good relationship. She told me Jamleck tried to steal from her she did not tell me what. I have asked her what Jamleck tried to steal from her. Yes, Jamleck went to Karimi's shop I don't know about him running away from the shop I did not ask him I only asked him if he took the money from Karimi. Yes, it is true Karimi is in business. I don't know if it is*

*possible she had cash. No. I don't know if she was paying the people working in the dam. I have never worked in the dam. Yes, the dam is near Karimi. No, it is not true that her Mpesa is the one that is close to the Mpesa. I don't know about the money she has in her Mpesa phone or her float. Karimi called for me she told me Jamleck had gone to steal from her that is why they came home. I was called and I went to my mother's Jamleck lives with her he was not home. It was about 5pm. I don't know since when he had been missing from home. I was called by Karimi about 2 pm. No, I did not see him that time. Yes, he was not home when I went home. He did not have a phone that is what I knew. Jamleck was a student then at Kiamiciri secondary he was in form three. He had been sent away due to fees. I was aware his mother was also aware."*

[25] In re-examination, she stated that, *"Yes, Karía is a recent town it had about five Mpesa shops then."*

### **Submissions**

[26] The appellant urged that the judgment and the sentence of the trial court were against the weight of the evidence adduced, and cited ***Republic v Annastacia Nthambi Atanus (2019) eKLR and Yosia Musungu v Republic (2020) eKLR***.

[27] The respondent urged that it had proved beyond reasonable doubt all the elements of the offence as set out in ***John Kariuki Gikonyo v Republic (2019) eKLR***. It submitted that this case was one of recognition as the complainant properly knew the appellant, and cited ***Anjononi v Republic (1980) KLR 59***.

### **Analysis and Determination**

[28] From the grounds of appeal as framed, the issues for determination are ***whether the offence was proved beyond reasonable doubt, whether the appellant's defence was considered and whether the sentence was excessive***.

### **Proof of the offence**

[29] Robbery is defined under section 295 of the Penal Code as follows:

***"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery."***

[30] The elements of robbery with violence, which the prosecution needed to prove beyond reasonable doubt are stipulated under section 296 (2) of the Penal Code as follows:

***"(2) 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.”***

[31] The complainant testified that on the material day, the appellant came to her shop to withdraw Ksh.20,000 through Mpesa, but the transaction could not be effected as he failed to produce his original identity card. He informed her the person under whose name the sim card was registered would bring the requisite documentation, and he sat outside awaiting the same, until the surrounding business operators had closed for the day. She stated that, ***“At about 2:30 pm Jamleck entered the shop I was at the counter. He told me he wanted to pick clothes so he can go and shower and dress as he waits for the person who registered the lines. He picked clothes totaling Kshs 300. He told me to pack the clothes for him. I stood up so that I pick a shopping bag to pack for him, just as I was about to enter the counter, I was taken hold of by the neck. He wanted to stab me in the head I blocked my head with my hand, he stabbed my hand with a knife on the top of the palm the knife went out through to the other side of the palm. This is the knife. I saw it when I fell to the ground I picked it and came with it to Kianyaga police station (knife marked PMFI-7). I saw him enter the counter. He stole Kshs 200,000. I saw him take the money he had tucked it into his armpit. There is nothing I could do I was heavily pregnant. I tried to scream but because he was holding my throat I was not able to scream well. I was injured on the left hand here (pointing to the upper part of the palm). This is the muffin the accused was wearing a black one (black muffin marked MFI-9). The muffin fell to the ground but he did not realize it he left the shop running and after he disappeared for five months. He returned after that.”***

[32] PW2 and PW3 saw the appellant fleeing from the complainant’s shop, and upon reaching the premises, the complainant informed them that the appellant had stolen from her and stabbed her on the hand, which was visibly bleeding. This report at first opportunity by the complainant is itself corroborative of the fact of the attack and theft.

[33] When the investigating officer visited the scene, he verified from the complainant’s Bank statements that she had received a cumulative sum of Ksh.141,120 between 8<sup>th</sup> October to 14<sup>th</sup> October. He interrogated different people at the shopping center, two of whom confirmed having seen the appellant running away from the complainant’s shop. He further retrieved from the report office the knife, a blood stained t-shirt and woolen hat (muffin).

[34] In his sworn defense, the appellant conceded having visited the complainant’s shop on the material day to purchase a jacket, and as he returned from fitting it, someone seized him from behind, causing him to injure his finger, and in the process, his jacket and cap fell:

***“[I]t was a Thursday 14<sup>th</sup> October 2021 I went to Karimi’s shop in Karia in the afternoon hours. There was a jacket that was in fashion that I wanted to buy. Asked her she showed me one. The one she had was small. I took one to fit I went outside to fit it because inside her***

*shop there is no mirror. **As I went outside I felt myself held from behind. I found I had an injury on the finger. I wondered what had injured me. I was hit by the edge of the window my cap fell off.** Karimi has divided her shop there is an area for utensils, another for clothes. When I was choosing the jacket Karimi was inside the shop. What I picked was small she left the shop and gave me another one. I fit the one she gave me. Her shop has many items. She has clothes she has partitioned it so it is dark so I was going outside to look at myself. I was held from behind I felt myself injured on the hand. I was hit on the head the cap I was wearing fell off. I was wearing a jacket when I went to her shop so my jacket and cap fell off.”*

[35] He went into hiding when the complainant’s brothers allegedly came to his home armed with pangas in search of him, and he was subsequently arrested and charged. It did not explain why he had run away from the shop; an innocent man would have stopped to find out who and the reason for the attack, and what had occasioned the injury on him. The defense is implausible.

[36] Upon learning of the alleged theft from the complainant on 24/10/2021, DW2 called the appellant’s mother and informed her. DW2 herself said the complainant had not told her more, but it confirms the complainant’s consistency that the accused had stolen from her.

[37] The Court finds the complainant’s evidence that she had Ksh.200,000/- which she had kept aside for purposes of Bank agency operations and the accused had taken this money during the incident unchallenged, as she said on cross-examination that:

*“It was the 14<sup>th</sup> the money was to pay advances. I was paying them as an agent. They used to come withdraw the money. It was the day I paid workers. The Kshs 200,000 from my statement you will see is almost million shillings. Students from Kiamwathia and Gatugura deposit their school fees there. I also load float for other agents so I usually have the cash. **From the 11<sup>th</sup> October I had not banked any money I was just keeping it because I knew I will have my clients. On the 11<sup>th</sup> I deposited 52,000 to two clients each. On the 9<sup>th</sup> I deposited Kshs 120,000 for one Pauline then there is 40,000 for the month of September. The withdrawals were not many. Yes, I didn’t get the money in a lumpsum. I had arranged the money in Kshs 100,000 in one thousand notes. The loose money he didn’t take.** The charges are not trumped up. My husband also knows I had the money because there is nothing I do without his knowledge. I arranged the money that day. My husband leaves for work in the morning. Yes, the money was there that night. There is somewhere I hid it then in the morning I removed it so that I transact. Yes, we have a safe. I removed it from the*

*safe because by 9 am they had started withdrawing the money. It will take me time to determine how much was withdrawn that day because I have to compute for KCB and Equity. I need a week to compute the figures. From the time I opened the business that day to the time I was robbed Co-operative bank there were nil withdrawals, KCB withdrawals were Kshs 9,000, deposits Kshs 7,000, Mpesa withdrawals Kshs 29,150, deposits Kshs 4,800, Equity withdrawal zero, deposit Kshs 59,000. When I compute the deposits minus withdrawals it comes to Kshs 32,630. Yes, that is the money I had in cash. **The money I had in bundles was Kshs 100,000 twice that I had not touched, the money I touched was the money in the drawers. I said in the drawers on side were two bundles of Kshs 100,000 each a total of Kshs 200,000 then there was money I had not calculated that was in the drawer. No other than money there is nothing else the accused took from me.***

The complainant distinguished the amount of Ksh.200,000/- in two bundles of 100,000 each from the money which she had already started using Mpesa/banking agency operations which was in loose change and which he accused did not take.

[38] Medical evidence of PW4 corroborated the evidence of the complainant, PW2 and PW3 that she had been assaulted. When PW4 examined the complainant, she was wearing a white blood stained torn T-shirt at the shoulder. The patient had a deep cut wound on the left hand about 4 cm by 4 cm deep, which was actively bleeding, tenderness on the neck on light palpation, and he classified the degree of injury as harm.

#### **Identification of the appellant**

[39] There can be no doubt that it was the appellant who violently robbed the complainant on the material day. PW1, PW2 and PW3 recognized the appellant, who was very well known to them as the offence took place in broad day light. PW1 stated that, ***“I know the accused, he is called Jamleck Kathuri. He comes from the same town. His family were my customers. They used to come to my shop to make purchases. Even he used to come to my shop to withdraw cash and take groceries when he was sent by his grandmother. He is someone I know very well.”***

[40] The appellant acknowledged in his testimony that he was indeed at the complainant’s shop on the material day.

#### **Consideration of the appellant’s defence**

[41] The appellant’s defence of being attacked by the complainant while at her shop was analyzed by the trial court when it observed that, ***“Examining the defense I find that it in fact lends credence to the case of the prosecution the actions of the accused are consistent with that of a guilty man.”***

[42] The appellant's jacket and muffin were recovered at the scene, together with the knife used to stab the complainant.

[43] The Court finds that the appellant's defense was a sham and a bare denial devoid of any evidentiary foundation, and could not raise any reasonable doubt as to the prosecution's case.

[44] This court finds that the corroborative and consistent evidence adduced by the prosecution witnesses sufficiently placed the appellant at the scene of the crime and was consistent with the commission of the offence of robbery with violence, the accused have stolen the money, while armed with a dangerous weapon, a knife, and in the course of the robbery wounding the complainant.

### **Sentence**

[45] The sentence prescribed for the offence of robbery with violence under section 296 (2) of the Penal Code is death. The appellant was fortunate that the sentence of imprisonment for twenty (20) years was passed on him on 29/12/2023 before the Supreme Court clarified (see **Republic v Manyeso** [2025] KESC 16 (KLR)) that the penalty of death sentence under section 296 (2) of the Penal Code was not affected by the decision as to the constitutionality of the death penalty in cases of Murder under **Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)** [2017] KESC 2 (KLR) and the **Muruatetu Directions [Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)** (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)], which ruled that the death sentence was a maximum rather than a mandatory sentence in cases of murder under section 2023 as read with 2024 of the Penal Code. There was no cross-appeal by the DPP and the Court cannot interfere with the lower sentence of imprisonment for 20 years in this case.

[46] During mitigation, the appellant stated that he was 21 years old, a first offender, expressed remorse for his conduct, and implored the court for leniency, and the Court properly exercised its sentencing discretion on the state of the law at the time.

### **ORDERS**

[47] Accordingly, for the reasons set out above, the court finds that the appellant's appeal has no merit and it is dismissed.

*Order accordingly.*

**DATED AND DELIVERED THIS 16<sup>TH</sup> DAY OF DECEMBER 2025.**

**EDWARD M. MURIITHI**  
**JUDGE**

**APPEARANCES:**

Mr. Heyi for the Appellant.

Mr. Mamba for the DPP/Respondent.