IN THE COURT OF APPEAL AT KISUMU

(CORAM: ASIKE-MAKHANDIA, OMONDI & ACHODE

JJ.A.) CRIMINAL APPEAL NO. 167 OF 2019

BETWEEN

LAWRENCE CHAMWADA ..... 1ST APPELLANT
SILAS ASAVA 2ND

APPELLANT AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kakamega, (Mwita, J.) dated 26th September, 2016

in

HCCRA No. 53 of 2015)
****

JUDGMENT OF THE COURT

1. This second appeal was lodged by the appellants against the judgment delivered on 26th September 2016 by the High Court of Kenya at Kakamega (Mwita, J.) in Kakamega High Court Criminal Appeal No 53 of 2019 which arose from the judgment of the Chief Magistrate's Court at Vihiga in Criminal Case No. 726 of 2013. The appellants were charged with two

counts. The first count was that of robbery with violence contrary to section

295 as read with section 296 (2) of the Penal Code. Particulars stated that on the night of 25th and 26th July, 2013, at Kegoye village in Vihiga County jointly with others not before court, while armed with offensive weapons, namely, pangas, robbed AM[1] fourteen plates, four sufurias, one weighing machine, 6 kilograms of beans, all valued at Kshs.10,000/=, the property of AM and at the time of such robbery, used actual violence to the said AM.

2. The second count was gang rape contrary to section 10 of the Sexual Offences Act, whose particulars stated that on the night of 25th and 26th July, 2016 at the same village, and location within Vihiga County, in association with others not before court, intentionally and unlawfully gang raped AM, a woman aged 52 years. The appellants faced an alternative charge of indecent act on a woman contrary to section 11(1) of the same Act, particulars being that on the night of 25th and 26th July 2013, at the same village, location and county, willfully and unlawfully caused their genital organs namely penis to make contact with the genital

[1] Initials used to protect her identity as she was also sexually assaulted

organ, namely, vagina, of [particulars withheld] a woman aged 52 years.

3. The appellant and the co-accused entered a plea of not guilty, and their trial proceeded, ultimately resulting in the conviction and death sentence of the appellants.

4. Aggrieved, they appealed to the High Court of Kenya at Kakamega against the whole decision, and after hearing it on the merits, the learned judge dismissed it in its entirety.

5. The appellants are now before this Court on a second appeal on one singular ground challenging the harshness and excessiveness of the death sentence imposed on them by the trial court and upheld by the first appellate court.

6. At the plenary hearing, Ms. Awuor appeared for the 2nd appellant while Mr. Kilambyo was present for the respondent. The 1st respondent withdrew his appeal.

7. Ms. Awuor, learned counsel argued that the sentence of death imposed on him was unconstitutional as it violates Articles 25[a][c], 28 and 29 of the Constitution. Relying on the case of ***Francis Karioko Muruatetu & Another vs. Republic [2017]***

eKLR, the appellant contended that the appellant was sentenced to death which sentence was declared unconstitutional.

8. In rebuttal, the respondent submitted that the sentence meted on the appellant was lawful and there is no basis on which the Court should interfere; and that in any event, the issue regarding the constitutionality of the death sentence was being raised for the first time. Relying on the case of ***Kenya Commercial Bank Limited vs. Osede [1982] eKLR,*** the respondent maintained that the argument has no basis as it was being raised for the 1st time in this appeal.

9. It was further contended that although the appellant based his argument on the holding in ***Muruatetu case*** *(***supra***)*, the Supreme Court in ***Republic vs. Joshua Gichuki Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR)*** has since reiterated that the court's decision in *Muruatetu* did not invalidate minimum mandatory sentences in the Penal Code, the Sexual Offences Act or any other statute. That the appellant's conviction was safe and the sentence meted out was lawful.

10. This being a second appeal, this court is restricted under Section 361(1) (a) of the Criminal Procedure Code to considering matters of law only as stated by this Court in ***Stephen M'Irungi & Another vs. Republic 1982 – 88 1KAR 360:***

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

11. Having considered the record, the grounds of appeal, the submissions of both parties and the Court's mandate, the main issue that falls for determination is whether the death sentence imposed on the appellant for the offence of robbery with violence was excessive or unlawful. The issue of mandatory death sentences was revisited by this Court way back in 2008 by a five Judge bench in the case of ***Joseph Njuguna Mwaura & Others vs. Republic (2008) KEHC 3435 (KLR).*** The Judges observed;

> ***"We hold that the decision in Godfrey vs.***

Republic to be per incuriam in so far as it purports to grant discretion in Sentencing with regard to capital offences. Our reading of the law shows that the offences of murder contrary to Section 203 as read

with section 204 of the Penal Code, treason contrary to section 40 of the Penal Code, robbery with violence contrary to section 296(2) of the Penal Code …. carry the mandatory Sentence of death".

12. From his submissions, the appellant has relied heavily on ***(Muruatetu 1),*** which outlawed the mandatory nature of the death sentence imposed in murder cases. Applying the same rationale, the holding must likewise extend to the other capital offences.

13. However, the Supreme Court clarified in ***Muruatetu & Another vs. Republic; Katiba Institute & 4 Others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6th July 2021) (Directions)("Muruatetu 2")***, that the principles in ***Muruatetu 1*** applied solely to murder cases. The Court stated that:

> ***"The decision in Muruatetu applies only in respect to sentences for murder under Sections 203 and 204 of the Penal Code. Courts remain bound by the mandatory sentences prescribed for other offences unless and until declared otherwise by the Supreme Court."***

14. Similarly, in the case of ***Wamwoma vs. Republic (Criminal Appeal 19 of 2018 [2024] KECA 546 (KLR)*** it was stated

as follows:

> ***"On the issue of sentence, the appellant was sentenced to the mandatory death sentence as provided for the offence of robbery with violence under Section 296(2) of the Criminal Procedure Code. The appellant contended that the sentence imposed upon him was unconstitutional. However, in Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (amicus curiae) (2021) eKLR, (Muruatetu 2), the Supreme Court clarified that notwithstanding its holding in Muruatetu that the mandatory nature of the death sentence under Section 204 of the Penal Code is unconstitutional, the death sentence in regard to the offence of robbery with violence under Section 296(2) remains valid until the constitutional validity of that sentence is fully argued before the High Court and escalated to the Court of Appeal. As this is yet to be done, the sentence of death that was imposed upon the appellant remains a lawful sentence."***

15. The appellant was sentenced to death by the trial court after it considered the plea in mitigation. Those findings were upheld by the High Court. Section 297 (2) of the Penal Code provides 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 any other personal violence to any person, he shall be sentenced to death. The sentence provided therein is couched in mandatory terms.

16. Furthermore, the Supreme Court of Kenya emphasized in the case of ***Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [supra]*** that until a challenge to mandatory sentences is taken up before the courts all the way to the Supreme Court, such sentences are lawful and cannot be interfered with. There is therefore no reason to interfere with the sentence, which, as passed by the trial court, was legal. The upshot is that this appeal lacks merit and is dismissed.

Dated and delivered at Kisumu this 19th day of December, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR