

IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MURGOR, NYAMWEYA & OCHIENG, JJ.A.)

CRIMINAL APPEAL NOS. E043 OF 2024 & E044 OF 2024

BETWEEN

1.ALI MAGHANGA.....1ST APPELLANT

2.RAPHAEL KIRIGHA.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Voi (F.M. Amin J.) delivered on 25th February 2020

in

High Court Criminal Appeal Nos. 28 of 2018 and 29 of 2018.)

JUDGMENT OF THE COURT

Ali Maghanga and ***Raphael Kirigha***, the **1st** and **2nd** ***Appellants*** respectively were jointly charged with the offence of robbery with violence contrary to ***Section 296(2) of the Penal Code***. The particulars were that on the 25th February, 2017 at about 0100hrs at Daraja ya Maveta area within Taita-Taveta county, jointly with others not before court, they robbed the complainant, ***Peter Leiyo***

(PW1) of Kshs. 38,000 and at the time of the robbery struck **PW1** with a panga on the forehead.

The Appellants pleaded not guilty and the matter proceeded to hearing where the prosecution called 7 witnesses.

The complainant, PW1, a driver with Naekana Matatu Sacco, testified that on the night of 24th February 2017, between 10.30 and 11.00 pm, he arrived in Taveta from Nairobi and parked at the bus stage to allow passengers to alight. At the time, he had with him the day's collections of approximately Kshs. 38,000 which he intended to bank the following day. He was scheduled to proceed to Rombo to pick passengers for Nairobi and decided to spend the night there. Being unfamiliar with the road to Rombo, he sought the assistance of the 2nd Appellant, a bodaboda rider. After negotiations, a fare of Kshs. 200 was agreed upon. The 2nd Appellant called another man, who it was agreed would ride with PW1 in his vehicle to show him the road and thereafter return with the boda boda rider. The man boarded the vehicle and sat with PW1 in the cabin.

PW1 drove along the Taveta-Mwatate road and after about one kilometre, he saw the 2nd Appellant on a motorcycle facing Taveta town. Two other men emerged from the roadside and joined him as pillion passengers. PW1 drove past them, but he noticed through the side mirror that they were following him with their headlamp switched

off. Suddenly, the man in his vehicle directed him to stop, alleging that there were police officers ahead. Sensing danger, PW1 accelerated, but the man in his cabin punched him, grabbed the steering wheel, and struck him with an object. In the

struggle, PW 1 lost control of the vehicle which veered off the road and into a ditch in the bush. He identified the man in the cabin as the 1st Appellant. The 2nd Appellant also alighted from the motorcycle, and they were joined by the three men on the motorcycle, who were armed with a panga and a rungu.

According to PW1, the 1st Appellant demanded money from him, whereupon, the group set upon him with a rungu and a panga, assaulting him on forehead, back and hands, and inflicting both blunt and cut injuries on him. They robbed him of Kshs. 38,000, a shirt and trouser he had recently purchased, and a USB flash disk. The commotion attracted neighbours in the area. The Appellants dragged PW1 onto the road. When he cried out "thief," members of the public turned on him and assaulted him, mistaking him for the culprit. A woman intervened and demanded that the police be called.

The police arrived shortly thereafter, and PW1 pointed out the 1st and 2nd Appellants, as the assailants, while the other two men fled the scene. Members of the public later realized that he was a driver from his uniform and apologized to him. The Appellants were arrested and escorted to Taveta Police Station. PW1 produced his PSV and driving licence and gave the contacts of one Maundu, a stage manager with

Naekana Sacco, who confirmed his identity. The vehicle was photographed and later towed to the police station. PW1 was treated at Taveta Hospital, but was not admitted

owing to a doctors' strike. He continued treatment at a nearby guesthouse and later proceeded to his home in Namanga to convalesce.

On the same night between 2.00am and 3.00am, **Honest Tayet Jadale PW2**, a resident of Darajani, was awakened by the sound of a vehicle and a loud bang. He then heard shouts of "thief, thief". He went outside with his wife Jackline and mother Filipina, and with the assistance of a torch, and the moonlight, he saw two men, one in a Maasai *shuka* and another in a yellow T-shirt, who claimed that a Naekana vehicle had been stolen. He also saw a man squatting nearby. The man in the yellow T-shirt picked a piece of wood and hit the squatting man prompting PW2 to restrain him. The squatting man explained that he was not a thief, but a driver headed to Rombo to pick passengers. He stated that the vehicle was his and showed his driving documents. It was resolved that the police be contacted. PW2 testified that he identified the Appellants among those present that night, although he had not seen them before. The Appellants were restrained until the arrival of the police.

At about 4.00 a.m. on 25th February 2017 **Alphonse Maundu Kimoli PW3**, stage manager with Naekana Sacco, was called by Police

Officer Musyoka, to inform him that one of their vehicles had been carjacked. He rushed to the scene and found PW1, whom he knew as a driver with the Sacco, injured on the head. The motor vehicle KCF 204B, a Nissan matatu, was off the road in a bush. He also found the Appellants

at the scene in the presence of police and members of the public. He later drove PW1 and the motor vehicle to Taveta Police Station.

Cpl. Buya Said Maro, PW4, an officer at Taveta Police Station, stated that while on patrol with PC Musyoki on the night in question, they were informed of a stolen matatu at Darajani. Upon reaching Maveta bridge, they found a crowd. PW1 was lying on the ground near a motorcycle, and the motor vehicle was in a bush nearby. PW1 narrated how he had been attacked by the 1st Appellant and robbed of Kshs. 38,000. The officers contacted the Sacco stage manager and thereafter arrested the Appellants, and took them to the police station.

Patterson Mwapulu, PW5, a clinical officer at Taveta Sub-County Hospital, examined PW1's injuries. He observed that he had a sutured scar on the forehead, scars and tenderness on the upper posterior chest, a pressure bandage on the left hand, and a scar on the left lateral ankle. The injuries were about 10 days old and were caused by both blunt and sharp objects. The P3 form classified the degree of injury as maim. PW1 was treated with anti-tetanus, antibiotics, analgesics and a diclofenac injection.

PC Francis Musyoki PW6, who at the time was attached to Taveta police station was the investigating officer. His evidence largely

reiterated the evidence of PW1 and PW2 save to add that, PW1 had informed them that he had Kshs. 38,000 stolen from him; that when they searched the scene, they found Kshs. 200 and a Naekana receipt. They also recovered the ignition key of the motor vehicle on the ground.

PC Shem Asher (PW7), a forensic crime scene officer processed the scene and provided photographic evidence from a soft copy, and he developed five photographs showing the motor vehicle KCF 204B in a thicket from different angles. He produced a certificate of photographic prints.

In their defence, the Appellants denied the charges. The 2nd Appellant stated that on the material date, he and the 1st Appellant, his brother, had spent the day visiting their ailing grandfather. On their return that evening, they encountered a group of about ten people who told them that there had been an accident and the driver was injured. They were asked to call the police. They contacted one Maureen, a cleaner at the border, who in turn called the police. They then continued their journey, but their motorcycle developed a puncture. While pushing it, a motor vehicle approached, and stopped ahead of them. Three men alighted, and proceeded to accuse him of having contacted the police. He was bundled into a police vehicle, and taken to Taveta Police Station without being told the reason for his arrest. He was later charged.

The 1st Appellant corroborated this account, stating that he was with his brother at their grandfather's home, and that they were

wrongly arrested while pushing their punctured motorcycle.

The trial Magistrate upon considering the matter convicted the Appellants of the offence as charged and sentenced them to suffer death. Aggrieved, the Appellants filed

an appeal to the High Court. Upon considering the appeal, the High Court upheld the conviction and substituted the death sentence with 30 years imprisonment.

Still aggrieved, the Appellants have filed an appeal to this Court on grounds set out in the supplementary grounds of appeal, which are that; the 1st appellate court failed in its duty to re-analyse and reconsider the evidence and arrive at its own conclusion and erred in failing to find that the trial, at the Magistrate's court was a nullity because the Appellants were not afforded legal representation by the State and yet they were facing a capital offence; in failing to find that the offence of robbery with violence was not proved beyond reasonable doubt; in failing to find that the charge sheet was defective, and that the charge was null and void; in upholding a conviction on a charge that was declared unconstitutional by the High Court in *Nairobi Petition No. 618 of 2010 Joseph Kaberia Kahinga & 11 Others vs Attorney General*; and in imposing an unlawful excessively long custodial sentence when there was no aggravating factors or circumstances associated with the offence.

Both the Appellants and the Respondent filed written submissions. When the appeal came up for hearing on a virtual platform, learned

counsel **Ms. Aoko** for the Appellants submitted that the trial in the Magistrates Court was a nullity because the Appellants were not afforded legal representation contrary to the requirements of **Article 50 (2)** of the **Constitution**; that substantial injustice would occur if an accused person faces a criminal charge attracting the death penalty, without the forensic skills

of a defence advocate; that, the Appellants should not have been tried without legal representation because the charge they faced was a capital offence.

Counsel further submitted that the offence of robbery with violence was not proved beyond reasonable doubt, since the theft of Kshs. 38,000 by the Appellants was not proved beyond reasonable doubt; and the owner of the motor vehicle was not called to give evidence that his car was hired out for Kshs. 38,000 or that PW1 who was driving it on the material day was supposed to hand over Kshs. 38,000 to the owner. It was further submitted that the persons who hired out the vehicle that day were likewise not called to testify that they hired the vehicle and paid PW1 Kshs 38,000 in cash for his services; that the Appellants were arrested at the scene, but no cash was found on them, which disproves the allegation that PW1 had Kshs 38,000 on him. Further, no weapon was found on the Appellants and no witness testified that the Appellants had offensive or dangerous weapon on them.

Counsel also submitted that the charge sheet was defective because it was drawn and signed by a police officer contrary to the law and decisions from the High Court.

Counsel further submitted that the sentence imposed by the trial court and the High Court are illegal because, contrary to the Judiciary Sentencing guidelines, the sentences were not proportionate to the gravity of the offence and not based on any law; and that 30 years is an imprisonment of a lifetime. It was submitted that the Appellants have already spent 8 years in legal custody (in remand and while serving

sentence), and even if they were guilty, they ought not to have been sentenced to 30 years imprisonment when there was no loss of life or limb or property; that a loss of Kshs 38,000 which was not proved is not commensurate nor proportional to serving a long imprisonment term of 30 years.

Learned Assistant Director of Public Prosecutions **Ms. Mutua** for the Respondent opposed the appeal and submitted that the Appellants' right to a fair trial under **Article 50(2)(g)** of the **Constitution** was not violated. It was argued that the Appellants neither sought for nor requested for legal representation to be assigned, and that in any event, they ably followed the proceedings, cross-examined witnesses, and gave sworn testimony; that no substantial injustice was therefore occasioned.

On proof of the charge, counsel maintained that all the ingredients of the offence of robbery with violence under **Section 296(2)** of the **Penal Code** were proved. It was submitted that it was the complainant's case that the Appellants were in the company of others, armed with a panga and a rungu, and that they assaulted and robbed him of money and personal effects; that the evidence of PW1 was clear, corroborated, and left no room for doubt.

Counsel further submitted that the charge sheet was not defective, and that no prejudice was occasioned to the Appellants within the meaning of **section 382** of the **Criminal Procedure Code**. The argument that **Section 296(2)** of the **Penal Code** was unconstitutional was rejected as misconceived, and reliance was placed on the case of

Joseph Kaberia Kahinga & Others vs Attorney General [2016]
eKLR where the court only

made recommendations for reform but did not invalidate the provision.

On the sentence imposed, it was contended that the trial court's imposition of the death penalty was lawfully reviewed by the first appellate court to 30 years' imprisonment under **Section 333(2)** of the **Criminal Procedure Code**. Counsel argued that severity of sentence is a matter of fact not open to a second appeal, and in any event the sentence imposed was lenient.

The Respondent further submitted that the investigations were thoroughly carried out and the identification of the Appellants was positive and free from error; that as a consequence, the conviction was based on direct, corroborated evidence of PW1 and PW2 and that minor inconsistencies in testimony did not affect the substance of the case. It was asserted that the defence, was considered, and rightly dismissed as an afterthought. In conclusion, the Respondent urged that the prosecution evidence was cogent, consistent, and sufficient to sustain a conviction, and that the appeal should be dismissed.

This being a second appeal, the jurisdiction of this court is limited to matters of law only as defined in **Section 361** of the **Criminal Procedure Code**.

This was affirmed by this Court in **David Njoroge Macharia vs. Republic [2011] eKLR** as follows:

“That being so only matters of law fall for consideration - see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings - see Chemagong v. R [1984] KLR 611.”

In the case of ***Mueke vs Republic (Criminal Appeal 46 of 2020) [2022] KECA 934 (KLR)*** this Court held:

In a second appeal, such as the one this Court is currently seized of this Court is to confine itself to matters of law, as provided under Section 361 (1) (a) of the Criminal Procedure Code, unless it is shown that the findings of fact by the two courts below considered matters they ought not to have considered or that they failed to consider matters 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 matters of law”

The issues that arise for determination in this appeal are: i)
whether the Appellants’ right to a fair trial under ***Article 50(2)(g)*** of

the **Constitution** was infringed by the alleged lack of provision of legal representation; ii) whether the charge sheet was defective and, if so, whether such defect occasioned any prejudice to the Appellants; iii), whether the provisions of **Section 296(2)** of the **Penal Code** are unconstitutional; iv) whether the prosecution proved the offence of robbery with violence under **Section 296(2)** of the **Penal Code**, including the identity of the

Appellants, the circumstances of their arrest, and the sufficiency and consistency of the evidence relied upon; v) whether the defence advanced by the Appellants was properly considered and was correctly rejected as an afterthought; and vi) whether the sentence imposed was lawful, proportionate, and open to interference by this Court.

We begin with whether the Appellants rights to legal representation as set out under **Article 50 (2)(g)** of the **Constitution** was infringed during the trial.

According to **Article 50(2)(g)** every accused person has the right to a fair trial, which includes the right;“...(g)*To choose, and be represented by an advocate, and to be informed of this right promptly*”.

In the Supreme Court decision of **Republic vs. Karisa Chengo & 2 others, SCK Petition No. 5 of 2015 [2017] eKLR** the Court issued guidelines and the circumstances to be considered in determining whether substantial injustice has resulted from lack of legal representation; that whether substantial injustice has occurred is a matter for determination on a case by case basis.

The Supreme Court then went on to say:

“...it is obvious to us that in criminal

proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with

regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:

- (i) the seriousness of the offence;**
- (ii) the severity of the sentence;**
- (iii) the ability of the accused person to pay for his own legal representation;**
- (iv) whether the accused is a minor;**
- v) the literacy of the accused;**
- (vi) the complexity of the charge against the accused;”**

In the case of **Mohammed Abudullahi vs Republic [2019]** eKLR, this Court

stated as follows;

“Having perused the record, it is clear that from the onset up to the conclusion of the trial the appellant was not represented by counsel. There is no evidence of him requesting the court for legal representation. Maybe he did not feel prejudiced by lack of representation. Article 50(1) of the Constitution does not in our view make appointment of counsel for an accused person at State expense automatic. If that were so, then such advocates would be appointed even before plea to appear for an accused person regardless of whether an accused person was in need of free legal aid or not. It is imperative for an accused person

who feels he needs free legal representation to place such an application before the trial court for consideration. When the matter went to the first appellate Court the appellant did not seek legal counsel either. The learned Judges who heard the first appeal do not appear to have held the view that the appellant needed legal representation.”

The foregoing is clear that though an accused person should be informed of the right to legal representation, it is also incumbent upon him or her to place such application before the court. In this case, the record does not indicate the Appellants raised this issue before the trial court. But this notwithstanding, from the manner of cross-examining of the prosecution witnesses by the Appellants, and their overall vigorous participation in the proceedings, no injustice—let alone substantial injustice—resulted from the failure to inform them of their rights under **Articles 50(2)(g)** of the **Constitution**. Consequently, this complaint is without merit and is dismissed.

The next issue was whether the charges preferred against the Appellants under **Section 296 (2)** of the **Penal Code** were unconstitutional on account of the High Court decision in the case of **Joseph Kaberia Kahinga & 11 Others vs Attorney General (supra)**.

Given that this is a constitutional issue that is being raised by the Appellants for the first time in this Court on a second appeal, we consider it inopportune to address it within the context of this case at this stage. (**See Makau & Another vs Republic [2025] KECA 661 (KLR)**). Accordingly, this ground is for dismissal.

Regarding the charge sheet, the Appellants contend that it was defective since it was drawn and signed by a police officer contrary to the law. In addressing whether or not the charge sheet was defective, **Section 134** of the **Criminal Procedure Code** is instructive, in that it lays out the essential components of a valid charge. It specifies that every charge shall be sufficient if it contains, a statement of the specific offence or

offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence

charged.

In the case of ***Isaac Omambia vs Republic [1995] eKLR***, this Court held that the

particulars of a charge require to be spelt out, and that a charge is adequate if it clearly states the specific offence and includes sufficient details to inform the accused of the nature of the allegation.

In the case of ***Peter Ngure Mwangi vs Republic [2014] eKLR***, which cited ***Yongo vs***

Republic [1983] eKLR, this Court stated that a charge may be defective not only when

it is flawed on its face, but also when it does not correspond to the evidence presented, either due to inaccuracies, omissions, or inconsistencies between the charge preferred and the evidence adduced at trial.

This Court in the case of ***Peter Saban Laitin vs Republic, Criminal Appeal No. 483 of 2007***, further clarified that a defect in a charge sheet is only fatal if it causes prejudice to the accused or leads to a miscarriage of justice. The Court reasoned that where the charge and its particulars are properly read out and understood by the

accused, the signatures by the OCS or the ODPP does not necessarily validate or invalidate the charge.

This position was also reiterated in the case of **Benard Ombuna vs Republic [2019] KECA 994 (KLR)** where this Court held;

“In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence.”

In effect, the validity of a charge sheet does not depend on the formalities pertaining to signatories of a charge sheet, but on compliance with **Section 134** of the **Criminal Procedure Code** and whether any prejudice or injustice was occasioned to the accused on account of non-compliance with the provision.

Having said that, upon interrogating the record, it is observed that the Appellants did not raise the issue of competence of the charge sheet on account of its having been signed by a police officer, before either the trial court or the High Court. It is being raised in this Court for the first time. At this stage of the proceedings, it is crucial to point out that whether or not the person who signed the charge sheet was a police officer is a matter of fact which ought to have been raised much earlier.

In the case of ***Chris Kasamba Karani vs Republic [2010] KECA 478 (KLR)***, this

Court stated thus:

“This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the 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 matters 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 matters of law.”

As we have stated above, this being a second appeal, this Court’s jurisdiction is limited to matters of law only. Given that the issue now being raised concerns matters of fact, we have no jurisdiction to address it. This complaint is therefore without merit and is dismissed.

The next issue for consideration is whether or not the prosecution proved its case beyond a reasonable doubt. For the offence of robbery with violence to be founded, the elements as enumerated in **Section 296(2)** of the **Penal Code** that require to be proved are that the offender is; i) armed with any dangerous or offensive weapon or instrument or; ii) in the company of more than one person or persons or; iii) immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person. The elements for the offence of robbery with violence were set out in the case of ***Johanna Ndung’u vs. Republic [2020]*** eKLR thus:

“(i) Therefore, the existence of the afore described ingredients constituting robbery are pre-supposed in three sets of

circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.

(1) If the offender is armed with any dangerous or offensive weapon or instrument, or

(2) If he is in company with one or more other person or persons or

(3) If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”

It is trite law that proof of any one of the ingredients of the offence of robbery with violence would warrant a conviction. See ***Mwangi & another vs Republic (Criminal Appeal 132 of 2018) [2022] KECA 656 (KLR)*** and ***Oluoch vs Republic [1985] KLR p.54.***

In the case of ***John Mwikya Musyoka vs Republic [1999] KECA 67 (KLR)*** the court held that the offender must steal something. In other words, theft is an essential ingredient of the charge of robbery with violence.

So as to reach a determination of whether the offence of robbery with violence was proved requires that we return to the facts. The complainant (PW1) testified that the man seated beside him in the cabin—whom he identified as the 1st Appellant punched him, grabbed the steering wheel, and struck him with an object, causing the vehicle to swerve off the road into a ditch in the nearby bushes. The 2nd Appellant thereafter alighted from the motor vehicle, together with three other men who were armed with a panga and a rungu. PW1

stated that the 1st Appellant demanded money from him, and together the gang assaulted him on the forehead, back, and hands, inflicting both blunt and cut injuries with the panga and rungu. According to PW1, they then robbed him of Kshs. 38,000, a shirt and trouser he had recently purchased,

and a USB flash disk. When the clinical officer at Taveta Sub-County Hospital, examined PW1, he observed that he had a sutured scar on the forehead, scars and tenderness on the upper posterior chest, a pressure bandage on the left hand, and a scar on the left lateral ankle. The injuries were caused by both blunt and sharp objects. The P3 form classified the degree of injury as maim.

From this evidence it can be ascertained that, PW1 was violently attacked and severely injured by the Appellants and three others using a rungu and a panga during the robbery, which was proof of one of the elements of the offence, that the Appellants were in the company of one or more other persons. And further, in the course of the attack, or immediately before or immediately after the robbery, violently beat and wounded, PW1. This was proof of yet another element of the offence. As a result, the elements pertaining to the offence under **Section 296 (2)**, were properly established.

As portends to the issue of whether it was demonstrated that PW1 was robbed, the Appellants' asserted that PW1 did not prove that he had Kshs 38,000, on him and neither were they found with the alleged stolen money. This Court while faced with similar facts in the case of **Antony Muchai Kibuika vs Republic [2013] KECA 210 (KLR)**

held:

“It is our considered opinion that the gravity of the offence of robbery with violence does not depend on the value of the subject matter robbed, but on the completion of the action of robbery which is an aggravated form of theft since it is

accompanied with violence or threat of violence which has been demonstrated to exist herein.”

PW1's evidence was that the 1st Appellant demanded money from him, whereupon, the gang proceeded to assault him on the forehead, back and hands, inflicting both blunt and cut injuries. During the attack, he was violently robbed of Kshs. 38,000, a shirt and trouser, and a USB flash disk by the Appellants. PC Musyoki, the investigating officer's evidence was that when they searched the scene, they found Kshs. 200 and a Naekana receipt. They also recovered the ignition key of the motor vehicle on the ground. Our re-evaluation of the evidence and events as they transpired discloses that the violent attack on PW1 was intended to perpetrate a robbery, which in the end, culminated in PW1 being robbed of Kshs. 38,000 and his personal effects. The recovery of Kshs. 200 and the Naekana receipt at the scene would infer that the amount indicated in the charge sheet and other personal effects were stolen from PW1 during the robbery. Clearly, the allegation that there was no money stolen from PW1 is without merit and accordingly fails.

On identification of the Appellants, as were the two court below, we too are satisfied that they were positively identified. PW1 saw the

2nd Appellant from whom he sought directions to Rombo following his arrival in Taveta. He again saw the 2nd Appellant as he followed them on his motor cycle, and thereafter during the attack. He was also able to see and identify the 1st Appellant who joined him in the motor

vehicle to assist in directing him to Rombo, and when he initiated the attack on him in the motor vehicle. Thereafter, PW1 retained visual contact of the Appellants, after the attack, and whilst they were being restrained by the members of the public, upto the time of their rearrest by the police. Therefore, given the length of time PW1 interacted with the Appellants, it can be concluded that the Appellants' identification was proper, and that this was not a case of mistaken identity.

The next issue was the Appellants' assertion that the learned Judge did not take into account their defence. Having assessed the Appellants' defence the trial court stated:

"I dismiss the two accused's respective statements of defence. They are theories they created to evade the clear and straightforward case brought against them. They had violently robbed the complainant who had innocently sought for help to direct him to a route he was to pick passengers from the next day. It is clear they took advantage of that interaction to crafting a plot to rob him of his valuables including money."

The Judgment of the 1st appellate court upheld the conclusions reached by the trial court. For our part, upon a re-evaluation of the defence in conjunction with the prosecution evidence, there can be no

doubt that the Appellants hatched the plan amongst themselves to violently rob PW1 as he drove from Taveta to Rombo. And much as their defence made it appear as if they were conducting their own family

business when they came upon the motor vehicle in the bush, the evidence of PW1 and PW2 effectively controverted their defence, and instead demonstrated that at all times they were the perpetrators of the violent attack and robbery on PW1. It was PW1's screams for help, after the motor vehicle veered off the road, that attracted PW2 and other members of public who lived nearby to the scene where they found the Appellants violently assaulting him. They were restrained and remained at the scene until they were arrested by the police. As a consequence, their defence did not in any way dislodge the prosecution's case. As did the High Court, we too uphold the trial court's conclusions. We find that the prosecution proved its case to the required standard, the conviction was safe and we have no basis on which to interfere with it.

As to whether the sentence imposed was lawful, proportionate, and open to interference by this Court, **Section 296(2)** of the **Penal Code** stipulates that:

“If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company of one or more other persons, or if, at or immediately before or immediately after the robbery, he wounds, beats, strikes, or uses any other personal violence to any

***person, he shall be sentenced to death.”
(Emphasis added)***

Upon re-evaluating the sentence imposed by the trial Court, the 1st appellate court substituted the death sentence with a term of thirty (30) years' imprisonment, effective from 27th February 2017.

This Court is mindful of its limited jurisdiction on a second appeal as set out under **Section 361(1)(a)** of the **Criminal Procedure Code**, which provides that:

“A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section on a matter of fact, and severity of sentence is a matter of fact.”

“With regard to sentence, under Section 361(1) of the

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to the
“
“To clear the confusion that exists with regard
as that in this case may be reached.
Murutetu, as it now stands, cannot
directly be applicable to
those cases.”
”

Appellants' appeals against both conviction and sentence. The appeals are

Lastly, this judgment is delivered and signed under **Rule 34(3)** of the **Court of Appeal Rules (2022)**, following the untimely death of the **Hon. Mr. Justice Fred Ochieng JA** prior to its delivery.

It is so ordered.

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

A.K. MURGOR

.....
JUDGE OF APPEAL

P. NYAMWEYA

.....
JUDGE OF APPEAL

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

Signed
DEPUTY
REGISTRAR

