

**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: W. KARANJA, M'INOTI & ARONI, JJ.A.)

CRIMINAL APPEAL NO. 81 OF

2017 BETWEEN

SIMON MUGAMBI MWAMBI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (Kiarie w. Kiarie, J.) dated 26th April 2017

in

HCCR.A. No. 97 OF 2014)

JUDGMENT OF THE COURT

1. This is a second appeal arising from the judgment of the **High Court of Kenya at Meru (Kiarie wa Kiarie, J.)** dated 26th April 2017. In its judgment the High Court dismissed **Simon Mugambi Mwambi's (appellant's)** first appeal against conviction and sentence by the **Chief Magistrate's Court at Maua**, where he was convicted and sentenced to death for the offence of **robbery with violence** contrary to section **296(2)** of the **Penal Code**.
2. The evidence against the appellant was adduced by five witnesses.

The totality of that evidence showed that at about 2.00 pm on 1st April 2012 ***the complainant, Siberian Nkoroï***, who testified as

PW1, was walking home from church when she met the appellant at **Kimongoro Market, Igembe** in **Meru County**. The appellant grabbed the complainant's handbag, which she held onto and a struggle ensued, during which the appellant pulled out a knife and stabbed the complainant on the abdomen and the right hand. After sustaining the injuries, the complainant let go of the handbag and the appellant ran off with it. In the handbag was **Kshs. 5,000**, a Nokia cellphone model 110, and a handkerchief.

3. The complainant was first treated at Maua Methodist Hospital. She reported the offence at Maua Police Station the same day and was issued with a P3 Form. She was later treated at Nyambene District Hospital and the P3 Form was duly filled.
4. The robbery was witnessed by **Dorcias Kanario (PW2)**, who at the material time was walking behind the complainant, also from church. She raised an alarm, which attracted members of the public, but they were unable to apprehend the appellant, who escaped. He was apprehended later by officers from Kanuni AP Camp and charged with the offence.
5. Another eyewitness to the robbery was **Stanley Kiriangi (PW3)** who at the material time was in a hotel at Kimongoro Market. Upon hearing screams, he rushed out and found the

appellant struggling

with the complainant before he stabbed her and ran away with her

handbag. He was about 10 meters away from the appellant and the complainant and knew the appellant since their childhood.

6. **M'Ngai M'Mathio (PW5)**, a clinical officer at Nyambene District Hospital who examined the complainant about nine days after the incident, testified to the injuries sustained by her, which he assessed as harm.
7. Upon being put on his defence, the appellant gave an unsworn statement and denied committing the offence. He added that the case against him was fabricated and borne of a conspiracy between the complainant and her brother-in-law, to whom he had declined to sell a piece of his family land at Kimongoro market.
8. As earlier stated, the trial court convicted the appellant as charged and sentenced him to death. His first appeal to the High Court, in which he challenged both his conviction and sentence, was unsuccessful, leading to this second appeal.
9. The appellant challenges the decision of the High Court on only two grounds, namely that the court erred by:

i) failing to find that the appellant was denied the right to a fair trial guaranteed by Article 50(2) (h) of the Constitution because the State did not provide him an advocate at its expense and he was not promptly informed of his said right; and

ii) By upholding the death sentence which is mandatory in nature and a violation of the right to a fair hearing.

10. Relying on submissions dated 15th August 2025, the appellant's counsel, **Mr. Kimani** submitted, on the first ground of appeal, that the appellant was not represented by an advocate in both the trial and the first appellate court, which was in violation of **Article 50(2) (h)** of the **Constitution** because he was facing a capital offence. He contended that from the nature of the prescribed sentence, the appellant suffered substantial injustice due to the lack of an advocate. Counsel cited the decision of the Supreme Court in **Republic v. Chengo & 2 Others** [2015] KESC 15 (KLR) and submitted that the right to legal representation at State expense is a fundamental ingredient to the right to a fair trial.
11. Turning to the second ground of appeal, the appellant submitted that the prescribed sentence for robbery with violence is a mandatory death sentence and that such a sentence amounted to a violation of **Article 25** of the **Constitution**, which allows no limitation to the right to fair trial. It was further contended that curtailment of judicial discretion in sentencing constituted a violation of the right to

fair trial.

12. In winding up his submissions, the appellant readily accepted that the grounds on which his appeal was founded were never raised before the trial court or the first appellate court. However, he urged us to allow the appeal and set him to liberty.
13. The respondent, represented by **Ms. Mengo**, learned counsel, opposed the appeal vide written submissions dated 16th August 2025. Counsel addressed the grounds of appeal raised in the appellant's self-drawn memorandum of appeal, but which issues the appellant's counsel abandoned and focused on two issues we have set out above. Those earlier issues were that the High Court erred by failing to hold that the appellant was not identified; by failing to find that some of the items alleged to have been stolen from the complainant were not set out in the charge sheet; by failing to hold that crucial witnesses were not called by the prosecution; by failing to hold that the P3 Form was filled later and by rejecting his defence.
- 14.** The respondent submitted that the elements of the offence of robbery, as explained in **Dima Denge Dima & Others v. Republic** [2013] eKLR, were proved beyond reasonable doubt in this case. It was contended that the offence was committed in broad daylight, and in addition to the complainant, there

were two

other eyewitnesses. As regards the particulars in the charge sheet,

it was submitted that they were sufficient to disclose the offence charged and that the mention of only the handbag and Kshs 5,000 was sufficient. Further, it was the kind of omission curable under **section 382** of the **Criminal Procedure Code**. On failure to call some witnesses, it was submitted that under section **143** of the **Evidence Act**, no particular number of witnesses is required to prove a case and that the prosecution had adduced sufficient evidence in this case.

15. It was also the respondent's submission that there is no set time within which the P3 Form should be filled and that the Form was properly filled on the complainant's second visit to the hospital and was properly produced in evidence. On the last issue of the appellant's defence, it was submitted that it was duly considered and found to be an afterthought because the appellant did not raise the issue of conspiracy and fabrication in his cross-examination of witnesses.
16. We have carefully considered this appeal, the submissions by learned counsel and the authorities cited. By dint of **section 361** of the **Criminal Procedure Code** and decisions of this Court such as **Karani v. Republic** [2010] 1 KLR 73, this second appeal is restricted to matters of law only.

17. As indicated, the appellant and the respondent submitted at cross-purpose, with the appellant focusing on the grounds of appeal drawn by his advocate, while the respondent addressed the earlier self-drawn grounds by the appellant.
18. Having considered the appeal, we will take it that the appellant abandoned the earlier ground which he did not submit on, and only focused on the two grounds we have set out above. It is the respondent who was blind-sided and concentrated on the earlier rather than the later grounds of appeal.
19. In his submissions, the appellant readily admits that the issues of representation by an advocate was never raised in the trial court or in the first appellate court. That issue is making its first appearance before this Court, and neither arises nor flows from the judgment of the High Court which is challenged in this appeal. The High Court simply never engaged with the issue and by reason of that fact, the appellant is precluded from raising in this Court a matter that was not decided by the first appellate court, unless it is an issue on jurisdiction.
20. It would be out of order for this Court to fault the first appellate court on an issue that was neither raised before that court nor decided by it. The appeal before us challenges the decision of the

High Court and for that reason, we cannot agree or disagree with the High Court on an issue that it neither considered nor decided.

21. If a party fails to raise an issue in the first appellate court, he is precluded from raising the issue for the first time in this Court or in the Supreme Court. In such instances it would be tantamount to the second appellate court exercising original rather than appellate jurisdiction, which is not its mandate.

(See **Republic v.**

Mwangi [2024] KESC 34 (KLR); **Republic v. Manyeso** [2025] KESC 16 (KLR) and **Republic v. Ayako** [2025] KESC 20 (KLR)).

22. As regards the mandatory nature of the death sentence in robbery with violence cases, the Supreme Court has since stated that its decision in **Francis Karioko Muruatetu & Another v. Republic** [2017] eKLR (**Muruatetu 1**), where it declared the mandatory nature of the death sentence unconstitutional, is applicable only in murder cases. In its subsequent decision in **Francis Karioko**

Muruatetu & Another v. Republic & Others [2021] eKLR (**Muruatetu 2**), the Supreme Court reiterated that the mandatory death sentence prescribed under **section 296 (2)** of the Penal Code for the offence of robbery with violence is

still legal.

23. In these circumstances and given the binding nature of the decisions of the Supreme Court under **Article 163(7)** of the **Constitution**, we cannot entertain for the first time an issue that

was not raised in the High Court and we cannot interfere with the prescribed sentence for the offence of robbery with violence.

24. In the circumstances, this appeal is dismissed in its entirety. It is so ordered.

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

WANJIRU KARANJA

---- JUDGE OF
APPEAL

K. M'INOTI

---- JUDGE OF
APPEAL

ALI - ARONI

---- JUDGE OF
APPEAL

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

Signed

DEPUTY REGISTRAR