Amollo & 2 others v Republic (Criminal Appeal E031 of 2022)
[2026] KECA 176 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 176 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E031 OF 2022

P NYAMWEYA, LA ACHODE & JM MATIVO, JJA

JANUARY 30, 2026

BETWEEN

DICKSON OBUYA AMOLLO ..... 1ST APPELLANT

FRED OMOLLO ..... 2ND APPELLANT

BRIAN JEFF OTIENO ..... 3RD APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Homabay (Omondi J.- as she then was) delivered on 16th October, 2017 in HCCRA No.3 of 2017)

JUDGMENT

1. Dickson Obuya Amollo, Fred Omollo and Brian Jeffo, (the 1st, 2nd and 3rd appellants) instituted this appeal seeking to overturn the Judgment delivered on 16th October 2017 by Omondi J., (as she then was), in Homa Bay High Court Criminal Appeal No. 3 of 2017. In the said Judgment, the learned judge dismissed their appeal against conviction and sentence of death imposed upon them by the Chief Magistrate in Homa bay CMCCR Case Number 1114 of 2018. The 2nd appellant died during the pendency of this appeal; therefore, this judgement relates to the 1st and 3rd appellants only.

2. Before the trial court, the appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The accusation against them was that on 11thNovember 2014 at Nyaudho village, Gem Central location in Homa Bay County, while armed with dangerous weapons, namely pangas, they jointly robbed Paul Otieno Ojwang cash Kshs. 50,000/=, two mobile phones make Itel valued at Kshs. 2,300/=, a Nokia phone valued at Kshs. 2300/=, safaricom credit cards worth Kshs. 8,000/= and YU credit cards worth Kshs. 1750/=, all valued at Kshs. 64,350/= and immediately before or after such robbery, they wounded the said Paul Otieno Ojwang.

3. The appellants denied the said charges and in the ensuing trial, the prosecution marshalled seven witnesses. In summation, the prosecution evidence was that the appellants while armed with pangas jointly violently robbed the complainant the items listed above and during the said robbery or immediately thereafter, they seriously wounded him. In their defence, the appellants gave sworn evidence. The 1st appellant called two witnesses in support of his defence, while the 3rd appellant did not call any witness. At the conclusion of the trial, in her Judgement dated 19th January 2017, the learned magistrate was satisfied that the offence of robbery with violence was proved to the required standard and convicted the appellants accordingly. After considering their mitigation, she sentenced them to suffer death.

4. Before the High Court, the respondent conceded the 1st appellant's appeal urging that he was not properly identified. However, after hearing the appeal, the learned Judge dismissed the appeal by both appellants and upheld their conviction and sentence. The appellants are now before this Court challenging the said verdict.

5. In his submissions dated 22nd May 2025, the 1st appellant's counsel abridged his grounds of appeal into 5 issues which can be summed up as follows: (a) whether the 1st appellant's identification was free from error;

    b. whether the High Court properly addressed the prosecution's concession of the 1st appellant's appeal and gave reasons for rejecting it;

    c. whether the High Court properly considered the 1st appellant's alibi, and, (d) whether the conviction and sentence should be allowed to stand.

    The appellant prays that the appeal be allowed, the conviction and sentence be set aside and the 1st appellant be acquitted of the offences.

6. In his memorandum of appeal dated 8th July 2025, the 3rd appellant contends that his alibi was not considered, his identification was not free from error, the case against him was not proved beyond reasonable doubt and the sentence imposed on him is unlawful and harsh. He also prayed for the conviction and sentence to be set aside and he be acquitted.

7. During the virtual hearing of this appeal on 4th September 2025, the 1st appellant was represented by learned counsel Mr. Otieno Obiero, the 3rd appellant was represented by learned counsel Mr. Ariho, while learned prosecution counsel Ms. Kagali appeared for the respondent. All the parties relied on their respective written submissions dated 22nd May 2025, 8th July 2025 and 30th July 2025.

8. In support of the 1st appellant's appeal, Mr. Obiero submitted that the identification was not free from error because the offence took place at night and the only source of light was a tin lamp, and the witnesses were traumatized, therefore they could not have properly identified the attackers in the circumstances. Counsel argued that the witnesses' accounts on the number of the attackers and their actions were inconsistent, therefore the prosecution evidence was contradictory. He also contended that PW4 did not mention the 1st appellant's name. It was also his submission that several witnesses admitted the existence of uncertainty, therefore, the threshold for a safe conviction was not met. He relied on Wamunga vs Republic [1989] KLR 424 in support of the proposition that before accepting identification evidence as the basis of a conviction, the court must be satisfied that the identification is free from error.

9. Counsel argued that the 1st appellate court failed to reasonably address the prosecution's decision to concede the 1st appellant's appeal and cited the High Court decision in Republic vs Norman Ambich Miero & Another [2008] eKLR and Okello vs Republic [2017] eKLR in submitting that where the

DPP concedes an appeal, though the court is not bound by the concession, it must examine the reasons given for the concession and arrive at its own decision on whether or not to accept the concession. Counsel maintained that where the court decides not to act on the concession, it must give reasons for its decision. He argued that the learned judge merely stated the concession was "not properly conceded," and that "the evidence is comprehensive against all the three appellants." It was counsel's submission that this inadequate approach by the learned judge contravened the requirement for a transparent and individualized determination of a case which the prosecution had doubted.

10. Submitting on the ground that the learned judge failed to consider the 1st appellant's alibi, counsel cited this Court's decision in Kiarie vs Republic [1984] KLR 739 in support of the holding that once an accused raises an alibi, the burden shifts to the prosecution to disprove it and in this case, the concession by the prosecution was itself prompted by their inability to disprove the 1st appellant's alibi. He argued that the 1st appellate court ignored this fact and failed to analyze or address the 1st appellant's alibi. In conclusion, counsel submitted that the prosecution evidence was full of inconsistencies, and the 1st appellant's alibi was not rebutted, therefore, the case against him was not proved beyond reasonable doubt. Lastly, counsel cited Sawe vs Republic [2003] KLR 364 where this Court underscored that the prosecution bears the burden of proof in criminal cases.

11. In support of the 3rd appellant's appeal, Mr. Ariho maintained that the 3rd appellant's alibi was not considered nor did the prosecution rebut it. Counsel also submitted that call records and the area code have confirmed that the 3rd appellant was at the scene of crime. Therefore, in the absence of such evidence, his conviction was arrived at using a wrong analysis.

12. Asserting that the 3rd appellant was not positively identified, Mr. Ariho argued that mere resemblance of a person with another without supporting evidence is not sufficient to prove identification because other inculpatory evidence is required. Counsel maintained that the purported identification of the 3rd appellant at night was not free from error because PW1 and PW3 stated that there was a lamp light which assisted in identifying the 3rd appellant, yet no evidence was led to demonstrate the intensity of the light. To buttress his submission counsel cited Joseph Muchangi Nyaga & another vs Republic [2013] eKLR wherein this Court stated that before acting on evidence of visual recognition, the trial court must make inquiries as to the presence and nature of light, the intensity of the light, the location of the source of the light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him subsequently.

13. Regarding the ingredients of the offence of robbery with violence, Mr. Ariho maintained that no weapon was recovered from the scene of crime or from the 3rd appellant and from the evidence adduced, the 3rd appellant was arrested the morning after the incident and he was not found with any of the allegedly stolen items. He also argued that no physical injuries allegedly sustained by the PW1 and PW3 were proved or shown to have been inflicted by the 3rd appellant. Further, no evidence was adduced to show that the 3rd appellant meted violence on PW1.

14. Regarding the sentence, Mr. Ariho submitted that the death sentence imposed upon the 3rd appellant was harsh and excessive. He relied on Mukwana vs Republic [2024] KECA 991 (KLR) (26 July 2024) (Judgment) where this court substituted a death penalty with a sentence of 35 years imprisonment after taking into consideration the injuries suffered by the complainant.

15. The respondent's counsel Ms. Kagali conceded the 1st appellant's appeal maintaining that before the High Court the respondent properly conceded the appeal on the ground that his identification was not free from error. Despite the respondent providing reasons in support of its concession, the learned judge found that the same was not proper.

16. However, Ms. Kagali opposed the 3rd appellant's appeal urging that all the elements of the offence of robbery with violence were proved to the required standard. It was her submission that the 3rd appellant was positively identified because he was recognized by PW1 and PW3. She maintained both the trial court and the first appellate court appreciated that the appellant was properly identified by PW1 who gave direct evidence and recognized the 3rd appellant being his relative. Therefore, the identification and recognition of the 3rd appellant was in line with the principles set out in R vs Turnbull {976} 63 CR Appeal Rl32, Abdalla Bin Wendo & Another vs R {1953} EACA 166 and Roria vs R {1967} EA 583.

17. Regarding the 3rd appellant's alibi, counsel submitted that the trial court and the first appellate court considered his defence and weighed it against the prosecution evidence and rejected it for being incredible and an afterthought. Besides, the 3rd appellant's alibi was incredible and unreliable in the light of the direct prosecution evidence placing him at the scene.

18. Regarding the sentence, counsel submitted that this ground must fail on account of the fact that this is a matter of fact; which was also raised before the High Court and determined. Counsel relied on the Supreme Court decision in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) and 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34(KLR) that section 361(1) of the Criminal Procedure Code explicitly bars this Court from hearing issues relating to matters of fact, and that severity of sentence is a matter of fact and not a matter of law, and it can only interfere with sentence if the trial court had no jurisdiction to impose the sentence or if it was enhanced by the first appellate court.

19. This is a second appeal, therefore, our jurisdiction is limited to considering matters of law as stipulated by section 361 of the Criminal Procedure Code. Addressing the jurisdictional limit, the Supreme Court in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others [supra] stated:

> " Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

20. Upon considering the entire record, we find that the following issues fall for determination are:

    (a) whether the ingredients of the offence of robbery with violence were proved to the required standard;

    (b) whether the appellants were positively identified as the offenders;

    (c) whether the prosecution evidence was tainted by contradictions;

    (d) whether the appellants' alibi was properly rejected;

    (e) whether the respondent's concession to the 1st appellant's appeal should be allowed to stand, and

    (f) whether there is any basis for us to interfere with the death sentence.

21. Regarding the first issue, it is settled law that to establish the offense of robbery with violence under section 296(2) of the Penal Code, the prosecution must prove the foundational offense of robbery, along with any one of the three aggravating circumstances. This involves proof of theft or attempted theft coupled with the use of violence or threat of violence to obtain, retain, or overcome resistance to the stolen items. It is also a requirement that at least one of the following three aggravating circumstances must be proved:

    (a) the offender was armed with a dangerous weapon;

    (b) the offender was with one or more other people; and,

    (c) the offender beat, wounded, or used other personal violence on the victim. (See this Court's decisions in Oluoch vs Republic [1985] KLR and Johana Ndungu vs Republic [1996] eKLR). In Dima Denge Dima & Others vs Republic, [2013] eKLR, this Court reiterated that the elements under Section 296(2) are disjunctive. In this regard, this Court in Oluoch vs Republic (Supra) KLR underscored that robbery with violence is committed in any of the following circumstances: the offender is armed with any dangerous and offensive weapon or instrument; or the offender is in company with one or more person or persons; or at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person. As was held by this Court in Dima Denge & Others vs Republic [supra], one element is sufficient to found a conviction.

22. PW1's evidence was that on 11th November 2014 after having supper with his family, he stepped out to brush his teeth, only to be confronted by 4 people wielding pangas. Frightened, he threw the mug at them and ran back into the house, but as he closed the door, one of the 4 men cut his right hand. They pushed him and he fell down. The man who cut him confronted his wife and threatened to cut her if she raised an alarm. He took away her phone while the other two men entered into the house, and one demanded money. PW1 pointed to them where the money was and the attacker picked the money which was wrapped in a polythene bag and hidden in a bag containing scratch (credit) cards and warned PW1 not to make noise otherwise they would come back and cut him. They left and locked the door from outside. From this evidence, it is clear that the robbers were armed with pangas, that PW1 was cut with a panga, and that they violently robbed them the items listed earlier.

23. As mentioned earlier, to prove the offense of robbery with violence, the prosecution must establish the underlying act of robbery (stealing accompanied by actual violence or threat of violence to obtain or retain the property) and then prove that at least one of three additional elements was present: the offender was armed with a dangerous weapon, acted in the company of others, or inflicted personal violence (wounding, beating, or striking) on the victim during or immediately before or after the robbery).

24. Clearly, from the evidence of PW1 and PW3, the underlying robbery has been established. The items listed in the charge sheet were stolen. From the evidence of PW1 and PW3, the attackers were more than one. The attackers were armed with pangas. PW1 was seriously injured on his hand. Accordingly, the question is not whether the violent robbery took place, but whether the appellants were positively identified as having positively participated in the robbery. This is the subject of the next issue.

25. PW1 testified that only three robbers entered his house. He identified them as accused persons before the trial court. He identified the deceased (Fred Omollo) as the person who cut his hand. PW1 also identified the 3rd appellant as the person who took his money. In his account to PW2 who came to their home after he heard their screams, PW1 told him he had identified the attackers who were village mates. He also identified him at the dock. Also, PW1 testified that the 1st appellant was the one who

took charge of him as the other two continued with their operation and he could see the appellants since there was light from a tin lamp which was placed on the table, therefore, he was able to recognize the three appellants whom he knew since childhood.

26. PW2's evidence was that he heard screams from his son's house and rushed to find out what was happening. He found the door locked from outside and opened for them. PW1 told him that it is the deceased who cut him and he was in the company of the 1st and the 3rd appellants. It was his evidence that he knew the 1st appellant because he is a son to his cousin while the 3rd appellant is his grandson. He also stated that outside PW1's house they recovered a cap which was green inside and dotted outside.

27. PW3 testified that she recognized the deceased since he was the one who ordered her to go to the sitting room and he even asked her if she was looking at his face. PW3 also confirmed that the tin lamp in their sitting room illuminated their sitting room and she could only see the deceased before her face was covered.

28. This Court in Francis Kariuki Njiru & others v R. Cr. A. No. 6/01 (UR)

stated:

> " The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R. v. Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v. R. Criminal Appeal No. 22 of 1996 (unreported), held that:
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> > ... it is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence."

29. PW1 testified that he recognized the appellants whom he knew by name since they were village mates since childhood. This fact was not contested. PW1 and PW3 were clear that there was light from a tin lamp, and the appellant spent ample time in their house as they demanded money. Clearly, this was evidence of recognition which is considered more reliable and has more weight than identification evidence of a person who was not previously known to the witness. Undeniably, it is easy to recognise a known face as opposed to identifying a person for the first time. Where a witness knows the person sought to be identified, or has seen him frequently, the identification is likely to be accurate. Even where the observation period is very brief, the witness could identify the person on the strength of his previous encounters with them.

As was held by this Court in Anjononi & others vs Republic [1980] KLR Pg. 59 at Pg. 60:

> "...This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya v. The Republic (unreported)"

30. We note that the High Court properly re- evaluated the evidence and correctly found that the appellants were properly identified. We find no basis to disturb the findings by the two courts below on this issue.

31. Next, we will address the question whether the prosecution evidence was marred by contradictions as claimed by the 3rd appellant. The contradiction being cited is that PW1 stated that he saw three attackers while PW3 said they were four. This court's duty is to determine whether there were contradictions and inconsistencies in the prosecution evidence to the extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to have rejected the evidence. As was held in Twehangane Alfred vs Uganda [2003] UGCA, 6 it is not every contradiction that warrants rejection of evidence. The Court subtly stated:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

32. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the court that an accused is entitled to benefit there from. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. The correct approach is to read the evidence tendered holistically. In Joseph Maina Mwangi vs Republic [2000] eKLR, this Court stated:

> "In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by the wording of section 382 CPC, viz whether such discrepancies are so fundamental as to cause prejudice to the Appellant or they are inconsequential to the conviction and sentence."
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> In Jackson Mwanzia Musembi vs. Republic (2017) eKLR in which the Court held that:
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> > "the Court will ignore minor contradictions unless the Court thinks that they point to a deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

33. Similarly, in Philip Nzaka Watu vs Republic [2016] eKLR, this Court, had this to say:

> "It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same

event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question."

34. The goal is to determine if the witnesses were genuinely truthful and reliable. PW1 and PW3 were consistent in their evidence in chief and during cross-examination. It is highly probable that PW1 who was seriously cut as he closed the door and was pushed and fell down only saw three people, while PW3, who stood at the bedroom door, a vantage position was able to see four people enter the house. She was ordered to sit down and not to scream and even observed the robbers prompting one of the attackers to tell her to stop looking at their faces. The most important point to remember is that the offenders were more than one and they acted in concert and with a common intention. Whether we agree that they were three or four, the element of the offence that requires the attacker to be in the company of one or more persons will still be satisfied. Therefore, we find that nothing turns on the assertion that the prosecution evidence was contradictory.

35. Regarding the argument that the appellants' alibi was not considered, the first appellate court stated as follows:

> " The trial magistrate also considered the alibi defences offered but noted that each appellant focused on how he was arrested on the morning of 12/11/2014. She noted that each appellant was very guarded as to why they could not get anyone whom they claimed to have been in their company that night as witnesses to support their claims. However, in this regard the trial magistrate was conscious of the position that (i) the burden of proof always rests with the prosecution, and never shifts (ii) an alibi defence can be tested by taking into account whether the same was raised at an early stage during the trial. The alibi was rejected as being raised too late in the day."

36. This Court in Erick Otieno Meda vs Republic [2019]eKLR stated:

> " In considering an alibi, we observe that:
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> a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
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> b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
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> c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
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> d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail."

37. From the evidence on record, we note that the 1st appellant's testimony was that on the night of 11th November, 2014 he was asleep with his wife. However, he could not call his wife as a witness because they disagreed and parted ways. The rest of his defence was basically how he was arrested. His two witnesses only spoke about how he was arrested and said nothing about his participation or otherwise in the robbery. Also, the 3rd appellant gave an account of how he was arrested said nothing about the accusations against him. This is the defence the first appellate court and the trial court are being accused of ignoring. However, the above cited excerpt from the impugned judgment leaves no doubt that the learned judge considered their alibi.

38. We associate ourselves with the decision of the Supreme Court of Uganda, in Festo Androa Asenua vs Uganda, Cr. App No. 1 of 1998 when it observed:

> " We should point out that in our experience in Criminal proceedings in this Country it is the tendency for accused persons to raise some sort of alibi always belatedly when such accused persons give evidence. At that stage the most the prosecution can do is to seek adjournment of the hearing of the case and investigate the alibi. But that may be too late. Although for the time being there is no statutory requirement for an accused person to disclose his case prior to presentation of his defence at the trial, or any prohibition of belated disclosure as in the UK statute cited above, such belated disclosure must go to the credibility of the defence.
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> Although the appellant in this case put forth his alibi defence rather late in the trial, we cannot agree with counsel for the respondent that the alibi defence must be ignored. That defence must still be considered against the evidence adduced by the prosecution. Indeed, in Ganzi & 2 Others vs. Republic [2005] 1 KLR 52, this Court stated that where the defence of alibi is raised for the first time in the appellant's defence and not when he pleaded to the charge, the correct approach is for the trial court to weigh the defence of alibi against the prosecution evidence..."

39. We note that the appellants only raised their alibi when they gave their defence. There is no hint that they raised the issue with the investigating officer. The record is also clear that their counsel did not raise the issue when cross- examining the prosecution witnesses. However, we are satisfied that their alibi was considered by the trial court and the first appellate court which found that even though it was raised too late in the day, it did not dislodge the prosecution evidence. Therefore, this ground of appeal fails.

40. Regarding the 1st appellant's contestation that the 1st appellate court improperly rejected the prosecution's concession of his appeal because his identification was flawed, it is important to underscore that an appellate court is not bound by a prosecution's decision to concede an appeal, as it is the court's duty to make its own independent determination based on the law and evidence, rather than simply accepting the prosecution's admission of error or concession of fact. This Court's primary role is to ensure justice and uphold the law, which can involve rejecting a concession if it appears contrary to public interest, the applicable legal principles or if it is not in the interests of justice. This Court in Lamek Omboga vs R. Kisumu Court of Appeal Criminal Appeal No. 122 of 1982 was emphatic that an appellate court is not in any way bound by the opinion of State Counsel as to the merits of an appeal.

41. The first appellate court after reconsidering the evidence on record stated:

> " In my view the appeal against 1st appellant is not properly conceded, the evidence against him is as comprehensive just as that against the other two. The conviction was safe and is upheld. The sentence was legal and is confirmed."

42. The first appellate court found that the evidence against the 1st appellant was as comprehensive as the evidence against his co-accused. It has not been demonstrated to us that in arriving at the said finding, the learned judge misdirected herself in law, or misapprehended the facts; or took into account irrelevant matters, or failed to take into account relevant considerations, or her decision, albeit a discretionary one, is plainly wrong. Consequently, we find no merit in her concession to the appeal by the 1st appellant.

43. Regarding, the sentence, the trial court imposed the mandatory death sentence under section 296 (2) of the Penal Code having found the appellants guilty of the offence of robbery with violence. The sentence was confirmed by the first appellate court. Regarding the 3rd appellant's contention that the sentence is harsh and severe, our jurisdiction as circumscribed by section 361 of the Criminal Procedure Code confines us to matters of law only; and severity of sentence is a question of fact. The sentence imposed upon the appellants is the mandatory sentence provided under the law. The Supreme Court in Republic vs. Gichuki Mwangi: Initiative for Strategic Litigation in African (ISLA) and 3 Others (supra) stated that:

> "Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction the singular sentence is already prescribed by law."

44. The mandatory death sentence meted out is the only sentence provided under the law for the offence of robbery with violence. Guided by the above Supreme Court decision, it is clear we have no discretion to interfere with lawful sentences. Accordingly, we dismiss this appeal and uphold both the conviction and sentence.

45. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF JANUARY, 2026.

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR