

**IN THE COURT OF  
APPEAL AT  
KISUMU**

**(CORAM: MUSINGA (P), KIAGE, & ODUNGA, JJ.A.)**

**CRIMINAL APPEAL NO. 162 OF 2020**

**BETWEEN**

**FREDRICK MUKHWANA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (N. Ombija & G. B. M. Kariuki, JJ.) delivered on 28<sup>th</sup> April 2008*

*in*

***Criminal Appeal No. 113 of 2005)***

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**JUDGMENT OF THE COURT**

1. **The appellant** was charged before the Chief Magistrates' Court at Kakamega with the offence of robbery with violence contrary to **section 295** as read with **section 296 (2)** of the **Penal Code**. It was alleged that on 27<sup>th</sup> April 2004 at Manyonyi village, Sianjeso Sub-location, Eregi Location in Kakamega District, he and others not before the court, while armed with rungas, pangas and torches robbed Melsa Khamuye Asamba of a Sony radio cassette and a box of

assorted clothes, all valued at

Kshs.20,000/=. It was further alleged that he used actual violence on the complainant immediately before or immediately after the robbery.

2. The prosecution's case was based on the testimony of six witnesses. **PW1, Melsa Khamuye Asamba**, testified that on 27<sup>th</sup> April 2004 at about 7.00 pm, while inside her house and when it was raining heavily outside, three men forcefully entered her house. She recognized two of them as her neighbours, Cyrus (Maramba) and the appellant, Fredrick Mukhwana, who were both armed with pangas. Cyrus cut her on the back while Fredrick inflicted several deep cuts on her body, including the blow that removed her left eye. A third man stole her radio and a box of clothes. She later woke up in hospital with grave injuries, including a skull fracture. She stated that the lantern in the house provided enough light to identify the attackers, and she pointed out the appellant in court.
3. **PW2, Silesa Asamba**, who is PW1's daughter, stated that she was in the bedroom when she heard the door open and her mother confronting Maramba. When she came out, she

saw Maramba and Fredrick, who she knew, attacking her mother

with pangas, while a third person identified as Dona carried away a radio and later a box of clothes. She hid under the bed until the assailants left after which she sought help. The following day she accompanied police who attempted to trace the suspects. She identified the appellant in court and said the lantern left on in the house enabled clear recognition.

4. **PW3, Erick Mbaya Buly**, testified that he responded to screams from PW1's home and went there with a torch. He found PW1 badly injured and recognized the appellant among the people he saw, identifying him by his facial appearance. He also saw the appellant carrying PW1's radio while another man, Dona, carried a box. He tied PW1's wounds, called neighbours and assisted in taking her to hospital. He recorded his statement and confirmed that the appellant was later arrested while Dona remained at large.

5. **PW4, PC Julius Lijoodi**, the investigating officer, testified that he received the robbery report on 28<sup>th</sup> April 2004 and visited the scene where he found bloodstains. He then went to Kakamega Hospital where PW1, though in poor condition,

named Fredrick and Maramba as her attackers. The following day police

attempted to locate them but found no one at home. He later received information that the accused was in Lessos, Uasin Gishu, where he was arrested and handed over to Kakamega Police. He stated that no stolen property was recovered.

6. **PW5, Japheth Maloba Akwabi**, a clinical officer attached to Kakamega Provincial General Hospital, examined PW1 and found multiple deep cut wounds on the head, back, arms and shoulders, a removed left eye and a chipped skull bone. Her clothes were blood-soaked and torn. He classified the injuries as maim and stated they were caused by both blunt and sharp objects. He produced the P3 form in court.
7. **PW6, PC Zakayo Anjaji**, testified that he received a signal from Kakamega police that a suspect in a robbery with violence case was hiding within his jurisdiction. After initial unsuccessful attempts to locate him, members of the public apprehended the accused on 12<sup>th</sup> July 2004. PW6 picked him and handed him over to Kakamega police and also identified him in court.
8. On his part, the appellant gave an unsworn defence denying any involvement in the attack. He said he was on leave from

his work in Burnt Forest and only heard neighbours mention that PW1

had been attacked by unknown people. He stayed home for two days before returning to work and claimed he was later arrested without being told the reason. He denied the allegations and stated that he knew nothing about the incident.

9. The trial court (**Hon. E. O. Obaga**) held that a violent robbery took place and that the prosecution had proved beyond reasonable doubt that the appellant was one of the attackers. The court found PW1, PW2 and PW3 to be credible and consistent witnesses whose recognition of the appellant was reliable, noting that the incident occurred around 7.00 pm when a lantern was lit, the witnesses knew the appellant as a neighbour and the conditions were favourable for positive identification. The court rejected the appellant's defence, finding it to be an afterthought, particularly his claim that he only heard screams at 9.00 pm and that he had been on leave at Burnt Forest. The court further found that the appellant fled his home after the robbery, which strengthened the prosecution case. In the end, the court concluded that all ingredients of robbery with violence under

section 296 (2) of the Penal Code were satisfied, convicted him and imposed the mandatory death sentence.

10. On his first appeal to the High Court, the appellant raised four grounds of appeal: that the trial court erred in relying on faulty evidence of recognition; that there was insufficient lighting to allow positive identification; that the trial court erred in allowing substitution of the initial assault charge with a capital robbery charge; and that the prosecution failed to prove the case beyond reasonable doubt.
11. Vide judgment delivered on 28<sup>th</sup> April 2008, the High Court dismissed all the four grounds of appeal. It held that the substitution of the charge was lawful and that the appellant had not objected to it at the trial. The court found that PW1, PW2 and PW3 all positively recognized the appellant under favourable conditions, noting the presence of a lantern, the early hour of the night, and the fact that the witnesses knew him as a neighbour. It agreed with the trial court that the identification was reliable and not mistaken. The court also upheld the trial court's rejection of the appellant's defence, finding his account inconsistent with the evidence and viewing his disappearance after the incident as an indicator of guilt. In the end, the High Court held that the prosecution

had proved the offence beyond

reasonable doubt, upheld the conviction, and affirmed the sentence.

12. In this second appeal, the appellant challenges his conviction and sentence on several fronts. He contends that the High Court failed to properly scrutinize serious deficiencies in the identification and recognition evidence, arguing that the circumstances were not conducive to a safe and reliable identification; and that the testimonies of the key witnesses contained inconsistencies that were overlooked. He further submits that the High Court erred by failing to find that the trial court acted unfairly in allowing the substitution of the initial assault charge with the more serious offence of robbery with violence, a step he says prejudiced his defence. The appellant also maintains that his constitutional rights were violated, particularly his right to a fair trial and to legal representation, and faults the High Court for failing to address these violations. He raises an additional complaint that the trial suffered from a jurisdictional defect, thereby rendering the proceedings invalid. Finally, he challenges the mandatory death sentence imposed

upon him as unconstitutional in light of evolving jurisprudence on sentencing discretion and proportionality.

13. At the hearing of this appeal, the appellant was represented by learned counsel **Ms. Nyamari**, while the respondent was represented by learned counsel **Ms. Busienei**. Both counsels made brief oral highlights of their respective client's written submissions.
14. On behalf of the appellant, it was submitted that his conviction cannot stand because the identification and recognition evidence was unreliable. In this regard, it was contended that PW1 and PW2 claimed to recognize the appellant under the light of a lantern whose brightness, position and stability were never established, thereby making the conditions unsuitable for accurate identification. The decision of this Court in **Cleophas Otieno Wamunga v Republic (1989) KLR 424**, was cited for the argument that recognition evidence must be treated with great caution because even honest witnesses can be mistaken.
15. To further demonstrate that the appellant's conviction cannot stand, counsel highlighted contradictions in the testimonies

of PW1 and PW2. It was contended that PW1 stated having  
seen

two attackers while PW2 saw four. Citing **Kiarie v Republic [2018] eKLR**, it was contended that such inconsistencies undermined the reliability of their evidence and create reasonable doubt. The appellant faulted the High Court for failing to reconcile these contradictions contrary to the duty set out in **Okeno v Republic [1972] EA 32**, which requires a first appellate court to re-evaluate evidence afresh. In addition, it was contended that the prosecution failed to produce the first report made to police contrary to the principle in **Cleophas Otieno Wamunga v Republic** (supra), which underscores the importance of early naming of suspects as a safeguard against mistaken identity.

- 16.** On substitution of the charge against the appellant, it was contended that the substitution of the initial assault charge with the capital offence of robbery with violence was sudden, unjustified and prejudicial to the appellant. According to the appellant, the prosecution offered no new evidence to warrant the shift and that the alteration violated section 214 of the Criminal Procedure Code and the fair trial guarantees in Article 50(2)(b) of the Constitution. He relied on **Joseph**

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**Mwaura v Republic [2013] eKLR**, wherein this Court held that a substituted charge must not prejudice the accused. It was further contended that the appellant had already prepared a defence to the earlier lesser charge and that upon introduction of the capital charge, he was not informed of his right to counsel, thereby compounding the unfairness.

17. At the hearing of the appeal, counsel for the appellant while responding to a question from the Court indicated that this issue had not been raised before the High Court. However, the record clearly reflects that the High Court considered and rejected the appellant's complaint about the substitution of the charge, noting that he did not raise an objection when the amendment was made before the trial court. It held that he could not be heard to challenge the issue on appeal and found that no provision of the law had been violated in the process.
18. Regarding the alleged constitutional violations, it was submitted that the appellant was tried for a capital offence without legal representation and without being informed of his right to counsel. The decision of **David Njoroge**

**Macharia v Republic [2011] eKLR**, was cited for the argument that legal

representation is mandatory where an accused faces the death penalty because of the complexity and gravity of such proceedings. Counsel for the appellant however could not urge this issue as it had not been raised before the first appellate court.

19. The appellant further contended that his trial was marred by multiple adjournments, which he argues infringed his right to a trial without undue delay. Relying on **Geoffrey Muli Kyalo v Republic [2015] KEHC 4043 (KLR)**, he contended that excessive delays render a trial unfair.
20. On jurisdictional defects, it was contended that the trial was a nullity because it was conducted by a Senior Resident Magistrate who lacked jurisdiction to try a capital offence or to impose a death sentence. Citing the Supreme Court decision in **Samuel Kamau Macharia v Kenya Commercial Bank [2012] eKLR**, the appellant emphasized that jurisdiction flows from the Constitution and statute and cannot be assumed. According to the appellant, only the High Court could lawfully preside over such a trial under **section 7(1) of the Criminal Procedure Code.**

21. Lastly, as regards the sentence, it was contended that the mandatory death penalty imposed on the appellant was unconstitutional. The Supreme Court decision of **Francis Karioko Muruatetu v Republic [2017] eKLR** was cited in support of the argument that mandatory death sentences violate the right to dignity and fair trial because they eliminate judicial discretion and ignore individual mitigating circumstances. The appellant also cited **William Okungu Kittiny v Republic [2018] eKLR** where this Court applied the **Muruatetu** decision to a robbery with violence case. This Court was urged to consider his advanced age (83 years), and ill health, including dementia, and to acknowledge that he has served approximately 20 years in custody. We were urged to consider the period served as an appropriate sentence and release the appellant to spend his remaining years with his family.
22. In response, the respondent contended that the ingredients of the offence of robbery with violence as set out by this Court in **Johana Ndungu v Republic [1996] KECA 187 (KLR)** were fully established. In this regard, it was asserted

that PW1 testified that the attackers were armed with rungas and pangas; acted in

a group; and inflicted severe violence which caused a fractured skull and the removal of the complainant's left eye. PW2 and PW3 independently corroborated this account. PW2 found the appellant and another assailant cutting her mother, while a third one stole a radio, and PW3, responding to the child's screams, recognized the appellant leaving the scene using his torchlight. The respondent submitted that recognition rather than identification of a stranger was at the heart of the case because the appellant was a neighbour who was well known to the witnesses and the ambient lantern light made the conditions favourable for recognition. Therefore, the High Court did not err in upholding the conviction.

23. On the complaint regarding substitution of the charge, the respondent indicated that the High Court addressed and rejected this ground. The High Court found that no law was breached when the initial assault charge was replaced with robbery with violence and that the appellant had raised no objection.
24. Turning to the ground on constitutional violations, the

respondent contended that the right to state-funded legal

representation was not yet operationalized at the time of the appellant's trial. In this regard, the respondent relied on the decision of **Swaka v Director of Public Prosecutions & 2 Others [2013] KEHC 5422 (KLR)** where the High Court held that constitutional guarantees must be interpreted realistically and in light of the prevailing justice system, and that courts could not be faulted for failing to provide legal aid before a legislative and institutional framework existed. It was further contended that the issue of legal representation as well as the issue touching on jurisdiction were not raised before the High Court. In this regard, the respondent cited the decision of the Supreme Court in **Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR)** which requires issues to be raised and canvassed in the High Court before being escalated to this Court.

25. On sentence, it was contended that the death sentence for robbery with violence remains lawful as a discretionary maximum penalty in accordance with the Supreme Court's directions in **Murutetu & Another v Republic; Katiba Institute & 4 Others (Amicus Curiae) (Petitions 15 &**



**2015) [2021] KESC 31.** It was submitted that considering the brutality of the attack, the severity and permanence of PW1's injuries, and the trial court's opportunity to consider the appellant's mitigation, the death sentence imposed on the appellant was appropriate. In addition, that the appellant had opportunity to mitigate, and in exercise of its discretion, the court imposed the death penalty. Lastly, it was submitted that no medical evidence had been adduced to support the appellant's claim that he was suffering from dementia. This Court was therefore urged to dismiss the appeal in its entirety and uphold both conviction and sentence.

26. We have considered the record, the rival submissions and the law. The mandate of this Court in a second appeal is restricted by **section 361** of the **Criminal Procedure Code** to matters of law only. This Court will therefore not interfere with concurrent findings of fact unless it is shown that the courts below misdirected themselves, considered irrelevant factors, failed to consider material evidence or reached plainly wrong conclusions. See **Michael Ang'ara Paul v Republic [2021] KECA 1004 (KLR)**.

27. The issues that present themselves for determination in this appeal are whether the prosecution proved the case beyond reasonable doubt; whether any of the appellant's constitutional rights were violated during the trial; and whether the death sentence imposed on the appellant was unconstitutional.
28. This Court in **Odhiambo & Another vs Republic [2005] 2 KLR 176** explained the ingredients of the offence of robbery with violence as follows:

***“The act of being armed with a dangerous or offensive weapon is one of the elements or ingredients which distinguishes a robbery under section 296(2) and the one defined under section 295 of the Penal code. Other ingredients or elements under section 296(2) include being in the company of one or more persons or wounding, beating etc the victim and since all these are modes of committing the offence under section 296(2), the prosecution must choose and state which of those elements distinguishes the charge from the one defined in section 295.”***

29. As regards the first issue, we fully associate ourselves with the findings of the High Court that the evidence presented was strong, consistent and well corroborated. The testimonies of PW1, PW2 and PW3 were consistent, closely

aligned and placed the appellant, who was in the company of others at the scene as an active participant in the violent joint attack and robbery. PW1

testified that the appellant cut her with a panga, which evidence was corroborated by PW2. All three witnesses, PW1, PW2 and PW3 testified that they knew the appellant as a neighbor, and the circumstances under which the attack occurred, including the presence of a lit lantern inside the complainant's house at around 7.00 pm and the illumination provided by PW3's torch, in our view, created conditions that supported clear and reliable recognition. Their accounts were also supported by PW5's medical findings which confirmed the severity of the injuries and demonstrated the level of force used. The appellant's unsworn denial did not dislodge this evidence, and his disappearance from home immediately after the incident, in our view, strengthened the prosecution's case. The trial court and indeed the High Court were therefore entitled to conclude that the ingredients of robbery with violence under section 296(2) of the Penal Code were fully satisfied.

30. On the issues of constitutional violations, particularly the complaint about lack of legal representation, we decline to entertain them because they were not raised before the first

appellate court. This Court cannot consider an issue that was

neither canvassed nor determined at that stage, and in any case, it would be improper to introduce it for the first time on a second appeal. The same position obtains in respect of the issue raised regarding the trial court's jurisdiction.

31. As to whether the substitution of the original charge with that of robbery with violence violated the appellant's right under **Article 50(2)(b)** of the **Constitution**, we are satisfied that it did not. We agree with the High Court's finding that the appellant raised no objection when the amendment was made before the trial court. Nothing on the record suggests that he failed to understand the new charge. His active participation in the proceedings, including cross-examining the prosecution witnesses shows that he was fully aware of the case he had to meet. In these circumstances, no prejudice was occasioned by the substitution.
32. On the question of sentence, section 296(2) of the Penal Code expressly prescribes the death penalty as the lawful punishment for robbery with violence. Once the trial court found the appellant guilty, it was required to impose the sentence provided by law, and the High Court was equally

correct in upholding it after affirming the conviction. The appellant's reliance on

**Francis Karioko Muruatetu & Another v Republic**

**(supra)** is misplaced in light of the Supreme Court’s Directions of 6<sup>th</sup> July 2021 which clarified that **Muruatetu** applies only to sentences for murder under **sections 203** and **204** of the **Penal Code**. In those circumstances, there is no basis upon which this Court can interfere with the sentence.

33. In conclusion, we find that the conviction of the appellant was sound in law and was supported by credible and corroborated evidence. The sentence meted against him was as prescribed by the law and therefore the High Court did not err by upholding both the conviction and the sentence. This appeal is therefore devoid of any merit and is hereby dismissed in its entirety.

**Dated and delivered at Kisumu this 30<sup>th</sup> day of January, 2026.**

**D. K. MUSINGA, (PRESIDENT)**

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**JUDGE OF APPEAL**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**  
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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**