

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARALAL

HCCRA E005 OF 2025

(Consolidated with HCCRA E007 OF 2025)

JAMAICA LESOWAPIR.....1ST APPELLANT

ALEX MBAYA LESUUTIA.....2ND APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

**(Being an appeal against the judgment delivered on the
26th day of April, 2023 by Hon. Tamar (SPM) at Wamba in
MCCR case no. E242 of 2022)**

JUDGMENT

1. The appellants **Jamaica Lesowapir and Alex Mbaya Lesuutia** were charged with another with **robbery with violence Contrary to Section 295 as read with Section296(2)** of the Penal Code. The particulars were that on the 31st day of August, 2022 at around 2200hrs at Golgoltim village, Golgoltim sub-location, Samburu East sub-county in Samburu County in the Republic of Kenya while armed with dangerous weapon namely a rifle and crude

weapons jointly with others not before court robbed LKIRAMU LESUUTIA two bags of maize flour, assorted clothes and cash kshs.20,000/= all totaling to kshs.47,000/= and during the said robbery used actual violence to Lkiramumu Lesuutia.

2. They faced a 2nd Count **robbery with violence Contrary to Section 295 as read with Section 296(2)** of the Penal Code. The particulars were that on the 31st day of August, 2022 at around 2200hrs at Golgoltim village, Golgoltim sub-location, Samburu East sub-county in Samburu County in the Republic of Kenya while armed with dangerous weapon namely a rifle and crude weapons jointly with others not before court robbed Lmanisi Lesowapir 3kgs of maize flour, 1kg of beans, 1kg of rice, two surget of blue band and a half kg of sugar all valued at kshs.800/= and during the said robbery used actual violence to Lmanisi Lesowapir.
3. After trial, they were convicted and each sentenced to 30 years imprisonment on both counts.
4. Aggrieved by the conviction and sentence, the Appellants filed separate appeals which have since been consolidated. The 1st Appellant raised the following grounds of appeal;

1. THAT, the learned trial magistrate erred in both law and fact in convicting the appellant . by failing to observe that all the elements of the charge were not conclusively proven as enshrined in law.
2. THAT, the learned trial magistrate erred in both law and fact in convicting the appellant on evidence seen to be adequate.
3. THAT, the learned trial magistrate erred in both law and fact by failing to take into account that the prosecution case was not proved beyond all shadow of doubt.
4. THAT, by merits of this case and other emerging jurisprudence a thirty (30) year jail term is excessive and arbitrarily harsh.
5. THAT, the learned trial magistrate erred in both law and fact in decision making by failing to note that due to the seriousness of the charges facing the appellant, he was entitled to legal representation as per the provisions of Article 50(2)(h) of the Constitution.
6. THAT, the learned trial magistrate erred in both law and fact in decision making by conducting trial without

noting that the appellant was not conversant with the language used.

5. The 2nd Appellant based his appeal on the following grounds;
 - a. THAT, the learned trial magistrate erred in both law and fact by convicting the appellant in the present case yet failed to find that the charge sheet was duplicitous and thus prejudiced the appellant.
 - b. THAT, the appellant's rights were violated as he was not be presented before the trial court for plea taking after the expiry of 24 hours as provided for under Article 49(f) of the Constitution but was held for six (6) days by the police in custody.
 - c. THAT, the learned trial magistrate erred in both law and fact by convicting the appellant in the present case yet failed to find that he was not informed of his right to legal representation or provided with an advocate at the state's cost yet he was facing a capital offence whose ultimate sentence is death.

d. THAT, the learned trial magistrate erred in both law and fact by convicting the appellant in the present case yet failed to find that the appellant's identification was not positive.

e. THAT, the sentence imposed is both harsh and excessive and did not take into consideration the appellant's mitigation and the unique circumstances of the case.

6. The appeal was canvassed by way of written submissions.

7. On his part, the 1st Appellant maintained that the 1st complainant had no opportunity to identify the attackers. That since he was lying on the ground he could not mark the exact number of the attackers. That the credibility of PW1 was in question. It is asserted that at testimony, PW1 never stated that he was injured. It is the 1st Appellant's submission that the evidence adduced fell short of the standard required in a trial of this magnitude and the circumstantial aspects relied upon by the learned trial magistrate were disjointed and incapable of sustaining a conviction.

8. It is urged that PW2 contradicts the evidence of PW1 on various occasions. That the witness stated that he was

attacked by a group of people armed with guns. That a gun was placed on his forehead. That he saw the 1st Appellant having placed a gun on the complainant shoulder.

- 9.** It is submitted that when one compares PW 1 's evidence with that of PW2 one will automatically rule that the purported identification is disputed by the appellant. That it does not meet the required standard or threshold at the scene of crime and neither does it emerge that it was proved beyond doubt that the appellant was the perpetrator of this crime. The evidence is faulted in that PW1 saw one gun while PW2 saw a number of guns.
- 10.** Further that PW3 (clinical officer) claims that PW 1 suffered some injuries during the attack and even produced a P3 form — MFI(a) EXHIBIT 1 in support of this allegation. That the same was contrary to what was stated in court by PW1. He never pointed out any issue to do with assault occasioned to him in the course of the robbery.
- 11.** The 1st Appellant submits there was a grudge between him and the PW1.

- 12.** Further, that Article 50(2)(h) of the Constitution was violated for denial of the right to have an advocate.
- 13.** The 1st Appellant submits that a critical issue emerging is that the exact language used by the trial court is not clear and this was a total miscarriage of justice.
- 14.** He faults the sentence of 30 years and states this was plainly wrong. That this was not a case of "eye for an eye". No eye was lost during the robbery. It is alleged that some assorted clothes with some foodstuffs were stolen in the course of the robbery.
- He submits that 30 years imprisonment is arbitrary harsh and that it is not ideal.
- 15.** The 2nd Appellant submitted that the charge sheet was defective for duplicity and this resulted in a miscarriage of justice. That being charged under both Section 295 and 296(2) of the Penal Code denied the 2nd Appellant sufficient clarity to understand the case against him.
- 16.** The 2nd Appellant further challenges the failure to be presented in court in 24 hours upon arrest. This was in

violation of Article 49(1)(f) of the constitution and international instruments on human rights.

17. His further grouse is that he was not informed of his right to legal representation in a case where he faced a mandatory death sentence. He asserts that this violated Article 50(2)(g) & (h) of the constitution.

18. On the merits of the appeal, he submits that his identification at the scene was not positive and that the trial court erred in dismissing his alibi defence.

19. On sentence, he submitted that the sentence meted out was harsh and excessive and the court is invited to exercise its Appellate jurisdiction to interfere with the same.

20. For the Respondent, it is submitted that the Prosecution adduced direct and documentary evidence linking the appellant to the offence. The testimony of PW1 and PW2 clearly place the appellant as the perpetrator of this crime. PW1 had closed his shop at 8pm. PW2 came at 10pm and requested to buy a few household items. When PW1 finished with him, the appellant together with other attackers stormed into his shop.

- 21.** PWI's shop was well lit with a solar power; the appellant was armed with a gun. PWI was able recognized the appellant's voice since he was a neighbour who occasionally visited his shop to chew miraa and drink alcohol together. He also spent the night there in the shop.
- 22.** That PW2 also corroborates the testimony of PWI, since he saw the appellant armed with a gun demanding PWI to give him money. He was able to identify the appellant, since he was a neighbour.
- 23.** Counsel submits that Section 296 (2) of the Penal Code states that if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death. .
- 24.** It is the Respondent's case that the ingredient of Robbery with Violence was proved appropriately. The appellant was armed with a gun. He was in the company of three accomplices, and immediately before the robbery, he

used actual force to steal two bags of maize flour and assorted clothes and cash Kshs. 20,000/all valued at Kshs. 47,000/- from PW1. Also, PW2's shopping worth Kshs. 800/-, The prosecution relied on cogent and overwhelming evidence to prove the guilt of the appellant.

25. Further, that the trial court was right in convicting the appellant, since the evidence adduced was overwhelming and beyond reasonable doubt. Reliance was placed on the case of **Woolmington vs. DPP 1935 A C 462.** and **Bakare vs. State 1985 2NWLR.**

26. On the propriety of the charges, counsel maintains the charge was not duplex and in any event such an anomaly can be cured by the application of **Section 382 of the criminal procedure code.**

27. On the alleged infringement of the right under Article 49(1)(f), counsel submits that the recourse open for the 2nd Appellant is a claim for damages for breach of a constitutional right.

28. Regarding the claim of violation of the right to legal representation, counsel placed reliance on the case of

Manyeso v R [2023] KECA 827 for the proposition that no substantial injustice was suffered by the Appellant by not being informed of this right.

- 29.** On sentence, it is submitted that **Section 296 (2) of the Penal Code** states that if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more person or persons, or if, at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.
- 30.** That the trial court was right in convicting the appellant to 30 years imprisonment sentence. The 30 years imprisonment sentence is not harsh and is within the law.
- 31.** As a first appellate court, this Court is duty-bound to reconsider and re-evaluate the evidence on record and draw its own conclusions, bearing in mind that it did not see or hear the witnesses testify.
- 32.** This principle is settled in **Okeno v Republic [1972] EA 32**, where the Court of Appeal held that a first appellate court

must subject the evidence to a fresh and exhaustive examination.

33. The prosecution called **four (4) witnesses**.

34. PW1, the complainant, testified that on the material night he had closed his shop and at about 10p.m, a customer knocked at the door and requested to buy some provisions. He opened and sold to him items worth Shs. 800. Suddenly thieves stormed in ordering everyone to lie down and branding them fools. They demanded money. PW1 lay down and he felt something placed on his back that seemed like a gun. He directed the attackers where to pick the money and and he turned to see them pick the money. The shop lit by a delight powered by solar energy and which was sufficient to light the inside of the shop. PW1 recognized all the three attackers who were in the house. The Appellant herein was a neighbor who lived about a kilometer away.

35. It is his testimony that the Appellant is the person who wielded a gun. And he is the one who told him fool (sic). He recognized him. He used to visit the shop and they would

chew miraa and drink together. He would at times sleep in the shop when he got drunk.

36. On cross examination, he denied that the Appellant had been an attendant in the shop for 6 months. He confirmed that he had a book record of those who took goods on credit. And that the Appellant would record in that book as he (the Appellant) had gone to school and PW1 had not. PW1 denied owing the Appellant 30,000.

37. PW2 told the court that he went to PW1's shop to buy items. He paid Kshs. 1000 for the items. He had the items in a bag and while still at the shop, they were attacked. A gun was placed on his forehead and he was whipped. The house was lighted and it was bright.

38. PW2 added that he saw the Appellant place a gun on PW1. The attackers were demanding money from PW1. He stated that he did not know why the 2 who were known to him attacked the complainant. Matter was reported to the police and PW2 got a P3 form filled in respect of injuries sustained.

- 39.** On cross examination, PW2 stated that he had no grudge with the Appellant.
- 40.** PW3 examined PW1 and PW2 who had injuries. PW1 had bruises and swellings on the forehead and right shoulder and lower back. PW2 had tenderness on the neck and back shoulder and in the right hand. PW3 produced the respective P3 forms duly filled.
- 41.** PW4 was assigned this matter on 1/9/22 to investigate. The attackers had been recognized at the scene and names given. On 22/9/22 while in his house, he was informed by sergeant Kimeu that the complainant had seen his attackers in wamba. In company of Sgt Kimeu and P.C Maina, they went to town and the complainant pointed out the suspects. They also met a 2nd complainant in the matter who also identified the suspects. The 2 were arrested and taken to Wamba Police Station. PW4 proceeded with investigations. He produced the investigation diary.
- 42.** In defence the 1st Appellant in an unsworn statement told the court that he was not present at the scene of crime as he was herding cows in Lenashuu area. He added that the

complainant owed him 30,000. He had gone to ask for the money on 31 /8 /2022 at 10.00am.

43. The 2nd Appellant also in an unsworn statement told the court that he is a boda boda operator at Wamba. On the 31/8/22 he had a customer whom he took to Sarara around 3pm. He spent the night at Lekangus Manyatta after a mechanical breakdown. It is thus not true that he committed the offence as he was not at home. He added that he knew the complainant who has a shop at home. Earlier in the day, he had confronted the complainant over a disagreement he had with the 1st Accused.

44. I have had occasion to consider the submissions made. I have had due regard to and evaluated the evidence on record. In so doing, I have taken cognizance that I did not see nor hear the witnesses testify and have given due allowance for that fact. From the grounds of appeal and the record, the following issues arise:

- a. Whether the trial proceeded in a language the Appellants did not understand.

- b. Whether the 2nd Appellant was held in police custody for over 24 hours and the effect thereof.
 - c. Whether the Appellant's constitutional right to legal representation was violated for failure to be informed of this right.
 - d. Whether the charge as framed was duplicitous.
 - e. Whether the Appellants were positively identified or recognized at the scene of crime.
 - f. Whether the offence of robbery with violence was proved.
 - g. Whether the conviction and sentence were lawful.
- 45.** The 1st Appellant, in the course of this appeal, contends that he did not understand the language used during the trial and that no interpretation was provided, thereby allegedly violating his right to a fair trial. I note that the trial was conducted in Samburu language (indeed the same language the Appellants used in their defence) except in the instance of PW3 who used Kiswahili.

46. The record shows that this issue was never raised before the trial court, neither at plea taking nor during the hearing of the prosecution case, defence case, or mitigation.

47. The sole issue for determination is whether the appellant's right to interpretation was violated, and if so, whether the alleged violation vitiates the proceedings, notwithstanding that the issue was not raised at trial.

48. Article 50(2)(m) of the Constitution guarantees an accused person the right:

“to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial.”

49. Section 198 of the Criminal Procedure Code similarly provides that evidence shall be interpreted to an accused person in a language that he understands where necessary.

50. These provisions are intended to ensure that an accused person meaningfully participates in his trial. However, the right to interpretation, like other fair trial rights, must be assessed in light of the entire record.

51. The trial record shows that:

- a. The language of the court proceedings was indicated;
- b. The appellants actively participated in the trial;
- c. They cross-examined all prosecution witnesses coherently;
- d. They gave a defence without raising any complaint regarding language or interpretation.

52. In instances where an accused person participates fully in a trial without objection, a later claim that he did not understand the language used should be rightly viewed as an afterthought. In **Kiyato v Republic [1982-88] 1 KAR 418**, the Court held that failure to object to language at the trial stage, coupled with active participation, is strong evidence that the accused understood the proceedings.

53. Similarly, in **Karisa Chengo & Others v Republic [2015] eKLR**, the Court emphasized that an appellant must demonstrate actual prejudice, not merely allege non-compliance.

54. In the present case, the 1st Appellant has not pointed to any specific instance where misunderstanding of language resulted in prejudice. No objection was raised when witnesses

testified, no request for an interpreter was made, and no complaint was recorded at any stage of the trial.

- 55.** The court is satisfied that the appellant waived any objection to the language used, either expressly or by conduct, and cannot be allowed to raise the issue for the first time on appeal without demonstrating prejudice.
- 56.** It is my finding that Upon careful consideration of the record, this court finds that the 1st Appellant participated meaningfully in the trial. He raised no complaint on language or interpretation at trial and no prejudice has been demonstrated. The record will show that the 1st Appellant's mother tongue was majorly used.
- 57.** The 2nd Appellant contends that his constitutional rights were violated as he was held in police custody for 6 days before plea was taken.
- 58.** Article 49(1)(f) of the Constitution guarantees the right of an arrested person to be brought before a court as soon as reasonably possible, and in any event not later than twenty-four hours after arrest, or on the next court day if the period expires outside ordinary court hours.

- 59.** The position in law as regards such violation even where proved is as stated by the Court of Appeal in **Julius Kamau Mbugua v Republic [2010] eKLR**, where the Court held that unlawful detention prior to arraignment does not automatically lead to an acquittal and that the appropriate remedy lies in damages for violation of constitutional rights, not termination of the prosecution.
- 60.** The Court observed that criminal trials are concerned with the determination of guilt or innocence based on evidence, and that pre-arraignment constitutional violations are separate and distinct from the merits of the criminal case.
- 61.** This position has been reiterated in subsequent decisions, including **Paul Mwangi Murunga v Republic [2008] eKLR** and **Gerald Macharia Githuku v Republic [2015] eKLR**, where courts declined to nullify trials solely on the basis of delayed arraignment.
- 62.** Accordingly, even where a violation of Article 49(1)(f) is established, the remedy available to an accused person is to pursue compensation by way of a constitutional petition or civil claim for damages, unless it is demonstrated that the

violation occasioned a miscarriage of justice affecting the fairness of the trial.

63. In the present case, the appellant has not demonstrated how the alleged delay prejudiced his defence or impaired the fairness of the proceedings.

64. The appellants contend that they were not informed of their constitutional right to legal representation due to the nature of the charges facing them. They fault the trial court for convicting them despite this omission.

65. **Article 50(2)(g)** provides for the right of an accused person to choose, and be represented by, an advocate and **Article 50(2)(h)** provides for the right to have an advocate assigned by the State at State expense if substantial injustice would otherwise result.

66. The Court of Appeal in ***David Macharia Njoroge v Republic [2011] eKLR*** authoritatively settled the scope of these rights and held that the right to legal representation is not absolute, that State-funded legal representation is only mandatory where substantial injustice would otherwise result

and that failure to inform an accused person of this right does not automatically invalidate a trial.

- 67.** The Court further emphasized that the accused must demonstrate that the nature of the charge, complexity of the case, or his personal circumstances required legal representation; and the absence of counsel occasioned actual prejudice or led to an unfair trial.
- 68.** In the present case the Appellant's have not achieved this threshold.
- 69.** The 2nd Appellant contends that the charge framed under section 295 as read with section 296(2) of the Penal Code was duplicitous and therefore defective.
- 70.** Section 295 of the Penal Code defines the offence of robbery, while section 296(2) provides for the aggravated form of robbery, commonly referred to as robbery with violence, together with the applicable penalty.
- 71.** It is now settled law that a charge framed under section 295 as read with section 296(2) does not disclose two separate offences but rather properly combines the definitional provision with the penal provision.

- 72.** The Court of Appeal in **Johanna Ndungu v Republic [1996] eKLR** explained that section 295 sets out the elements of robbery, while section 296(2) elevates the offence to robbery with violence where any of the statutory aggravating factors are present.
- 73.** Similarly, in **Juma v Republic [2003] eKLR**, the Court held that such a charge is proper in law and is not duplicitous, as the accused is charged with one offence only, namely robbery with violence. In light of the foregoing, this point was not correctly taken.
- 74.** More recently, the court in **Mwangi v Republic (Criminal Appeal E001 of 2023) [2023] KEHC 26636 (19 Dec 2023)**, the appellant argued the charge was duplicitous for citing both **section 295 and section 296(2)** of the Penal Code. The court followed the Court of Appeal's holding in **Paul Katana Njuguna v Republic [2016] eKLR**, confirming the legal test: duplicity is concerned with whether the charge causes uncertainty or confusion to the accused. The court emphasized that **Section 295** is a definition section

(describing robbery generally) and **Section 296(2)** creates the specific offence of robbery with violence.

76. Regarding the key question of identification of the Appellants as the perpetrators of the offence, it is noteworthy that the incident occurred at night. The law is clear that evidence of identification at night must be tested with the greatest care.

77. In **Wamunga v Republic [1989] KLR 424**, the Court of Appeal warned against the dangers of mistaken identity.

78. However, this case is distinguishable as it is one of **recognition**, not mere identification. Recognition is more reliable than identification of a stranger, as stated in **Anjononi & Others v Republic [1980] KLR 59**, where the Court held:

“Recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger.”

79. Both PW1 and PW2 knew the Appellants before the robbery. Their evidence was consistent that there was solar lighting at the scene, which enabled them to see the

Appellants clearly. Both witnesses had prolonged interaction with the attackers. The two pointed out the Appellants at arrest and indeed in the initial report it was indicated that the attackers had been recognized. The trial court correctly evaluated the lighting conditions, the proximity, and the witnesses' prior familiarity with the Appellant. This Court finds no error in that evaluation.

80. The appellants have cited contradictions between the evidence of PW1 and PW2. Granted, no two people can perceive facts the same way especially in a situation of duress like in a robbery where a firearm is in use. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. 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 trial court that an accused is entitled to benefit there from. The correct approach is to read the evidence tendered holistically. It is only when

inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court that they can necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from. **(See Osetola vs State {2012} 17 NWLR (Pt1329) 251 and Theophilus vs State {1996} 1 nwlr (Pt.423) 139).**

- 81.** In rebuttal to the evidence, both Appellants raised alibi evidence. That they were elsewhere at the material night. This issue was never raised during the cross examination of witnesses to enable it to be tested. Nevertheless, the burden of proof never shifts to the Appellants and therefore this court is to consider the alibi raised when put against the evidence on record for the Respondent.
- 82.** Notably, the 2 Appellants both mention to have had an encounter with the 1st complainant on the 31/8/22. The 1st Appellant indicates the encounter was at 10.00am when he had gone to demand his money while the 2nd Appellant indicates he had confronted the complainant earlier in the

day over a dispute he had with 1st Appellant. The nature of the dispute is not indicated.

83. These alleged encounters with the 1st complainant water down the alibi defences given. At what time did the 1st Appellant go to herd cattle at Leshanuu if he was with the 1st complainant at 10.00am on the material day? Where had the 2nd Appellant confronted the 1st complainant, at what time and over what disagreement? These questions remain unanswered.

84. It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution. In **Karanja V R, [1983] KLR 501** the court held;

“In a proper case, a trial court may, in testing a defence of alibi and in weighing it with all the other evidence to see if the accused's guilt is established beyond all reasonable doubt, take into account the fact that he had not put forward his defence of alibi at an early stage in the case so that it can be tested by those responsible for investigation and thereby

prevent any suggestion that the defence was an afterthought.”

- 85.** Further, despite an attempt to allude at a grudge harboured by the 1st complainant, there was no evidence to support the allegation to establish that the witnesses had the motive to falsely implicate the Appellants.
- 86.** It is a settled principle that an accused person who alleges that criminal charges against him are motivated by a grudge, malice, or vendetta bears the burden of laying a factual basis for that allegation. Mere assertions from the dock, without supporting evidence, cannot displace an otherwise cogent prosecution case.
- 87.** The Court of Appeal in **Kiarie v Republic [1984] KLR 739** held that an accused person’s defence must be weighed against the prosecution evidence, and where the defence raises allegations such as fabrication, malice, or grudges, there must be some evidence to support such claims. A defence based on mere allegations, unsupported by evidence, does not raise a reasonable doubt.

- 88.** Similarly, in **Muiruri v Republic [1980] KLR 70**, the court stated that where an accused alleges a frame-up or personal grudge, he must demonstrate circumstances showing motive, conduct, or prior hostility on the part of the complainant or investigators sufficient to suggest fabrication of charges.
- 89.** Courts have further held that the prosecution is not required to disprove speculative claims of malice or grudges. In **Joseph Maina Mwangi v Republic [2000] eKLR**, the Court of Appeal emphasized that bare allegations of ill-will or grudges, without evidential backing, cannot be a basis for rejecting credible prosecution evidence.
- 90.** The Appellants did not place before the court evidence demonstrating the existence and relevance of a grudge. In the absence of such proof, the court is entitled to treat the allegation as a mere afterthought and determine the case on the strength of the prosecution evidence. Am satisfied the Appellants were properly identified.

- 91.** On whether the offence of robbery with violence was proved, under section 296(2) of the Penal Code, robbery with violence is proved if any one of the following is established:
- a. The offender is armed with a dangerous weapon; or
 - b. The offender is in company with one or more persons; or
 - c. The offender wounds, beats, strikes or uses personal violence.
- 92.** This was restated in **Oluoch v Republic [1985] KLR 549.**
- 93.** In the present case, the evidence shows that:
- a. The Appellants were in the company of one or more persons.
 - b. They were armed with a fire arm.
 - c. They injured their victims as proved by the medical evidence.

Any one of these ingredients would suffice. All were proved.

- 94.** As regards sentence, the appellants challenge the sentence of 30 years' imprisonment as excessive. Sentencing is a matter of judicial discretion, and an appellate court will

not interfere with the sentence imposed by a trial court unless it is shown that:

- a. The court acted on wrong principles;
- b. It ignored relevant factors;
- c. It considered irrelevant factors; or
- d.** The sentence is manifestly excessive or illegal
(see *Wanjema v Republic* [1971] EA 493).

95. Section 296(2) of the Penal Code provides:

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

96. Section 296(2) prescribes a mandatory death sentence on conviction for an offence of robbery with violence. In

Francis Karioko Muruatetu & Another v Republic

[2017] eKLR, the Supreme Court declared the mandatory

nature of the death penalty as provided for in murder charges unconstitutional.

- 97.** Subsequently, the Supreme Court in **Joshua Gichuki Mwangi v Republic**, Petition No. 2 of 2019, clarified the scope of **Muruatetu** and issued binding directions that the **Muruatetu** decision applies strictly to murder cases under sections 203 and 204 of the Penal Code;
- 98.** Its application to other capital offences, including robbery with violence, is not automatic;
- 99.** I have considered the law and the sentence imposed. In my view, the court ignored relevant factors given the nature of the violence, injuries and dangerous weapon used in the commission of the offence. I would be inclined to enhance the sentence to the death sentence. I however note that the state has not sought enhancement of the sentence, and indeed, no notice of enhancement was served to afford the Appellants the opportunity to address the issue. In the premises, I would let the matter lie.
- 100.** In the end, I find and hold that the offence of robbery with violence was proved beyond reasonable doubt. The

conviction was safe and based on sound evidence. The sentence was lenient in the circumstances.

101. With the result, that the appeal lacks merit and is hereby dismissed in its entirety. The conviction and sentence imposed by the trial court are affirmed.

Dated signed and delivered virtually this 30th day of January 2026



A.K. NDUNG'U

JUDGE