**Patrick & another v Republic (Criminal Appeal E110 & E109 of 2025 (Consolidated)) [2026] KEHC 449 (KLR) (27 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 449 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT KIBERA**

**CRIMINAL APPEAL E110 & E109 OF 2025 (CONSOLIDATED)**

**DR KAVEDZA, J**

**JANUARY 27, 2026**

**BETWEEN**

**MIKE MURIMI PATRICK ..... 1ST APPELLANT**

**SAMUEL MWAURA NJENGA ..... 2ND APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the original conviction and sentence delivered on 26th June 2025 by Hon. Z. Abdul (PM) at Kibera Chief Magistrate's Court, Criminal Case no. E627 of 2021 Republic vs Mike Murimi Patrick and Samuel Mwaura Njenga)***

**JUDGMENT**

1. The appellants were jointly charged with the offence of Robbery contrary to section 295 as read with section 296(2) of the Penal Code. The charge sheet was later amended and the charge of robbery was substituted with robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code. After a full trial, they were both sentences to serve life imprisonment. Being aggrieved, each of the appellants filed separate appeals, Criminal appeal No. E110 and E109 respectively, challenging conviction and sentence. The two appeals have since been consolidated.

2. In the 1st Appellant's petition of appeal dated 25th July 2025, he raised grounds, which have been coalized as follows:

    a. That the Learned Trial Magistrate erred in law and fact by allowing a prejudicial amendment of the charge from robbery contrary to section 295 of the Penal Code to robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code at the close of the prosecution's case, after all prosecution witnesses had testified and been cross-examined on the lesser charge, thereby violating the Appellant's right to a fair trial under Article 50 of *the Constitution* and occasioning a miscarriage of justice.

b. That the Learned Trial Magistrate further erred in law by permitting the amendment of the charge at the instance of the Investigating Officer (PW6) during her testimony, thereby unlawfully usurping the constitutional mandate of the Director of Public Prosecutions and contravening Article 157(10) of *the Constitution*, which insulates prosecutorial powers from direction or control by any person.

c. That the Learned Trial Magistrate erred in law and fact in relying on weak, contradictory, and inconsistent prosecution evidence, including unreliable identification evidence, the absence of an identification parade, and doubtful arrest circumstances, thereby failing to establish the Appellant's guilt beyond reasonable doubt.

d. That the Learned Trial Magistrate improperly applied the doctrine of recent possession, without proof of proper recovery, custody, or inventory of the alleged items, rendering the doctrine inapplicable.

e. That the Learned Trial Magistrate failed to adequately consider and evaluate the Appellant's defence, as well as his expressed intention to pursue alternative dispute resolution mechanisms, contrary to Article 159(2)(c) of *the Constitution*, resulting in an unsafe conviction.

f. That the conviction and sentence were founded on an offence and punishment that have since been declared unconstitutional, rendering both the conviction for robbery with violence and the life sentence imposed unlawful and unsustainable.

3. In the 2nd Appellant's petition of appeal dated 17th July 2025, he raised grounds, which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted. He also contended that his defence was not considered by the trial court and urged the court to quash his conviction and set aside the sentence.

4. The Respondent did not file a response to the appeal. The Court then directed parties to file submissions. The parties filed written submissions which have been duly considered and there is no need to rehash them.

5. This being a first appeal, it is the duty of this court as the first appellate court, to reconsider, re-evaluate, and re-analyse the evidence afresh and come to its own conclusion on that evidence. The court should however bear in mind that it did not see witnesses testify and give due consideration for that. (See Okeno v Republic [1972] EA 32)

6. The prosecution called six witnesses who testified as follows:PW1, KBO a 17-year-old student, testified that on 11th April 2021 at about 4.00 pm, while at Ngong Hills, he boarded a motorcycle as a fare-paying passenger. The rider was accompanied by another person who later joined them as a pillion passenger. Along the way, the rider negotiated a corner and stopped. Both men turned on him, assaulted him with kicks and blows, and robbed him of a Realme mobile phone, shoes, a jacket and a belt. They forced him back onto the motorcycle and rode towards Bomas, where they stopped again and ransacked his pockets, stealing Kshs 300.

7. PW1 stated that he managed to snatch the ignition keys and ran towards nearby members of the public, where he encountered a police officer and reported the robbery. The assailants chased him but retreated on seeing the police, whereupon the officer fired a warning shot in the air and alerted a colleague. One suspect was arrested shortly thereafter.

8. PW1 sustained injuries to the forehead and sought medical treatment. His phone and shoes were recovered and produced before court. He identified the appellants as his assailants, stating that the 1st appellant was the rider and the 2nd appellant the pillion passenger, though they were previously

unknown to him. During cross-examination, he maintained that it was the appellants who attacked and robbed him.

9. PW2 Kelvin Lodanga testified that on the same date, while at work, he received a call from his employee informing him that the motorcycle could not be traced. Using a tracker installed on the motorcycle, he established that it was at Hardy Police Station. Upon attending there, he was informed that the motorcycle had been involved in a robbery. He identified the 2nd appellant as the rider he had employed for about one week and stated that he had not authorised him to engage in any illegal activity. He identified the motorcycle from photographs produced. He added that the motorcycle had been purchased on loan from Watu Credit and, as payments were incomplete, it did not yet have a logbook. During cross-examination, he stated that he found the 2nd appellant at Kiserian and that they proceeded together to Hardy Police Station.

10. PW3, Wesley Kiprop the Officer-in-Charge, Bomas Police Post, testified that at about 6.00 pm he received a radio call from PC Lactan Lengurus informing him that a suspect had been arrested and transport was required. He visited the scene and found the 1st appellant in the company of PC(W) Christine Lemuna, together with a red Boxer motorcycle registration number KMFK 554X, a pair of shoes and a mobile phone, which he was told were stolen items. He escorted them to Hardy Police Station. At about 1.30 am, PW2 arrived with the 2nd appellant and reported that the motorcycle had allegedly been stolen by a customer and tracked to the station. The 2nd appellant was then arrested and detained.

11. PW4 PC Christine Lemuna reiterated the evidence relating to the arrest and recovery of the exhibits and issued a duly completed P3 form in respect of PW1's injuries. She produced the mobile phone, receipt, shoes and photographs of the motorcycle as exhibits. During cross-examination, she maintained her testimony.

12. PW5, a police surgeon, testified on behalf of his deceased colleague, Dr. Kamau, who filled a P3 Form for PW1 ON 13th April 2021. PW1 complained of being assaulted and had a swelling on the right periorbital region (around the eye) and pain on the right forearm. The degree of injury was assessed as harm and he produced the PE Form as an exhibit.

13. PW6, PC (W) Rachel Mutheu, the investigating officer, restated the circumstances surrounding the alleged robbery as narrated by the other prosecution witnesses. However, during re-examination, PW6 stated that the appellants herein were supposed to be charged with the offence of robbery with violence as opposed to the offence of robbery. It was at this juncture that the prosecution made the application to amend the charge sheet to read the offence of robbery with violence.

14. DW1, Mike Muimi Patrick, the 1st Appellant, told the Court that on 11/04/2021, he accompanied the 2nd Appellant on a motorcycle trip after a customer hired them to go to Galleria at an agreed fare of Kshs. 1,100. He stated that upon arrival, a dispute arose over payment, after which the customer began screaming and accusing them of theft. He ran away fearing assault by members of the public and was later arrested. He stated that no stolen items were recovered from him and that he had never seen the exhibits prior to being shown them at the police station. In cross-examination, DW1 stated that the 2nd Appellant was his friend and that it was not unusual for one operator to accompany another.

15. DW2, Samuel Mwaura, the 2nd Appellant, told the Court that on 11/04/2021, he hired the 1st Appellant to accompany him after a customer engaged him for transport. He stated that a disagreement arose over payment at Galleria, leading the customer to scream and accuse them of theft. He stated that he fled fearing mob justice and later surrendered to the police, maintaining that nothing was recovered from him.

16. In cross-examination, DW2 reiterated that it was common practice for operators to seek partial payment or accompaniment and stated that he fled due to fear of being lynched. He also maintained that no stolen items were recovered from him.

**Analysis And Determination**

17. I have considered the grounds of appeal raised in the respective petitions of appeal for both appellants, together with the submissions and I find that the main issue for determination is;

> Whether the Appellant's right to a fair trial under Article 50 of *the Constitution* was violated by the Learned Trial Magistrate's decision to allow a late amendment of the charge from robbery to robbery with violence at the close of the prosecution's case.

18. In the event that this issue is determined in the negative, I will then proceed to examine whether the prosecution discharged its burden of proof to the required standard of beyond reasonable doubt. For context on the main issue, I shall give a brief summary of the proceedings at the trial Court that culminated into the issue of violation of the right to fair trial.

19. On 24th October, 2024, PW6 PC(W) Rachel Mutheu, testified as the final prosecution witness. At re-examination stage, PW6 testified that the appellants herein ought to have been charged with the offence of robbery with violence and not robbery. It is on the strength of PW6's opinion that the prosecution made an oral application seeking to amend the charge sheet. The defence opposed the application on the grounds that the trial had substantially progressed, with PW6 being the final prosecution witness, and that allowing the amendment at that stage would occasion prejudice to the accused persons and amount to an unfair reopening of the prosecution's case.

20. Despite the objection, the trial magistrate allowed the application for the amendment, stating that the

> " The law allows the prosecution to amend the charge sheet at any time before close of their case" and that "no prejudice shall be suffered by the accused persons".

21. On the 29th October 2025, the appellants had new charges read to them. The 1st Appellant has argued that the trial court erred by permitting an amendment that fundamentally altered the nature, gravity, and ingredients of the charge after the prosecution had fully closed its evidence. According to the 1st Appellant, the amendment from a charge under section 295 to one under section 296(2) constituted an entirely difference and aggravated offence attracting a drastically enhanced sentence.

22. The law on amendment of charges is provided under section 214 of the Criminal (CPC) procedure Code as follows;

    1. Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:

       Provided that—

       i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

       ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further

cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

2. Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

3. Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

23. Section 214 of the Criminal Procedure Code permits the prosecution, at any stage before the close of its case, to seek an amendment of the charge. However, the amendment alone is not sufficient. The section imposes mandatory safeguards to protect the accused person's right to a fair trial. Once a charge is altered, the court must call upon the accused to plead afresh and must expressly inform the accused of the right to recall prosecution witnesses for further cross-examination or to have them testify afresh. Where necessary, the court is also required to grant an adjournment to avert prejudice. Non-compliance with these safeguards renders the amendment procedurally defective and prejudicial.

24. In the present case, it is common ground that the issue of amendment was first raised by PW6, the investigating officer, during re-examination, and that the prosecution's application to amend the charge sheet followed directly from that prompt. The critical question is whether the procedure prescribed under section 214 was complied with before the trial proceeded.

25. The record shows that the application to amend was made on 24th October 2024. On the next court date, 29 October 2024, the amended charge was read to the appellants and they pleaded not guilty. The prosecution thereafter closed its case.

26. Even on the face of the record, the trial court did not fully comply with section 214. At no point, either before or after the fresh plea, were the appellants informed of their statutory right to recall prosecution witnesses for further cross-examination or to have them testify afresh.

27. Witness testimony is the foundation of a criminal trial. It is through witnesses that the prosecution proves the elements of the offence, and it is through cross-examination that an accused person tests and challenges that evidence. The right to recall witnesses after an amendment is therefore not a technical formality but a substantive safeguard.

28. This safeguard is reinforced by Article 50(2)(b) of *the Constitution*, which guarantees every accused person the right to be informed of the charge with sufficient detail to answer it. At the commencement of a trial, this right enables the accused to understand the nature of the charge and to tailor cross-examination accordingly.

29. Where a charge is amended, that constitutional right must be renewed and protected by expressly informing the accused of the right to recall witnesses, regardless of the stage at which the amendment is made. The prosecution's liberty to amend the charge must be matched by an equal and corresponding opportunity for the defence to meet the amended case.

30. This was not done in the present case. The appellants were left to proceed without the opportunity to recall any prosecution witness in light of the amended charge. The omission placed them at a clear

procedural disadvantage and occasioned prejudice to their right to a fair trial. The amendment was therefore fatally irregular and cannot be sustained.

31. In David Abdalla Osma v Republic, [2010] eKLR,the Court held as follows: -

> " .... upon the amendment of the charge sheet after some witnesses have testified, the Court has a duty to, first, take plea afresh and, second, inform the Accused Person that he has a choice whether to recall the witnesses who had already testified. This is a fundamental right to fair trial which, if not adhered to, fatally taints the entire trial." (Emphasis mine)

32. As the appellant in the above case was not informed of his right to recall the witnesses after the charge sheet was amended, the High Court proceeded to quash the appellant's conviction and set aside the sentence.

33. Similarly, in Joseph Kamau Gichuki v Republic, [2013] eKLR, the Court of Appeal followed its earlier decision in Harrison Mirungu Njuguna v Republic, Cr A. No. 90 of 2004 where the Court had expressed itself as follows: -

> " The Code requires that once a charge is amended, the accused person should be called upon to plead to the amended charge and further entitles him to demand the recall of witnesses who have already testified to give their evidence afresh or to be further cross examined. In that case the charge was amended but the accused person was not called upon to plead to the amended charge. This Court held, correctly in our view, that the trial was substantially defective. The effect of amending the charge was to alter the case that the accused person had to meet. Hence, he had to plead to the amended charge afresh and had to be informed of the right to re-call witnesses to testify on the charge as amended and to be cross-examined. [emphasis added]
>
> ...
>
> The failure to inform an accused person of rights given to him by law is not a procedural irregularity which can be cured under the provisions of Section 382 of the Criminal Procedure Code."

34. At the risk of repetition, notwithstanding that the trial court allowed the amendment of the charge, there is no evidence that section 214 of the Criminal Procedure Code was complied with. The court therefore finds that this omission rendered the proceedings fatally defective, and any conviction founded thereon was unsafe and cannot be allowed to stand.

35. Upon examining both the original and the amended charge sheets, it is further apparent that the defects in the trial were not confined to the impugned amendment. The original charge sheet was itself fundamentally defective. Although the offence was described as robbery, it was framed as being contrary to section 295 as read with section 296(2) of the Penal Code. In law, section 296(2) creates and prescribes the offence and punishment for robbery with violence, while the offence of simple robbery under section 295 is punishable under section 296(1). The charge as drawn therefore improperly conflated two distinct offences with different elements and penalties. Had the trial proceeded to conclusion on the basis of that charge, the entire proceedings would equally have been vitiated.

36. These matters disclose a pattern of fundamental procedural lapses in the framing and handling of the charges. Taken cumulatively, they undermined the integrity of the proceedings and violated the appellants' right to a fair trial. The conviction is accordingly unsafe and cannot be sustained.

37. Having reached that conclusion, the only remaining issue is the appropriate order to make. In Muiruri v Republic [2003] KLR 522, the Court of Appeal held that a retrial may be ordered where the interests of justice so require, considering all the circumstances of the case, including the nature of the offence and the evidence on record. Further, in Francis Ndungu Wanjau v Republic [2011] eKLR, the Court of Appeal stated: -

> " Whether or not there ought to be a retrial in any particular case is a matter for discretion of the court depending on the circumstances of the case."

38. In this case, taking into consideration the nature of the offence and the evidence presented before the trial court, this Court is persuaded to find that this is a suitable case to order a retrial.

39. Accordingly, I make the following orders;

    a. The trial in Kibera Magistrate's Court in Criminal Case Number E627 of 2021; Republic Vs. Mike Murimi Patrick and Samuel Mwaura Njenga is hereby declared a mistrial.

    b. The conviction entered against the appellants is hereby quashed, and the sentence imposed is set aside.

    c. The matter is hereby remitted to the Magistrates' Court, Court No. 1, for allocation and retrial before a magistrate other than the one who previously heard the case.

    d. Pending the retrial, the bond terms earlier granted by the trial court are hereby reinstated.

    Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF JANUARY 2026**

**D. KAVEDZA**

**JUDGE**

In the presence of:

Shadrack Wambui & Wanjiku Waithera for the Appellant

Mutuma for the Respondent

Karimi Court Assistant.