REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAPSABET

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. E016 OF 2023

BETWEEN

GEOFFREY KIMANI NJUGUNA::APPELLANT

AND

REPUBLIC::RESPONDENT

[Being appeal from the judgment and sentence made by Hon. S.M. Mokua, Chief Magistrate in the Chief Magistrate's court at Kapsabet, delivered on 6th December 2022 in Criminal Case No. E364 of 2022 between Republic Vs. Geoffrey Kimani Njuguna & Vincent Kipkemboi]

JUDGMENT

1. The Appellant, **Geoffrey Kimani Njuguna** appeared before the Chief Magistrate at Kapsabet charged alongside another with the offence of robbery with violence **Contrary to Section 296[2]** of the **Penal Code** in that, on the 17th January 2022 at Kapsabet Township Nandi County jointly robbed **Henry Kipkoech Maina** of Kshs. 40,700 and immediately before or immediately after the time of such robbery used actual violence to the said **Henry Kipkoech Maina.**

2. After a full trial the Appellant was convicted and sentenced to life imprisonment, but being aggrieved with the outcome preferred the present appeal on the basis of the grounds set out in the petition of appeal dated 20th April 2023 filed herein by the firm of **Cheruiyot Melly and Associates Advocates** even though the Appellant personally filed additional and/or fresh grounds of appeal dated 31st March 2025. The Appellant opted to represent himself at the hearing of the appeal which effectively proceeded by way of written submissions.

3. Both sides filed their respective written submissions which have been given due consideration by this court in light of the grounds of appeal and those in opposition thereto as reflected in the state respondent's written submissions dated 20th December 2023 and supplementary submissions dated 12th January 2026.

A notice of enhancement of the sentence from life imprisonment to death sentence was filed contemporaneously with the supplementary submissions and is also dated 12th January 2026.

4. The duty of this court was to reconsider the evidence presented at the trial and draw its own conclusions bearing in mind that the trial court had the advantage of seeing and

hearing the witnesses **[See, Okeno Vs. Republic [1972 EA 32 and Achira Vs. Republic [2003] KLR 707].**

5. In that regard, the prosecution case was briefly that on the material 17th January 2022, the Complainant **Henry Kipkoech Maina [PW2],** a farmer from Tinderet was in Kapsabet town standing on the verandah near a hardware shop after having sold a bull for which he earned a sum of Kshs. 40,700/- which was in his possession at the time.

6. The complainant noticed a person standing near a wines and spirit shop and the Appellant/ Accused emerging from a nearby bar. The Appellant then held him by the neck and took away his Kshs. 40,700/- which was in the pocket before escaping from the scene together with another person.

7. The Complainant **[PW2]** after the incident reported to the police at Kapsabet Police Station and recorded a statement. He later sought treatment for his injured neck at the Kapsabet Referral Hospital where he was examined and a medical report **[P3] [P. Exhibit 1]** compiled and signed by a Clinical Officer known as **Kipkemei Langat,** but on whose behalf his colleague **Patrick Kemei [PW1]** produced in court the said **P3 form** indicating that the Complainant suffered bodily harm.

8. At the time of the incident, **Eunice Chepkoech [PW3]** was at her place of work when she was attracted by some commotion and upon enquiring saw the 1st Accused/ Appellant and another. Whereas the first Accused held the Complainant by the collar, his co-accused inserted his hands into the pockets of the Complainant and removed some money from his pocket.

9. The witness **[PW3]** indicated that she had previously known the First Accused since the year 2009 and the Appellant's Co-Accused since 2015.

That, the Co-Accused after getting the money from the Complainant entered a bar while the First Appellant went away. She called the Complainant after the incident and adviced him to report the matter to the police. He told her that his money amounting to Kshs. 40,700/- was stolen and she informed him that she knew the two offenders and gave their names to him.

10. **P.C. Fred Walubengo [PW4],** investigated the matter after it was reported by the Complainant at about 3:00pm on the material date. The report was to the effect that the Complainant was outside Annex bar in Kapsabet when he was attacked by the two people **Geoffrey Kimani Njuguna**

and **Vincent Kipkemboi.** He was rescued by a witness who gave those names.

11. The Investigations Officer **[PW4]** gathered that the attackers attempted to strangle the Complainant when the Appellant's Co-Accused took Kshs. 40,700/- from his coat. The Complainant screamed and Eunice [PW3] appeared at the scene and identified the attackers. Thereafter, the attackers escaped towards the direction of Bondeni.

12. The witness **[PW4]** indicated that the Appellant was arrested on the material date of the incident after being identified by the Complainant while his Co-Accused was arrested on 22nd January 2022 after being arrested in connection with another offence.

Both suspects were eventually charged with the present offence.

13. The Appellant's defence was a denial of having committed the offence. He stated that he used to sell shoes and clothes and on the date of his arrest he was out on normal business when immediately after buying a cigarette a police vehicle arrived. It was at that juncture that he was arrested for his failure to wear a face mask and later charged with the present offence which he did not commit.

14. The trial court considered the evidence in its totality and concluded that the prosecution had discharged its burden of proving the charge against the Appellant and his Co-Accused beyond reasonable doubt. The two Accused were therefore convicted and sentenced accordingly.

15. In this appeal the supporting grounds were initially filed by the Appellant's counsel on record at the material time. The subsequent or supplementary grounds of appeal were filed by the Appellant in person. The cumulative effect of all the grounds is firstly a challenge on the substance and credibility of the prosecution evidence relied upon by the trial court to convict the Appellant and Secondly, a challenge on the constitutionality of the trial in relation to specified **Provisions** of **Articles 49** and **50** of the **Constitution.**

16. For purposes of this appeal the ground alleging violation of the Appellant's constitutional rights during the trial are irrelevant having been raised rather belatedly for the first time in this appeal and being brought by way of the appeal instead of a substantive constitutional petition. Consequently, those grounds are hereby overruled and dismissed for being misconceived and incompetent.

17. With regard to the grounds challenging the Appellant's conviction on the basis of the evidence led by the

prosecution at the trial and after re-consideration of the evidence by this court; it was clearly evident that the fact that the Complainant was attacked and robbed of his money by a team of two people was not in dispute. The bone of contention was whether the Appellant and his Co-Accused at the trial were the two robbers said to have violently robbed the Complainant of his money amounting to Kshs. 40,700/-.

18. The trial court found that indeed the Appellant and his Co-Accused were the offending robbers despite their contention in defence that they did not commit the offence and were implicated without good cause. Invariably, this appeal therefore turns on the evidence of identification adduced by the prosecution against the Appellant and upon which the trial court relied to find that the Appellant was one of the two offender and convicted him.

19. Identification is a key ingredient of a robbery with violence offence and in its absence a conviction for such offence cannot hold.

Section 295 of the **Penal Code** defines the offence of robbery in the following terms: -

> **"Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property, in**

order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained is guilty of the felony termed robbery."

20. Notably in the charge sheet presented in court by the prosecution and on which the Appellant pleaded "not guilty" the aforementioned vital provision of the law which creates the offence of robbery was never invoked. Instead, the prosecution invoked only **Section 296[2]** of the **Penal Code** which basically prescribes the punishment for the offence of robbery with the use of violence as follows: -

"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."

21. It would therefore follow that the charge as presented in the charge sheet was fatally defective for failure to include the actual offence alleged to have been committed against

the Complainant and its attendant ingredients. This meant that the Appellant took a plea and was tried for a non-existent offence, an omission which the trial court failed to notice and which is enough to dispose of this appeal without much ado.

22. Be that as it may, in as much as the matter proceeded on the basis that the Appellant was facing a charge of robbery and that the prosecution evidence was undisputed with regard to the commission of the offence, it was absolutely incumbent upon the prosecution to provide sufficient and credible evidence of identification against the Appellant for him to be convicted, hitherto safely.

23. The obligation to establish and prove beyond reasonable doubt that the Appellant was one of the two people who violently robbed the Complainant lay squarely on the prosecution. There was no duty placed upon the Appellant to prove his innocence **[See Kioko Vs. Republic [1983] KLR 289].**

As noted hereinabove, identification is a major element or ingredient of a charge of robbery and failure to prove it as against the Accused Person would render the charge unsustainable and suitable for dismissal.

24. The need for credible and reliable evidence of identification arises greatly where the identification is by a single witness such as in the present case where it was evident that the key and sole witness of identification was the alleged owner of a wines and spirits shop situated near the scene of the offence i.e. **Eunice Chepkoech [PW3]** rather than the Complainant **[PW2].**

25. The witness **[PW3]** was the person who was said to have properly seen the two robbers at the time of the offence and immediately thereafter. She alleged that the two Offenders were previously known to her. The Complainant [PW2] said that she was the person who gave him the names of the two Offenders. The Investigations Officer **[PW4]** implied that the Complainant was also familiar with the Offenders prior to the material date of the offence and that he was the person who gave him **[PW4]** the names of the two Offenders, being **Geoffrey Kimani Njuguna** and **Vincent Kipkemboi** i.e. the Appellant and his Co-Accused.

26. There is always inherent danger of convicting an Accused Person on the basis of evidence by a single witness. A trial court is therefore called upon to property and carefully evaluate such evidence and satisfy itself that the possibility of mistake or error in identification was nonexistent or in the

very least, remote whether or not the identification was by recognition as indicated in this case.

27. Considering the conflicting and contradictory evidence of the Complainant **[PW2]** with regard to whether or not the two Offenders were previously known to him and with regard to what he informed the investigations officer **[PW4]** it was clear that chances are that he was attacked and robbed of his money by the people whom he could not identify or recognize due to the swiftness and speed that the act was committed thereby denying him adequate opportunity to clearly visualize and make a correct and reliable identification of the attackers.

28. The alleged visual identification of the Appellant by the Complainant was most likely than not mere dock identification based on what the shop owner **[PW3]** told him on the identity of the two attackers to the effect that the two attackers were previously known to her and thats he gave their names to the Complainant.

Ironically, the Complainant never actually mentioned the names while testifying in chief and during Cross-Examination. He only said that he was given the names by the shop owner **[PW3],** but fell short of specifying them.

29. It was evident that the Complainant **[PW2]** could not positively identify his two attackers even if the offence occurred in broad day light for lack of adequate opportunity to see and be able to mark their faces. His evidence could not therefore corroborate that of the shop owner **[PW3]** and vice-verse.

30. The shop owner [PW3] said that the two attackers were previously known to her but she did not specifically mention their respective names. The investigating officer **[PW4]** was the person who introduced the names **Geoffrey Kimani Njuguna** and **Vincent Kipkemboi** during the trial. He indicated that the names were given to him by the Complainant who in turn said that they were given by the shop owner **[PW3]** to him [Complainant], yet she **[PW3]** never mentioned the names to the police or even in the court.

31. Most intriguing was the fact that the shop owner **[PW3]** indicated that she had known the Appellant and his Co-Accused previously, yet in Cross-Examination she clearly implied that she had not previously know the attackers and that she only got to know them on the material date of the incident.

There was a lot of lacunas [gap] in the identification evidence of the Complainant **[PW2]** and the shop owner

[PW3] such that they could not and ought not have been relied upon by the trial court in that regard for want of credibility.

32. It is trite law that where the only evidence against an Accused Person is evidence of identification or recognition a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error or mistake before it can safely make it the basis of a conviction **[See, Cleophas Otieno Wanunga Vs. Republic [1989] eKLR].**

33. It is important that evidence of visual identification in criminal cases ought to be examined carefully to minimize the danger of bringing about miscarriages of justice.

Where a case depends wholly or to a great extent on the correctness of one or more identifications of the Accused, the court is required to warn itself of the special need for caution before convicting the Accused **[See, the Cleophas Otieno case [supra].**

34. In the English Case of **Republic Vs. Turnbul [1976] 3ALLER, 549,** it was stated that: -

“Recognition may be more reliable than identification of a stranger, but, even when the witness is purporting to recognize someone whom he knows the Jury should be reminded that mistakes in recognition of close relative and friends are sometimes made.”

The Court of Appeal for Eastern Africa in the case of **Abdullah Bin Wendo Vs. Republic [20EACA]166,** stated that: -

“Subject to certain well known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is know that the conditions favouring correct identification were difficult. In such circumstances, what is needed is other evidence whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness; can safely

be accepted as free from the possibility of error."

35. And, in **Roria Vs. Republic [1967] EA 583, the Court of Appeal** stated that: -

"A conviction resting entirely on identity invariably causes a degree of uneasiness……..

That danger is, of course, greater when the only evidence against an Accused Person is identification by one witness and although no one would suggest that conviction based on such identification should never be upheld, it is the duty of the court to satisfy itself that in all circumstance it is safe to act on such identification."

36. In applying the principles set out in all the foregoing authorities to the facts of this case and this court having carefully reconsidered the evidence availed at the trial court, it is the finding of this court that the prosecution evidence of identification against the Appellant was not reliable and free from the possibility of error or mistake so as to found a secure basis for his conviction by the trial court.

37. With respect, the trial court failed to warn itself of the dangers apparent when it was clear that the case against the Appellant was wholly dependent on the correctness of his alleged identification by the shop owner [PW3] and/or the Complainant [PW2]. Further, the trial court failed to carefully examine that evidence and be satisfied that it was credible, reliable and free from the possibility of error.

38. In the circumstances, this court must and hereby allows this appeal to the extent that the Appellant's conviction by the trial is hereby quashed and the life imprisonment sentence set aside.

The Appellant is forthwith set at liberty *"to fly like a blue bird in the sky"* unless otherwise lawfully held.

Dated and Delivered this 19th day of February 2026

HON. J. R. KARANJAH,
JUDGE