REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO.E039 OF 2025

REGAN OTIENO OCHIENG.....**APPELLANT**

VERSUS

REPUBLIC.....**RESPONDENT**

(Being an appeal from the Judgment and sentence of the Principal Magistrate Hon. Benjamin Limo dated 16th July 2025 in Siaya Criminal Case No. E045 of 2025)

JUDGMENT

1. The Appellant, **Regan Otieno Ochieng,** was charged and arraigned on 5th February 2024 before the Chief Magistrate's Court at Siaya in Criminal Case No. E045 of 2025 for the offence of robbery with violence contrary to Section 295 as read with 296(2) of the Penal Code. The Appellant took a

plea of not guilty. The particulars of the offence are that on 2nd February 2024 at Deputy Commissioner's servant quarter residence in Siaya Township Location, within Siaya Township County robbed Jackline Muthoni Ngugi of an iron box valued at Kshs. 2000, one mobile phone make Realme of IMEI No. 866143050070334 valued at Kshs. 16,000, one pair of Airmaxs Shoes valued at Kshs. 2500 and immediately before such robbery used actual violence to the said Jackline Muthoni Ngugi.

2. In support of the prosecution case, five witnesses were called to testify. Briefly, the complainant (PW1) told the court that on 2nd February 2024 she went to her house in the afternoon from her workplace to take lunch. When she reached her house, she found the main door had been broken into. She opened the padlock and entered the house. She then saw the accused, who pushed her into the bedroom and hit her on the head with a cleaning brush for laundry. When she fell down, the accused sat on her chest. According to PW1, the accused told her "wewe leo nakuuwa" and told her to keep quiet (wewe nyamaza). The accused put a piece of cloth in her mouth and started to strangle her. She punched the accused on the side of his head. According to PW1, the accused took two of her laptop bags and her phone and left, locking the door from outside. She stated that she was bleeding from her head. She broke the window near the door and unlocked the door. She went

back to the office where she found her friend Lilian Odongo, whom she informed about the incident. They reported the incident at Siaya Police station and thereafter, she went to Siaya Referral Hospital for treatment. According to PW1, in February 2025, the accused had come to their offices at Siaya Probation office to report since he was on Community Service Order after sentence review. She stated that the accused had worn a cap, but that on the 2nd day, when the accused reported to work, he was not wearing a cap. She saw the accused and reported him to the County Commander Officer who sent Siaya police station officers to arrest the accused. She went to the police station on 4th February 2025 to identify the accused in an identification parade where the accused had been placed among a few people who were less than 10. She was able to identify the accused. On being cross-examined, PW1 stated that in her statement, the attacker was a young man, but she did not give a description or features of the attacker to the police. She stated that at the identification parade there were those who had same height but others taller, and same body size. She stated that her items were not recovered from the accused but there are efforts to locate the phone.

3. PW2 **Lilian Odongo** stated that on 2nd February 2024 at 3.00 pm, PW1 told her that she was going for lunch but that she came back while bleeding on her head and that she informed her that a thug had broken into her house,

attacked and assaulted her. PW2 stated that PW1 described the attacker as short, dark, and slim and had shaved his head.

4. PW3 **Eunita Nyakundi**, Clinical Officer stated that PW1 had a stitched cut wound on the head at the occipital area of the skull and a palpable tenderness on the neck and on the upper limb; there was a palpable tenderness on both hands. He estimated the age of the injury as 3 days. PW3 opined the probable weapon of injury was a blunt object. He produced the P3 Form dated 5th February 2024 as exhibit 1.

5. PW4 **No. 237371 Inspector Hillary Kibor** stated that he conducted the identification parade on 4th February 2024 involving the accused. He stated that he briefed the accused. The accused gave him a go ahead. He stated that he made sure the accused and PW1 had not seen each other before the identification parade. He lined up nine people in the parade of the same age, height and general appearance with the suspect. That the accused stood between the 4th and 5th persons in the parade. He stated that PW1 positively identified the accused. Upon completion of the parade process, the accused stated that he was satisfied with the process.

6. PW5 **No. 65825 Pc Tobias Kungu,** the investigating officer stated that he received a complaint from PW1

who was a Probation Officer at Siaya Sub- County. He produced a receipt of the phone with IMEI number worth Kshs. 16,000 as exhibit 3 and the phone box marked a PMF1-4. According to PW5, the accused went to steal at Karapul area where he was arrested and charged and placed on probation at the DC's office in Siaya where PW1 identified him. He stated that PW1 gave description of the accused as young and slender.

7. At the close of the Prosecution case, the learned trial Magistrate found that a prima facie had been established against the accused. The accused (DW1) was placed on his defence. In his sworn testimony, the accused stated that he was not arrested while in possession of any of the alleged items but while at the Probation Office where he had been assigned work to do. He stated that he had met PW1 before the identification parade in the same clothes. He stated that the identification parade was done, but he was alone during the identification. On being cross-examined, he stated that on 2nd February 2024, he was at home, but he had no witness to support that fact.

8. The learned trial Magistrate found that the prosecution had proved its case beyond any reasonable doubt, convicted him, and sentenced him to thirty (30) years in jail. According to the learned trial Magistrate, he held

that PW1 was able to identify the assailant who talked to her and that the offence happened during the day at 3 pm, thus a clear case of identification by way of recognition of the accused. Reliance was placed on the case of **Johana Ndungu vs Republic Cr. App No. 116 of 1995** where the Court held that if the Court finds that at or immediately before or immediately after the time of robbery, the offender wounds, beats, strikes or uses any other violence to any person then it must find the offence under Subsection (2) proved and convict accordingly. According to the learned trial Magistrate, PW3 and PW5 corroborated the testimony of PW1 and PW2. The accused's defence was dismissed for lack merit and substance.

9. Dissatisfied by the decision, in the Amended Petition of Appeal dated 29th September 2025, the Appellant contends that;

    1. **The Appellant was charged and convicted under invalid provisions of the Penal Code.**
    2. **The learned trial Magistrate erred when he failed to determine whether theft was proved by the Prosecution.**
    3. **The learned trial Magistrate erred when he based his judgment on recognition which was not supported by evidence.**

4. **The learned trial Magistrate erred when he held that there were no inconsistencies in the identification process.**
5. **The learned trial Magistrate erred when he held that the evidence of the Clinical Officer corroborated the evidence of PW1 and PW2.**
6. **The learned trial Magistrate erred in law when he shifted the burden of proof to the Appellant to prove his defence of alibi**
7. **The learned trial Magistrate erred in law and fact when he applied a wrong principle in sentencing.**

10. The Appellant urges this court to quash the conviction and set aside the sentence. The Appellant submits that the court in **Joseph Kaberia Kahinga & 11 Others vs Attorney General [2016] eKLR** declared Section 295 and 296(2) of the Penal Code unconstitutional. Reliance is placed on **Mativo J**.(as he then was) decision in the **Law Society of Kenya vs Kenya Revenue Authority & Another [2017]eKLR** where it was held that an unconstitutional law is not a law and actions or decisions taken pursuant to an unconstitutional law would out rightly be illegal. The Appellant asserts that it is impossible to sustain a conviction of a charge of robbery with violence without proof of theft.

According to the Appellant, the elements to prove on the issue of theft are not ownership or conversion, but rather they are ownership and conversion which were not proved by the Respondent. The Appellant submits that the trial Court's failure to analyse the evidence and determine the element of theft violates Section 169 of the Criminal Procedure Code which demands that judgments must have an issue by analysis and reasons for each judicial decision. On identification by recognition, the Appellant submits that it was not a case of recognition since PW1 stated that she did not give the description or features of the attacker and had not met the attacker before the incident. Reliance is placed on P**eter Musau vs Republic [2008] eKLR** where the Court of Appeal set out the applicable standards for evidence of recognition to be relied upon. The Appellant submits that the conduct of the identification parade went against the Police Force Standing Orders since PW1 was allowed to see the Appellant shortly before the parade was officially organized, contrary to Rule 6(iv) (c) of the Police Force Standing Orders. According to the Appellant, PW4's evidence contradicted the testimony of PW1 on the description of the members in the identification parade. The Appellant submits that the identification was improperly conducted. Reliance is placed on the

case of **Gideon Mwinga Ndung'u vs Republic [2021]eKLR** where the court held the evidence of identification was not sufficient to support the conviction. According to the Appellant, there were apparent inconsistencies in the identification process. The Appellant submits that having failed to produce the treatment notes recorded on 2nd February 2024, the Prosecution failed to prove that PW1 was assaulted on the date that she was allegedly robbed, thus PW1 testimony was uncorroborated by the medical evidence. The Appellant submits that failure to present the Clinical Officer who attended to PW1 on 2nd February 2024 show PW1 testimony was uncorroborated. According to the Appellant, holding that the Appellant failed to avail a witness to ring fence his defence of alibi, the learned trial Magistrate shifted the burden of proof from the Prosecution to the Appellant. The Appellant submits that in cross-examination, the Prosecution did not challenge the Appellant's testimony that he was at home on the material date and at the time of the attack. Regarding the application of wrong principles in sentencing, the Appellant submits the trial Court failed to consider the unique circumstances of the case and instead considered the maximum sentence available in law. According to the Appellant, the Respondent has failed

to make a case for their prayer seeking enhancement to a death sentence, thus the request should be declined. The Appellant urges this Court to allow his appeal and both the conviction and sentence be set aside.

11. The Respondent has filed a *Notice of Enhancement* dated 23rd October 2025 seeking that the sentence of 30 years meted out to the Appellant be enhanced to death. Despite the directions issued by this Court on several dates, the Respondent has never filed written submissions in opposition to the appeal.

12. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to a fresh analysis to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. See ***Okeno vs. Republic [1972] EA 32; Shantilal M. Ruwala -vs- R (1957) EA 570.*** Section 354(2) of the Criminal Procedure Code provides that an appeal to the High Court may be on a matter of fact as well as on a matter of law. The appeal herein arises from the Chief Magistrate's Court at Siaya in Criminal Case No. E045 of 2025, thus a first appeal.

13. I have considered the Record of Appeal, Notice of Enhancement, the submissions by Appellant, the authorities cited and the applicable law. The issues for determination are:

i. whether Appellant was charged and convicted under invalid provisions of the Penal Code;
ii. whether the ingredients of the offence of robbery with violence were established;
iii. Whether there is any evidence linking the Appellant to the offence;
iv. whether the learned trial Magistrate shifted the burden of proof to the Appellant to prove his defence of alibi; and
v. Whether the learned trial Magistrate applied the wrong principles in sentencing the Appellant.

14. On the first issue, the Appellant was charged and convicted of the charge of robbery with violence under Section 295 as read together with Section 296(2) of the Penal Code. The Appellant contends that the decision of **Joseph Kaberia Kahinga & 11 others [2016] eKLR**, a three Judge bench **(Lesiit, Kimaru, & Mutuku JJ) (Kahinga's case)** declared the sections of the law invalid. The declaration was suspended by the Court for eighteen (18) months from the date of the delivery of this judgment to enable the Attorney General, the Kenya Law Reform and Parliament to act and appropriately amend

the impugned sections of the Penal Code with a view to removing the identified ambiguities and inconsistencies and setting out the degrees of aggravation, and differentiate and graduate the various aspects of the offence of robbery.

15. Despite such a suspension in Kahinga's case, **Mativo J.** (as he was then) in **Law Society of Kenya v Kenya Revenue Authority & Attorney General (Petition 39 of 2017) [2017] KEHC 9228 (KLR) (Constitutional and Human Rights) (21 September 2017) (Ruling)** stated that:

"12. It's trite that an unconstitutional law is not law and actions or decisions taken pursuant to an unconstitutional law would out rightly be illegal. It follows that once a law has been declared unconstitutional it has no business remaining in the law books."

16. It follows therefore that charges preferred against an accused person under Section 295 and 296(2) Penal Code are illegal since it is not law. The Appellant was arraigned before the Trial Court on 5th February 2025 for a charge under Section 295 as read together with Section 296(2) of the Penal Code. He took a plea of not guilty. Upon conclusion of the trial, the Appellant was found guilty of

the offence, convicted and sentenced to serve 30 years in jail.

17. The decision in **Katiba Institute & 8 others v Prosecutions & 7 others; Kenya National Commission on Human Rights & 6 others (Interested Parties) (Petition E036, E080 & E497 of 2024 (Consolidated)) [2026] KEHC 489 (KLR) (Constitutional and Human Rights) (28 January 2026) (Judgment)** confirms that no action was taken to amend the invalidated sections of the law as ordered by the Court in Kahinga's decision. **Mugambi J.** while noting that the Respondents who included among others the Attorney General, the Kenya Law Reform and Parliament, had not undertaken the legislative interventions that were ordered by the Court (Kahinga's decision) within the stipulated time and did not also move the Court to seek extension of the said orders if indeed, there were any challenges that needed to be addressed, held that:

> **"174. Firstly, the Respondent's action of enforcing provisions of law declared unconstitutional by a competent Court exercising its authority vested under Article 165 (3) d (i) of the Constitution is a blatant infringement of Article 2**

(4) on the Supremacy of the Constitution which declares that:

> **‘(4) Any law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.’**

175. Further, the acts of continuing to charge individuals under a law that has been found and declared unconstitutional by the Court in exercise of its constitutional jurisdiction violate the fair rights of the affected persons, as it is a direct breach of Article 50 (2) (n) of the Constitution which states thus:

> **“Every accused person has the right to a fair trial, which includes the right—**
>
> **(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—**
>
> **(i) an offence in Kenya;**
>
> **or (ii) a crime under international law”**

176. Consequently, preferring charges or pursuing prosecution founded on the provisions of law that have been declared unconstitutional and thus invalid is an act of impunity and abuse of State power by Respondents contrary to Article 2 (2) which provides that 'No person may claim or exercise State authority except as authorized under this Constitution.' The persistent failure to take necessary measures to implement the binding declaration that would have ensured that accused persons are only criminally prosecuted for the offences that are lawfully defined under a valid law infringes Article 2 (2) of the Constitution for it amounts Respondents arrogating themselves non-existent powers to enforce invalid legal provisions.

177. For the reasons aforesaid, this Court thus finds that the State through the Respondents has violated the Constitution and also, the Rights of the accused by continuing to charge accused persons under invalid legal provisions, in particular, Sections 295, 296 and 297 of the Penal Code which were declared unconstitutional and the State ordered to take remedial measures by way of legislative interventions which the State has failed and/or neglected to effect.

18. The Petitioners therein had sought injunctive orders against the Respondents. **Mugambi J.** went ahead to find that:

> **“While this Court duly acknowledges there has been non-compliance with Kahinga judgment, and thus the State is guilty of continuing violations, this Court opines, that the specific orders sought by the Petitioners are not in themselves the appropriate remedy and thus would exercise its discretion to fashion what in its view, are the appropriate reliefs.”**

19. In crafting the appropriate orders, **Mugambi J.** declared that since 15th March 2018,the Respondents had continued to charge, arraign and convict people under the invalidated sections of the law, the Respondents had violated Article 50 (2) (b) of the Constitution including the rights of the Petitioners guaranteed under Articles 27,28,29, 48, 50(2)(b) and (n) of the Constitution. However, the learned Judge, in the interest of administration of justice and to safeguard public interest by avoiding legal vacuum in respect of grave criminal offences and to facilitate orderly legislative intervention towards correcting the defects that led to declaration of unconstitutionality of the impugned provisions of the Penal Code, the operation

and the effect of orders specified in (a) and (b), suspended the declaration until the 30th of June, 2027(18 months) to allow for the judicial supervised interventions that would ensure compliance.

20. According to the learned Judge:

“187. Despite the violations,….an immediate order that stops all prosecutions for robbery, robbery with violence and attempted robbery with violence would create an unprecedented turmoil and confusion that would do cause much harm and uncertainty hence more specific realistic measures under judicial supervision would eventually remedy the harm without igniting an explosive impairment of the entire criminal justice system…

189…issuing a blanket order that prohibit immediately all trials for robbery with violence or ordering the release of all persons undergoing those trials or prohibition of any arraignment with immediate effect, would be inimical to the overriding interest of justice that transcends the interest of parties in a constitutional petition…”

21. As at the time the Appellant was arrested, arraigned, charged, convicted and sentence by the trial Court, the order in Kahinga’s case invalidating Section 295 as read together with Section 296(2) of the Penal Code had taken effect. In the

premises, the Appellant was charged and convicted under invalid provisions of the Penal Code.

22. However, **Mugambi J.** in Katiba's case(supra) suspended the declarations on grounds that stopping all prosecutions for robbery, robbery with violence and attempted robbery with violence would create an unprecedented turmoil and confusion that would do cause much harm and uncertainty.

23. **Mativo J.** in **Law Society of Kenya v Kenya Revenue Authority & Attorney General(supra)** stated that:

> **"19. A suspended declaration is a remedial device by which a court strikes down a constitutionally invalid law, but suspends the effect of its order such that the law retains force for a temporary period.**
>
> **20. Suspended declarations of invalidity have become a familiar feature of Canadian constitutional jurisprudence.[22] Having originated as an exceptional remedy, enabling courts to temporarily suspend the effect of a declaration invalidating a law on constitutional grounds, a suspended declaration is now included in the majority of Supreme Court of Canada**

decisions in which the power of statutory invalidation is utilized.[23] As the usage of suspended declarations has grown, the justifications for their use have evolved. No longer are they reserved for instances of “emergency”, in which the invalidation of an unconstitutional law would result in imminent danger to the public. Rather, suspended declarations are now used to instantiate a particular conception of the proper roles of legislatures and courts.[24]

21. Suspended declarations engage real consequences for individual litigants and others affected by judicial decisions, as laws found to violate the Constitution are permitted to have continued, temporary effect.[25] A suspended declaration occurs when courts choose to delay the effect of invalidating a law. A court may declare a law to be invalid, but “suspend” the effect of the declaration until a future date. During the interim period, the law continues to apply. At the expiry of the period, the court's declaration takes full effect: unless the law has been replaced or amended to comply with the constitution, it is rendered null.[26].”

24. In the premises, as a result of the order suspending the invalidity of Section 295 and 296(2) of the Penal Code in Katiba's Case, I find the charge of robbery with violence preferred against the Appellant as at now is the law in force. The ground of appeal fails.

25. The second issue is on the ingredients to prove in a robbery with violence offence, and whether the Prosecution proved against the Appellant. Section 295 of the Penal Code defines what is considered to be 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."**

26. For the offence of robbery with violence to be proved, the element of stealing under Section 295 of the Penal Code must be proved, coupled with one or all the other elements set out in Section 296(2) of the Penal Code. See ***Johana Ndungu V. Republic, CR. APP. No. 116 of 1995; Ganzi & 2 Others V. Republic (2005) 1KLR 52***.

27. 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.**

28. The elements of the offence were set out by the Court of Appeal in **Oluoch v Republic [1985] KLR** as follows: i. the offender is armed with any dangerous and offensive weapon or instrument; ii. The offender is in company with one or more persons; and iii. At or immediately before or immediately after the robbery, the offender uses actual violence on the victim.

29. The Court of Appeal in **Dima Denge Dima & Others v Republic [2013] KECA 480 (KLR)** held:

> **"The elements of the offence under Section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction."** *See* ***Reimond Munene Kamau & another v Republic***

[2018] KECA 250 (KLR); Masakuv Republic [2008] KLR 604

30. PW1 stated that the Appellant pushed her into the bedroom and hit her on the head with a cleaning brush for laundry. When she fell down, the accused sat on her chest. According to PW1, the accused told her “wewe leo nakuuwa” and told her to keep quiet (wewe nyamaza) and put in her mouth a piece of cloth and started to strangle her. According to PW1, the accused took two of her laptop bags and her pone and left locking the door from outside. She stated that she was bleeding from her head.

31. The Appellant was not in the company of any other person. PW1 alleged that the Appellant hit her head with a cleaning brush that caused bleeding. Before the robbery, the Appellant told PW1 that he would kill her and told her to keep quiet and started strangling her. I am satisfied that elements (i) and (iii) of the offence of robbery with violence were proved. The element of stealing under Section 295 of the Penal Code was proved since PW1 stated that the Appellant took two of her laptop bags and her pone and left while locking the door from outside.

32. Having found that two elements of the offence of robbery with violence were proved, on the third issue, the learned trial Magistrate held that the Appellant was properly identified by PW1as the offence was committed during the day at 3.00 pm

and that PW1 and the Appellant were able to talk to each other. According to the learned trial Magistrate, since PW1 had enough time to identify the Appellant, this was a case of identification by way of recognition. Indeed, this was a case of recognition and not identification. The Appellant was arrested in February 2025 but the offence had been committed and reported to the police on 2nd February 2024. The Appellant arrested after a year since the charge sheet shows that the Appellant was arrested on 4th February 2025 but the offence was committed on 2nd February 2024. PW1 who was working as a Probation Officer saw the Appellant in 2025 when he came to report under Community Service Order after sentence review. According to PW1, on that day, the Appellant wore a cap but on the second day, the Appellant had not put on a cap. According to PW1, he was the first person to come into contact with the Appellant.

33. For the Prosecution to establish whether circumstances established a positive identification, the English Court of Appeal in **R vs TurnBull (1976) 3 ALL ER 549** stated that:

> **“Such interrogatories and enquiry as to how long did the witness have the accused under observation? At what distance? In what light, whether the observation was impended in any way. Had the witness seen the accused before? How often? If only occasionally had he any reason**

for remembering the accused? How long time elapsed between the original observation and subsequent identification to the police…"

34. The Court of Appeal in **Anjononi v Republic [1980] KLR 59** at page 60 stated:

"The proper identification of robbers is always an important issue in a case of capital robbery, emphatically so in a case like the present one where no stolen property is found in possession of the accused. Being night time the conditions for identification of the robbers in this case were not favourable. This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other. We drew attention to the distinction between recognition and identification in Siro Ole Giteya vs. Republic (unreported)."

35. Based on PW1's testimony, I am satisfied that PW1 positively identified the Appellant, the offence having been committed during the day at 3.00 pm. PW1 had enough time with the Appellant who attacked her as she also hit

the Appellant on the head. The complainant was able to recognize the Appellant even after a year despite not giving the police full description of the person who attacked her on 2nd February 2024.

36. The Court of Appeal in **Cornel Otieno & Nelson O. Oloo vs Republic (Criminal Appeal 41 of 1997) [1997] KECA 181 (KLR) (18 July 1997) (Judgment)** stated that:

> **"And now to the crucial issue of identification. We see no reason to disagree with the findings of the High Court and the subordinate court that there was sufficient light and time at the house of M.B to enable her and M.J to have a good look at the appellants, and sufficient contact with the appellants which would enable them to recognize the appellants if they were to see them again, and which they did even though it was about eleven months later, at the identification parades conducted by the police. We also accept that upon the evidence adduced at the trial of the appellants, these identification parades were conducted properly.**

37. The Appellant contends that the identification parade went against the Police Force Standing Order since PW1 saw the Appellant before the identification parade. When PW1

saw the Appellant in 2025, she reported to the County Commander's Office and the police officers were sent to arrest the Appellant. The Court in **John Mwangi Kamau vs Republic (2014) eKLR** while considering the essence of identification parade stated that identification parade are meant to test the correctness of a witness in identification of a suspect. See ***Kinyanjui & 2 Others -vs- Republic (1989) KLR 60.***

38. Under Chapter 42 paragraph 7(5) (c) (d) of The National Police Service Standing Orders Legal Notice 100 of 2017: (c) the witness or witnesses shall not see the accused before the parade; d) the accused or suspected person shall be placed among at least eight persons, as far as possible of similar age, height, general appearance and class of life as him or her. It is clear that PW1 ought not to have seen the Appellant before the identification parade, thus the parade was not properly conducted. The Court of Appeal in **Odonde v Republic (Criminal Appeal 293 of 2019) [2025] KECA 201 (KLR) (7 February 2025) (Judgment)** stated that the importance of conducting identification parades with scrupulous fairness, adhering to prescribed procedures outlined in police standing orders and relevant statutes cannot be overemphasized.

39. The Appellant contends that PW1 did not give description or features of the attacker save that the

attacker was a young man. It was PW2 who stated that she was told by PW1 that the attacker was short, dark, and slim and had shaved his head. The Court of Appeal in **Douglas Kinyua Njeru v Republic [2015] KECA 939 (KLR)** stated that ideally, a witness ought to give the description of his/her assailant for purposes of organizing an identification parade. However the Court cited **Nathan Kamau Mugwe – vs- Republic- Criminal Appeal No. 63 of 2008** where court expressed itself as follows:

> **"As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify**

him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him. In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade.

40. I find that the identification parade was not properly conducted but this is clear case of recognition by PW1. In my view, despite the identification parade not being conducted properly PW1, the same is not fatal to the case since PW1 was able to recognize the Appellant. The offence was committed during the day where PW1 spent ample time with the Appellant during the attack. The Court of Appeal in **Katana & Another V. Republic [2022] KEC 1160 (KRL)** held that:

“…. it is also notable that an identification parade is not necessary where the witness is positively confident at the time of commission of the crime as to the identity of the perpetrator of the offence and will only become necessary where the victim of the crime did not know the accused before his acquaintance with him during the commission of the offence, or identification was made under difficult circumstances such that the witness may have made a mistake…..’’

41. I find the Appellant was positively identified by recognition. According to the Appellant, on 2nd February 2024 he was at home but his evidence was not supported by other witnesses. The onus was on the prosecution to disprove the alibi defence. PW1 sufficiently placed the Appellant at the scene and as the person who committed the offence.

42. Regarding the sentence meted against the Appellant, it has been contended that the learned trial Magistrate failed to consider the unique circumstances of the case but considered the maximum sentence available in law. The Respondent seeks enhancement of the sentence to death as per Section 296(2) of the Penal Code. As per the Court proceedings, the Respondent’s counsel informed the Court that the Notice has been filed and would submit on the

same. The Appellant has urged this Court to dismiss the request for enhancement of the sentence since the Respondent has not submitted on it by filing any written submissions. While considering the sentence to mete out against the Appellant, learned trial Magistrate was guided by the case **James Kariuki Wagana vs Republic (2018) eKLR** where **J. Ngugi J.(**as he then was) held that death sentence should be reserved for most heinous level of robbery with violence. The court in **Michael Kathewa Laichena & Martin Mugambi Karindi vs Republic[2018]eKLR**, **Majanja J**. took the same position, that:

> **“16. I now turn to consider the sentence to be imposed on the petitioners. The starting point of this inquiry is that although the mandatory death penalty has been declared unconstitutional, the death penalty still exists as the maximum sentence for robbery with violence under section 296(2) of the Penal Code. In my view, the death penalty should be excluded where the robbery does not result in the death of a person. From the facts of the case, I have outlined, the petitioners did not kill anyone in the course of the robbery hence I would exclude the**

death penalty leaving life imprisonment as the maximum penalty."

It is noted that the Respondent has filed a notice of enhancement of sentence from 30 years imprisonment to death sentence. The Appellant has vehemently opposed the same and urged the court to reject it. The issue of enhancement of sentences has been addressed by several courts.

In **J.J.W. v Republic [2013] eKLR** the Court held as follows on enhancement of a sentence by the High Court;

"It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that

eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal." See Sammy Omboke & Another v Republic [2019] eKLR; Kesusa & Another vs Republic [2022] KECA 546 (KLR).

Also in **Onesmus vs Republic [2022] KECA 53 (KLR),** the Court of Appeal succinctly concluded;

"...Indeed, we confirm that it is within the right of the appellate court to enhance sentence where there is evidence when the person was convicted under the wrong provision or the provision is not commensurate with the facts. But in doing so, the court must follow the correct steps and procedure. 17. First, is to record if the prosecution intends to change or substitute the sentence to a more serious sentence and give a warning. Second, that warning must be found on the record. Third, it must be brought to the attention of the appellant that if he were to proceed and the court were to find merit in the conviction, it is likely to enhance sentence and fourth, the appellant must be given an opportunity to elect whether to proceed with the appeal or not in view of the warning

and that he is aware of the consequences of his actions. That was not done.

18. In the event he elects to proceed with the appeal, this must be reflected in the record; that despite warning in a language he understands, the appellant elected to proceed with the appeal. It is upon taking these steps and requirements that the appellate court is entitled to enhance or substitute the sentence by the trial court".

It is noted that the notice of enhancement herein was not directly placed on the Appellant's doorstep but that his learned counsel did receive the same and submitted thereon. The Appellant's counsel was deemed to have the requisite instructions to receive the said notice but ultimately the Appellant was required to address the court thereon so that it comes out from the horse's own mouth as it were. As this was not done, and in view of the fact that the robbery did not result in the death of the victim, iam inclined to reject the notice of enhancement of sentence by the Respondent. I find that the said sentence of thirty years imprisonment is commensurate with the moral blameworthiness of the Appellant. It transpired from the evidence that the Appellant was a person with a criminal past since he was arrested while serving another sentence under probation after the complainant pointed him out as the person who had robbed her one year earlier.

43. From the foregoing authorities, it is clear that the learned Judges took into consideration the fact that no death resulted from the robbery with violence, and deemed it appropriate to apply its discretion in sentencing the Appellant to serve determinate years in jail. In the present case, it is noted that the robbery did not result to death of the complainant, thus the basis of not sentencing the Appellant to death. I find no basis to disturb the sentence.

44. In the result, I find the Appellant's appeal against conviction and sentence to be devoid of any merit. Accordingly, the appeal is dismissed. The conviction and sentence of the trial court is upheld.

Dated and delivered at Siaya this 20th day of February 2026

D. K. Kemei

Judge

In the presence of:

Regan Otieno Ochieng…… Appellant

Odhiambo……for Appellant

Muntui……for Respondent

Maureen……Court Assistant