

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**HIGH COURT CRIMINAL APPEAL NO. E097 OF 2023**

**STEPHEN            MARUBU            MUIRURI.....**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

*(Being an appeal against the conviction and sentence by Hon. S. Mwangi, PM, in Murang'a Criminal Case E429 of 2022 delivered on 10<sup>th</sup> August, 2023)*

**JUDGEMENT**

- 1.The appellant herein, *Stephen Marubu Muiruri*, jointly with another person not before this court were tried and convicted at the lower court, with the offence of Robbery with Violence **contrary to section 295 as read with section 296(2) of the Penal Code.**
2. It is alleged that on 22<sup>nd</sup> July, 2022, at around 19.30 hrs in Muchungucha within Murang'a County, with two others not before the court, the appellant and his co-accused, robbed *Jacob Munyi Wang'ombe* of one mobile phone make infinix Hot 5 and cash of Kshs. 2530, and during the time of such robbery, wounded the said *Jacob Munyi Wang'ombe* by cutting him on his back using a panga.
- 3.Upon conviction, the appellant was sentenced to death. He was aggrieved by his conviction and sentence and he appealed to this court through a Petition of Appeal filed before this court on 16<sup>th</sup> August, 2023.

4. In his Petition of Appeal, the appellant relied on seven (7) grounds of appeal, which when considered as a whole, disclosed that the appellants main complaint were that the learned trial magistrate erred in law and in fact in failing to find that the offence of robbery with violence was not proved to the requisite threshold, as the evidence on record did not establish mens rea: for reason that it was improbable for the accused to have intended to rob the complainant since the two were close acquaintances, well known to each other since childhood; for reasons that the unfortunate events resulting in the alleged robbery emanated from a scuffle between teenagers in the same neighbourhood; and for reasons that the objective conduct of the complainant during and after the alleged robbery was inconsistent with that of a person who had been robbed.
5. The appellant also faulted the learned trial magistrate for failing to find that the totality of the evidence on record pointed to the irresistible conclusion that the complainant's claim of robbery with violence was an afterthought which was subsequently implanted in him by others; and for failing to find that the death sentence imposed by the trial court is unconstitutional for reason of taking away judicial discretion in sentencing, and for being harsh and inappropriate under the circumstances.
6. On the above grounds, the appellant urged this court to quash the conviction and set aside the sentence.
7. A brief background of the prosecution case before the trial court was that on 22nd July 2022, at around 6:30 p.m., while Jacob Munyi Wangombe (PW1) was on his way home, he was followed by four men, Marubu, Ndungu, Kevin, and a fourth

unidentified individual. Marabu ordered him to stop, and PW1 complied.

8. PW1 stated that Marabu then took his mobile phone and earphones, claiming he wanted to listen to music. Marabu subsequently ordered PW1 to give him the phone's pattern, but PW1 refused and instead unlocked it using his fingerprint. PW1 further alleged that Ndung'u then grabbed him by the neck and ordered him to reveal the pattern, which he eventually did.
9. PW1 testified that Marabu then ordered him to lead them to their destination, and he complied since Marabu was still in possession of his phone. He stated that Ndung'u threatened him, by telling him that it was the end for him. They walked until they reached a certain church, where Marabu ordered him to stop, after which they all jumped over the fence into a nearby farm. It was his testimony that Ndung'u then ordered him to sit down and told him that he either gives him Kshs. 5,000 or else his life would be over.
10. PW1 stated that when he told Ndung'u that he could not raise such an amount, Ndung'u dismissed his explanation and instructed him to call someone and ask for money, on claims that he had been arrested with bhang. PW1 then called his mother, Sylvia Muthoni Wairimu (PW2). When his mother informed him that she did not have the money, Ndung'u produced a panga from inside his trouser and hit him with the sharp edge of the panga on his left arm.
11. He then told Ndung'u that he had another line that had Kshs. 400, and Marabu transferred the money to his phone. Marabu then transferred Kshs. 370, to another line belonging to Jennifer Ngoki. PW1 then stated that his mother (PW2)

sent him Kshs. 100, claiming that she did not have any money, when he informed Ndung'u what his mother had said, Ndung'u ordered Marabu to bring a stick, which he cut using the panga he had, and Marabu used the stick to beat him on his back and legs near the knees.

12. He testified that he then called his uncle to request money, under the pretext that he had been arrested by the police for possession of bhang. However, his airtime ran out before he could finish the conversation. When his assailants realized that no money had been sent, Ndung'u struck him twice on the back with a panga. When his uncle called back, Marabu took the phone and pretended to be a police officer. His uncle responded by telling Marabu to lock PW1 up and take him to court the following day. After ending the call, Marabu hit PW1 again on the back with a stick, angered by the uncle's refusal to send money.

13. PW1 further stated that he borrowed airtime and called his mother again. His mother then sent him Kshs. 1,930, which Marabu immediately transferred to Jennifer's phone number. PW1 testified that the total amount of money transferred from his phone was Kshs. 2, 570; and that Marabu warned him that the day he will see the police at their home, he will know that he sent them.

14. He testified that thereafter, Ndung'u remarked that his hair was too long and proceeded to cut it using the panga. Ndung'u then threatened him, warning that if he ever spoke about the incident, there would be dire consequences. PW1 further stated that Ndung'u ordered him to remove the SIM card from his Infinix Hot 5 mobile phone, which he had purchased for Kshs. 7,000, and he complied. He was then released and allowed to go home.

15. That when he got home, he inserted his sim cards on his mother's mobile phone and called Safaricom, who then advised him to reverse the money; and he was able to reverse Kshs. 1,900 as his assailants had used the rest of the money. He testified that he reported the incident at Murang'a Police station on Monday and he was issued with a P3 form and thereafter he proceeded to Murang'a hospital.
16. It was his testimony that after treatment, he was given medication and advised to return to the police station where he recorded his statement. PW1 stated that Marabu was known to him as his aunt was married in their home. He also stated that he did not know Ndungu and that he had met him for the first time that day.
17. PW2, Sylvia Muthoni Wairimu, testified that on 22<sup>nd</sup> July, 2022, at around 7:30pm, his son called her requesting for Kshs. 5,000, that when she asked him why he needed the money, before her son could answer, she heard someone on the background telling her son to tell her that it was the police in Murang'a who were requesting for the money. It was her testimony that when she called PW1 again, his phone was switched off, and so she decided to send Kshs. 100, to see if the same would be received. That as she was heading home, her son called her crying, and that is when she sent him Kshs. 1930.
18. PW2 testified that when she got home, PW1 called her again and told her that the money was not enough, and that is when Jose sent him Kshs. 200. That at around 10PM, PW1 returned home and requested for a drink of water, which he drank. That when he removed his sweater, blood started coming from his left arm, on top of his head, his back and at

the back-left side of his neck. That upon inquiry, PW1 told him that it was Marabu and Ndungu who had assaulted him.

19. It was PW2's testimony that when she advised PW1 that they report the incident to the police and pick a p3 form, he refused as his assailants had threatened to kill him should he report the incident to the police. That however, they went to report of the incident to the police in Murang'a after persuasion from another police officer who was based in Nairobi. That they were then referred to Murang'a hospital where PW1 was treated and given medication.
20. PW3, Judy Wakanyi Nderitu, testified that she is the mother of Kevin Ndung'u. She stated that on 27th July 2022, at around 8:00 a.m., she found a black mobile phone and a pair of white earphones on top of his bed. Since she had been informed by PW2 that her son's phone was missing, she took the items to PW2, who advised her to take them to the Murang'a Police Station. PW3 then took the phone and earphones to the police station, where she also recorded her statement.
21. PW4, Jennifer Wambui Goki, testified that she was the grandmother of Stephen Marabu. She stated that in 2017, she registered a mobile phone number for him using her identity card because his mother's identification card had been lost. She further testified that she did not know the specific mobile numbers that Stephen Marabu registered in her name. It was her testimony that she only gave him her identity card once for the purpose of registering his mobile number.
22. PW5, John Ndereba Mwangi, a clinical officer at Murang'a Level 5 Hospital, testified that PW1 presented at the facility

complaining of a headache. Upon examination, PW5 noted bruises on PW1's head, neck, and upper arms. PW1 informed him that he had been assaulted by two individuals known to him, who allegedly used a panga to inflict injuries on his upper arm, back, and neck.

23. PW5 further testified that PW1 was managed for soft tissue injuries, which he assessed to be approximately 48 hours old. PW1 was treated with antibiotics and analgesics and discharged on the same day. PW5 classified the injuries sustained by PW1 as harm, noting that they were adequately managed with medication.

24. PW6, Corporal Munyu Waweru, attached to Murang'a Police Station, testified that on 25th July 2022, in the morning hours, a young man was brought to the station by his mother, reporting that he had been injured by four individuals on 22nd July 2022, at around 7:30 p.m., while on his way home. He recorded the report, issued the complainant with a P3 form, and relayed information to Kiangochi Police Post to facilitate the arrest of the four suspects. He stated that only two of the four were arrested and subsequently brought to Murang'a Police Station.

25. PW6 further testified that the mobile phone used by the assailants to transfer money from PW1's phone belonged to Marabu, and that the SIM card had been registered in the name of his grandmother, as he was not yet 18 years old at the time.

26. When placed on his defence, the appellant opted to give a sworn statement and did not call any witnesses. He denied committing the offence and stated that on the material day, contrary to the complainant's allegations, he was at home

when Kevin Ndung’u went to look for him. He explained that it was campaign season and politicians were distributing money. According to him, they received Kshs. 1,050 from a particular politician, and after withdrawing the money, Kevin requested that he accompany him to visit a friend in Ngaru, which he agreed to do.

27. He testified that while on their way, they met PW1 in the company of two girls who were coming from school. He clarified that PW1 was not from school, as he was not wearing a school uniform. He stated that when Kevin called out to the complainant, PW1 responded by referring to them as “uncircumcised boys.” When they questioned him about the remark, PW1 allegedly told them that he had insulted them because he was with the two girls.

28. The appellant further testified that Kevin Ndung’u then asked PW1 to accompany them, and PW1 agreed. According to the appellant, when they reached a forested area, Kevin removed a panga from his back and demanded that PW1 give him Kshs. 10,000, threatening him if he failed to do so. PW1 allegedly responded that he only had Kshs. 400, and Kevin instructed him to send the amount to his phone. The appellant stated that he agreed to have the money transferred to his phone because Kevin was armed and was also assaulting the complainant.

29. He testified that Kevin further demanded Kshs. 5,000, but when PW1 stated that he only had Kshs. 400, Kevin insisted that PW1 find someone who could send him the additional money. He stated that, in total, Kshs. 2,450 was sent. According to him, Kevin then took PW1’s phone, after which they left the forested area and parted ways with PW1 as he and Kevin proceeded to a club. He further testified that later,

when he returned home, he received a call from Safaricom informing him that PW1 was reversing the money, and he agreed to the reversal. During cross examination, the appellant denied hitting the complainant with a stick and that he never reported the incident to the police because it was dark and because Ndung'u had indicated that he would come for the money the following day.

30. This being a first appeal to the High Court, I am reminded of my primary duty as the first appellate court, which is to subject the evidence adduced before the trial court to a fresh and exhaustive analysis, in order to arrive at my own independent conclusions, bearing in mind that I did not have an opportunity to hear or see the witnesses.

31. This duty was re-stated by the Court of appeal, in ***Okeno versus Republic (1972) EA 32***; as follows: ***“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v Sunday Post, [1958] E. A. 424.”***

32.Guided by the principle in the aforementioned duty, I have carefully considered the grounds of appeal, the rival written submissions made on behalf of both parties; I have also read the evidence on record together with the impugned judgement. Having done so, I find that the main issue arising for determination, is whether the evidence adduced by the prosecution proved the case against the appellant beyond all reasonable doubt.

33.**Section 296 (2)** of the *Penal Code*, stipulates 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.”***

34.A careful reading of the above provision of law will reveal that in order for the prosecution to prove the charge of robbery with violence against an accused person, it must prove beyond all reasonable doubt, any of the ingredients of the said offence which are:

- i. That the accused was armed with a dangerous or offensive weapon or instrument; or
- ii. That the accused is in the company of one or more other person or persons; or
- iii. That immediately before or immediately after the time of robbery, the accused wounds, beats, strikes or uses any other personal violence to any person.

35.It is also important to note that it is not necessary for the prosecution to prove all the above ingredients in order to

prove the offence of robbery with violence against an accused person; proof of one ingredient is sufficient to prove the said offence.

36. This position was reiterated by the court of appeal in ***Johana Ndungu versus Republic [1996] KECA 187 (KLR)***; as follows: ***“In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section: If the offender is armed with any dangerous or offensive weapon or instrument, or If he 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 violence to any person.”***

37. With due consideration, I find that the evidence by PW1 concerning what transpired on the fateful day clear and straightforward. His testimony was corroborated by all the prosecution witnesses on record. Furthermore, the appellant also confirmed that indeed they waylaid the complainant and took away his phone and coerced him to borrow money from people on the pretext that he had been arrested by police officers for being in possession of bhang.

38. Whereas the appellant claimed that he only agreed to have the money transferred from the complainant's phone to his mobile number, registered in his grandmother's name, because his co-accused was assaulting the complainant and was armed with a panga, I am of the view that, taken as a whole, the evidence on record establishes that the appellant actively participated in robbing the complainant of his mobile phone and money.
39. The fact that the appellant and the complainant were well known to each other, being distant relatives, does not absolve him of guilt. The evidence on record clearly shows that the appellant, while in the company of three other individuals, one of whom was armed with a dangerous weapon, namely a panga, assaulted the complainant and robbed him of his mobile phone and money amounting to Kshs. 2,530.
40. Based on the above, I am satisfied that the prosecution proved beyond all reasonable doubt the charge of robbery with violence against the accused person. The conviction by the learned trial magistrate was therefore safe.
41. Regarding his sentence, the appellant indicated in his written submissions that the sentence imposed on him by the trial court was unconstitutional, harsh and excessive given the circumstances of the case.
42. It is trite that sentencing is an exercise that is at the discretion of the trial court, and an appellate court will only interfere with such a discretion if it is shown that the trial court acted upon some wrong principles, overlooked some material factors or that the sentence was manifestly excessive given the circumstances of the case.

43. This principle was set out in the celebrated case of **Sayeko versus Republic, (1989) KLR 306**; where the court held as follows: ***“The appellate court will not ordinarily interfere with the discretion exercised by the lower court unless it is evident that the lower courts has acted upon some wrong principles or overlooked some material factor or the sentence is manifestly excessive in the circumstance of the case.”***

44. Similarly, the Court of Appeal in **Mulwa v Republic (2023) KECA 693 (KLR)**; stated thus:

***“Sentencing is a discretion of the trial Court. It is also a matter of fact. The second appellate Court cannot interfere with that exercise of discretion unless it is shown that the Court passed an illegal sentence.”***

45. That said, **Section 296 (2) of the Penal Code**, makes it clear that a person convicted of the offence of robbery with violence is liable to a maximum sentence of death. In this case, I note that the appellant is a young man and a first-time offender. I also note that the injuries sustained by the complainant in the course of the robbery was classified as harm. The violence meted out on him did not cause him grievous harm to warrant the appellant the maximum sentence of death.

46. In light of the foregoing, and taking into account that the appellant had spent a considerable period in custody pending trial, the following orders shall ensue:

- i. ***Appellant’s conviction is upheld***
- ii. ***The death sentence meted against the Appellant is hereby set aside and substituted with a term of***

***imprisonment for twelve (12) years. Which will run from the date of his sentence by the trial court that is, 10<sup>th</sup> August 2023.***

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3<sup>RD</sup> DAY OF MARCH, 2026.**

**HON. T. W. Ouya  
JUDGE**

**For Applicant.....Stephen Marubu Muiruri (In Person)  
For Respondent.....Mr. Mwakio  
COURT ASSISTANT.....Brian**

**ORIGINAL**