Lepiri v Republic (Criminal Appeal E006 of 2025)
[2026] KEHC 2610 (KLR) (Crim) (26 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2610 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ISIOLO

CRIMINAL

CRIMINAL APPEAL E006 OF 2025

SC CHIRCHIR, J

FEBRUARY 26, 2026

BETWEEN

ERIC LEKALA LEPIRI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. Lucy Mutai (CM) in Isiolo Criminal Case No. E029 of 2023 delivered on 08th day of April, 2025)

JUDGMENT

1. The Appellant was charged with three counts of robbery with violence before the trial court. He was convicted on all counts and sentenced to death on the 1st count. The sentence on the other two were held in abeyance.

2. On the 1st count the particulars of the charge were that on 3rd November 2022 at around 0700 hrs at Mlima Tatu Village Sereolipi location, Samburu East Sub-County, in Samburu County, in the Republic of Kenya, while armed with dangerous weapon namely all Ak 47 Rifle and crude weapons, jointly with others not before court, robbed Kennedy Kiarie Mwaura of Ksh. 10, 000/= and immediately before or after the time of such robbery, threatened to use actual violence on the said Kennedy Kiarie Mwaura.

3. On the 2nd count the particulars of the charge were that on 3rd November 2022 at around 0700 hrs at Mlima Tatu Village Sereolipi location, Samburu East Sub-County, in Samburu County, in the Republic of Kenya, while armed with dangerous weapon namely all Ak 47 Rifle and crude weapons, jointly with others not before court, robbed Joseph Nyoike Nduta of Ksh. 7, 000/= and immediately before or after the time of such robbery, threatened used actual violence on the said Joseph Nyoike Nduta

4. On the 3rd count the particulars of the charge were that on 3rd November 2022 at around 0700 hrs at Mlima Tatu Village Sereolipi location, Samburu East Sub-County, in Samburu County, in the Republic of Kenya, while armed with dangerous weapon namely all Ak 47 Rifle and crude weapons, jointly with others not before court, robbed David Maina of Ksh. 200/= and a pair of shoes all valued at kshs. 1,900, and immediately before or after the time of such robbery, threatened used actual violence on the said David Maina.

5. The Appellant was aggrieved by the conviction and sentence and proffered this appeal.

Grounds of Appeal

1. That the Learned trial Magistrate erred in both law and facts in failing to find that the alleged identification fell short of the required standard in law.
2. That, the Learned Magistrate erred in both law and facts in failing to find that the prosecution did not prove the case beyond any reasonable doubt.
3. That, the learned trial Magistrate erred in both law in failing to accord the accused a fair hearing in reference to Article 50 of *the Constitution*.
4. That, the Learned trial Magistrate erred in both law and fact by not finding that the prosecution tendered un collaborative(sic) and inconsistent evidence.
5. That, the trial erred in law in failing to find that the charge sheet was defective.
6. That, the trial Magistrate erred in law in failing to find that the presentation of the exhibited items fell short of the required standard in law.
7. That, the trial Magistrate erred in Law and facts in failing to note that the prosecution failed to summon vital witnesses mentioned during the trial for a just and fair decision to be reached.
8. That, the trial suffered some procedural irregularities.
9. That, the trial Magistrate erred in law in dismissing and disregarding the appellant defence without cogent reason for the same.

6. The Appeal was heard by way of Written Submissions.

Appellant's Submissions

7. It is submitted that the prosecution witnesses' testimonies were marked with contradictions and inconsistence casting doubts on the Prosecution's case, and which doubt should be resolved in favour of the Appellant. The Appellant further argues that the Respondents failed to discharge the duty of proving its case beyond reasonable doubt. He points out, for instance, that the gun which was presented as an exhibit was not found in the possession of the Appellant; that it was not tested for finger prints; and that the serial No. of the gun couldn't be ascertained.

8. It is the Appellant's Submission that the Appellant was not identified as the perpetrator of the crime; that an Identification Parade ought to have been held, and failure to conduct one was fatal to the prosecution's case. It is submitted that identification of the accused by the missing lower teeth was prejudicial and constituted a miscarriage of justice, as most Samburu men, like him, have their front lower teeth missing. It is stated that there was nothing outstanding therefore about identifying a Samburu man by missing teeth.

9. The Appellant further submits that there was no corroborative evidence on identification. It is further stated that dock identification is generally worthless. The case of Nzaro -vs- Republic [1991] KAR 212 was relied on, in this regard.

10. On the Mpesa transactions, the Appellant submits that there was no evidence linking him to the SIM No. 0799-668184 that was identified in court . consequently, the circumstantial evidence relied on, did not link the offence to the accused.

11. The Appellants faults the prosecution for failing to call two vital witnesses, namely; the two people who allegedly handed the gun to the Chief (PW5) . That these witnesses would have identified the person who handed to them the killer weapon. The Appellant contends that by failing to avail the two identified witnesses the prosecution was being influenced by oblique motive. The Appellant has relied on the decisions in the case of Julius K. Mutunga -vs- Republic [2006] eKLR and Bukenya & other -vs- Uganda [1972] E.A 549 to buttress his submissions.

12. On the sentence, it is submitted that the trial court didn't consider the Appellant's mitigation; that the sentence was harsh and excessive in any event; that notwithstanding that the penal code prescribes the penalty of death for the offence, there has been a paradigm shift on sentencing in Kenya and judicial discretion is now allowed.

Respondent's Submissions

13. It is the Respondent's Submissions that the ingredients of the offence of robbery with violence were proved as set out in the Court of Appeal case of Johanna Ndugu -vs- Republic (Criminal Appeal No. 116/1995. That in any case, the prosecution is required to prove only one of the ingredients.

14. It is submitted that according to the evidence of PW 1 and PW2 the Appellant was armed with a Riffle; that the total number of robbers were nine as per the testimony of PW 1, PW2 and PW3; that the gun was cocked at the victim and directed to "say his last words"; and finally that the victim was stepped on and threatened before being robbed. The Respondent state that all the above acts are proof that that all the ingredients of the offence were established.

15. On identification, it is submitted that the Appellant was identified by PW1, PW2 and PW3; that the time was in the morning around 6:30 am; and the ordeal took about 30 minutes. However, it is admitted that there were variations between the testimonies of the three witnesses on their descriptions of the appearance of the perpetrator. It is further admitted that no Identification Parade was held. The Respondent concedes to this ground of Appeal.

16. On the witnesses, it is submitted that the seven prosecution witnesses were sufficient to prove the prosecution's case. However, the Respondent concedes that for purposes of establishing the chain of the custody of the A47 Rifle, the said two witnesses should have been called to testify.

17. On the sentence it is submitted that it was lawful and appropriate in the circumstances of the case.

Analysis and determination.

18. This being a first appeal, this court has the duty to review the evidence, carry out its own evaluation and arrive at its own conclusion, save that due allowance must be made for the fact that the trial court had the advantage of hearing the witnesses first- hand as well as observing their demeanor. (see Kiilu vs Republic (2005) 1 KLR 174

19. Issues for determination

1. Whether the Appellant was identified as the perpetrator.

2. Whether crucial witnesses were left out.

3. Whether the sentence was excessive.

Identification

20. PW1 was the driver of the vehicle that became the subject of attack. He was driving from Meru to Marsabit. He told the court that at sereolipi, he slowed down. Suddenly, he saw someone stepping onto the Road. The attacker pointed a Rifle at him and told PW1 to say his last prayers. The vehicle had by then come to a halt and he let go of the breaks. That person was the Appellant. Other attackers emerged from the sides of the road. He saw 5 people in total. He was asked to step out of the vehicle, and he complied. Two of the attackers came over and stepped on him, while pointing the gun at him. PW1's companions were led to the bushes. His phone wallet and ksh. 7,000 were taken from him but the phone and wallet were later returned. He was later forced to join his companions. He found them sited and were being robbed. They were then released.

21. He stated that the time was between 6:40 to 6:50 a.m and thus visibility was good. The perpetrator repeatedly stepped on him and was very close to him at the time, and hence he had seen him clearly. He stated that the perpetrator wore a combat jacket and a cap, and his lower front teeth were missing. That they were very close to each other, and for a reasonable time, and that was why he could identify the Appellant. He identified the Accused in the dock as the perpetrator. The court then makes a note that the accused's front teeth were indeed missing.

22. PW2 was in the company of PW1. On the matter identification, he stated that the attacker wore a police hike jacket and a shuka and he was dark . PW3 did not give any specific description of the attacker. He stated that the attacker had no unusual facial features. He insisted however that he saw him well as the conditions were conducive and he was positive that the Accused in the dock was the attacker.

23. The above three witness were eye- witnesses to the incident, but there are obviously gaps in their description of how the attacker was dressed. The 1st noted missing lower teeth and the clothes, the 2nd noted the attackers skin colour as well as the clothes , which he described as police- like uniform and the 3rd did not point out any specific features. The conditions however were good. It was early morning and the ordeal took place between 30 to 50 minutes or 40 to 50 minutes. According to PW 1, the Appellant was close enough to allow for positive identification.

24. The imperative question is, was the identification adequate? There are inconsistences and gaps in the three witness's description of the assailant, as aforesaid. The " shuka" for instance referred to by PW2 is such an outstanding piece of attire that all the 3 witnesses would remember, yet it is only PW2 who seemed to have seen the shuka. The gap on the lower teeth is also a significant body feature and should have been obvious to all the three witnesses, and not just PW1 alone. The attacker wore a cap, according to PW1, and how much of the face the witnesses could see was not brought out in the evidence. On the other hand, the height or colour of the skin carries very little weight on matters identification. None of the three eye- witnesses had also seen the attacker before.

25. When the evidence available is solely on identification, the court must warn itself on the danger of convicting on such evidence. I have read the judgment of the trial court and am of the view that despite the element of identification being key in robbery with violence cases, the trial court did not do a sufficient analysis of the identification evidence, available.

26. There was also circumstantial evidence. These were the mpesa statements. What the statements showed was that there was money transferred from PW2's Cellphone No. 0717008703 to 0799668184. The latter number was registered to one Ngirigat Lekirmui. The same money was further transferred to Peneten Lepiri (recorded in the proceedings as Benedit Legir). According to the Investigating Officer, Peneten Lepiri was the Appellant's mother. He stated that he got the information from the Chief. However, the said Chief was never called as a witness. There was therefore no cogent evidence showing that there was any relationship between the Appellant and the final recipient of the money.

27. The AK47 Rifle too was supposed to be part of circumstantial evidence, but there was no evidence linking the Rifle to the Appellant . The Rifle was delivered by two persons to the chief allegedly on the instructions of the Appellant. The two people referred to were called as witnesses. Further there was no evidence that a shot was fired at the crime scene, and therefore the discovery of a Rifle which was not fired in the first place would not have added any value to the prosecution's case.

28. For circumstantial evidence to form a basis of conviction it must meet certain conditions. In the case of Abanga alias Onyango v R Cr. App. No 32 of 1990, cited in case of Ahamad Abolfathi Mohammed & another v Republic [2018] KECA 743 (KLR) the court of Appeal held: "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Subject; (iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else." The circumstances in this case hardly formed any chain, let alone a complete one.

29. The circumstances of this case required Identification Parade for purposes of identifying the attackers. The investigation fell short in this regard. Am not satisfied that the evidence on identification was therefore without a doubt, and as always, any doubt must be resolved in favour of the accused.

Whether vital witnesses were omitted.

30. PW 5, the Chief, testified that the accused's firearm was taken to him by one Leswani. The Leswani was however not called as a witness. According to the Appellant Leswani and the two others who had accompanied the Chief in search of the gun should have testified. I have considered the relevancy of the alleged gun as aforesaid. There was no evidence linking the gun to the Appellant or more importantly to the commission of the crime. Thus even if the alleged witnesses had testified it would not have helped the prosecution's case , in anyway.

31. In view of all the aforegoing , it is my finding that the case against the Appellant failed the threshold of proof in criminal cases. His conviction was therefore unsafe.

Sentence.

32. Section 296 (2) of the penal code, under which the Appellant was convicted prescribes sentence of death for the offence. I do not agree with the Appellant's Counsel 's submission that the trend is towards discretion in sentencing for capital offences. Save for the offence of murder, the sentence for the offence of robbery with violence remains intact, as well as other mandatory sentences. The sentence was lawful and I would have had no reason to interfere with it.

33. However, the conviction of the Appellant was faulty as aforesaid. The conviction is hereby quashed, and sentence set aside. He shall be set free forthwith, unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT ISIOLO, THIS 26TH DAY OF FEBRUARY 2026.

S. CHIRCHIR

JUDGE

In the Presence of:-

Ismail Abdow -Court Assistant.

Mr. Majale for the Respondent.

The Appellant – present