



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutinda v Republic (Criminal Appeal 64 of 2023)  
[2026] KEHC 2389 (KLR) (27 February 2026) (Judgment)**

Neutral citation: [2026] KEHC 2389 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL APPEAL 64 OF 2023  
H NAMISI, J  
FEBRUARY 27, 2026**

**BETWEEN**

**BONFACE MUNYAO MUTINDA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against conviction and sentence on judgement delivered on 16 September 2013 by Hon. M. W. Mutuku, SPM in Thika Criminal Case No. 125 of 2011)*

**JUDGMENT**

1. This Court is seized of an appeal arising from the judgment, conviction, and subsequent sentencing rendered by the Chief Magistrate's Court at Thika on 16 September 2013, in Criminal Case No. 125 of 2011. The Appellant was arraigned before the trial court facing a litany of grave charges under the Penal Code and the *Sexual Offences Act*.
2. The indictment upon which the trial proceeded contained three principal counts. Count I alleged the offence of Robbery with Violence contrary to section 296(2) of the Penal Code. The particulars of the charge averred that on 1 January 2011, at [Particulars Withheld], Machakos County, the Appellant, while armed with a dangerous weapon, namely a panga, robbed GWM of a Nokia 2300 mobile phone valued at Kshs. 4,899/=. The charge sheet further alleged that immediately before the time of such robbery, the Appellant threatened to use actual violence against the said GWM.
3. Count II initially preferred a charge of defilement contrary to section 8(1) and 8(4) of the *Sexual Offences Act*. The prosecution's particulars alleged that on the aforementioned date and location, the Appellant intentionally caused his penis to penetrate the vagina of GWM, a minor aged 16 years. During the course of the trial judgment, the learned trial Magistrate invoked her discretion to substitute this main charge with an Alternative Charge of committing an Indecent Act with a Child contrary to section 11(1) of the *Sexual Offences Act*.



4. Count III preferred a second, concurrent charge of Robbery with Violence contrary to section 296(2) of the Penal Code. It was alleged that during the same continuous transaction on 1 January 2011, the Appellant, while armed with a panga, robbed Richard Kimeu Maundu of a wallet and a Nokia 290 mobile phone, both cumulatively valued at Kshs. 3,100/=. It was similarly alleged that the Appellant threatened to use actual violence against Richard Kimeu Maundu immediately before the robbery.
5. The Appellant entered a resolute plea of not guilty to all charges, prompting a full adversarial trial during which the prosecution tendered evidence through 7 witnesses. At the conclusion of the trial, the court delivered its judgment, finding the Appellant guilty on Count I (Robbery with Violence), the Alternative to Count II (Indecent Act with a Child), and Count III (Robbery with Violence). As a consequence of these convictions, the Appellant was sentenced to suffer death—the statutorily mandated sentence for capital robbery under section 296(2) of the Penal Code at the time of the trial—with the sentences for the remaining counts legally held in abeyance to prevent double punishment for acts arising from the same transaction. The death sentence was subsequently commuted to life imprisonment pursuant to a presidential directive.
6. Aggrieved by both the conviction and the severity of the sentence, the Appellant filed the present appeal, petitioning this Court to quash the convictions and set aside the sentences. The appeal is anchored on a multiplicity of grounds that fundamentally challenge the evidentiary threshold achieved by the prosecution, the integrity of the identification procedures employed, the handling of his defence of alibi, and the constitutionality of the sentencing regime applied by the trial court.

#### **The Prosecution's Case**

7. The prosecution's case was constructed upon a foundation of oral testimonies from civilian witnesses and police officers, supplemented by medical and forensic observations. The events forming the crux of the charges transpired in the dark, early hours of New Year's Day, 2011.
8. The primary complainant, Gladys Wanza (PW2), a form two student at Kyeteteni Secondary School and a minor at the material time, testified that she was walking home following New Year's Eve church celebrations. Navigating a lonely path toward her sister's residence, she requested the company of Richard Maundu (PW3), who was coincidentally traversing the same route to meet his own sister. According to their concurrent testimonies, at approximately 1:00 AM, the two were abruptly ambushed. A man emerged from the obscurity of the night, armed with a sharp panga and holding a highly luminous torch, which he shone directly and blindingly into their faces.
9. The assailant issued a peremptory command for PW2 and PW3 to sit on the ground and surrender all their valuables. Terrified by the weapon and the suddenness of the attack, PW2 surrendered her Nokia 2300 mobile phone, while PW3 lost possession of a wallet and his Nokia mobile phone. During the chaotic implementation of the robbery, PW3 capitalised on a momentary lapse in the assailant's attention, found an avenue of escape, and fled the immediate scene, tragically leaving the minor, PW2, behind.
10. Following the flight of PW3, the assailant ordered PW2 to stand and forcefully directed her toward a neighbouring maize plantation. PW2 testified before the trial court that upon reaching a secluded clearing within the plantation, the assailant ordered her to sit, forcibly removed her undergarments, and proceeded to sexually assault and rape her for a sustained duration of approximately 10 minutes. In a piece of testimony that would later become a highly contested fulcrum of the prosecution's case, PW2 claimed that during the ordeal, despite the darkness, she observed that the assailant wore dark underpants featuring a distinct tear or hole in the front genital area. After completing the assault, the



perpetrator fled into the night. PW2 subsequently sought refuge at a nearby homestead, narrated her traumatic ordeal to the occupants, and was eventually escorted to the police station the following day.

11. The investigative narrative then shifted to the apprehension of the Appellant, which was effectuated not by law enforcement, but through a citizen's arrest. Pius Muindi Muthama (PW1), a local businessman in Masinga, testified that at approximately 4:00 AM on 2 January 2011—more than 24 hours after the robbery and assault—he was traveling toward [Particulars Withheld] as a pillion passenger on a motorcycle. The motorcycle operator alerted him to a pedestrian walking alone along the road. PW1 testified that this individual exhibited highly suspicious behaviour, specifically attempting to conceal his face and darting behind roadside shrubs upon spotting the approaching motorcycle headlight. PW1 and the operator confronted the individual, whom PW1 immediately recognized from [Particulars Withheld] as Boniface Munyao Mutinda, the Appellant herein. Dissatisfied with the Appellant's explanation that he was innocently returning from his sister's home, PW1 and the operator forcibly escorted the Appellant to the Masinga Police Post. PW1 added a highly prejudicial detail to his testimony, claiming that during the journey to the police station, the Appellant attempted to open negotiations for his release, an act the prosecution heavily relied upon as evidence of a guilty conscience.
12. The medical and forensic components of the prosecution's evidence were tendered by Benjamin Mango (PW5), a Senior Clinical Officer stationed at Matuu District Hospital. PW5 examined the complainant (PW2) on 2 January 2011, the day the incident was formally reported. He documented fresh blood stains on her genitalia and her undergarments. While the subsequent laboratory analysis did not detect the presence of spermatozoa—a negative finding that PW5 attributed to the complainant having bathed prior to presenting herself at the hospital—PW5 firmly concluded, based on the physical trauma and the history provided, that PW2 had been subjected to a violent sexual assault.
13. Crucially, PW5 was also tasked with conducting a physical examination of the Appellant on the exact same day. During this examination, PW5 noted a physical detail that eerily mirrored the complainant's testimony: the Appellant's inner wear was visibly torn on the front side. Furthermore, a routine urinalysis conducted on the Appellant revealed the microscopic presence of spermatozoa. In his expert capacity, PW5 testified that the presence of spermaturia indicated that the Appellant had ejaculated within a 72-hour window immediately preceding the medical examination, a timeframe that perfectly encapsulated the hour of the assault on PW2.
14. The formal police procedures were detailed by Police Constable Robert Maina (PW7), the primary Investigating Officer, and Police Constable Biden Thiong'o (PW6), the Officer designated to conduct the identification parades. PW7 testified that the complainant was able to identify her assailant by name immediately upon reporting the matter, referring to him as "Munyao". PW6 testified to conducting two separate, formal identification parades for the victims, PW2 and PW3. He asserted that both parades were conducted strictly within the confines of the Force Standing Orders, comprising 8 members of similar height, build, and complexion. PW6 confirmed to the trial court that both PW2 and PW3 positively, and without hesitation, identified the Appellant as their attacker. PW7 also attempted to introduce a critical piece of documentary evidence: a mobile phone purchase receipt. PW7 alleged that this receipt belonged to the fleeing victim, PW3, and had been recovered directly from the Appellant's possession, thereby providing a purportedly irrefutable physical nexus between the Appellant and the crime scene.



## The Appellant's Case

15. The Appellant's challenge to the trial court's judgment is comprehensive, systematically targeting the legal sufficiency of the evidence, the integrity of the investigative and identification processes, and the constitutionality of the sentencing framework. These arguments were meticulously articulated through an original Memorandum of Appeal and a subsequent Supplementary Memorandum of Appeal filed on 17 October 2018.
16. The Appellant's primary and most forceful contention rests on the profound unreliability of the visual identification evidence. The Appellant argues that the environmental conditions prevalent at the time of the offence were highly adverse, rendering accurate visual identification not just difficult, but physiologically impossible. Relying heavily on the complainant's own explicit admission during cross-examination that the night was dark and that the assailant shone a very bright torch directly into their eyes, the Appellant asserts that the victims were effectively blinded. The Appellant further argues that the extreme terror, trauma, and psychological shock of the sudden armed ambush severely compromised the cognitive recall and observational capacity of the witnesses, who were inherently more focused on survival than on memorising facial features. The Appellant asserts that the trial court erred fundamentally in law by failing to interrogate the intensity, source, and relative position of the light, a strict prerequisite established in Kenyan jurisprudence for validating any nighttime identification.
17. The Appellant mounts a vigorous challenge against the credibility of the corroborating physical evidence, specifically the testimony regarding the torn underwear. The Appellant submits that it defies all logical and physical probability for a terrified victim, operating in near-total darkness while simultaneously blinded by a high-intensity torch, to accurately discern a specific, minor tear in the dark-coloured undergarments of an assailant. The Appellant posits a far more sinister explanation: that this specific detail was supplied to the complainant by investigative or medical personnel following his arrest and subsequent physical examination, constituting severe evidentiary contamination and coaching.
18. A critical plank of the Appellant's defence focuses on the complete failure of the doctrine of recent possession. The Appellant points out that despite the grave allegations of robbery, neither the stolen Nokia 2300 mobile phone, the Nokia 290 mobile phone, nor the wallet was ever recovered from his person, his residence, or his environs. Furthermore, the Appellant highlights a fatal, irreconcilable contradiction in the prosecution's case regarding the sole piece of documentary evidence intended to link him to the robbery. The Investigating Officer introduced a receipt purportedly recovered from the Appellant, claiming it was for the mobile phone stolen from PW3. However, during his sworn testimony, PW3 explicitly and unequivocally disowned the document, stating on the record: "This is not the receipt". The Appellant argues that this bungled or fabricated evidence wholly extinguishes any physical nexus between him and the crime, leaving the prosecution's case entirely dependent on flawed identification.
19. On the medical front, the Appellant originally contested the competence of PW5 to tender expert evidence, erroneously referring to him in his submissions as a clerical officer rather than a clinical officer, and arguing that the admission of his P3 form violated the *Evidence Act*. More substantively, the Appellant argues that the presence of spermatozoa in his urine does not constitute conclusive, or even highly probative, proof of sexual intercourse, let alone non-consensual intercourse with the complainant. The Appellant argues that such biological markers could naturally result from entirely innocent physiological processes, including nocturnal emissions, and without DNA linkage, the evidence is hopelessly circumstantial.



20. Finally, the Appellant argues that his statutory defence of alibi was summarily, unlawfully, and unfairly disregarded by the trial court. The Appellant maintains that he was asleep in his residence at the time of the offence and was arbitrarily arrested the following day while innocently commuting to his legitimate place of work at a local butchery. The Appellant asserts that the trial Magistrate unlawfully shifted the burden of proof, effectively requiring him to prove his alibi rather than requiring the prosecution to dismantle it beyond a reasonable doubt, a blatant violation of his right to a fair trial.

### **The Respondent's Case**

21. The Respondent vigorously opposes the appeal, submitting that the learned trial Magistrate properly evaluated the totality of the evidence, correctly applied the relevant law, and arrived at a safe and sound conviction. The Respondent contends that the evidence tendered by the prosecution was overwhelming, internally consistent, mutually corroborative, and easily met the requisite threshold of proof beyond a reasonable doubt.
22. Regarding the charge of Robbery with Violence under section 296(2) of the Penal Code, the Respondent relies on the binding precedent set by the Court of Appeal in *Oluoch v Republic KLR 549* and later affirmed in *John Kariuki Gikonyo v Republic eKLR*. The Respondent submits that the prosecution is not required to prove every aggravating factor listed in the statute; proving merely one of the three statutory ingredients is sufficient. The Respondent argues that the concurrent, unshaken testimonies of PW2 and PW3 definitively established that the assailant was armed with a dangerous weapon (a panga) and utilized explicit threats to effect the theft of their mobile phones. This, the Respondent argues, perfectly satisfies the statutory requirements for capital robbery, rendering the failure to recover the stolen items legally immaterial.
23. On the highly contested issue of identification, the Respondent asserts that the appellant was positively, safely, and irrefutably placed at the scene of the crime through a watertight combination of visual recognition, voice recognition, and subsequent formal identification parades. The Respondent emphasizes that PW2 did not merely identify a stranger; she explicitly testified that she recognized the Appellant's voice and possessed prior visual familiarity with him, as he was a known attendant at a butchery she frequently visited in town. The Respondent maintains that this prior knowledge elevates the evidence from mere identification to recognition. Citing established Kenyan jurisprudence, the Respondent argues that recognition of an assailant is inherently more reliable, more assuring, and safer to base a conviction upon than the identification of a stranger.
24. Addressing the severity of the sentence, the Respondent defends the trial court's imposition of the death penalty for the robbery charge and the equivalent sentencing structure applied to the sexual offences. The Respondent submits that the trial court had no discretion in the matter, being strictly bound by the mandatory statutory minimums enacted by Parliament. Anticipating the Appellant's constitutional challenges based on the evolving jurisprudence of the Supreme Court, the Respondent cites the recent, definitive, and binding ruling in *Republic v Joshua Gichuki Mwangi (Petition No. E018 of 2023) eKLR*. The Respondent points out that the Supreme Court recently affirmed that mandatory and minimum sentences for sexual offences and robbery with violence remain strictly constitutional, do not infringe upon judicial independence, and do not violate the right to a fair trial. Consequently, the Respondent urges this Court to dismiss the appeal in its entirety and uphold both the conviction and the sentence.

### **Analysis & Determination**

25. The statutory parameters governing this Court's jurisdiction are explicitly delineated under section 347 of the Criminal Procedure Code. As a first appellate court, the mandate bestowed upon this Court



extends far beyond a mere superficial or perfunctory review of the trial court's record to ascertain if there exists some evidence to support the conviction.

26. The Court of Appeal, in the seminal and frequently cited case of *Okeno v Republic EA 32*, which was subsequently echoed in *Japheth Gituma Joseph & 2 others v Republic eKLR*, explicitly outlined this onerous duty. The appellate court held that a first appellate court is under an uncompromising obligation to reconsider all the evidence adduced at trial, evaluate it exhaustively, and draw its own independent factual and legal conclusions. This Court must subject the entire trial record to a fresh, objective, and exhaustive scrutiny, weighing the testimonies, examining the exhibits, and applying the relevant legal thresholds as if the trial were being conducted anew.
27. However, this Court must simultaneously bear in mind the caveat that it did not possess the distinct advantage of observing the demeanour of the witnesses firsthand, and must therefore accord due respect to the factual findings of the trial Magistrate unless they are demonstrably perverse, based on no evidence, or arrived at through a misapprehension of the law. It is through this rigorous, dual-lens approach that this Court proceeds to analyse the merits of the present appeal.
28. Upon review of the trial court record, the memoranda of appeal, the written submissions filed by both parties, and the relevant statutory and case law, this Court distils the following 5 critical issues for determination:
  - a. Whether the prosecution successfully proved the essential ingredients of Robbery with Violence under section 296(2) of the Penal Code beyond a reasonable doubt;
  - b. Whether the visual and voice identification evidence relied upon by the trial court was watertight, safe, and free from the possibility of error, given the adverse nighttime conditions and the presence of a blinding light source.
  - c. Whether the forensic and medical evidence, specifically the competence of the clinical officer, the presence of spermatozoa in the Appellant's urine, and the observation of torn undergarments, provided safe and uncompromised corroboration;
  - d. Whether the trial court unlawfully shifted the burden of proof regarding the Appellant's defence of alibi.
  - e. Whether the sentences imposed were lawful and constitutional in light of contemporary Supreme Court jurisprudence.

### **The Ingredients of Robbery with Violence**

29. The offence of Robbery with Violence is strictly codified under section 296(2) of the Penal Code. The jurisprudential threshold for securing a conviction under this section was definitively articulated by the Court of Appeal in the case of *Oluoch v Republic KLR 549*, a standard that has been consistently applied, including in the more recent case of *Johanna Ndungu v Republic [2020] eKLR*. The law mandates that the prosecution must first establish the base elements of simple robbery under section 295 (theft coupled with violence or the threat thereof) and subsequently prove at least one of three specific aggravating factors: that the offender was armed with a dangerous or offensive weapon, that the offender was in the company of one or more persons, or that the offender used actual violence before, during, or after the robbery.
30. In the instant case, the testimonies of PW2 and PW3 established the fundamental actus reus of the crime; they testified that they were intercepted by an individual wielding a panga who dispossessed them of their mobile phones and a wallet through intimidation. The undisputed presence of the panga



undeniably satisfies the first aggravating ingredient of being armed with a dangerous weapon. The Respondent is legally correct in asserting that proving all three ingredients is unnecessary; proving one is sufficient to elevate the charge to capital robbery.

31. However, establishing that a violent robbery occurred in rem is vastly different from establishing the identity of the perpetrator in personam beyond a reasonable doubt. In cases where direct visual identification is heavily contested, the prosecution routinely relies on the Doctrine of Recent Possession to provide an objective, physical nexus between the accused and the stolen property. This doctrine posits that a person found in possession of recently stolen property is presumed to be the thief, or a receiver of stolen goods, unless they can offer a reasonable explanation for their possession.
32. In the present case, the application of this doctrine suffered a catastrophic and total collapse. The stolen Nokia 2300 phone, the Nokia 290 phone, and the wallet were never recovered from the Appellant's person, his residence, or his control. Faced with this evidentiary void, the Investigating Officer (PW7) attempted to cure the deficit by introducing a mobile phone receipt purportedly recovered from the Appellant, alleging it belonged to PW3 and correlated to the stolen Nokia 290.
33. However, during cross-examination, the prosecution's own witness, the victim PW3, definitively repudiated the exhibit. When presented with the receipt by the prosecution, PW3 stated unequivocally on the judicial record: "This is not the receipt". This absolute disavowal by the victim is deeply troubling and legally fatal to the physical evidence. It does not merely weaken the prosecution's case; it fundamentally compromises the integrity of the entire police investigation. The presentation of a disowned document as connecting evidence raises grave concerns regarding investigative overzealousness, incompetence, or deliberate fabrication.
34. Without the recovery of the stolen items or a verified, unchallenged receipt, there exists absolutely no physical, documentary, or objective evidence linking the appellant to the robbery. Consequently, the conviction rests entirely, and precariously, on the safety of the identification evidence and the subjective medical corroboration.

### **The Integrity of Visual Identification**

35. The absolute bedrock of the Appellant's conviction is the visual and voice identification tendered by PW2 and PW3. Kenyan jurisprudence treats visual identification, particularly when conducted under difficult circumstances, with the utmost circumspection. The foundational principles are laid out in the English case of *Republic v Turnbull* 3 All ER 549, which was wholly adopted into Kenyan law via the locus classicus of *Maitanyi v Republic* [1986] KLR 198, and subsequently reinforced in *Wamunga v Republic* KLR 424.
36. In *Maitanyi*, the Court of Appeal issued a stark warning: while a fact may be legally proved by the testimony of a single witness, evidence of visual identification in criminal cases can, and frequently does, bring about profound miscarriages of justice. The Court held that it is not merely advisable, but absolutely essential for the trial court to rigorously ascertain the nature of the light available, its size, its intensity, and its position relative to the suspect. In *Wamunga v Republic*, the Court reiterated that where the only evidence against an accused is identification or recognition, a trial court is enjoined to examine such evidence with microscopic care and to be satisfied that the circumstances were completely favourable and absolutely free from the possibility of error before basing a conviction upon it.
37. Applying these rigorous, mandatory standards to the factual matrix at hand exposes severe, incurable deficiencies. The incident occurred at approximately 1:00 AM on an isolated, unlit path. The primary source of illumination was a torch held by the assailant himself. Crucially, both PW2 and PW3 testified that the torch was very bright and was shone directly at them. PW2 explicitly testified to the trial court:



"It was dark. The man had a bright torch and a panga. He came close to us. I could not see the face well...".

38. This Court takes judicial notice of the well-documented physiological phenomenon of flash blindness. When scotopic (nighttime) vision is suddenly interrupted by a high-intensity, directed light source such as a bright torch, the photoreceptor cells in the retina are overwhelmed, resulting in immediate, severe, and temporary visual impairment. Under such biological conditions, it is physiologically impossible for a victim to accurately discern the facial features of an individual standing in the dark behind the blinding light source. The trial court fundamentally erred in law by failing to evaluate the blinding effect of the torchlight. By wholly ignoring the adverse impact of the directed light and the absolute darkness of the hour, the trial court failed to adhere to the strict testing mechanisms mandated by the *Turnbull*, *Maitanyi*, and *Wamunga* precedents. The visual identification evidence in this case was inherently unsafe, scientifically improbable, and falls far below the standard required to sustain a criminal conviction.

### **Voice Recognition and the Fallacy of Prior Familiarity**

39. Recognizing, perhaps subconsciously, the extreme fragility of the visual identification, the trial court placed substantial, almost absolute weight on the concept of recognition. The court noted that PW2 was casually familiar with the Appellant, as he was an attendant at a local butchery she patronized. The trial court relied on the established legal principle articulated in *Anjononi & Others vs Republic* [1976-1980] KLR 1566, which holds that the recognition of an assailant is inherently more satisfactory, more assuring, and more reliable than the identification of a total stranger.
40. Furthermore, PW2 claimed she was able to identify the Appellant by his voice in the dark. The legal threshold for accepting voice identification is exceptionally stringent. In the case of *Simeon Mbelle v Republic* (1982-88) 1 KAR 578, the Court of Appeal established that voice identification must be rigorously tested against three criteria: the witness's prior familiarity with the voice, the length of time the voice was heard during the incident, and the conditions under which it was heard.
41. While recognition is generally more reliable than the identification of a stranger, the Court of Appeal in *Wamunga* specifically warned that "mistakes in the recognition of even close relatives and friends are sometimes made". In the present case, the familiarity was entirely casual—a customer seeing an attendant at a butchery. There was absolutely no evidence led by the prosecution to suggest that PW2 had engaged in extensive, frequent, or meaningful conversations with the Appellant that would securely imprint his unique vocal signature into her auditory memory. Moreover, the vocalizations during the brief incident consisted merely of terror-inducing, shouted commands ("sit down", "surrender all valuables"). Recognizing a casually known voice under the extreme psychological duress of an armed ambush, while simultaneously suffering from fear and visual impairment, is fraught with a remarkably high margin of error.
42. If PW2 had definitively recognized the Appellant by voice or sight during the attack, ordinary human conduct dictates that she would have immediately disclosed his identity by name to the very first persons she encountered at the neighbouring homestead where she sought refuge, or in her very first report to the police. The Appellant's Supplementary Grounds of Appeal highlight the glaring absence of his description or identity in the initial police reports. The subsequent identification of the Appellant via a police parade—conducted only after his highly publicized citizen's arrest for unrelated "suspicious behavior"—carries a heavy, incurable taint of retrospective deduction and suggestion rather than instantaneous, genuine recognition.



## Evaluation of Medical and Forensic Evidence

43. The Appellant challenged the competence of PW5, Benjamin Mango, to tender expert medical evidence, characterizing him dismissively in his submissions as a clerical officer and arguing his P3 form was inadmissible. The trial record unequivocally confirms that PW5 is a registered Senior Clinical Officer.
44. This Court must take this opportunity to correct a persistent, legally erroneous procedural fallacy regarding medical evidence in Kenya. There exists a widespread misconception that only registered Medical Officers of Health (doctors) possess the legal competence to complete Post Rape Care (PRC) forms and P3 forms, and subsequently testify in court as experts. This is legally inaccurate. Section 77 of the *Evidence Act* governs the admissibility of expert reports in criminal proceedings. Under the operational guidelines of the *Sexual Offences Act* and the broader framework of the *Evidence Act*, designated health professionals—explicitly including registered Clinical Officers and registered Nurses—are fully authorized and legally competent to examine victims, complete PRC and P3 forms, and tender expert medical testimony. Therefore, PW5 was entirely competent, his evidence was admissible, and the trial court did not err in admitting his expert testimony.
45. However, the substantive weight and probative value of the medical evidence require rigorous scrutiny. PW5 testified that an examination of the complainant (PW2) revealed fresh blood stains and physical trauma indicative of sexual assault. This evidence establishes the actus reus—that the offence of an indecent act or defilement occurred. However, corroborative evidence must not merely confirm the commission of a crime in a vacuum; it must implicate the specific accused in a material particular.
46. The prosecution relied on two critical elements to connect the Appellant to the sexual assault: the presence of spermatozoa in his urine (spermaturia) and the observation of torn undergarments.
47. Regarding the urinalysis, PW5 testified that the microscopic detection of spermatozoa in the Appellant's urine indicated that he had ejaculated within a 72-hour window prior to the medical examination. In forensic jurisprudence, particularly in rural jurisdictions where full DNA profiling is unavailable or delayed, the presence of spermaturia is often tendered as circumstantial corroboration. However, the probative value of this finding is exceptionally limited and highly prejudicial if overvalued. The presence of spermatozoa in urine merely confirms recent physiological ejaculation; it provides absolutely no indication regarding the context, the partner, or the legality of that ejaculation. As the Appellant rightly points out, this biological marker could result from consensual intercourse with a third party, masturbation, or involuntary nocturnal emissions. Without DNA analysis linking the spermatozoa directly to the biological profile of the complainant, this finding lacks the specificity required to safely establish guilt beyond a reasonable doubt. It represents a mere biological possibility, not a forensic certainty.
48. The final, and most problematic, pillar of the prosecution's corroborative evidence is the testimony regarding the torn undergarments. PW2 testified that during the sexual assault, she specifically observed a distinct hole or tear in the front of the assailant's dark underpants. PW5 subsequently confirmed during the medical examination of the Appellant that his inner wear was indeed torn in the front.
49. This Court finds this specific piece of evidence to be highly suspect, logically irreconcilable, and scientifically impossible when viewed against the prosecution's own narrative. As analysed extensively above, PW2 explicitly testified that it was night, the area was dark, and she was blinded by a highly luminous torch to the extent that she could not see the face well. It defies basic human physiology, optics, and common sense to suggest that a victim, suffering from scotopic vision loss due to flash



blindness, cowering in a dark maize plantation, could accurately discern the structural integrity of dark-coloured undergarments on her assailant.

50. The far more plausible explanation, as forcefully argued by the Appellant, is post-event information contamination. The Appellant was subjected to a physical examination by medical personnel (PW5) and was in the custody of the police (PW7). It is highly probable, indeed almost certain, that the detail regarding the torn undergarments was inadvertently or deliberately communicated to the complainant after the fact, allowing her to retrospectively weave this detail into her narrative to fortify what investigators knew was a weak identification. When evidence presents a physical impossibility, an appellate court has a duty to reject it entirely. The inclusion of this impossible observation deeply undermines the credibility of PW2's entire testimony and points toward active evidentiary coaching.

### **The Defence of Alibi and the Shifting of the Burden of Proof**

51. The Appellant asserts that the trial court ignored and unlawfully disregarded his defence of alibi. The trial Magistrate explicitly noted in her judgment: "the accused never raised the evidence of alibi" and "Again, the accused person never raised alibi as defence".
52. The court record reflects that during his unsworn defence statement, the Appellant stated he was arrested on 2 January 2011 while going to work at his butchery in town, and that he knew absolutely nothing about the offence. The Appellant correctly argues in his memorandum that a person is not required to explicitly use the magic words "I was at home" to invoke an alibi. If an accused person categorically denies being at the scene of the crime and states his whereabouts upon arrest the next day, the defence of alibi is inherently raised.
53. The foundational principle of criminal law, established in the globally recognized precedent of *Woolmington v DPP* AC 462 and strictly adhered to in Kenyan courts (see *Bhatt v Republic* EA 332), is that the burden of proof rests squarely and immovably on the prosecution to prove guilt beyond a reasonable doubt. An accused person does not bear the burden of proving an alibi. If an accused person raises a defence that creates a reasonable doubt regarding their presence at the scene, the prosecution must actively disprove it.
54. The trial court fundamentally erred by imposing a negative burden on the Appellant. The Appellant's consistent denial of presence at the scene, coupled with his arrest by a civilian (PW1) over 24 hours later based solely on highly subjective "suspicious behavior," created an evidentiary gap that the prosecution was legally required to close. By relying on an unverified, disowned receipt and demonstrably unsafe visual identification, the prosecution failed to place the Appellant at the locus in quo with the requisite degree of certainty. The benefit of the doubt, which as the Appellant rightly notes, is not a judicial concession but a fundamental constitutional right, must invariably flow to the accused.

### **Constitutional Dimensions of Sentencing in Capital and Sexual Offences**

55. Although this Court's findings on the severe evidentiary deficits are more than sufficient to dispose of this appeal and quash the conviction, the Appellant raised profound constitutional arguments regarding the legality and proportionality of his sentences—specifically the mandatory death sentence for robbery and the minimum sentences for sexual offences. To ensure the completeness of this judgment, to fulfill the exhaustive mandate of a first appellate court, and to provide clarity on the rapidly evolving jurisprudence, this Court addresses these sentencing issues obiter dictum.
56. The Appellant argued forcefully that the imposition of mandatory sentences strips judicial officers of their inherent discretion to consider mitigating factors, thereby violating the constitutional right to a fair trial, the right to dignity, and the doctrine of separation of powers. The Appellant heavily relied on



- the trajectory of the Supreme Court's landmark decision in *Francis Karioko Muruatetu & Another v Republic* eKLR, which famously declared the mandatory death penalty for murder unconstitutional.
57. It is imperative for this Court to correct the widespread misapplication of the Muruatetu doctrine by lower courts, practitioners, and Appellants alike. Following an avalanche of applications seeking sentence reviews for offences far beyond murder, the Supreme Court was forced to issue a definitive clarification in *Muruatetu II* KESC 31 (KLR). The Supreme Court unequivocally restricted the application of the original Muruatetu decision solely to the offence of murder under sections 203 and 204 of the Penal Code.
58. More recently, and conclusively resolving the matter, the Supreme Court in *Republic v Joshua Gichuki Mwangi* (Petition No. E018 of 2023) eKLR, directly addressed the constitutionality of mandatory minimum sentences concerning sexual offences and, by necessary extension, other statutorily mandated sentences like those for robbery with violence. The apex Court set aside decisions of the Court of Appeal that had erroneously declared such minimum sentences unconstitutional. The Supreme Court affirmed that while the act of sentencing is a judicial function, it is the constitutionally mandated prerogative of the Legislature—representing the will of the people—to set the parameters, minimums, and severity of punishment for specific crimes, reflecting the gravity with which society views heinous offences such as sexual violence against children and armed robbery.
59. Therefore, as the law currently stands, the mandatory death sentence for Robbery with Violence under section 296(2) of the Penal Code (subject to lawful presidential commutations to life imprisonment), and the mandatory minimum sentences prescribed under the *Sexual Offences Act*, remain lawful, valid, and fully constitutional. Had the conviction in this matter been safe and predicated upon watertight evidence, this Court would have possessed absolutely no jurisdiction to interfere with the statutorily mandated sentence imposed by the learned trial Magistrate.
60. Consequently, this appeal succeeds in its entirety. It is the order of this Court that:
- i. The conviction of the Appellant, Boniface Munyao Mutinda, on Count I (Robbery with Violence), the Alternative to Count II (Indecent Act with a Child), and Count III (Robbery with Violence) is hereby quashed.
  - ii. The sentences imposed in respect of all counts are wholly set aside.
  - iii. The Appellant is ordered to be set at liberty forthwith, unless he is otherwise lawfully held for any other cause.

**DATED AND DELIVERED AT THIKA THIS 27 DAY OF FEBRUARY 2026.**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For the Appellant: Present at Kamiti Maximum Prison

For the Respondent: Ms Torosi

Court Assistant: Lucy Mwangi

