Wanjiku v Republic (Criminal Appeal E027 of 2024) [2026] KEHC 2472 (KLR) (24 February 2026) (Judgment)

Neutral citation: [2026] KEHC 2472 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL E027 OF 2024

CW MEOLI, J

FEBRUARY 24, 2026

BETWEEN

DENIS KIMANI WANJIKU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from conviction and sentence Ngong SPM's Criminal Case No. 230 of 2017 (Achieng, SPM))

JUDGMENT

1. Denis Kimani Wanjiku, the Appellant herein, was charged before the Magistrate's Court at Ngong with four counts, three of which were in respect of Robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. The particulars of the robbery charges, being counts 1-3 were similar save for the identities of the victims and items stolen from them during the robbery.

2. The particulars were individually stated seriatim under the respective counts and were to the effect that on 29th April 2017 at Kambi Moto area of Ongata Rongai, within Kajiado County, jointly with others not before the court, the Appellant while armed with a dangerous weapon, namely, a pistol serial no. KP245P0557, robbed the three victims, namely, Florence Jerotich Kipkemboi of her motor vehicle registration number KBV 871S Toyota Wish silver in colour valued at Ksh. 900,000/=, HP laptop, two Toshiba laptops and one Wiko mobile phone all valued at Ksh. 1,000,900/=, and at the time of the said robbery threatened to shoot Florence Jerotich Kipkemboi; Jotham Wasike Milimo of his mobile phone make Huawei black in colour valued at Ksh. 6,000/= and at the time of the said robbery used actual violence to the said Jotham Wasike Milimo; and Claire Ogoti Mugeni of her mobile phone make Nokia valued at Ksh. 2,600/=; and at the time of the said robbery threatened to use actual violence to the said Claire Ogoti Mugeni.

3. The 4th count was Abduction with intent to confine contrary to Section 259 of the Penal Code. In that, on 29th April 2017 at Kambi Moto area of Ongata Rongai within Kajiado County, jointly with others not before court, while armed with a dangerous weapon namely a pistol serial no. KP245PZ05757 with intent to cause Jotham Wasike Milimo to be secretly and wrongfully confined, abducted the said Jotham Wasike Milimo.

4. The 5th count was Handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code. The particulars being that, on 29th April 2017 at Rangau River in Ongata Rongai within Kajiado County, otherwise than in the course of robbery dishonestly retained one motor vehicle registration number KBV 871S Toyota Wish silver in colour, a black bag labeled HP power which contained one HP laptop, two Toshiba laptops and four mobile phones make wiko, Huawei, Nokia and iPhone all valued at approximately Kshs. 1,010,000/=, having reason to believe it to be stolen property.

5. The Appellant denied the charges, but following a full trial, he was found guilty on counts 1, 2 and 4 while being acquitted on the 3rd count under Section 215 of the Criminal Procedure Code (CPC) in the judgment delivered on 22nd November, 2023 . He was subsequently sentenced to 20 years imprisonment in each of the 1st and 2nd counts , and 4 years imprisonment in the 4th count. The sentences were to run concurrently.

6. Dissatisfied with the outcome, the Appellant preferred this appeal via his original petition of appeal dated 5th December 2023 and later amended via his submissions dated 22nd January, 2025. However, inside the record of appeal erroneously initially lodged in the Environment and Land Court, Kajiado by his advocates Kasera & Co. Advocates on 17th April 2025 and eventually received in the High Court registry, Kajiado, and placed on this file, is another petition of appeal dated 11th April 2025.

7. This subsequent third petition of appeal dated 17th April 2025 of appeal, coming after the Appellant's submission of 22nd January 2025 amending his earlier grounds was filed without leave of the court, and is hereby struck out. Further, the court will rely on the record of appeal prepared earlier by this court and the lower court record, and not the Appellant's record of appeal containing the discarded petition of appeal dated 11th April 2025.

8. That settled, the so-called amended petition of appeal presented in the Appellant's submissions dated 22nd January 2025 reflects the following five grounds:

> ''i. That the learned trial Magistrate erred in both law and fact by convicting the Appellant on a duplex charge sheet which made the charges ambiguous and difficult to understand and defend.
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> ii. That the learned trial Magistrate erred in both law and fact when he relied on the evidence of re-arresting police officers who deliberately, unprofessionally and through unlawful action on their part, placed the appellant at the scene of crime to his own prejudice.
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> iii. That the learned trial Magistrate erred in both law and fact when he convicted the Appellant on charges whose basic elements, to wit identification with the offence and joint intention, were based on suspicions, unlawful acts and without cogent prove to the required standard.

iv. That the learned trial Magistrate erred in both law and fact when he relied on the doctrine of recent possession to convict, which was doubtful with severed links and not linked to the appellant to his prejudice.

v. That the sentence of 20 years imprisonment was harsh and excessive based on the circumstances of the case". (sic)

9. In support of the first ground the Appellant's counsel argued that the charges in counts 1 to 3 as framed were incurably defective for combining two distinct offences—simple robbery under Section 295 and robbery with violence under Section 296(2). Which resulted in ambiguity as to which charge the Appellant was facing, whether a felony punishable by 14 years imprisonment, or violent robbery carrying the death penalty. It was contended that the duplex charges impacted upon the Appellant's ability to mount a proper defense and his rights under Article 50(2)(b) of *the Constitution* to be informed of charges with sufficient detail.

10. For this proposition counsel cited the case of Ibrahim Mathenge v R Cr App No 222 of 2014, where the Court of Appeal held inter alia that "a duplex charge is a fundamental breach which goes to the root of the appellant's conviction and cannot be cured under Section 382 CPC (sic)." And the case of Joseph Njuguna Mwaura & 2 Others v R (2013) eKLR, for the statement by the Court of Appeal that "It would not be correct to frame a charge for the offence of robbery with violence under Section 295 and 296 (2) as this would amount to a duplex charge."

11. Regarding Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code, counsel cited Joseph Kaberia Kahinga & 11 others v Attorney General [2016] KEHC 3275 (KLR), where the High Court declared that the sections failed the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery. Asserting that the provisions had not subsequently been amended, the Appellant's counsel complained that the Appellant's trial was unconstitutional and prejudicial, and he should benefit from the ambiguity, pursuant to dicta in Republic v Joshua Gichuki Mwangi [2024], Petition No. 18 of 2023.

12. In support of his 2nd ground, counsel contended that police officers involved in the Appellant's arrest acted unprofessionally and unlawfully in placing him at the crime scene. Asserting that having been allegedly rescued from a lynch mob near Kandisi Police Post, the Appellant was instead of being booked at the said post, whisked away to a robbery scene that was 3 kilometers away and where suspects had been gunned down. This, it is argued, was a deliberate attempt to unlawfully link him to the crime, and counsel cited Ndungu Kimani v Republic (1979) KLR 282 on the requirement for utmost veracity and candour of witnesses before the court.

13. Further, counsel pointed out that PW6 and PW12 failed to record the Appellant's arrest in the Occurrence Book at the said police post , or to document the mob's involvement, thereby violating provisions of the *National Police Service Act* and Standing Orders. Contending that the said unlawful conduct breached the Appellant's rights under Article 49 and Article 50(4) of *the Constitution*, rendering the witnesses' evidence inadmissible, and in the absence of credible proof linking him to the robbery, the prosecution's case collapses.

14. The 3rd ground challenges the reliability of identification evidence, counsel arguing that the complainants were strangers to the robbers and interacted with them under duress while firearms were trained on them, hence too absorbed with concerns for their lives to observe the appearances of the robbers. As was the finding of the Court of Appeal in similar circumstances that obtained in Paul Etole & Another v Republic, Criminal Appeal No. 24 of 2000.

15. It was further asserted by counsel that in the absence of first descriptions of the robbers to police, the identification parade conducted after witnesses had already seen the Appellant at the crime scene, was worthless. Here citing Michael Norman Mbache Njoroge & Another v Republic [2016] eKLR, where the Court of Appeal stated that dock identification is generally worthless and the court ought not to place reliance on it, unless preceded by a regularly conducted identification parade. The cases of Ajode v Republic [2004] 2 KLR 32 and John Mwangi Kamau v Republic (2014) eKLR, were also cited for the same proposition.

16. Counsel also contended that common intention was not proved, as no forensic evidence, communication records, or confessions linked him to the slain suspects. Whereas nothing was recovered from him to connect him to the crime, and the chain of identification was broken.

17. The 4th ground addressed the doctrine of recent possession: the Appellant's counsel contends that the trial court wrongly relied on the doctrine of recent possession, asserting in that regard that the alleged recovery of stolen items was not credibly linked to the Appellant, as the chain of custody was broken and the evidence doubtful. Hence, in the absence of clear proof that he was in possession of the stolen property, the doctrine could not be applied in the case. Counsel submitted that the trial court's invocation of the doctrine was prejudicial to the Appellant and resulted in a conviction premised on suspicion rather than cogent proof.

18. Finally, with regard to the 5th ground, counsel submitted that the sentences though concurrent, were harsh and excessive given the circumstances. The court was in light of the foregoing urged to find that the trial court erred in law and fact, and to set aside both the conviction and sentence.

19. The Respondent's submissions in opposition to the appeal are dated 13th June, 2025 and appear to be based on the Appellant's initial petition of appeal dated 5.12.2023. Prefacing their arguments with the assertion that the prosecution discharged its burden of proof in this case, the Respondents submitted that the offence of robbery with violence requires proof of the ingredients of stealing and one or more aggravating circumstances: being armed, being in company of others, or using violence. Citing the Court of Appeal decision in Oluoch v Republic [1985] KLR, Bakare v State (1985) 2 NWLR 465 and Miller v Minister of Pensions [1942] AC, on the standard of proof.

20. Addressing the issue of identification of the Appellant, the Respondent highlighted the testimony of Florence Jerotich Kipkemboi, to the effect that she was attacked by a man with a pistol, later shot dead by police, and that the Appellant who was present was subsequently identified in an identification parade. The Respondent here cited Wamunga v Republic [1989] KLR 424, where the court, while emphasizing the need for careful scrutiny of identification evidence, held that where the circumstances enabled a witness adequate opportunity to observe the attacker during the commission of the offence, such evidence was reliable. Thus defending the identification evidence by Florence Jerotich Kipkemboi, the Respondent contended that she had sufficient opportunity to observe the Appellant during the day, in clear light, which testimony was corroborated by her husband, Jonathan Milimo Wasike.

21. Regarding asserted contradictions and inconsistencies in the prosecution case, the Respondent submitted that there were no material contradictions in the prosecution's case. Even if minor inconsistencies existed, they were not fatal and did not destroy the credibility of the evidence by the prosecution, calling to his the aid dicta in Richard Munene v Republic [2018] eKLR, that '' not every trifling contradiction or inconsistency in the evidence of the prosecution witness will be fatal to its case...(but) ...only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an Appellant person will be entitled to benefit from it".

22. And defending the trial court regarding the Appellant's complaint that it failed to consider the Appellant's defence, the Respondents asserted that the said court properly weighed the defence against the prosecution evidence, Including the positive identification of the Appellant and found the former implausible. To the Respondents therefore the conviction was well-founded on credible evidence, and the defence was rightly rejected. The Respondents asserting that the grounds of appeal were without merit urged the court to dismiss the appeal, uphold the conviction, and confirm the sentence.

Analysis and Determination

23. The duty of this Court, on a first appeal, is to re- evaluate, and re-consider all the evidence adduced at the trial court with a view to arriving at its own independent conclusion. These principles were enunciated by the East African Court of Appeal in the case of Pandya v Republic [1957] EA 336 pg 37:-

> " On first appeal from a conviction by a judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the materials before the judge or magistrate with such other materials at it may have decided to admit. The appellant court must then make up its mind not disregarding the judgement appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on a manner and demeanour, the appellate court must be guided by the impression made on the judge or magistrate who saw the witnesses but there may be other circumstances, quite apart from manner and demeanour which may warrant a court in differing from the judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen......"

24. The prosecution evidence adduced during the trial was as follows. Florence Jerotich Kipkemboi (PW1), the complainant in count 1 testified that on 29th April 2017, she drove into her home compound in Kandisi, Ongata Rongai in her vehicle Toyota Wish motor vehicle registration KBV 872S ,silver in colour (hereafter the Toyota vehicle) at about 3.00pm from a meeting. At the gate she hooted for the house help, Claire (Clara) Ogoti Mugeni (complainant in count 3) who opened the gate, but no sooner had she driven in than she was accosted by a man wielding a pistol (Exh.3) who knocked on her car window and motioned her to be quiet. A second man whom she identified as the Appellant locked the gate behind them before joining the gunman, and together forced her and the house help into the living room of her house where her husband, Jotham Wasike Milimo (PW2) and other family members were.

25. All persons present in the living room were ordered to lie down as the robbers demanded money, before the gunman handed over the firearm to the Appellant , announcing that he was going to call for reinforcement. It was during that moment that the witness was able to send a quick text by way of SOS to a friend Nelson Gikera Kahara (PW3) , who with Lyma Kivali Kadenge (PW4) started to mobilize in search of help. Meanwhile, the first gunman returned with two other men and together with the Appellant forced PW1 and her son to a bedroom where they were locked up as the robbers continued to ransack the house.

26. After a while, the robbers came back to PW1 demanding that she accompany them to the Toyota vehicle to help locate the vehicle's anti-theft device (cut-out) before once more being forced back and locked inside the bedroom. According to the witness, the ordeal lasted about 45 minutes, and during this time, she observed the Appellant , noting that he wore blue jeans, a black T-shirt, and boots.

27. While back in the locked room, she heard the gate open as the vehicle drove off but presently gunshots rang out, and fearing that PW2 may have been shot, she struggled with and managed to open the door and upon emerging learned that the shots were fired by police and that the Toyota vehicle was grounded at Kiserian (Rankau) river. She then saw PW2 who had cuts on the face and bleeding coming towards the home. Thereafter, she proceeded to the scene where the Toyota vehicle was, and noted the dead body of one of the robbers beside it, as well as the firearm and some of the stolen items.

28. She stated that during the robbery, her Toyota vehicle, her work Toshiba laptop, another Toshiba laptop belonging to her son's friend, and several mobile phones including a Huawei phone, a Wiko phone, a Nokia phone, and an iPhone were stolen . Also stolen was an HP laptop, an HP laptop charger, and an Alcatel router.

29. She identified these items when shown respective photographs and exhibits in court, including the pistol (a Ceska, serial number 245P2057), ammunition, and photos of slain gangsters. She confirmed that the stolen devices were later returned to her at the police station. When recalled for cross-examination, PW1 reiterated that the Appellant was present during the robbery incident and at one point handled the pistol. She confirmed participating in the identification parade and picking out the Appellant , though she could not recall his exact position in the line-up in the parade.

30. Jotham Milimo Wasike testifying in a similar vein narrated how his wife PW1 arrived home at 3.00pm on the material date accompanied by two men, one of whom was the Appellant, the second man brandishing a pistol. PW2 and his two sons, and a nephew complied when ordered by the men to lie down. The robbers demanded money and mobile money withdrawals and ransacked his house; that he surrendered Kshs. 2,000 in cash from his pocket and gave his Mpesa PIN to the robbers, before herding PW2 and the rest of the family members to a bedroom where they were confined.

31. The robbers took with them from the house several properties, including laptops, clothes, mobile phones, and chairs which they took loaded in the Toyota vehicle while taking PW2 with them. However, he was unable to locate the vehicle anti-theft device and PW1 was brought to the vehicle to do so before PW2 was bundled into and locked in the boot before the robbers drove off at a speed on rough road.

32. However, after a short while, PW2 heard a bang as the vehicle seemingly hit an obstacle, before doors opened as the robbers abandoned the vehicle, fleeing. Managing to get out, PW2 encountered police at the scene, and was taken to Ongata Rongai Women's Hospital, where he was treated for cuts to his face and issued a medical report and P3 form. He confirmed the recovery of most stolen items except the Kshs. 2,000/- cash . He identified the Appellant as the one who slapped him while outside the house, at the vehicle, before departure when he failed to locate the anti-theft device , before forcing his wife out of the house to do so. Like PW1 he described the Appellant's attire as blue jeans and a black T-shirt. He emphasized that the Appellant was in his home for over 30 minutes during the robbery and at one point was holding the pistol (Exh.3).

33. PW2, when recalled for cross-examination, confirmed that the Appellant was inside his vehicle during the incident, armed with a pistol, and that four robbers were involved, two of whom were killed. He did not attend the identification parade but maintained that he recognized the Appellant from his direct involvement in the robbery.

34. David Mureithi Nyaga (PW5) a retired NSIS officer, testified how on 16/4/2016, he lost his official firearm which he identified as the pistol (Exh. 3) recovered by police at the shoot-out scene. He described the incident of the theft of the firearm by two women whom he gave a lift to but who subsequently plied him with a stupefying substance. He had reported the matter to Kikuyu Police

Station, and on 3/5/2017, he was summoned to Ongata Rongai Police Station where he identified the recovered pistol with one magazine and two cartridges.

35. PC Simon Obiero testifying as PW6 , stated that he was formerly stationed at DCI Ongata Rongai and that on 29/4/2017 he and PC Desmond Ecarus (PW12) were on standby duties when instructed by the DCIO to respond to a robbery at Kandisi. That as they proceeded , at a scene near the police post, they came across a mob assaulting the Appellant, who was accused of being part of the gang that robbed PW1's family. The officers rescued him and on learning that officers from Kandisi police post had already proceeded to the robbery scene near Kambi Moto, followed them there. On the way, the officers found the Toyota vehicle which had plunged into the river, and next to it the body of one of the suspected robbers, the pistol (Exh.3), with its magazine (Exh. 5(a)), and cartridges (Exh. 6(a)-f). He identified the motor vehicle and the deceased suspected robber in photographs Exh.4(a)), (pmf1-8(a)(b)), and recovered property including phones and laptops (Exh. 9(a)(b), Exh. 10(a)(c)), a bag (Exh.11), and the driving license of the suspected robber in the name of Gichuki Andrew Njihia (Exh.-12).

36. PW7 was CIP Kenneth Chomba a forensic ballistic expert, who testified that on 5th May 2017 he received exhibits for examination that included :

- Exhibit A: "1 Pistol ceska number 245PZ05757" (Exh.-3)
- Exhibit B: "1 pistol magazine" (Exh. 5)
- Exhibit C1-C4: "4 rounds of ammunition" (Exh. 6)
- Exhibit D1-D2: "2 fired cartridges"

37. The witness confirmed that Exhibit A was a brocading pistol, caliber 9x19mm, manufactured in Belgium, capable of firing the ammunition submitted. The magazine was functional with a capacity of 13 rounds. He concluded that Exhibits D1 and D2 were fired from two different firearms and not from Exhibit A. He further linked Exhibit A to another criminal incident of kidnapping (OB No. 04/15/04/2017, DCI Kabete). His report was produced as Exh.14.

38. Inspector Simon Mitau (PW8) stated on 1st May 2017 he conducted an identification parade involving 8 members plus the suspect, the Appellant, who requested that his sister Esther Wambui Wanjiku be present. That the witness, PW1 identified the Appellant by touching him between members 7 and 8, while Clara Ogoti (complainant in 3rd count) identified him between members 3 and 4. He stated that the Appellant expressed satisfaction with the parade and signed the form, produced as Exh.15.

39. On his part, PC Joseph Jonathan Mutonga (PW9) who was the lead investigator, testified that PW1 reported the robbery incident to police and that police in responding to the incident pursued the stolen vehicle, which was grounded at River Kiserian (Rankau). That two suspected robbers were fatally shot, and Exh.3 with a magazine and 4 live bullets plus 2 spent cartridges recovered . The deceased suspects were identified through finger prints as Andrew Njehia Gichuki and Daniel Chege Maina (Exh.16(a)(b)) and postmortems conducted per (Exh.-17(a)(b)). PW9 confirmed that the pistol Exh. 3 pistol had originally been issued to PW5 in 2013 but was stolen in 2016. He produced several exhibits including Exh.2, 3, 5, 6, 13, 16(a)(b), and 18.

40. PW10 was Fredrick Avoga , a clinical officer working at Ngong Health Centre. He produced the P3 form (Exh. 19) on behalf of Dr. Catherine Muchoki in respect of injuries sustained by PW2 during the robbery, including a cut on the left cheek and swollen limbs. The injuries were classified as harm and probably caused by a blunt weapon.

41. A Scenes of Crime Officer, Sgt. George Odhiambo (PW11) testified that at the request of PW6 and PC Desmond Ecarus (PW12) on 29.04.2017, he documented the scene at Kambi Moto and River Kiserian

(Rankau). He took photographs of the bodies of suspects (Exh.8) , the Toyota vehicle (Exh. 4) and the following recovered items, which he photographs he produced as exhibits:-

- Pexh.4(a) – pistol
- Pexh.4(b) – photos of Appellant
- Pexh.9(a)(b) – photos of phone
- Pexh.10(a)(c) – photos of laptops
- Pexh.11 – photo of bag
- Pexh.12 – cartridge photos

42. PW12, testified that in the company of PW6 , he on 29th April 2017 proceeded to Kandisi to respond to a robbery at the instructions of the DCIO. That having rescued the Appellant from a mob at Kandisi Police Post, he was arrested. Thereafter the officers recovered the Toyota vehicle at the river, the pistol (Exh.3) with a magazine and 4 live rounds of ammunition and spent cartridges (Exh.5 and 6). Two bodies of suspected robbers were at the scene and were removed to the mortuary.

43. Upon being placed on his defence, the Appellant elected to make a sworn statement. To the effect that on 29th April 2017 he was off duty and went to visit his sister Esther Wambui Wanjiku at Rimpa. He claimed he was attacked by motorcycle riders after a fare dispute with the owner of the motorcycle he had hired for the journey and that he fled to Rimpa Police Station, which he later referred to as Kandisi Police Post . However, his report was not recorded. He denied involvement in the robbery and stated that during the identification parade he was disadvantaged because other members of the parade wore no shoes while he wore one shoe. He denied knowing the two men who were killed by police and insisted on his purpose for visiting the area on the material day.

44. Before dealing with the grounds touching on the evidence, the court proposes to deal with the Appellant's complaint in the 1st ground that the charge sheet was defective because the robbery charges as drafted were duplex, for carrying two distinct offences, namely simple robbery contrary to section 295 of the Penal Code and robbery with violence contrary to section 296(2) of the Penal Code. Which defect prejudiced the Appellant's defence.

45. Section 295 of the Penal Code describes the offence of robbery. It provides as follows:

> " 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."

46. For aggravated robbery, section 296(2) of the Penal Code defines the ingredients of the offence and sentence for the offence of robbery with violence as follows:

> " (2) 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"'.

47. The rule against duplicity is premised on provisions of section 134 of the Criminal Procedure Code which provides as follows:

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the Appellant person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"

48. Thus, a duplex charge is one which charges more than one offence in the same count. In Joseph Njuguna Mwaura (2013) eKLR (supra) a five Judge bench of the Court of Appeal clarified the difference between robbery with violence and simple robbery under section 295 of the Penal Code when it stated that;-

> " We reiterate what has been stated by other courts in various cases before us. The offence of robbery with violence ought to be charged under section 296(2) of the Penal Code. This is the section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others, or if he uses personal violence to any person. The offence of robbery with violence is totally different from the offence defined under section 295 of the Penal Code, which provides that any person who steals anything and at or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296(2) as this would amount to a duplex charge".

49. In Amos -V- DPP (1985) RTR 198 the court observed that the risk of uncertainty in the mind of the Appellant is what the rule against duplicity is aimed at countering, so that there is no possibility that the Appellant may be confused on the exact charge he may be defending .

50. In a more recent decision in Justine Masolo Nyakundi V Republic (2019) KECA 349 (KLR), the Court of Appeal considered whether as framed at the trial , the charges against the appellant therein were duplex and occasioned him prejudice. This is what the Court of Appeal stated:

> " As already stated the charge against the appellant was stated as: "Robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The learned judge in considering whether the charge was defective rendered herself as follows:
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>> "On whether the charge was bad for duplicity, the Appellant submitted that this was occasioned by the fact that the charge sheet was drawn both under Section 295 and 296(2) of the Penal Code. This court agrees with the Appellant because both sections of the law provide for two distinct offences; of robbery and robbery with violence respectively. The Court of Appeal said as much in Joseph Njuguna Mwaura v. Republic [2013] eKLR, to wit:
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>> ....
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>> The question however is whether the duplicity was fatal to the prosecution case. The test to be applied is whether the duplicity occasioned any injustice to the

accused. The then Court of Appeal for East Africa in Cherere s/o Gukuli v. Reginam [1955] EACA 478, held that:

> "[T]he test therefore which we must apply to answer the question, what has been the effect of the defect in the charge on the trial and conviction of the appellant, must be whether there has in fact been a failure of justice...."

51. The Court of Appeal proceeded to state in Justine Masolo (supra) that :-

> " It is evident from the above extract that the learned judge properly directed herself on the law. Moreover, section 295 of the Penal Code states as follows:
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> "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."
>
> Section 296(2) of the Penal Code states:
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> " 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."

52. Then observing as follows:

> ''Thus section 295 defines "Robbery" and gives the ingredients of the offence of simple robbery, while in section 296(2) the offence of simple robbery is graduated to the more serious offence of "Robbery with violence," where there are aggravating circumstances. The aggravating circumstances are provided in that provision as any one or more of the following: either the offender is armed with any dangerous or offensive weapon; or the offender is in company with one or more other person or persons; or the offender at or immediately before or after the robbery, wounds, beats, strikes or uses any other personal violence to any person.
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> There is no doubt that the charge against the appellant was not elegantly drafted. Nevertheless, the particulars of the charge stated clearly that:
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> " JUSTICE MASOLO NYAKUNDI: on the 29th May 2012 at Kawagware 46 area within Nairobi country, jointly with others not before court while armed with offensive weapon namely, knife, robbed Clive Cetewayo cash Kshs. 35,000 and mobile phone make nokia 2310 valued at Kshs. 2,500 or valued at Kshs, 37,500 and immediately before such time of robbery threatened to use actual violence to the said Clive Cetewayo."
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> Therefore, although the statement of the charge as framed made reference to two distinct offences and could be considered bad for duplicity, it was clear from the statement of the charge read together with the particulars, that the appellant was charged with the aggravated offence of robbery with violence as the particulars alleged fitted within section 296(2) of the Penal Code. The appellant was not in

any way prejudiced nor did the defect occasion any failure of justice. The defect can therefore be cured under section 382 of the Criminal Procedure Code.

53. In concluding , the Court of Appeal stated:

> “ ’ We are therefore in entire agreement with the learned Judge who properly addressed the issue as follows:
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> “The particulars of the robbery were in consonance with the offence of robbery with violence. He set up a defence against the charge of robbery with violence. The evidence adduced by the prosecution sought to prove only one offence, of robbery with violence. Although it is trite that duplicity is a question relating to the count and not the underlying evidence it is clear that the case put forth by the prosecution was one of robbery with violence and the Appellant was clear as to the charge he faced. Both the charge and the evidence adduced did not represent any uncertainty as to the offence the Appellant was charged with. Thus, no injustice was occasioned by the duplicity in the charge.” (Emphasis added)

54. Similarly in this case, while no doubt the statement of the offence of of robbery with violence as framed in the charge sheet made reference to two distinct offences, and resulting in duplicity, when read together with the charge particulars in respect of each count , it was clear that the Appellant was charged counts 1 to 3 with aggravated robbery with violence. The said particulars were consistent with the ingredients of the offence of robbery with violence contrary to section 296(2) of the Penal Code.

55. Equally, from the proceedings, the Appellant was left in no uncertainty from the time when the first prosecution witness testified, as to the nature of the case which he had to meet. Thus, the Appellant was not prejudiced by the duplicity. Nor did the defect occasion any failure of justice. As with Nyakundi’s case (supra) the defect can be cured under section 382 of the Criminal Procedure Code. See also Paul Katana Njuguna -V- Republic (2016) e KLR. Nothing therefore turns on the 1st ground of appeal.

56. The 2nd to 4th grounds of appeal relate to the quality of the prosecution evidence and can be treated together. In Johana Ndungu -V- Republic CRA 116/1995 (1996) eKLR, the Court of Appeal outlined the ingredients to be proved in a successful prosecution on a charge of robbery with violence contrary to section 296(2) of the Penal Code, in the following terms:-

> “
>
> “ (i) if the offender is armed with any dangerous or offensive weapon or instrument; or
>
> (ii) if he is in company with one or more other person or persons; or
>
> iii) if at or immediately before, or immediately after the time of the robbery, he wounds, beat, strikes or uses any other violence on any person”.
>
> See also Oluoch -v- Republic (1985) KLR.

57. According to evidence by prosecution witnesses, and especially PW1 and PW2, the robbery occurred during daytime at about 3.00pm. Both witnesses gave similar detailed accounts of the incident that took place in their home. Both described the role played by the armed robbers and especially the Appellant during the robbery long before the police entered the scene. Moreover, they detailed the items taken by the robbers from their home, and the events that led to the intervention by police,

namely the SOS text message sent by PW1 to PW3 and PW4 whose intervention led to the dispatch of police officers to the scene.

58. During cross-examination of relevant prosecution witnesses, and defence, the fact of the robbery and sequence of events was not seriously challenged. The issue seriously contested at the trial was the Appellant's involvement in the robbery as asserted by the identification evidence of PW1 and PW2 . On this appeal, he asserts by his submissions that the evidence of his identification, common intention and recent possession of the stolen goods was insufficient, tainted by illegality and unreliable.

59. Starting with the question of identification, in the old English case of R v Turnbull & Others (1976) 3 ALL ER 549 the court held that mistakes can be made even in cases of recognition; and that an honest witness may nonetheless be mistaken. The court exhorted:

> "On identification the Judge ought to examine closely the circumstances in which each witness came to identify the accused. How long did the witness have with the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? Had he any special reason for remembering the accused..?"

60. Similarly, in Kiarie v Republic [1984] KLR 739, the Court of Appeal stated:-"It is possible for a witness to be honest but mistaken and for a number of witnesses to all be mistaken. Where the evidence relied on to implicate an accused person is entirely of identification, that evidence should be watertight to justify a conviction".

61. In Wamunga v Republic [1989] KLR 424, the Court of Appeal held that:-

> "It is trite law that where the only evidence against a defendant is of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from the possibility of error before it can safely make it the basis of a conviction." (Emphasis added)
>
> See also Paul Etole & Another v Republic [2001] KECA 285 (KLR).

62. In this case, the material events including the eventual arrest of the Appellant occurred during the day. The evidence of PW1 was that she had just driven into her home compound when accosted by a man wielding a black pistol, who knocked on her car window and motioned her to keep silent. She was frog-marched into her house together with her house help, who had just opened the gate as the second man who locked the gate joined them. According to her evidence, the latter man was the Appellant who wore blue jeans , a black T-shirt marked as MFI 1(a) and (b) and reflected in the photograph Exh. 8 produced by PW11 at the trial.

63. The witness estimated that the entire ordeal took about 45 minutes as the assailants demanded money and ransacked the house. From her account, PW1 had not less than five separate encounters with the Appellant in that period. First, in her compound as he locked the gate before joining the gunman to escort her into her living room; second, inside the sitting room as the Appellant and his companion demanded money from her and PW2 and was handed the firearm by the first gunman who briefly left, before returning accompanied by two other men; third, when the Appellant herded the witness and her children into the bedroom; fourth, when the Appellant returned to the bedroom to escort her to the Toyota vehicle parked outside to locate the vehicle cut-out; and finally, when he took her back to and locked her in the bedroom before the robbers drove off in the Toyota vehicle.

64. Apart from questioning the witness during cross-examination concerning the identification parade, the Appellant's cross-examination did not shake her general testimony above . Contrary to the assertions by the Appellant, this witness, though obviously alarmed by the close presence of a firearm, had the presence of mind, not only to send an SOS text message to PW3 while the Appellant was being handed the firearm as the first gunman briefly left, but she also observed the attire worn by the Appellant.

65. Moreover, some two days later on 1st May 2017 she identified the Appellant during an identification parade conducted by PW8 in the presence of the Appellant's sister Esther Wambui Wanjiku, who with the Appellant signed off the parade forms (Exh.15) having raised no complaint. PW1 maintained during cross-examination that all members wore shoes , and the Appellant did not suggest to her that during the parade, he wore one shoe, as stated in his defence.

66. The events described by PW1 were largely corroborated by PW2 who was present in the home, and was in his living room which he described as a well-lit at the time the first gunman and the Appellant escorted PW1 into the house and started to demand money, taking his Kes. 2000/- in cash and ransacking the home for about 30 minutes. He said he was later slapped by the Appellant when he failed to recall the Toyota vehicle's security cut-out, before being locked in the boot of the said vehicle as the robbers drove off. And that he managed to get out after the Toyota vehicle stopped , having struck an object , and following which the robbers fled the vehicle abandoning it.

67. In the process, he sustained injuries including a cut to the cheek which was stitched. The degree of the said injuries as documented in the P3form (Exh.19) was assessed by PW10 as harm. However, compelling PW2's evidence on events surrounding the robbery might be in lending corroboration to the narration by his wife PW1, as correctly pointed out by the Appellant, PW2's identification of the Appellant cannot be acted on. For the chief reason that PW2 , unlike PW1 and the 3rd complainant Clara Ogoti, did not attend any identification parade. Thus, his purported identification of the Appellant amounts to dock identification and is of no value. That however does not diminish the weight of his consistent evidence concerning the entire robbery transaction, culminating with his abduction by the robbers in the stolen Toyota vehicle.

68. In Joseph Muchangi Nyaga & Anor. -Vs- Republic [2013] eKLR the Court of Appeal observed that:-

> " Evidence of visual identification should always be approached with great care and with caution (see Waithaka Chege -Vs- Republic [1979] KLR 27. Greater care should be exercised where the conditions for a favourable identification are poor (Gikonyo Karuma & Another -Vs- Republic [1980] KLR 23. Before a court can return a conviction based on identification of any accused person at night and in difficult circumstances, such evidence must be water tight. (See Abdalla bin Wendo & Another -Vs- Republic, [1953] 20 EACA 166; Wamunga -Vs- Republic, [1989] KLR 42; and Maitanyi -Vs- Republic, 1986 KLR 198). Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him."

69. It appeared from his submissions that the Appellant in assailing his identification by PW2 implied prior exposure to her at the scene of his arrest. This version of events was not put to PW2 or PW8 in cross-examination. Nor expressly asserted in the defence statement. Evidence by PW6 and PW12 regarding the Appellant's arrest indicates that he was rescued from a crowd within the vicinity of Kandisi Police Post, rather than the scene at Rankau river where the stolen Toyota vehicle had stalled, apparently having run aground at the river. The Appellant's testimony confirmed the presence and involvement

of an agitated crowd with whom he was engaged in a commotion at the time of arrest. There was no evidence that PW1 was present amidst the crowd at that scene of his arrest, and her evidence attests to her presence at a different scene where the Toyota vehicle had stalled at the Rankau river, not long after the robbers fled therefrom.

70. Reviewing the evidence on record, this court agrees with the well-reasoned finding by the trial court upon careful analysis, that the conditions obtaining in the home of PW1 favored positive identification of the Appellant during the robbery. The evidence is credible and places the Appellant at the scene of the offence. No doubt, he and his accomplices left the complainant's home in the stolen Toyota vehicle with PW2 in the boot upon the cut-out being located by PW1 whom the Appellant subsequently returned to the bedroom where he confined her.

71. His subsequent arrest near Kandisi police post from a mob approximately one kilometre from PW1's home , is consistent with the evidence by PW2 (that following the sound of a bang, possibly as the robbers were confronted by police responding to PW3's alert) , the robbers fled the vehicle after it ran aground and that while two of them were undeniably shot dead by police at the scene, two others including the Appellant escaped. The Appellant's suggestion on this appeal that he was unlawfully whisked away by PW6 and PW12 while in custody at Kandisi Police Post which he erroneously referred to as Rimpa Police Post, is inconsistent with his own statement in defence, and was not raised at all during the cross-examination of the said police officers .

72. Thus, the Appellant's defence that he was an innocent traveler who got caught up in a fare dispute with a motorcycle rider and was wrongfully framed for a robbery he knew nothing about was totally displaced by the credible prosecution evidence placing him at the scene of the robbery, and in the company of three other accomplices, two of whom were shot dead close to the stolen Toyota vehicle which had stalled. The findings of the trial court in this regard cannot be faulted.

73. Regarding the question of common intention, principal offenders are defined in Section 20 (1) of the Penal Code as follows:

> " (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say-
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids or abets another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence;
>
> and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.
>
> (2) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

(3) Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part is guilty of an offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission."

74. Section 21 of the Penal Code provides as follows regarding the common intent of joint offenders:

> " When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such a purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

75. The prosecution evidence on record clearly delineates the role played by the Appellant in conjunction with his three companions during the robbery at PW1's home. As the trial court itself observed, the Appellant was not only in the company of the other robbers but fully participated in the execution of the robbery, jointly with his companions, including the acts of locking the gate upon PW1 entering her compound, entering the house , at one point bearing the pistol used to threaten the family to give up their valuables, herded PW1 and her son and nephew to a room where he confined them , ransacked the house for valuables, slapped PW2 in the course of demanding the location of the cut-out to facilitate the taking away of the Toyota vehicle, before escorting PW1 to the same car for the same purpose, carting away the stolen items, and was evidently in the vehicle in which PW2 was carried in the boot , having been abducted from his home .

76. The conviction recorded against the Appellant was with respect to two counts of Robbery with violence contrary to section 296(2) of the Penal Code (counts 1 and 2) and Abduction with intent to confine contrary to section 259 of the Penal Code (count 4). There is no reference in the judgment of the trial court to invocation of the doctrine of recent possession, as raised on this appeal by the Appellant. Equally, the trial court , having found the 1st and 2nd counts proven, properly and correctly eschewed any consideration of the 5th count. The trial court correctly determined the case based on the cogent identification evidence before it. Nothing therefore turns on the issue of recent possession.

77. In the result, the court finds that the Appellant was properly convicted in respect of counts 1,2 and 4. The appeal against conviction is therefore without merit and must fail.

78. Finally, regarding the sentence, the lower court on 22.11.2023 sentenced the Appellant to serve 20 years imprisonment on each of the first two robbery counts, and 4 years in respect of count 4 for the offence of abduction. The sentences were to run concurrently. An offence of Robbery with violence contrary to section 296(2) of the Penal Code attracts a mandatory death sentence.

79. In the notes before sentence for robbery with violence as preferred in counts 1 and 2, the trial referred to what it termed as ''superior court decisions on mandatory death sentence for robbery with violence" , no doubt adverting to the jurisprudence emanating from Francis Karioko Muruatetu and Others Versus Republic SC Petition No. 15 of 2015 (2017) eKLR (Muruatetu I). Thus, awarding a sentence, other than the prescribed mandatory sentence for robbery with violence contrary to section 296(2) of the Penal Code.

80. The rationale in Muruatetu I (supra) has hitherto been applied in many cases involving offences carrying mandatory sentences including offences under the *Sexual Offences Act*. However, the Supreme Court in Francis Karioko Muruatetu and Others Versus Republic SC Petition No. 15 of 2015 (2021)

eKLR (Muruatetu II) expressly stated that the dicta in Muruatetu I only applied to the mandatory death sentence for convictions for the offence murder. See also the more recent decision by the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) .

81. Recently, in Chege V Republic (2025) KECA 1207(KLR), the Court of Appeal in a judgment delivered on 4th July 2025 expressed itself as follows concerning the validity of the prescribed mandatory sentence for the offence of robbery with violence :

> " As already stated, the appellant abandoned his appeal on conviction and therefore, there is no dispute that the ingredients of the offence were established beyond reasonable doubt. This appeal is on sentence only. We must, however, point out that even if the appeal on conviction was pursued, the facts of this case are straightforward as there was overwhelming evidence leading to his conviction.
>
> 18. The appellant was sentenced to death after the trial court considered his mitigation. This sentence was upheld by the High Court. Section 296 (2) of the Penal Code provides that a person convicted of the offence of robbery with violence shall be sentenced to death. The penalty for this offence is couched in mandatory terms. The directions of the Supreme Court issued on 6th July 2021 in Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR reiterated that mandatory or minimum sentences imposed in the statutes have not been invalidated. The Apex Court further clarified that the exercise of discretion in meting out a sentence was only applicable to murder cases where it is not expressly provided in statute.
>
> 19. In view of the foregoing, it is clear that our hands are tied, and we cannot interfere with the sentence. .....
>
> 20. Having said that, we have no option but to sadly inform the appellant that, as things stand at the moment, his sentence must remain as we are unable to interfere with the sentence meted out. Accordingly, the appellant's appeal lacks merit and it is hereby dismissed." (Emphasis added)

82. From the foregoing, it is apparent that at the time of sentencing the Appellant in 2023, the trial court may have been unaware of the directions of the Supreme Court in Muruatetu II in 2021, to the effect that the dicta in Muruatetu I did not apply to offences other than murder. Thus, like the Court of Appeal in Chege v Republic (supra), the trial court's hands were tied, and it had no discretion to award a sentence other than the prescribed mandatory sentence. The sentence of 20 years imprisonment imposed in respect of each of the two counts of Robbery with violence contrary to section 296(2) of the Penal Code was therefore without jurisdiction and erroneous.

83. Consequently, this court invoking its appellate power as donated by section 354 (3) as read with section 382 of the Criminal Procedure Code hereby sets aside the sentences in count 1 and 2. However, only with regard to count 1 (one) does the court hereby proceed to substitute the correct and legal sentence to the effect that the Appellant shall suffer death in the manner authorized by law. In light of that sentence, sentencing with regard to count 2 (two) and 4 (four), will be held in abeyance. Thus, the ground challenging the sentence also fails. In the result, the appeal on conviction and sentence is without merit and is accordingly dismissed. It is so ordered.

DELIVERED AND SIGNED ELECTRONICALLY AT KAJIADO ON THIS 24TH DAY OF FEBRUARY 2026.

C.MEOLI

JUDGE

In the presence of:

For the State: Ms. Kivali

For the Appellant: Mrs Kasera

Appellant: Present

C/A: Lepatei