IN THE COURT OF APPEAL AT NAKURU

(CORAM: MATIVO, GACHOKA & MUCHELULE, JJ. A.)

CRIMINAL APPEAL NO. NAK E019 OF 2024 BETWEEN

DANIEL NJIHIA MIANO.....APPELLANT

AND REPUBLIC

.....

RESPONDENT

(Being an appeal against the Sentence of the High Court of Kenya at Nakuru ***(Ouko & Omondi, JJ.)*** *dated 29th October 2012*

in

Criminal Appeal No. 393 of 2010).

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JUDGMENT OF THE COURT

1. Daniel Njihia Miano (the appellant) was charged with the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code at the Principal Magistrates' Court at Nyahururu in Criminal Case No. 2327 of 2010. It was alleged that on 11th September 2010 at 0400hrs at Ritaya Village, Nyandarua District within Central Province, jointly with others not before the Court being armed with dangerous weapons, namely, pangas and rungus, they robbed Philip Karuoya Wambugu of his mobile phones make Nokia 1600 and Vodafone 125 and cash Kshs.2,100/-

all valued at Kshs.

6,750/- and immediately after the said robbery, he used actual violence to the said Philip Karuoya Wambugu.

2. The appellant denied the charge and in the ensuing trial, the prosecution marshalled 5 witnesses while the appellant's defence rested on his sole unsworn defence. The trial court, in its judgment delivered on 10th December 2010, found the appellant guilty for the offence of simple robbery contrary to Section 296 (1) of the Penal Code, convicted him and sentenced him to serve 14 years imprisonment. Aggrieved by the said verdict, the appellant appealed at the High Court at Nakuru in CRA No. 393 of 2010 challenging both his conviction and sentence essentially contending that the trial court's findings were not supported by the evidence and that his defence was not considered. The prosecution filed and served the respondent with a notice of enhancement of sentence and urged the first Appellate Court to enhance the sentence to death. The court explained to the appellant the implication of the notice. He nevertheless elected to proceed with the appeal. After hearing the appeal, the first Appellate Court, *(Ouko & Omondi, JJ.)* concluded that there was ample

evidence that the appellant was sufficiently recognized as one

of the offenders and upheld the conviction. Regarding sentence, the learned justices stated:

> ***"Turning to the question of sentence, learned counsel for the respondent having filed and served the notice of enhancement of sentence, urged us to enhance the 14 years sentence to that of death. We explained to the appellant the implications of the notice. He, however elected to proceed with the appeal.***
>
> ***In terms of Section 354 of the Criminal Procedure Code, this court on appeal against sentence or conviction, may increase the sentence. In doing this, however, the court must avail the appellant an opportunity to show cause against the proposed enhancement. We did explain to the appellant the consequences of the notice and having understood those consequences, the appellant insisted on proceeding. The trial court found as a fact that:***
>
> *"...the defence herein is uncorroborated. It is founded on shaky grounds. I reject it. The ingredients of robbery with violence contrary to Section 296 (2) of the Criminal Procedure Code (sic) have been proved beyond any shadow of doubt. I have already pointed out the issue of injuries and weapons not having been brought out very clearly.*
>
> *In my very humble view, the evidence herein support a charge of simple robbery in line with Section 179 (2) of the Criminal Procedure Code... (sic)."*
>
> ***It would appear that the learned trial magistrate reduced the charges only on the grounds that the evidence of the type of weapon the appellant and his confederates had was contradictory and secondly that there was no evidence of injury to PW3. That consideration was erroneous in view of the***

ingredients of the charge of robbery with violence contrary to Section 296 (2) of the Penal Code set out earlier in this judgment. It was not

necessary to prove that the robbers were armed. It was enough to show that they were two or more. It was equally not necessary to demonstrate with a medical report that PW3 was beaten or struck. On our part, we are convinced from the evidence on record that the appellant and company were armed. The alleged contradiction of whether they were armed with a panga and axe or with a panga only is not of any significance in our view.

… In the result, this appeal fails and is dismissed. We order however, that the sentence of 14 years be and is hereby set aside and in place thereof we substitute death sentence."

3. During the virtual hearing of this appeal on 11th February 2026, the appellant who was present was represented by learned counsel M/s Muthoni while the respondent was represented by learned counsel Mr. Omutelema, Senior Assistant Director of Public Prosecutions. Both parties had filed detailed written submissions which they briefly highlighted.

4. The nub of the appellant's counsel's oral submissions is that the appellant was initially charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. However, in its judgment, the trial court sentenced him for the offence of simple robbery contrary to Section 296 (1) of the Penal Code and sentenced him to

serve 14 years in prison. The appellant's counsel's contestation is that the first Appellate

Court did not expressly set aside the conviction arrived at for the offence of simple robbery with violence or expressly impose a fresh sentence for the offence of robbery with violence. Counsel maintained that the record is silent on this issue. According to counsel, the conviction for the offence of simple robbery still stands, therefore, the sentence imposed by the first Appellate Court is not a lawful sentence for the offence of simple robbery under Section 296 (1) which prescribes a prison term not exceeding 14 years. Therefore, the sentence passed by the first Appellate Court is not supported by the law.

5. In her written submissions dated 21st May 2025, the appellant's counsel argued that the death sentence overlooked material factors of the offence and it was based on wrong principles of sentencing. Counsel submitted that notwithstanding the provisions of Section 204 of the Penal Code, a court has discretion to impose any other penalty that it deems fit and just considering the peculiar facts of the case. Counsel cited ***Ogalo s/o Owuora [1954] 24 EACA 70*** to support of the proposition that the court has powers to interfere with any sentence imposed by a trial

court if it is evident that the trial court acted on wrong principles, or it over

looked material factors, or the sentence is illegal, or manifestly excessive so as to amount to a miscarriage of justice. Counsel argued that the first Appellate Court overlooked the fact that the only ingredient met was that the appellant was in the company of two or more persons during the robbery and faulted the first Appellate Court for enhancing the sentence in the absence of any aggravating circumstances and for mechanically applying Section 204 of the Penal Code and also failing to provide reasons.

6. In addition, the appellant's counsel argued that sentence must be commensurate to the moral blameworthiness of the offender, and it should not exceed that which can be justified as appropriate or proportionate as was stated in ***Charo Ngumbaso Gaduo vs. Republic [2011] KECA 387***. Citing ***James Kariuki Wagana vs. Republic [2016] eKLR***, counsel maintained that the circumstances of the offence do not justify a death sentence.

7. M/s Muthoni also submitted that the first Appellate Court overlooked the fact that the appellant was a first offender and relied on ***Charo Ngumbaso Gaduo vs. Republic***

(supra) and

***Josephine Arissol vs. Republic* [1957] 1 EA 447** in support

of the holding that a maximum sentence should only be meted out to the worst offenders. Urging this Court to reduce the death sentence to 15 years, counsel cited ***James Kariuki Wagana vs. Republic*** (supra) and maintained that the court was plainly wrong because there were no aggravating circumstances to merit the death penalty. Lastly, counsel urged this Court to consider and apply the provisions of Section 333 (2) of the Criminal Procedure Code.

8. Mr. Omutelema opposed the appeal. He submitted that the first appellate court properly invoked the provisions of Section 354 (3) of the Penal Code which empowers the Court to *inter alia* increase the sentence. Therefore, the appellant's appeal was dismissed, his sentence of imprisonment for 14 years set aside and substituted with the death sentence. Counsel relied on ***Oluoch vs. Republic [2024] eKLR*** in which this Court held that:

> ***"…the fact remains that the accused was charged and tried under Section 296 (2), and if the magistrate wrongfully convicts under Section 296 (1), it would, in our view, be perfectly lawful for the High Court in its appellate jurisdiction to substitute the correct conviction. For in that event, the High Court would merely be doing what the magistrate***

could have lawfully done, namely, to record a conviction on the charge brought

under Section 296 (2), which was what the accused person was charged with and tried for before him. That in our view, is why the High Court under Section 354 (3) (a) (iii) of the Criminal Procedure Code may:

*"...alter the finding, alter the nature of the sentence**."***

9. Mr. Omutelema submitted that the omission to indicate that the conviction for the offence of robbery with violence contrary to Section 296 (1) of the Penal Code was quashed and a conviction for robbery with violence contrary to Section 296 (2) was entered is an error that is curable under Section 382 of the mandatory sentence for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code as was held by the Supreme Court *in* ***Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024)***.

10. This is a second appeal, therefore, our jurisdiction is limited to consideration of matters of law as stipulated by Section 361 of the Criminal Procedure Code. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived by the two courts below unless such findings are based on no evidence.

(See this

Court's decisions in ***David Njoroge Macharia vs. Republic [2011] eKLR), Chemogong vs. R. [1984] KLR 611*** and ***Ogeto vs. R. [2004] KLR 14).***

11. The germane issue in this appeal is whether the High Court upon finding that the evidence on record proved the ingredients of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code, it erred by not setting aside the appellant's conviction for simple robbery under Section 296 (1) of the Penal Code. According to the appellant's counsel, the conviction under Section 296 (1) still stands, therefore creating an illegality, hence the death penalty ought to be set aside.

12. This argument, attractive as it is, collapses for several reasons.

First, when the High Court finds that a trial court's sentence was too lenient or illegal (such as failing to meet a mandatory minimum), it can enhance that sentence while dismissing the appeal against conviction. The court "*sets aside*" only the earlier sentence to substitute it with a more severe one, rather than setting aside the underlying conviction. This power is derived from Section 354 of the

Criminal Procedure Code which provides that the High Court when it hears a criminal

appeal, it may take the following actions: (a) quash the conviction and acquit the appellant; (b) set aside the conviction and order that the case be tried again by a court of competent jurisdiction; (c) it can maintain the conviction but change it to a different offence that is supported by the evidence on record;

(d) it may increase (enhance) or reduce the sentence, or change its nature (e.g., from custodial to non-custodial or death).

13. Second, the first Appellate Court has a duty to rehear the case and can substitute a conviction for a more serious offence if the evidence supports it, provided the accused is not prejudiced and is given an opportunity to be heard. There is no dispute that the appellant was served with a notice of enhancement of sentence and he opted to proceed with his appeal. Third, the appellant was charged under Section 296 (2). The trial court held that the evidence proved the offence of simple robbery. However, this finding was overturned by the first Appellate Court which held that the evidence supported the offence of robbery with violence. This means that the conviction stood

but for the offence of robbery with violence. As stated above, it was not necessary to set aside the underlying conviction because it still stood.

14. Comparatively, the Supreme Court of India *in* ***Nagarajan vs. State of Tamil Nadu*** ***[2025] INSC 802*** clarified that if a notice of enhancement of sentence is issued, the conviction remains valid while the sentence is adjusted. Also, in ***Sachin vs. State of Maharashtra*** ***[2025] INSC 518*** the Supreme Court of India emphasized that the Appellate Court can maintain the conviction and alter the sentence "*with or without altering the finding*" of the trial court.

15. It is important to mention that the High Court clearly found that the evidence on record proved the ingredients of the offence of robbery with violence, which is the offence the appellant was charged with. What the appellant is not saying is that the High Court faulted the learned Magistrate for finding that the evidence supported a lesser offence, which is simple robbery and convicted him accordingly. The appellant is not questioning the finding that the evidence supported the ingredients of the offence of robbery with violence. The finding by the trial court, as was correctly held by the High Court was a serious misdirection which was properly corrected by the High Court. We say no more.

16. The next question is whether the High Court erred in substituting the sentence of 14 years with the death penalty. In ***Mburu vs. Republic [2025] KECA 421*** this Court in February 2025 dismissed an appeal against a death sentence for robbery with violence. The court found that the ingredients of the offence being armed with a gun and in the company of others were proved beyond reasonable doubt. Critically, the court held that the death penalty was the "*penalty provided by the law*" for the offence and found no merit in overturning it based the Supreme Court guidance in ***Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024).***

17. On a second appeal, this Court cannot review "*sentence severity*" if the sentence is legally provided for in the Penal Code. Also, this Court has frequently cited Supreme Court explicit clarification in ***Muruatetu & Ano. vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021)*** that its earlier decision in ***Muruatetu & Ano. vs.***

Republic; Katiba

Institute & 5 Others (Amicus Curiae) ***(Petition 15 & 16 of***

2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) only applies to mandatory death sentences for murder under Sections 203 and 204 of the Penal Code. It clarified that the said decision did not automatically invalidate mandatory or minimum sentences for other crimes, such as robbery with violence or sexual offences. Accordingly, we are unable to interfere with the sentence of death passed by the High Court, which is provided under the law. The upshot of the foregoing is that this appeal is devoid of merit. Therefore, we dismiss it in its entirety.

Dated and delivered at Nakuru this 25th day of March, 2026.

J. MATIVO

.....
... JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb

.....
... JUDGE OF APPEAL

A. O. MUCHELULE

.....
.... JUDGE OF APPEAL

I certify that this is
a true copy of the

original.

Signed.

DEPUTY REGISTRAR.