IN THE COURT OF APPEAL
AT NYERI

(CORAM: KANTAI, LESIIT & ALI-ARONI,

JJ.A.) CRIMINAL APPEAL NO. 100 OF 2015

BETWEEN

JAMES MWANGI NJUGUNA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nyeri (Ong'udi, & Ng'aah, JJ.) dated 15th December 2015

in

HCCRA No. 77 of 2013)
****

JUDGMENT OF THE COURT

1. **James Mwangi Njuguna,** the appellant herein, is before this Court by way of a second appeal, his first appeal having been dismissed by the High Court (Ong'udi, Ng'aah, JJ.) on 15th December 2015. Our mandate on second appeals is on matters of law only as provided under ***section 361(1)(a)*** of the Criminal Procedure Code and as stated by this Court in the case of ***George Morara Achoki vs. Republic [2014] eKLR:***

> ***"The jurisdiction donated to this Court by Section 361 (1) (a) Criminal Procedure Code in a second appeal like this one is to***

consider only issues of law raised in the appeal. We must avoid

the temptation to deal with matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court unless it is shown that there has been misdirection on the treatment of facts or the findings of fact are not based on evidence."

2. The appellant and one other person were charged before the Chief Magistrate's Court in Nyeri, with the offence of robbery with violence, contrary to ***section 296(2)*** of the Penal Code. The particulars of the offence were that, on 18th January 2012, at Mathari Area in Nyeri County, jointly with others not before the court, being armed with an offensive weapon, namely a toy pistol, they robbed **Stanley Kariuki Wairimu** of his Acer laptop valued at Kshs. 49,000/- and at or immediately before or immediately after the time of such robbery, threatened to use actual violence on the said **Stanley Kariuki Wairimu.**

3. Additionally, he faced an alternative count of possessing suspected stolen property contrary to ***section 323*** of the Penal Code. The particulars were that on 18th January 2012 at Mathari – Mweiga Road Junction, he was detained by PC Paul Kemei after being found in possession of a Samsung mobile phone, Serial Number 355055041956207, which was reasonably suspected of having been stolen or unlawfully obtained.

4. The appellant pleaded not guilty to both charges, and the matter proceeded to trial, during which the prosecution

called five witnesses. At the close of the prosecution's case, the trial

magistrate found that the appellant had a case to answer, and he was placed on his defence. After considering the evidence, the trial magistrate convicted the appellant of robbery with violence and sentenced him to death on the 1st count. He was equally convicted, but the sentence was held in abeyance. Dissatisfied with the verdict, the appellant appealed to the High Court, which upheld the conviction and sentence on the 1st count and found that the second count ought to have been an alternative charge to the first. The court found that the circumstances prevailing at the time of robbery were conducive to identifying the robbers, that PW2 was threatened with violence, and that the appellant was found in possession of the stolen laptop.

5. Aggrieved by the decision of the High Court, the appellant preferred an appeal to this Court on grounds which can be summarised as follows: the learned Judges erred in law by upholding the appellant's conviction. The prosecution's evidence raised numerous doubts and inconsistencies, and the allegations presented were insufficient to link the appellant to the crime in question. The conviction was upheld despite the lack of corroborating evidence. The appellate court failed to fully evaluate and analyse the entire record and did not comply with the provisions of ***section 169(1)*** of the Criminal Procedure Code.

6. Counsel for the appellant had filed supplementary grounds of appeal dated 1st April 2025. The additional grounds of appeal

are: that the learned Judges erred in upholding the conviction and sentence for the offence of robbery with violence, yet the charge sheet disclosed the offence of simple robbery; the prosecution did not discharge the burden of proof and that the sentence was excessive in the circumstances, thereby occasioning a gross miscarriage of justice.

7. The appellant has raised an issue with the judges' evaluation of the evidence, claiming that they failed in their mandate to re- evaluate the entire record so as to arrive at an independent decision. This would fall under our mandate as a matter of law and calls for this Court's attention, and in order to interrogate the complaint, we shall briefly consider the facts of the case in order to satisfy or negate the allegations.

8. **PW1, Kenneth Mburu Muthoni,** testified that on 18th January 2012 at around 5:00 pm, he left PW2 and Ian Kigweru in his cyber, where they were playing electronic games on the computer. He went to the Joy Hotel, where PW3 was employed. While at the hotel, PW2 called him and asked him to return to the cyber cafe to attend to a customer. PW1 then headed back to the cyber but, before he could enter, he saw a man walk out.

9. When PW1 got inside the cyber cafe, PW2 informed him that the man who had just left was looking for internet services and had gone to fetch his friends. PW1 told PW2 to call him

from the hotel if the man returned. Shortly thereafter, he heard PW2 shouting, "Thief! Thief!" PW1 immediately rushed out of the

hotel and saw PW2 chasing after two individuals who had run through a shortcut and had gone up the road. They learned from people around that the thieves had escaped on a red motorcycle. He called a Mathari Police Post officer who was at the time at a roadblock at King'ong'o, to inform him that his laptop had been stolen and that the thieves had fled on a red motorcycle. PW1 then boarded a motorcycle with PW3 and pursued the suspects towards the roadblock.

10. Upon arrival at the roadblock, PW1 found PW4 and other police officers with a young man who had been arrested and who had a laptop. PW1 recognised the arrested man as the person he had seen leaving his cyber cafe earlier. He noted that, as they were chasing them, the appellant kept looking back as they ran away. PW1 identified his laptop, an Acer model that was missing two keypads. He also recognised his HP mouse, which was still plugged into the laptop. A toy pistol was placed on top of the laptop. A vehicle from Nyeri Police Station arrived, and they went to the station, where the appellant was detained.

11. PW1 further testified that he had been given the laptop by his aunt, Esther Njeri Muchoki, who lives in Australia. In support of his claim, he produced a warranty for the laptop. He confirmed that only the laptop and the mouse had been stolen. He was not to identify the appellant's co-accused. PW1 recalled having seen the appellant's co-accused before the robbery, noting that he wore a red jacket and rode a red

motorcycle with the appellant and another person as pillion passengers. PW4

informed PW1 that the appellant’s co–accused had been riding the motorcycle but had escaped at King'ong'o junction.

12. **PW2, Stanley Kariuki Wairimu,** testified that on 18th January 2012 at 5:00 pm, while he was playing computer games with Ian at PW1's cyber cafe, a young man (the appellant) walked in and inquired about the owner of the cyber cafe and the cost of surfing the internet. PW2 answered his questions. Afterwards, PW1 (the owner of the cyber cafe) came and left. The appellant later returned with another man, when one of them held him by the neck and threw him onto a seat while pointing what seemed like a pistol at him. He then grabbed the laptop and fled, followed by his associate, who held Ian. Ian yelled 'thieves!' and both PW2 and PW1 chased after them. The thieves escaped on a motorcycle toward Nyeri. PW1 called the police and spoke to PW4. They later found the appellant, whom he recognised as the one who threatened him. He also noted seeing the appellant's co-accused earlier on a red motorcycle in a red jacket. Police at the King’ong’o junction contacted PW5, who came to escort the suspects to Nyeri Police Station.

13. **PW3, PC Japheth Omutelema** testified that on 7th May 2012 at about 11.00 pm, he was on patrol duty in Nyeri township with PC John Kipsani when they received a tip-off from an informer about a robbery that had occurred in the Mathari area on 18th January 2012. They proceeded to the area near Nairobi stage, where motorcycles were parked,

and arrested one

Charles, who was the appellant's co-accused. Charles was taken to Nyeri Police Station and subsequently charged.

14. **PW4, PC Paul Kimei** testified that on 18th January 2012, at around 5:00 pm, while conducting roadblock duties at Mathari junction with Cpl. Korir, PC Saul, and PC Kaguci, he received a phone call from PW1, who informed him that a laptop had been stolen from his cyber cafe and that the thieves were heading towards Nyeri. PW4 immediately alerted his colleagues. He was also informed that the thieves were on a motorcycle. After a few minutes, they spotted the motorcycle near the junction and stopped it. It had four men on it. PW4 and his colleagues ordered the men to disembark from the motorcycle. The appellant's co-accused was riding the motorcycle, while the appellant was a pillion passenger seated directly behind him. PW4 arrested the appellant, who had a laptop in his possession, while the others, including the appellant's co-accused, managed to escape on the motorcycle.

15. PW4 testified that, though they were armed, they could not shoot at the thieves as there were students boarding motorcycles at the junction. They searched the appellant and from the back pocket of his trousers, a toy pistol and a pink Samsung mobile phone, suspected to be stolen since the appellant had no receipt for it, were recovered. PW1 arrived at the junction on another motorcycle and found the appellant had been arrested. PW1 identified the laptop and

mouse as his possessions. PW4 then called the Nyeri Police Station, where

officers arrived and took the appellant into custody. PW4 noted that he did not accompany them to the police station because he was on duty.

16. **PW5, PC Steven Oloo,** testified that on 18th January 2012, he was on standby for crime response. He was detailed to collect a prisoner who had been arrested at the Nyeri-Nyahururu road junction. Upon arrival, he found the appellant, who had been arrested with a toy pistol, an Acer laptop, and a Samsung phone. The complainant, PW1, was also present at the scene, and he escorted them to the police station. PW5 recorded their statements, revealing that the appellant had entered PW1's cyber cafe armed with a toy pistol, stolen the laptop, and then jumped onto a waiting motorcycle. PW1 called PW4, who managed to stop the motorcycle and arrest the appellant, while three other accomplices escaped. On 7th May 2012, the appellant's co–accused was arrested by the police operating in Kahuria town. PW3 arrested him after receiving information that he was the rider of the motorcycle they had escaped on.

17. When placed on his defence, the appellant elected to give sworn statement. He stated that on 18th January 2012, he woke up in the morning and went to Nyeri to do shopping for his mother, and was thereafter to visit his grandmother at Mweiga. He arrived at Mweiga stage at 4:30 pm and boarded a vehicle, inside the vehicle, DW1 testified that he recognized the pastor of the church his mother attended.

Upon reaching Mathare junction, the vehicle was stopped by the police. The appellant

recognized one of the police officers as someone he had quarreled with at a club called Impala in Nyeri. When the police officer ordered the appellant to get out of the vehicle, he refused. However, on seeing the police call his colleagues who were nearby, the appellant decided to exit the vehicle. The police officer asked if he remembered him and threatened to teach him a lesson. The appellant was then tied to a metal post at the junction and the driver of the vehicle allowed to continue on. One of the police officers then called another officer on the phone, and when a Land Rover arrived from Mweiga, the appellant was ordered to board it. He was taken to the police station and was thereafter charged. He claimed to have purchased the phone that was confiscated by the police on 23rd July 2010 at Kshs. 9,490/-. He produced the receipt in court.

18. **DW2, Charles Kiringa Ndirangu,** the appellant's co-accused, testified that on 7th May 2012 at approximately 9:30 pm, while he was at work in Nyeri town, two police officers came looking for a person named Wangahu. According to DW2, they initially passed him, but then returned and insisted that he was Wangahu, the person they were looking for. Despite DW2's attempts to clarify that he was not Wangahu, the police arrested him and took him to the Nyeri Police Station. He informed them that he had left his motorcycle at his workplace, and they escorted him back to retrieve it before riding with him back to the police station. Later that night, a police officer informed him that

the charge in the occurrence book was that on 27th December 2011, he had rescued thieves who were being beaten

by members of the public. The following day, DW2 was arraigned in court, where he discovered that the charge read to him was different from what he had been told was in the occurrence book.

19. **DW3, Michael Wachira Mwangi,** testified that on 18th January 2012, at about 4:30 pm, he was in the same vehicle with the appellant, whom he referred to as Jane Njuguna Mwangi. The appellant informed him that he was headed to Mweiga. On arrival at Mweiga Mathari Junction, they encountered a roadblock. The police stopped the vehicle and asked the driver to produce a driving license, which he did, and the police proceeded to check the sticker. Thereafter, the police officer ordered the appellant to alight from the vehicle because he had not fastened his seat belt. The driver exited the vehicle, spoke with the police, and after about five minutes, he returned, and they continued their journey. The passengers asked the driver why he left the appellant behind with the police, and he responded that the appellant had been arrested. Since DW3 had the appellant's mother's number, he called her to inform her of the appellant's arrest.

20. This matter was heard on the Court’s virtue plat form. Both parties filed submissions, and counsel on record briefly highlighted them. Learned counsel for the appellant’s submissions are dated 1st April 2025. He reiterated the grounds of appeal namely; misapplication of the applicable provisions of the Penal Code; failure of the prosecution to

discharge its

burden of proof; excessive and unjust sentence; and misapplication of ***section 361(4)*** of the Criminal Procedure Code to the matter.

21. In addressing the misapplication of the relevant provisions of the Penal Code, learned counsel for the appellant references ***section 296(2)*** of the Penal Code. He argues that inasmuch as the charge sheet alleges that the appellant was armed with a toy gun, it is well established that the weapon must be inherently dangerous or offensive. A toy gun, by its nature, lacks the capacity to cause harm and does not meet the statutory requirement. Additionally, the charge sheet claims that the appellant acted in concert with others. However, the appellant's co-accused was subsequently acquitted by the trial court, calling this assertion into question. Learned counsel argues that, based on pure points of law, the lack of evidence showing that the appellant acted in concert undermines the application of ***section 296(2)*** of the Penal Code. Learned counsel avers that the correct interpretation of the offence is simple robbery as defined in ***section 295*** of the Penal Code, read with ***section 296(1).***

22. Regarding the prosecution's failure to meet its burden of proof, learned counsel for the appellant contends that the foundational principle established in ***Woolmington vs. DPP [1935] AC 462*** is that the prosecution bears the burden of proving every element of the offence beyond any reasonable doubt. The trial court, however, did not rigorously evaluate

the

evidence, and it allowed a conviction based on a standard that fell short. Counsel also relied on ***Sawe vs. Republic [2016] eKLR,*** where the court held that the prosecution must prove the case against the accused beyond any reasonable doubt, and suspicion, however strong, cannot provide a basis for inferring guilt which must be proved by evidence. Further counsel submits that in the instant matter, the inherent gaps and contradictions in the witness testimonies should have compelled the trial court to find that the prosecution did not meet its burden, thereby warranting an acquittal.

23. Regarding the issue of sentencing, counsel argues that the sentence meted out is excessively harsh considering the evidentiary shortcomings and mitigating circumstances. He points out that the principles of proportionality in sentencing were overlooked, referencing the Supreme Court case ***Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR.*** He contends that the trial court imposed a severe sentence without addressing reasonable doubts in the prosecution's evidence, resulting in a manifestly disproportionate punishment.

24. Additionally, counsel argues that a mandatory death sentence under ***section 296(2)*** is only applicable if specific statutory elements are met. The facts of the case indicate the use of a toy gun and do not show the appellant acted in concert with others, making the sentence excessive and

unjust. This warrants either

a remittal for resentencing or an outright reversal of the conviction.

25. Applying ***section 361(4)*** of the Criminal Procedure Code, counsel contends the evidence fails to support a conviction due to insufficient proof that the toy gun was dangerous or offensive. Furthermore, the claim of acting in concert is unsubstantiated, as evidenced by the acquittal of the co-accused. Thus, he requests that the conviction be quashed or the case remitted for proper sentencing under ***section 295,*** in conjunction with ***section 296(1).***

26. Learned counsel for the respondent filed submissions dated 1st April 2025. On whether the evidence adduced had inconsistencies, was not corroborated, and did not link the appellant to the offence, counsel argues that a wholesome review of the evidence confirms the appellant was seen at the cyber cafe at Mathari Trading Centre on 18th January 2012, inquiring about internet connection. Witnesses stated that he left and later returned to attack PW2 by grabbing him by the neck and threatening him with a pistol. The appellant, accompanied by another, stole a laptop and fled the scene. Witnesses PW1, PW2, and PW3 pursued the thieves, and PW1 immediately alerted the police after the incident. This testimony constitutes corroborative evidence.

27. On ground four, learned counsel for the respondent asserts that the High Court bears original and appellate jurisdiction over

various matters, including criminal cases. In the case of ***David Njuguna Wairimu vs. Republic [2010] eKLR,*** where this Court in *Okeno vs. R [1972] EA. 32,* stated that the role of the first appellate court is to analyze and re-evaluate evidence which was before the trial court, ultimately coming to its own conclusions while acknowledging the trial court's findings. Counsel submits that the record reveals that the High Court undertook comprehensive analysis and review of the entire record of the trial court and in so doing, observed several issues including that; the appellant ought to have been charged with handling stolen property as a separate count and not as an alternative count, as such quashed the conviction on this count; the appellant had proven ownership of the mobile phone confiscated upon arrest and directed that the same be returned to him forthwith; the appellant was found with the laptop which was under the possession of PW2 from whom it was stolen forcefully by the appellant who was armed with a toy pistol and that the appellant was arrested within a short period of time after the robbery occurred.

28. On ground five, counsel argues that the High Court issued its judgment in a language that the appellant understood. The court thoroughly examined the prosecution's evidence presented during the trial, considered the appellant's defence, and identified the elements of the offence. After this analysis, the court concluded that the prosecution had proven the case beyond a reasonable doubt.

29. On the death sentence, counsel for the respondent submits that the appellant was sentenced to death, which is the statutory mandatory sentence under ***section 297(2)*** of the Penal Code. He argues that the same has not been deleted or repealed from the statutes. Additionally, the appellant has not raised the issue of the sentence's constitutionality in the instant appeal, nor did he do so before the High Court.

30. We have considered the record and the submissions by both sides, and we are of the opinion that our task is to find out if the charge of robbery with violence was proved to the required standard and whether the death penalty is appropriate.

31. The evidence of the prosecution witnesses, in a very brief summary, is that the laptop was stolen from PW1's cyber by someone who had been there minutes before and who had engaged PW2 and was seen leaving the cyber by PW1. The appellant returned shortly thereafter with one other person and demanded to be given the laptop as he attacked PW2, and minutes later, he was stopped at a roadblock as PW1 had alerted the police, and he was found with the stolen laptop and a toy pistol.

32. The two courts below believed the facts as set out by the prosecution. We are bound by law to the facts established by the courts below. The record of the high court is also clear that it analysed and evaluated the evidence and arrived at its conclusion. For example, it set aside the second

conviction and

held that the second charge of being in possession of stolen property should have been a separate count. The court also found that the appellant had duly proved ownership of the phone and ordered it returned to him.

33. **Section 295** of the Penal Code defines robbery 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.***

Section 296 provides for the elements and punishment for the offence of robbery in the following terms:

> ***(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years***
>
> ***(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.***

34. Having agreed with the findings of fact by the two courts below. However, we are of the considered view that the two courts erred in convicting the appellant of the charge of robbery with violence and in the sentence meted out. The

facts of the case do not support a conviction under ***section 296(2)*** or the death penalty.

The appellant did not have an offensive weapon; he used a toy pistol to threaten PW2. Inasmuch as he used it for the commission of the offence, we cannot classify it as a dangerous weapon. The facts of the case squarely fall within the definition of ***section 295,*** read with ***section 296(1)*** of the Penal Code. In ***Ajode vs. Republic*** ***(Criminal Appeal 87 of 2004) [2004] KECA 168 (KLR) (25 June 2004) (Judgment),*** this Court had this to say on the three sections dealing with robbery.

> ***"In our view we cannot tell what conclusion, the magistrate and the judge of the superior court may have arrived at had they weighed the evidence as we have pointed out herein above. They may very well have found the evidence of identification parade valueless. The benefit of doubt must go to the appellant. Before we proceed to allow the appeal as we must do, we want to state that in our view, the learned Chief Magistrate, was clearly wrong in reducing the charge that was before him to that of robbery under section 296 (1). We do repeat here what this Court stated in the case of Johana Ndungu v Republic (Criminal Appeal No 116 of 1995 (unreported). It was stated inter alia as follows:***
> ***-***
>
> > ***"In order to appreciate properly as to what acts constitute an offence under section 296(2), one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredients of robbery under section 295, is use of or threat to use actual violence against any person or property***

at or immediately before or after and further in any manner the act of stealing. Thereafter the existence of the afore –described ingredients constituting

robbery are presupposed in three sets of circumstances prescribed in section 296(2) which we give below and any one of which if proved will constitute that offence under subsection.

1. ***If the offender is armed with any dangerous or offensive weapon or instrument; or***

2. ***If he is in company with one or more other person or persons or***

3. ***If at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other violence to any person.***

Analysing the first set of circumstances, the essential ingredients apart from the ingredients including the use or threat to use actual violence constituting the offence, e.g., robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in section 295 of the Penal Code, the offender was armed in the manner aforesaid then he is guilty of the offence under subsection (2) and it is mandatory for the Court to so convict him."

35. As a consequence of our finding that the appellant was not armed with a dangerous weapon, and further the co-accused having been released due to lack of evidence to the required

standard linking him to the offence, we find that the evidence

that the appellant acted in concert with others was short of the required standard, we therefore we quash the appellant's conviction of the offence of robbery with violence and, as a result, set aside the death sentence. In place of the earlier conviction, we convict the appellant of simple robbery under *section 296(1)* of the Penal Code and sentence him for the period so far served.

36. The appellant is to be released forthwith unless otherwise lawfully held.

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

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF
APPEAL ALI-
ARONI

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...
JUDGE OF APPEAL

I certify that this is
a true copy of the

original
Signed
DEPUTY REGISTRAR