IN THE COURT OF APPEAL
AT ELDORET

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

CRIMINAL APPEAL NO. ELD E151 OF

2022 BETWEEN

ISAAC MANYENGO ABUKU.....1ST APPELLANT
JOHN MUTONYI LUTENYO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Eldoret ***(G. K. Kimondo, J.)*** *dated 9th October 2017*

in

Consolidated Criminal Appeal No. 7 of 2012).

****

JUDGMENT OF THE COURT

1. Isaac Manyengo Abuku and John Mutonyi Lutenyo (the appellants) were jointly charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code at the Principal Magistrates' Court at Eldoret in Criminal Case No. 1891 of 2011. The particulars of the offence were that on 27th May 2011 at Musembe Village in Lugaro District within the Western Province, jointly robbed Japheth Walela Wekesa cash Kshs.12,400/-, one mobile phone make Nokia RG-19 (c) all valued at Kshs.21,400/- and immediately

after or at the

time of the said robbery, used actual violence to the said Japheth Walela Wekesa.

2. The first appellant faced an alternative count of handling stolen property contrary to section 322 (1) as read with section 322 (2) of the Penal Code. It was alleged that on 28th day of May 2011 at Misembe Village in Lugari District within Western Province, otherwise than in the course of stealing dishonestly retained one mobile phone make Nokia 19 (c) knowing it to be stolen property.

3. The appellants denied the charges and in the ensuing trial, the prosecution marshalled 5 witnesses. PW1 (the complainant) testified that on 27th May 2011 at about 6.00pm, he went to Musembe Market to buy fertilizer. However, it started to rain prompting him to seek shelter in a bar where he found both appellants whom he knew. He greeted them, sat with them and bought some beer for the 1st appellant but the 2nd appellant declined his offer. He left the bar at around 8.00pm. On his way home, he noticed the appellants following him. He recognized them because they were with him at the bar. They warned him not to raise any alarm and the 1st appellant held his hand at his back and

started ransacking his pockets.

Earlier in the day, he had sold a cow. He had planned to use the proceeds to buy fertilizer. He had used half of the money at the bar. He was pushed to the ground. Sensing danger, he called his wife and told her his life was in danger, but the appellants took his phone. The 1st appellant repeatedly kicked his genitals until he became unconscious. He was found in a certain house the following day by his wife among others. He sustained injuries on the left arm and right side of his chest and his genitals. As a result, he is unable to control his urine. He was admitted in hospital for 2 weeks. He reported the incident at Lumakanda Police Station where he was issued with a P3 form which he produced in court together with a discharge summary from the hospital. He said the 1st appellant locked him in the house and guarded him until the following day.

4. PW2 (the complainant's wife) recalled that on 27th May 2011, at 8.00pm, PW1 called her and told her he had been attacked and his life was in danger. However, the phone was suddenly disconnected. At about 1.00am, she received a call again from PW1's phone but no one spoke, nonetheless she could hear commotion. At dawn she

received a call from a Police Officer

who asked if her husband was at home. She told him he was not. The officer also told her he had received a call from PW1's phone but he did not talk. She proceeded to Musembe market early in the morning and found people gathered in groups and talking in low tones about a person found locked in a house who appeared to be dead. She proceeded to the said house and found PW1 unconscious. His hands were tied. It was her evidence that the house belonged to the appellants and it was locked from outside. She saw PW1's phone in the 1st appellant breast pocket and she told him so, but the 1st appellant warned her that if she raised any issues he would beat her. She replied that she just wanted to take her unconscious husband to the hospital and 1st appellant agreed. She was unable to lift him, so, she called an administration police officer who came after 20 minutes and found both appellants at the scene. She asked the appellants to return her husband's money but they started arguing among themselves that each should produce what he took. She took PW1 to Webuye District Hospital where he was admitted. His wrists were tied together and swollen and his clothes were muddy. It was her evidence that she found both

appellants at the house.

Members of the public demanded that the appellants open the house. Lastly, she said the Kshs.11,700/- which her husband had was not recovered.

5. PW3, an administration police officer was on patrol on 28th May 2011 when he received a call from PW1 whose number he had saved in his phone but the call was disconnected. He tried to call but the phone was switched off. He decided to text. The person called and introduced himself as Joshua, a police officer and switched off the phone. He called PW2 to establish the whereabouts of PW1. PW2 told him that PW1 had called earlier and said his life was in danger. He advised PW2 to go to Musembe Market and make inquiries. Later she called and told him she had found him unconscious in the 1st appellant's house. PW1 was rushed to hospital. Further, by the time the 2nd appellant was arrested, he was still drunk. He asked him why he claimed to be a police officer and the 2nd appellant answered that he was drunk.

6. PW4, a Clinical Officer examined the appellant and completed the P3 form. His findings on examination were injury to the chest, injury to the testicular veins, neck

tenderness and chest pain. In his opinion, a blunt object was used to inflict the

injuries, which he classified as harm. He produced the P3 form and the treatment notes.

7. PW5, (the Investigating Officer) was at the police station when

   2 administration police officers brought 2 suspects on allegation that they had assaulted and robbed PW1 Kshs.12,000/- who had since been admitted in hospital. He visited the appellants' house where they had detained PW1. He preferred the charges against them. He produced PW1's phone as an exhibit.

8. In his unsworn defence, the 1st appellant stated that on the day he was arrested, he had just come from his farm where he was working, only to find police officers who beat him demanding he admits violently robbing PW1 which he had not done. He said the 2nd appellant was brought and they were told they had robbed PW1 of his cash.

9. In his sworn defence, the 2nd appellant stated that while at the trading centre, he heard noise from the plot where the 1st appellant was staying. He went to the plot and found the 1st appellant tied with a rope and being beaten. He was also tied together with the 2nd appellant and they were taken

to the

police station where he was forced to accept what the police wanted.

10. The trial magistrate in his judgment dated 13th January 2012 was persuaded that the prosecution had proved the offence of robbery with violence to the required standard and convicted them and upon considering their mitigation, he sentenced them to death as provided by the law. However, the trial magistrate's judgment is silent on the alternative count of handling stolen property.

11. Aggrieved by the said decision, the appellants filed separate appeals in the High Court at Eldoret. The two appeals were consolidated on 9th February 2017. However, after analyzing the entire record, the parties' submissions and the law, the first Appellate Court dismissed the appellants' consolidated appeals for lack of merit.

12. The appellants are now before this Court seeking to overturn the said judgment. In his written submissions dated 30th January 2026, the appellants' counsel Mr. Oyaro framed and addressed the following issues: (a) whether the charge was fatally defective; (b) whether the prosecution evidence was

marred by contradictions; (c) whether the prosecution proved its case to the required standard; (d) whether the failure to comply with section 200 (3) of the Criminal Procedure Code vitiated the proceedings, and (e) whether the sentence should be interfered with.

13. Regarding the first issue, Mr. Oyaro submitted that the prosecution evidence materially differed with the particulars in the charge sheet namely, the exact property/amount, circumstances and the manner of the attack and the number of assailants. According to counsel, this variation was prejudicial to the appellants. Counsel faulted the first Appellate Court for failing to address its mind to the question whether the variance prejudiced the appellants rendering the conviction unsafe.

14. Expounding on the argument that the prosecution evidence was contradictory, Mr. Oyaro maintained that the contradictions highlighted above are not peripheral but they touch on what was stolen and whether the theft was proved, how the attack occurred, whether the violence was proved, who participated in the robbery, and whether the appellants' identity was established.

15. Mr. Oyaro insisted that the ingredients of the offence were not proved. He cited absence of credible prove of theft, violence and identification of the assailants, therefore, the conviction rests on suspicion and gaps.

16. In support of the ground that the trial court failed to comply with the provisions of section 200(3) of the Criminal Procedure Code, Mr. Oyaro relied on ***Peter Gitau Muchungu vs. Republic [2020] KECA 347 (KLR), Gitau vs. Republic [2020] KECA 33 (KLR)*** and ***Abang vs. Republic [2022] KECA 1019 (KLR)*** in support of the proposition that non-compliance with the said section is fatal.

17. Regarding sentence, Mr. Oyaro urged this Court to interrogate whether the two courts below treated sentence as mechanically pre-determined rather than requiring lawful exercise of discretion consistent with current jurisprudence and mitigation.

18. Mr. Okaka, the respondent's counsel submitted that the appellants were properly identified because they were not strangers to the complainant. Regarding the offence of

possession of stolen goods, he maintained that even though

PW1's phone was found with the 1st appellant, possession may be actual or constructive, therefore, both appellants stood in the same legal position when it comes to possession. To buttress the foregoing assertion, Mr. Okaka relied on ***Pius and Ano. vs. R [2022] KECA 460 (KLR).***

19. Regarding the alleged failure to comply with the provisions of section 200 of the Criminal Procedure Code, Mr. Okaka dismissed the said ground as inapplicable urging that all the witnesses testified before Hon. Onginjo who wrote the judgment which was delivered on her behalf by Hon. Mmasi. Lastly, Mr. Okaka submitted that the 1st appellant's defence of intoxication is being raised in this Court for the first time, therefore, it ought to be disregarded.

20. 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).***

21. First, we will address the question whether the ingredients of the offence of robbery with violence were proved to the required standard. This Court in ***Johana Ndungu vs. Republic [1996] eKLR*** determined the three sets of circumstances, which any one of them if proved, will constitute the offence of robbery with violence under section 296 (2) of the Penal Code as follows: *"(i) if the offender is armed with any dangerous or offensive weapon or instrument; or (ii) if he is in company of one or more other person or persons; or (iii) if at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."* (See also ***Oluoch vs. Republic [1985] KLR).*** Similarly, this Court in ***Dima Denge & Others vs. Republic [2013] eKLR*** stated: *"the elements of the offence under Section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to sustain an offence of robbery with violence."*

22. We will now address our minds to the question whether the appellants were properly identified as the persons who violently robbed PW1. In doing so, we are alive to the fact that we must satisfy ourselves that the appellants' identification was truthful and free from error. Therefore, we must evaluate the believability of the witness(es) who identified the appellants as the attackers. (See this Court's decision in

Francis Kariuki Njiru & Others vs. R. [2001] eKLR).

23. The trial court was satisfied that that all the ingredients of the offence were proved to the required standard. The 1st appellate court after re-evaluating the evidence at paragraphs 21 and 22 of the impugned judgment had this to say:

> ***"21… The appellants spent a considerable amount of time together at the bar at the trading centre. Secondly, the complainant was not a stranger to the 2nd appellant. He was an in-law. Both appellants conceded that were together with the complainant at the bar on the material day. The complainant testified that he knew both appellants well. When he left the bar they followed him; threatened to kill him; attacked him; and, robbed him of his money and mobile phone. There was moonlight.***
>
> ***22. I have reached the inescapable conclusion granted a combination of all those***

circumstances, the appellants were positively identified by the complainant. Doubt is completely removed because PW2 found the complainant unconscious in the house of the 1st appellant. She was

emphatic that both appellants were present; and that they were quarrelling over the spoils. Furthermore, the 1st appellant was still in possession of the complainant's phone."

24. As the above excerpt shows, the appellants were known to PW1. In fact, the 2nd appellant is said to be an in-law of PW2. PW1 spent time with them at a bar, a fact conceded by the appellants. They followed PW1 on his way home and he recognized them. The appellants did not dispute this fact. This is a case of recognition as opposed to identifying a stranger. Courts distinguish between identification of a stranger and recognition of a known person, asserting that recognition evidence generally carries higher probative value because it involves a familiar cognitive process rather than a fresh observation. When a witness identifies someone known to them, it is a process of recognition, which is a different and often more reliable cognitive process than identifying a stranger. Prior knowledge of an accused means a witness requires less time to make an accurate identification. The probative value of identification (including recognition) depends on testing the reliability of the observation against factors like lighting, proximity, visibility, and the extent of prior knowledge of the accused.

In this case, PW1 had prior

knowledge of the appellants. They sat in a bar at 6.00pm, and remained together until 8.00pm when PW1 decided to go home. The appellants followed him and they spoke even as they attacked him.

25. PW1's evidence on identification is reinforced by the testimony of PW2. She found both appellants in the house where PW1 was locked after the attack. This fact is not disputed. They allowed her to take him to hospital. She recognized PW1's phone in the 1st appellant's breast pocket. All these facts remain uncontested. The administration police officers arrested them at the same house where PW1 was found unconscious. There is no denial as to who owned or lived in the house. We find no reason to doubt the concurrent findings by the two courts below. We are satisfied that the identification was free from error.

26. The other ingredient is whether the appellant was in the company of two or more persons. To prove that an accused person in the offence of robbery with violence was in the company of two or more persons, the prosecution must establish beyond reasonable doubt that the accused acted

in concert with others during the commission of the crime.

Demonstrating that an accused person acted in concert (also referred to as "*acting with a common purpose*" or "*joint criminal enterprise*") in a robbery with violence case involves proving that the accused and at least one other person shared a common intention to commit the crime and actively participated in its execution. A common purpose can arise extemporaneously at the scene if several people act together with the intent to achieve a single common objective, such as surrounding a victim or performing coordinated tasks like attacking and robbing a victim or holding the victim while another steals from the victim. In this regard, the detailed evidence tendered by PW1 clearly shows that both appellants had a common intention, to violently rob PW1.

27. This brings us to yet another critical consideration, which is whether violence was proved in this case. There is clear evidence that the robbery was executed in a violent manner. Details of the injuries are clearly stated in the P3 form and the evidence of the Clinical Officer. PW1 was seriously injured to the extent of losing consciousness necessitating hospitalization. These facts remain

undisputed. Therefore, the ingredient of violence, was also proved in this case.

28. The appellants claim that the prosecution evidence was full of contradictions. This Court's duty is to determine whether there were contradictions and inconsistencies in the prosecution evidence to the extent that a reasonable person would be left in doubt as to whether the charges were proved, or whether the contradictions (if any), are so material that the trial court ought to have rejected the evidence. However, as was held in ***Twehangane Alfred vs. Uganda*** ***Crim. App. No 139 of 2001, [2003] UGCA,*** it is not every contradiction that warrants rejection of evidence. The Court subtly stated:

> ***"With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."***

29. Contradictions in evidence of a witness that would be fatal must relate to material facts and must be substantial. Minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is only when such inconsistencies or contradictions are substantial and

fundamental to the main issues in question before the court and therefore necessarily

create some doubt in the mind of the trial court that an accused is entitled to benefit therefrom. The correct approach is to read the evidence tendered holistically. The cited examples of contradictions include what was stolen, how the attack occurred, whether violence was meted and who participated in the robbery. True, the charge sheet states a sum of Kshs.21,400/- being the total value of the cash stolen and the phone. PW1 said the cash was Ksh.12,400/-. PW2 said the cash was Kshs.11,700/-. PW5 stated that the cash was Ksh.12,000/-. In all honesty, there is a slight difference on the exact value of the items/cash stolen which in our view is insignificant. It does not go to the root of the case. A slight disparity in the total amount does not injure the credibility of the evidence nor does it suggest that no robbery took place. It is basic truth that courts don't expect witnesses to be carbon copies of one another. In fact, if three witnesses gave an identical, word-for-word account, courts would likely suspect they had rehearsed their story. As was held by the Supreme Court of Appeal of South African in ***S vs. Oosthuizen 1982 (3) SA 571 (T),*** it is rare for two people to describe an occurrence in the exact same way. Slight differences in

detail

are seen as a sign of truthfulness rather than dishonesty. The Court looks at whether the witnesses agree on the material aspects (the core facts) rather than whether they agree on every tiny detail.

30. In our considered opinion, the approach is not to reject evidence just because there are contradictions. Instead, the Court asks: (a) Are the contradictions material? Do they go to the heart of the case, or are they about minor "*peripheral*" matters (like the color of a shirt or the exact minute something happened)? (b) Is the witness being dishonest? A witness might be mistaken about a detail due to the passage of time or the trauma of the event, but still be a "*truthful*" witness. (c) The "Holistic" Approach. In ***S vs. Hadebe 1998 (1) SACR 422 (SCA),*** the South African Supreme Court of Appeal emphasized that evidence shouldn't be broken into little pieces and analyzed in isolation. The court looks at the "*mosaic*" of the evidence as a whole. If the "*big picture*" painted by the witnesses is consistent and probable, the small gaps or slight differences between them don't invalidate the case. (d) Reliability vs. Credibility. A witness might be credible (they

believe they are telling the truth) but not reliable (their

perception was off). The Court weighs the slight differences to see if they stem from a lack of reliability (e.g., poor lighting at the scene) or a lack of credibility (e.g., intentional lying). Applying the above considerations to the issue at hand, we find that this ground fails.

31. Regarding the alleged failure to adhere to the provisions of section 200 (3) of the Criminal Procedure Code, as was pointed out by the respondent's counsel, all the prosecution witnesses and the defence testified before Hon. Onginjo who wrote the judgment which was delivered on her behalf by Hon. Mmasi. Therefore, section 200(3) was inapplicable in this case.

32. The appellant argues that the charge was defective in that its particulars varied from the evidence tendered. The alleged variation is basically the disparity in the exact value of the stolen items. To our mind, as was held by the High Court in ***George Mwai Mwangi vs. Republic [2016] eKLR***, minor defects in the charge sheet do not result in a failure of justice where the elements of the crime are established beyond reasonable doubt. In any case, such a defect was curable under section 382 of the Criminal

Procedure Code which provides that:

Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice: Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raisedat an earlier stage in the proceedings.

33. By now arising from our conclusions on each and every issue discussed above, it is clear that the appeal on conviction has failed.

34. The next question is the appellants' invitation to this Court to interfere with the death penalty imposed on them. The appellants' counsel urged this Court to interrogate whether the two courts below treated the sentence as mechanically pre- determined rather than requiring lawful exercise of discretion consistent with current jurisprudence and mitigation. 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. Joshua Gichuki Mwangi* [2024].**

35. In ***Hassan vs. Republic* [2024],** this Court dismissed a second appeal against a death sentence, ruling it was a "*non-starter*" due to jurisdictional limitations. Under section 361 of the Criminal Procedure Code, the Court of Appeal on a second appeal cannot review the severity of a sentence that is legally prescribed; it can only review matters of law.

36. On a second appeal, this Court cannot review "*sentence severity*" if the sentence is legally provided for in the Penal Code or any other law enacting the charged offence. Also, this Court has frequently cited Supreme Court clarifications in ***Muruatetu & Ano. vs. Republic; Katiba Institute & 5 Others* (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)** that its

decision *in*

Muruatetu & Ano. vs. Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015

(Consolidated)) [2017] KESC 2 (KLR) *was* specific to section

204 of the Penal Code (murder) and did not automatically invalidate the mandatory death penalty provided under section 296 (2) of the Penal Code for the offence of robbery with violence. Accordingly, we are unable to interfere with the sentence of death passed by the trial court and affirmed by the High Court. 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 10th day of April, 2026.

J. MATIVO

.....
JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

I certify that this

a true copy of the

original.

Signed.

DEPUTY REGISTRAR.