

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL APPEAL NO. E102 OF 2024**

**ALEXANDER MUANGE KILONZO.....**  
**APPELLANT**

**VERSUS**

**REPUBLIC.....**  
**RESPONDENT**

*(Being an Appeal against the judgment of Kithimani MCCR No. 1299 of 2017 by Honourable Khapoya S. Benson in Criminal Case delivered on 12<sup>th</sup> November 2024)*

**JUDGMENT**

**A. Introduction**

1. The appellant was charged and convicted of the offence of Robbery with violence contrary to Section 296 (2) of the Penal Code, and sentenced to death.
2. Aggrieved by that decision, he lodged this appeal on the grounds that the Learned Trial Magistrate erred in law and in fact by: failing to observe that the evidence adduced on robbery was not enough as base for conviction; not considering that the first report of the complainant was doubtful according to other witnesses' testimonies; convicting him based on witnesses evidence which was fully contradictory; relying on prosecution evidence that was

riddled with contradictions and discrepancies leading to selective judgment; and failing to give due consideration on the plausible defence.

## **B. Background**

3. Before the trial court, the appellant was charged with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence are that on 24<sup>th</sup> December 2017 at Kalandini village in Yatta sub-county within Machakos County while armed with a dangerous weapon namely a knife, he robbed Gregory Mutunga Muthama of cash 1700/=, one mobile phone make Techno valued at Kshs 12, 000/= and immediately before the time of such robbery used actual violence on the said Gregory Mutunga Muthama.
4. He pleaded not guilty to the charge and to prove its case, the prosecution called 4 witnesses.

## **C. Prosecution's case**

5. **PW1, Gregory Mutunga Muthama**, testified that on 24<sup>th</sup> December 2017 at about 3:30 p.m., he left his home in Katangi village to look for a goat to buy for his family. After failing to find one at Kalindilo, he proceeded towards Ngomano. Along the way, near a river, he encountered the accused person standing in the stream, seemingly using a phone. That as he approached, he moved aside to give way,

but the accused followed him and confronted him, accusing him of walking with pride and questioning how much money he had. PW1 responded that the road was for everyone and that each person had their own money. That the accused then grabbed him by the collar and punched him on the head. A struggle ensued, during which PW1 pushed the accused to the ground and attempted to flee. However, the accused got up, produced a knife and advanced towards him. Fearing for his safety, PW1 engaged him again in an attempt to disarm him. During the struggle, the accused bit PW1 on the forehead and ultimately stabbed him on the right side of the chest. The accused then reached into his pocket and took Kshs. 1,700 and his Techno mobile phone. He disarmed the accused after sustaining cuts to his fingers, and fled the scene, leaving the accused behind.

6. PW1 testified that he was assisted by Good Samaritans and reported the incident to the police. At the station, he found the accused already present. Police officers facilitated his transfer to Matuu Hospital, where he was treated, stitched and admitted. A P3 form dated 25<sup>th</sup> December 2017 was filled. PW1 identified his recovered Techno phone and the knife used in the attack as exhibits, stating that the knife was the one he took to the police station. He further testified that his phone was recovered from the accused's possession after it was called while at the station.

7. He stated that although he did not personally make any calls after the incident, his children called the phone, leading to its recovery from the accused. He stated that he did not instruct anyone to contact his family, but noted that neighbours who assisted him after the attack could have informed them. He recalled that about six people helped him cross the river, though he could not remember their names and none of them recorded statements with the police. PW1 testified that the incident occurred on a road accessible to vehicles, though none passed during the approximately 30 minutes the altercation lasted. He stated that some individuals, including Daudi Makonyongo, witnessed the struggle from a distance of about 10-15 metres but did not intervene, while another person, Benjamin Kivindu, recorded a statement. He reiterated that he knew the accused well, as they were from the same village and had previously lived together without any prior disagreements. He also stated that despite the violent struggle, the accused had no visible injuries and the blood on the knife was his.

8. **PW2, Daudi Ndambuki Makonyongo** testified that he was a farmer residing in Ngomani village and that he knew both the complainant, Gregory Mutunga Muthama (PW1) and the accused person, who are neighbours and from the same locality. He stated that on 24<sup>th</sup> December 2017 in the evening, he was walking from Ngomani towards Kalandini,

following behind the accused person. That as they approached the home of one Musili, he saw the complainant, PW1, coming from the opposite direction. Upon meeting, the accused blocked the complainant's path and even when the complainant attempted to move aside, the accused continued to obstruct him. That shortly thereafter, the two engaged physically, holding each other and falling to the ground. PW2 observed the complainant push the accused down. He stated that after the struggle, the complainant stood up and PW2 noticed that he was bleeding from the chest. That upon seeing the blood, PW2 became frightened and ran away from the scene, fearing that he too might be stabbed.

9. **PW3, PC Nicholas Yegon (No. 107741)** attached to Kisiiki Patrol Base testified that on 24<sup>th</sup> December 2017 at about 6:30 p.m., he was in a meeting with the OCS at the Yatta crime office when he and other officers heard a commotion at the report office. Upon proceeding there, they found two individuals quarreling. One of them, who later became the complainant (PW1) was bleeding profusely with a blood-stained shirt while the other identified as the accused was in possession of two mobile phones. PW3 also observed that the complainant had a knife which he stated had been taken from the accused during the altercation. The officers intervened, recorded the complainant's report and facilitated his transfer to hospital for treatment. The

accused Alex Mwange was arrested at the station. PW3 later visited the scene of the alleged stabbing and robbery and was assigned as the investigating officer by the OCS. He testified that although the accused was initially charged with assault causing actual bodily harm, the charge was later substituted with robbery with violence.

10. He testified that according to the complainant's report, he had been attacked while on his way to buy a goat, during which the accused stabbed him with a knife and robbed him of Kshs. 1,700 and a mobile phone. PW3 confirmed that the phone was recovered from the accused and he produced both the recovered phones as exhibits, as well as the knife allegedly used in the attack. PW3 further testified that during the course of investigations, he established that there had been prior tension between the complainant and the accused, allegedly arising from claims that the accused had an affair with the wife of the complainant's brother which may have contributed to bad blood between them.

11. He further testified that the complainant arrived at the station first and that the accused followed him there, allegedly attempting to continue the assault even at the report office. He reiterated that the complainant had the knife at the station, having disarmed the accused. PW3 confirmed that the accused was found with two phones upon search, though no cash was recovered. He admitted that no inventory was prepared for the recovered items and

that other officers who assisted in the arrest were not called as witnesses. He also confirmed that he visited the scene the following day and completed investigations before charging the accused. PW3 maintained that the accused was violent at the station and had to be subdued by several officers.

12. He reiterated that, although he did not witness the incident, the complainant's report and the recovery of the phone from the accused formed the basis of the charge. He concluded by restating that the complainant had been injured in the course of the incident while on his way to purchase a goat during the Christmas period.

13. **PW4, Peter Mwaniki**, a clinical officer and the officer in charge at Matuu Level 4 Hospital, testified that he examined and treated the complainant on 24<sup>th</sup> December 2017 following an alleged assault. He referred to the P3 form which he produced in court as an exhibit, and confirmed that the complainant had been referred from Kithimani and was attended to at Matuu Hospital. According to PW4, the complainant presented with a history of assault said to have occurred at about 4:30 p.m. on the same day. Upon examination, the complainant was in pain and bleeding, with multiple injuries affecting various parts of the body, including the head, face, chest, upper limbs, and jaw.

14. Specifically, PW4 noted a superficial human bite wound on the head, swelling and bruising of the lower lip, a tender and swollen forehead, and two loose premolar teeth on the left lower jaw. There was also swelling and tenderness of the jaw, a stab wound to the chest consistent with a sharp object such as a knife, and deep cut wounds on the second, third, fourth, and fifth fingers. Additional injuries included multiple bruises on the left wrist joint and a swollen, tender left knee joint. PW4 assessed the injuries as having been caused by both a sharp object, a knife and human bites and classified the degree of injury as “harm.” He further indicated that the approximate age of the injuries was one day. He clarified that he did not know the accused person and had no prior knowledge of him.
15. With this evidence on record, the prosecution closed its case. Upon an appraisal of the evidence, the trial court found that a prima facie case had been established against the appellant and placed him on his defence.

#### **D. Defence case**

16. The accused gave unsworn evidence and called one other witness.
17. **DW1, Alexander Mwange Kilonzo**, testified that he was a businessman residing in Kalukuni. He recalled that on 24<sup>th</sup> December 2017, he had been invited to a party at his brother in law’s home in Ngomano. He left his home at

about 9:30 a.m., passed through Karandini and proceeded to Ngomano where he attended the gathering, took drinks and later became intoxicated. He stated that he eventually left the party and began his journey back home. According to DW1, while at Karandini, he encountered the complainant, Gregory Mutunga with whom he had previously disagreed several months earlier over an issue involving his sister-in-law. He testified that the complainant confronted him over that issue and an argument ensued. He alleged that the complainant grabbed him and tore his clothes, prompting a physical struggle during which they both fell to the ground. DW1 stated that in the course of the struggle, he produced a knife and held the complainant but the complainant cut him on the fifth finger. He screamed, attracting nearby fishermen, upon which the complainant allegedly ran away towards Mwala.

18. DW1 further testified that he then proceeded to Kithimani, where he met a local headman, Joseph Katino, to whom he reported that he had been injured by the complainant. That thereafter, he boarded a motor vehicle and went to Yatta Police Station, where he made a report to a police officer called Ms. Otieno. He stated that while at the station, the complainant arrived and went to the senior office, returning with police officers including PW3, who allegedly assaulted him and placed him in the cells. He stated that he was initially charged with assault, which he denied, but

later, in April 2018, the charge was substituted to robbery with violence which he also denied. He further testified that during subsequent court hearings, he saw the phone and knife produced as exhibits but maintained that he was not responsible for the alleged offences.

19. **DW2, Joseph Kahonia** testified that he is a businessman residing in Kalandini. He stated that on 24<sup>th</sup> December 2017 at about 10:00 a.m., the accused, Alexander Mwange, passed by his shop and informed him that he was heading to a party at his brother's place. He further testified that at around 12:00 noon, he heard screams but did not go out to investigate. Shortly thereafter, he saw the accused passing by while lifting his hand and stating that he had been injured by the complainant, Gregory Mutunga. According to DW2, the accused did not stop but indicated that he was proceeding to report the matter to the police, after which he left. DW2 added that on 26<sup>th</sup> December 2017, he went to the police station where he learned that the accused had been arrested. He met PW3, to whom he offered assistance but was informed that he would instead testify as a defence witness. He stated that the matter thereafter proceeded with the accused facing the charges.

20. At the close of the defence case, the trial court evaluated the totality of the evidence and a judgment was delivered on 12<sup>th</sup> November 2024 where the court convicted

the appellant herein for the offence of robbery with violence and sentenced him to death.

### **E. The Appeal**

21. The appeal is as set out in the earlier paragraphs of this judgment. The appeal was disposed of by way of written submissions. The Appellant's submissions are dated 30<sup>th</sup> June 2025 while the Respondent's submissions are dated 27<sup>th</sup> October 2025.

### **Appellant's submissions**

22. The Appellant challenges both conviction and sentence, advancing three principal grounds in his amended submissions.

23. On the first ground, the appellant contends that the trial court erred in law by imposing a sentence under Section 296(2) of the Penal Code that is unconstitutional, particularly the death sentence. He argues that such punishment violates fundamental rights and freedoms guaranteed under Articles 25(a), 27, 28 and 29(f) of the Constitution, including the right to dignity and freedom from cruel, inhuman, or degrading treatment. He submits that the death penalty, especially as administered by hanging is outdated and inconsistent with modern constitutional values and international human rights standards, including those reflected under Articles 2(5) and

(6) of the Constitution and international instruments such as the ICCPR. He further argues that the trial court failed to apply a purposive and liberal interpretation of the Constitution as required under Article 20 and disregarded evolving jurisprudence, including decisions of superior courts that have questioned the mandatory nature of the death sentence. According to the appellant, the sentence imposed was excessive, disproportionate, and failed to balance the objectives of punishment, including deterrence, retribution, and rehabilitation, contrary to the Judiciary Sentencing Policy Guidelines, 2023.

24. On the second ground, the appellant submits that the trial court failed to properly consider his mitigation, in violation of Sections 216 and 329 of the Criminal Procedure Code. He argues that mitigation is a critical component of the sentencing process and that the court ought to have taken into account his personal circumstances, including the fact that he was a first offender. He contends that the imposition of a death sentence without due regard to mitigation denied him the opportunity for a fair and individualized sentence and extinguished any prospects of rehabilitation.

25. On the third ground, the appellant argues that the trial court failed to consider that the offence was committed under the influence of alcohol, as provided for under Section 13 of the Penal Code. He submits that intoxication

impaired his judgment and ought to have been taken into account either as a defence or as a mitigating factor, particularly in assessing whether he had the requisite intent to commit the offence. He further contends that there existed a prior grudge between him and the complainant arising from a personal dispute involving his brother's wife, which led to the altercation. According to the appellant, the evidence on record, including that of the investigating officer, pointed to a personal dispute that escalated into an assault rather than a premeditated robbery with violence. He emphasizes that he reported the matter to the police himself, which, in his view, negates the element of criminal intent required for robbery. He therefore urges the court to find that the case was essentially one of assault and not robbery with violence, or in the alternative, to extend the benefit of doubt to him and impose a more lenient sentence.

### **Respondent's submissions**

26. On the first ground, the respondent submits that the sentence of death imposed under Section 296(2) of the Penal Code is lawful and constitutional. It relies on the decision of the Supreme Court decision in **Godrick Simiyu Wanga v Republic Supreme Court Petition No. E030 of 2023**, where the Court reaffirmed that the death penalty remains a valid sentence for the offence of robbery

with violence. The respondent emphasizes that the Supreme Court clarified that the principles in the **Muruatetu** decision, which addressed the mandatory nature of the death sentence, apply only to murder cases and not to offences such as robbery with violence. That accordingly, the trial court did not err in imposing the sentence as it was bound by the law as it stands.

27. On the second ground, the respondent contends that the appellant was indeed given an opportunity to mitigate before sentencing and therefore there was no violation of Sections 216 or 329 of the Criminal Procedure Code. It argues that although the appellant mitigated, the trial court correctly noted that the law prescribed a mandatory death sentence thereby limiting its discretion in sentencing.

28. On the third ground, the respondent submits that intoxication does not automatically constitute a defence under Section 13 of the Penal Code unless specific conditions are met. It argues that the appellant failed to prove that he was intoxicated to the extent that he did not know what he was doing or that his actions were wrong or that he was rendered temporarily insane. The respondent further points out that no medical evidence was produced to support the claim of intoxication. Additionally, it contends that the circumstances of the offence particularly the fact that the appellant was armed with a knife, attacked

the complainant and stole from him demonstrate intention and premeditation, thereby negating any suggestion of incapacity due to intoxication.

29. In conclusion, the respondent submits that the appeal lacks merit on all grounds and prays that it be dismissed with the conviction and sentence affirmed.

#### **F. Analysis and determination**

30. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of **Pandya v R {1957} EA 336; Ruwala v R {1957} EA 570** and **Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR** where the Court of Appeal held that:

***“the duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We***

***do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”***

31. Having considered the evidence adduced before the trial court for the prosecution, the defence, the grounds of appeal and the submissions filed by the parties., I discern the following issues for determination;

- a. Whether the prosecution proved the offence of robbery with violence contrary to Section 296(2) of the Penal Code beyond reasonable doubt.*
- b. Whether the appellant’s defence including intoxication under Section 13 of the Penal Code and alleged prior grudge, raised a reasonable doubt.*
- c. Whether the sentence imposed was lawful and constitutional, including whether mitigation was properly considered.*

32. On whether the offence of robbery with violence was proved beyond reasonable doubt, Section 296 (2) of the Penal Code provides that;

**“(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.**

33. Thus the offence of robbery with violence under Section 296(2) of the Penal Code is established where any one of the following ingredients is proved:

*a. The offender is armed with a dangerous or offensive weapon; or*

*b. The offender is in the company of one or more persons;*

*c. The offender uses or threatens to use actual violence.*

34. In the present case, the evidence of PW1 was that the appellant was armed with a knife, attacked and stabbed him and stole Kshs 1, 700/= and a mobile phone. This evidence was partially corroborated by PW2, who confirmed that the appellant blocked PW1, engaged him in a physical struggle and that PW1 was bleeding from the chest shortly thereafter, though he did not witness the stabbing. PW3, testified that the appellant was found in possession of two phones, one of which was identified as belonging to PW1. PW4's medical evidence confirmed multiple injuries including a stab wound to the chest consistent with use of a sharp object.

35. The appellant has challenged the conviction on grounds of contradictions and inconsistencies. However, upon analysis, the alleged inconsistencies are not set out. It is trite that whoever alleges must prove. The appellant bears

the onus where he alleges contradictions and inconsistencies to set them out so as shift the burden to the respondent to rebut them. It is not enough to just state in the grounds of appeal that there were contradictions and inconsistencies. Further, save for pleading in the grounds of appeal that the evidence was not sufficient, the appellant has not submitted or demonstrated to this Court which particular aspects of the evidence of the prosecution were insufficient as to prove the offence of robbery with violence.

36. In this case, the core narrative remains consistent that is, there was a violent confrontation between the appellant and PW1, PW1 sustained serious injuries and his phone was recovered from the appellant. The appellant's argument that the matter was merely an assault arising from a personal grudge is not persuasive. Even where a prior grudge exists, the offence may still amount to robbery with violence if the elements are proved. The key issue is whether robbery accompanied by violence occurred. PW1's evidence that his phone and money were taken, coupled with recovery of the phone from the appellant, strongly supports the element of robbery.

37. Further, the recovery of the complainant's phone from the appellant shortly after the incident invokes the doctrine of recent possession. The Court of Appeal in **Malingi v Republic [1989] eKLR** held that where recently stolen

property is found in possession of an accused and no reasonable explanation is given, a presumption of guilt arises. The appellant did not provide a credible explanation for possession of PW1's phone.

38. On the totality of the evidence, this court finds that the appellant was armed with a knife, he inflicted actual violence on PW1 and he robbed PW1 of his phone. Accordingly, the ingredients of robbery with violence were proved beyond reasonable doubt. I hasten to add that in his submissions, in fact the appellant raised the issue of intoxication. This goes to the aspect of defence and not insufficient evidence. It presupposes that yes, the incident occurred as claimed but it was due to intoxication. Consequently, I find that on the first issue, the trial court properly found that robbery with violence was proved.
39. Regarding the second issue for determination, the alleged defence is the appellant was intoxicated, and that secondly, the incident arose from a prior grudge and it was a mere case of assault.
40. First on intoxication, the defence of intoxication is only available in circumstances set out in Section 13(2) of the Penal Code. A person who commits an offence when intoxicated is not automatically excused from the consequences of his act. The first circumstance is that the intoxication must have been involuntary. Secondly, it must be shown by reason of intoxication one is temporarily

insane so that he does not know what he is doing or that it is wrong and lastly under section 13(4) of the Penal Code were accused by reason of intoxication is incapable of forming a specific intent.

41. Thus section 13 of the Penal Code is clear therefore that intoxication is not a defence unless it renders the accused incapable of understanding his actions or is induced without his consent. In **Kupele Ole Kitaiga vs Republic (2009) e KLR CR 27 OF 2007**, the court said:-

**“A clear message must also go on out to those of the appellant’s ilk who deliberately induce drunkenness as a cover up for criminal acts. Unless a plea of intoxication accords with provision of section 13 of the Penal Code, It will not avail the accused and does not avail the appellants in this particular case.”**

42. In the present case, I have evaluated the evidence and at the trial court, the appellant never raised the issue of intoxication as a defence. In his defence, he mainly stated that he met the complainant and a confrontation ensued between them over the complainant’s sister in law. He merely stated that he had taken alcohol. There was no medical or other evidence of intoxication. There is no evidence that he was intoxicated and incapacitated so as not to comprehend what was happening. I shudder to think how intoxication would apply selectively so as not to

comprehend that the robbery was unlawful, but remain 'sober' to recount that they had a confrontation with the complainant over his sister-in-law.

43. Further, the appellant's actions, that is, arming himself with a knife, engaging in a struggle and proceeding to the police station demonstrates awareness and control. His actions show deliberate intentions. He did not give any explanation why he was going around armed with a knife.
44. Consequently, I find that the defence of intoxication as raised does not suffice and I dismiss that ground of appeal.
45. On the alleged grudge, even PW3 alluded to possible bad blood. However, this does not displace the prosecution's case. A grudge may explain motive but does not negate commission of an offence where evidence is otherwise sufficient. In this matter, the prosecution evidence is clear that the appellant was the aggressor. The complainant attempted to give way but as stated by PW1 and corroborated by PW2 the appellant could not let the complainant pass. Hence, I find that the alleged grudge, though not proved, was not material as to cause the appellant to accost the complainant.
46. On self defence or mutual fight, the evidence does show a struggle. However, the degree of force used by the appellant particularly the use of a knife causing a stab wound to the chest was clearly disproportionate. Moreover, the theft element is not explained by self

defence. Taken as a whole I find that the appellant's defence of intoxication and existence of a grudge was insufficient and correctly dismissed by the trial Court.

47. The issues of severity and constitutionality of sentence and mitigation are intertwined and I consider them together.

48. On the legality of the death sentence, the law remains that Section 296(2) of the Penal Code prescribes the death penalty. The position of the Supreme Court in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** was later clarified in the directions of 2021 where the Supreme Court expressly stated that the decision applies only to murder under Section 204 of the Penal Code and not to robbery with violence.

49. This position was reaffirmed in **Goddrick Simiyu Wanga v Republic (Supreme Court Petition No. E030 of 2023)** where the Court emphasized that lower courts must not extend the **Muruatetu** case to Section 296(2). Accordingly, the trial court cannot be faulted for imposing the sentence provided by law.

50. On mitigation, the record shows that the appellant was accorded an opportunity to mitigate. However, the trial court indicated that it had no discretion due to the mandatory nature of the sentence. While there has been evolving jurisprudence at the High Court and Court of Appeal suggesting that even in robbery with violence cases

courts may exercise discretion, the binding position from the Supreme Court remains as clarified above.

51. Based on the foregoing, the conclusion becomes irresistible that this appeal against both conviction and sentence is dismissed.

52. Orders accordingly.

Dated, signed and delivered at Machakos this 9<sup>th</sup> day of April, 2025.

**RHODA RUTTO**

**JUDGE**

**In the presence of;**

.....Appellant

.....Respondent

Selina Court Assistant