REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

HCCRA E054 OF 2023

(Consolidated with HCCRA E053 OF 2023)

SAMUEL MBURU NYOIKE alias KAMWANA.....1ST APPELLANT

SIMON NGANGA WAINAINA alias SIMO.....2ND APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(Being an appeal against the judgment and sentence of Hon. J. Irura delivered in Kigumo PM's Criminal Case No. 119 of 2017 on 18th April, 2023)

JUDGMENT

1. The two consolidated appeals arise from the judgment of the trial court in which the appellants, Samuel Mburu Nyoike alias Kamwana and Simon Nganga Wainaina alias Simo, were jointly tried on two counts of robbery with violence.
2. In Count I, the appellants were charged with robbery with violence contrary to **section 295 as read with section 296(2) of the Penal Code**. The particulars were that on the night of 8th May 2017 at about 2300 hours at Kenol area in Kandara Sub-County within Murang'a County, jointly with others not before court, while armed with

dangerous weapons namely rungus and pangas, they robbed one Jane Ruth Wanjiru Mburu of cash, a mobile phone make Huawei Y360, a purse, cards, a handbag, an apron and a school bag, and immediately before such robbery used actual violence on her.

3. In Count II, the appellants were charged with robbery with violence contrary to section **295 as read with section 296(2) of the Penal Code**. The particulars were that on 9th May 2017 at about 0200 hours at Kenol area in Kandara Sub-County within Murang'a County, jointly with others not before court, while armed with dangerous weapons namely rungus and pangas, they robbed Wanyoike Kibocho of Kshs. 800/= and immediately before such robbery used actual violence on him.
4. The appellants pleaded not guilty to both counts and the matter proceeded to full trial. The prosecution called six witnesses. The defence case comprised the sworn evidence of the two appellants.

Facts at trial

5. PW1 was Wanyoike Kibocho. He testified that on the night of 8th and 9th May 2017 he was asleep in his house when he heard the window being hit. He was asked to open the door and to give money. As he was with his daughter, he caused his trousers to be thrown out and the attackers removed Kshs. 800/= therefrom, but said that was too little. They then entered the house through the window. PW1 testified that

the 1st appellant hit his left hand and broke it while the 2nd appellant hit him on the head. He stated that the attackers were three in number and that the third person shone a torch which enabled him to see the two appellants. He stated that although the attackers had covered parts of their faces, their eyes were visible, and he knew the appellants beforehand as they came from the same village. He was later treated and produced treatment documents.

6. PW2 was Mary Wanjiru Wanyoike, PW1's daughter. Her evidence was that she was at her father's home when, at about 1.00 a.m., the attackers struck the window and demanded money. She engaged them in conversation, passed out the trouser given by PW1, and shortly thereafter the attackers entered through the window. She testified that she saw the appellants and a third person who held a torch for them. According to her, the 1st appellant struck PW1 on the hand while the 2nd appellant hit him on the head. She was also injured on the face and ear. She later attended an identification parade and identified both appellants.
7. PW3 was Jane Ruth Wanjiru Mburu. She testified that on the night of 8th May 2017 at around 11.00 p.m., while she was at home with her children and her son Kennedy, three men entered the house and attacked them. She and her son were cut and assaulted. The attackers demanded money and phones and stole assorted items including a school bag, a brown bag with a purse, an apron, cards, a Huawei

mobile phone and cash. PW3 was unable to identify the attackers, but she later identified some recovered items as hers.

8. PW4 was Simon Karanja, who produced P3 forms and medical evidence on behalf of a colleague whose handwriting he knew. His evidence showed that PW1 sustained multiple injuries, including healing scars and fractures, and that the degree of injury was assessed as maim. He also testified on the injuries sustained by PW2 and PW3, which were consistent with assault by sharp and blunt objects.
9. PW5 was PC Kennedy Otieno. He testified that while on patrol with colleagues on the night in question, they received a report that robbers had attacked people around Kenol near the Catholic Church. They rushed to the scene, found PW3 and another injured person, and took them to hospital. Later, at about 2.00 a.m., they received a further report of another robbery at PW1's home and also responded thereto.
10. PW6 was PC James Nkoile, the investigating officer who took over the matter. He testified that he corroborated the other witnesses' evidence, that an identification parade was conducted at Kandara Police Station, and that PW2 identified the two appellants. He also produced the recovered exhibits.
11. At the close of the prosecution case, the trial court found that a prima facie case had been established and placed the appellants on their defence.

Defence Case

12. DW1 was Samuel Mburu Nyoike alias Kamwana, the 1st appellant. He gave sworn evidence and denied involvement in the offences. He stated that police officers went to his house, searched it, arrested him and took his mobile phone. He challenged the manner in which the identification parade was conducted and complained that he was not booked with any exhibit connected to the case.

13. DW2 was Simon Nganga Wainaina alias Simo, the 2nd appellant. He also gave sworn evidence and denied the charges. He too challenged the identification parade and contended that the police investigation was inadequate.

14. After considering the evidence adduced and the rival positions before it, the trial court convicted both appellants on the two counts of robbery with violence. From the material placed before this court, the sentence imposed was death on Count I, while sentence on Count II was held in abeyance.

The Appeal

15. Being dissatisfied with both conviction and sentence, the appellants lodged separate petitions of appeal both dated 20th May 2023, citing the following grounds of appeal:

a. THAT the learned trial magistrate erred in law and fact by not according the appellant a fair hearing, thereby

contravening Articles 25(c), 49(1)(f) and 50(2)(e), (g) and (h) of the Constitution.

b. **THAT the learned trial magistrate erred in law and fact by reaching a conviction on the basis of a defective charge sheet which was stamped on 18th July 2017 after the appellant had already been apprehended and presented in court on 27th June 2017, a difference of about three weeks and twenty-one days.**

c. **THAT the learned trial magistrate erred in law and fact by basing the conviction on a fabricated first report allegedly made on 19th June 2017 while the appellant was already in custody, having been arrested on 10th June 2017.**

d. **THAT the learned trial magistrate erred in law and fact by basing the conviction on shaky and unsteady identification made at night (at about 2300 hrs and 0200 hrs) under unfavourable conditions, and further on a first report which mentioned unknown assailants with no description, contrary to the guidelines in *R v Turnbull*.**

e. **THAT the learned trial magistrate erred in law and fact by failing to consider that the identification parade was conducted unprocedurally, contrary to the**

provisions of the National Police Service Standing Orders (Chapter 46), and further by failing to call the parade officer who would have shed light on the same.

f. **THAT the learned trial magistrate erred in law and fact by failing to note that the prosecution did not call crucial witnesses, including the arresting officer, the investigating officer, and the parade officer, whose evidence would have addressed material gaps in the prosecution case.**

g. **THAT the learned trial magistrate erred in law and fact by failing to recall PW1 at the request of the appellant, thereby contravening section 150 of the Criminal Procedure Code and further failing to comply with section 200 of the Criminal Procedure Code.**

h. **THAT the learned trial magistrate erred in law and fact by failing to evaluate the evidence in accordance with section 169 of the Criminal Procedure Code and by failing to adequately consider the appellant's defence.**

i. **THAT the learned trial magistrate erred in law and fact by convicting the appellant on the basis of mere suspicion, which was insufficient to sustain a conviction.**

j. **THAT the learned trial magistrate erred in law and fact by imposing a harsh and maximum mandatory death sentence under section 296(2) of the Penal Code without taking into account the appellant's mitigation and the circumstances of the offence.**

k. **THAT the appellant prays for leave of this Honourable Court to adduce additional grounds of appeal at the hearing, the appeal having been lodged before obtaining typed proceedings and the judgment.**

16. The appeal was canvassed by way of written submissions. On record are submissions by the respondent dated 2nd February 2025. At the time of writing this judgment, no submissions by the appellants are in the court file nor on CTS.

Respondent's Submissions

17. In the written submissions on record dated 2nd February 2025, the respondent opposed the appeal in its entirety and urged this Court to uphold both the conviction and sentence.

18. Counsel for the respondent submitted that the prosecution proved the offence of robbery with violence beyond reasonable doubt.

It was contended that the evidence of PW1 and PW2 established positive recognition of the appellants during the second robbery. Counsel emphasized that the two witnesses knew the appellants prior to the incident, as they came from the same locality, and that the circumstances of the attack, including the use of torch light and close proximity, were conducive for proper identification. It was further submitted that the identification was not that of strangers but of persons well known to the witnesses, thereby rendering the evidence more reliable.

19. On the complaint regarding identification, the respondent submitted that the trial court properly directed itself on the law and was alive to the conditions prevailing at the time of the offence. It was further argued that the identification parade conducted only served to corroborate the already existing evidence of recognition.

20. With regard to the alleged failure to call certain witnesses, including the arresting officer, the parade officer and other police officers, counsel submitted that the prosecution is not obligated to call a superfluity of witnesses and that the witnesses called were sufficient to establish the ingredients of the offence. Reliance was placed on section 143 of the Evidence Act, to the effect that no particular number of witnesses is required to prove a fact.

21. On the alleged violation of **section 200 of the Criminal Procedure Code** and the failure to recall PW1, the respondent

submitted that the record demonstrates compliance with the law and that the appellants were accorded an opportunity to be heard. It was contended that no prejudice was occasioned to the appellants and that the proceedings were conducted fairly.

22. Counsel further submitted that the appellants' defences were mere denials and did not displace the cogent and consistent evidence adduced by the prosecution witnesses. It was argued that the trial court duly considered the defences and correctly found them to be unmeritorious.

23. On sentence, the respondent submitted that the offence of robbery with violence carries a mandatory sentence under **section 296(2) of the Penal Code** and that the sentence imposed was lawful. The Court was therefore urged not to interfere with the sentence.

24. In conclusion, the respondent submitted that the appeal lacks merit and prayed that it be dismissed in its entirety, with both conviction and sentence upheld.

Analysis and Determination

25. 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; Ruwalla 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 analyze 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.''***

26. Having considered the record placed before this court, the grounds of appeal and the respondent's submissions, I am of the view that the issues falling for determination are:

i. **Whether the prosecution proved the two counts of robbery with violence against the appellants beyond reasonable doubt.**

ii. **Whether the appellants' fair trial rights were violated by the manner in which the trial proceeded,**

particularly in relation to section 200 of the Criminal Procedure Code and the alleged failure to call additional witnesses.

iii. **Whether the appellants' defences and the complaint on sentence warrant interference by this court.**

27. On the first issue, **sections 295 and 296(2) of the Penal Code** define robbery and robbery with violence. Under **section 296(2),** the offence is proved if, at the time of the robbery, the offender is armed with a dangerous or offensive weapon, or is in the company of one or more other persons, or wounds, beats, strikes or uses personal violence on the victim. The statutory text states those ingredients disjunctively, and Kenyan appellate courts have repeatedly affirmed that proof of any one of them, together with theft and identity, is sufficient.

28. In the present appeal, there can be no real doubt that violent robberies occurred. PW3 testified that three men invaded her house at about 11.00 p.m., assaulted her and her son, and stole assorted property. PW1 and PW2 testified to a second attack a few hours later at about 1.00 a.m. to 2.00 a.m., in which the attackers violently entered their house, stole money and injured them. PW4's medical evidence materially corroborated the injuries sustained by the complainants. The evidence therefore proved theft accompanied by

violence, the presence of multiple assailants, and the use of dangerous weapons.

29. The more contested question is identity. The law is settled that evidence of visual identification at night must be examined with the greatest care. Even recognition may be mistaken if conditions were difficult. At the same time, recognition of a person already known to a witness is more satisfactory and more reliable than identification of a stranger. Those twin principles emerge from **Wamunga v Republic** and **Anjononi & Others v Republic.**

30. Applying that caution to the facts before me, I am satisfied that the evidence of PW1 and PW2 was not mere dock identification nor the identification of strangers. Both said they knew the appellants beforehand. PW1 stated that the appellants came from the same village and that he had known them since birth. PW2 similarly placed them as persons whose homes were not far from theirs. Their evidence was also that the attackers spoke to them, remained within close proximity, and were illuminated by torchlight from the third assailant. While the attack occurred at night, it was not a fleeting glance. It was a direct and violent encounter within the complainants' house and compound.

31. PW2's evidence further gained support from the fact that she later picked out both appellants at an identification parade. Even if the appellants criticised the parade, the conviction in this matter did not

rest on parade evidence alone. There was already direct evidence of recognition by persons who said they knew the appellants before the incident. In my view, the trial court was entitled to treat that evidence as recognition evidence and to rely on it, having warned itself of the conditions prevailing at night.

32. As regards Count I, PW3 did not identify the appellants by face. That, however, was not fatal. Her evidence firmly established the fact of the first robbery. The trial court also had before it evidence that items stolen from her were later recovered in the wake of the second incident and were identified by her. When that circumstance is considered together with the evidence of PW1 and PW2 that the same gang of three men attacked them within the same locality only hours later, armed in similar fashion and using similar violence, the chain of evidence linking the two incidents was, in my view, sufficiently strong. The trial court cannot therefore be faulted for concluding that the same gang was involved in both attacks.

33. I therefore find that the prosecution proved beyond reasonable doubt that the offences charged occurred and that the appellants were among the perpetrators. The ingredients of robbery with violence were amply established in both counts.

34. On the second issue, the appellants complained that the proceedings offended **section 200 of the Criminal Procedure Code** and that PW1 was not recalled. Section 200(3) expressly requires that

where a succeeding magistrate takes over a partly-heard matter, the accused person must be informed of the right to demand that witnesses be resummoned and reheard. The section also makes clear that a conviction may be set aside only where material prejudice is shown. (kenyalaw.org)

20. The appellate courts have also repeatedly cautioned that section 200 should be used sparingly, and only where the exigencies of the case require it. In Abdi Adan Mohamed v Republic and Ndegwa v Republic, the Court of Appeal underscored that the critical question is whether the accused was informed of the right under the section and whether any real prejudice resulted. (Kenya Law)

21. In the matter before this court, the material shared indicates that the respondent specifically pointed to the record as showing that the trial court complied with section 200(3), heard both sides, and directed that the case proceed from where it had reached because of the age of the matter and difficulty in tracing witnesses. No contrary portion of the proceedings has been placed before this court to demonstrate that the appellants were denied the right guaranteed by section 200(3), or that they suffered any specific prejudice as a result. In those circumstances, I am unable to hold that the proceedings were vitiated on that ground.

22. The complaint that certain witnesses, including the arresting officer or the initial investigating officer, were not called is equally

without merit. S**ection 143 of the Evidence Act** is explicit that no particular number of witnesses is required to prove any fact. The question is always whether the witnesses called were sufficient to prove the essential ingredients of the charge. Here, the prosecution called the complainants from the two robberies, a medical witness, a police officer who responded to the reports, and the investigating officer. Those witnesses covered the occurrence of the robberies, the violence inflicted, the recovery of exhibits, and the question of identity.

23. In the circumstances of this case, the evidence on record was not rendered barely adequate merely because additional officers were not called. The omission did not create a gap so fundamental as to raise a reasonable doubt. I therefore reject the complaint that the appellants' fair trial rights were violated by failure to call more witnesses.

24. On the third issue, I have considered the defence tendered by each appellant. In substance, both appellants denied involvement, attacked the police investigation, and challenged the fairness of the identification parade. Those were matters the trial court considered. The difficulty with the defences is that they remained bare denials against direct recognition evidence from PW1 and PW2, supported by medical evidence and the surrounding circumstances of the two robberies. No existing grudge or motive to falsely implicate the appellants was demonstrated. The evidence of PW1 and PW2 placed the appellants at the scene not as strangers but as persons already

known to them. In my view, the learned trial magistrate cannot be faulted for rejecting the defences as not raising a reasonable doubt.

25. On sentence, the complaint was that it was harsh and excessive. **Section 296(2) of the Penal Code** provides for the sentence of death for robbery with violence. The recent decision of the Court of Appeal in **Ashibabi v Republic** reaffirmed that, following the Supreme Court's clarification in **Muruatetu II,** challenges to the constitutional validity of the mandatory death sentence in robbery with violence cases must be properly filed and argued; they are not automatically available on ordinary appeal merely because sentence is complained of as harsh. (Kenya Law)

26. In the present appeal, no distinct constitutional challenge to sentence was mounted on the material before this court. In those circumstances, and given my finding that the conviction was safe, I find no basis upon which to interfere with the sentence as recorded.

27. In the result, I find that the consolidated appeals lack merit. The prosecution proved both counts of robbery with violence beyond reasonable doubt; no material violation of the appellants' fair trial rights has been demonstrated; the defences were properly rejected; and no proper basis has been laid for interference with sentence.

28. Accordingly, the appeals are hereby dismissed. The convictions on both counts are upheld. The sentence imposed by the trial court is also upheld. It is so ordered.

29. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED ONLINE AT KAKAMEGA THIS 24TH DAY OF APRIL, 2026.

S.N MBUNGI

JUDGE

In the Presence of:-

CA: Velma

Appellant present online.

Mwakio for ODPP present online.