REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ITEN
CRIMINAL APPEAL NO. E005 OF 2025

OLIVER KIBET KIPTOO…….....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeal against the Judgment and sentence delivered by Hon. E. Kigen – PM on 5/02/2025 in Iten Senior Principal Magistrate's Court Criminal (Sexual Offences) Case No. E245 of 2024*)

JUDGMENT

1. The Appellant was charged in the case referred to above with the offence of robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the **Penal Code**. The particulars were that the Appellant, on 19/02/2024 at about 2300 hours at Kamarin Village in Keiyo North sub-county, Elgeyo Marakwet County, robbed one **Jemimah Mogure Mwangi** of her Samsung A4 mobile phone, cash Kshs 6,000/-, and NHIF Card, all valued at Kshs 26,000/-, and at the time of the robbery, wounded the said victim on the head.

2. The Appellant also faced the alternative charge of handling stolen goods contrary to **Section 322(1)** of the **Penal Code**. The particulars were that on 25/02/2024, at about 0030 hours at Kiptingo Village in the same sub-Country and County as above, otherwise in the course of stealing, dishonestly received or retained a National Identity Card No. [……] knowing or having reason to believe it to be stolen property.

3. The Appellant pleaded not guilty to the charges and the case then proceeded to full trial in which the Prosecution called 5 witnesses. On his part, the Appellant was his only defence witness. At the close of the trial, the Court convicted the Appellant on the main charge, and sentenced him to serve 20 years' imprisonment.

4. I will now recount the testimonies and evidence presented before the trial Court.

5. **PW1** was the complainant, **Jemimah Mugure Mwangi**, who testified that she is a business lady at Kamariny where she operates a wines and spirits outlet. She stated that on 19/02/2024, at around 11.00 pm, the Appellant, who is well known to her, went to her shop and greeted her, that he was with one Samson whom he introduced as his boss, both were drunk and they went to the back door. She testified that the Appellant kept coming to the

front and they talked, but when it reached the time of settling the bill, the Appellant told her that he did not have any money, upon which his alleged boss offered to pay for the Appellant a sum of Kshs 50/-, and the Appellant promised to send the balance and thus requested for **PW1's** phone number, which she gave him. She stated that another short man then appeared and started quarrelling with the Appellant and they fought, that when her boss came to inquire, they stated that the fight was about some alleged forced sale of land. She stated that when they closed the shop and while on her way home, she met the Appellant standing behind an electricity pole, he called her but she told him that it was late and she was rushing home, the Appellant pounced on her and slapped her on the left cheek, pushed her to the ground and her phone and bag dropped as she fell down. She testified that the Appellant then picked a stick and hit her on the head twice, she screamed since she was next to a gate and there was security light, and the Appellant picked **PW1's** phone, Identity Card, and Kshs 6,000/- which was in the bag and ran away with them. She stated that she managed to stand up and went home where she informed her sister about the incident, they then phoned her boss who asked them to go the road where he picked them and took them to the **Moi Teaching & Referral Hospital** (**MTRH**) where she was treated and her wounds stitched, and later reported the matter to the police. She reiterated that at the scene where the Appellant attacked her, there was security lights including a sensor and CCTV, and that she saw the Appellant well since he called her using her child's name. She wondered why the Appellant attacked her as she never wronged him and they had agreed that the Appellant would send the balance via Mpesa to her phone. She stated further that she knows the Appellant as "**Baba Ashley**", he has 2 children, and that they used to live in the same plot before he moved out in December of that year. She denied harbouring any grudge against the Appellant. In cross-examination, she stated that there were other customers in the bar, and that the Appellant came with his boss and others, and they came with a trailer. She stated further that when the Appellant called her while she was on her way home outside, he called her as **Mama June**. She also stated that no neighbour responded to her screams when the Appellant was assaulting her, and that her husband did not live with her.

6. **PW2** was **David Kimani Wanyoike**. He testified that he was in Karuna on 19/2/2024 when he phoned his wife (**PW1**) at around 11.00 pm but he was surprised when he asked whether **PW1** had reached home but the phone was responded to by a man. He stated that **PW1** had saved his name as "***My Love***", and the receiver, told him that he will have to write a Statement since he is saved in the phone as "***My Love***". He stated that he did not interrupt the receiver as he sounded agitated. He testified that he then phoned his sister and it is **PW1** who received the call and informed him that she had been attacked and was bleeding, upon

which he asked her to seek medical attention. He testified that he came to know the receiver of the phone call on the following day after he learnt that he was a neighbour, the Appellant herein, and that he knew the receiver and his family, although they had never interacted but he had seen him around for about 2 months. He, too, denied harbouring any grudge against the Appellant. In cross-examination, he stated that the Appellant told him that the phone belonged to his (Appellant's) wife. He also stated that after speaking with **PW1**, he again phoned the number at around 2.00 pm and the Appellant again answered the call. He further stated that the Appellant's house was opposite his, and he recognized the Appellant's voice since he used to hear him speak. He, too, stated that he knew the Appellant as "**Baba Ashley**.

7. **PW3** was **Corporal Simeon Onyango**, attached at the Iten Police Station. He testified that he was at the Station on 24/02/2024 when at around 10.30 pm, he received a phone call from the Officer Commanding the Station (**OCS**) asking him to rush to Kiptingo where a suspect had been arrested by members of the public. He testified that he went to the area and on reaching the scene, they found a man (Appellant) lying down surrounded by a crowd, upon interrogation, he learnt that the man had stolen a phone (Samsung make) from a lady (**PW1**) by snatching it, and also cash. He stated that he then phoned the complainant (**PW1**) who had earlier made a report, they then took the Appellant to hospital, and upon inspection, he was found with **PW1's** Identity Card, and 2 Safaricom Sim Cards and 1 Airtel Sim Card whose owners were unknown. In cross-examination, he stated that he was the arresting Officer, and that the Identity Card was handed over to him by members of the public who had recovered it from the Appellants behind his phone cover, and the Sim Cards were also found in his pocket.

8. **PW4** was **Police Constable Shikanda Henry**, also attached at the Iten Police Station, the Investigation Officer in this matter. He testified that **PW1** came to the Station on 24/02/2024 and reported that she had been hit with a stone on the head by the Appellant, and she had been stitched, and had a bandage on the head, upon which he gave her a P3 Form. He testified that he recorded statements, members of the public later arrested the Appellant and they (police) were called to the scene, where, on arrival, they found the Appellant had been beaten by members of the public, who had also recovered an Identity Card belonging to **PW1**, and also 3 Sim Cards. He stated that the Appellant was then taken to hospital and booked. He then stated that **PW1** had after closing her shop, the Appellant called her by name and demanded to know why she had allowed her husband to beat him, that he then picked a stone and hit her before taking her Samsung A4 phone, Kshs 6,000/- cash, and

Identity Card. He also reiterated that **PW1** came to the Station and reported the Appellant. He then produced the Identity Card and the 3 Sim Cards. In cross-examination, he stated that the time of the attack on **PW1** was established to have been around 8.00 pm.

9. **PW5** was **Philemon Kitony**, from at the Iten Referral Hospital. He produced a P3 Form for **PW1** whom he stated, went to the facility on 20/02/2024 and reported that she had been assaulted by a person known to her. He stated that **PW1** had a cut wound on the head which was also swollen, the right hand had bruises on the olecranon and right leg, and that she went to the hospital within 72 hours. He stated that he gave **PW1** medicine and stitched the wound.

10. At the close of the Prosecution case, the trial Court found the Appellant to have a case to answer and put him on his defence.

11. The Appellant then testified as **DW1**, and gave sworn testimony. He denied committing the offence but agreed that on 19/02/2024, he returned home from Embobut at around 9.00 am, and that his boss' son asked him to show him a wines and spirits shop, upon which he took them to one where they parked their trailer and lorry and entered only to find **PW1** working there, and who greeted him as she was a neighbour. He testified that prior to working at the wines and spirits shop, **PW1** had asked him to get her a job and he did not even know that she had taken a job at the wines and outlets spirit. He stated that he took a soda while his boss took alcohol. He then stated that shortly thereafter, some people started fighting, and assaulted them, his boss and the son left, and **PW1** asked them to leave upon which he got a motor-cycle and went home at around 5.40 pm. He stated on the following day he went for his errands and after a few days, he was informed that the police were looking for him, and when he returned home, he was attacked at his door, he fell down, he screamed and neighbours came, and he was taken to hospital. He testified that he was later brought to Court and he was surprised when he was charged with the offence of robbery with violence. He confirmed that the door to his house is adjacent to that of **PW1**, and that their street has several street-lights and CCTV cameras, as a result whereof at night, the area is like daytime. He complained that there is nothing to show that **PW1** had a Samsung phone, and stated that he is the one who welcomed **PW1** to the plot and their children even play together. According to him, **PW1** had a "***mulika***" (cheap) phone and has never owned a smart phone, thus she could not also have had cash of Kshs 6,000/-. She observed that **PW1** did not produce a receipt, and also that she normally uses a motor-cycle taxi to return home, and it is thus not true that she usually walks home. He observed further that there is no eye-witness

and no CCTV footage was produced. He also stated that **PW1's** husband only comes once a month, and he was surprised when he claimed that he identified the Appellant's voice while speaking on phone. He claimed that **PW1's** children sometimes even took lunch in his home because she does not return home sometimes. He stated that the only business he had with **PW1** is when he purchased clothes for his child from her, but he agreed that she had reported him at the Police Station. He also contended that the stone he is alleged to have used to hit **PW1** was not produced, and claimed that **PW1** did not mention the Identity Card and it is the Investigating Officer (**PW5**) who introduced the allegation. He however agreed that the 3 Sim Cards were found on him when he was searched. He also claimed that contrary to **PW1's** assertions, her employer denied that he (Appellant) fought with anybody, and also denied that he (employer) he is the one who took **PW1** to hospital. In cross-examination, he stated that he met **PW1** at 7:30 on Sunday and he was at home at 11.00 pm sleeping. He denied that he sustained any injuries at the bar.

12. As aforesaid, the trial Magistrate, by her said Judgment delivered on 5/02/2025, then convicted the Appellant on the main charge, and after mitigation, sentenced him to serve 20 years imprisonment.

13. Aggrieved with the decision, the Appellant filed this Appeal by way of the Petition dated 12/02/2025 listing 13 grounds. The conduct of the Appeal was later taken over by **Messrs Hamba Caroline Advocates**, who then filed the Amended Petition dated 17/06/2025 containing a whooping 21 grounds as follows:

i) **THAT the Learned trial Magistrate erred in matters of law and fact by failing to note that the prosecution side failed to prove their case beyond reasonable doubt as required by law in the Evidence Act Section 107 of Laws of Kenya**

ii) **THAT the Learned trial Magistrate erred in matters of law and fact by not making a finding that the ingredients of the robbery offence were never established. It was the prosecution evidence that the Appellant was alone, was not armed among other ingredients. The effect of not proving these ingredients was that it disclosed another offence or no offence at all in that regard.**

iii) **THAT the trial Magistrate erred in law and fact by failing to appreciate the danger of relying on the evidence of a single identifying witness in difficult circumstances and dock identification.**

iv) **THAT the Learned Magistrate erred in matters of law and fact by finding him guilty based on a defective charge sheet violating Section 134 of the Criminal Procedure Code. The particularization in the charge sheet did not match the evidence presented notably a witness indicated that an identification card was among the stolen items which is not listed as items that were stolen in the charge sheet.**

v) **THAT the Learned trial Magistrate erred in matters of law and fact when the prosecution charged the Appellant with the alternative charge of handling stolen items which did not have an inventory and the doctrine of recent possession was not applied in his case as it was an afterthought and frame-up.**

vi) **THAT the Learned Magistrate erred in law and fact by not making a finding that the exhibited items were never part of the listed item that were stolen namely the sim card plates and the Identification Card. The CCTV footage was never exhibited to prove their case among others.**

vii) **THAT the Learned trial Magistrate erred in law and fact by not finding the complainant was not credible as it took her a whole week before he was arrested for the alleged offence considering they were neighbours.**

viii) **THAT the Learned trial Magistrate erred in law and fact by convicting and sentencing the Appellant based on the evidence PW2 whose evidence was just hearsay.**

ix) **THAT the Learned trial Magistrate erred in law and fact where he rejected my general defence and alibi defence over mere allegations brought against me some of which were not proved after court doubled its accuracy and my defence remained unchallenged.**

x) **THAT the Appellant is faulting the police for conducting a very shoddy investigation which does not meet the minimum standard for the police investigation procedures. The police did not visit the scene of crime.**

xi) **[Deleted by amendment]**

xii) **[Deleted by amendment]**

xiii) **THAT the Learned Magistrate erred in both law and fact where she failed to consider the time that was spent in remand custody of (11) months and 21 days**

while undergoing the trial as part of his sentence of 20 years pursuant to Section 333(2) of Criminal Procedure Code.

xiv) THAT the Learned trial Magistrate erred in law and in fact in failing to find that the prosecution case had a myriad of glaring gaps which could not be filled by the Appellant.

xv) THAT the Learned Magistrate erred in law and in fact in convicting the Appellant when it was clear that the prosecution's case against the Appellant had many reasonable doubts which could only be construed in favour of the Appellant.

xvi) THAT the Learned Magistrate erred in law and in fact in shifting the burden of proof to the Appellant in total disregard of the well laid down cannons of Criminal jurisprudence.

xvii) THAT the Learned Magistrate erred in law and in fact in disregarding the entire evidence of the defence witnesses thereby arriving at erroneous findings and conclusions.

xviii) THAT the Learned trial Magistrate erred in law and in fact in meting out a very harsh sentence against the Appellant in the circumstances in total disregard of the mitigation tendered by the Appellant.

xix) THAT the Learned Magistrate erred in law and in fact in disregarding the Appellant's submission thereby occasioning a serious miscarriage of justice.

xx) THAT the Learned trial Magistrate erred in law and in fact in failing to put on record some of the issues raised by the Appellant during cross examination of the prosecution witnesses and submissions thereby occasioning injustice.

xxi) THAT the Learned trial Magistrate erred in law in denying the right to legal representation pursuant to Article 50(2)(h) of the Constitution occasioning the Appellant substantial injustice.

14. Once again, I am obligated to comment that the Court of Appeal has on several occasions reminded litigants that this practice of filing unnecessarily lengthy, verbose and argumentative Memoranda or Petitions of Appeal is wrong and unnecessary. Apart from being annoyingly irritating considering the volume of work Judicial Officers already handle,

for such lengthy pleadings, the reader most often loses focus at a very early stage of reading or midway, long before completing it. If anything, it only gives the strong indication that the Appeal is speculatory, or a fishing expedition, with the drafter simply throwing everything at the Court hoping that perhaps one of the multiple stray torrents of bombs fired would find a target. The 21 grounds can, in fact, with a little bit of better drafting, have very easily been simply summarized into 4 or 5 brief grounds. On this issue of need for brevity in drafting pleadings, I once again, remind Advocates to read the case of **Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR**, the case of **William Koross v. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013,** the case of **Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR**, and also the case of case of **Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR**.

15. Be that as it may, the parties then filed written Submission. The Appellant's Submissions is dated on 7/10/2025, while the State's is dated 28/08/2025.

Appellant's Submissions

16. The Appellant's Counsel submitted that the Appellant took plea without an Advocate, and he was not informed of his rights to legal representation, or the seriousness of the offence he was facing. She cited several authorities, **Article 50(2)(h)** of the **Constitution**, and also **Section 43** of the **Legal Aid Act, No 6 of 2016**. She contended further that the Charge Sheet was defective and in violation of **Section 134** of the **Criminal Procedure Code** because the National Identity Card was not among the items mentioned in the Charge Sheet. She also asserted that the Chage Sheet was also defective because it cited two different provisions under which the Appellant was charged, namely, **Section 295** and **296(2)** of the **Penal Code**, and thus created confusion and prejudiced the Appellant. She also contended that the alternative charge was not clear whether the Appellant "***dishonestly received or retained***" the Identification Card. Regarding "***identification***" of the assailant, Counsel submitted that the incident is reported to have occurred at night at around 11.00 pm, and **PW1** failed to disclose the intensity of the security lights at the gate and the distance so as to rule out possibility of mistaken identity, and also that despite **PW1** alleging that the Appellant was her neighbour, it was not established for how long they stayed at the same plot and their level of interaction before he moved out in December, or how often the Appellant used to purchase clothes from her. She also pointed out that it was not **PW1** who identified the Appellant to members of the public or to **PW3** or **PW4**, (arresting and Investigating Officers, respectively) who she submitted, did not even visit the scene of crime, or even

view the CCTV footage, and also it was not even established who identified the Appellant to members of the public. Counsel further pointed out that **PW1** stated that her husband (**PW2**) does not live in the area yet **PW2** claimed that he recognized the Appellant's voice during a phone call. She also observed the contradiction that while **PW1** stated that the Appellant hit her with a stick on the head, **PW4** (arresting officer) testified that **PW1**, when she made the report, stated that she was hit with a stone on the head. She also submitted that the stone was never produced.

17. Counsel contended further that the injuries suffered were not profound to amount to robbery with violence, and that the assault was not aggravated, and thus the Court ought to have reduced the charge to simple robbery in accordance with **Section 179(2)** of the **Criminal Procedure Code**. Regarding the alleged theft of the phone, Identity Card, and cash, Counsel asserted that none of the Prosecution witnesses was present during the search and/or arrest of the Appellant and none of the alleged members of the public who made the alleged recovery of the items from the Appellant was called to testify, and that no investigations were conducted to identify owners of the Sim Cards. She submitted that proper investigations ought to have been carried out to cast out any doubt of planting evidence on the Appellant. Counsel then submitted that it is not the duty of an accused person to prove his innocence, that the trial Court having failed to inform the Appellant of his right to legal representation and the seriousness of the offence, the Appellant, in his defence, took it upon himself to fill in the Prosecution gaps thereby greatly incriminating himself. She faulted the Court for failing to interrogate the Appellant's ***alibi*** testimony that after being thrown out of the bar, he took a motor-cycle and went home, and was thus asleep at home at 11.00 pm when the incident is alleged to have occurred. Counsel also cited the Appellant's testimony that only the 3 Sim Cards were found on him when he was arrested, and not the Identification Card, that **PW1** did not mention theft of the Identification Card, and also that no evidence was presented to prove that **PW1** owned the alleged Samsung phone. In conclusion, she also submitted that the trial Court did not grant the Appellant the opportunity to submit upon closing his case, and instead immediately fixed a Judgment date, which is against the rules of natural justice.

Respondent's Submissions

18. **Prosecution Counsel Fred Namasake**, in refuting the Appellant's Counsel's submissions that the Charge Sheet was defective in quoting two different Sections of the Penal Code, cited the case of **Joseph Anyango Owuor and Cliff Ochieng Oduor vs R [2010] eKLR**, whereof it was guided that for a Charge Sheet for the offence of robbery with violence to disclose the offence, both **Sections 295** and **296(2)** must be cited. Counsel then submitted

that the Prosecution proved the case beyond reasonable doubt in accordance with the ingredients stated in the case of **Oluoch vs Republic (1985) KLR**, being that use of the conjunction "**OR**" in **Section 296(2)** means robbery with violence is established by proving commission of any of the ingredients listed in **sub-Sections (a)**, or **(b)**, or **(c)** thereof. In respect to "***identification***", he cited **PW1's** testimony that the Appellant was well known to her, that they had interacted on the same night, that there were security lights at the scene, and that they used to live in the same plot and knew the Appellant as "***Baba Ashley*****"**. He also cited **PW2's** testimony that when he called **PW1's** phone at night, it is a man who answered the call and he later recognized that the man was the Appellant. On the issue of sentence, Counsel submitted that the trial Court meted out 20 years imprisonment, when the mandatory sentence provided by law for the offence of robbery with violence being the death sentence, the trial Court took into account everything that was urged before it before passing the sentence. He reiterated that the Court it did not disregard any material factor, nor did it take into account any matter immaterial, and that the sentence was therefore lawful and proper.

Determination

19. As a first appellate forum, this Court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions bearing in mind that the trial Court had the advantage of hearing and observing the demeanour of the witnesses **(See Okeno vs. Republic [1972] E.A 32)**.

20. The issues that arise for determination can, in my view, be broadly summarized as followed;

i) **Whether the lack of legal representation prejudiced the Appellant.**

ii) **Whether the charge sheet was defective.**

iii) **Whether the Prosecution proved the case of robbery with violence to the required standard.**

iv) **Whether the sentence of 20 years imprisonment was excessive or unconstitutional.**

21. Regarding the issue of legal representation, it is true that the record does not reflect whether the Appellant was made aware of his right to seek legal representation. It is also true that he was facing the capital offence of robbery with violence for which the sentence of death was a possible penalty. It is also true that while historically, the State has been slow to extend this right to robbery suspects as compared to murder cases, current jurisprudence is geared

towards placing robbery offences under the same category. In this case, however, looking at the proceedings, I have not observed or noted indication of any "***substantial injustice***", or prejudice caused to the Appellant as a result of that fact since he evidently ably cross-examined the Prosecution witnesses and conducted his defence well.

22. There is also no allegation that the he did not know of such right or that he sought for time to perhaps apply for legal aid through the **National Legal Aid Service (NLAS**) as provided under the **Legal Aid Act**. It is also not the position that all trials carried out without the accused person being informed of his right to legal are automatically a nullity. I also agree with **Prosecution Counsel Mr. Namasake** that in Kenya, as was pronounced by the Supreme Court in **Petition No 5 of 2015, Republic -vs- Karisa Chengo & 2 Others [2017] eKLR**, and also by the Court of Appeal in **David Njoroge Macharia v Republic [2001] eKLR**), the right to mandatory legal aid at the expense of the State is not absolute

23. On the allegation that the Charge Sheet was defective because it cited two different provisions of the **Penal Code**, namely, **Sections 295** and **296(2)** thereof, **Prosecution Counsel Fred Namasake**, in refuting that contention, correctly cited the case of **Joseph Anyango Owuor and Cliff Ochieng Oduor vs R [2010] eKLR**, which is one of the many cases that have declared the contention raised by the Appellant as having no merit.

24. Regarding the issue whether the charge was proved, it is trite law that the burden of proof in criminal cases is one of beyond reasonable doubt.

25. The offence or robbery is defined under **section 295** of the **Penal Code** 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.**

26. Section 296(2) then defines "***robbery with violence***", and sets out the sentence to be meted out to an offender as follows:

> **(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.**

27. In **Jeremiah Oloo Odira v Republic [2018] eKLR**, **Mrima J** elaborated as follows:

"Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence.

On the other hand, the offence of robbery with violence is committed when robbery is proved and further if any one of the following three ingredients are established: -

i. The offender is armed with any dangerous or offensive weapon or instrument, or
ii. The offender is in the company of one or more other person or persons, or

iii. The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person"

28. Similarly, in **Maritim v Republic (Criminal Appeal E024 of 2021) [2022] KEHC 10256 (KLR) (6 July 2022) (Judgment)**. **F Gikonyo J** held as follows;

"The three elements of the offence of robbery with violence under section 296(2) of the Penal Code are, however, to be read disjunctively and not conjunctively. Thus, proof of one element beyond reasonable doubt founds an offence of robbery with violence"

29. In this case, **PW1**, the complainant, **Jemimah Mugure Mwangi**, was the single eye-witness. She testified that the Appellant, who is well known to her, went to her wines and spirits outlet on 19/02/2024, at around 11.00 pm and they spoke. She testified that the Appellant was accompanied by his alleged boss and came with a trailer, and that both were drunk and bought more alcohol in the outlet where they spent time, and drunk, but at the time of settling the bill, the Appellant claimed that they did not have money, but after some discussions, they paid part of it and the Appellant promised to send the balance to the Appellant via Mpesa, upon which he requested for **PW1's** phone number, which she gave him. She stated that a third man then appeared and started quarrelling with the Appellant and they fought. She stated that after closure of the outlet and while on her way home, she met the Appellant standing behind an electricity pole, he called her but she told him that it was late and she was rushing home, that the Appellant then pounced on her, slapped her on the cheek, pushed her to the ground and her phone and bag dropped as she fell down. She stated

that the Appellant then picked a stick and hit her on the head twice, she screamed, and the Appellant picked her phone, Identity Card, and Kshs 6,000/- which was in the bag and ran away with them.

30. The P3 filled at the Iten County Referral Hospital where **PW1** was treated, produced in evidence and dated 20/02/2024, indicates that **PW1** had a blood-stained scarf, and she had sustained a cut on the occipital area of the head, her right hand at the olecranon area was bruised, and there was tenderness on the back of the head. The injuries were indicated to have been inflicted by a blunt object, and the age of the injuries was estimated at "hours". The P3 also indicates that **PW1** reported the attack to the police at around 2300 hours on 19/02/2024 and she had reported that she was assaulted by "***a person known to her***". The P3 is therefore consistent with the account of the attack as narrated by **PW1**.

31. According to **PW4**, the Investigating Officer, the Appellant was arrested by members of the public, who upon inspecting him, found him with among others, **PW1's** Identity Card that had been stolen from her on the night of the attack. The Identity Card was indeed produced in evidence and positively identified by **PW1**.

32. In his defence, the Appellant, testifying as **DW1**, confirmed knowing **PW1** as a neighbour in the same plot, and being at the wines and spirits shop with his boss and other people, and having come driving a trailer. He did not however disclose the time that they arrived there. He also confirmed that an altercation did occur at the outlet and a fight ensued, and that **PW1** asked him and his group to leave. Up to this point therefore, he confirmed all that **PW1** had stated in her testimony. The point of departure is when he claimed that he left the outlet by motor-cycle at about 5.40 pm and went home after **PW1** asked them to leave, and that as such, he could not have committed the offence at 11.30 pm as alleged, since by that time, he was fast asleep in his house.

33. Looking at the proceedings, I observe that the Appellant, while cross-examining **PW1**, did not at all question her on the allegation of the timing which is clearly the major point of departure between their testimonies. He did not at all put **PW1** to task about the allegation that he left the outlet at 11.00 pm and thus did not therefore do anything to shake **PW1's** testimony on that allegation. He also did not call any witness to corroborate his claim that he reached home by 5.40 pm. He also did not interrogate **PW1** on the allegation that he picked her phone and cash and fled with them, just as he also did not also question **PW1** and **PW4**, the Investigating Officer, about the allegation that **PW1's** the Identity Card was recovered from him. He did not therefore contradict **PW1's** narration of the events or shake her

testimony. On her part, **PW1** was consistent and her testimony did not contain any discernible contradictions. The Appellant did not also advance any reason why **PW1** would want to "***fix***" him by falsely implicating him in the committal of the offence, and also why anyone would want to "***plant***" the Identity Card on him as evidence as alleged by his Counsel. The trial Magistrate having listened and observed both witnesses chose to believe **PW1**, and to disbelieve the Appellant as indeed her discretion permitted her to do.

34. Further, the Appellant being found in possession of **PW1's** stolen Identity Card was the final nail on the coffin in determining whether indeed, he was the perpetrator. This is the doctrine of "***recent possession***" which was commented upon in the Court of Appeal case of **Isaac Ng'anga Kahiga alias Peter Ng'ang'a Kahiga v. Republic Criminal Appeal No. 272 of 2005 (UR)**. For ***"recent possession"*** to amount to positive proof, it must be demonstrated that the property was found with the suspect; that the property is positively the property of the complainant; that the property was stolen from the complainant; and that the property was recently stolen from the complainant. I find all these ingredients to be present in this case.

35. In respect to "***identification***", as aforesaid, **PW1** and the Appellant were well known to each other as they used to live in the same plot, and **PW1** referred to the Appellant as "***Baba Ashley*"**. They had also interacted on the same night and both of them confirmed that there were security lights at the scene. There was also the testimony of **PW2 (PW1's** husband**)** who testified that when he called **PW1's** phone at night, it is a man who answered the call, and whom he later recognized, by his voice, to be the Appellant, their neighbour. Of course, this testimony, taken alone, would not possess much weight, but when weighed with the testimony of **PW1**, it does amount to serve as corroboration evidence.

36. Regarding the ***alibi*** defence alleged by the Appellant, as aforesaid, the same was not raised or even alluded to at any time earlier, not even during cross-examination of the Prosecution witnesses, and was only brought up at the defence stage. The logic behind the requirement to raise an ***alibi*** defence early enough is to give the police an opportunity to investigate it. The timing on when an ***alibi*** defence is raised therefore determines the weight the Court will give to it. Where it is raised late as in this case, the weight of the defence is weakened as there is no opportunity for the police to scrutinize its veracity. (see for instance, the case of **R v Sukha Singh S/o Wazer Singh & Others (1939) 6 EACA 145**)

37. Regarding the stick used to attack and harm **PW1**, while a stick may not always or ordinarily be considered a "***dangerous***" weapon, it becomes an "***offensive***" weapon if it is used to beat or strike a victim during the course of the robbery. Kenyan Courts have defined an "***offensive weapon***" as constituting any article made, adapted, or intended by the person having it for causing injury to a person. There is therefore generally categorization of weapons into those made for causing injury (such as a firearm), those adapted for causing injury (such as a broken bottle), and those carried with the intention to cause injury (such as a stick or a hammer). While a stick is not inherently designed for causing injury, it becomes an "***offensive***" weapon if the person holding it intends to use it to cause injury, or actually uses it to "beat, strike, or wound" a victim. Using a stick during a robbery with intent to harm or subdue, therefore qualifies the act as "***robbery with violence"*** (aggravated robbery), which is a far more serious offense than simple robbery. It is therefore the "***intent to use"*** the stick to cause injury, or the actual application of violence with the stick during the robbery that elevates the status of the stick to a "***dangerous weapon***". This was the holding in the Court of Appeal at Nyeri, in **Criminal Appeal Nos. 105 and 110 of 2003, John Maina Kimemi and Peter Kamau Ndungu**, in which it followed the reasoning in the earlier case of **Mwaura and Others v. Republic [1973] EA 373**, and also the case of **Muthiori v. Republic [1981] KLR 46**

38. For the above reasons, I find no material to fault the trial Magistrate for reaching and/or making the findings that she did.

39. Regarding sentence, as was restated by the Court of Appeal in the case of **Bernard Kimani Gacheru v Republic [2002] eKLR**, it is a matter that rests at the discretion of the trial Court, and a higher Court will therefore not easily interfere with the sentence unless it is manifestly excessive in the circumstances of the case, or the trial Court overlooked some material factor, or took into account the wrong material, or acted on the wrong principle:

40. In this case, although, as aforesaid, the mandatory sentence provided by law for the offence of robbery with violence under **Section 296(2)** of the **Penal Code** is the death sentence, the trial Court meted out the lesser sentence of 20 years imprisonment. It is therefore clear that the sentence imposed by the trial Court was within the law. This observation does not however mean that I cannot interrogate whether the sentence was manifestly excessive or harsh, which I now do.

41. In doing so, I cite the Supreme Court decision in the the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR)** in which it guided that, in re-sentencing, the following mitigating factors would be applicable; **(a) age of the offender; (b) being a first offender; (c) whether the offender pleaded guilty; (d) character and record of the offender; (e) commission of the offence in response to gender-based violence; (f) remorsefulness of the offender; (g) the possibility of reform and social re-adaptation of the offender;** and **(h) any other factor that the Court considers relevant.**

42. Similarly, the Court of Appeal, in the case of **Daniel Kipkosgei Letting Vs. Republic [2021] eKLR**, pronounced itself as follows;

> **"With regard to the above, we observe that the purpose and objectives of sentencing as stated in the Judiciary Sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets the end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. ……."**

43. Further, **Majanja J**, in quoting **Francis Karioko Muruatetu (supra)**, in the case of **Michael Kathewa Laichena & another v Republic [2018] eKLR**, stated as follows:

> **"The Sentencing Policy Guidelines, 2016 ("the Guidelines") published by the Kenya Judiciary provide a four tier methodology for determination of a custodial sentence. The starting point is establishing the custodial sentence under the applicable statute. Second, consider the mitigating circumstances or circumstances that would lessen the term of the custodial sentence. Third, aggravating circumstances that will go to increase the sentence. Fourth, weigh both aggravating and mitigating circumstances. ……"**

44. Applying the above guidelines to this case, I find that there were mitigating factors which the trial Court may not have fully considered and, as such, ended up imposing the manifestly excessive sentence of 20 years imprisonment considering the circumstances of the case. For instance, the Applicant was a first offender and from the evidence, appears to be a responsible family man, the injuries inflicted on the complainant were also not life-threatening as she was treated and discharged on the same day. The attack also seems to have arisen from some kind of a local altercation, and not really a case of a hard-core criminal terrorizing people in the neighbourhood. It does not also seem to have been a pre-

meditated attack as the stick used to attack the complainant was simply picked by the attacker from the ground, not one that he had armed himself with in advance. The Appellant was also said to have been drunk at the time of committing the offence, and that may have therefore also influenced his lapse in judgment. My own inkling is that in trying to resolve a personal local disagreement, the Appellant simply went overboard.

45. According to the Ruling on sentence of the trial Court, the Appellant is said to have been in custody since arrest, which according to the charge sheet, was 25/02/2024, meaning that he has so far spent about 2 years and 3 months in custody. Although the offence the Appellant was convicted of is categorized as a capital offence, and ought to be decisively dealt with, the Applicant, having been in custody for that long, I believe that retribution has been substantially achieved, and he is now approaching full rehabilitation. I believe understands the need to remain a law-abiding citizen, and I do not believe that continuing to incarcerate him for an unnecessarily longer time will be of any further benefit to the society.

Final Orders

46. The upshot is therefore as follows:

i) The Appeal on conviction is hereby dismissed.

ii) On the sentence however, the sentence of 20 years imprisonment imposed by the trial Court is hereby set aside and substituted with a prison sentence of 5 years, to be computed from the date of arrest, namely 25/02/2024.

DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 8TH DAY OF MAY 2026

……..
WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Appellant (present virtually from Eldoret Main Prison)
Ms. Hamba for the Appellant
Ms. Muriithi for the State
Court Assistant: Brian Kimathi