



**Chege v Republic (Criminal Appeal 98 of 2019)  
[2025] KECA 1207 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1207 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 98 OF 2019  
JM MATIVO, PM GACHOKA & GV ODUNGA, JJA  
JULY 4, 2025**

**BETWEEN**

**DANIEL NJENGA CHEGE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Naivasha (M. Odero & C. Meoli, JJ.) dated 6th November 2015 in HCCRA No. 67 of 2014)*

**JUDGMENT**

1. As will become apparent later in the judgment, there is a need for somber debate on the question of mandatory minimum sentences. It is mindboggling why those convicted of murder can walk away with a light sentence, and yet those charged with robbery with violence, even where there is only a threat, can only be sentenced to death. This glaring discrepancy is one which the consumers of the justice that we dispense find difficult to fathom. Not that we can give any rational justification for it, save for the oft stale retort that “it is the law”. It is a question which we pose but which we cannot answer. We can only hope that sooner than later, this discordant state of affairs will be resolved in order to make the learned opinion of Newbold, JA in *Omari Musa and Others vs. Republic* [1970] EA 42 a reality. In that case the learned Judge held that:

“ [Justice] is not a cloistered virtue. It is a tree under whose spreading branches all who seek shelter will find it. But it is a tree which flourishes in the open, in the glare of public scrutiny... if it is kept in the darkness of secrecy this tree will wither and its branches become deformed.”

2. On 28<sup>th</sup> February 2010, within Naivasha Municipality, Naivasha District in the Rift Valley, the appellant, Daniel Njenga Chege, was accused of robbing Bernard Kogi Karanja’s bicycle, a Neelam model, valued at Kshs. 4,000.00. In the course of it, the appellant, who was jointly with another, was alleged to have been armed with an axe, an offensive weapon, and threatened to inflict harm on



- the victim. This formed the particulars of the charge sheet drawn against the appellant when he was charged with the offence of robbery with violence contrary to section 296 (2) of the *Penal Code*.
3. When the appellant was arraigned before the trial court in Naivasha CMC Criminal Case No. 465 of 2010, he pleaded not guilty. After full trial, the learned magistrate convicted him of the offence. He was sentenced to death.
  4. Aggrieved, the appellant filed an appeal before the Naivasha High Court in HCCRA No. 67 of 2014. In the end, C. Meoli, & M. Odero, JJ. found that the appeal lacked merit. The conviction was affirmed and the sentence upheld.
  5. The appellant is dissatisfied with those findings. He filed his undated notice of appeal, an undated memorandum of appeal and a second memorandum of appeal through his advocate, Okumu John Owour, dated 20<sup>th</sup> March 2025 that raised a combined eleven grounds disputing the findings of the learned judges. We have taken the liberty to summarize those grounds as follows: that the doctrine of recent possession was unsustainable since the evidence was insufficient; that the exhibited items were not proved to the satisfaction of the standard of proof required; that the victim was neither injured nor harmed during the incident; that the evidence of the witnesses relied on was contradictory and inconsistent; that the trial court failed to consider his defence in line with section 169 (v) of the *Criminal Procedure Code*; and that the death sentence was harsh and excessive given the circumstances of the case. For those reasons, he prayed that his appeal be allowed by setting aside the sentence in lieu of a determinate sentence from the date of his arrest.
  6. The appeal was heard on 25<sup>th</sup> March 2025. The appellant was present and represented himself while the respondent was represented by Mr. Omutelema, Senior Assistant Director of Public Prosecutions. Parties relied on their diametrically opposed written submissions, urging the Court to decide in their favor.
  7. The appellant filed written submissions, a list of authorities and case digest all dated 20<sup>th</sup> March 2025. He abandoned his appeal on the conviction. Challenging the sentence only, he submitted that since the victim was not injured during the incident, he ought to have benefited from a sentence having a term of imprisonment and not condemned to the death penalty. He urged this Court to be guided by the provisions of Article 50 (2) (p) of the *Constitution* and the decisions in *Jackson Wanyoike Njuguna & another vs. Republic* [2019] eKLR and *Swaley Muhaya Lubanga vs. Republic* [2021] eKLR.
  8. The respondent filed written submissions, a case digest and a list of authorities all dated 3<sup>rd</sup> June 2024. It submitted that the prosecution proved the ingredients of robbery with violence to the required standard of proof being beyond reasonable doubt. On sentence, it submitted that there were aggravating circumstances that urged the two courts below to find that the death penalty was the proper sentence. It prayed that his appeal be dismissed.
  9. The duty of this Court sitting as a second appellate Court was enunciated by this Court in the case of *Ahamad Abolfathi Mohammed & another vs. Republic* [2018] KECA 743 (KLR) thus:

“As it is a second appeal, we are obliged, by dint of section 361 (1) (a) of the *Criminal Procedure Code* to consider only issues of law. Where the two courts below have made concurrent findings of fact, we are further obliged to respect those findings unless we are satisfied that the conclusions are not supported by the evidence or are based on a perversion of the evidence. This is a well-established principle and is aptly articulated in the authorities cited by the appellants such as *Karingo v Republic* [1982] KLR



213. In *M'Riungu v Republic* [1983] KLR 455, this Court was empathic that:

“ [W]here a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law.”

10. The prosecution assembled four witnesses in a bid to establish that the appellant committed the offence. According to the record before us, PW1 Bernard Kogi Karanja, the complainant herein, testified that on 28<sup>th</sup> February 2010, at 5:00 p.m., he was riding his bicycle alone. On reaching the Naivasha slaughter house, he was approached by two men. One of them, the appellant that is, removed an axe from his pockets and raised it. He was then commanded to empty his pockets. Afraid, PW1 pleaded with them not to harm him. The appellant then took his bicycle while threatening him.
11. After the ordeal, PW1 ran away. The two men tried to pursue him for about 50 metres but he was able to cover his trail. He then called his friend PW2 Samwel Kinja Muchunu and informed him what had transpired. PW2 and PW3 pursued the robbers aboard a motorbike. They managed to find the appellant aboard the bicycle. They knocked the bicycle on the side causing the axe carried by the appellant to fall down. PW1 arrived at the scene shortly thereafter and was able to identify the appellant as one of the attackers. The other thief was not found as he escaped on foot. The appellant was subsequently arrested and charged with the present offence.
12. PW2's evidence was that on the fateful day, he received a call from PW1 informing him about the offence. He proceeded with PW3 to the slaughter house in Naivasha. He found the appellant riding the stolen bicycle. Another man was walking away. He asked the assailant to stop but refused. He thus hit the bicycle on the side with the motorbike he was aboard. This led the bicycle and the axe to fall on the ground. The appellant was then arrested and brought before the trial court.
13. PW3 testified that following PW1's call to PW2, he accompanied PW2 to the Naivasha slaughter house. They found the appellant on a bicycle and another man walking away. PW2 told the appellant who was riding a bicycle to stop but did not heed to the call. He was subsequently hit by PW2 with his motorbike. The appellant fell down together with the bicycle and axe. PW1 came to the scene and identified him as the perpetrator. He was then arrested and escorted to the police station.
14. PW4 PC Said Mbaya the investigating officer stated that he was in Naivasha police station on 28<sup>th</sup> February 2010 when members of the public brought in the appellant. He conducted his investigations, collected evidence and interrogated witnesses. Upon completion of his investigations, he formed the opinion to level the present charges against the appellant who was resultantly arrested and charged before the trial court. PW4 produced the receipt showing that the bicycle was purchased by the complainant, the stolen but recovered bicycle and the axe.
15. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was placed on his defence. His unsworn testimony was that on 25<sup>th</sup> February 2010, he was imbibing in a bar and had a Kshs. 1,000.00 note. It was stolen by a young man. He proceeded to go home and on reaching the Naivasha slaughter house, found a sea of motorbike taxis. It was here that he was arrested. He denied committing the offence that he was charged with.



16. The ingredients to the offence of robbery with violence were set out by this Court in *Johana Ndungu vs. Republic* [1996] eKLR as follows:

“In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the *PC*. The essential ingredient of robbery under Section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved will constitute the offence under the subsection:

1. If the offender is armed with any dangerous or offensive weapon or instrument;  
or
2. If he is in company with one or more other person or persons; or
3. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”

17. As already stated, the appellant abandoned his appeal on conviction and therefore, there is no dispute that the ingredients of the offence were established beyond reasonable doubt. This appeal is on sentence only. We must, however, point out that even if the appeal on conviction was pursued, the facts of this case are straightforward as there was overwhelming evidence leading to his conviction.

18. The appellant was sentenced to death after the trial court considered his mitigation. This sentence was upheld by the High Court. Section 296 (2) of the *Penal Code* provides that a person convicted of the offence of robbery with violence shall be sentenced to death. The penalty for this offence is couched in mandatory terms. The directions of the Supreme Court issued on 6<sup>th</sup> July 2021 in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR reiterated that mandatory or minimum sentences imposed in the statutes have not been invalidated. The Apex Court further clarified that the exercise of discretion in meting out a sentence was only applicable to murder cases where it is not expressly provided in statute.

19. In view of the foregoing, it is clear that our hands are tied and we cannot interfere with the sentence. We must reiterate with a heavy heart that the apparent discriminatory sentencing regime ought to be reviewed and reconsidered as soon as possible. It is puzzling why a murderer can, for example, be sentenced to just one day in prison based on the court's discretion, while other crimes still receive mandatory death or life sentences without such flexibility, yet murder is, going by the forum at which it is tried, deemed to be more serious than some of the offences for which death sentence is mandatorily imposed. This is repugnant to justice and the case before us is a good example. The undisputed facts of the case are that the appellant threatened PW1 with an axe and did not inflict injuries upon him. While it is not gainsaid that he stole the bicycle, why should he be condemned to the sentence of death, the only one available on conviction of this offence? The circumstances of the case certainly called for a determinate jail sentence and we hope this kind of scenario will prick the conscience of the lawmakers to address this obvious injustice.

20. Having said that, we have no option but to sadly inform the appellant that, as things stand at the moment, his sentence must remain as we are unable to interfere with the sentence meted out. Accordingly, the appellant's appeal lacks merit and it is hereby dismissed.

**DATED AND DELIVERED AT NAKURU THIS 4<sup>TH</sup> DAY OF JULY 2025.**



**J. MATIVO**

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**JUDGE OF APPEAL**

**M. GACHOKA C.Arb, FCIArb.**

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**JUDGE OF APPEAL**

**G.v ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a True copy of the original

Signed

**DEPUTY REGISTRAR**

