



**Dima & another v Republic (Criminal Appeal 8 of 2020)
[2025] KECA 1206 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1206 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 8 OF 2020
JM MATIVO, PM GACHOKA & GV ODUNGA, JJA
JULY 4, 2025**

BETWEEN

MOHAMMED AFTAM DIMA 1ST APPELLANT

JOHN NJOROGE NGECHU 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Narok (Bwonwonga, J.) dated 29th July 2019 in HCCRA No. 140 as consolidated with 141, 142, 143 & 145 of 2017)

JUDGMENT

1. The appellants, together with James Chege, Joseph Njenga and Joseph Mwangi faced three counts of the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the [Penal Code](#). The particulars of count I were that on 7th October 2011 at Mashariani area along the Narok-Mai Mahiu road Narok sub-county within Narok County, jointly with others not before the court, while armed with dangerous weapons namely a rifle, pangas and knives, they robbed David Boro Kimani, a motor vehicle registration number KZD 303 Isuzu canter, generator, gas cylinders, motor vehicle tyres, food stuffs, assorted motor vehicle spares, Samsung B mobile phone and Kshs. 2,250.00 cash all valued at 1,611,250.00 and immediately before or immediately after the time of such robbery threatened to use actual violence on the said David Boro Kimani.
2. The particulars of count II were that on the same day and place, jointly with others not before court, while armed with dangerous weapons namely a rifle, pangas and knives, they robbed Elijah Waweru Gacheru a Samsung C3010 valued at Kshs. 7,000.00 and immediately before or immediately after the time of such robbery threatened to use actual violence on the said Elijah Waweru Gacheru.
3. The particulars of count III were that on the same day and place, jointly with others not before court, while armed with dangerous weapons namely a rifle, pangas and knives, they robbed Gideon Karanja



Kinuu a Samsung C3010 valued at Kshs. 7,000.00 and immediately before or immediately after the time of such robbery threatened to use actual violence on the said Gideon Karanja Kinuu.

4. The appellants were arraigned before the trial court in Narok Chief Magistrate's Court, Criminal Case No. 993 of 2011, to answer the charges. They entered a plea of 'not guilty'. After a full trial, the learned magistrate convicted them of the offence on two counts and sentenced them to death.
5. The appellants were dissatisfied with those findings. They appealed in Narok High Court in HCCRA No. 140 of 2017 consolidated with HCCRA Nos. 141, 142, 143 and 145 of 2017. Bwonwonga, J. (as he then was) found that the appellants' appeals had no merit on the conviction. They were dismissed. However, the first appellate court substituted their sentences of death with life imprisonment. It is those findings that triggered the appeal before us.
6. The appellants filed separate, undated memoranda of appeal.

They also filed undated grounds of appeal that raised a combined 18 grounds disputing the findings of the learned judge. In summary, the appellants urged this Court to interfere with those findings on account of the following germane reasons that: the High Court failed to take into account the Muruatetu decision when sentencing them; in substituting the sentence of death with life imprisonment, the High Court violated their rights enshrined in Articles 27 and 50 (2) of *the Constitution* guaranteeing them the right to benefit from the least severe sentence; the ingredients of the offence of robbery with violence were not proved to the required standard; they were not properly identified as the assailants; the doctrine of recent possession was not proved beyond reasonable doubt; the first appellate court failed to find that the learned magistrate erroneously shifted the burden of proof to the appellants; and the two courts failed to consider their defence and mitigation.

7. For these reasons, the appellants invited this Court to reevaluate the evidence and make an independent finding regarding conviction and sentence. They further urged this Court to quash their convictions, set aside their sentences and have them set at liberty.
8. The appeal was heard on 26th March 2025. The appellants were present and represented by learned counsel Mr. Matoke. The respondent was represented by Mr. Omutelema, Senior Assistant Director of Public Prosecutions. Parties relied on their rival written submissions urging this Court to decide in their favor.
9. The appellant filed written submissions, list of authorities and case digest all dated 6th August 2024 to submit that while the actuality of the robbery was not contested, they were not the assailants for the reason that the aspect of identification failed to meet the parameters set out in law. According to the appellants, the identification parade violated paragraph 6 (iv) d of the Force Standing Orders as there was nothing to show that the eight persons the 1st appellant stood with bore similar age, height, general appearance and class of life leaving him exposed and an easy target for being of Somali origin. This, bearing in mind that it was reported that one of the assailants was of Somali descent with crossed teeth.
10. They attacked the evidence of PW1, PW2, PW3 and PW4 as incredible. That there was no proof to the satisfaction of the reasonable doubt test that money was transferred from PW1 to the 1st appellant. Furthermore, when arresting the other accused persons, and a photograph was taken capturing their images, the 1st appellant was conspicuously absent. They noted that the tyres adduced in evidence were never claimed by the complainant as belonging to him and the inventory of items recovered failed to demonstrate how those items were recovered. In addition, the rifle used in the robbery was not produced in evidence.
11. Turning to the identification of the 2nd appellant, it was submitted that it was marred with errors because his description was not given in the parade and the issue of similarity of appearance and voice



was not factored rendering the process worthless. They further cast doubt in the process since from the record, PW2 identified him but PW1 failed to do so. That though the assailant was identified from his voice, those details did not emerge in the identification parade. They added that though the 2nd appellant was found in the company of the culprits at Majengo, he was a victim of circumstances and denied participating in the robbery. They urged this Court to consider their defences in quashing the convictions.

12. Turning to the sentences, they lamented that they were harsh and excessive and failed to consider their mitigation. Resultantly, they offended their right to a fair trial that is inalienable and set out in Article 25 (c) of *the Constitution*. They complained that the sentence of life imprisonment is indeterminate and contravenes *the constitution* and the sentencing objectives. They urged this us to reconsider the mitigating factors and sentence them to 15 years imprisonment each from the date of arrest, that is, 10th October 2011, in the event we upheld the conviction.
13. The respondent opposed the appeal. It filed written submissions, a case digest and a list of authorities all dated 5th March 2025. It submitted that all the ingredients of the offence of robbery with violence were proved beyond any iota of doubt. It argued that PW1, and PW2, at the time of the robbery, had the chances of seeing the assailants clearly from the vehicle's lights and the moonlight and accordingly, there was no case of mistaken identity. After the robbery, they immediately reported the incident at the nearest police station.
14. Furthermore, the identification parade was conducted within the confines of the law as to conclude that the appellants were the perpetrators. Withal, the doctrine of recent possession was very much applicable since the items were recovered from PW5 who stated that it was the 2nd appellant who requested him to store some items at his yard. It added that MPESA statements confirmed that airtime purchase coincided with the time the robbery took place, raising suspicion on the actions of the appellants.
15. Lastly, on the sentence the respondent submitted that firstly, the appellants' plea for a lenient sentence was akin to their admission of guilt. Secondly, the sentence provided by the High Court was proper. It submitted that should this Court be convinced to review the sentence it should provide a sentence that is commensurate to the crime. It prayed that the convictions be upheld and the sentences be affirmed.
16. We have considered the memorandum of appeal, and the parties' diametrically opposed written submissions, examined the record of appeal and analyzed the law. Section 361 of the *Criminal Procedure Code* provides that a second appeal shall only be confined to matters of law. Our duty as a second appellate court was further set out in the case of *Boniface Kamande & 2 Others v Republic*, Crim. App. No 166 of 2004 in the following indubitable terms:

“On a second appeal to the Court, which is what the appeals before us are, we are under legal duty to pay proper homage to the concurrent findings of facts by the two courts below and we would only be entitled to interfere if and only if, we were satisfied that there was no evidence at all upon which such findings were based or if there was evidence, that it was of such a nature that no reasonable tribunal could be expected to base any decision on it.”

17. According to the record before us, the prosecution called twelve witnesses in an attempt to establish beyond reasonable doubt that the appellants committed the offence. The evidence captured is as follows: PW1 David Mburu Kimani testified that he was the driver of motor vehicle registration number KZD 303, a white Isuzu canter with a blue body. Its commercial use was at all material times designated for transporting goods on hire.



18. On 6th October 2011, PW1 was assigned the role of transporting goods to Mariarian Masai Mara. Upon being loaded, the journey commenced at 9:30 p.m. from Nairobi's Lenana area together with two turn boys, Gideon Karanja and Elijah Waweru Mucheru PW2. At around 12:45 a.m., they came across a roadblock with very sharp spikes compelling them to slow down and stop. Suddenly, four men dressed in police uniforms emerged. One of the four men approached them with a torchlight flashing it at the occupants of the vehicle from the windscreen. He was dressed in a jungle green jacket similar to those worn by AP officers. He was also wearing police boots and black trousers. The second man approached them wearing a black jacket, black trousers and a beret. They inquired from them what they were carrying. In the process of responding to the question, the man in the black jacket came to PW1's side of the vehicle.
19. PW1 gave the conductor keys to open the canter but was unable to as one of the assailants was standing in his way. He therefore elected to alight himself but firstly applied hand brakes. In the process, he was grabbed and pulled down by the assailant next to him, later identified as the 1st appellant. He pointed a gun at PW1. On reaching the back side of the canter, PW1 found several other persons. The other two occupants of the canter had also been brought to the back of the canter.
20. After surrendering the keys to the assailants, the victims were made to rise. PW1 attempted to take a look at the assailants but was blocked by one of their elbows. They were placed in a file and walked into the forest. They were led by one of the assailants, carrying the spikes to the forest. They ended up walking about 1 kilometer in a small bushy field.
21. They were then commanded to lie on their stomachs and were robbed. They took PW1's Samsung B 200 and a wallet carrying Kshs. 2,000.00 cash. Their hands were then tied separately with sisal ropes. They then asked for PW1's MPESA pin number after which airtime was purchased from his phone. The perpetrators continued to speak to them for hours until dawn. They were armed with pangas and a gun.
22. PW1 recalled that the moonlight was bright and the headlamps of the vehicle were on and was thus able to identify the perpetrators. He stated that the one who shone the flashlight on him was referred to as 'corporal' by the others. He had a thin face and had the appearance of a Somali. He had a rungu (read swagger stick) with him, similar to that assigned to police officers. Another of the assailants talked in "Bonoko Kiswahili and like mshamba, not pure Kiswahili." He threatened one of the other victims that he would use the panga to shave him. One of them was tall, light skinned and had a black mark on his face.
23. After sometime, they all left one by one. PW1, PW2 and Gideon Karanja struggled to untie themselves and eventually managed to cut loose. They walked and found their way to the road at around 4:30 a.m. With the assistance of good Samaritans who were selling charcoal, they managed to speak to the OCS Narok who later came to the crime scene. Though they traced the ropes that they were tied with, they did not find the spikes that barricaded the road when they were stopped. They then reported the matter at Narok Police Station.
24. Later at 3:00 p.m., PW1 was informed by the deputy DCIO that a vehicle had been abandoned at Tipis. They were informed that the vehicle fit the description of the one he was driving, save that the two tyres were missing. At 5:00 p.m., they were informed that two suspects had been arrested in possession of two tyres and a phone. On examining it, PW1 affirmatively identified that it was his mobile phone. He arrived at that conclusion based on the fact that his phone had previously been tampered with by another thief, leaving a mark. He also relied on the receipt of purchase. He also identified the two tyres as belonging to a white man whom he was supposed to deliver.



25. Two or three days later, PW1 was invited to an identification parade. He identified the 1st appellant as of Somali origin with crossed teeth. He was the ‘corporal’ who was wearing an AP jungle jacket, black trousers, police boots, and a police stick. He is the one who shone the flashlight and asked several questions. One other suspect was identified from the black mark on his head while the third one was identified by voice recognition.
26. Relying on an MPESA statement, he stated that while he was not in control or possession of his phone on 7th October 2011, a sum of Kshs. 3,590.00 was withdrawn. A request for checking the balance also occurred at a cost of Kshs. 1.00. A total of four transactions took place when he didn’t have his phone.
27. PW2 testified that he was a mechanic and turn boy and had worked with David Boro for about 7 years. His evidence was that on the material day an assortment of goods was loaded onto the vehicle at 4:00 p.m. at Nakumatt Karen consisting of: vegetables, eggs, motor vehicle tyres, a generator, gas cylinders, six sodas, flour, cakes, crates of soda, and spare parts of a motor vehicle generator. PW1 would pick him up at 10:00 p.m. together with Gideon Karanja and he sat between them.
28. Just 8 kilometres shy of Narok town, they were met with a roadblock and stopped by four men. One of them, wearing a jungle green uniform, black trousers and a beret, approached them as they stopped. He stood at the windscreen and came to the side of the conductor. He demanded that they open the canter. The other three, wearing civilian clothes, went to the side of the driver and forced him out of the vehicle. One of them had a gun. They were then all pulled to the back of the canter.
29. PW2 continued that they were all then escorted to a bushy area about 30 - 40 meters from the road. They were made to walk in a straight line. The assailants also had knives and pangas. They were led by one of them who was carrying spikes. They were then made to lie on their abdomens. They then tied their hands with a rope around their backs. His phone make C3010 and Kshs.
80. 00 was then snatched from his pocket. PW2 recalled that he could recognize the assailants with the aid of the motor vehicle lights and the moonlight. He recollected that there were eight assailants; four escorted them to the bush while the other four manned the canter.
30. PW2’s evidence was that the ordeal lasted about three hours.

They were constantly questioned as to what they had carried in the canter. The assailants then left one by one. On realizing that they were alone, they managed to untie themselves and traced the road. It was about 4:00 a.m. They were assisted by charcoal sellers who called the OCS, who came to the crime scene.
31. PW2 would later record his statement at the police station. He recalled that one of the assailants was a Somali, one was a short dark person and one had the “Kiswahili of Bonoko.” That evening, PW2 identified some of the items that had been stolen including a chain and tyres. Later, he identified the appellants as the assailants. In fact, he vividly remembered that the 1st appellant had worn a jungle jacket, black trousers and had the stick of an inspector. He was the first one to approach them. The 2nd appellant threatened him that he would use a panga to shave him.
32. The record shows that the investigations led to the recovery of some of the stolen items and some of those implicated were arrested but eventually turned out to be witnesses. One of them was PW3 Joseph Ndumia Wagura, a conductor operating motor vehicle registration number KBJ 758. He testified that on 7th October 2011, he left Nakuru at 5:30 a.m. together with the driver David Njoroge Njenga PW4. On reaching Mwisho wa Lamii in Mau Narok, he met two boys carrying two tyres. They informed them that their vehicle had broken down and needed assistance to transport the tyres to Narok. PW3 charged them Kshs. 500.00. He was instructed to call telephone number 0716697536 upon arrival.



33. PW3 loaded the tyres, leaving the two men behind. On arrival in Narok at 10:00 a.m., PW3 called the number and a man came to collect the tyres from the Mau Narok stage. PW3 and PW4 would later return to Nakuru when PW3 was called by an unknown number, claiming to be the OCS, to confirm if he delivered the goods. On arrival at Tipis, PW3 and PW4 met the OCS and were taken to Mau Narok Police Station. They were then remanded in the police cells. Thereafter on 9th October 2011, an identification parade was done. He confirmed that he delivered the tyres to the 1st appellant.
34. PW4 confirmed that he was the driver of motor vehicle registration number KBJ 758 and PW3 was his conductor. On 7th October 2011, they were on duty, having left Nakuru at 5:30 a.m. for Narok. On reaching Mwisho was Lamii at Mau Narok, they found two boys who spoke to PW3. When they continued with their journey, PW3 informed him that he was asked by the two boys to deliver the tyres to a particular person. At 10:00 a.m., he saw a doctor and on return, was informed that the tyres had been dispatched. On reaching Tipis, they were asked about the tyres. They were then placed at the police cells in Mau Narok police station.
35. PW5 Haron Lemayan Kaare testified that in September of that year, his cousin Johanna informed him that friends of Sam Mwangi wanted stock for fertilizer. On 7th October 2011 at 4:00 a.m., he was awoken up together with his cousin. They found three people in a canter outside his gate. The canter was dark in color with a white cabin. His cousin recognized him as the people who sought for fertilizer a month earlier. They informed them that they wanted to offload some goods and were rushing to pick potatoes.
36. PW5 acceded to storing the goods including a big generator, four gas cylinders, 4 new huge tyres without rims, two tents, a cool box, several cantons of eggs, tomatoes and mineral water, a spare tyre of a lorry with a rim, spade, slasher, three motor vehicle springs, three crates of soda, 1 carton of wine, maize flour, one bag of flour, and tissue. In quick succession, the goods were offloaded. They informed them that they would return the following day. He however observed that it appeared that the three men were not aware of the contents in the cartons. The following day, motor vehicle registration number KBC 317V, belonging to John, picked the following items: tissue, 50kgs of sugar, tomatoes, onions, wheat flour and mineral water. They all left with John at noon.
37. A week later, another vehicle came and carried four tyres and one gas cylinder. Come 28th November 2011, a Toyota Noah came to his home with seven unknown persons. They took three gas cylinders, a generator, cool boxes, mineral water, maize flour, a spade and a slasher. Later that evening, he was visited by police officers and took away the remaining stock including a slasher and a spade.
38. PW5 was arrested and realized that the goods had been stolen.
Later, he was able to identify one of the appellants' co-accused persons as the one who went to his house on the night of 7th October 2011.
39. PW6 Richard Kinyanjui a bodaboda operator in Narok town testified that on 7th November 2011 at 11:00 a.m., he carried a tyre. A second one was carried by his colleague while three people were carried on a third motorbike. The tyres were dropped at Majengo and were each paid Kshs. 100.00. Later that day, they were summoned at the police station and recorded their statements. He could not ascertain if the tyre in the photograph was the one that he had carried.
40. PW7 Gerald Sakimba testified that as a bodaboda operator, he was at the Narok main stage on 7th November 2011. He then carried two passengers and dropped them at around 11:00 a.m. at Majengo and was paid Kshs. 100.00. At 1:00 p.m., he was called by the CID and recorded a statement at the police station.



41. PW8 Deputy DCIO at Narok Peter Muiruri conducted the identification parade. Starting with James Chege Ngechu, PW8 informed him of the purpose of the parade to which he voluntarily participated. He also relinquished his right to have a lawyer or representative present. In a line of eight people, the suspect stood between the fifth and sixth person. PW1 was then called after the eight persons had been lined up. He had been previously held at the CID officers unable to see the suspects. He explained to him that it was or not possible that the suspect would be in that line of people. He went around and touched the suspect on the shoulder. The suspect was satisfied with the process and signed the parade form.
42. Thereafter, PW8 informed the suspect that another witness, that is PW2, would be called to participate in the exercise and that he had the right to stand in another position. The accused person retained the same position. Following the same procedure, PW2 did not identify him. The third witness, Gideon Karanja Kinoo was called to identify the suspect who elected to remain in the same position. He was identified by touch on his shoulder. The fourth witness, Francis Theuri was unable to identify him, while the fifth witness PW3 identified him by touching him on his shoulder. The accused was satisfied with the parade and signed the form.
43. PW8 similarly conducted an identification parade on the 2nd appellant. He explained its purpose to which the 2nd appellant elected to participate. He stood between the third and fourth person in a line of eight persons. He waived his right to have a lawyer or friend present. After explaining the process to PW1, he was asked to identify the suspect. He was unable to. Retaining the same position, he was identified by means of touch by PW2 and Gideon Karanja Kinoo. PW3 and Francis Theuri did not identify him. The 2nd appellant explained that he was satisfied with the parade and appended his signature on the parade form.
44. He continued that the other co accused persons were identified by touching. Similarly, they were satisfied with the process and signed the forms. The 1st appellant also underwent an identification parade exercise with the same witnesses. He remained on all parades in between the 2nd and 3rd members. He was satisfied with the exercise and similarly signed the parade form. All parade forms were produced in evidence.
45. PW8 was emphatic that the members of the parade that were used for each accused person had similar semblances to the suspects. Finally, PW8 emphasized that all witnesses were isolated from the suspects before the exercise was conducted.
For those reasons, the process was fair.
46. PW9 James Sambu Lentika testified that he was working on 7th October 2011 as a motorbike operator in Narok when he saw two people alighting from a motor vehicle carrying tyres. He was working alongside Kiboya. He carried one tyre as did Kiboya while the two persons were carried on a third bike. They all reached Majengo which was the destination and each paid Kshs.
100. 00. He thereafter went to the police station and recorded his statement.
47. PW10 Francis Karanja Kamau an accountant at Oltome Safaris Serian Camps Maasai Mara testified that on 4th October 2011 he received the following orders from the manager at Siare Camps: tinned food vegetables, a wedding cake, wines, sodas, chocolates, meat, flour, tinned food, tyres, shocks, oils, bushes, ice cubes, tubes, a generator, water pipes, angle lines and a hand pump. They were all purchased from Karen Production Stores, United Engineering, corner sheep, game meat, Wines of the World Thom House, Kingsway Tyres, Impala and Farmers Choice shops. The purchases took place between 4th and 6th October 2011 after which they were stored.



48. PW10 called David Boro Kimani to transport the goods. He was accompanied by PW2 and Gideon Karanja. The vehicle was loaded on 6th October 2011 at 8:00 p.m. He then got wind of the fact that a robbery had taken place during the night.
49. PW11 CPL Henry Kiboma testified that on 7th October 2011 at 3:30 p.m., he accompanied other colleagues to Majengo Estates to look for suspects. On arrival in a plot belonging to the 1st appellant, they found five persons, including some of the accused persons with wine. Outside the house were two tyres. Two police uniforms were placed on the washing lines. He took photographs and arrested the suspects. The suit motor vehicle was then found abandoned the next day at Tipis Trading Centre. PW11 took photographs of two suspects and a bottle of wine, recovered lorry wheels, the jungle jacket and the vehicle the subject of the investigation. He then prepared a certificate of the photographs. He adduced them in evidence.
50. PW12 PC Collins Okoth the investigating officer testified that he was on night patrol on the night of 6th October 2011 at the Narok Mai Mahiu road together with Corporal Gachanga. On return to the Narok police station at 4:00 a.m., his colleague informed him that a robbery had taken place next to Ole Tipis Girls gate. They immediately went to the scene and commenced investigations to establish the whereabouts of the assailants. He also interrogated PW1, PW2 and Gideon Karanja.
51. After establishing the events surrounding the robbery, PW12 retrieved PW1's M-Pesa statement. It revealed that several transactions took place on PW1's mobile phone number 0720616400 as follows: balance request at 1:26 a.m., balance request at 5:48 a.m. and withdrawal of funds through agent Tuko Net Majengo Narok in the sum of Kshs. 3,570.00.
52. PW12 was later informed that Isuzu canter KZD 303 had been abandoned at Mau Narok trading centre with two missing tyres. He also learnt that two men took the two tyres to a Nissan motor vehicle registration number KBJ 758Z that ferried them to Narok. Thereafter, they were ferried by bodaboda operator to a plot.
53. PW12's evidence was that all persons involved were all traced and recorded their statements. They later discovered that the suspects were in Majengo. That was where four of them were found, the 1st appellant included with his family. They were in the 1st appellant's home. The 1st appellant's mobile phone was located on site confirming that they were the suspects. It was this number that called PW3 to confirm that the tyres had been delivered. They also found tyres which they believed were stolen from PW1. They collected a jungle green jacket and trouser, blue jacket, black jacket, PVC pipe and a metal chain.
54. Conducting further investigations, PW12 was informed by people in the bakery that indeed the house belonged to the 1st appellant. This house was also confirmed by the motorbike riders that it was the destination for dropping the tyres. They furthermore collected an album of a G3 rifle, a wallet carrying Safaricom registration of MPESA services over mobile number 0716697536 belonging to the 1st appellant, application for registration of an identity card and waiting card belonging to the 1st appellant, Safaricom plate, an exercise book bearing an inventory of stolen items, the 2nd appellant's mobile phone, a Nokia mobile phone, a red Samsung phone belonging to PW1, the 2nd appellant's voter's card, ID and wallet. They also took photographs of the accused persons.
55. The fifth accused person was arrested in another house in Majengo. He had incessantly called the 1st appellant's phone, unknowingly in the presence of PW12, wanting to know how they would share the loot. In the course of that conversation, he revealed his location. PW12 also collected receipts from PW10's checklist which were all adduced in evidence. Thereafter, witness statements were recorded and the identification parade conducted. Through intelligence surveillance, PW12 was able to retrieve



- the whereabouts of PW5. He was initially arrested and later claimed that he knew the accused persons since he had stayed with them previously.
56. In PW5's barn, PW12 recovered the following items: slasher, Spader, metal bars, angle lines, perishable assorted food stuffs, two tyres, a tall horse wine, cool boxes, water, chlorine, maize flour honey, king water, tea leaves, sultanas, sunflower seeds, red onions, chocolates, macadamia nuts, almonds, gobas, sweet corn, crisps, water bottler, Dorman's coffee, castor sugar, corn flour, eggs, thyme and tamarind. These items were recorded and released back to the complainant. He confirmed that the firearm used during the robbery was not recovered.
 57. At the close of the prosecution's case, the trial court found that the prosecution had established a prima facie case against the appellants. They were placed on their defence and gave unsworn testimony. DW1, the 1st appellant testified that on 7th November 2011 at around 3:00 p.m., he was at his home when a police officer called him. He stated that he was a wrist watch, perfume and handkerchief vendor. The police officer came to his home informing him that he wanted to search his premises.
 58. The police officer collected an album bearing photos of himself and his children together with his wallet and asked him to step out. DW1 found other police officers outside. He was asked to join others who were at Mama Rima's house. Approximately ten of them were ferried by a land cruiser to the DCIO's offices. DW1 slept in the police cells from 7th – 9th October 2011.
 59. On 9th October 2011, he underwent an identification parade exercise. He was given a paper to sign. He complained. He stated that police officers had rungus and cautioned him not to ask questions. He therefore signed out of coercion. He recalled that before the identification parade took place, he was placed in the same room as PW1.
 60. Additionally, PW3 slept with him in the same police cell before identifying him as a culprit. He was emphatic that since he was not captured in any of the photographs, then he was certainly not there when the investigating officer arrested the culprits. Finally, he stated that all the witness accounts of the prosecution were marred with falsities and inadequacies. He complained that the parade fell short of fairness standard.
 61. DW3, the 2nd appellant on his part testified that he traveled to Narok on 6th October 2011 to visit his brother DW2. Since his brother had a family, he set off in search of a rental on 7th October 2011. He found a house in London on that day when police officers arrested him. Photographs were taken while other people were removed from other houses. DW3 was taken to the police station. On 9th November 2011, an identification parade took place. He maintained that nobody identified him from the parade. Finally, PW12 did not state with specificity where the recovered items were retrieved from. He denied committing the offence.
 62. We have carefully read the record of appeal and the written submissions. The ingredients to the offence of robbery with violence are set out in section 295 as read with section 296 (2) of the *Penal Code*. The prosecution must establish the 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 prosecution must establish that during such act of stealing, the offender was armed with any dangerous or offensive weapon or instrument; or was in company of one or more other person or persons; or at or immediately before, or immediately after the time of the robbery, the offender wound, beat, struck or used any other violence to any person.
 63. The undisputed facts are that between 4th and 6th October 2011, PW10, an accountant purchased the following items for Siare Camps: tinned food vegetables, a wedding cake, wines, sodas, chocolates, meat, flour, tinned food, tyres, shocks, oils, bushes, ice cubes, tubes, a generator, water pipes, angle



lines and a hand pump. Thereafter, the goods were loaded onto Isuzu canter motor vehicle registration number KZD 303 on 6th October 2011. PW1, the driver of the said canter, intended to deliver the goods to Narok. He was accompanied by PW2 and Gideon Karanja, when their journey commenced at around 10:00 p.m. from Nairobi.

64. At around 12:45 a.m., just eight kilometers away from Narok, they came across a roadblock with very sharp spikes compelling them to slow down. Suddenly, four men, dressed in police uniforms emerged. One of the four men approached them with a torchlight flashing it at the occupants of the vehicle from the windscreen. He was recalled to have been dressed in a jungle green jacket similar to those worn by AP officers. He was also wearing police boots and black trousers. The second man approached them wearing a black jacket, black trouser and a beret. They inquired from them what they were carrying. In the process of responding to the question, the man in the black jacket came to PW1's side of the vehicle.
65. As PW1 was applying hand brakes, he was accosted by one of the assailants and forcefully removed from the vehicle. PW2 and Gideon Karanja were similarly egressed by force. One of the assailants pointed a gun at PW1. They were all escorted to the back of the canter where they found several other assailants. The canter was opened and thereafter, PW1, PW2 and Gideon Karanja walked in a file into a thicket about 1 kilometer away from where they had left the canter.
66. While lying on their stomachs, PW1's Samsung B 200 and a wallet carrying Kshs. 2,000.00 cash was taken away from him. The culprits then asked for his MPESA pin number after which airtime was purchased from his phone. They also took PW2's C3010 mobile phone and Kshs. 80.00 from his pocket.
67. Their hands were then tied separately with sisal ropes. Armed with pangas and a gun, the perpetrators continued to speak to them for hours until dawn. After about four hours, when they realized that they had been left alone, the victims untied themselves and walked to the main road where they found charcoal sellers. Through their assistance, they managed to speak to the OCS who visited the crime scene, accompanied by PW12, where they found that the canter had vanished.
68. PW12 interrogated PW1, PW2 and Gideon Karanja. He was later informed that the canter was abandoned at Mau Narok Trading Centre with two missing tyres. On further investigation, it was unearthed that two men, delivered two tyres to a Nissan motor vehicle registration number KBJ 758Z that ferried them to Narok. The conductor of the vehicle was PW3, the person who spoke to and received Kshs. 500.00 from the two men while PW4 was the driver.
69. Upon reaching the Narok main stage, it was also discovered that the two tyres and two men were transported to a plot in Majengo by PW6, PW7 and PW9 where the suspects were traced. They were found by PW11 and PW12. Meanwhile, PW5's evidence was that on 7th October 2011 at 4:00 a.m., he was awoken up together with his cousin, by three people in a canter outside his gate. His cousin recognized him as the people who sought for fertilizer a month earlier. They informed them that they wanted to offload some goods and were rushing to pick potatoes.
70. PW5 acceded to storing the goods including a big generator, four gas cylinders, 4 new huge tyres without rims, two tents, a cool box, several cantons of eggs, tomatoes and mineral water, a spare tyre of a lorry with a rim, spade, slasher, three motor vehicle springs, three crates of soda, 1 carton of wine, maize flour, one bag of flour, and tissue. In quick succession, the goods were offloaded. The following day, motor vehicle registration number KBC 317V, belonging to John, picked the following items: tissue, 50kgs of sugar, tomatoes, onions, wheat flour and mineral water. They all left with John at noon.
71. A week later, another vehicle came and carried four tyres and one gas cylinder. Come 28th November 2011, a Toyota Noah came to his home with seven unknown persons. They took three gas cylinders,



a generator, cool boxes, mineral water, maize flour, a spade and a slasher. Later that evening, he was visited by police officers and took away the remaining stock including a slasher and a spade. When the goods had been collected by the police officers, PW10 confirmed affirmatively that the stolen stock was indeed the one he had purchased albeit some having gone bad.

72. The above facts indeed prove that indeed a robbery took place on the night of 7th October 2011 where PW1 and PW2 were the victims. The assailants were armed with pangas and guns and were more than one in number. One of the assailants threatened PW2 that he would use the slasher to shave him.
73. The record also shows that PW12 in the course of investigations, discovered that funds were withdrawn from PW1's MPESA number 0720616400 as follows: balance request at 1:26 a.m., balance request at 5:48 a.m. and withdrawal of funds through agent Tuko Net Majengo Narok in the sum of Kshs. 3,570.00. Importantly, the time stamps proved that PW1 did not have his phone as it had been taken away from him by the assailants.
74. Secondly, the suspects, particularly the appellants, were found in Majengo. According to PW12, they were found in the 1st appellant's home. This fact of being his home, was also corroborated by the 1st appellant who stated that the police took a photo album from his house which bore pictures of himself and his children. We have no doubt in our mind that the suspects were arrested in the 1st appellant's home.
75. Thirdly, at the 1st appellant's home, it was discovered that it was the 1st appellant's mobile phone number 0716697586, located on site that called PW3 to confirm that the tyres had been delivered. The details of the 1st appellant's mobile number were confirmed as belonging to the 1st appellant through his Mpesa and Safaricom credentials.
76. During the raid, PW12 and team also found tyres which they believed were stolen from PW1 and other stolen items including a bottle of alcohol. They collected a jungle green jacket and trouser, blue jacket, black jacket, PVC pipe and a metal chain. Importantly, they found PW1's mobile phone in 1st appellant's house.
77. Fourthly, the fifth accused person, unbeknownst to the presence of police officers, had called the 1st appellant wanting to know how they would share the loot. In PW5's barn, severally items were recovered by PW12 recovered several items. On inspection, PW10 confirmed that though some of the goods had gone bad, he identified them as the ones purchased, including the tyres.
78. Lastly, the appellants challenged the procedure of identification parade that was conducted on 9th October 2011 after the offence took place. The rationale of an identification parade is well settled in our jurisdiction. In Francis Kariuki Njiru & others v R.Cr. A. No. 6/01 (UR), this Court held as follows:

“The law on identification is well settled, and this Court has from time to time said that the evidence relating to identification must be scrutinized carefully, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error. The surrounding circumstances must be considered (see R.v Turnbull [1976] 63 Cr. App. R. 132). Among the factors the court is required to consider is whether the eye witness gave a description of his or her attacker or attackers to the police at the earliest opportunity or at all. This Court, in Mohamed Elibite Hibuya & Another v R. Criminal Appeal No. 22 of 1996 (unreported), held that:

... it is for the prosecution to elicit during evidence as to whether the witness had observed the features of the culprit and if so, the conspicuous details regarding his features given to anyone and particularly to the police at the first opportunity. Both the investigating officer



and the prosecutor have to ensure that such information is recorded during investigations and elicited in court during evidence. Omission of evidence of this nature at investigation stage or at the time of presentation in court has, depending on the particular circumstances of a case, proved fatal – this being a proven reliable way of testing the power of observation, and accuracy of memory of a witness and the degree of consistency in his evidence.”

79. From the 1st appellant’s identification parade form, the 1st appellant was agreeable to participating in the exercise and stated that he had no desire to have a friend or solicitor present. Furthermore, he made no objections concerning the arrangements or the persons in the parade. He was identified by means of touching by all five witnesses. When asked if he was satisfied with the conduct of the parade, he answered yes and appended his signature.
80. According to the 2nd appellant’s identification parade form, the 2nd appellant on his own volition participated in the exercise and stated that he had no desire to have a friend or solicitor present. Furthermore, the 2nd appellant made no objections concerning the arrangements or the persons on the parade. He was identified by means of touching by PW2 and Gideon Karanja. When asked if he was satisfied with the conduct of the parade, he answered yes and appended his signature.
81. It is also instructive to point out that PW1 was able to identify the 1st appellant with the help of the moon light, the flashlight and the headlamps of the vehicle. The one who shone the flashlight, he described, had a thin face, crossed teeth and had the appearance of a Somali. He had a police stick with him similar to that assigned to police officers. PW1 described the 2nd appellant as the assailant who talked in “Bonoko Kiswahili and like mshamba, not pure Kiswahili.”, and who threatened PW2.
82. PW2 on his part also recalled that he could recognize the assailants with the aid of the motor vehicle lights and the moonlight. His recollection was that there were eight assailants. He recalled that one of the assailants was a Somali, one was a short dark person and one had the “Kiswahili of Bonoko”, that is the 2nd appellant, threatened him that he would use a panga to shave him.
83. The identification parades took place two days after the offence occurred. Both PW1 and PW2 had vivid descriptions of the assailants and easily managed to point them out during the parades. We find that the identification parades served the purpose of cementing the identities of the suspects which had already been established beyond reasonable doubt. They were found in possession of the stolen items inoculating the doctrine of recent possession. The chain of events leading up to the appellants’ arrest leaves no doubt in our minds that the appellants were the perpetrators. It is our finding that the appellants were properly convicted. Just like the first appellate Court, we are satisfied that all the ingredients of the offence were proved beyond reasonable doubt and that this is a safe conviction. On that account, we dismiss the appeal on conviction and affirm the same.
84. The other ground urged by the appellant is that the mandatory minimum sentence prescribed by the trial court is unconstitutional. However, this issue is now settled, at least for now. The Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR) clarified that in the *Muruatetu* case, the court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example, to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code* and reiterated that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This means that until the law is changed or the Supreme Court rules differently, our hands are tied.



However, we hasten to add that the sooner this issue is resolved, the better to bring to an end the obvious discrimination in the sentencing policy.

85. Finally, we note that the death sentence on count 1 was commuted to a life sentence by the first appellate Court, with the sentence on count II being held in abeyance. The penalty for this offence is couched in mandatory terms under section 296 (2) of the *Penal Code*. However, there was no cross-appeal or notice to enhance the sentence by the respondent. Accordingly, we will not interfere with the sentence of life that was imposed by the first appellate Court. In the end it is our finding that the appellants' appeal is dismissed in its entirety.

DATED AND DELIVERED AT NAKURU THIS 4TH 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

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR.

