



REPUBLIC OF KENYA



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**Gitigi v Republic (Criminal Appeal 79 of 2019)
[2025] KECA 1187 (KLR) (4 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1187 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 79 OF 2019
JM MATIVO, GV ODUNGA & PM GACHOKA, JJA
JULY 4, 2025**

BETWEEN

JULIUS MAINA GITIGI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Narok (J. M. Bwonwonga, J.) dated 19th October 2017 in HCCRA No. 53A & 53B of 2017)

JUDGMENT

1. The appellant, Julius Maina Gitigi, together with Stephen Mwangi Wairimu alias Kadera and John Mwangi Waweru were charged with the offence of robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code*. The particulars of the offence were that on 29th December 2014, at Narok township Jorachem Chemist in Narok sub-county within Narok County, they, jointly with others not before court, while armed with a dangerous weapon namely AK 47 rifle, robbed Kennedy Mutwiri Mutie Kshs. 93,840.00, a mobile phone model Nokia 100 valued at Kshs. 2,000.00, all to the total value of Kshs. 95,840.00, and during the time of such robbery, threatened to use actual violence to Kennedy Mutwiri Mutie.
2. The appellants, together with his co-accused persons, were arraigned before the trial court. They all entered a plea of ‘not guilty’ when arraigned in Narok CMC Criminal Case No. 210 of 2015. Upon considering the evidence before it, the trial court found that the appellant and his co-accused Stephen Mwangi Wairimu guilty and accordingly convicted them of the offence. They were both condemned to the death penalty.
3. Dissatisfied with those findings, the appellant and his co-accused appealed before the Narok High Court in HCCRA No. 53A and 53B of 2017. After reevaluating the evidence, Bwonwonga, J. (as he



then was) found that the appellant's appeal lacked merit and dismissed it while his co-accused's appeal was successful.

4. The appellant is aggrieved by the learned judge's findings, hence this appeal. He filed grounds that barely raise any issue of law. The three grounds that he raised are as follows: that he pleaded not guilty at the trial; he wished to be present at the hearing of his appeal; and he was a poor man with no money to pay for his fees in this appeal. As will become apparent later in the judgment, the appellant addresses different issues in the submissions.
5. When the appeal was heard on 24th March 2025, learned counsel Miss. Wangari was present and represented the appellant, while learned counsel for the state counsel, Mr. Omutelema, was present for the respondent. Parties confirmed that they had filed their respective written submissions and elected to rely on.
6. We note that in his written submissions dated 11th September 2024, the appellant has addressed issues that were not raised in the grounds of appeal. However, noting that he was initially acting in person, we shall nonetheless address the issues of law that are raised in the submissions. Firstly, the appellant submitted that the identification parade was not conducted with fairness and repute to conclude that he was the perpetrator of the offence. Laying out the procedure of conducting an identification parade, the appellant submitted that the process was flawed since he was exposed before the parade by the officers investigating.
7. Secondly, speaking about the informer, the appellant submitted that this crucial witness was not called to testify. The result of the absence of his testimony was to cast doubt on the evidence of the prosecution. Furthermore, the absence of the informer's testimony rendered that of PW3, PW4 and PW5 hearsay; evidence that is not admissible before a court of law. Finally, the appellant submitted that the confessions were not taken within the parameters of the law. For those reasons, the appellant urged this Court to mete out a lenient sentence or in the alternative, set him at liberty.
8. The respondent filed its written submissions, a case digest and a list of authorities all dated 17th July 2024. It submitted that the prosecution proved all the elements robbery with violence to the required standard as set out in sections 295 and 296 (2) of the *Penal Code*. It submitted that the identification parade met the dictates of statute and left no room for error as to conclude that the appellant was the assailant. The evidence of all prosecution witnesses corroborated each other as to sustain a conviction since his defence was not cogent.
9. Regarding the informer, the respondent submitted that firstly, it was not under any duty to call the informer. That it held the discretion to call the witnesses it so wished. It is submitted that the informer was not a crucial witness. Secondly, section 132 (1) (sic) of the *Evidence Act* gave protection to the prosecution not to disclose its sources. Lastly, on the sentence, it submitted that there were aggravating circumstances that justified the two courts below to find that the death penalty was the proper sentence. In the alternative, it prayed for a severe sentence of imprisonment. It prayed that his appeal be dismissed.
10. As a second appellate Court, our duty was set out in *Victor Mwendwa Mulinge vs. Republic* [2014] KECA 710 (KLR) thus:

“This being a second appeal the Court can only consider matters of law in such an appeal as stated under Section 361 (1) of the *Criminal Procedure Code*. The Court cannot interfere with concurrent findings of fact by the two courts below, unless such findings are based on no evidence or on a misapprehension of the evidence or where the courts below are shown



to have taken into account wrong principles in making their findings, see CHEMAGONG v REPUBLIC [1984] KLR 611.”

11. The facts set out in the record before us show that the prosecution laid out the following evidence: PW1 John Nyamwega Ratemo, the administrator of Jorachem Pharmaceuticals, testified that PW2 Kennedy Mutwiri Mutie was employed as an attachee student from the African Institute of Research and Development. He recalled that on 16th December 2014 at around 7:00 p.m., he left the chemist with PW2 inside. He was traveling to Kisii town for a ceremony.
12. At 8:00 p.m., he received a call from PW2 who informed him that a robbery had taken place. It was explained to him that a man walked into the chemist as a phantom client seeking to purchase drugs. Shortly thereafter, two other men walked into the chemist, with one holding a gun. The first man jumped over the counter and forced PW2 to lie on the ground. Narrating the story in tears, PW2 informed him that they stole a Nokia mobile phone and Kshs. 93,840.00 cash. PW1 urged him to report the matter at the police station.
13. PW1 continued with his journey. He was then informed on 30th December 2014 that CID officers had called PW2 asking him to go to the police station and identify the culprits. PW1 testified that he did not know the culprits. He recorded his statement adding that one of the suspects was found with cash believed to be stolen from the chemist.
14. PW2 testified that as a student on attachment, he was working at Jorachem Pharmaceuticals on 29th December 2014. At 7:40 p.m., one young man walked into the chemist impersonating himself as a sick man with intent to purchase drugs. He was short in stature. Describing the chemist, PW2 explained that it was one roomed with 3 long tube fluorescent bulbs that were very bright.
15. After asking a few questions and establishing the purpose of his visit, PW2 recommended him to take Betapin tablets. As he was removing the drugs, the man placed his hand in his pocket to which PW2 presumed he was removing his wallet. In the process, two other men walked into the chemist. One of the men closed one door and left the other door ajar. Giving descriptive features of their attributes, PW2’s evidence was that two of the men were tall, while the one pretending to be sick was short.
16. He continued that one of the men, wearing a sweater, flushed out an AK 47 gun and pointed it at him. He ordered PW2 to lie down flat on the floor and cooperate. The other two unarmed men jumped over the glass counter. He lay down head facing down and could not see what was taking place. One of them asked PW2 to point out where the money was, to which PW2 obliged. The money was taken. They then took the Nokia mobile phone. They demanded the MPESA pin number but on realizing that PW2 was in a state of shock, they all hurried off.
17. After the incident, PW2 informed his neighbours and his employer that the mobile phone and Kshs. 93,840.00 cash had been stolen. PW2 immediately reported the matter at Narok Police Station and returned to the crime scene with three other police officers that assessed the scene. PW2 was then asked to go home.
18. PW2 further stated that he was later summoned to the Narok DCI offices. He was informed that some suspects were in their custody. They were suspicious that they were the same people who stole from PW2’s employer. He was later informed by the police that they recovered Kshs. 36,000.00 from the appellant.
19. On arrival, PW2 testified that he did not see the appellant at the CID offices before the parade. A parade was lined up along the corridor. At that juncture, PW2 identified the appellant and recognized him as one of the suspects. According to PW2, he was the sick man pretending to have a serious headache.



- When he was informed that another person had been gunned down the same night for committing a crime, PW2 requested to view the body at the mortuary. From his observation, he confirmed that he was one of the three robbers who stole from the chemist.
20. PW3 PC Joseph Njunge Kabete, the arresting officer, testified that on 29th December 2014 at 8:50 p.m., the OCS Narok called him and informed him about the offence. After visiting the crime scene, he patrolled the town with his colleagues PC Mulwa and PC Mutwiri. A police informer, whose identity was not revealed for security reasons, informed them that they had spotted a habitual robber whose alias was Susu in the gang that had struck the chemist. The informant was a bystander by the chemist when the robbery occurred.
 21. Staying in touch with this informer, PW3 was informed that Susu had rented out a lodging room in town in lower Majengo at around 2:00 a.m. PW3, together with his colleagues, found the 2nd accused in room 4. He was found together with the 3rd accused person John Mwangi Waweru. The two suspects were arrested.
 22. The 2nd accused person then revealed that the leader, alias Susu had a firearm in room 5. They cautioned them that he was armed with a rifle. PW3 left his colleagues to search room 5 as he did a sweep in room 4. Suddenly, he heard gunshots. On stepping out, he found PC Mulwa bleeding from his head. Susu was seen running away with an AK-47 rifle. PC Mutwiri's revolver was stolen by another suspect identified as Wakanene. The suspect hit the police officer with a beer bottle, whose impact led him to let go of his gun. PW3 shot Wakanene on the head and shoulder. He suffered fatal injuries.
 23. PW3 continued that another suspect emerged from the room and tried to escape. PW3 cautioned him that should he escape, he would be shot. On hearing this, the suspect surrendered and was arrested. The suspect informed him that he had Kshs. 36,300.00 in his pocket from the proceeds of the loot. However, he later changed the narrative, stating that it was his money for buying vehicle spare parts. This is the person who was identified as the appellant; the short black man described by the informer. Later on, Susu was gunned down in Eldoret in possession of an AK 47 rifle.
 24. PW4 PC Donald Chemosit the investigating officer testified that he was on night duty on 29th December 2014. At 8:00 p.m., the DCIO Narok SP Festus Kiambi called the team and informed them about the robbery that occurred at the chemist. He went to the scene and was joined by CPL Nakwamonu. He interrogated PW2 at the scene and was informed what transpired. This information was relayed to PW3. He then recorded the witness statement of the complainant the following day.
 25. The witness also gathered the testimony of PW3. He confirmed that an identification parade was conducted where PW2 identified the appellant as one of the culprits. He interrogated the appellant who explained that he had come to Narok to buy scrap metal at Bridge area. He then collected the evidence, including the Kshs. 36,300.00 cash recovered from the appellant and charged the appellant with the present offence. He described the appellant as the one who had posed as the sick short man during the robbery.
 26. PW5 Inspector Achilles Omondi testified that he was requested by PW4 to conduct the identification parade. He stated that PW2, the identifying witness, was placed at the CID general office at the waiting bay before the exercise commenced. PW5 did not meet the witnesses before the exercise. He testified that parade 1 commenced at 1:10 p.m. where the appellant was placed. PW5 explained to the appellant that it was a voluntary exercise and the reasons behind the parade. The appellant stood between the 4th and 5th persons in an eight-member parade.
 27. PW5 then called PW2 to the parade. He informed him that the suspect could or could not be at that parade. PW2 went around and touched the shoulder of the appellant. On asking for the appellant's



- comment, he stated that he did not know PW2. He stated that the appellant said that he was dissatisfied with the exercise without furnishing reasons. Nonetheless, he signed the identification parade form. PW5 also signed the form that was produced in evidence.
28. PW5 conducted two other parades placing the other accused persons in positions of their choosing. PW2 did not identify either of them as the culprits. Those forms were also adduced as evidence.
 29. At the close of the prosecution's case, the trial court found that the prosecution had established a prima facie case against the appellant and the 2nd accused person. The 3rd accused person was ruled to have no case to answer. The appellant was placed on his defence. His sworn testimony firstly questioned the defectiveness or otherwise of the charge sheet because it spelt his name wrong and further indicated that he was a masai yet he hailed from the agikuyu community. Denying the charges leveled against him, the appellant narrated that when he went to answer to a call of nature on 30th December 2014 in Majengo pussy lodging, he heard commotion at the verandah prompting him to investigate.
 30. The appellant found four men; one was lying on the ground lifeless, while the other three were standing. He added that two CID police officers clad in civilian clothes aimed their guns at him, forcing him to lie on the ground. At their behest, the appellant took the police officers to his room number 5 for a search but found nothing. The appellant was physically searched. The officers found him with a stash of cash. They gave the appellant two options: to surrender the cash to them and set him free or retain the cash and face the force of the law. He chose the latter.
 31. The appellant was bundled in an unmarked police car and escorted to Narok police station. When questioned by other officers about what he had seen, he was beaten. He was then moved from the cells to the CID general office where he found three civilians and was returned to the cell. He was then informed that he would participate in an identification parade exercise. He was placed in the middle of an eight-line men parade. He testified that one of the three civilians that he saw at the general office earlier then pointed at him. He signed the form under protest because the civilian had seen him before the exercise.
 32. The definition of robbery is captured in section 295 of the *Penal Code*. It provides that 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 offence of robbery.
 33. Section 296 (2) of that statute sets out the parameters for robbery with violence. It states that any one of the following circumstances will constitute the offence under that section: If the offender is armed with any dangerous or offensive weapon or instrument; if he is in company with one or more other person or persons; 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.
 34. Both courts confirmed that it was not denied that on the night hours of 29th December 2014, the complainant PW2 was robbed at gun point by three men; two were tall while one was short. The short man masqueraded as a sick man trying to purchase over the counter drugs in the chemist. The description of the chemist by PW2 was that it was well lit up with three bright fluorescent bulbs bringing to the fore the question of his visibility of the culprits, though admitting that he had never seen them before the offence occurred.
 35. PW2 raised a few questions to the short, sick man to establish the cause of his ailment. The interactions that PW2 had with the assailant would play a big role later and both courts affirmed that they gave PW2 a personal and direct interaction with the would-be culprit. As he was prescribing his treatment and reaching out for the drugs, two tall men walked into the chemist, one armed with an AK 47 rifle.



36. PW2 was ordered to lie on the ground as the three men partook in the robbery. The culprits parted away with a Nokia mobile phone valued at Kshs. 2,000.00 and Kshs. 93,840 cash. Responding to the distress call after the suspects had left the scene, PW2 immediately informed PW1. Reports were also channeled to PW3 and PW4, the latter, that is PW4, visiting the crime scene shortly thereafter.
37. The following day, an identification parade took place to establish who the assailants were. At this juncture, the appellant had been arrested. The circumstances of his arrest were explained by PW3, the arresting officer. He explained that he received a tip from an informer, in the company of his colleagues PC Mulwa and PC Mutwiri, that a habitual robber whose alias was Susu was spotted in the company of the gang that had struck the chemist at a lodging in Majengo.
38. Those reports led PW3 to room 4 and room 5. In the whole process of the search, there were gunshots. Susu was seen running away with a rifle. Wakanene, one of the men, was gunned down by PW3 while the appellant was arrested while he was an occupant in that room while trying to escape. He was found in possession of Kshs. 36,300.00 that from PW3's assessment was suspicious. He was arrested and escorted to the Narok police station.
39. PW2 identified the appellant as one of the three men. This is significantly one of the arguments raised by the appellant to the extent that he was of the considered view that the identification parade was not compliant with the law. Chapter 42, paragraph 4 subsection 7 of the National Police Service Standing Orders (under the [National Police Service Act](#)) governs the mode and conduct of an identification parade. The question is whether the identification parade conducted in these proceedings aligned with those provisions of the law.
40. PW5 conducted the identification parade. He stated that PW2, the identifying witness, was placed at the CID general office at the waiting bay before the exercise commenced. PW5 did not meet the witnesses before the exercise. He testified that parade 1 commenced at 1:10 p.m., where the appellant was placed. PW5 explained to the appellant that it was a voluntary exercise and the reasons behind the parade. The appellant elected to stand between the 4th and 5th persons in an eight-member parade.
41. PW5 then called PW2 to the parade. He informed him that the suspect could or could not be at that parade. PW2 went around and touched the shoulder of the appellant. On asking for the appellant's comment, he stated that he did not know PW2. He stated that he was dissatisfied without furnishing reasons but nonetheless signed the identification parade form. PW5 also executed the form that was produced in evidence.
42. The appellant lamented that the process was flawed. However, he did not express these reservations when he signed the parade form. If he had any issues with the manner and conduct of the parade, nothing would have been easier than discharging his rights at the point of execution. We find that PW2's identification of the appellant as the culprit, who posed as the sick man in the chemist, was properly and positively done. He interacted with him at the chemist that was well lit and the following day, identified him. His memory remained clear and did not leave room for any iota of doubt.
43. The appellant also lamented that the informer was never called to testify. The first appellate court substantially addressed this issue in the following manner:

“... Furthermore, there was the potential evidence of the informer whose evidence is privileged in terms of section 133 of the [Evidence Act](#) [Cap 80] Laws of Kenya. The court did not compel the prosecution to call this informer unless it was shown that his evidence was going to enable the appellants to establish their innocence. The issue of informer privilege was fully analyzed by this court in the case of Tiapukel Kuyoni and another in Criminal



Appeal Nos. 25 and 25A of 2017 (Narok) which stands for the proportion that an informer is privileged unless his evidence is required to establish the innocence of the accused persons. In the circumstances, I find no merit in this ground of appeal and is hereby dismissed.”

44. Section 132 of the *Evidence Act* provides that no public officer shall be compelled to disclose communications made by any person to him in the course of his duty, when he considers that the public interest would suffer by the disclosure. Under section 133 (1) of the same statute, no judge, magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence. The information acquired from the informant was glaringly that which was qualified under the above provisions. Accordingly, we uphold the findings of the High Court and see no reason to depart from it. That argument fails and is accordingly dismissed.
45. It is also clear from the evidence that the appellant was in the company of three other persons when they robbed the chemist. They all had the common intention of stealing from that chemist. It is also not in doubt that from PW2’s evidence, which was not shaken, one of the robbers was armed with an AK-47 rifle, a dangerous and offensive weapon. They parted away with cash and a mobile phone, having threatened to use violence on PW2, who was horrified and left shaken after the ordeal. We have no doubt in our mind that the appellant committed the offence that he was charged with, together with the others and that all the ingredients of the offence were established.
46. Ultimately, we come to the inescapable conclusion that the appellant’s conviction was safe. Accordingly, the appellant’s appeal to this Court on conviction has no merit and must accordingly fail.
47. On the question of the sentence, the appellant was sentenced to death in line with the provisions of 296 (2) of the *Penal Code*. The penalty for this offence is couched in mandatory terms. The directions of the Supreme Court issued on 6th July 2021 in Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR clarified that mandatory or minimum sentences imposed in the statutes have not been invalidated. Taking the above decision into account, we are unable to interfere with the sentence meted out. We therefore similarly dismiss the appeal on sentence.

DATED AND DELIVERED AT NAKURU THIS 4TH DAY OF JULY 2025.

J. MATIVO

.....

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

