Mutegi v Republic (Criminal Appeal 91 of 2019)
[2025] KECA 1269 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KECA 1269 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 91 OF 2019

JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA

JULY 4, 2025

BETWEEN

AMOS MUGENDI MUTEGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from conviction and sentence of the High Court of Kenya at Chuka (Limo, J.) delivered on 27th April 2017 in HCCR. No. 35 of 2015)

JUDGMENT

1. The appellant, Amos Mugendi Mutegi, was charged in the Senior Magistrate's Court at Chuka, with 5 counts of the offence of robbery with violence contrary to Section 296(2) of the *Penal Code*.

2. On Count I, the particulars were that, on 8th June 2004 at Old Marima Market, in Meru South District, within Eastern Province, jointly with another, not before the court, being armed with a dangerous weapon, namely a pistol, robbed Nicholas Njagi Nabea Kshs. 3,700 and a mobile phone make Sagen 3020 valued at Kshs. 5,000 and at or immediately before or after the time of such robbery, shot the said Nicholas Njagi Nabea.

3. In Count II, the appellant was charged with a similar offence of robbery with violence, under similar circumstances. The particulars of the offence being that on 8th June 2004, at Old Marima Market aforesaid, he, along with another person not before the court, armed with a dangerous weapon, namely a gun, robbed Rosemary Wairimu Njagi of one Sagen mobile phone, car keys, and Kshs. 5,500, all valued at Kshs. 10,500 and during the robbery, or immediately before or after, he threatened to use actual violence against Rosemary Wairimu Njagi.

4. In Count III, he was charged with the same offence under similar circumstances, being that 8th June 2004, at Old Marima Market aforesaid, along with another not before the court, armed with a dangerous weapon, namely a pistol, robbed Nkonge Barine Manyara of Kshs. 380 and during the

robbery, or immediately before or after, he threatened to use actual violence against Nkonge Barine Manyara.

5. In Count IV, he was charged with the same offence under similar circumstances, being that on 8th June 2004, at Old Marima Market aforesaid, along with another not before the court, armed with a dangerous weapon, namely a gun, robbed Annis Muthoni of a purse, an identity card, an ATM Card, a bank plate, and Kshs. 1,220 with a total value of Kshs. 1,335 and during the robbery, or immediately before or after, threatened to use actual violence against Annis Muthoni.

6. }In Count V, the appellant was charged with attempted robbery with violence contrary to Section 297(1) of the *Penal Code*. That on 8th June 2004, at Old Marima Market, aforesaid, along with another not before the court, he attempted to rob Annis Muthoni of a Nissan Sunny Motor Vehicle Registration Number KAC 851N, valued at Kshs. 160,000 while armed with a dangerous weapon, namely, a gun.

7. In support of its case, the prosecution called eight witnesses. Morris Mutwiri (PW1) testified that on 8th June 2004, at about 3:00 p.m., while he was at school, he heard screams coming from Marima. A neighbour approached him and informed him that there were thieves in the area. They then heard a loud noise that sounded like a tyre burst. PW1 and the neighbour went to assist, and on their way, they encountered the appellant, who was running towards them while being chased by other people. The appellant hit him with a stone; however, PW1 and the others managed to apprehend him.

8. Joseph Mwenda (PW2) testified that on 8th June 2004 at 3:00 p.m., while he was at Muthambi Polytechnic College, he heard a loud bang that resembled the sound of a tyre burst and saw someone running. He joined in the pursuit and, together with PW1, was able to arrest the appellant.

9. Nicholas Njagi (PW3) testified that on 8th June 2004 at approximately 4:00 p.m., while he was in his shop at Marima, the appellant approached the counter holding Kshs. 50 and wanted to make a purchase, when another person joined him, pointing a gun at PW3, demanding for his car keys. PW3 searched for the keys but was unable to find them. He then grabbed a stool and hit the person holding the gun. The person went outside, and when he returned, PW3 hit him again with the stool. The assailant then shot PW3 in the left shoulder. The appellant jumped over the counter, broke the cash box, and stole Kshs. 3,000 and stuffed in his pocket, and demanded the phone worth Kshs. 5,000. The appellant, along with his accomplice, demanded car keys. PW3 called his wife, who was behind the shop, to bring a set of keys. She came without, and she was told to produce the keys or PW3 would be killed. The appellant followed her to retrieve them. Upon returning, the appellant joined his armed accomplice and then left. PW3 heard gunshots. He went out and he found another vehicle belonging to a teacher. Members of the public gathered and chased the two assailants, one of whom was the appellant, who was eventually apprehended. PW3 was then taken to Chogoria Hospital and hospitalised for six weeks.

10. Rosemary Wairimu Magi (PW4) testified that on 8th June 2004, her husband (PW3) arrived at their shop at about 4:00 pm. She left him and went to the back of the shop. Shortly after, she heard a loud bang and went back to the shop. She saw one man with a gun, the second person entered their house which seems to have been behind the shop and demanded from her car keys. PW4 retrieved the keys from the bedroom, and the man who followed her is the appellant; he had threatened to kill her if she did not hand over the car keys. PW3 was bleeding, and the cash box was on the floor. Later, she learned that one of the assailants had been arrested.

11. Alice Muthoni Gitonga (PW5), in her testimony, informed the court that on 8th June 2004, while being driven home from school, in her vehicle Registration Number KAC 851N, in the company of her colleague Kinyua Barine, near Old Marima Market, opposite PW2's shop, they noticed two individuals

approaching from the left side, one of whom was armed. PW5 and her companions were ordered to leave the vehicle. They complied. The assailants took PW5's purse containing over Kshs. 2,000, a bank plate, an ATM Card, and other documents. They ordered PW5 and others to lie down and demanded the car keys, but PW5's driver, PW7, lied to the assailants that PW5 had them. PW5 told them that the keys were in a paper bag, and as they searched for them, bystanders began throwing stones. The duo attempted to escape towards a stream. Subsequently, the appellant was arrested by members of the public. Soon thereafter, the police arrived. PW5 received minor injuries. She later recovered her belongings.

12. Nkonge Barine (PW6) testified that on 8th June 2004 at about

    4. 00 pm, he was in a car with PW5 when they encountered two men at Old Marima Market. One was armed with a gun and demanded the car keys from the driver, while the other (the appellant) forced them out of the vehicle and searched them. The appellant took Kshs. 3,801 from his pocket while the other assailant continued to harass them. Amidst the chaos, a mob gathered and scared the two men away. PW6 discovered his cell phone was missing, but later found it. The police arrived, and the appellant was arrested, but PW6's money was not recovered, and he reported no injuries.

13. Gilbert Ireri (PW7), who was PW5's driver, testified that on the day in question, he saw two people running and stopped the vehicle to avoid hitting them. One of the individuals collided with the bonnet of the car and pointed a gun at him. He identified the appellant as one of the two men; however, the appellant was unarmed. The appellant then forced PW5 and PW6 out of the vehicle and made them lie down. PW7 was subsequently ordered to surrender the car keys. During this time, a mob began to approach, and the armed assailant fired a shot at them. PW7 informed the armed assailant that the car keys were with the others who had exited the vehicle. He then discreetly removed the keys and hid them under the seat. PW7 was instructed to remain in the car. As people started throwing stones, both assailants fled, but the mob apprehended the appellant.

14. Sgt. Musila (PW8), the investigating officer, testified that on 8th June 2004, he received a call regarding a person who had been robbed and shot, and had been admitted at Chogoria Hospital. He was also informed that one of the robbers had been apprehended. PW8 proceeded to the scene and found the appellant lying unconscious near the complainant's shop after being beaten by the mob. His accomplice had managed to escape. He learnt that one of the victims had been shot in the chest. Upon searching the area, PW8 recovered two live rounds of ammunition, one of which was discovered inside PW3's shop. He was unable to locate the spent cartridge because the scene had been disturbed. He then took the appellant into custody and charged him.

15. At the close of the prosecution's case, the appellant was placed on his defence. He elected to give unsworn evidence and stated that at the time, he was looking for a job and arrived at Marima at 2:00 p.m. He recalled hearing screams and seeing people running away. In the process, he was arrested and accused of robbery due to his unemployment status. After being badly beaten, he was taken to the police station.

16. On 1st July 2005, while returning a verdict of guilty, the trial court found that the prosecution's eight witnesses had proved beyond all reasonable doubt that the appellant committed the offence, noting that the crime occurred in broad daylight and the evidence against the appellant was overwhelming that his defense amounted to little more than a mere denial, which appeared to be a last-minute effort to avoid the consequences of his actions. The court was satisfied that Counts I, III, IV, and V were proven beyond any reasonable doubt and the appellant was found guilty of Counts I, III, IV and V under Section 215 of the *Criminal Procedure Code* (CPC). He was acquitted in respect of Count II due

to variance of the charge and the evidence adduced in support thereof. The appellant was sentenced to death in respect to Counts III and IV, and 7 years' imprisonment on Count V. The court did not specify the punishment on account of Count 1.

17. Aggrieved by the conviction and sentence, the appellant lodged a first appeal to the High Court. In his amended grounds of appeal filed on 22nd February 2017, he complained that the trial magistrate erred by conducting the trial in a language the appellant did not understand; failing to consider the embarrassment caused by the many counts on the charge sheet; failing to acknowledge the appellant's indisposition hence his failure to cross-examine the witnesses; by sentencing the appellant to death on two counts and seven (7) years on another without holding the counts in abeyance and by failing to rule that the appellant was identified on the dock.

18. The High Court in its judgment found that despite an identification parade not being conducted, the appellant clearly placed himself at the scene of the crime and the evidence tendered connected him with the offence committed. The court also found that the appellant's defence had been considered. The court did not find the charge sheet embarrassing as claimed by the appellant and held that since the offences were founded on the same facts and the same chain of events, trying the five counts together in the same trial did not embarrass the appellant in any way.

19. The court, however, found that the sentence meted out against the appellant was not proper and altered it as follows:

> "i. The appellant's sentence meted out by the trial court shall be in respect to count I.
>
> ii. The sentences of death in respect to counts III and IV shall be held in abeyance pending execution of the capital sentence in count I.
>
> iii. The sentence of 7 years in respect to count V should also have been held in abeyance, but the same now is academic as the sentence has been overtaken by events of the appellant having been in prison custody for more than a decade since he was sentenced."

20. On 9th March 2017, the appellant informed the High Court that his death sentence was commuted to a life sentence through a Presidential Amnesty, but no evidence was tendered to demonstrate the same. The court held that if that were the case, then it would remain so.

21. Dissatisfied with the decision, the appellant filed the instant appeal raising grounds, inter alia, that the learned Judge erred in law by failing to: consider that the appellant was a minor at the time of the offence; consider that the whole trial process suffered from procedural irregularities that led to a breach of justice as captured in Article 50(2) of *the Constitution*; consider that the appellant was unwell throughout the trial; consider that the prosecution did not adduce the exhibits in court as evidence. Additionally, the evidence adduced was insufficient to sustain a conviction, and the sentence was harsh and excessive. The appellant also claimed that his defence was dismissed without a valid reason, thereby violating the provisions of Section 169 of the *Evidence Act*.

22. Learned counsel for the appellant filed a supplementary memorandum of appeal dated 27th September 2023, with one ground of appeal stating that the learned Judge erred in finding that the prosecution had proved its case beyond a reasonable doubt.

23. Learned counsel filed submissions dated 27th September 2023, and distilled two issues for our consideration, namely: whether the prosecution proved its case beyond any reasonable doubt and whether the appellant was correctly identified.

24. Learned counsel contended regarding Count 1, that the P3 form should not have been admitted into evidence without proper production by its maker. That PW1 was not competent to produce it, even though the appellant did not object to the production of the same, taking note that he was at the time unrepresented and lacked the benefit of proper legal representation, which is a fundamental aspect of a fair trial. Furthermore, the learned counsel contended that the court neglected its duty under Section 150 of the *Criminal Procedure Code* by failing to order for the attendance of a medical officer to produce the P3 form, and absent the P3 form, the prosecution failed to prove the element of violence or injury inflicted on PW1.

25. Further learned counsel submitted that since PW7 was driving the subject motor vehicle, he became the special owner of the car and should have been indicated as the complainant in Count V and not PW5, Alice Muthoni, as it appears on the charge sheet, rendering it fatally defective.

26. Learned counsel also asserted that the prosecution's case was not proven beyond any reasonable doubt as the prosecution failed to provide the ballistic report, making it unclear whether the spent cartridge, which was alleged to have been recovered but not produced as an exhibit, belonged to the weapon purportedly used in the robbery.

27. Additionally, learned counsel argued that the prosecution did not conduct an identification parade. None of the complainants described the individual who allegedly robbed them, and since none of them knew the appellant prior to the incident, the prosecution could not rely on recognition. Further, he contended that the prosecution relied on dock identification, which, given the circumstances of the case, was insufficient to support a conviction. He placed reliance on the case of Peter Mwangi Mungai vs. Republic [2000] KEHC 412 (KLR), where the High Court cited with approval the case of Owen Kimitho Kiarie vs. Republic Criminal Appeal No. 93 of 1983 (Unreported), where the court stated that dock identification of a suspect is worthless unless a properly conducted identification parade precedes it.

28. Learned counsel further submitted that the appellant was arrested and subsequently charged because he was fleeing amidst skirmishes that followed a shootout. Yet the police did not inquire as to why the appellant was running.

29. In opposing the appeal, learned prosecution counsel for the respondent filed submissions dated 16th December 2024. It was argued that the appellant's grounds of appeal lack merit and should be disregarded. At the trial, the appellant neither claimed to be a minor nor provided proof of his age. Additionally, he did not raise the issue on first appeal. As relates to Ground 2 it was submitted that a review of the lower court's record confirms that the appellant was able to follow proceedings, cross-examine the witnesses, and present his unsworn evidence. Learned counsel fully adopted the High Court's reasoning on this ground, asserting that the appellant's rights under Article 50(2) of *the Constitution* were not infringed.

30. As for Ground 3, learned prosecution counsel submitted that the claim is baseless, since at the hearing of 10th May 2015, the appellant indicated to the court that he was unwell only after PW8 testified in-chief, claiming that he was unable to cross-examine the witness due to illness. As a result, the trial magistrate adjourned the matter and ordered that the appellant be taken to the hospital by prison authorities. On 9th June 2015, the appellant was able to cross-examine PW8 and subsequently tendered his unsworn evidence. The issue of illness did not arise again, and neither is there evidence to support

the claim that the appellant was forced to continue with the trial while ill, as the High Court rightly found.

31. Concerning Ground 4, the appellant argued before the High Court that the failure to produce the recovered ammunition and the expert report as evidence prejudiced his case. Learned prosecution counsel concurred with the position of the first appellate court, stating that it is not necessary for the firearm, weapon or ammunition used to be recovered and produced as an exhibit nor is it essential for the offender to be armed with a dangerous weapon for an offence under Section 296(2) of the *Penal Code* to be established. The evidence on record indicated that the appellant's accomplice, who had the gun, managed to escape. Consequently, the weapon could not be recovered or produced as evidence.

32. On Ground 5, learned prosecution counsel contended that the High Court properly determined that the prosecution's evidence was sufficient to sustain a conviction, and made a finding that the appellant's evidence was weak and failed to rebut the strong case presented by the prosecution. In all, the prosecution proved all the necessary elements of the offence of robbery with violence to sustain a conviction on Counts I, III and IV.

33. Concerning Ground 6, learned prosecution counsel contended that the sentence imposed on the appellant was in accordance with the Law. Section 296(2) of the *Penal Code* prescribes the death penalty for the offence of robbery with violence and the principles established in the case of Muruatetu & Another vs. Republic; Katiba Institute & 4 Others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC31(KLR) do not apply to this case.

34. Concerning Ground 7, it was submitted that a review of the trial court record indicates that the trial magistrate carefully considered the appellant's defence and deemed it to be a mere denial aimed at avoiding the consequences of his actions. The High Court Judge also re-evaluated the appellant's defence and agreed with the trial court's findings. The High Court's reasoning in this regard was logical and well-supported.

35. Having duly considered the record, the appellant's grounds of appeal and the rival submissions, we start by reminding ourselves that this being a second appeal, the court is restricted to addressing itself to matters of law only as provided in Section 361 of the *Criminal Procedure Code*, and that this Court will not usually interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence, or they are based on a misapprehension of the evidence, or the courts below acted on wrong principles in making the findings as held in the case of Karingo vs. Republic [1982] KECA 23 (KLR), where the court stated as follows:

> "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on the second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja v Republic (1950) 17 EACA 146)."

36. We have revisited the record and considered it in light of the rival arguments set out in the submissions by the appellant and the respondent. We identify three issues that require our consideration: whether the ingredients of the offence of robbery with violence were established, whether the identification was proper, and whether the sentence imposed was lawful.

37. Section 296(2) of the *Penal Code* defines what robbery with violence entails as follows:

> "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."

38. The assailant/robber must be armed with a dangerous or offensive weapon, or be in the company of one or more persons, or at the time of robbery, immediately before or immediately after the robbery, the victim is wounded, beaten, or there is use of personal force. (See Oluoch vs. Republic (1985) KLR).

39. There is sufficient evidence that the complainants were all robbed. The assailants, who were two in number, had a gun, and all the complainants were robbed at gunpoint, with PW3 receiving serious injuries from a gun wound. The two courts below established these facts. The appellant has raised the issue of his age. Age is an issue of fact; it was not raised in the trial court or the High Court. It cannot be raised at this stage. In Alfayo Gombe Okello vs. Republic [2010] eKLR, this Court expressed itself as follows:

> " ...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

Therefore, nothing turns on this issue. The two courts below also established that the assailants were armed with a gun. Therefore, the issue is not available for our consideration.

40. Having established that the assailants were armed and they robbed the complainants, the critical issue is whether the appellant was among the two people who robbed the complainants herein. PW1 to PW7 were all categorical that the appellant was the one of the robbers though unarmed. PW1 & PW2 gave chase and apprehended the appellant who his victims identified to have been part of the two who robbed them. PW1 stated:

> " ... We left to assist. I met someone running. He hit me with a stone. We arrested him. It is the accused in the dock, I did not know him. People were chasing the accused..."

PW2 on his part stated:

> " ... I saw someone running. We chased him and arrested him. He was passing through our fence. I was with the 1st witness here... we arrested the accused in the dock..."

PW3 said of the appellant:

> " ... he was one of my attackers"

41. The next issue we must look into is whether the person who was apprehended was sufficiently identified as having been one of the robbers. In the case of Alfred Peter Pius & Edward Paul Tesha (Criminal Appeal No. 8 of 2008) [2002] KECA 460 (KLR), a case with similar circumstances where the appellants were pursued and arrested this Court had this to say:

> "The 1st appellate court upheld the trial magistrate's findings as to the correctness of the identification of the appellants at the scene of the robbery because PW1 had spent a considerable time with their attackers. The flow of events from the time of the robbery to the mob justice being meted out to the appellants, their rescue by the police and being taken to hospital where they were equally identified by PW1 left no doubt that they were indeed

the persons who committed the robbery. Given the circumstances, the identification of the appellants cannot be said to have been dock identification as claimed by the appellants."

42. Though learned counsel for the appellant lamented that there was dock identification, which was insufficient, the evidence on record from PW1 and PW2 indicates that they gave chase and arrested the appellant. All the complainants, in their evidence, testified that the appellant attempted to escape from the scene of the crime, but his pursuers did not lose sight of him, subsequently apprehending him. This was indeed immediately after the incident, and his victims were still on site.

43. Having found that the two courts below had established the ingredients of the offence of robbery, and having formed the view that one of the robbers was apprehended by those who gave chase, and that the person apprehended was none other than the appellant before us, we affirm the appellant's conviction as being safe.

44. Next is whether the sentence was lawful. Section 296(2) (supra) provides that the punishment for the offence of robbery with violence is death. This is what the trial court imposed on the appellant. The sentence is lawful for now. In the case of R vs. Joshua Gichuki Mwangi & 4 others [2024] KESC 34 KLR, it was strongly made clear that the issue of severity of sentence was a matter of fact as prescribed by Section 361 of the *Criminal Procedure Code*. Furthermore, the Muruatetu case (supra) and directions were clear that the decision was only aimed at offences committed under Section 204 of the *Penal Code*. As the law currently stands, the sentence is lawful, and this Court has absolutely no basis to interfere.

45. We, in the end, find the appeal devoid of merit and dismiss the same.

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

J. LESIIT

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JUDGE OF APPEAL ALI-ARONI

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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