



**Mwazo v Republic (Criminal Appeal 123 of 2022)  
[2024] KECA 112 (KLR) (9 February 2024) (Judgment)**

Neutral citation: [2024] KECA 112 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CRIMINAL APPEAL 123 OF 2022  
MSA MAKHANDIA, AK MURGOR & GV ODUNGA, JJA  
FEBRUARY 9, 2024**

**BETWEEN**

**MAGHANGA MWAJEWE MWAZO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the Conviction and Sentence of the High Court at Voi  
(J. Kamau, J.) delivered on 5th December, 2017 in HCCRA No. 48 of 2016)*

**JUDGMENT**

1. The appellant, Maghanga Mwajewe Mwazo together with another were jointly charged with two counts of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of count 1 were that, on 4<sup>th</sup> August 2015 at Kabanga Village within Taita Taveta County, jointly with others not before court being armed with a dangerous or offensive weapon namely AK 47 robbed Silas Muriuki PW1 of tourmaline gemstones of unknown value.
2. In count 2, the particulars were that on the same day in the same village and County, jointly with others not before court while armed with a dangerous or offensive weapon namely AK 47, robbed Joseph Katula, PW4 of a motor vehicle registration No. KBY 302T Nissan Pickup valued at Kshs. 965,000.
3. The appellant pleaded not guilty to both counts whereupon, the prosecution called fourteen (14) witnesses to testify. Upon considering the evidence, the trial court found the appellant guilty and convicted him on both counts and sentenced him to death. His co-accused was however found not guilty and discharged.
3. Dissatisfied with the conviction and sentence, the appellant appealed to the High Court which considered his appeal, and upheld the conviction on count 1, and the sentence of death.



4. The appellant was once again aggrieved by the decision and filed this appeal on the grounds that the learned judge was wrong in finding that the prosecution proved its case to the required standard; in failing to find that tourmaline gemstones were not stolen; in failing to find that he was not properly identified and that the sentence imposed was harsh, excessive and unconstitutional.
5. The appellant filed written submissions and during the hearing on a virtual platform, his learned counsel Ms. Mwangi holding brief for Ms. Oluoch submitted that the prosecution did not prove all the ingredients of the offence as required by law; that neither was it proved that minerals were allegedly stolen from the stores, since contrary to the provisions of the law, no description was provided of the nature of the goods stolen. There was also no identification of the owners of the goods as stipulated by section 10 as read with section 72 of the [Mining Act](#) 2016; that further, no evidence was adduced by the prosecution that pointed to the person who stole the goods. Lastly, it was submitted that the sentence imposed was harsh and excessive.
6. On its part, Mr. Kamanu, learned prosecution counsel for the State submitted that: the totality of the prosecution witness evidence of PW2, PW4, PW6, PW8 and PW9, all established that a robbery with violence occurred, and that the appellant was properly identified as one of the members of the gang that perpetrated the robbery. It was also submitted that while the sentence meted out was lawful, it should be substituted with life imprisonment given that the robbery was carefully planned and involved use of live ammunition.
7. This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law and not of fact. See *Joseph Njoroge vs Republic* [1982] KLR 388.
8. Having carefully considered the record in light of the parties' submissions and the law, we find that the issues that fall for determination are: i) whether the offence was proved to the required standard; ii) whether the appellant was properly identified; iii) whether the owner of the minerals was identified; and iv) whether the sentence imposed was harsh and excessive.
9. Before addressing the aforesaid grounds of appeal, we consider it necessary to set out the facts that were placed before the trial court. Johnson Githii Karanja (PW1), a miner at Mwatate and the owner of the subject mine for green garnet, and tormaline testified that on the 4<sup>th</sup> August 2015 at about 1.00 or 2.00 am, he received a call from his manager, one Cyrus Aritho Muriuki, who informed him that they had been attacked by robbers who were armed with guns.
10. PW1 called the police who upon visiting the scene, found that the stores were broken into and most of the stocks stolen. He stated that the police collected spent cartridges from the scene.
11. Prior to 4<sup>th</sup> August 2015, Wilson Kilaghala Mwatati (PW2), a teacher at Murugi Primary School had discussed the purchasing of mining sand from one of the mines with the appellant. This is sand that miners dig up from mines and dispose of after separating the sand from the minerals. PW 2 had agreed to purchase the sand, and since it was a large quantity, the appellant advised him to hire a vehicle to transport the sand. PW 2 then requested Daniel Muthoka (PW 3), for the use of his motor vehicle registration No. KBY 302 T. It was agreed that he would hire it to him for Kshs 4,500, together with a driver Joseph Katula (PW 4) and a turnboy.
12. At about 5.00 pm on the material day, PW 2 called the appellant and informed him that he was ready to collect the sand. The appellant requested him to pick him up from his house near Taita Academy a few metres from Taveta Town. PW 2, PW 4 and the turnboy went to the appellant's residence, and together with another person who the appellant described as his employee, they proceeded to Kabanga



- where PW2 was to collect the sand. After a while, the appellant told PW2 to stop and wait for him to bring the sand, after which, the appellant and his employee disappeared into the bushes.
13. PW 2, PW 4 and the turnboy waited for about 30 minutes when, instead of the appellant returning with the sand, he came with a gang of about six people, four of whom were armed with guns. The men demanded their phones, which PW 2, PW 4 and the turnboy handed over to them. They were marched to a camp where they were ordered to sit down. Suddenly gunshots were fired and they heard the sound of doors being broken. Soon thereafter, their vehicle was driven into the compound, and the witnesses were ordered to load what looked like sacks taken from one of the houses into the vehicle. PW 2, PW 4 and the turnboy were then ordered to board the rear of the motor vehicle, where they were joined by some of the gang members. Others entered the driver's cabin. The motor vehicle was driven away from the camp, led by a motorcycle.
  14. Towards day break, the motor vehicle stopped and they were ordered to alight and offload the sacks, whereupon, they were released and their phones and car keys returned to them. Because they did not know where they were, the gang, using the same motorcycle led them to where they could see lights in the distance. They were directed to drive in the direction of the lights to Kasighau. As they neared the town, their phones began to work, and PW 2 called PW 3 the motor vehicle owner, and explained what had befallen them. He requested for money for fuel, whereafter, they drove to Mwatate police station where PW 3 had already reported that his motor vehicle was missing. PW 2 confirmed that he had gone to Kabanga with the appellant to purchase mining sand. He stated that he knew the appellant before as a miner, and it was the appellant who directed them to where the sand was to be purchased.
  15. Daniel Muthoka Nthusi (PW 3), was the owner of motor vehicle. He confirmed hiring his motor vehicle together with a driver, PW4 and a turnboy, one Mbidyo Kailiti to PW 2 to Kabanga to purchase sand from the mining tunnels. When they did not return that evening, he tried calling PW 2 and PW 4 but their phones were off. He filed a report at Mwatate police station. At about 6.30 am the following day, he was able to reach PW 2 who informed him that they were at Kasighau where they reported the robbery to the police.
  16. Joseph Katula (PW 4), a resident of Mwatate and the driver of the motor vehicle belonging to PW 3 and Jonathan Mbidyo (PW 6) the turnboy corroborated the evidence of PW 2.
  17. Daniel Muya (PW 5), is PW1's son. He accompanied PW1 to the camp where they found the stores, among them, one containing unrefined gemstone broken into and sacks of unrefined gemstone stolen.
  18. Cyrus Muriuki Karithi (PW 8), and Lazaras Saidi (PW 9), are miners working for PW 1 at the mines. They were at the camp at the time of the attack. PW 8 who was the Manager was asleep in his house in the camp on the material night when at about midnight, he heard gunshots. He ran for safety to the neighbouring camps of Ushe and Waweru where he tried to reach the police, without success. He informed his employer PW 1 of the attack. While at Waweru's camp, he saw the gang pass in a motor vehicle led by a motorcycle. On returning to the camp, he found the store and safe were broken into and half of the unprocessed gemstone stolen. A mallet, axe (jembe) and spent cartridges were recovered from the compound. PW 8 confirmed that though he knew the appellant as they had worked together, he had not seen the faces of the attackers.
  19. When the attack occurred, PW 9 ran into the forest and came back three hours later to find the food store, implements store, and safe for the gemstone broken into.
  20. Sgt Stephen Samkuli (PW 10) and P.C Njau Merita (PW 14) from Mwatate police station went to the scene on 4<sup>th</sup> August 2015. They saw the broken doors and damaged padlocks. They collected six spent and one unspent cartridge and established that the gang was armed with AK 47 rifles. Also recovered



was a mallet and an axe (jembe) outside the store that were used to break into the store. PW 14 obtained the appellant's mobile number from PW 2. He traced him to Mwatate and found him asleep in a room with a woman. They searched him and found a phone, gemstones and cash and arrested him. PW 14 indicated the appellant's mobile number was 0706819683 and pointed him out as the person they arrested.

21. IP Peter Kyalo (PW 13), the scenes of crimes personnel duly gazetted to offer crime scene support services photographed the motor vehicle at Mwatate police station on 15<sup>th</sup> August 2015. He then accompanied the CID officers to Kabanga mines, the scenes of the robbery where he took photographs of the food store and gemstone stores that were broken into. He also photographed motor vehicle KCC 629 B Nissan Saloon and a motor bike KMDN 337 A Haojin connected with the same robbery, and produced the photographs as evidence.
22. The spent cartridges were forwarded to the ballistics for examination to IP Reuben Kiptum (PW 12), a firearm examiner testified that on 17<sup>th</sup> August 2015, the ballistic department laboratory received eight (8) spent cartridges marked E1 — E8 and one ammunition marked F 1 as well as one fired bullet marked F2. He established upon examination that the eight (8) spent cartridges measured 7.62 x 39 mm, and that they were fired from three different firearms with E1, E3, E4, and E5 being from one firearm, E2 and E7 from another and F6 and F8 from a third firearm; that F1 misfired, meaning it was fired but did not work. He further established that F2 was also fired but was damaged. Both F1 and F2 were of similar Calibre with E1 — E8 i.e 7.26 x 39mm. He prepared his report. He noted that E1 — E8 were fired from firearms designed to use Calibre 7.6 x 39mm e.g AK 47, Simonov Rifle among others. He formed the opinion that E1 — E8 and F1 and F2 were ammunitions. PW 12 stated that no firearm was forwarded for examination, and he could not tell from whom they were recovered.
23. A.P.O Joseph Malasi (PW 15), was a co-investigator with one CIP Haro.
24. As instructed by DCIO Voi, he took over the investigations of the robbery. Accompanied by CIP Haro, he proceeded to Mwatate where they collected the eight spent cartridges, the mallet and axe (jembe). He revisited the scene of the robbery and established that the appellant had informed PW 2 that mining sand was being sold. PW2 had hired the vehicle to collect the sand when they were attacked by the gang and the camp robbed of gemstones. He later traced the appellant through his phone, and arrested him in a lodging at Mwatate. The phone and Ksh 29,800 were recovered from him, together with a knife and a motorcycle KMDN 337A Haojin, red in colour, some gemstones, a jacket and keys. The appellant was arrested and charged.
25. In his defence, the appellant testified that on 8<sup>th</sup> August 2015, he was in his house when one Mwasharo called him and informed him that he had 2 kg of tormaline that he was selling at Chunga Unga. He proceeded there and purchased the minerals. They returned to Mwatate and went to Fly Over bar at 8.00 pm, he retired to a room with the lady at 1.00 am.
26. The next morning, five people came to his room. He was searched, and Kshs. 29,800, his Identity Card, a reflective jacket, spanners, pen knife, 2 kg of tormaline, and the lady's Identity Card were recovered from him. At his house the motorcycle was retrieved, but nothing else was recovered. He was thereafter charged with the offence which he denied committing.
27. Returning to the issues, and beginning with whether the offence of robbery with violence was proved, the trial court stated:

“What clear from the evidence and important at this point is that there was an attack at PW1's Camp by a gang of about eight me (sic). The same men had shortly before the attack commandeered PW4 and his companion PW2 and PW6 and taken their vehicle which they



had used to transport the items robbed off at the camp. These items i.e unrefined gemstones was under the care of the Manager PW8. Very important at this point is that the men were armed with dangerous weapons to wit guns and at least eight shots were fired from three different rifles(sic). Robbers were more than one and were armed sufficiently establishes that the robbery perpetrated was indeed robbery with violence”.

28. The offence of robbery with violence is provided for under sections 296 2. of the Penal Code. The case of Johanna Ndungu vs Republic [1996] eKLR defined the elements of the offence in the following terms;

“Therefore, the existence of the afore-described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

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

29. From the above, it is clear that the offence of robbery with violence is committed if any one of the following three ingredients are established:

- i). the offender is armed with any dangerous or offensive weapon or instrument, or
- ii. the offender is in the company of one or more other person or persons, or
- ii. the offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person. Of importance to appreciate is that the three elements of the offence are to be read disjunctively and not conjunctively.

30. In the instant case, PW2, PW4 and PW 6’s evidence was that the appellant, who was in the motor vehicle directing them to Kibanga where they were to purchase mining sand, led them to an isolated area where he left them in the motor vehicle only to emerge from the bush after 30 minutes in company of six (6) others, four of whom were armed. They each corroborated the other’s evidence that the armed men, including the appellant, ordered them to cooperate; took their phones and the motor vehicle keys and marched them to camp site where they started shooting, and ordered everyone to lie down. They broke the doors of the buildings within the compound and stole sacks of stones which were loaded onto PW 3’s motor vehicle which was then driven off.

31. The evidence of PW2, PW4 and PW6 proved beyond doubt that the appellant was in the company of a gang of armed men, immediately before or immediately after the time of the robbery, used violence to rob the complainant of the unrefined gemstones from the campsite.

32. As to whether the evidence demonstrated that the appellant was identified as one of the robbers, the evidence relied on is that the appellant was previously known to PW2, and offered to sell mining sand to him. PW 2, PW 4 and PW6 accompanied by the appellant drove to Kibanga area in broad daylight. Upon reaching an isolated area, he instructed them to wait there for the sand. When he returned 30 minutes later, he was with a group of six men, some armed with rifles, who took their phones, and commandeered the vehicle. On entering the camp, they began shooting in the air, and ordered everyone to lie down. Thereafter, they broke the doors and padlocks to the stores, and violently stole sacks of



unrefined gemstones. The appellant who had accompanied the witnesses to the campsite thereafter left with the robbers.

33. Clearly this was a case of identification of the appellant through recognition. See *Anjononi & Others vs. Republic* [1980] KLR 59. The appellant was known to PW2. When he boarded the vehicle and directed PW2, PW4 and PW6 to the campsite it was in broad daylight and they were able to see him clearly. It was the appellant who returned with the gang after he told them to wait while he procured the mining sand. And after the stolen minerals were off loaded from the vehicle, and the witnesses released, he remained with the other assailants. There is no doubt that the appellant was one of the gang members that stole the unrefined gemstones. He was properly identified by the witnesses, and therefore this could not be a case of mistaken identity. Given the foregoing, we too are satisfied that the appellant was properly identified. This ground fails too.
34. The appellant further contended that the owner of the goods was not identified, contrary to the requirements section 10 as read with section 72 of the *Mining Act* 2016.
35. We begin by observing that this was not an issue raised in the courts below. But be that as it may, in addressing the issue, according to the evidence, PW1 is a miner at Mwatate and the owner of the mine that was robbed. At no point during the hearing did the appellant challenge PW1's ownership of the mine or the minerals. There was also evidence showing that the appellant used to work at the mine for PW1, and he knew PW1 to be the owner of the mine, and the minerals. So that contrary to the appellant's assertions, there is no doubt that ownership of the minerals was sufficiently established. This complaint also fails.
36. All in all, based on the concurrent findings of both the trial and the High Courts, we are satisfied that the appellant was among the gang that robbed PW1 of the unrefined mineral, and that the ingredients for the offence of robbery with violence was proved to the required standard, which rendered the conviction safe. We have no reason to interfere with the conviction.
37. The appellant's next complaint was that the death sentence imposed by the trial court and upheld by the High Court was harsh, excessive and unconstitutional. The appellant relied on the decision of the Supreme Court in *Francis Karioko Muruatetu & Others vs Republic* [2017] eKLR [Muruatetu 1].
38. However, in *Muruatetu & another vs Republic; Katiba Institute & 4 others [Amicus Curiae]* [2021] KESC 31 [KLR] [Muruatetu 2], the Supreme Court directed that its decision in *Muruatetu 1* should only apply to the mandatory death sentence for the offence of murder under sections 203 as read with section 204 of the Penal Code. In view of the guidance, we have no basis on which to interfere with the sentence.
39. In sum, the appeal against conviction and sentence lacks merit and is dismissed in its entirety.
40. The Judgment has been delivered pursuant to Rule 34(3) of the Court of Appeal Rules, 2022 since Odunga, JA refused to sign the Judgment.
41. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**A. K. MURGOR**



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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

\*\*DEPUTY REGISTRAR\*\*

