



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndiangungu & another v Republic (Criminal Appeal  
108 of 2017) [2023] KECA 1022 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KECA 1022 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 108 OF 2017  
PO KIAGE, F TUIYOT & WK KORIR, JJA  
JULY 7, 2023**

**BETWEEN**

**JACKSON OSIAKO NDIANGUNGU ALIAS DOCTOR/PASTOR .... 1<sup>ST</sup>  
APPELLANT**

**GEORGE MWEMBERE CHESSEREMI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An Appeal from the Judgment of the High Court of Kenya at Kakamega (R.N. Sitati, J.)  
delivered and dated 23rd May 2017 in HC CR Appeal Nos. 111 & 112 of 2012 (as consolidated))*

**The use of the same individuals in two separate identification parades for two accused persons rendered the identification process flawed and of little or no probative value.**

*The appellants were convicted of robbery with violence under section 296(2) of the Penal Code and sentenced to death. The prosecution case relied on direct identification by the complainant, forensic evidence linking the appellants to M-Pesa transactions, and an identification parade later found to be flawed. On appeal, the High Court upheld the conviction and sentence. The Court of Appeal found the identification parade unreliable but ruled that forensic and circumstantial evidence independently proved the appellants' guilt. It also upheld the mandatory death sentence, citing *Muruatetu 2*, which limited the applicability of *Muruatetu 1* to murder cases.*

Reported by John Ribia

***Criminal Law*** – identification – identification parade – conditions precedent – identification parade vis-à-vis identification at the scene of the crime - where the same individuals were used for two separate parades - whether the use of the same individuals in two separate identification parades for two accused persons rendered the identification process flawed and of little or no probative value - whether the identification parade conducted for the 2<sup>nd</sup> accused person was fundamentally flawed due to the presence of members previously seen in the 1<sup>st</sup> accused's parade, thereby rendering the identification process unreliable - whether the appellants' identification at



*the scene of the crime, having spent a considerable amount of time with the complainant in close proximity, was more reliable than that of an identification parade.*

**Law of Evidence** – forensic evidence – probative value - sim card tracing – tracking of M-Pesa transactions - whether the forensic evidence, particularly the tracing of SIM cards and M-Pesa transactions linked to the stolen funds, was sufficient to establish the appellants' involvement in the robbery beyond a reasonable doubt - Penal Code (Cap 63) section 296(2).

**Law of Evidence** – circumstantial evidence – circumstantial evidence in identifying an accused person at the scene of the crime – where a subsequent identification parade was flawed - probative value – prolonged interaction with an accused person during a robbery - whether the chain of circumstantial evidence, including the prolonged interaction between the complainant and the appellants during the robbery, was sufficient to establish their culpability beyond a reasonable doubt, despite the flaws in the identification parade – Penal Code (Cap 63) section 296(2).

**Criminal Procedure** – appeals – role of the first appellate court vis-à-vis the role of the second appellate court – mandate and jurisdiction - whether the first appellate court correctly discharged its duty by independently reviewing the record and arriving at its own decision, regardless of whether it aligned with the trial court's findings - what was the mandate and scope of the second appellate court's jurisdiction in criminal appeals - Criminal Procedure Code (Cap 75), section 361(1) and 361(2).

**Criminal Law** – sentencing – death sentence – mandatory nature of death sentence – import of the decision in *Muruatetu 1* that declared the mandatory nature of the death sentence was unconstitutional – import of the *Muruatetu 2* guidelines that provided that the decision only applied to the offence of murder and did invalidate the mandatory death sentence for other offences such as robbery with violence - whether the Supreme Court's decision in *Muruatetu (Muruatetu 1)* was applicable to challenging the mandatory death sentence for robbery with violence, given the restrictive guidelines issued in *Muruatetu 2* - Penal Code (CAP. 63) section 296(2); Section 204; *Francis Karioko Muruatetu & Another v Republic (2017) eKLR*.

### **Brief facts**

Jackson Osiako Ndiangungu alias Doctor/Pastor (1<sup>st</sup> appellant) and George Mwembere Chesseremi (2<sup>nd</sup> appellant) were charged with robbery with violence and demanding property with menaces. The charges stemmed from an incident on March 15, 2010, in Kakamega, where the complainant, Sudhir Khetia, was carjacked at gunpoint while driving his son to school. Three armed men forced their way into his car, stole cash, identification documents, and bank cards, and demanded Kshs. 500,000 under threat of death. The complainant's manager, Peter Wawire (PW4), arranged for M-Pesa agent Halima Were (PW3) to send Kshs. 50,000 to a number provided by the robbers.

Following continued threats, the complainant sent an additional Kshs. 50,000 before reporting the matter to the police. Investigators, led by Chief Inspector Godfrey Nyongesa (PW2), used mobile tracking and Safaricom data to trace the SIM cards used in the transactions. The 2<sup>nd</sup> appellant was arrested first, leading to the arrest of the 1<sup>st</sup> appellant. A firearm was recovered during the investigation.

At trial before the Chief Magistrate's Court in Kakamega, the prosecution relied on direct identification, forensic evidence, and an identification parade. The appellants were convicted of robbery with violence and sentenced to death. The 1<sup>st</sup> appellant was also convicted of demanding property with menaces. The High Court upheld the conviction and sentence on first appeal. The appellants then appealed to the Court of Appeal, arguing that the evidence was insufficient, the identification parade was flawed, and the mandatory death sentence was unconstitutional.

### **Issues**

- i. Whether the use of the same individuals in two separate identification parades for two accused persons rendered the identification process flawed and of little or no probative value.



- ii. Whether the identification parade conducted for the 2<sup>nd</sup> accused person was fundamentally flawed due to the presence of members previously seen in the 1<sup>st</sup> accused's parade, thereby rendering the identification process unreliable.
- iii. Whether the appellants' identification at the scene of the crime, having spent a considerable amount of time with the complainant in close proximity, was more reliable than that of an identification parade.
- iv. Whether the forensic and circumstantial evidence, particularly the tracing of SIM cards and M-Pesa transactions linked to the robbery, was sufficient to establish the appellants' culpability beyond a reasonable doubt, despite the flaws in the identification parade.
- v. Whether the first appellate court correctly discharged its duty by independently reviewing the record and arriving at its own decision, regardless of whether it aligned with the trial court's findings.
- vi. What was the mandate and scope of the second appellate court's jurisdiction in criminal appeals?
- vii. Whether the Supreme Court's decision in *Muruatetu (Muruatetu 1)* was applicable to challenging the mandatory death sentence for the offence of robbery with violence.

### **Held**

1. Being a second appeal, the scope of our mandate was as legislated under section 361(1) and (2) of the Criminal Procedure Code. The second appeal's court jurisdiction was only on issues of law. In as much as possible, matters of fact should remain as concurrently established by the two courts below. The only time the second appellate court could interfere on the concurrent finding of facts by the two courts below was where it was apparent that the conclusion of fact was erroneously arrived at as a result of misapplication of the law.
2. An identification parade was recommended where a witness purported to identify an accused in extremely difficult conditions. The parade served to remove any doubt arising out of confusion by offering a complainant a controlled and fair environment to pick out the alleged offender. The probative value of the outcome of an identification parade often depended on whether the parade complied with the dictates of the police force standing orders and whether it was conducted in a controlled environment capable of delivering a free and fair outcome.
3. Two separate identification parades were conducted for the 1<sup>st</sup> and 2<sup>nd</sup> appellant respectively. The use of the same persons in both parades offended the requirement for a controlled environment during identification parades. Consequently, the evidence of identification was of little if not zero probative value. The trial court and the first appellate court failed to appreciate the defect in the conduct of the identification parades. The identification parades were not conducted in a controlled environment hence the outcome was of no probative value.
4. The first parade which was held in respect to the 1<sup>st</sup> appellant may have been proper as it was not indicated that the witness had seen the members prior to the parade. The parade for the 2<sup>nd</sup> appellant was outrightly wrong in that the 2<sup>nd</sup> appellant was the only new person, the other members having been seen by the witness when they appeared in the parade conducted for the 1<sup>st</sup> appellant. It was a no-brainer for the witness to pick out the 2<sup>nd</sup> appellant from the second parade. Be that as it may, the respondent had conceded to the poor quality of the identification parades and as such the identification parades were of no probative value.
5. The first appellate court correctly appreciated the legal principles and rules underpinning the treatment of the evidence of identification by a single witness. The robbery occurred at about 9.30 am when there was ample light from the sun; the appellants also accosted their victim, sat with him in the driver's cabin, and conversed with him as they negotiated what they believed was due to them. They eventually gave him his phone, which they had snatched, to make a call for the deposit of KShs. 50,000 to be sent. The ordeal took almost 30 minutes. The foregoing circumstances, despite there being a gun, could not be said to have hindered a proper identification at the scene of crime.
6. Even if the court were to doubt the identification of the appellants at the scene of crime, there was still the forensic evidence given on how the appellants were linked to the offence. That evidence



- undoubtedly established not only circumstantial but also scientific link between the appellants and the robbery. The sim cards recovered from the appellants were the conduits of the money that had been sent by the complainant and PW3. The tracking of one of the sim cards led to the arrest of the 2<sup>nd</sup> appellant who in turn led to the arrest of the 1<sup>st</sup> appellant who was found with a sim card linked to an M-PESA account that had received money from PW1. That intricate web established through the investigations of PW2 could not be overlooked; even though being circumstantial, it pointed directly to the appellants as the perpetrators of the offence.
7. The duty of the first appellate was neither to automatically exonerate an appellant nor affirm the judgment of the trial court. The first appellate court was deemed to have discharged its mandate once it undertook an independent review of the record and arrived at its own independent decision. It mattered not whether it arrived at a similar conclusion as the trial court thereby rehashing the conclusions of the trial court. What mattered was that in arriving at its decision the first appellate court had independently reviewed the evidence adduced at the trial and correctly applied the relevant law to that evidence. It faithfully lived to and discharge its calling as a first appellate court.
  8. The burden of proof in criminal cases lay with the prosecution. The standard to be achieved in discharging that burden was one of beyond reasonable doubt. If the weight of the evidence was such that it pointed to nobody else other than the accused being the perpetrator of the offence, then the burden of proof would be deemed to have been discharged. If, however, there lingered a doubt in the mind of the court as to whether somebody else other than the accused could have committed the offence, the burden had not been discharged in such circumstances.
  9. The prosecution discharged its mandate. The three elements of the offence of robbery with violence can be proved independently of the other. The elements were whether the offender was armed with any dangerous or offensive weapon or instrument, or was 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. The proof of either one of the three elements was sufficient to sustain a conviction for an offence under section 296(2) of the Penal Code.
  10. The decisions in *Muruetu 1* cited in support of the appellants' argument against the death sentence were not applicable to the death sentence provided for the offence of robbery with violence under section 296(2) of the Penal Code, which was the offence for which the appellants were charged and convicted. The Court of Appeal deferred to the restrictive guidelines issued by the Supreme Court in *Muruatetu 2* by the vertical operation of the doctrine of *stare decisis* and had to uphold the mandatory death sentence for robbery with violence despite the court's misgivings.

*Appeal dismissed.*

## Citations

### Cases

1. *Adan Muraguri Mungara v Republic* Criminal Appeal 347 of 2007 [2010] KECA 131 (KLR)- (Mentioned)
2. *Dima Denge Dima & others v Republic* Criminal Appeal 300 of 2007; [2013] KECA 480 (KLR) — (Applied)
3. *Kinyanjui & 2 others v Republic* Criminal Appeal 976 & 977 of 1986 [1989] KEHC 73 (KLR) – (Explained)
4. *Maitanyi v Republic* ([1986] KLR 198 — (Applied)
5. *Mbugua , Leonard Njoroge v Republic* Criminal Appeal 1477 of 2000 ;[2001] KEHC 331 (KLR) — (Mentioned)
6. *Mulili , Stephen Nguli v Republic* (Criminal Appeal 337 of 2011; [2013] KEHC 6248 (KLR)) — Applied
7. *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR)- (Explained)



8. Muruatetu & Wilson Thirimu Mwangi v Republic Petition 15 of 2015 [2017] KESC 2 (KLR) — (Explained)
9. Njihia , Sarah Gatitu v Martin Njihia Mbugua Civil Case 1094 of 2002; [2002] KEHC 792 (KLR) — Applied
10. Njoroge v Republic Criminal Appeal 28 of 1979 [1982] KECA 19 (KLR)- (Explained)
11. *Wairimu* , *David Njuguna v Republic* Criminal Appeal 28 of 2009; [2010] KECA 495 (KLR)- (Followed)
12. Wamunga v Republic Criminal Appeal 20 of 1989; [1989] KECA 47 (KLR)- (Followed)
13. Wanja, , David Mwita & 2 others v Republic Criminal Appeal 117 of 2005; [2007] KECA 324 (KLR) — (Explained)

### ***Regional Court***

Okeno v R [1972] EA 32 — (Mentioned)

### ***United Kingdom***

1. Miller v Ministry of Pensions [1947] 2 All ER 372 — Applied
2. R v Turnbull & others [1976] 3 All ER 549 — (Explained)

### **Statutes**

1. Penal Code (cap 63) — sections 204, 296(2); 302;322 — (Interpreted)
- Criminal Procedure Code (cap 63) section 361(1) (2) – (Interpr

## **JUDGMENT**

1. At the trial before the Chief Magistrate’s Court at Kakamega, Jackson Osiako Ndiangungu alias Doctor/Pastor (the 1<sup>st</sup> appellant) and George Mwembere Chesseremi (the 2<sup>nd</sup> appellant) were together with one Joseph Omar Ayoo alias Motoo faced with two counts. In the first count they were charged with robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars of the offence alleged that on 15 March 2010 at Kakamega town within the then Western Province while armed with a dangerous weapon namely a pistol they robbed Sudhir Khetia of Kshs 7,000, 120 USA dollars, a wallet, two alien identity cards, a copy of a Kenyan national identity card, a standard chartered visa card, six passport-size photographs and assorted business cards all valued at Kshs. 20,000 and at or immediately before or immediately after such robbery threatened to use personal violence against the said Sudhir Khetia.
2. In the second count the trio were charged with the offence of demanding property with menaces contrary to section 302 of the *Penal Code*. The particulars of the offence being that on 15 March 2010 at Kakamega town while armed with dangerous weapons namely pistols and with intent to steal from Sudhir Khetia, they jointly demanded Kshs 50,000 from him while threatening to kill him.
3. As for the third count, the appellants alone faced a charge of demanding property with menaces contrary to section 302 of the *Penal Code*. It was alleged that on diverse dates between 18 March 2010 and 30 March 2010 with intent to steal cash demanded Kshs. 50,000 from Sudhir Khetia on his mobile phone by threatening to kill him.
4. The appellants were also faced with an alternative charge of handling stolen property contrary to section 322 of the *Penal Code*. It is not necessary to restate the particulars of this charge and it suffices to state that it was alleged that the appellants were arrested with the complainant’s stolen documents.
5. At the conclusion of the trial, the appellants were found guilty and convicted in respect of the first count which related to the charge of robbery with violence contrary to section 296(2) of the *Penal*



- Code. Joseph Omar Ayoo alias Motoo who was the third accused person at the trial was acquitted of all the charges that were facing him. The 1<sup>st</sup> appellant who was the 2<sup>nd</sup> accused person at the trial was acquitted in respect of the second count but also found guilty and convicted for the third count. The 2<sup>nd</sup> appellant who was the 1<sup>st</sup> accused person at the trial was acquitted in respect of the second and third counts.
6. Dissatisfied with the judgment of the trial court, the appellants preferred separate appeals, but which were heard jointly, to the High Court at Kakamega. In a judgment delivered on 23 May 2017, Ruth N Sitati, J dismissed the appeals and confirmed the judgment and sentence of the trial court.
  7. A perusal of the record shows that the prosecution based its case on the evidence of seven witnesses. In a nutshell, the case against the appellants was that on 15 March 2010, Sudhir Khetia (PW1) was driving his motor vehicle within Kakamega on his way to drop his son in school. At the junction of Golf Hotel three people emerged and pointed a gun at him and thereafter forcefully entered the vehicle. He was then sandwiched in the middle of the front seat as the 1<sup>st</sup> appellant took control of the vehicle while the 2<sup>nd</sup> appellant sat on the co-driver's side. A third person entered the rear of the vehicle. The 1<sup>st</sup> appellant then drove the vehicle towards Shinyalu where they snatched his wallet which had 120 US dollars, Kshs 7,000, 3 identification documents, passport-size photographs, and business cards. They also took his mobile phone make Nokia 2330 but later returned it. After a futile search for money in the vehicle, the attackers demanded Kshs 3 million from the complainant threatening to kill him if he did not comply. Eventually, they settled on Kshs 500,000. The complainant then called his manager, Peter Wawire (PW4) and asked him to send him Kshs 50,000. The money was sent to a number provided by the 1<sup>st</sup> appellant by Halima Were (PW3), an M-PESA agent at the instruction of PW4. The complainant was released after the ordeal and he drove back to his house. He later gave out another Kshs.50,000/= as the attackers kept on calling him and threatening his life. Upon realizing that they would not leave him alone, the complainant reported the matter to the police.
  8. Chief Inspector Godfrey Nyongesa (PW2) received the complainant's report and acted on it leading to the arrest of the 2<sup>nd</sup> appellant. In his evidence, PW2 gave a detailed account of how he relied on technology and Safaricom, a renowned mobile phone service provider, to narrow down to and arrest the 2<sup>nd</sup> appellant in whose possession he recovered two mobile phone sim cards which were produced as exhibits. Upon interrogation, the 2<sup>nd</sup> appellant gave the identity of the 1<sup>st</sup> appellant who upon arrest, a sim card was recovered. During interrogation, PW2 managed to get information leading to the recovery of a firearm from the 2<sup>nd</sup> appellant's abode.
  9. PW3 gave an account of what happened on 15 March 2010 at 9.00am when PW4 requested her to send Kshs 50,000 to a given number using her M-PESA number. She sent the money in two tranches to an unregistered beneficiary. She also gave an account of the money she sent on the 20 March 2010 after being instructed to do so by PW1 who was known to her as a director of Yako Supermarket. On this day she dispatched kshs 50,000 also in tranches to two mobile phone numbers.
  10. Chief Inspector of Police Christopher Mzee (PW6) conducted identification parades in respect of both appellants at the request of Sergeant Peter Kabogo (PW7) who was the investigating officer. He explained to PW1 (the complainant) the purpose of the parade after which PW1 went through the parade and identified the 1<sup>st</sup> appellant. He conducted a second parade in which PW1 picked out the 2<sup>nd</sup> appellant. The witness produced the forms for both parades.
  11. At the first appellate court, the learned Judge dismissed the appeal finding that the trial court properly addressed itself to the evidence and the applicable law thereby arriving at a proper decision. The following paragraphs from the judgment are of relevance and we highlight them:



31. There was therefore a link between the robbery that occurred on the 15 March 2010 and the items recovered from the appellants. They (appellants) were unable to account for the said goods and the monies they received from PW4 through the agent PW3. I therefore find that the evidence by the prosecution's witnesses corroborated the incidents of 15 March 2010. Especially the evidence by PW3 and PW4 which showed that the M-pesa transaction was done on the same day and which evidence was investigated by PW2 and PW7 who traced the transaction using the Sim cards produced in evidence.
32. I therefore find that the trial court was duly guided by evidence adduced and that she correctly evaluated the same to come up with the conclusion to convict the appellants...
39. In this instant case, the conditions for identification were not difficult since the robbery took place at 9.00oclock in the morning. The complainant and the appellants sat together in one seat in the car, as they talked and as the appellants demanded cash. I have no doubt therefore that the identification of each of the appellants by the complainant was without error.
40. As for the identification parade, I find that the same was properly conducted as per law required. A report was made and produced as P Exh 15 (a) and 15(b). The complainant had a second chance of seeing his assailants and he properly identified them. Even if the evidence of the parade and the recovered items were to be excluded, there is still other evidence to connect the appellants to the robbery. The complainant clearly identified his assailants during the half hour ordeal. He gave a description of them to the police and the money he sent was withdrawn using the same sim card to which the money had been sent.”
12. In this appeal, the appellants raised four grounds as follows: that the evidence on record was not sufficient to prove the case beyond reasonable doubt; that the circumstances of identification were not favourable to sustain a proper identification of the appellants at the scene of crime; that the identification parade was not properly conducted as required by the law; and that the death sentence was passed without the court exploring other forms of punishment.
13. This matter was canvassed by way of written submissions on 14 February 2023. Mr Cecil Kouko, filed written submissions dated September 21, 2020 on behalf of the appellants. Counsel submitted that the circumstances of identification were not favourable during the robbery and that the court erred in convicting the appellants based on the evidence of a single witness. Counsel urged that since there was a gun held to the head of the complainant at all times during the robbery, the complainant was in a panic mode and could not positively identify his assailants. Counsel also urged that the period between the incident and the time of making the report was too long thereby watering down the evidence of identification at the scene of crime. In support of this line of submission, counsel relied on the cases of *R v Turnbull & others* [1976] 3 All ER 549 and *Maitanyi v Republic* [1986] KLR 198.
14. Regarding the conduct of the identification parades, counsel argued that from the evidence of PW6, it was apparent that the identification parades for the two appellants had same members as the appellants were the only new entrants in both parades. It was counsel's view that having the same persons stand in the separate identification parades held for the two appellants, in regard to the same offence, and for identification by the same witness accorded the complainant an undue advantage as it made it easy for him to pick the appellants who were the new entrants each time. Counsel additionally submitted that no description was given to the police prior to the identification parade and that it could not be possible that the appellants had similar features.
15. Counsel relied on the case of *David Mwita Wanja & 2 others v Republic* [2007] eKLR to point out the objectives of an identification parade and the manner in which it should be carried out and to assert



- that the manner in which the parades were conducted was prejudicial to the appellants. Counsel also relied on the case of *Kinyanjui & 2 others v Republic* [1989] eKLR to submit that identification parades must not only be free but must also be seen to be fair by ensuring that the attention of the witness is not directed specifically to the suspect but also the other members of the parade.
16. On the issue of sentence, counsel urged us to import the reasoning of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR when rendering unconstitutional the mandatory nature of the death sentence in murder cases. Counsel was of the view that the same position is applicable to the sentence passed against the appellants. In conclusion, counsel urged the court to allow the appeal, quash the conviction and set aside the sentence and in the alternative, set aside the death sentence and substitute it with a definite prison term.
  17. Mr Okango, the learned Principal Prosecution Counsel who appeared for the respondent filed submissions dated 13 February 2023. Mr Okango relied on the case of *Njoroge v Republic* [1982] eKLR to reiterate the scope of this court's mandate on a second appeal. Counsel pointed out that the first appellate court properly appreciated the elements of the offence of robbery with violence and that the prosecution proved each and every element of the offence independently.
  18. On the question of identification of the appellants, Mr Okango submitted that the complainant had ample time with the appellants and he was even accorded time to make a phone call and therefore it could not be said that the circumstances affected proper identification of the appellants at the scene. Counsel added that the forensic evidence as tabled by PW2 as well as the items recovered during the arrests undoubtedly linked the appellants to the offence.
  19. Regarding the impropriety of the identification parades, counsel conceded that the manner in which the two parades were conducted prejudiced the appellants since they were conducted in un-controlled and unfair conditions contrary to the requirements of the law. Counsel, however, submitted that even without the evidence of the identification parades, the appellants were still linked to the offence. Mr. Okango therefore urged us to dismiss the appeal on conviction.
  20. On the issue of sentence, Mr Okango submitted that the Supreme Court decision in *Francis Karioko Muruatetu v Republic* [2017] eKLR (hereinafter referred to as Muruatetu 1) is not applicable to this case as the same court in *Muruatetu & another v Republic; Katiba Institute & 4 others* (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (hereinafter referred to as Muruatetu 2) restricted the application of Muruatetu 1 to the death sentence provided under section 204 of the Penal Code for murder convicts. Mr Okango therefore urged this court to also dismiss the appeal on sentence.
  21. This being a second appeal, the scope of our mandate is as legislated under section 361(1) & (2) of the *Criminal Procedure Code*. Our jurisdiction is only on issues of law. In as much as possible, matters of fact should remain as concurrently established by the two courts below. The only time we can interfere on the concurrent finding of facts by the two courts below is where it is apparent that the conclusion of fact was erroneously arrived at as a result of misapplication of the law. See *Adan Muraguri Mungara v Republic* [2010] eKLR.
  22. Cognizant of our mandate as a second appellate court, we have duly reviewed the record of appeal and submissions by both parties. In our view, the issues raised in this appeal are whether the identification parades were properly conducted; whether the evidence of identification was cogent; whether the standard of proof was met thereby linking the appellants to the offence; and whether the death sentence is the only sentence available for a convict of the offence of robbery with violence.



23. An identification parade is recommended where a witness purports to identify an accused in extremely difficult conditions. The parade serves to remove any doubt arising out of confusion by offering a complainant a controlled and fair environment to pick out the alleged offender. The probative value of the outcome of an identification parade will often depend on whether the parade complied with the dictates of the police force standing orders and whether it was conducted in a controlled environment capable of delivering a free and fair outcome. In *David Mwita Wanja & 2 others v Republic* [2007] eKLR, this court underscored the importance of properly conducting identification parades as follows:

“The purpose for, and the manner in which, identification parades ought to be conducted have been the subject matter of many decisions of this court over the years and it is worrying that officers who are charged with the task of criminal investigations do not appear to get it right. As long ago as 1936, the predecessor of this court emphasized that the value of identification as evidence would depreciate considerably unless an identification parade was held with scrupulous fairness and in accordance with the instructions contained in Police Force Standing Orders.”

24. In the instant case, two separate identification parades were conducted for the 1<sup>st</sup> and 2<sup>nd</sup> appellant respectively. From the evidence of PW5 he conducted the two separate parades using the same members of the public. The two appellants during their respective parades took positions between the 3<sup>rd</sup> and 4<sup>th</sup> persons. PW5 further stated that he ensured that the heights, ages and appearances of the members of the parades were similar to those of the appellants. This alleged compliance would mean that the two appellants were of the same age, height and appearance. This is unlikely. But even if we were to concede that the two were of similar age, height and appearance, we would agree with the submission of the appellants and the respondent that the use of the same persons in both parades offended the requirement for a controlled environment during identification parades. Consequently, the evidence of identification in this instance was of little if not zero probative value. To this extent, we find that the trial court and the first appellate court failed to appreciate this defect in the conduct of the identification parades. The effect of a poorly conducted identification parade was explained by this court in *Njibia v Republic* [1986] eKLR as follows:

“If properly conducted, especially with an independent person present looking after the interests of a suspect, the resulting evidence is of great value. But if the parade is badly conducted and the complainant identifies a suspect the complainant will hardly be able to give reliable evidence of identification in court. Whether that is possible, depends upon clear evidence of identification apart from the parade. But of course, if a suspect is only identified at an improperly conducted parade, it will be concluded by the witness that the man in the dock, is the person accused of the crime; and it will be difficult, if not impossible, for the witness to dissociate himself from his identification of the man on the parade, and reach back to his impression of the person who perpetrated the alleged crime.”

25. Our finding is that the identification parades by PW5 were not conducted in a controlled environment hence the outcome was of no probative value in this case. The first parade which was held in respect to the 1<sup>st</sup> appellant may have been proper as it is not indicated that the witness had seen the members prior to this particular parade. As regard the parade for the 2<sup>nd</sup> appellant we find that it was outrightly wrong in that the 2<sup>nd</sup> appellant was the only new person, the other members having been seen by the witness when they appeared in the parade conducted for the 1<sup>st</sup> appellant. It was therefore a no-brainer for the witness to pick out the 2<sup>nd</sup> appellant from the second parade. Be that as it may, the respondent has



conceded to the poor quality of the identification parades and we will proceed from the understanding that the identification parades were of no probative value.

26. The next question therefore is whether without the evidence of the identification parades, the remaining evidence on record was sufficient to connect the appellants to the offence. On this issue, two sets of evidence were available, namely, the evidence of PW1 on the identification of the appellants during the commission of the offence and the forensic evidence as given by PW2.
27. In considering the evidence of identification by PW1, the first appellate court appreciated the need to put to thorough scrutiny the evidence of identity of a single witness to avoid miscarriage of justice. The first appellate court also pointed out that there was need to confirm if the complainant gave a description of his attackers in the initial report. This court in *Cleophas Otieno Wamunga v Republic* [1989] eKLR, which decision was also cited by the first appellate court, proffered a jurisprudential guide on matters of identification by a single witness as follows:

“Evidence of visual identification in criminal cases can bring about miscarriages of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleges to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification.

This need for caution was also reiterated by the Court of Appeal for Eastern Africa in the case of *Abdallah Bin Wendo v R* 20 EACA 166 at page 168 thus:

“Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”

28. In this case, we are satisfied that the first appellate court correctly appreciated the legal principles and rules underpinning the treatment of the evidence of identification by a single witness.

Further, upon review of the evidence on record, we are satisfied on the findings of the first appellate court and the probative value it accorded to the evidence of PW1 on identification of the appellants as the people who robbed him on 15 March 2010. The robbery occurred at about 9.30am when there was ample light from the sun; the appellants also accosted their victim, sat with him in the driver’s cabin, and conversed with him as they negotiated what they believed was due to them. They eventually gave him his phone, which they had snatched, to make a call for the deposit of Kshs 50,000 to be sent. The ordeal took almost 30 minutes. The foregoing circumstances, despite there being a gun, cannot be said to have hindered a proper identification at the scene of crime.

29. Notwithstanding our finding above, even if we were to doubt the identification of the appellants at the scene of crime, there was still the forensic evidence given by PW2 on how he managed to link the appellants to the offence. That evidence undoubtedly establishes not only circumstantial but also scientific link between the appellants and the robbery. The sim cards recovered from the appellants were the conduits of the money that had been sent by the complainant and PW3. Indeed, the tracking of one of the sim cards led to the arrest of the 2<sup>nd</sup> appellant who in turn led to the arrest of the 1<sup>st</sup>



appellant who was found with a sim card linked to an M-PESA account that had received money from PW1. This intricate web established through the investigations of PW2 cannot be overlooked; even though being circumstantial, it points directly to the appellants as the perpetrators of the offence.

30. Finally, on conviction, the appellants have faulted the first appellate court in what they deem to be failure to independently analyze the evidence. The duty of the first appellate is neither to automatically exonerate an appellant nor affirm the judgment of the trial court. As has been pointed out by this court in several occasions, the first appellate court is deemed to have discharged its mandate once it undertakes an independent review of the record and arrive at its own independent decision. It matters not whether it arrives at a similar conclusion as the trial court thereby rehashing the conclusions of the trial court. What matters is that in arriving at its decision the first appellate court has independently reviewed the evidence adduced at the trial and correctly applied the relevant law to that evidence. Our view is fortified by the pronouncement in *David Njuguna Wairimu v Republic* [2010] eKLR thus:

“In *Okeno v R* [1972] EA 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision.”

31. Considering the judgment of the High Court within the confines of these pronouncements, we have no doubt that it faithfully lived to and discharge its calling as a first appellate court.
32. The appellants also raised an issue regarding the standard of proof. In Kenya, as is in the vast majority of the commonwealth countries, except for clearly legislated exceptions, the burden of proof in criminal cases lies with the prosecution. The standard to be achieved in discharging this burden is one of beyond reasonable doubt. If the weight of the evidence is such that it points to nobody else other than the accused being the perpetrator of the offence, then the burden of proof will be deemed to have been discharged. If, however, there lingers a doubt in the mind of the court as to whether somebody else other than the accused could have committed the offence, the burden will not have been discharged in such circumstances. In *Stephen Nguli Mulili v Republic* [2014] eKLR, Lord Denning was quoted as having defined the meaning of “proof beyond reasonable doubt” in *Miller v Ministry of Pensions* [1947] 2 All ER 372 as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”

33. In this case, upon review of the evidence on record, we have no doubt that the prosecution discharged its mandate. In saying so, we are aware that the three elements of the offence of robbery with violence can be proved independently of the other. The elements are whether 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. The proof of either one of the three elements is sufficient to sustain a conviction for an offence under Section 296(2) of the *Penal Code*. In this regard it was stated in *Dima Denge Dima & others v Republic* [2013] eKLR that:

“The elements of the offence under Section 296

(2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction.”

34. The final ground raised by the appellants is against the death sentence imposed by the trial court and upheld by the first appellate court. In arguing for a definite prison term, counsel for the appellants urged us to import the rationale of the Supreme Court in *Muruatetu 1* which rendered the mandatory nature of the death sentence in murder cases unconstitutional. Our view on this issue resonates with the submissions of the respondent that vide *Muruatetu 2* the Supreme Court restricted the application of *Muruatetu 1* to the death sentence provided under section 204 of the *Penal Code* for the offence of murder. It is our view therefore that the decision cited in support of the appellants’ argument against the death sentence is not applicable to the death sentence provided for the offence of robbery with violence under section 296(2) of the *Penal Code* which is the offence for which the appellants were charged and convicted. We defer to the restrictive guidelines issued by the Supreme Court in *Muruatetu 2* by the vertical operation of the doctrine of *stare decisis* and must for now uphold the mandatory death sentence for robbery with violence despite our misgivings.

35. In conclusion and based on the reasons we have given in this judgment this appeal fails on all fronts. The same is hereby dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF JULY, 2023.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

