Mwangi v Republic (Criminal Appeal 38 of 2023) [2025] KEHC 5690 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5690 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL 38 OF 2023

FN MUCHEMI, J

APRIL 30, 2025

BETWEEN

SIMON THUKU MWANGI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an Appeal against the conviction and sentence in the Chief Magistrate Court in Thika by Honourable E. Riany (SRM), in Criminal Case No. 7476 of 2016 on 8th March 2022.)

JUDGMENT

Brief Facts.

1. The appellant lodged this appeal against the entire judgment of the Senior Resident Magistrate Thika where he was charged and convicted of the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code* and sentenced to death.
2. Being aggrieved by both conviction and sentence, the appellant has lodged this appeal citing 6 grounds of appeal which are hereby summarised thus::-
    a. The learned trial magistrate erred in law in passing the judgment convicting the appellant while the prosecution had not proved its case to the standards required.
    b. The learned trial magistrate erred in law and in fact in meting out the mandatory sentence against the appellant which is unconstitutional;
3. Parties disposed of the appeal by written submissions.

The Appellant's Submissions.

4. The appellant submits that he was in custody for 24 days, from 24/10/2016 to 17/11/2016, before he was arraigned in court for plea taking. The appellant further submits that he was denied legal representation thereby infringing on his right to a fair trial under Article 50 of *the Constitution*. The appellant argues that he ought to have been given legal representation considering the severity of the sentence of the offence of robbery with violence which is death. The appellant argues that he is a layman in matters of law and he did not know all the court processes and procedures.

5. The appellant submits that the trial was conducted in his absence and therefore he did not have a chance to cross examine PW1 and PW2 which infringes on his right to a fair trial.

6. The appellant argues that the charge sheet is defective on the ground of duplicity as he was charged under Section 295 and 296(2) of the *Penal Code*. The appellant further argues that the offence under Section 295 of the *Penal Code* is different from the one set out in Section 296(2) of the *Penal Code*.

7. The appellant submits that the trial magistrate did not comply with Section 200 of the *Criminal Procedure Code* as the matter was heard by two magistrates.

8. The appellant further submits that the trial magistrate shifted the burden of proof to him thus protecting the prosecution. The appellant argues that his defence remains unshakable by the prosecution and the prosecution did not prove its case beyond a reasonable doubt.

9. On the issue of sentence, the appellant relies on the case of Julius Ndung'u vs Republic Murang'a High Court Criminal Appeal No. E052 of 2022 and submits that the sentence meted to him is severe, harsh, disproportionate and illegal.

10. The appellant submits that the evidence in the instant case was illegally obtained as the informer who was adversely named, the Safaricom data employed and the chain of custody form were not availed.

The Respondent's Submissions.

11. The respondent relies on Section 296(2) of the *Penal Code* and the case of John Kariuki Gikonyo vs Republic [2019] eKLR and submits that the prosecution proved the elements of the offence of robbery with violence. PW1, the complainant testified that on 18/10/2016, he was to transport firewood and the appellant was to buy it. It was about 4pm when the appellant told him to deliver half of the firewood to an undeveloped plot and then proceed to school. The witness stated that on the way, a pistol was put on his head and he was ordered to lie down. The appellant took his phone and he was dropped on the railway line together with the appellant and another person while someone else was left in motor vehicle registration number KCA 6X8E. PW1 further stated that the two tied him up and the appellant hit him on the head and he lost consciousness. He was found the following day and taken to hospital for treatment the witness stated that he lost Kshs. 10,000/- on Mpesa, Oppo phone, Sony Erickson phone, driving license, identity card and the motor vehicle registration number KCA 6X8E which was later found. The respondent submits that the appellant did not claim the ownership of the items that were stolen from PW1 and therefore he had no claims to the said property. Thus, the first ingredient was proved to the satisfaction of the trial court.

12. The respondent submits that PW1 testified that the attackers were more than one who attacked and robbed him. The witness further testified that the appellant held a pistol to his head and together with another tied his hands to the back, packed his mouth with a jacket thereby he could not breathe. The appellant had a pistol all the while and hit the complainant at the back of his head with an item he

could not see and he lost consciousness. Thus the respondent submits that from the evidence, it is clear that there was more than one attacker who were armed.

13. The respondent argues that proof of participation of an accused person is crucial as that enables one to determine who to attach criminal responsibility to. PW1 testified that the incident occurred in broad daylight which was around 4pm hence he saw what happened clearly. Further he was together with the attackers from Tinderet to Ruiru hence they spent enough time with them and therefore it was not hard to recognize them. PW2 identified the appellant as the person who hired his motor vehicle. The respondent submits that the appellant was identified through recognition and was placed at the scene. The respondent further argues that the appellant was placed at the scene by direct evidence and there are no other c-existing circumstances which would weaken or destroy the inference that it is the appellant who jointly with others attacked PW1 and robbed him of his precious items. Accordingly, the respondent submits that the prosecution proved their case beyond reasonable doubt and the burden of proof was never shifted to the appellant as he alleges.

14. The respondent submits that nowhere in the trial proceedings was the issue of unlawful detention raised and that is an afterthought by the appellant. The respondent argues that if the same happened, the appellant ought to have raised it at the earliest opportunity in the trial which he did not and the same is not captured anywhere in the proceedings.

15. The respondent relies on the case of Charles Maina Gitonga vs Republic [2020] eKLR and submits that for legal representation, the appellant must have demonstrated that from the commencement of the trial he raised concerns about his inability to afford legal representation and that substantial injustice may occur as a result. The respondent argues that there is no evidence that the appellant was incapacitated in the trial for lack of legal representation.

16. The respondent submits that on 24th October 2017, the prosecution was ready to proceed for hearing with one witness, the complainant. However, the appellant declined to proceed with the hearing saying he was not ready to proceed. He the shouted in court demanding to be taken back to the cells. The matter was adjourned to 8/3/2018 when the complainant started testifying it. The appellant threw a book at the trial magistrate in open court and shouted seeking to be allowed back to the cells as he did not want the hearing to proceed. The respondent submits that after the testimony of PW1 and PW2 the court said it would still allow the appellant another chance to participate in the trial despite the drama he had caused in court. Thereafter, the appellant was present in court in subsequent trial sessions although he still continued saying he did not want to proceed with the hearing. The respondent argues that the trial court had no choice than to order that the trial goes on in the absence of the appellant because his conduct made it impossible for the matter to proceed, which it noted in its judgment.

17. The respondent further submits that where an accused person makes it impossible for the trial to proceed in his presence, the court can make directions that the same proceed in his absence. In the instant case, the appellant was not ready to proceed and employed delay tactics to slow the matter. The appellant waived his right to be present during the hearing of his case and it would be contrary to the letter of the law for the case to collapse on account of his conduct as that would amount to him earning freedom by defeating the course of justice. Furthermore, Article 50(2)(f) of *the Constitution* empowers the court to proceed with the matter in the absence of an accused person. To support her contentions, the respondent relies on the cases of Regina vs Jones (2003) I ACI; Aggrey Mbai Injaga vs Republic (2014) eKLR; Republic vs Galma Abagaro Shano (2017) eKLR; United States vs Tortora 464F 2d 1202, 1210 (2d Cir) and Price vs State 36 Miss 531 (1858) and submits that an accused person's right to be present during trial can be vitiated by his own conduct especially willingly absenting oneself from trial. The appellant by his hostile behaviour in court and asking to be taken back to the cells waived his constitutional right to be present in court.

18. The respondent submits that the appellant was charged with robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code* which is not fatal to the prosecution case. Section 295 simply defines the offence and Section 296(2) defines the offence and the penalty therein. Furthermore, the respondent refers to the case of Johana Ndungu vs Republic Criminal Appeal No. 116 of 1995 and submits that in order to appreciate properly as to what acts constitute an offence under Section 296(2) one must consider the subsection in conjunction with Section 295 of the *Penal Code*.

19. The respondent argues that Section 200 and 211 of the *Criminal Procedure Code* was complied with and explained to the appellant by the trial court. On the allegations that evidence was illegally obtained and an informer who is alleged to be mentioned adversely not called, Safaricom data and chain of custody not availed, the respondent argues that the appellant has not demonstrated that evidence was obtained illegally therefore they are just mere empty allegations. The respondent submits that all evidence and witnesses that they availed were able to prove the case beyond any reasonable doubt.

20. The respondent relies on the case of Shadrack Kipkoech Kogo vs Republic (no citation given) and Wilson Waitegi vs Republic [2021] eKLR and submits that the appellant was sentenced to death which was lawful given that nothing has been shown that the trial court acted upon wrong principles or overlooked some material factors or considered irrelevant factors or the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle. To support her contentions, the respondent relies on the cases of Ogilla s/o Owuor vs Republic (1954) EACA 270; Wanjema vs Republic [1971] EA 493, 494; Ambani vs Republic (1990) KLR 161 and Republic vs Jagani & Another (2001) KLR 590.

21. Relying on the cases of James Kariuki Wagana vs Republic (2018) eKLR and Paul Ndung'u Njoroge vs Republic (2021) eKLR, the respondent argues that the instant case was a heinous crime with severe aggravating circumstances. Therefore as the aggravating circumstances were more than the mitigating factors, the trial magistrate's hands were tied to pass the death penalty which was legal given the circumstances of the case.

Issues for determination.

22. The appellant has cited 6 grounds of appeal which can be compressed into seven main issues:-

    a. Whether the charge was defective;

    b. Whether the constitutional rights of the appellant were abused for being in detention for 24 days;

    c. Whether the appellant's rights were infringed due to his absence during trial;

    d. Whether the appellant's rights under Article 50(2)(h) of *the Constitution* were violated;

    e. Whether the trial court complied with Section 200 of the *Criminal Procedure Code*.

    f. Whether the prosecution proved its case beyond any reasonable doubt;

    g. Whether the sentence is harsh and excessive.

The Law.

23. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu vs Republic [2010] eKLR where the Court of Appeal stated:-

> "The duty of the first appellate court 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 that 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 decisions.

24. Similarly in the case of Okeno vs Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs Republic (1957) EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs R (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs Sunday Post [1958]EA 424." This was also set out in the case of Kiilu & Another vs Republic [2005] KLR 174.

Whether the charge was defective.

25. Section 134 of the *Criminal Procedure Code* provides:-

Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

26. It is noted that the statement of the charge against the appellant was that he was charged with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. Section 295 of the *Penal Code* defines the offence of robbery as follows:-

Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

27. Section 296(2) of the *Penal Code* provides for the offence of robbery with violence 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 robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

28. It is clear from the foregoing that Section 295 creates the offence of simple robbery, the punishment for which is outlined in Section 296(1) whereas Section 296(2) provides for a different offence, known as aggravated robbery or robbery with violence. The provision provides that where during the commission of the offence, the offender is armed, is in the company of another person, and either uses or threatens to use violence then the punishment is death.

29. In Paul Katana Njuguna vs Republic [2016] eKLR, the Court of Appeal considered a line of authorities on duplicity of charges and held that:-

Having considered the law on duplicity as it has evolved, can we say that the charge as framed in the appeal before us was so defective as to have occasioned a failure of justice? Can it be said with any certainty that the said defect is incurable under Section 382 of the *Penal Code*. We observe that the offence under Section 295 and 296(2) were not framed in the alternative. So, following the decisions in Cherere s/o Gakuli vs Republic (supra) Laban Koti vs R (supra) and Dickson Muchino Mahero vs R (supra) the defect in the charge herein is not necessarily fatal.

In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross examined them. He raised no complaint before both the trial court and the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted, the rule against duplicity is to enable an accused know the case he has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice as which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and the evidence presented, a charge which may be duplex will not be found to be fatally defective.

30. Thus, it is important to consider whether any prejudice was suffered by the appellant, whether he understood the case against him in order to properly mount a defence and whether there was injustice occasioned in the trial. It is notable from the record that, the charge was clearly read out to the appellant in the language of his choice and he pleaded to it. Because he understood the contents of the said charge he was facing. The charge made clear reference to the offence of robbery with violence as well as the date the alleged offence was committed. These particulars were also read and explained to the appellant during plea-taking. Thus, it is evident that the appellant fully understood the charge he was facing. The record show that the appellant participated in the trial and did not suffer any prejudice. The charge was therefore, not defective as claimed by the appellant.

31. The appellant argued that he was in custody from 24th October 2016 until 17th November 2016 before he was taken to court for plea taking. from the trial court record, it is noted that the appellant did not raise that issue of unlawful detention. The charge indicates that the appellant was arrested on 24th October 2016 and presented in the Chief Magistrates Court in Thika on 17th November 2016. The appellant was present in court and did not raise the said issue. In my view, this is not an issue to be addressed by this appeal court. However, the appellant is at liberty to deal with the issue in a constitutional court as he seeks the remedies available.

Whether the appellant's rights were infringed due to his absence during trial.

32. Article 50(2)(f) of *the Constitution* provides that:-

Every accused person has the right to a fair trial, which includes the right:-

(f) To be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed.

33. In the persuasive decision in Republic vs Galma Abagaro Shano [2017] KEHC 6175 (KLR) the court stated:-

On the second issue, it is my view that the accused's conduct that may deny him the enjoyments of the right to be present in court during his trial include situations where for instance the accused person becomes violent or unruly during proceedings to such extent that it becomes impossible for the court to conduct the proceedings or where he deliberately absents himself or absconds. Care must be taken to carefully consider the circumstances behind an accused person's failure to attend court.

34. This case came up for hearing before the trial magistrate on 24th October 2017 for prosecution hearing and the appellant protested that he did not want to proceed because he was not ready. The appellant demanded that the trial magistrate recuse herself as she insisted that the witness was to be heard on that day. The trial magistrate gave the appellant a chance for the last time for him to consider his position on whether he would want to proceed with the case. The court warned the appellant after a lot of drama that if he continued that way, the case would proceed in his absence. During the following hearing, the accused continued with his protests forcing PW1 to be stepped down. He engaged in misconduct and violence in the courtroom. He threw a book at the trial magistrate and shouted that he wanted to be returned to the cells for he did not want to proceed with the hearing. It was at this juncture that the court directed that the matter proceeds in the absence of the appellant for his conduct made it impossible for

the trial to proceed. PW1 and PW2 testified on that day. The magistrate who seemed to exercise a lot of restraint on the appellant still gave him another chance to participate in the trial if he wished to do so. During the next hearing date 12th March 2019, the appellant continued with his protest and refused to participate in the hearing claiming he was unwell. The trial magistrate noted that the appellant appeared well but he had a trend of refusing to proceed with the hearing of the case. It is evident from the record that the appellant was hostile and portrayed unbecoming conduct in the court room so consistently which led to the court keeping him away for the trial to be conducted. By virtue of his own conduct he vitiated his right to be present during the trial. The action of the magistrate was in accordance with the provisions of *the Constitution*, specifically Article 50 (2) (f).

Whether the appellant's rights under Article 50(2)(h) of *the Constitution* were violated.

35. The appellant argues that he was not conversant with the law and ought to have been offered legal representation at the expense of the state and thus his constitutional right under Article 50 (2) (h) was violated.

36. Article 50 (2) (h)of *the Constitution* stipulates:-

Every accused person has the right to a fair trial, which includes the right-

To have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

37. A cursory look at Article 50 (2)(h) of *the Constitution* which provides the right to legal representation, it is clear that the right is not absolute but qualified. Legal representation at the expense of the state is thus only available where there is a likelihood of substantial injustice occurring to the detriment of an unrepresented accused person. The Court of Appeal in the case of Macharia vs Republic stated as follows:-

Article 50 of *the Constitution* sets out a right to a fair hearing which includes the right of an accused person to have an advocate if it is in the interest of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where public interest requires that some form of legal aid be given to the accused because of the nature of the offence….We are of the considered view that in addition to situations where substantial injustice would otherwise result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at the state expense.

38. In the instant appeal, the appellant was charged with the offence of robbery with violence which carries death sentence. It is important to note that the appellant did not request for any legal representation during the trial. It is noted that the appellant was supplied with witness statements at the onset of the trial and he conducted cross examination on the prosecution witnesses satisfactorily as borne by the court record. During defence hearing, the appellant's rights under Section 211 of the *Criminal Procedure Code* were explained to him. He responded to the effect he understood and elected to give unsworn evidence.

39. It is my considered view that there was no risk of injustice occurring and no substantial injustice occurred during the whole trial. As such, there was no critical need of provision of legal representation and no rights were violated.

Whether the trial court complied with Section 200 of the *Criminal Procedure Code*.

40. Section 200 (3) of the *Criminal Procedure Code* provides:-

Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be summoned and reheard and the succeeding magistrate shall inform the accused person of that right.

41. The record shows that the trial was conducted by two magistrates Hon. G. Omodho (SRM) and Hon. E. Riany (SRM). The first magistrate heard four (4) prosecution witnesses. The succeeding magistrate heard one prosecution witness and the defence case. The court record shows that on 25th February 2020, Hon. Riany informed the appellant of his rights under Section 200 of the *Criminal Procedure Code*. The appellant elected to have the matter proceed from where it had reached as it was an old case. The trial magistrate directed that the doctor to be recalled on 5th March 2020 and that the matter proceeds from where it had reached. As such, it is evident from the record that the provisions of Section 200 of the *Criminal Procedure Code* were complied with.

Whether the prosecution proved its case beyond any reasonable doubt.

42. The elements of the offence of robbery with violence were set out by the Court of Appeal in the case of Oluoch vs Republic [1985] KLR:-

Robbery with violence is committed in any of the following circumstances:-

a. The offender is armed with any dangerous and offensive weapon or instrument; or

b. The offender is in company with one or more person or persons; or

c. At or immediately before or immediately after the time of robbery the offender wounds, beats, strikes or uses other personal violence to any person….

43. According to the case of *Dima Denge Dima & Others vs Republic Criminal Appeal No. 300 of 2007*:-

The elements of the offence under Section 296(2) are three in number and they are to be treated not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.

44. The term robbery has been defined in Shadrack Karanja vs Republic Criminal Appeal No. 119 of 2005 [2006] eKLR, the Court of Appeal stated as follows:-

The same issue was raised in Moneni Ngumbao Mangi vs Republic Criminal Appeal No. 141/2005 (UR) and this court examined in detail the essential ingredients of the offence of robbery with violence under Section 296(2) of the *Penal Code* as analysed in Johana Ndungu vs Republic, Criminal Appeal No. 116 of 1995 (UR). After noting that the charge sheet in that case stated, as it does in this case, that the appellants "robbed" the complainant, the court continued:-

The word robbed is a term of art and connotes not simply theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property.

45. Briefly, the evidence was that the complainant was in the company of the appellant and a third party unknown to him on 19th October 2016 in motor vehicle registration number KCA 6X8E transporting firewood from Tinderet. On reaching Ruiru, the appellant told the complainant that he would deliver the firewood to a school but before they got to the school, the appellant told the complainant that he would deliver only half of the firewood to the school and they proceeded to deliver the other half to an undeveloped plot. on their way to school, the appellant pointed a pistol to the complainant's head and he was ordered to lie down. The appellant took the complainant's phone and ordered him to lie beneath the motor vehicle and they drove off. The complainant was dropped off at the railway line and the appellant and the third party got off the vehicle and walked on foot. The appellant and the third party tied the complainant's hands to the back. The appellant stuffed the complainant's mouth with a jacket to the extent that he could not breathe. The appellant had the gun pointed at the complainant. He also hit the complainant on the back of his head with an item the complainant could not see that made him lose consciousness.

46. PW1 told the court that the incident occurred at 4pm. The following day, the complainant managed to remove the jacket from his mouth. A good Samaritan went to his aid and he called his boss, PW2 and informed inform him of the incident. He was admitted in hospital for treatment. The evidence of the complainant was that appellant and third party took the motor vehicle, his phones Oppo and Sony Erickson by make and Kshs. 10,000/- from his mpesa. The witness testified that he was taken to Lilens Hospital where he t the hospital a CT Scan was done. He was admitted at St. Mary's Hospital from 20/10/2016 to 1/11/2016. The P3 Form was produced in evidence.

47. PW2 testified that he is in motor vehicle transportation business. He said that on the material day, the appellant sought his services to transport firewood while in the company of a third party. On arrival at Ruiru around 11 am, PW2's driver PW1 called him and informed him that they had reached Ruiru and were offloading the firewood. The witness testified that thereafter his calls to his driver went unanswered. It was on the following day that he got a call from a stranger informing him that PW1 had been attacked. PW1 was taken to St. Mary's Hospital for treatment. After a week the motor vehicle was recovered in Taita Taveta and the appellant was arrested while on board the motor vehicle.

48. The incident took place in broad daylight at around 4.00 p.m. PW1 testified that he had travelled with the appellant and the third party from Tinderet to Ruiru which was ample time with the assailants and that there was no possibility of mistake on the appellant's identity. PW2 testified that the appellant sought his services to transport firewood on the material day. The court in Wamunga vs Republic (1989) KLR 424 at 426 had this to say:-

Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction.

49. The appellant herein identified through recognition as the perpetrator of the crime. He was further placed at the scene of the crime by PW1. As such, the appellant was positively identified.

50. Proof of ownership of motor vehicle registration number KCA 608E was proved through a log book which belonged to PW2. The receipts of the lost phones Oppo and Sony Erickson were also produced. Both phones belonged to PW1, the driver of the vehicle. The appellant did not claim ownership of any of the recovered items. In his defence, he opted not to say anything.

51. It is my considered view that the prosecution proved its case beyond reasonable doubt that the appellant robbed PW1 used violence on him immediately before or during or immediately after the robbery.

52. Consequently, this court finds that the conviction was based on cogent evidence and it is hereby upheld.

Whether the sentence is harsh and excessive.

53. The appellant argues that the mandatory nature of the sentence under Section 296(2) of the *Penal Code* is unconstitutional.

54. The sentence prescribed for robbery with violence under Section 296(2) of the *Penal Code* is mandatory death. However, the recent decision by the Supreme Court in Francis Karioko Muruatetu & Another vs Republic [2017] eKLR on the death penalty and mandatory sentences held that the death penalty is unconstitutional and that mandatory sentences were unjust as they took away the discretion of the trial court to impose sentences that fit the particular circumstances of the case. Thus, in the instant case all the ingredients of robbery with violence have been met. The appellant robbed the complainant, was armed with a dangerous weapon. He was in the company of another person and at the time of the robbery wounded the complainant. The appellant used violence on the complainant of very high degree. The items stolen were of substantial value of Kshs. 5.2 million.

55. The appellant argued that death sentence was declared unconstitutional. The correct position is that death sentence is still valid under Section 296 (2) of the *Penal Code*. In the Supreme Court Petition No.15 of 2015 KLR (2017) Francis Karioko Muruatetu & Another, the court declared unconstitutional only the mandatory nature of the sentence that denied the courts the discretion to impose appropriate sentences. Death sentence was not declared unconstitutional, and is therefore a lawful sentence.

56. In the decision of the Supreme Court of Republic vs Julius Kitsao Manyeso Petition No.E013 of 2024 Court of Appeal was faulted by the Supreme Court for applying the Muruatetu petition principles in a defilement case to reduce life sentence to 30 years imprisonment. The Supreme Court set aside the Court of Appeal sentence of 30 years imprisonment and upheld the life sentence of the trial court that had been affirmed by the High Court. This is the current jurisprudence and all other courts below the Supreme Court are bound by the said decision under Article 163 (7) of *the Constitution*. This court shall therefore not interfere with, but instead uphold the death sentence imposed by the trial court.

57. The appeal is partly successful.

58. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 30TH DAY OF APRIL 2025.

F. MUCHEMI

JUDGE