



REPUBLIC OF KENYA



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**Muthike v Republic (Criminal Appeal E010 of 2022)
[2025] KEHC 7062 (KLR) (28 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 7062 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CRIMINAL APPEAL E010 OF 2022
JK NG'ARNG'AR, J
MAY 28, 2025**

BETWEEN

JULIUS NDAMBERERI MUTHIKE APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against both conviction and sentence imposed by Hon. L.W. Kabaria
(PM) arising from judgment delivered on 24/6/2022 in Case No. E183 of 2020)*

JUDGMENT

1. The Appellant before this court was charged with robbery with violence contrary to Section 295 as read with Section 296(2) of the *Penal Code*. Particulars stated that on 4/3/2020 at Kianyaga trading centre, Baragwi sub mocation in Kirinyaga East- Sub county within Kirinyaga County, the appellant jointly with others not before court, while armed with crude weapons namely rungus and sticks robbed James Muchira Muthoni his mobile phone make Q55232 and cash Kshs. 6,000/= all valued at Kshs. 7,000 and immediately after the time of such robbery used actual violence against James Muchira Muthoni.
2. The Appellant was convicted of the charge and sentenced to death.
3. Being aggrieved by both the conviction and sentence, the accused filed the instant appeal on the following grounds: -
 - i. That the learned trial magistrate erred in law and facts by relying on a single evidence.
 - ii. That the learned trial magistrate erred in law and facts by convicting me on the basis of identification which lacked merit.
 - iii. That the learned trial magistrate erred in law and facts by sentencing me to death which is harsh and excessive without considering that I am a first offender.



- iv. That the learned trial magistrate failed to consider that the prosecution failed to prove the case beyond reasonable doubt.
 - v. That the learned trial magistrate failed to consider my defense and rejected it.
4. The appellant thus urged this court to quash the conviction and set aside the sentence herein.

Appellants' submissions

5. It was the appellants' submission that the offence occurred on a rainy night and in difficult circumstances and there was no source of light. That it was difficult to identify someone through moonlight thus there was no positive identification. That on the day the offence occurred, he was at home with his family members conducting funeral arrangements for his brother and this was collaborated by DW2 and DW3. That the trial court relied on the evidence of a single witness without caution and convicted the appellant without sufficient proof of positive identification.
6. That there was contradiction in the prosecution's evidence including the charge sheet which indicated that the offence occurred on 4/3/2020 yet PW1 testified it occurred on 1/3/2020. That there was also duplicity of charge as the same was framed as 'robbery with violence c/section 295 as read with section 296(2) of the PC. That the appellant was charged with a capital offense yet he was not informed of his right to have an advocate assigned by the state as per Article 50 (2) (h) of *the Constitution*.
7. The appellant also submitted that he was not found at the scene of the crime and there was no exhibit concerning the case that was found in his possession. That no weapon was recovered, and the allegedly stolen money and phone were also not found. Further, the appellant was arrested alone. Consequently, the ingredients for the offence were not established. The appellant added that the injuries sustained by the complainant PW1 were not caused by being beaten, instead, he fell when drunk.
8. As regards the sentence, it was submitted that the sentenced imposed was harsh and excessive. That the death sentence had been declared unconstitutional by the Supreme court.
9. The appellant also submitted that his defence was rejected without any cogent reasons and the defense was not displaced by the prosecution.
10. The appellant urged this Court to quash the conviction and set aside the sentence.

Respondent's submissions

11. It was submitted that the prosecution proved its case beyond reasonable doubt as all elements for the offense of robbery with violence were proven. That the prosecution proved that the victim had a phone which was robbed from him and he was wounded at the time of the robbery. That though the appellant took issue with the reliance of one witness, Section 143 of the *Evidence Act* provides that no particular number of witnesses are required for the proof of any fact.
12. On identification, it was submitted that there was positive identification as the appellant was well known to the victim. That the victim also explained that the moonlight enabled him to recognize the appellant who also came face to face with him and was thus able to positively identify him. That the appellant was thus identified by recognition as he also admitted that he knew the victim prior to the incident. That the victim also stated that he saw the appellant earlier during the day and he wore the same clothes at night.
13. As to whether the appellant's defense was considered by the trial court, it was submitted that the trial court found there were material contradictions and inconsistencies on the defense as regards the date



the deceased passed on and on account of the time the appellant was allegedly attending the meetings. That there was evidence that the appellant had already been arrested and was in custody when the deceased died thus the defense was incredible and was a sham. That the appellant was also inconsistent as he claimed that the victim had been involved in an accident and later changed to say that the victim was beaten by the bar owner thus he was lying.

14. On the sentence, it was submitted that the appellant was given a chance to give his mitigation but he was not remorseful for the violent conduct against the victim. That the victim was fractured on his hand as he was defending himself against being hit on the head. That the victim suffered serious pain and loss of amenities. That the circumstances did not call for another sentence other than death and the violence meted on the victim coupled with the un-remorsefulness of the appellant justified the death sentence.

Analysis and Determination

15. The duty of the first appellate court in criminal cases was restated in the case of Charles Mwita v Republic, C. A. Criminal Appeal No 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that: -

“In Okeno v R [1972] E.A. 32 at page 36 the predecessor of this Court stated: - “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 v R [1957] EA. 336) and to the appellate court’s own decision on the evidence”.

16. Being a 1st Appeal Court I must, weigh conflicting evidence and draw conclusions. As held in Shantilal M. Ruwalla v R [1957] EA 570, it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own 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 v Sunday Post, [1958] EA 424.
17. See Okeno v Republic [1972] EA 32. The court should also bear in mind that it did not see witnesses testify and give due consideration for that.
18. Having considered the grounds of appeal, and evidence adduced before the trial court, it is my considered opinion that the paramount issue for determination is whether the prosecution proved its case to the required standard and the issue of legal representation.
19. On the question of legal representation, Article 50 (2) (g) of *the Constitution*. states as follows: -

“ 50

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

(g) to choose, and be represented by an advocate, and to be informed of this right promptly.”

20. In its decision in Republic v Karisa Chengo & 2 Others [2017] eKLR, the Supreme Court considered the issue of legal representation at state expense and stated:

“Article 50(2) (h) of *the Constitution* provides that “[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.” It does not define what “substantial injustice” means. However, in *David Macharia Njoroge vs Republic*, (supra), the Court of Appeal held that “substantial injustice” results to “persons accused of capital offences” with “loss of life” as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in Article 50 (2) (h) are “if substantial injustice would otherwise result....” While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in Article 50 (2) (h) goes beyond capital offence trials. The Court of Appeal indeed appears to have embraced this reasoning in a recent decision in *Thomas Alugha Ndegwa vs Republic*; C.A. No. 2 of 2004, when it allowed an application for legal representation by the appellant who had been convicted of defilement and sentenced to life imprisonment.

In addition to the above, we do not agree with the Court of Appeal’s holding in the instant case to the effect that the right guaranteed in Article 50 (2) (h) of *the Constitution* is progressive and that it can only be realized when certain legislative steps have been taken, such as the enactment of the *Legal Aid Act*. While this is true regarding the general scheme of legal aid which the Act is set to fully implement, the same cannot be the case regarding the right in Article 50 (2) (h). We are thus in agreement with Mr. Ole Kina, that the right to legal representation at state expense, under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more. We must however emphasize the fact that in accordance with the language of *the Constitution*, this particular right is not open ended. It only becomes available “if substantial injustice would otherwise result”.

21. In *Bernard Kiprono Koech vs Republic* [2017] eKLR in considering an argument similar to what is now before me, Justice Mumbi Ngugi stated: -

“Secondly, there is now a framework in place, which was not in place at the time of the appellant’s trial, under which an accused person can apply under section 40 of the *Legal Aid Act* No. 6 of 2016 for legal representation at state expense. Section 43 of the Act imposes a duty on the court to inform an accused person of his right to apply for legal representation. It provides as follows:

43.

- (1) A court before which an unrepresented accused person is presented shall —
 - (a) promptly inform the accused of his or her right to legal representation;
 - (b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and
 - (c) inform the Service to provide legal aid to the accused person.



40. I am satisfied that in the present case, there was, first, no substantial injustice as suggested in the Karisa Chengo case resulting to the appellant. Secondly, it is evident that the accused fully understood the charges facing him, and was able to address himself to the issues that arose.”
22. In the instant case, the appellant was arraigned before the trial court in Kerugoya on 10/3/2020 where he was accordingly charged. The charges were presented to him in a language that he understood and a plea of not guilty was entered and bond terms given. The appellant applied for review of bond terms on two occasions and the same was declined based on the offence. The appellant was issued with all requisite documents including the charge sheet, statements. P3 and medical documents. The court explained that due to the ongoing Covid 19 pandemic, the court was unable to fix a hearing date as court appearances were restricted.
23. On 4/11/2020 when the matter was fixed for hearing, the appellant applied for an adjournment on account of ailment and the court allowed the same. The accused again sought an adjournment on 23/12/2020 on basis that he had an untreated ear infection and when the court confirmed the same to be true, the adjournment was allowed and the court ordered that medication be availed to the appellant. On 17/2/2021, the appellant was ready to proceed but informed court that he had talked to the complainant and sort time for negotiations and the court agreed to the same. When the prosecution constantly informed court that they did not have the police file on several mentions, the court fixed a hearing date and warned the prosecution that there would be no adjournment on that day on account of a missing file. Even then, the appellant applied for an adjournment again and the same was granted.
24. The appellant was again issued with the statements to enable him refresh his memory before the hearing and a later date was fixed. Eventually on 11/8/2021, both the prosecution and the appellant were ready to proceed and the matter kicked off. I do note that the appellant was able to cross-examine the witnesses in detail. The appellant even applied to re-examine PW1, the victim, and the same was allowed.
25. After the close of the prosecutions case, the appellant was placed on his defense and the court duly complied with the provisions of section 211 of the *Criminal Procedure Code*. The record was not however clear on whether the appellant was informed of his right to legal representation. The Appellant elected to give sworn testimony and called two witness, DW1. Before sentencing, the court called for the appellant’s mitigation and a victim impact report.
26. Was there any substantive injustice in the trial process? I note that the appellant fully participated in the trial. He was able to intensely cross-examine each witness and he was elaborate in the manner he conducted the cross-examination the witnesses. The trial court balanced fairness between the prosecution and the appellant and never once declined the appellant’s requests for adjournments, more so on medical grounds. The trial court ensured that the hearing took off noting that the appellant was in custody. The appellant also applied to recall the victim for cross-examination and the same was allowed. The appellant was also issued with prosecution documents on two occasions and was given a chance to refresh his memory on the documents before the hearing could commence.
27. I note that throughout the trail, the appellant seemed well versed and understanding of the charges that faced him. The appellant ably put up the defence of alibi and elaborated on his whereabouts on the material day. The appellant also called two witness to further buttress his case.
28. From how the trial was carried out from the very beginning to the end, I have found no reason to arrive at the conclusion that the appellant suffered any substantial prejudice. The entire process was



fair to the appellant. I do note that there was both procedural and substantial fairness in how the court conducted the trial.

29. In the circumstances, I am satisfied that no substantial injustice resulted on the appellant by the failure of provision of legal representation. It is my opinion that the appellant's right to a fair trial as enshrined in Article 50 (2) of *the Constitution* was not infringed. That ground of the appeal cannot succeed.

Whether the case against the appellant was proved beyond reasonable doubt

30. The next point to consider was whether the charge sheet was defective for charging the appellant under section 295 as read with section 296(2) of the *Penal Code*. Our superior courts have on several occasions stated that drafting the robbery with violence count under the two sections amounts to duplicity. See Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR. The courts have also held that where the charge is deemed to be duplex, the test will be whether the defects occasioned any prejudice to the Appellant. The Court of Appeal in Paul Katana Njuguna v Republic [2016] eKLR while faced with a similar issue held thus: -

“...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 before 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 has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at 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 evidence presented, a charge which may be duplex will not be found to be fatally defective.”

31. In this case, the Appellant understood the charges against him, he participated in the hearing by cross examining the witnesses and mounted a defence at the close of the prosecution case. He raised no complaint before the trial court and in the circumstances, I find that there was no miscarriage or failure of justice on the ground that the charge was duplex.
32. Though the charge sheet indicated that the offence took place on 4/3/2020, I do note that the same was regularized by the testimony of the police officer PW2 as well as the medical documents on record and the P3 form. There was evidence that the offence took place on 1/3/2020 as alleged by the prosecution and the mistake in the charge sheet was not prejudicial to the appellant. I say so noting that the appellant's defense of alibi on 1/3/2020 was well considered and determined upon.
33. As to whether the offence of robbery with violence was proven to the required standard, I note that the offense is provided for in Sections 295 and 296(2) of the *Penal Code* which states: -

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

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- (2). 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

34. In *Jeremiah Oloo Odira v Republic* [2018] eKLR the court held that: -

“Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: Theft and the use of or threat to use actual violence. On the other hand, the offence of robbery with violence is committed when robbery is proved and further 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
- iii. 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” See *Olouch v Republic* (1985) KLR)”

35. The prosecution’s case was that the offence of robbery with violence was established as the complainant, PW1, was assaulted prior and after the theft. It was the prosecution’s case that on the material night of 1/3/2020, the victim was walking home when he met three young men, two of which appeared to have been urinating. That he recognized the appellant amongst them as there was lots of moonlight and he had seen the appellant during the day and was still wearing a blue trouser, black shirt and open shoes. That when at the center of the men, he was hit on the head and leg. That the appellant attempted to hit him on the head but he defended himself with hand which got injured.
36. That the victim then fell to the ground and the three men stole from him and he escaped to a coffee plantation where they chased him unsuccessfully and he hid till morning when he reported the incident and sought medical assistance. He further testified that he was found to have suffered a fracture on his hand. That he knew the appellant as he once worked for the victim’s grandmother and would also make ngumu in town. That the appellant and the other men stole his phone worth Kshs. 1,000/= and he marked the cash sale receipt, as well as Kshs. 6,000/= which he had received from his chama on the same day.
37. From the foregoing, the ingredients of robbery with violence were all established and proven by the prosecution in that the appellant used a blunt object to hit the victim on the hand causing a fracture thereon as he stole from him. There was medical evidence to prove that injury including the x-ray and treatment notes as well as the evidence of PW3 who testified that from the injuries, the victim was injured with a blunt object.
38. The appellant was also in the company of two other men who hit the victim from behind. PW3 testified that the victim had multiple bruises on his body which indicated that he faced some sort of force like a fight or struggle. He also had a painful leg and swollen hip. All these prove the offense of robbery with violence as correctly found by the trial court.



39. Though the appellant took an issue with identification, I do note that the prosecution was able to prove that the complainant positively identified the appellant as one of the robbers. PW1 testified that he knew the appellant well as he had previously worked for his grandmother and he had also seen him selling ngumu in town. I do note that the appellant collaborated this himself as he testified that he worked in a hotel. Further, the appellant had seen the appellant earlier during the day and notes that he was wearing the same clothes he had on during the day.
40. Though the appellant submitted that it was not possible for the victim to recognize him in moon light only, the victim testified that he was face to face with the appellant who attempted to strike him on the head but he defended himself using his hand. Noting that the victim could even see the color of the clothes worn by the appellant, I am inclined to agree with the trial court that he positively identified the appellant through recognition. The appellant himself testified that both he and the victim knew each other before the incident. In the circumstances, I find that there was positive identification.
41. As to the defendant's defense of alibi, I do agree with the trial court that the prosecution's case outweighed the defendant's. Though the appellant testified that he was engaged in family meetings on the date and time when the offence occurred, his own witness testified that the appellant's brother died on 3rd March whereas the offence occurred on 1st March. This then collaborates the victim's testimony that the appellant had already been arrested and was in custody when his brother died thus there were no funeral meetings on the day of the offence. Based on that, the defense of alibi could not stand and the prosecution was able to disarm that defense.
42. I am inclined to agree with the respondent's submission that the appellant's defense was not reliable as he testified that the victim fell from a motorcycle and sustained the injuries, then changed to testify that the victim was beaten by a bar owner during the day. These was a huge contradiction, and PW3 testified that the victim's injuries were not sustainable with injuries from a fall off a motorcycle.
43. Considering the entire record, the foregoing and the comprehensive judgment of the trial court which I have considered, I wholly agree with the findings of the trial court that the elements of robbery with violence were properly established and as such the conviction was proper.
44. It then follows that the finding of the trial court on conviction is upheld.

Whether the sentence was manifestly harsh and should be interfered with

45. As noted above: -

“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.296(2).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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”



46. In *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, the Supreme Court held that mandatory death penalty for murder is unconstitutional. In that case, the Supreme Court outlined the following guidelines as being applicable when the Court was considering re-sentencing: -

- “(a) age of the offender;
- (b) being a first offender;
- (c) whether the offender pleaded guilty;
- (d) character and record of the offender;
- (e) commission of the offence in response to gender-based violence;
- (f) remorsefulness of the offender;
- (g) the possibility of reform and social re-adaptation of the offender;
- (h) any other factor that the Court considers relevant.”

47. It then follows that the accused mitigation ought to count in sentencing. I am also cognizant of the principles of sentencing as captured in High Court criminal appeal decision in *Dahir Hussein v. Republic* Criminal Appeal No. 1 of 2015; [2015] eKLR. In the said case, the High Court held that the objectives include: -

“deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”

48. In *Duncan Kyalo Muange & another v Republic* [2019] eKLR, the Court held that: -

“In my view, fairness to the accused where a sentence re-hearing is considered appropriate would require a consideration of the circumstances prior to the commission of the offence, at the time of the trial and subsequent to conviction. The conduct of the accused during the three stages may therefore be a factor to be considered in determining the appropriate sentence. The need to protect the society clearly requires the Court to consider the impact of the incarceration of the offender whether beneficial to him and the society or not hence the necessity for considering a pre-sentencing report.”

49. The sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

- “1) Retribution: to punish the offender for his/her criminal conduct in a just manner.
- 2) Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
- 3) Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.
- 4) Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.



- 5) Community protection: to protect the community by incapacitating the offender.
- 6) Denunciation: to communicate the community's condemnation of the criminal conduct.
- 7) Reconciliation: To mend the relationship between the offender, the victim and the community.
- 8) Reintegration: To facilitate the re-entry of the offender into the society.”

50. On whether an appellate court can interfere with the sentence of the trial court, the Court of Appeal in the cases of Shadrack Kipkoech Kogo –vs- R Eldoret Criminal Appeal No. 253 of 2003 stated that: -

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (See also Sayeka –vs- (1989 KLR 306).”

51. In Bernard Kimani Gacheru vs Republic (2002) vs- Republic (2002) eKLR the Court of Appeal held restated that: -

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong materials or acted on a wrong principle. Even if the Appellate Court feels that the sentence is heavy and that the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

52. In considering the above-mentioned factors and circumstances of the case, more so considering the mitigation of the appellant/accused, category of harm caused noting that the same was classified as grievous harm, I will interfere with the sentence and substitute it with 30 years' imprisonment. In compliance with Section 333 (2) of the *Criminal Procedure Code*, the sentence will start running from 10/3/2020 when the appellant was first arraigned in Court.

It is so decreed.

JUDGEMENT DATED AND SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF MAY, 2025.

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J.K.NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Appellant and Mamba for the Respondent. Siele/Mark (Court Assistants).

