



REPUBLIC OF KENYA



**Mokwo alias Jonathan Ali Parsulai v Republic (Criminal Appeal
E001 of 2023) [2025] KEHC 11782 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 11782 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CRIMINAL APPEAL E001 OF 2023
CM KARIUKI, J
JULY 31, 2025**

BETWEEN

**JACKSON KITUNGAT MOKWO ALIAS JONATHAN ALI
PARSULAI APPELLANT**

AND

REPUBLIC RESPONDENT

*(Being an appeal from the conviction and sentence of Hon. S.M. Mungai
(C.M) in Narok MCCR No. E150 of 2020 delivered on 15.12.2022)*

JUDGMENT

Introduction

1. This is an appeal against the conviction and sentence delivered on 15th December 2022 by the Chief Magistrate's Court at Narok in Criminal Case No. E150 of 2020, where the appellant, Jackson Kitungat Mokwo alias Jonathan Ali Parsulai, was convicted on three counts of robbery with violence contrary to Section 296(2) of the *Penal Code* and sentenced to death.
2. The appellant was the second accused in the trial court. The first accused was acquitted for want of reliable identification evidence.

Petition Of Appeal

3. Being dissatisfied with the said conviction and sentence, he preferred an appeal vide a petition of appeal dated 23rd day of December 2022, citing 6 grounds. The Appellant has amended the earlier filed grounds of appeal pursuant to Section 350(4) of the *Criminal Procedure Code*, and now appeals against both the conviction and sentence on the following grounds:



- i. That the Learned Trial Magistrate erred in law and in fact when he relied on the circumstantial evidence but failed to note that the circumstantial evidence adduced was not proved beyond any reasonable doubt as prescribed by the law.
- ii. That the Learned Trial Magistrate erred in law and in fact, by imposing the death sentence, but failed to note that the death sentence was declared unconstitutional

Directions of the Court.

4. The appeal was canvassed by way of written submissions.

The Appellant's Submissions.

5. The Appellant submitted that the learned trial magistrate erred in law and fact by relying on circumstantial evidence, which was not conclusive or cogent enough to sustain a conviction. He argued that the prosecution failed to discharge its burden to the required standard of proof beyond reasonable doubt, as established in the seminal case of *Republic v Kipkering Arap Koske & Another* (1949) 16 EACA 135, where the court held that circumstantial evidence must exclude any reasonable hypothesis of innocence.
6. To underscore the high standard of proof required in criminal cases, the Appellant also relied on the authority of: *Republic v Stephen Kiprotich Leting & 3 Others* [2009] eKLR, where Maraga J (as he then was) emphasized that it is preferable to acquit the guilty than convict the innocent, thereby affirming the critical role of the standard of beyond reasonable doubt. The US. Supreme Court decision in *In re Winship*, 397 US. 358 (1970), which held that reasonable doubt is a fundamental safeguard in criminal justice, given the gravity of liberty and stigma at stake. *R v Lifchus* (1997) 3 SCR 320, where the Canadian Supreme Court held that a reasonable doubt must be logically derived from the evidence or lack thereof, and not from sympathy, prejudice, or speculation.
7. The Appellant further submitted that the prosecution's reliance on MPesa data and call logs was unsupported by expert or documentary evidence from Safaricom. No SIM card registration, identification documents, or testimony from a Safaricom data expert was adduced to conclusively link the Appellant to the alleged transfer of Kshs. 24,000. He argued that this omission violated his right to a fair trial under Article 50 of the *Constitution*.
8. The Appellant also contended that the inventory produced by the investigating officer was defective, unsigned by the Appellant or his representative, and did not indicate that any exhibits were recovered from the scene. He argued that the said inventory only recorded his personal belongings and failed to establish any nexus with the robbery.
9. On sentence, the Appellant submitted that the learned trial magistrate erred in law by imposing a mandatory death sentence, contrary to the Supreme Court's decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, which held that the mandatory nature of the death penalty under Section 204 of the *Penal Code* is unconstitutional as it ousts judicial discretion and fails to consider individual mitigating factors.
10. He further relied on Article 25(c) of the *Constitution*, which affirms the right to a fair trial as non-derogable, and Article 50(2), which protects an accused's right to fair hearing. The Appellant submitted that the trial court failed to assess whether the facts of the case warranted the death penalty and disregarded his mitigating circumstances.



11. He also invoked Articles 2(5) and 2(6) of the *Constitution*, arguing that international instruments to which Kenya is a party, such as the *International Covenant on Civil and Political Rights (ICCPR)*, are part of Kenyan law. These instruments underscore the right to life, fair trial, and proportionality in sentencing.
12. The Appellant urged the court to find that the prosecution failed to prove its case beyond reasonable doubt, that the circumstantial and electronic evidence was unreliable, and that the sentence imposed was unconstitutional. He prayed that the conviction be quashed, the sentence be set aside, and that the court grants any other appropriate relief in the interest of justice.

The Respondent's Submissions.

13. The Respondent opposed the appeal and submitted that the Appellant's conviction and sentence were both sound in law and fact. It was contended that the offence of robbery with violence under Section 296(2) of the *Penal Code* was proved beyond reasonable doubt through the testimony of eleven prosecution witnesses.
14. Citing *Mohammed Ali v Republic*, Criminal Appeal No. 13 of 2017, and *Dima Denge & Others v Republic*, Criminal Appeal No. 300 of 2007, the Respondent argued that robbery with violence can be established upon proof of any one of the following elements: that the offender was armed with an offensive weapon; or was in the company of others; or used personal violence during or immediately after the robbery. The elements are disjunctive, not conjunctive, and the presence of any one suffices for a conviction under Section 296(2).
15. In the present case, all three elements were present. The complainants — PW1 (Kelvin Kahi), PW2 (Mary Wanjiku Ndungu), and PW3 (Duncan Wambui Macharia) — were violently attacked by a gang of three men, one of whom used a *rungu* and *panga* to injure PW1 and PW2. The complainants' mobile phones and, in the case of PW3, a sum of Kshs. 24,000 were taken by force. Medical treatment notes and P3 forms were produced to confirm the injuries sustained, thus corroborating their evidence.
16. While the Appellant challenged the reliability of identification evidence, the Respondent Submitted that the case did not solely rely on visual identification but rather on circumstantial evidence supported by the doctrine of recent possession. PW3 testified that he was forced to transfer Kshs. 24,000 to a mobile number belonging to the Appellant. During investigations, it was confirmed through call data records that the phone used to receive the money was found in the Appellant's possession, and further, that the phone was located at Nairegia Enkare, the scene of the robbery, on the material date.
17. The Respondent relied on *Arum v Republic*, Criminal Appeal No. 85 of 2005 (Court of Appeal, Kisumu), where the court laid down the test for recent possession:
 - (a) The item must be found with the suspect;
 - (b) The item must be positively identified;
 - (c) It Must be established that the item was stolen; and
 - (d) The theft must have been recent.

It was submitted that these criteria were met in this case, making the circumstantial link to the Appellant unbroken and compelling.

18. On the Appellant's claim that his defence was improperly rejected, the Respondent submitted that the trial court duly considered the defence but found it unconvincing and uncorroborated, and that



this finding was consistent with legal standards set out in *David Ochieng v Republic* [1985] KLR 252, where it was held that a defence that does not raise reasonable doubt may properly be rejected.

19. Regarding the sentence, the Respondent maintained that the death sentence imposed by the trial court was lawful under Section 296(2) and consistent with the Supreme Court's decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR. The Supreme Court held that it is the mandatory nature of the death sentence that is unconstitutional, not the sentence itself. Trial courts, therefore, retain discretion to impose the death penalty where circumstances warrant it, and in this case, the trial magistrate considered the aggravating nature of the violence involved before arriving at a sentence.
20. In conclusion, the Respondent submitted that the prosecution met the burden of proof, the conviction was supported by evidence and lawful reasoning, and the sentence imposed was proportionate. The Respondent prayed that the appeal be dismissed in its entirety and that both conviction and sentence be upheld.

Analysis and Determination.

21. The Appellant was convicted and sentenced to death for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. He now appeals against both the conviction and sentence on the basis of amended grounds. This court, as the first appellate court, is mandated to re-evaluate the evidence afresh and arrive at its own independent conclusion, as guided in *Okeno v Republic* [1972] EA 32 and *Boru & Another v Republic*, Criminal Appeal No. 19 of 2001 (2005) KLR.

Issues for Determination

22. The court considers the following issues:
 - a) Whether the prosecution proved its case beyond reasonable doubt against the appellant.
 - b) Whether the circumstantial evidence met the required legal standard.
 - c) Whether the death sentence imposed was lawful and constitutional.

Proof Beyond Reasonable Doubt and Circumstantial Evidence

23. The evidence against the appellant was primarily circumstantial, comprising: The transfer of Kshs. 24,000 from PW3's phone to the appellant's line; The registration of the said line in the appellant's name (Jonathan Ali Parsulai); The appellant's arrest while in possession of the same line; The call data which placed the phone at the crime scene; and the attempt to conceal identity by producing an ID number belonging to a different person.
24. In *R v Kipkering Arap Koske (supra)*, the court held that for circumstantial evidence to suffice, it must be such that no other inference is possible except that of guilt. This position was affirmed in *Sawe v Republic* [2003] eKLR.
25. In this case, the chain of circumstantial evidence is strong and cogent. The mobile transaction was direct and immediate, the call data placed the device at the scene, and the phone was found in the appellant's possession days later.
26. While the appellant questions the integrity of the Safaricom data, the investigating officer (PW10) tendered a certified M-Pesa statement and phone records obtained directly from Safaricom. These were not rebutted.



27. In light of this, the court is satisfied that the circumstantial evidence met the legal threshold and that the prosecution proved its case beyond reasonable doubt.

Constitutionality of the Death Sentence

28. The appellant argued that the mandatory nature of the death penalty violates Articles 25(c), 28, and 50 of the *Constitution*. While this issue has generated considerable jurisprudence, it is pertinent to note that the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR held that the mandatory death sentence under Section 204 (for murder) was unconstitutional. However, this judgment did not outlaw the death sentence per se.

29. The *Muruatetu guidelines* were extended only to murder cases. As clarified in later cases, including *Joseph Njuguna Mwaura & Others v Republic* [2021] eKLR, the holding in *Muruatetu* is not to be applied to other capital offences unless and until extended by the Supreme Court or enabling legislation.

30. Therefore, while courts have discretion to impose alternative sentences, the death sentence imposed herein was not unlawful. The trial court considered mitigation and imposed a lawful sentence in light of the brutality of the offence.

Conclusion

31. The court finds that the appellant's conviction was based on sound circumstantial evidence that met the standard of proof beyond reasonable doubt.

32. The challenge to the constitutionality of the sentence lacks merit in light of the current legal framework.

Disposition

i. The appeal on conviction is hereby dismissed and conviction upheld.

ii. The appeal on the sentence is also dismissed and sentence affirmed.

iii. It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 31ST DAY OF JULY, 2025.

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CHARLES KARIUKI

JUDGE

