**Murunga & another v Republic (Criminal Appeal E188 of 2019)**
**[2025] KEHC 12442 (KLR) (8 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12442 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**CRIMINAL APPEAL E188 OF 2019**

**RN NYAKUNDI, J**

**SEPTEMBER 8, 2025**

**BETWEEN**

**DAVID MURUNGA ..... 1ST APPELLANT**

**STEPHEN SIFUNA WAMALWA ..... 2ND APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

## JUDGMENT

1. The two appellants were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The brief facts being on 14th day of April 2017 at Turbo stage Tapsagoi location in Eldoret West District within Uasin Gishu county, jointly with another not before court, while armed with offensive weapon namely rungu robbed Philip Wakhwaka off cash Kshs. 4,500 and at the time of such robbery used actual violence to the said Philip Wakhwaka.

2. The two appellants were tried, found guilty, convicted and sentenced to death by the learned trial magistrate on 20th November 2019. In this appeal they were aggrieved with the judgment in its entirety and moved the court on the following grounds:

    a. That the learned trial court magistrate erred in law and facts by convicting the appellant on mere suspicious and speculations of the witnesses without tangible witnesses.

    b. That the trial court magistrate erred in both law and facts when convicting in failing to appreciate that the evidence tendered was hearsay.

    c. That the learned trial court magistrate erred in law and facts when convicting in not considering the ingredients that relate to the offence of robbery with violence as required by the law.

d. That the trial magistrate erred in both law and facts in failing to notice that section 296(2) of the penal code under which I was charged and sentenced contradicts Article 26 and 50(2) (p) of the Kenyan constitution 2010.

e. That, the trial magistrate erred in both law and facts in failing to notice that time taken under observation was not specified and so weakened the evidence adduced for identification and observation.

3. The trial before the subordinate court was based on the evidence of four witnesses who on reflection and on oath told the court as follows; PW1 happened to be one Geofrey Mungare attached to Turbo sub county hospital where he came into contact with PW2 Philip Nyongesa the complainant to this offence. It was PW1 testimony that PW2 had gone to the medical facility with an history of having been assaulted by a gang of robbers. That on treatment of PW2, Pw1 established that he had suffered injuries to the head, upper and lower limbs and the degree of injury was assessed to be harm.

4. In so far as PW2 is concerned he told the court that on the material day which was on the 14th April 2017 at around 10pm, three young men appeared and inflicted physical injuries as he was waiting to hire a motorcycle. In addition, PW2 testified that during the attack they robbed him Kshs. 4,500/ = pickpocketed him from his trouser. According to PW2 he relied on the street lights to positively identify the robbers and those features assisted the police to effect an arrest and bring them to justice adjudicatory forum. In the evidence of PW2 following the injuries he was treated at Turbo health center and thereafter issued with a P3 which formed part of his documentary in support of this case against the appellants. Apparently the complainant saw his assailants for the first time at the scene of the crime but alludes to the issue of identification on the existence of the street lights.

5. The other witness summoned by the prosecution was PW3 Francis Jirongo who worked as a watchman at Zebra hotel. To the best of his recollection PW3 told the trial court that on 14th April 2017 while on patrol duties his attention was drawn to some distress screams and he took a step of moving to that scene. That is when he discovered three people had wrestled the complainant PW2 to the ground and simultaneously inflicted physical injuries. That, according to PW3 from the source of street lights around the scene, he positively identified the three men accompanied with knowledge of his previous encounter with the same very people which he describes spans over three years. This very same men two of them were in the dock and the witness had no difficulty in giving a detailed explanation to support positive identification of their participation in assaulting the complainant PW2.

6. The last witness who testified on behalf of the State was Sgt Lilian Ruto who played the role of an investigator on the offence of robbery case which had been reported by the complainant to Turbo police station. In her evidence PW4 recorded witness statements and ensured also PW2 had been taken to the hospital for medical assessment. It is through that medical step PW1 filled the P3 which was admitted as documentary evidence to show that PW2 suffered physical harm. As a consequence of the investigations she recommended the appellants to be charged with the offence of robbery with violence contrary to section 296 (2) of the penal code.

7. This is the whole of the evidence which would be tested against this appeal as filed by the appellants. The appellants were placed on their defence and each elected to give unsworn statement in answer to the offence. First and foremost, the first appellant acknowledges that he works at Zebra hotel and on 14th April 2017 he had closed his office normally and went back to his house. That on the same day at around 1.00 am in the night, the appellant told the court that PW3 accompanied with police officers knocked his house demanding him to open it so that they could conduct a search. This was followed with an arrest and escort to a police station in Turbo with an allegation that he had robbed

the complainant and in the course of it used actual violence. This was vehemently denied by the first appellant.

8. As for the second appellant, he denied the offence only recalling that police officers had gone to his house to effect an arrest alleging that he had committed an offence of robbery with violence. This he also denied.

9. In support of the appeal, the appellants filed written submissions challenging the decision of the Lower court based on mistaken identification evidence. The appellants invited the court to examine and scrutinize the veracity of the evidence on identification as stated by PW2 and PW3 respectively. It was also their contention that the learned trial magistrate erred in law by convicting each one of them without establishing that all ingredients of the offence had not been proven by the prosecution beyond reasonable doubt. In essence the Appellant placed reliance on the following authorities in support of the appeal: Olemwenda vs. Republic Cr. No. 51 of 1998 C.O.A at Nairobi, R.V. Mohammed Bin Alui (1942) EACA, John Kenga vs. Republic Cr. Appeal No. 1126 & 1121 of 1984, Sawe vs. Republic (2003) KLR, Abdalla Bin Wendo & Another vs. Republic (1953) 20 EACA 166, Chemeng'ich Wachie vs. Republic (2003) Appeal No. 70 of 2013 vide Cr. Case no. 69 at Eldoret, Anjononi & Others vs. Republic (1980) KLR 59.

10. From the record, the prosecution seems not to have taken a position in so far as this appeal is concerned. However, it suffers no prejudice or injustice for the very reason of not filling submissions. This is an old matter duly admitted for hearing and determination by this court. As I bear this in mind, I proceed to consider the issues as raised by the appellants in their memorandum of appeal.

**Analysis and Resolution**

11. This is a first appeal by the appellants exercising their constitutional right of appeal. Therefore, a court of first instance on appeal carries a heavier burden of ensuring the record and the impugned judgment of the trial court meets the threshold of the fair trial rights under Article 50 of *the constitution* including the preservation, protection and guaranteeing the doctrine of presumption of innocence until the contrary is proved. The solemn duty which I am about to embark is so clearly stated in the case law of Njoroge v Republic [1987] KLR, 19 & Okeno v Republic [1972] E.A, 32 and Kiilu & Another v Republic [2005]1 KLR 174.

12. Looking back, the judgment must be read as a whole with a measure of inquiry with the evidence and ingredients of the offence as determined by the trial court to establish whether the memorandum of the appeal is capable of impeaching that threshold issue of the presumption of innocence until the contrary is proved beyond reasonable doubt by the state organ created under Article 157 of *the constitution* as against the appellants.

13. The law on what constitutes the offence of robbery with violence contrary to section 296(2) of the penal code it is now well settled. The court of appeal in the case of Oluoch v Republic [1985] KLR held as follows:

> " 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;

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

14. It is a rule of law that in a charge of robbery with violence contrary to section 296(2) of the penal code, the nature of violence used on the victim or the threat of it and its characteristics must be specifically be mentioned in the information or as it is commonly known as the charge sheet and eventually specifically proved by the prosecution beyond reasonable doubt.

15. The state or prosecution has the burden of proof in criminal cases. The burden is linked to the presumption of innocence. The standard of proof is beyond reasonable doubt. The state has to prove that the accused has committed the actus reus elements of the offence charged, with the mens rea required for that offence. Proof of the actus reus of the offence requires proof of all its elements. The state has to discharge its burden of proof on any given issue, and loses on that issue if upon the evidence a doubt is created in the mind of the court. Such doubt is resolved in favour of the accused person, and the state is said to have failed to prove its case beyond reasonable doubt. Since the burden of proof of most of the issues in the case is beyond reasonable doubt, the guilt of the accused must be established beyond reasonable doubt in the same measure. It was stated in Mwaula and another v the Republic [1980] KLR 127 [1976-80]1 KLR 1656 (Law, Miller and Potter JJA), that mere silence by the accused person does not of necessity invite a finding that the prosecution has established its case beyond all reasonable doubt. The fact that the accused person takes no part at all in the proceedings after pleading not guilty does not relieve the prosecution of the burden of proving the inculpatory facts beyond all reasonable doubt.

16. According to the charge sheet, the alleged robbery which was later a subject of the trial before the subordinate court in which the appellants were found guilty, convicted and sentenced to death, the complainant Philip Wakhwaka was threatened and injured. There is evidence to that effect from PW1, PW2, PW3 and PW4 that the complainant PW2 was assaulted and later taken to Turbo sub county hospital for treatment. The medical evidence in the form of P3 which assessed the degree of injury as harm was produced by PW1 as documentary evidence in support of the charge. The evidence when assessed by this court satisfies the criteria of expert evidence in consonant with section 48 of the *Evidence Act*. According to PW2, the complainant to this offence he was beaten by his assailants using rungus, I presume those are the pieces of wood readily available within homes and villages easily manipulated as devices within the scope of dangerous weapons for use in such criminal activities. The description of the assailants was given by PW2 that on the material day on 14th April 2017 while at the motorcycle stage waiting to hire one to take him to his home suddenly the three young men appeared and without notice or warning they targeted him by pushing him to the ground and inflicting physical injuries. This very day and time, the prosecution witness PW3 explained to the court that he was on patrol duties and his attention was drawn to the screams and as a local watchman he rushed to that scene and the criminal transactions by the assailants whom he identified positively to be the two appellants was ongoing and the complainant PW2 as the victim. According to PW3, the assailants were persons known to him prior to this fateful day for they used to frequent Zebra Hotel where he worked as a watchman.

17. This evidence on the assault, the use of violence and the theft of Kshs. 4,500 removed from the trouser pocket of the complainant (PW2) while he was wrestled to the ground is in conformity with the elements of the offence as defined by the Court of Appeal in the case of Oluoch (supra). In the case against the appellants, the single identifying witness PW3 held to the measure of weight accorded by the State and later the trial court to make a finding of an offence proven beyond reasonable doubt against

the appellants. The case was based on visual identification and not recovery of any stolen property as stated in the cases of Abdalla Bin Wendo & Another v R (1953) 20 EACA 166 Roria v R (1967) EA 583 and Kamau v R [1975] EA 139 and Anjononi & Others v R [1980] KLR 54.

18. Correspondingly identification evidence is viewed with caution that is what the court had in mind in Alexander v The Queen (1981) 145 CLR 395, [426], Mason J stated that:

> 'Identification is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognizing on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation in a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably the tendency to substitute a photographic image once seen for a hazy recollection of the person initially observed'.

19. The following principles in the case of Renton [1997] QCA 441 though from a common law heritage have actually domesticated in our very own jurisprudence in the authorities cited above in which the following summarized principles remain to be the yardstick on identification cases.

    a. 'Where evidence as to identification represents any significant part of the proof of guilt of an offence, the judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed';

    b. 'The terms of the warning need not follow any particular formula ... but it must be cogent and effective ... it must be appropriate to the circumstances of the case';

    c. '... The jury must be instructed "as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'...";

    d. 'A warning in general terms is insufficient ... The attention of the jury "should be drawn to any weaknesses in the identification evidence"';

    e. 'Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the judge's office behind it';

    f. '... The trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence';

    g. '... The adequacy of a warning in an identification case must be evaluated ... by reference to the identification evidence and not the other evidence in the case';

    h. '... The adequacy of the warning has to be evaluated by reference to:

        a. the nature of the relationship between the witness and the person identified;

        b. the opportunity to observe the person subsequently identified;

        c. 'the length of time between the incident and the identification'; and

        d. 'the nature and circumstances of the first identification';

    i. 'A trial judge is not absolved from his or her duty to give general and specific warnings concerning the danger of convicting on identification evidence because there is other evidence, which, if accepted, is sufficient to convict the accused'; and

j. 'The judge must direct the jury on the assumption that they may decide to convict solely on the basis of the identification evidence'.

20. It is also clear as stated in the case of R v Weeder (1980) 71 Cr. App. R. 228 it was emphasized at [231] that what mattered was the quality of the visual identification rather than its volume, that:

> 'The identification can be poor, even though it is given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions. [...] Where the quality of the identification evidence is such that the jury can be safely left to assess its value, even though there is no other evidence to support it, then the trial Judge is fully entitled, if so minded, to direct the jury that an identification by one witness can constitute support for the identification by another, provided that he warns them in clear terms that even a number of honest witnesses can all be mistaken'.

21. In this respect, the trial court relied on the evidence of PW3 on recognition evidence. During the trial, the record shows that the defence subjected that issue to cross examination to test its reliability and credibility. From the judgment of the trial court and my own fresh evaluation, I find no additional evidence worthy to impeach the testimony of PW3 on recognition. It is on record that the witness went further even to remind the appellants of their alias names positively identifying them within the village or locality of their residence or domicile. It is also further on record that the witness PW3 works at Zebra hotel frequently patronized by the appellants as customers. The period under review for this recognition evidence was placed to be over three years by the witness PW3. It is also in the chain of evidence that the two appellants before court were pursued on the very same night by the intelligible evidence given by PW3 to the police officers. All these pieces of evidence by PW3 form a common chain of strands to believe the truthfulness, cogency and credibility of the identification evidence. I rule out any error of fact as alluded to by the appellants that the identification was a mistaken identity on the part of the witnesses. As if that is not enough, unsworn evidence by the appellants never contradicted or controverted any of the characteristics of the recognition evidence placing each one of them squarely at the scene of the crime.

22. In so far as the case proven beyond reasonable doubt is concerned on the crucial elements of the offence of robbery with violence contrary to section 296(2) of the Penal Code, there is no escape route for the appellants and the appeal ought to be dismissed without much ado.

23. The submissions by the appellants relate to the crucial issues on whether the offence of robbery with violence as framed by the prosecution was determined qualitatively by the court below on purely the legal evidence as legitimately fashioned under section 107 (1), 108 & 109 of the *Evidence Act*. My answer to this question is simple; the prima facie case established by the prosecution from the four witnesses remained unchallenged by the defence throughout the trial. In criminal cases, the burden of proof rests on the prosecution to prove the accused person(s) guilt, and the standard of proof required is "beyond a reasonable doubt." This means the prosecution must convince the judge or jury to the point where there is no other logical explanation for the facts except that the accused person(s) committed the crime.

24. Why has the defense lost this appeal? The appeal was based on the five grounds both mixed facts and law and in essence they had raised a statutory defense on mistake of facts on recognition evidence. The fact that the prosecution/State established a prima facie case essentially shifted the burden to the accused person(s) to satisfy the Court that they were not the same persons positively identified at the scene by PW3. It is trite that the burden of proof as to any particular fact lies on the party who wishes the Court to believe in its existence, unless provided otherwise by law. However, the burden may in the course of a case shift from one side to the other. In considering the amount of evidence necessary to shift the

burden of proof, the Court shall have regard to the opportunity of knowledge with respect to the fact to be proved, which may be possessed by the respective parties. It is trite law that an accused person can only be convicted on the strength of the prosecution case and not on the basis of the weakness of his or her defense. This means on appeal, I must exercise discretion in favour of the state only if the evidence on record is so convincing that no reasonable person can ever question it as to its admissibility, reliability and probative value. The position I take in scrutinizing this evidence is that the robbery with violence did take place and although it was on the night, PW3 who works at a nearby Zebra Hotel and also did visit the scene in response to the screams had prior knowledge of recognition of the people he saw wrestling the Complainant to the ground and who immediately took flight upon noticing his presence. This evidence has presented by the trial court remains virgin when juxtaposed on the defence case by the Appellants. That then drives the point home that the conviction as founded by the trial court be affirmed by this Appeal's Court.

25. I therefore affirm the judgment of the Lower Court on conviction but on sentence there is need to apply the principles in the Bernard Gacheru vs. Republic [2002] eKLR where it was held 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, the 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 material, or acted on a wrong principle. Even if, 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 are shown to exist."

26. There is much talked, discussed, construed, and applied the doctrine of proportionality in sentencing. The concept of the punishment befitting the crime is as old as mankind as can been seen from the following extract:

> The notice of proportionate punishment, which seems so deeply rooted in common law jurisprudence, has had a chequered history. It is an old idea which has been expressed in both lay and legal literature in a variety of ways. The lex talionis of the book of Exodus required a high degree of equivalence between the offence and the sanction: 'eye for eye, tooth for tooth, hand for hand, foot for foot.' Cicero saw proportionality as only setting outer limits: 'take care that the punishment does not exceed the guilt'. In 1215, three chapters of the Magna Carta were devoted to ensuring that 'amercements' were not excessive. The 1689 Bill of rights prohibition on excessive fines and cruel and unusual punishments conveys the same notion. In Italy in 1764, the father of the classical school of criminology, the Marchese de Beccaria, published a much translated and influential Essay on Crimes and Punishments on which he argued for the courts to be bound by a graduated and legislatively defined scale of crimes and punishments. See Mathew Davenport Hill, 'On the Objection Incident to sentences of Imprisonment for Limited Periods, Exodus 21:24 and Cesare Bonesana Beccaria, an Essay on Crimes and Punishments, translated from the Italian, with a commentary attributed too M de Voltaire, translated from the French (1767).

27. The doctrine of proportionality does embody the notion of justice in that people have a sense that punishments scaled to the gravity of offences are fairer than punishments that are not if punishment is seen as an expression of blame for reprehensible conduct, then the quantum of punishment should depend on how reprehensible the conduct is. See Andrew Von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 Crime and Justice 55, 56-8.

28. This was also discussed in the case of Nationwide News Pty Ltd. V Wills (1992) 177 CLR 1 in which Mason J as he then was remarked as follows on the 'reasonable proportionality test' in these terms:

> In determining whether that requirement reasonable proportionality is satisfied, it is material to ascertain whether, and to extent, the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object sought to be attained and, in so doing, causes adverse consequences unrelated to the achievement of that object. In particular, it is material to ascertain whether those adverse consequences result in any infringement of fundamental values traditionally protected by the common law. Proportionality can thus be seen as rooted in respect for the basic human rights of those before the court. In the case of crime, though punishment may be deserved, the fundamental values of the law restrain excessive, arbitrary and capricious punishment. The doctrine of proportionality is one of the means by which that restraint is enforced.

29. So what should the courts be doing while exercising discretion in sentencing of offenders? In my considered view, it is to look at the surrounding circumstances of the offence and the gravity of it in light of the objectives in the applicable penal statute as envisaged by parliament in fixing a particular sanction for that offence. It is also critical, as a matter of law, to appreciate the maximum statutory penalty as a starting point for the Court in defining the range and scale of the final verdict while weighing the aggravating and mitigating aspects submitted by the State prosecutor on one hand and the accused persons on the other. At this stage, the Court is expected to embark on an inquiry and analysis into the degree of harm occasioned to the victim of the offence and the culpability of the accused. The Court should not stop there but must also weigh the mens rea and actus reus of the offence. What is more practical and experiential is for Courts to place greater weight on deterrence and retribution when imposing custodial sentences. The unanswered question, however, is whether protection of the community or society should always be the only legitimate objective of sentencing pursued in our criminal justice system. In my view, if such protection is to rank higher than the other principles and objectives of sentencing, it must be pursued while bearing in mind the doctrine of proportionality, rehabilitation, victim offender mediation which incorporates the elements of restorative justice. I do not believe that a guilt person is automatically condemned to death or for life because of just one incident of criminality without rehabilitation by virtue of being found guilty by a trial court.

30. In the instant appeal, the trial magistrate imposed the maximum sentence for robbery with violence contrary to Section 296(2) of the Penal Code, namely the death penalty, even though elements of diminishing culpability were present. I have in mind the nature of the injuries sustained by the victim as described in the P3 form - classified as soft tissue injuries and opined as 'harm.' It is also evident from the prosecution's evidence that the assailants were armed with rungus (pieces of wood), which if the medical evidence under Section 48 of the *Evidence Act* is persuasive, were not used heavily against the victim. That assessment does not end there: what is the nature of the irremediable loss suffered by the victim as a result of the unlawful act committed by the appellants? Perhaps, in this instance, it is the cash of Kshs. 4,500 violently taken from the complainant's trouser pocket in the course of threats and actual use of violence by the appellants, as testified by PW2. The struggle individual judges face is how to ensure that sentences not only fall within the perimeter of proportionality but also, in cases involving multiple counts or offences, that the cumulative total of the sentences imposed reflects the application of the doctrine of proportionality. In robbery cases within our jurisdiction, there has been an overemphasis on imposing maximum sentences without sufficient scrutiny of the individual characteristics of each offence - most importantly, the gravity of the crime and the level of culpability of the accused persons."

31. At first glance, as much as I appreciate that the death penalty as a lawful sentence in Kenya, in the very same sense sentences should be individualized and no greater emphasis should be placed on the principles of deterrence and retribution as allude to somewhere in this judgment of the trial court. One cannot escape describing it as punitive, harsh and excessive based on the surrounding circumstances of this case. The best words to describe the sentence of death - which may by now has been commuted by the Executive to life imprisonment - are found in Article 25(a) of *the Constitution*, which provides:

> " Every person has the right not to be subjected to torture, or to cruel, inhuman or degrading treatment or punishment."

32. These Courts of Kenya were created by the people of Kenya within the framework of *the Constitution* to try and adjudicate criminal cases and ultimately to punish offenders who have been convicted of such offences on the principle that punishment should fit the crime. By and large as our citizens go through criminal trials on allegations which the State must prove beyond reasonable doubt and upon conviction and sentence, it should be clearly understood that certain fundamental rights and freedoms remain sacrosanct, subject only to the residual limitation of the right to liberty in the course of serving a sentence.

33. In essence therefore, any such sentence currently enforced against the appellants, based on the reasoning laid down in this judgment be and is hereby reviewed, varied, and substituted with a determinate custodial sentence of twelve (12) years subject to credit for the period already spent in remand custody in accordance with section 333(2) of the Criminal Procedure Code. The warrant of committal to prison shall incorporate the commencement date as 15th November 2017. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 8TH DAY OF SEPTEMBER 2025**

.....

**R. NYAKUNDI**

**JUDGE**

In the presence of:

The Appellants

M/s Sidi Kirenge for the State