



REPUBLIC OF KENYA



**Kanuu v Republic (Criminal Appeal E065 of 2022)
[2024] KEHC 6586 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6586 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL APPEAL E065 OF 2022**

LW GITARI, J

MAY 30, 2024

BETWEEN

PATRICK KIRIMI JACOBU KANUU APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant herein was charged with the offence of robbery with violence contrary to Section 295 as read with section 296 (2) of the *Penal Code*. The particulars of the offence being that on 15.02.2019 at about 9.00 pm at Kalimbene location in Igembe Central sub county within Meru County beding armed with a dangerous weapon namely a machete robbed of Ezekia Baimati Kalatuu of one mobile phone make itel valued at Kshs.3000/= and cash Kshs 1000/= all valued at kshs.4000/= and immediately after the time of such robbery wounded the said Ezekia Baimati Kalatuu.The Appellant pleaded not guilty to the said charge and the prosecution called four(4) witnesses to support its case.
2. By a judgment dated 12.04.2022, the trial court reached a determination whereby the appellant was sentenced to death. The appellant having been aggrieved by the said determination, has filed the appeal herein citing the following grounds as enunciated on their petition of appeal:
 - i. That the learned trial magistrate erred in law and fact by failing to note that key witnesses weren't invited to adduce testimony against the appellant.
 - ii. That the learned trial magistrate erred in both law and fact by relying on uncorroborated and contradicting evidence tendered by the prosecution witnesses.
 - iii. That the learned trial magistrate erred in both law and fact by failing to exercise prudence thus relied on hearsay rather than facts based on factual findings.



- iv. That the learned trial magistrate failed to consider his litigation.
 - v. That the learned trial magistrate erred in matters of law and fact by failing to consider his defense.
 - vi. That the grounds herein were laid down in the absence of the court judgement and proceedings, the same may be changed when availed with the court judgement and proceeding
 - vii. That he prayed to be present during the hearing of the appeal.
3. The Appellant filed his undated submission wherein he submitted that his conviction and sentence be quashed.
 4. The Appellant submitted on amended grounds of Appeal that:
 - i. That the learned magistrate erred in law and fact by convicting the accused on a defective and duplex charge sheet that made the charges ambiguous to the prejudice of the appellant herein.
 - ii. That the trial magistrate erred in matters of law and facts by failing to find that the identification of the accused was not cogent and was marred by illegalities and amounted to dock identification which was improper and worthless in law.
 - iii. That the learned trial magistrate erred in law and fact when he failed to note that the elements of the offence of robbery with violence were not proved beyond reasonable doubt making the guilty verdict unsafe.
 - iv. That the trial Magistrate erred in law and fact by failing to note that the alibi defense of the appellant was not investigated and was not controverted by the prosecution evidence. Failure to investigate the alibi defence was fatal to the prosecution's case.
 - v. That the magistrate erred in law and procedure when he failed to consider the different sentences defined by the section of the law charged, the judicial sentencing policy guidelines the current jurisprudence on mandatory sentences and the provision of Article 50 (2) (p) of the Constitution of Kenya, 2010 thus the sentence of death was manifestly harsh, inhuman and excessive considering the overall circumstances of the case.
 5. The appellant submitted that the accused was convicted on a charge that was ambiguous as it was defective and duplex in nature. The Appellant submitted that he was tried and convicted based on a defective and duplex charge sheet that made the charge ambiguous and difficult to understand the charge to his prejudice.
 6. It is the Appellant submission that the charge sheet read robbery with violence contrary to Section 296 (2) as read with section 295 (1) of the Penal Code.
 7. The Appellant submitted that Section 296 (2) defines the offence of robbery with violence and stipulates that once convicted the person shall be sentenced to death. That the penal code does not contain Section 295 (1) but section 295 defines the offence of robbery while section 296(1) states that once a person has been convicted of robbery under section 295 of the Penal code, he shall be sentenced to 14 years imprisonment's appellant relied in the case of Sigilani v Republic (2004)2 KLR 480.
 8. The Appellant submitted that it is not clear from the charge whether the appellant was facing the charges under Section 295,296 (1),or 296 (2) of the Penal Code. The Appellant further submitted that Section 234of the CPC demands that the charge shall contain a statement of specific offence or



- offences and the accused is charged with together with such reasonable information as to the nature of the offence charged.
9. The Appellant relied on Section 50 (2) (b) of the Constitution of Kenya 2010 which stipulates that an accused has the right to a fair trial that includes the right to be informed of the charge with sufficient details to answer it. That the right is non derogable according to article 25 (c) of the Constitution.
 10. The Appellant relied in the case of Ajode vs Rep (2004) 2 KLR wherein the court emphasized the need to draft the charges with utmost care to prevent prejudice to the accused.
 11. It is the Appellant's submission that the charge was at variance with the evidence given by PW1 in court. That the complainant stated that the person who attacked him was together with another person.
 12. The Appellant submitted that those facts were not captured in the report made to the police as PW4 the investigating officer did not allude that fact. The Appellant relied in the case of Ndug'u Kimani vs Republic (1979)KLR.
 13. It is the Appellant's submission that PW1 alleged that the person who attacked him did so without any preamble. Further PW4 alleged that there was a quarrel before the attack and during cross examination he alleged that he was aware of the allegations raised by the appellant that the complainant killed his brother though he did not write those allegations. That therefore the two witnesses were not reading from the same script and therefore the charges of robbery with violence have thus been marred by doubts and might as well have been fabricated.
 14. The Appellant submitted that based on those arguments he prayed that the conviction be reversed and he be set at liberty.
 15. The Appellant submitted on the second limb on the elements of robbery with violence and he was of the opinion that it was not proved beyond reasonable doubt.
 16. The Appellant submitted that robbery with violence is an aggravated form of robbery as defined under Section 296 (2) of the Penal Code. That on one part is an offence against property involving theft and on another part, it is an offence against the person as it involves assault or violence. The Appellant relied in the case of Mangi vs Rep (2006) 1EA 162.
 17. The Appellant submitted that it is the duty of the Prosecution to prove both Actus reus and Mens rea elements for robbery with violence beyond reasonable doubts and to do this it is important that they prove that there was theft of the complainant's property by the appellant and that during that theft one of the overt circumstances existed. That the overt circumstances are that the offender was armed with dangerous or offensive weapon, or he was in company of one or more persons, or he wounds, beats, strikes or uses any other form of violence to any person immediately before, during, or immediately after such robbery, in order to retain the thing being stolen.
 18. The Appellant submitted that that those elements were not proved beyond reasonable doubt to warrant a conviction based on the fact that theft was not proved and the use of violence was not attributable to the alleged theft.
 19. It is the Appellant submission that Prove of theft of property is a key ingredient to prove the offence of robbery with violence as where theft is not conclusively proved, there will be no robbery even though violence has been proved.
 20. The Appellant submitted inter alia that the charge sheet alleged that the appellant robbed Ezekiel Baimati Kalatuu one mobile phone make itel valued at Kshs 3000/ and cash of kshs 1000 all valued at



kshs. 4000. That, that allegation has not been backed with evidence in the trial. The Appellant relied in the case of *Alexander Nyachiru Marube vs Rep* Criminal Appeal No.159 of 1984.

21. The Appellant submitted that PW1 Ezekiel Buirati alleged that he was on his way at night when he met Patrick with another. That Patrick told him he will kill him and cut him on the lower leg with the machete and he was armed with.
22. The Appellant further submitted that, it is alleged Patrick took cash Kshs. 3000/- and a phone when the complainant fell down. That people took the complainant to the hospital when he fell down.
23. It is the Appellant's submission that PW2 Doreen Kawira on cross examination testified that PW1 did not tell them how much money had been stolen. That PW4 PC Purity Karvitha testified that PW1 reported that during the time of the attack, he was robbed Kshs. 3000/- and Ksh1000/- which items were never recovered. That the charge sheet alleges cash Kshs. 1000/- was robbed off while the complainant maintained during his evidence that it was cash Kshs 3000/. That both reports were made by the complainant who admitted he was initially taken to the police station to report before he was taken to the hospital and both versions of the same facts cannot be true. The Appellant relied in the case of *Thomas Oluoch Okumu v Republic*, Nairobi High Court Criminal Appeal No.589 of 2001.
24. It is the Appellant's submission that the prosecution has a legal mandate to prove the element of theft with certainty because where theft is not proved there can be no robbery even if violence was employed. The Appellant relied in the case of *Nuru and another vs Rep* (1985) KLR 507.
25. The Appellant submitted that the complainant similarly alleged that an itel phone valued at Kshs.3000/ was stolen from him in the charge sheet. That during his evidence in court, he did not specify the type of phone robbed.
26. It is the Appellant's submission that it is trite law that where property can fully be described it should be done with certainty and accurately for the charges to be clear.
27. The Appellant submitted that there is no description of the colour or the serial number of the phone in the charge sheet and further in PW1's evidence it did not clarify the type or serial number of the phone he alleged was stolen if at all he had any.
28. The Appellant submitted on the use of violence that was not linked or attributed to the offence of robbery with violence. The Appellant submitted that it must be proved that some form of violence was accompanied the theft and that the violence was used in order to obtain the thing so stolen. The Appellant relied in the case of *Joseph Wangangu and another vs Rep* (1977) KLR 223.
29. It is the Appellant submission that the Mens rea element for robbery with violence is an intention to steal, an intention to use violence to attain the objective or the inference by the doctrine of recent possession where the accused is presumed to be the thief if he knew or had reasons to suspect that the property found on him was recently stolen/robbed.
30. The Appellant submitted that the account of PW1 allege that the intention of the Person who assaulted him was to kill him as he had threatened to do so. He went ahead to attack him. The evidence of PW1 did not allege that the violence was directed to him in order to steal or rob from him and there is no indication that PW1 apprehended that the intention was robbery and indeed, PW4 the investigating officer testified that the alleged attack was after the quarrel between the complainant and the appellant. The Appellant relied in the cases of *Gilbet vs Rep* 1971 EA 51 and *Mose vs Rep* (2002) 1 EA 163.
31. It is the Appellant's submission that the court should take note that PW1 alleged that people attended to him on the day he was attacked. It is also alleged the report was made to the Police immediately after the attack and before escorting the complainant to the hospital. That If PW1 had named his



- Perpetrators at the point of reporting, it is not explained why it took more than six months to arrest the appellant where evidence on record shows he was a neighbour known to the complainant and the witnesses. The Appellant relied in the cases of *Akumu vs Republic* (1954)21 EACA and *Terekali & Others vs Republic*.
32. The Appellant submitted on the issue of identification in which in his opinion he submitted it was faulty.
 33. The Appellant submitted that PW1 alleged that he was leaving his place of work at 9.00 pm alone when he was attacked by the appellant and another person, he alleges that the other person was Muthama during cross examination. The Appellant submitted that Muthama was never investigated or charged with any offence. The Appellant relied in the case of *Marwa Wangiti Mwita and another v R* Criminal Appeal No.6 of 1995(unreported)and the case of *Bogere Moses and Another vs Uganda* Criminal appeal No.1 of 1997.
 34. The Appellant submitted that it is undisputed that the offence took place at night beside a road and the issue of lightening is disputed as PW1 was alone thus the identification is based on a single identifying witness under very difficult circumstances. The nature of lighting has not been proved with clarity. The Appellant relied in the case of *Robert Gitau vs Republic* COA Criminal Appeal No.63 of 1990 (Nakuru) unreported.
 35. It is the Appellant submission that the evidence on record clearly indicates that PW1 and the appellant were well known to each other prior to the incident. PW1 has admitted that other charges were leveled against the appellant where PW1 was a complainant and where in other charges PW1's brother was the complainant. That the appellant has explained in details how they are related to the complainant and the genesis of the bad blood existing between them.
 36. The Appellant submitted that it is evident that he took that nature of cross examination and that is how he was able to unearth the fact of their relationship which PW1 had initially attempted to deny and prevent the court from discovering. That it is for these facts that the identification Parade form produced as exhibit 3 by PW 4 has no probative value and it should be excluded from analysis of the evidence.
 37. It is the Appellant's submission that the identification of the appellant with the instant charges has been motivated by malice. First it not understandable why it took six months to arrest the appellant in connection with the current charges if at all he was named as the perpetrator from the onset. He was well known to the complainant and the other relatives who came to assist PW1. Secondly it is not explained why immediately after the incident the appellant was not sought immediately with a view to recover the alleged stolen items especially the phone and no one attempted to track the phone using cybercrime investigating unit with a view of tracing it to the appellant. That without such evidence to prove recent possession against the appellant, the allegations are very weak. Lastly the identification evidence alleged to be relied on was under very difficult circumstances and has been marred by existing animosity of the parties and it is an error of principle to rely on such evidence to convict.
 38. The Appellant submitted that the court failed to exhaustively analyze and investigate the appellants alibi defence. It is the Appellant submission that the trial court did not exhaustively analyze his defense as provided under section 169 of the Criminal procedure code. The Appellant relied in the case of *Adedeji vs The state* (1971)1 ALL L.R 75, *Wangombe vs Republic* (1980)KLR, *Michael Mumo Nzioka* criminal Appeal No. 96 of 2017 and *Victor Mwendwa MJulinge vs Republic* (2014) criminal appeal No. 357 of 2012.



39. The Appellant submitted on the issue that the sentence was harsh and disproportionate. The Appellant submitted that if the court is not convinced to interfere with the conviction, it is the Appellant submission that the court be pleased to review the appellants sentence based on the fact that the death sentence was harsh and disaproprate given the overall circumstances of the case. The Appellant relied in the case of *Francis Muruatetu v Republic* in petition No.15 of 2015 Muruatetu 1.
40. The Appellant further relied in the case of *Oprodi Peter Omukanga vs Rep* 430 KLR Criminal Appeal No.260 of 2019.
41. The Appellant submitted that while the magistrate was sentencing the appellant, he observed that the law provides for a mandatory death sentence and went ahead to sentence him as such. That the jurisprudence in mandatory sentences has since changed and we seek the court to embrace the current law.
42. It is the Appellant's submission that court to note that in striking a balance between the interests of the society and the seriousness of the offence, it be persuaded to consider the interests of the appellant geared towards promoting the offender's rehabilitation, transformation and reintegration. Moreover, may the court have mercy and kindness to consider that the effects of a conviction are far reaching as it directly affects the appellant's life and has an overall effect on the family that depends on me as the sole bread winner. The Appellant relied in the cases of *State v Warren Vorster* CC No.125/2009 in South Gauteng High Court, *Dodo v S* 2001 (3) SA 381 (CC), *Samson Njuguna Njoroge v Republic* HCCr App No.150 of 2016)(UR).
43. The respondent filed his submissions dated 25th April 2023 wherein he submitted on brief facts of the case. It is the respondent's submission that the appellant filed 7 grounds but the grounds may be summarized as whether the prosecution proved its case beyond reasonable doubt, whether all key witnesses testified and whether the defense and mitigation was considered.
44. The respondent relied in the case of *Erick Otieno Arum v Republic* (2006)eKLR in outlining the duty of an appellate court.
45. On whether the prosecution proved their case. The respondent submitted that the ingredients of the offences of robbery under Section 296 (1)of the *Penal Code* are stealing anything, at or immediately before or immediately after the time of stealing and using or threatening 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 it being stolen or retained.
46. The respondent submitted on stealing and violence that PW1 testified that he was robbed of Kshs.3000/ and a phone and he was cut on the leg ,a fact that was proved by the production of the complainant's P3 form filed on the 18th of July 2019 indicating that he had a deep bleeding wound on the right leg and the trial court noted the said injury.
47. The respondent submitted that the stolen items were never recovered as the appellant was arrested about six months after the offence.
48. The respondent submitted on identification by a single identifying witness. The respondent submitted that the law on identification and particularly on identification by a single witness is well set out in our jurisprudence. The respondent relied in the case of *Abdalla Wendo v Republic* (1953)20 EACA 166 and the English case of *R v Turnbull & Others* (1976) 3 All ER 549 and the case of *Wamunga v Republic* (1989)KLR.



49. The respondent submitted that in the present case PW1 testified that on the material night he was attacked by the appellant and another person and that it was the appellant who cut him with a machete and robbed him his phone and Kshs.3000/= before fleeing from the scene upon seeing people responding to the complainant's call for help. That the solar lighting at the scene had provided ample environment for positive identification of the appellant free from mistaken identity and further it was the complainant who took the police officer's to the appellant's home for arrest.
50. The respondent further submitted that it is also not disputed that the complainant and the appellant hailed from the same area and the complainant had known the appellant for a long period of time as the appellant's sister was married to the complainant's brother.
51. It is the respondent's submission that to cut the complainant's leg with the machete and rob him, the assailant who in this case is the appellant would have had to have been up close to the complainant to the point of having physical contact allowing a positive identification free from error and further the appellant talked to the complainant at the time of the offense and therefore the identification parade would not have been ideal.
52. The respondent submitted that PW2 was among the first responders who heard the screams and went to the scene and found the complainant had been cut and escorted him to hospital.
53. It is the respondent's submission that no other witness saw the appellant cut and rob the complainant and therefore calling other witnesses who responded to the call of the complainant would have had no probative value to the prosecution case.
54. The respondent further submitted in the appellant defense and mitigation he denied having participated in the alleged offense and further stated that in 2019 though he did not specify the date he was taking care of his pregnant wife. The Appellant indicated that they had a land dispute with the complainant.
55. The respondent submitted that, that land dispute was not substantiated and neither was his alibi corroborated and in mitigation the appellant showed no remorse at all.

Analysis & Determination.

56. I have considered the grounds of appeal, the evidence, the submissions and authorities relied upon.
57. This being a first appeal, this court thus is expected to review and analyse the evidence afresh in order to form an independent opinion and draw my own conclusions bearing in mind that I do not have the benefit of seeing and observing the witnesses. [See *Okeno v Republic* [1972] EA 32 and *Kiilu & Another v Republic* [2005] 1 KLR, 174].
58. The issues for determination as I can deduce are:
 - i. Whether the prosecution proved its case beyond reasonable doubt.
 - ii. Whether the identification of the accused was sufficient.
 - iii. Whether the sentence of death was manifestly harsh, inhuman and excessive considering the overall circumstance of the case.



Whether the prosecution proved its case beyond reasonable doubt.

59. The offence of Robbery with Violence is provided for under the Section 296(2) of the [Penal Code](#) as follows:

“296. Punishment of robbery

(1)

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

60. The ingredients of this offence were aptly discussed by Cockar, CJ, Akiwumi & Shah, JJA in the case of [Jobana Ndungu vs. Republic](#) CRA. 116/1995, [1996] eKLR where the Court of Appeal in Mombasa stated as follows:-

“In order to appreciate properly as to what acts, constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the {{title Penal Code PC}}. The essential ingredient of robbery under Section 295 is ‘use of or threat to use’ actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore -described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved, will constitute the offence under the subsection:

- i. If the offender is armed with any dangerous or offensive weapon or instrument;
or
- ii. If he is in company with one or more other person or persons; or
- iii. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.”

[See also [Oluoch v Republic](#) [1985] KLR].

61. Similarly, in the Court of Appeal case of Criminal Appeal No. 300 of 2007, [Dima Denge & Others v Republic](#) (2013) eKLR, the learned Bench stated as follows:

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

62. In the case herein, PW1 testified that he has a small bakery. That on 15th February 2019 as he was leaving his place of work around 9.00 p.m. was alone when he met the Appellant and another. That he told him that he will kill him. That he was armed with a machete and he cut him on his lower leg and he fell.

63. PW1 testified that he screamed and the Appellant and the other man ran away and took his money which he had in his pocket Kshs 3000/= and a phone. People carried him and he was taken to hospital. He produced a P3 form marked PMF1-2 and an ID parade report marked MF1-3.



64. Accordingly, the prosecution proved beyond reasonable doubt that; (i) the offenders were armed with dangerous and offensive weapon or instrument; (ii) the offender were in company with one or more person or persons; and (iii) at or immediately before or immediately after the time of the robbery the offenders wounded, beat, strike or used other personal violence against PW1.[See *Paul Njoroge Ndungu v Republic* [2021] eKLR].
65. It is given that in a case as this, identification is key given that it is the link that connects an accused person to an alleged act that constitutes an offence. Identification has been defined by the *Black's Law Dictionary* 2nd Edition as:
- “Proof of identity; the proving that a person, subject, or article before the court is the very same that he or it is alleged, charged, or reputed to be; as where a witness recognizes the prisoner at the bar as the same person whom he saw committing the crime; or where handwriting, stolen goods, counterfeit coin, etc., are recognized as the same which once passed under the observation of the person identifying them –‘Identitas vera colligitur ex multitudine signorum”.
66. Nonetheless, as the incident occurred at night, care should be taken to ensure the appellant was positively identified as the perpetrators of the offence. The court in *Wamunga v 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.”
67. I have interrogated the circumstances herein, and from the evidence of PW1 on cross examination testified that he knew the appellant for a long time. That at times he used to come to his place of work. Further the appellant’s sister was married to his brother.
68. Therefore, the identification of the Appellant as the perpetrator cannot be in doubt.
69. In the case of *Abdalla Wendo v Republic* (1953) 20 EACA 166 it was held that:
- “Subject to certain well-known exceptions it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”
70. As I have already noted that there was no prosecution witness who saw or identified the appellant herein and as the respondent has also conceded that calling other witnesses who responded to the call of the complainant would have had no probative value to the prosecution case. It is trite law that before a court can draw from circumstantial evidence the inference that the accused is guilty, it must also satisfy itself that there are no other co-existing circumstances which could weaken or destroy the inference of guilt [see *Sawe v Republic* [2003] KLR 364]. It is also settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests namely: the circumstances



from which an inference of guilt is sought to be drawn must be cogently and firmly established; those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else [see *Teper v Republic* [1952] ALL ER 480 and *Musoke v Republic* [1958]EA 715].

71. In the case herein, it is outright that the investigating officer testified that on 15th February, 2019 she received a complaint from the complainant that he had been assaulted. That there was a quarrel between the two when the accused assaulted the complainant with a machete and he received a deep cut on the right leg. That the accused was later arrested and an identification parade was done on 23rd July 2019 wherein he was identified and the accused did not raise any objection.

72. Sections 111(1) and 119 of the [Evidence Act](#). These sections stipulate as follows:

111.

(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

119. "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

73. From the evidence adduced by the appellant herein, nothing adduced to cast any shadow of doubt upon the evidence by the prosecutor.

Whether the sentence of death was manifestly harsh, inhuman and excessive considering the overall circumstance of the case.

74. The appellant was sentenced to death which I find that the same is lawful as given that nothing has been shown that the trial court acted upon wrong principles or overlooked some material factors or considered irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle [See [Shadrack Kipkoech Kogo v R.](#), and [Wilson Waitegei v Republic](#) [2021] eKLR].

75. In the case of [Joseph Ochieng Osuga v Republic](#) [2021] eKLR this court stated that the power to interfere with a sentence imposed by the trial court is limited by precedent except where certain conditions are met. This court cited the Court of Appeal in [Bernard Kimani Gacheru v Republic](#) [2002] eKLR where it was stated 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 material, 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 stated is shown to exist.”

76. Bearing the above holding and having in mind the circumstances of this case, the question is whether there is any lawful reason to interfere with the discretion of the trial court in passing sentence.

77. The principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of *Ogolla s/o Owuor vs R*, (1954) EACA 270 wherein the Court of Appeal stated as follows:

“The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (*R v Shershowsky* (1912) CCA 28TLR 263).”

78. In the case of *Wanjema v R* [1971] EA 493, 494, the court held that the appellate court is entitled to interfere with the sentencing discretion of the trial court in view of plain error of omnibus sentence and the illegality of the sentence.

79. In the case of *Francis Karioko Muruatetu & Another v Republic* (2017)eKLR.

Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

80. . Sentencing is a discretion of the trial court. In *Ambani v Republic* (1990) KLR 161, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate with the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.

81. In *Republic v Jagani & Another* (2001) KLR 590, it was held that:-

“The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in rehabilitation by providing for reparation for harm done to victims in particular to and to society in general. This is also seen as promoting a source of responsibility in offenders.”

82. The question is whether this court should interfere with the sentence. In *James Kariuki Wagana – v- Republic* (2018) eKLR Prof. Ngugi.J (as he then was) stated-‘while the sentence of death is the maximum penalty for both murder and robbery with violence the court has the discretion to impose any other penalty that it deems fit and just in the circumstances.’ He argued that death penalty should



be reserved for most heinous levels of robbery with violence. In another persuasive decision Gikonyo J in *Paul Ndung'u Njoroge-v- Republic* (2021) eKLR considered a long term of imprisonment as appropriate where the violence did not cause death or grievous harm. In this case the ingredients of the offence of robbery with injury inflicted was grievous harm. The trial magistrate opined that his hands were tied to pass the death penalty. It is my view that the discretion of the trial magistrate was unfettered. The current jurisprudence is that though the maximum penalty for robbery with violence is death, the court has the discretion to impose any other penalty based on the circumstances of the case. The trial magistrate's hands were not tied there was room for exercise of discretion. I find that a term of imprisonment is appropriate. I set aside the death sentence and substitute with imprisonment for a term of thirty (30) years to run from 19/7/2019 the date the appellant was arrested and placed in custody in compliance with Section 333(2) of the *Criminal Procedure Code*.

In conclusion:

83 I find that the appeal on conviction fails and is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 30TH DAY OF MAY 2024.

L.W. GITARI

JUDGE

