



REPUBLIC OF KENYA



KENYA LAW
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**Sang v Republic (Criminal Appeal E002 of 2024)
[2025] KEHC 741 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 741 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CRIMINAL APPEAL E002 OF 2024
GL NZIOKA, J
JANUARY 17, 2025**

BETWEEN

VINCENT KIPROTICH SANG APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the decision of Hon. Y. M. Barasa Senior Principal Magistrate (PM) delivered on 6th February, 2024, vide Chief Magistrate's Criminal Case No. E610 of 2023)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's court at Naivasha charged vide Chief Magistrate Criminal Case No. E610 of 2023, with the offence of robbery with violence contrary to section 296(2) of the Penal Code (Cap 63) Laws of Kenya.
2. The particulars of the offence are that on the 11th day of May 2023 at Nyamathi village in Naivasha sub-County within Nakuru County jointly with others not before the court, while armed with crude weapons namely rungunus robbed John Mundia Kimani his bicycle, two mobile phones valued at Kshs. 12,000 and unknown cash and immediately before or immediately after the time of such robbery used actual violence on the said John Mundia Kimani which caused his death.
3. He was also charged in the alternative count with the offence of handling stolen goods contrary to section 322 (1) (2) of the Penal Code. The particulars thereof states that on the 11th day of May 2023 at Nayamthi village in Naivasha sub-County within Nakuru County otherwise than in the course of stealing dishonestly retained one bicycle decorated with different colours knowing or having reason to believe it to be stolen property.
4. The appellant pleaded not guilty to both charges and the case proceeded to full hearing. The prosecution case in a nutshell is that on the 11th May 2023, at around 5:30 a.m. (PW1) Samuel



- Kimani Irungu, a boda boda rider noticed the appellant pushing a bicycle, with multiple colours and recognized as belonging to the deceased who was his uncle.
5. Pw1 testified that at the time he was ferrying PW2 Meshack Kungu Waweru and PW7 Alice Wambui and he approached the appellant to establish where he had gotten the bicycle from and where the owner was.
 6. That, the appellant claimed to have come with the bicycle from Nairobi but when PW1 Kimani called the deceased his mobile number was off. After further interrogation by PW1 Irungu, the appellant informed him that he found someone sleeping by the road whom he thought was drunk and he decided to take the bicycle.
 7. That, thereafter the appellant took PW1 Irungu and PW2 Meshack to where the deceased was lying while PW7 was left with the bicycle. According to PW1 Irungu, the deceased had been hit on the head and was bleeding and although he was still breathing but could not talk. PW1 Irungu left PW2 Meshack with the appellant and rushed to call the deceased's father and they rushed the deceased to the hospital. However, the deceased succumbed to his injuries.
 8. That, the scene of crime personnel processed the scene and the appellant and the bicycle were taken to Karai Police Post while the body of the deceased was taken to the mortuary. A post-mortem was done and revealed that the cause of death was head injury.
 9. The investigation was commenced by (PW12) No. 93113 PC Laban Amolo and PW13 Corporal Vincent Gereza and according to Corporal Gereza he established that on the day of the deceased died he left his home at 5:00 a.m. carrying two mobile phones, money of an unknown amount and the bicycle going to his business at Nyakairu Trading Centre about 500 meters away. That about 200 meters from Nyakairu Trading Centre, he was attacked and fatally injured and lost all his possessions.
 10. That on 22nd May 2023, (PW8) Teresia Wairimu was rearing cattle when she came across a blood stained rungu about 10 meters from the scene that was suspected to be the weapon of murder. That upon conclusion of investigations the appellant was held to blame and charged accordingly.
 11. At the conclusion of the prosecution case the appellant was placed on his defence. In a sworn statement he testified that he resides at Merlin resort and deals in a scrap metal business at Kinungi.
 12. That on the day of the offence, he woke up at 3:30 a.m. and left for Kinungi and when he reached Nyamathi he found the deceased lying on the side of the road with the bicycle next to him. That he thought the deceased was drunk and since it was dark he did not notice any injuries. That he pulled the bicycle so as not to alert the deceased and crossed the road walking towards Naivasha.
 13. That a motorcycle rider with two pillion passengers passed him from behind and stopped in front of him and the rider informed him that the bicycle belonged to his father and wanted to know where he got it. That he explained that the owner was lying drunk by the road and led them to where the deceased was. That it was at this time that he discovered the deceased was injured.
 14. That the rider rushed home and returned in a private vehicle and the deceased was rushed to hospital while he was taken to Karai Police Post. That the police officer searched him but none of the deceased belongings were found on him nor the recovered rungu. He denied committing the offences he was charged with.
 15. At the conclusion of the case, the trial court delivered a judgment dated 6th February 2024, found the appellant guilty on the main count and sentenced him to life imprisonment.



16. However, the appellant is aggrieved by the decision of the trial court and appeals against it on both conviction and sentence on the following grounds:
 - a. That, the learned trial Magistrate erred in finding that the prosecution had proved its case beyond reasonable doubt;
 - b. That the trial Magistrate erred in law and fact in finding a conviction that was against the weight of evidence;
 - c. That, the learned trial magistrate erred in finding him guilty based on circumstantial evidence when it was not safe to convict on the same;
 - d. That, having found him guilty based on circumstantial evidence, the learned trial magistrate failed to consider the possibilities available;
 - e. That, the trial court erred in law in not considering his defence pursuant to section 309 and 169 of the Criminal Procedure Code, Cap 75 Laws of Kenya;
 - f. That, the learned trial Magistrate directed himself in law in that, he shifted the onus of prove from the prosecution to him contrary to law;
 - g. That he was not identified as the culprit;
 - h. That, the trial court erred in law and fact in not diligently considering the doctrine of recent possession;
 - i. That, the trial court erred in law and in fact in negating the fact that there was no direct evidence linking him to this crime;
 - j. That, the trial Magistrate erred in law and fact by passing a harsh sentence under the circumstances.
17. However, the appeal was opposed by the respondent based on the grounds of opposition dated; 2nd September 2024 which states: -
 - a. That the ingredients of the offence were sufficiently proved beyond reasonable doubt;
 - b. That the test of circumstantial evidence was adequately proved;
 - c. That the doctrine of recent possession was proved beyond reasonable doubt;
 - d. That the appeal is misconceived and devoid of merit and ought to be dismissed forthwith and the conviction and sentence upheld.
18. The appeal was disposed of vide filing of submission. The appellant cited the case of Oluoch vs R (1985) KLR where the Court of Appeal set out the ingredient of the offence of robbery with violence as; that the offender is armed with a dangerous or offensive weapon or, the offender is in the company of one or more persons, or the offender wounds, beats, strikes or uses personal violence before, after or at the time of the robbery.
19. The appellant submitted that, the prosecution failed to prove any of the ingredients of the offence. Further, that he was not identified as the attacker as no one saw him commit the offence.
20. The appellant further submitted that the prosecution case rested on circumstantial evidence. He relied on the case of, Abanga alias Onyango vs Republic Criminal Appeal No. 32 of 1990 where the Court of Appeal laid out the conditions precedent for a court to convict on circumstantial evidence. He further



- relied on the case of *Tooper vs Rep* (1952) AC where the court stated that to rely on circumstantial evidence there should be no existing circumstances that would weaken inference of guilt of the accused.
21. The appellant argued that, the prosecution failed to prove that the bicycle belonged to the deceased and did not belong to him. That, the bicycle was only taken to police station after he had already been arrested and he was not photographed with it at the scene of the crime.
 22. Further, the trial court ignored the evidence that the deceased was not in good terms with (PW4) Samuel Kimani Mundia as they differed over money and that PW4 was a thief. Additionally, the Police failed to investigate one Harun who, according to (PW3) Jane Wakonyo, had threatened to kill the deceased for failing to pay him after a betting game.
 23. The appellant further submitted that, the sentence imposed by the trial court was excessive taking into consideration that he was a first offender, remorseful and pleaded for forgiveness during mitigation.
 24. Furthermore, while section 296(2) imposes a mandatory death sentence, courts have departed from the mandatory death sentence as it infringes on an accused right to a fair trial and right to access justice under article 48 of the *Constitution* of Kenya, 2010. That, the mandatory nature of the sentence prevents from considering mitigation pursuant to section 329 of the Criminal Procedure Code, which is a part of the trial process and the sentence being reviewed by a higher court.
 25. The appellant relied on the case of *Godfrey Ngotho Mutiso v Republic* [2010] eKLR where the Court of Appeal in determining the legality of the mandatory death sentence for the offence of murder held that section 204 of the Penal Code was inconsistent with the provisions of the *Constitution* of Kenya, to the extent that it provides the death penalty as the only sentence for the offence of murder.
 26. That the Court of Appeal further stated that, the death penalty may be imposed in appropriate cases but only after the court has heard submissions relevant to the circumstances of the case under section 329 of the Criminal Procedure Code.
 27. The appellant relied on the case of, *James Kariuki Wagana v Republic* [2018] eKLR where the High Court considered the case(s) of; *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR and *William Okungu Kittiny v R* [2018] eKLR and held that the maximum sentence for the offence of robbery with violence is the death penalty but that courts have discretion to impose any other penalty it deems fit and just in the circumstances.
 28. The appellant urged the court to consider the circumstances of the case and award an appropriate sentence, including the provisions of section 333(2) of the Criminal Procedure Code and order that the sentence runs from the date of his arrest.
 29. However, the prosecution argued vide submissions dated 2nd September 2024 that, the ingredients of robbery with violence were proved beyond reasonable doubt. That, the case rested entirely on circumstantial evidence which showed that, the appellant was found with the deceased bicycle a few meters from where the deceased was lying with no other person in the vicinity.
 30. Further, the appellant on initial interrogation by PW1 Irungu lied that the bicycle belonged to him. Furthermore, the appellant did not raise an alarm to rescue the deceased despite the fact that he possibly saw that the deceased was bleeding.
 31. That the evidence adduced by the prosecution satisfied all three tests of circumstantial evidence as laid out in the case(s) of; *Tooper vs Republic* [1952] ALL ER 480 and *Mukose vs Republic* [1958] EA 715.
 32. Further, the doctrine of recent possession was applicable in this case and cited the case of *Athuman Salim Athuman vs Republic* [2016] eKLR where the High Court discussed the doctrine to entail



where an accused person is found in recent possession of stolen property and cannot offer reasonable explanation how he came into possession of such property that gives rise to a presumption that he is either the thief or receiver.

33. That similarly the High Court in the case of *Isaac Nganag Kabiga Alias Peter Nganga Kabiga vs Republic CR APP No 272 of 2005* enumerated the circumstances in which the doctrine of recent possession forms the basis of a conviction being that; the property was found with the accused, the property was positively identified to belong to the complainant, and that the property was recently stolen from the complainant, with proof of time being dependent on how easy the stolen property can move from one person to another.
34. The respondent argued that, the doctrine of recent possession was satisfied as the prosecution proved the bicycle belonged to the deceased through the evidence of various witnesses, and that the appellant gave evidence that he took the bicycle from where the deceased was lying. The respondent urged the court to find the conviction merited and the sentence of life imprisonment lawful.
35. At the conclusion of the arguments advanced by the respective parties and the materials before the court, I note that, the role of the 1st appellate court as stated in the case of *Okeno -vs Republic (1972) EA 32* is to evaluate the evidence afresh and arrive at its own conclusion taking into account that this court did not benefit from the demeanour of the witness.
36. In that regard the appellant herein was charged and convicted of the offence of robbery with violence under section 296 (2) of the Penal Code which state: -
 - (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.
37. Pursuant to the afore provisions, the ingredients of the offence are settled as: -
 - a. Theft- that, the offender stole something capable of being stolen
 - b. The violence-that the offender used or threatened to use violence to obtain or keep the stolen item, or prevent or overcome resistance
 - c. Armed- that the offender was armed with a dangerous weapon and was in the company of others.
38. Be that as it may, the law is settled that in all criminal cases, the prosecution must prove the ingredients of the offence beyond reasonable doubt. In the instant matter, there is no direct evidence to link the appellant to commission of the offence of robbery with violence nor proof of the afore ingredients.
39. It is noteworthy that, there is no evidence that the appellant was seen robbing the deceased, and if he did whether he was alone and/or with any other person and neither is there evidence, if at all he robbed the deceased he was armed with any dangerous weapons, and used or threatened to use violence on the deceased.
40. The trial court acknowledges at paragraph 53 of the judgment that there was no direct evidence to link the appellant to the offence of robbery with violence. In the same manner the court clearly indicated at paragraph 54 of the judgment that, the case is anchored on circumstantial evidence,
41. However, it is crucial that, the circumstances of the case be considered wholesome to prove whether the appellant committed the offences he was charged with in the main or alternative count.



42. In that regard, the evidence that links the appellant to the offence was led mainly by three witnesses, (PW1) Samuel Kimani Irungu, (PW2) Meshack Kungu Waweru and (PW7) Alice Wambui. The witnesses testified as to how they found the appellant in possession of the deceased's bicycle and upon inquiry by PW1 as to where he got it, he told them that he bought it at Nairobi. That upon further inquiry he owned up that he had taken it from someone lying in the ditch and led the witnesses to where the deceased was.
43. The question that arises is; does the afore evidence prove the ingredients of robbery with violence or handling suspected property. In convicting the appellant of the offence on the main count, the trial court stated as follows: -
70. I am not persuaded by the accused person's defence that he just happened to be passing by and on spotting the bicycle on the ground and the deceased person was lying beside it, he decided to take it.
71. Some key questions remain unanswered. One, is why didn't the accused person raise an alarm so that people could come and rescue the deceased who by that time was still alive albeit in critical condition? Secondly, is why did the accused person have to lie that the bicycle belonged to him when he knew very well it had been stolen.
72. Those are the issues that paints the accused person as an insincere and dishonest person. It is immaterial that the accused person was not found with the other items belonging to the deceased, that is mobile phones and cash.
73. The accused person having been found with deceased's bicycle just a few meters where he was lying and fighting for his life as result of having been attacked, and no other person having been spotted in the vicinity, strongly points towards the guilt of the accused person."
44. Based on the afore it is clear that, the trial court relied heavily on the fact the appellant had possession of the deceased's bicycle and lied that it belonged to him and therefore he was insincere and dishonest person. That may be so, but it does not prove the ingredients of the offence of robbery to violence?
45. The other issue that influenced the trial court's finding is that, the appellant was found with the deceased's bicycle a few meters from the scene. However, it is also in evidence that, the appellant after being confronted by PW1 as to whether the bicycle was his, he initially stated that, it was his and that he bought it in Nairobi, but when PW1 insisted that it belonged to the deceased who was his uncle and demanded that the appellant take him and his passengers to where he got the bicycle, the appellant took them to where the deceased was.
46. The question is; if it is the appellant who had robbed the deceased of the bicycle would he have been keen on taking these witnesses to the scene. It is unlikely. It is more probable that having been cornered he would flee to escape. Furthermore, PW2 who was with PW1 as they interrogated the appellant testified that after pressing appellant he told them that "he found someone lying and thought he was drunk and he took his bicycle." The accused testified to the same in his defence.
47. In my considered opinion, it is possible that the appellant took advantage of the state of the deceased indisposition and saw an opportunity to steal the bicycle from him. In fact, the appropriate offence might as well have been stealing. However, he was found in possession of the stolen bicycle and has admitted to unlawfully obtaining the same.
48. Consequently, I quash the appellant's conviction for the offence of robbery with violence and substitute it with a conviction on the alternative count. Pursuant thereto the sentence of life imprisonment is also set aside. The sentence herein will pronounced after pre-sentence report is filed.



49. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 17TH DAY OF JANUARY 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellant present virtually

N/A for the respondent

Mr. Komen: court assistant

