



**Lentirash v Republic (Criminal Appeal 142 of 2012)
[2025] KEHC 3473 (KLR) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CRIMINAL APPEAL 142 OF 2012
PN GICHOHI, J
MARCH 20, 2025**

BETWEEN

NOAH LENTIRASH APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from conviction and sentence in Principal Magistrate's Court at Maralal Criminal Case No. 303 of 2012 dated 04/7//2012 by Hon. A.K. Ithuku PM)

JUDGMENT

1. The background of this appeal is that both Noah Lentirash (herein referred to as the Appellant) and Keeyan Lentipo were arraigned before the trial court on 10/4/2012 in Principal Magistrate's Court at Maralal where they were jointly charged with two counts of Robbery with Violence Contrary to section 296 (2) of the Penal Code. The Appellant was also charged with the offence of handling stolen goods contrary to section 322 (2) of the Penal Code.
2. The particulars of Count I were that on 30th day of March 2012 in Samburu Central District within Samburu County, the accused persons jointly with others not before court while armed with dangerous weapons namely rungun and G3 rifle robbed Lesamaja Lipainya of his mobile phone make Nokia 1280 valued at Ksh.2,000/=, two jackets valued at Kshs. 2,000/= and cash Kshs. 635,000/= and immediately before or immediately after such robbery threatened to use actual violence against Lesamaja Lipainya.
3. The particulars of Count II were that on 30th day of March 2012 in Samburu Central District within Samburu County, jointly with others not before court while armed with dangerous weapons namely rungun and G3 rifle robbed of Mr. Peter Leyaangu his jacket valued at Kshs. 1,500/= and cash Kshs. 205,000/= and immediately before or immediately after such robbery threatened to use actual violence against Peter Leyaangu.



4. The particulars of the Alternative charge in regard to the Appellant were that on 6th day of April 2012 at Ipartuk village in Samburu Central District within Samburu County in Rift Valley Province otherwise than in the cause of stealing dishonestly received or retained one Torch knowing or having reason to believe it to be stolen goods.
5. After hearing, the trial court rendered its judgment on 4/7/2022 where the Appellant was convicted on both counts of robbery with violence and sentenced to death while the alternative charge was put in abeyance. His co-accused was acquitted. Aggrieved by both conviction and sentence, the Appellant filed an appeal before High Court being Criminal Appeal No. 142 of 2012 and on the grounds that: -
 1. The learned trial magistrate erred in law and fact in holding the identity and recognition evidence was free of error when there was evidence that the robbers had covered their faces.
 2. The learned magistrate erred in law and in fact in applying the doctrine of recent possession to sustain Section 296 (2) of the *Penal Code* whereas there was doubt as to the time of the act and the nature of the items recovered.
 3. The learned magistrate erred in law and in fact in failing to consider the Appellant's alibi.
 4. The learned magistrate misdirected himself on matters of law and in fact in not addressing the issue of why the witnesses tracked the footsteps of robbers on the morning after the robbery when they knew the identity of the Appellant and could easily find him.
6. The appeal was heard and determined by two Judges and vide their judgment dated 8th day of November 2013 where the two judges dismissed the Appeal and upheld both the conviction and sentence of the lower court.
7. Aggrieved by the High Court Judgment of M.J. Anyara Emukule & L.N. Waithaka JJ, the Appellant preferred an appeal before the Court of Appeal vide Nakuru Criminal Appeal No. 50 of 2013 but on 5th July 2023, the Court of Appeal referred the Appeal back to the High Court for retrial as one of the judges was an Environment & Land Court Judge and hence did not have jurisdiction to hear the Appeal.
8. The Appellant has now raised Six (6) grounds he called Amended Grounds of Appeal under Section 350 of the *Criminal Procedure Code* and filed on 5th March 2024. They are summarised as follows: -
 1. That the learned Magistrate erred in law and in facts by holding that identity and or recognition evidence by Prosecution witnesses was free of error yet there was evidence robbers had covered during the act.
 2. That the learned Magistrate erred in law in relying on the doctrine of recent possession.
 3. That the learned Magistrate erred in law and in facts by not considering his alibi defence.
 4. That the learned Magistrate erred in law and in facts in failing to note that evidence was not corroborative of positive identification.
 5. That the learned Magistrate erred in law and in fact when he failed to observe that Section 151 of CPC was not duly complied with.
 6. That the death sentence is not mandatory pursuant to the Supreme Court Judgment (declaration) in Petition No. 15 and 16 of 2015 and the Petition of Joseph Kaberia Kahiga and 11 others vs Attorney General [2016] eKLR both as same was declared unconstitutional in respect of Section 296 (2) of the *Penal Code*.



Appellant's submissions

9. In regard to Ground 1 and 4 which are on evidence on identification and recognition upon which the Appellant was convicted, he submitted that according to the evidence on record, the attackers had disguised themselves and therefore no victim of the attack could have seen them so as to recognise them.
10. Further , he submitted that according to PW2, they were attacked by three men but he could not identify them as they had covered their heads. He further submitted that though PW3 claimed in her statement to have known the Appellant for a long time, and even spent considerable time with them the previous day, she never gave his name in her initial statement to the Police.
11. The Appellant submitted that the initial statement by PW1 was that among the group, he could only identify Lentrash though he had partially covered his face and though he would recognise him later and therefore, they tried to follow the footsteps of the attackers the following day but in vain.
12. The Appellant wondered why it was necessary for the witnesses to follow the footsteps if at all PW1, PW2 and PW3 had identified the attackers on the material night. He submitted that even though PW3 testified that he gave the Appellant's name to the police, she retracted it during cross examination and confirmed that her statement did not mention any names.
13. While citing the case of R v Eria Sebwato (1960) 1 EA 174 where it was held:-

“ This accused, well known to the complainant, should to go with seven other men to commit an organised robbery in a house where he was known seems to be explicable. He must have known he was bound to be recognised, and that, in my view, casts doubt on the evidence of the complaint and his wife.”
14. He further cited the case of Annah Wanjohi Njagi & another vs R [1987] eKLR Criminal Appeal No. 133 of 1987 this Court held that “recognition not borne out by any immediate report or even identification parade.”
15. The Appellant therefore submitted that evidence on record showed that the attackers had covered their faces during the robbery and therefore, the identification was not free from error. Flowing from there, the Appellant submitted that conviction based on identification was erroneous.
16. On Ground 2 being the doctrine of recent possession, he relied on several cases including the Court of Appeal decision in Isaac Ng'ang'a Kahiga & another v Republic [2006] eKLR on what has to be proved before the court can rely on doctrine of recent possession as a basis for conviction. He submitted that the charge sheet herein shows that several items were stolen from the victims on the material night yet none of the said items were recovered from the Appellant when a search was conducted.
17. He submitted that the only item which the police alleged to have recovered and allegedly belonging to PW1 was a torch whose ownership remained contested as PW1 had not reported that he had lost his torch.
18. In this case, the Appellant submitted that he was only suspected to have bought the item with proceeds of the robbery but he explained that he was a timber dealer and called independent witnesses who testified that the torch belonged to their sister hence possession was explained.
19. On ground 3 which is on alibi defence , he submitted that he was arrested on suspicion that he had visited the Complainant the day before the robbery yet in his defence, he gave a plausible explanation of his presence at the locus quo and an alibi which defence proved he was not a robber. In support, he



cited the case of Singh S/O Asenua vs Uganda CR. App. No. 9 of 998 and submitted that he discharged the burden on his alibi defence.

20. On ground 5 which is failure to comply with Section 151 of the Criminal Procedure Code , he submitted that PW4 was not reminded that he was still on oath when he was recalled for purposes of cross examination. Arguing that PW4's evidence was crucial in that during his further cross examination, it was revealed that the torch did not feature anywhere in his recorded statement and therefore that evidence was impeached under Section 163 (3) of the Evidence Act.
21. On Ground 6 which is on death sentence, he relied on the decision in Joseph Kabera Kahiga and 11 Others v Attorney General[2016] eKLR and submitted that that the said sentence has since been declared unconstitutional. Lastly, he urged the court to allow the Appeal in its entirety and set him at liberty.

Respondent's Submissions

22. His submissions were filed on 5th March 2024. He emphasised on the three ingredients of the offence of robbery with violence as set out by the Court of Appeal in Oluoch v Republic [1985]KLR. On identification, the Respondent relied on the decision in R v Turnbull & Others [1973]3 all ER 549 and submitted that this was a case of direct evidence that was corroborated by three witnesses who knew the Appellant and that was no evidence to show he was frame. It was submitted that the evidence confirmed that the Appellant came to the homestead and committed robbery.
23. It was further submitted that there was no doubt that after robbing PW1 and PW2 of the money they had secured in their body, the Appellant went on shopping spree in Maralal town and that the items were produced as exhibits together with receipts but he was unable to explain where he got the items from.
24. In regard to the Appellant's alibi defence that he spent the day on 30th March 2012 purchasing timber and that he offloaded it until 8.00 pm and slept in the lodging, the Respondent submitted that the defence was false in that his witnesses confirmed that he was lying. It was submitted that DW2, who was the Appellant's brother, denied being with the Appellant on 30th March 2012 as he was at Loyangalani and that he also did not see the Appellant from 29th March 2012 to 12th April 2012.
25. The Respondent further submitted that though the Appellant told the court that he slept at Jamhuri Bar and lodging, DW3 testified that the Appellant slept at home. It was therefore submitted that that the Appellant's defence was false and did not dislodge the Respondent's case.
26. On sentence, the Respondent submitted that pursuant to jurisprudence on death sentence, he had no objection to the same being reviewed but urged that Court passes a deterrent sentence. In conclusion, he urged the Court to dismiss the Appeal.

Analysis and determination

27. This being the first appellate court, its duty is to reconsider the evidence before the trial court , evaluate it and draw its own conclusion though bearing in mind that it neither saw nor heard the witnesses and should make due allowance in that respect- See Okeno v Republic [1972] EA 32.
28. The Respondent's case before the trial court was advanced by Five (5) witnesses while the Appellant called two other witnesses.



29. Liesamaja Lipainya (PW1) and who was a livestock dealer, testified that he was in his house with Peter Leyaangu (PW2) on 30/ 3/2012 at about 7.30 pm. PW2 intended to spend the night so that he could attend the market the following day.
30. The two of them were in one room chatting and the door was not locked. The room was lit by a hurricane lamp. PW1's wife Naipara (PW3) and children were in the other room (kitchen) where she was cooking and the fire was large and bright and lit the kitchen.
31. Suddenly , three men entered. They called out PW1's name. One of them was armed with a gun and fired in the air. PW1 was hit on the knee with a rungu as the three attackers demanded money. They took his cash Kshs. 635,000/=, a Nokia phone, torch and some clothes. From PW2, they took cash money Kshs. 205,000/= and a jacket.
32. In cross examination by the Appellant, PW1 explained that with the help of the light from hurricane lamp which was bright enough, he clearly saw the faces of two of the attackers. It was the Appellant and another who was a stranger to PW1. He explained it was the Appellant who had a gun and that he knew the Appellant as he used to work as a herds boy for PW1's neighbour. He did not clearly see the 3rd attacker who was outside and shouting and that the two hit PW1 on the head.
33. On his part, Peter Leyaangu (PW2) told the court that he saw the Appellant clearly as he searched his (PW2's) pockets and even knew his name. It was his evidence that he knew the Appellant before as the Appellant used to work at Ongata Rongai where PW2 lived.
34. In cross examination by the Appellant, PW2 maintained that he knew the Appellant as Lentirash and also known as Noah . That the Appellant used to live in Ongata Rongai where PW2 lived.
35. Naiparai testified as PW3. She was PW1's wife. She told the court that she knew the Appellant before for a long time as a herd's boy in Lelekwe's Manyata and that he had come to her house on 29/3/2012 while in company of another person not before court. She made them tea . They then left.
36. She therefore recognised him on the night of robbery when he came back with two other people and ordered them to lie down. The hurricane lamp was on and the light was very bright. She saw the faces of the attackers and they spoke to them . The Appellant was armed with a gun and he shot in the air. She ran to the adjoining and after a while, the robbers walked out with PW2's jacket .
37. In cross -examination by the Appellant, she maintained her evidence and further told the Court that she knew him as Lentirash and that he is also known as Noah.
38. It is the evidence of PW1 and PW2 that the following day, they reported the matter at Kisima Patrol Base. The search for the attackers commenced and on 6/4/2012, PW1 and PW2 saw the Appellant at Maralal town and alerted the police.
39. PW4 No. 6716 PC Kalamon Kukuton testified that he accompanied PC Kingori to Maralal town where the complainants pointed the Appellant to them. The two police officers carried out a body search on the Appellant but did not find him with any of the stolen items. However, they recovered:- A phone bought on 31/3/2012 (P Exhibit 3A) and its receipt (P Exhibit 3 B) and Receipt for a wheelbarrow, axe and 2 jembes (P Exhibit 4) all bought on 2/4/2012. Receipt for Mpesa Account opened on 2/4/2012 (P Exhibit 5).
40. He took them to his house and they conducted a search. They recovered a wheelbarrow, steel box, assorted clothes, and two pairs of shoes (P Exhibit 6 to 9) which were all newly bought. Further, they recovered several other items (P Exhibit 10 to 21) which included three (3) torches. They escorted the Appellant and the items to the Police Station.



41. In cross examination by the Appellant, he told the court that they got the complainant's torch from the Appellant's house. He confirmed that the statement did not mention the torch.
42. PW5 No. 76717 PC Mark Kingori recounted the evidence by PW4 and told the court that the Appellant could not give a satisfactory explanation as to how he bought the said items in a span of two days making him conclude that the Appellant must have bought the said items with money stolen from the two complainants. Further, he told the court that he visited the scene of robbery and recovered one spent cartridge (P Exhibit 2).
43. In cross examination by the Appellant, he told court that the complainant had reported that a torch had been stolen. He however admitted that PW1's statement did not mention the torch. He also told the court that he could not conduct an Identification Parade as the Appellant was identified by PW1 for purposes of arrest.
44. In re-examination, he explained that in the further statements recorded on 31/3/2012, PW1 and PW2 mentioned the Appellant's name and with the description and name, they started searching for the Appellant. He denied destroying the Appellant's receipts.
45. The Appellant (DW1) raised alibi defence that he brought timber to Malaral town on 30th March 2012 where he arrived at 6.00 pm as his vehicle broke down. They offloaded it up to 8.00 pm and spent the night at a lodging called Jamhuri. The following day, he was paid by his customer and went to do shopping and that is when he was arrested.
46. In cross examination, he told the court that he and PW1 were known to each other and that it was PW1 who led the police to his arrest. He explained that he was paid Ksh. 105,000/= by DW2.
47. DW2 Jackson Lekoshere told the court that he was a businessman dealing with timber and that on 27/3/2012, the Appellant who he knew as he also sells timber, came to his shop and borrowed him Kshs. 16,500/= which DW2 was to recover from the Appellant. Thereafter, DW2 travelled to Loyangalani. He came back on 12/4/2012 and learnt that the Appellant had been arrested for robbery. He did not know anything about that robbery.
48. In cross examination, he told the court that he was at Lyangan on 30/3/2012 and did not meet the Appellant between 29/3/2012 and 12/4/2012. He denied giving the Appellant Kshs. 105,000/=.
49. DW3 Lepeina Lentirash testified that the Appellant was his younger brother and he (Appellant) works for DW2. His evidence was that the torch which was an exhibit in this case belonged to his sister.
50. In cross examination, he told the court that the Appellant had worked for DW2 for one year and that on 30/3/2022, the Appellant was at home in Lapurtuk where he and DW 3 slept together that night. He did not know Jamhuri bar.
51. After considering the evidence on record , grounds of appeal and submissions by both parties, there does not appear to be any dispute that the complaints were violently robbed on the material night and by three attackers thus satisfying the ingredients of robbery with violence as stated by Court of Appeal in *Oluoch v Republic* [1985]KLR that: -

“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 of one or more other persons; or



- 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.”
52. Indeed, the trial court held in its judgment:-“The circumstances under which the complainants lost their money has all the ingredients of robbery with violence. People who had firearms actually fired in the air. They hit PW1 with a rungu. Actual violence was used during robbery.”
53. In the circumstance, the broad issues for defemination are:-
1. Whether the Appellant was identified as one of the said attackers in light of his alibi defence.
 2. Whether the doctrine of recent possession was applicable in the case to warrant a conviction.
 3. Whether death sentence passed on the Appellant should be sustained.
54. On the first issue, and regarding evidence of identification by recognition, the Court of Appeal in *Wamunga versus Republic* [1989] KLR 424 stated :-
- “It is trite law that where the only evidence against a defendant is evidence on 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.”
55. In this case, there is no doubt that the PW1, PW2 and PW3 knew the Appellant very well before the incident. It is also clear from their unwavering testimony that there was bright light in the house when the three men attacked them. They were able to see them and identify the Appellant who was the one armed with the gun.
56. Indeed , PW2 saw the Appellant at a very close range as the Appellant searched PW2’s pockets. There is no evidence of a grudge between the witnesses and the Appellant before.
57. There is no reason for the witnesses to have fabricated the case against the Appellant. Further, there was no need for identification parade in the circumstances herein. The two complainants spotted the Appellant at Maralal town, pointed him to PW4 and PW5 and he was arrested.
58. In regard alibi defence, the Court of Appeal in *Erick Otieno Meda v Republic* [2019] eKLR had this to say:-
- “In an alibi defence based on witness testimony, the credibility of the witness can strengthen or weaken the defence dramatically. A successful alibi defence entirely rules out the accused as the perpetrator of the offence. There is no burden of proof on the accused to prove an alibi. If there is a reasonable possibility that the accused's alibi could be true, then the prosecution has failed to discharge its burden of proof and the accused must be given the benefit of the doubt.”
59. The Appellant raised his alibi only in his sworn statement in defence. Further, that defence was contradicted by his own witnesses. It was a defence that was made up. It was an afterthought and untrue. It had no effect on the Respondent’s case.
60. In its judgment, the trial court held on the issue: -
- “PW1 said that he clearly saw the 1st accused. That the 1st accused used to work as a herd’s boy of a neighbour. That although it was around 7.30 pm, the house was lit with hurricane



lamp and he saw him very well. That he did not see the 2nd accused at the scene. PW2 said that he saw 1st accused from very close range as he went through his pockets. That he knew his name. That the 1st accused used to work at Ongata Rongai where complainant in the 2nd count lives. This witness also did not say anything about the 2nd accused person. PW3 is a wife to PW1 . She knew him. . That on 29/3/2012, he visited her home with another who was not in court . That she made them tea and recognised him when he came to rob them. The above evidence is overwhelming on identification. The complainants are the ones who led the police to arrest the 1st accused person. I heard what the 1st accused said in his defence. His sworn testimony was contradicted in very material particulars by his own witnesses. His defence of alibi collapsed. I am therefore convinced beyond any reasonable doubt that the 1st accused person was properly identified as one of the men who robbed the complainants.”

61. This Court is satisfied that though the robbery occurred at night, there was no possibility of error in the identification of the Appellant herein. The trial court’s finding on the issue is therefore sound and upheld.

62. Regarding application of doctrine of recent possession, the Court of Appeal in the case of Isaac Ng’ang’a Kahiga & another v Republic [2006] eKLR held: -

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect, secondly that; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other. In order to prove possession, there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses.”

63. In this case and having been found as properly identified as one of the attackers on the material night, the evidence of recovery of the three torches one of which was claimed to belong to a sister to DW2 and also claimed by PW1 is not one of the main issues. It was not a newly bought torch and it was not among the items stated in the charge sheet as having been stolen from PW1. It was recovered after a search in the Appellant’s house.

64. The search conducted on the body of the Appellant and in his house was in attempt to recover the items stolen from the complainants on the material night and that included the money. None was recovered but the items recovered from the Appellant, including the receipts for the same, gave inference that they were bought using the money stolen from the two complainants during the robbery.

65. The evidence shows that the Appellant could not satisfactorily explain where he got the money so as to go on shopping spree in Maralal town soon after the robbery. In its judgment the trial court held:-

“Further the 1staccused person was found with a torch which was identified as belonging to PW1. That was taken during the robbery. While it is true that the 1st accused may have bought the goods found with him with his own money, I find that it adds to the strong evidence already on record. This body of evidence directly links the 1st accused to the robbery. ...as noted above, the prosecution has proved beyond any reasonable doubt that the 1st accused person was one of the men who entered PW1’s house armed with a rifle and



robbed him and his friend of the money and clothes. His defence is demonstrated to be a sham . It is thus dismissed. He is convicted on both counts...the alternative is spent.”

66. From the above reasoning, it is not the torch that formed the basis of the finding of guilt by the trial court.
67. Further, the Appellant’s contention that Section 151 of the *Criminal Procedure Code* was not duly complied with in that PW4 was not reminded that he was still on oath when he was recalled for purposes of cross examination does not in any way affect the Respondents case. In the circumstances, the conviction is upheld.
68. On sentence, it is acknowledged that the death sentence has since been declared unconstitutional but the Respondent urged this Court to consider a deterrent sentence. The court record shows that the Appellant was treated as a first offender.
69. He had nothing to say in mitigation. The trial magistrate imposed the sentence clearly based on mandatory sentence provided for under Section 296 (2) of the *Penal Code* and therefore, the said sentence calls for interference by this Court.
70. In conclusion this Court makes the following orders:-
 1. The Appeal on conviction is dismissed.
 2. The death sentence on both counts be and is hereby set aside and substituted with a sentence of Twenty-Five (25) years imprisonment on each of the two counts and to run concurrently.
 3. The period the Appellant spent in custody pending trial being from 6/4/2012 when he was arrested to 4/7/2012 when the Appellant was committed to serve prison sentence be put into account when computing the said sentence.
 4. Right of Appeal explained.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 20TH DAY OF MARCH, 2025.

PATRICIA GICHOHI

JUDGE

In the presence of:

Noah Lentirashi - Appellant

Mr. Kihara for Respondent

Ruto, Court Assistant

