Mwangi & another v Republic (Criminal Appeal E004 & E005 of 2025 (Consolidated)) [2025] KEHC 10184 (KLR) (23 June 2025) (Judgment)

Neutral citation: [2025] KEHC 10184 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E004 & E005 OF 2025 (CONSOLIDATED)

GL NZIOKA, J

JUNE 23, 2025

BETWEEN

PAUL KARANJA MWANGI ..... 1ST APPELLANT

STEPHEN MUHIKA MWANGI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence delivered on 16th January 2025 by Hon. E. Kelly (PM) in CMCRC E1691 of 2021 at the Naivasha Chief Magistrate's Court)

JUDGMENT

1. Paul Karanja Mwangi and Stephen Muhika Mwangi (herein "the appellants") were arraigned before the Chief Magistrate's Court charged vide CMCRC No. E1691 of 2021, with the offence of robbery with violence contrary to section 296(2) of the *Penal Code* (Cap 63) Laws of Kenya, in count (1).

2. The particulars of the charge states that, on 8th day of September 2021 at Kayole area Naivasha sub-county within Nakuru County, while armed with a dangerous weapon, namely a knife, jointly robbed off Ann Wanjiru cash Kshs. 87,000, two mobile phones make Huawei and King, hand bag containing keys and assorted personal effects all valued at Kshs. 100,000 and immediately before or immediately after the time of such robbery threatened to use actual violence to the said Ann Wanjiru.

3. The 1st appellant Paul Karanja Mwangi was also charged with an alternative offence of handling stolen goods contrary to section 322(1)(2) of the *Penal Code*.

4. The particulars thereof are that on the 17th day of September 2021 at Kayole area in Naivasha south sub-county within Nakuru County, otherwise than in the course of stealing, dishonestly retained one mobile phone make Huawei black in colour serial number 861080031385602, the property of Ann Wanjiku knowing or having reasons to believe it to be stolen property.

5. The charges were read to the appellants and each plead not guilty wherein the case proceeded to full hearing with the prosecution calling a total of five (5) witnesses.

6. The prosecution case in brief is that, on 8th September 2021, (PW1) Ann Wanjiru Njugunga (herein "the complainant"), closed her Mpesa shop at around 8:50 pm and left for home. That she noticed a person wearing a maroon marvin hat and grey sweater was trailing and keeping pace with her.

7. That about 100 meters from her home, another person wearing a leather jacket with stripes approached from the fence, held and strangled her with his elbow, while the one who was trailing her cut the straps of her handbag, took it and ran away. That as she tried to scream and hold on to her handbag the assailant removed a knife and threated her to hurt and she kept quiet. The assailants ran away.

8. That following her screams for help several people including (PW2) Samuel Mureithi Kimani and (PW3) Ezekiel Kiplagat (although indicated as (PW4) in the trial court proceedings) rushed to the scene and upon learning of what had happened ran after the robbers but they did not find them. The following day, the complainant reported the matter to the police and investigations commenced.

9. That on 9th September 2021, the police received information that two people suspected to be robbers had locked themselves in a house at Kayole area. That (PW4) No. 113621 PC Ellam Wekhulu (although indicated as (PW5) in the trial court proceedings) in the company of Inspector Chepkwony went to the house and found the appellants. That upon conducting a search a Huawei phone was recovered from the 1st appellant.

10. That the appellants led the police officers to a general shop where other items including; shoes, credit cards, phones and a sub-woofer were recovered and the appellants were arrested. Subsequently, Inspector Chepkwony prepared an inventory and handed over the case to the Directorate of Criminal Investigations.

11. That the complainant identified the Huawei phone by availing the box the phone was packed in when she purchased it to prove the phone was her property and it was noted that the serial number thereon matched that on the recovered phone. That she further identified the appellants as the people who had robbed her and they were charged accordingly.

12. At the close of the prosecution's case, the appellants were placed on their defence. The 1st appellant gave a sworn testimony and denied that he was arrested in the alleged house but stated that he was arrested while hawking groundnuts. That upon arrest only Kshs. 350 and his Tecno phone were recovered and that he saw the Huawei phone produced in evidence for the first time in court. He denied have worn the jacket as testified by the complainant and stated that he was wearing work overall.

13. The 2nd appellant also gave a sworn statement, denied committing the offence and stated that he owns a shop at Komothai where he sells cereals, foodstuff and electronics and not phones.

14. That on the night of 8th September 2021, he closed the shop at 10.00pm and went home where he was arrested from. That he was taken to the shop where he met the 1st appellant and he was arrested. Further the items in the inventory were taken from his shop.

15. At the close of the case the trial court *vide* a judgment dated; 16th January 2025, found each appellant guilty of the offence of robbery with violence and sentenced each to serve a term of twenty (20) years imprisonment.

16. However, the 1st appellant is aggrieved by the decision of trial court and appeal against it on the following grounds verbatim reproduced: -

a. That the learned trial Magistrate erred in both law and fact by convicting the appellant in the present case but failed to appreciate that the appellant's identification was not positive.

b. That the learned trial Magistrate erred in both law and fact by convicting the appellant in the present case, yet failed to appreciate that Huawei phone serial No.xxx was never positively proved to be the property of the complainant.

c. That the learned trial Magistrate erred in both law and fact by convicting the appellant in the present case by placing reliance on circumstantial evidence yet failed to appreciate that the mobile phone was never found in possession of the appellant.

17. Further, the 2nd appellant is aggrieved by the decision of trial court and appeal against it on the following grounds verbatim reproduced: -

a. That the Hon. Magistrate erred in matters of law and fact by convicting the appellant yet failed to find that his identification was not positive.

b. That the Hon. Magistrate erred in matters law and fact by failing to appreciate that there was identification parade conducted in respect of the appellant.

c. That the Hon. Magistrate erred in law and fact by relying on the evidence of a single identifying witness to convict the appellant yet the same was not corroborated.

d. That the sentence meted upon the appellant was harsh and excessive since it was not based on the unique facts and circumstances of the case.

18. However, the appeal was opposed by the respondent based on the grounds of opposition dated 7th March, 2025 which states as follows:

a. That the evidence of identification by recognition irresistibly pointed to the appellant.

b. That there was corroborating evidence.

c. That the prosecution proved its case beyond reasonable doubt. All ingredients proved.

d. That the sentence is appropriate to the circumstances of the offence.

e. That the appeal is misconceived and devoid of merit and ought to be dismissed forthwith and the sentence upheld.

19. The appeal was disposed of by filing written submissions. The 1st appellant submitted that his identification was questionable as the circumstances of the offence were not favourable for identification. That the offence was committed at night and that, the evidence of lighting was not satisfactory.

20. That although the complainant testified that the scene was well lit, she did not inform the court about the source of the light, its intensity or its position as stated in the case of *R v Turnbull* (1973) ALL ER 549. Furthermore, unlike the complainant (PW3) Ezekiel testified that the scene was dark.

21. That similarly, there was discrepancy as to who was wearing the leather jacket produced as (P. exhibit 2) in that, PW4 PC Wekhulu testified that the 1st appellant was arrested when wearing the leather jacket, while PW5 Stephen Wachira testified that it was the 2nd appellant who was wearing the leather jacket. Furthermore, the complainant did not explain any special features or marking that made the jacket unique from similar ones in the market.

22. The 1st appellant relied on the case of, *Stephen Owino Opere v Republic* (2006) eKLR where the High Court held that the identification of the appellant therein by the green T-shirt with white stripes was not tenable and amounted to gross injustice as similar T-shirts were readily available in the open market and anyone could but them.

23. The 1st appellant submitted that the complainant was allowed to see him in the police cells when she went to identify her property therefore an identification parade should have been conducted and relied on the case of *Moses Munyua Mucheru v Republic*, Criminal Appeal Number 63 of 1987 where the Court of Appeal stated that for identification the first report to the police must be produced in evidence to establish whether a witness can identify an suspect and by which means.

24. The 1st appellant argued that, the prosecution did not prove the ingredients as set out by the High Court in the case of; *Isaac Nganag Kahiga Alias Peter Nganga Kahiga v Republic* CrApp No 272 of 2005 enumerated the circumstances in which the doctrine of recent possession form 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.

25. He argued that there was no evidence that the mobile phone he was allegedly found in his possession belonged to the complainant. That, ownership must be proved by either direct or circumstantial evidence and that mere ownership is not sufficient. He relied on the case of; *Wanjohi v Republic* (1970) EA 514 where the Court of Appeal stated that possession of an item raises presumption of ownership but can be rebutted by evidence demonstrating lawful possession.

26. The 1st appellant submitted that, the production of the phone box did not establish ownership of the mobile phone unless it is demonstrated that the box belonged to the complainant. Further, the police officer failed to record serial number of the phone allegedly recovered from him in the inventory raising doubts as to whether it belonged to the complainant.

27. The 2nd appellant on his part submitted that he was not properly identified as the circumstances of the offence were not favourable for identification. That the offence was committed at night and that, the evidence of lighting was not satisfactory.

28. That although the complainant testified that the scene was well lit, she did not inform the court about the source of the light, its intensity or its position. Furthermore, unlike the complainant (PW3) Ezekiel testified that the scene was dark.

29. That similarly, there was discrepancy as to who was wearing the leather jacket produced as (P. exhibit 2) in that, PW4 PC Wekhulu testified that the 1st appellant was arrested when wearing the leather jacket, while PW5 Stephen Wachira testified that it was the 2nd appellant who was wearing the leather jacket.

30. The 2nd appellant argued that in addition, from the trial court's record, it is not clear whom the complainant identified in court as the person who wore the leather jacket. Furthermore, she did not explain any special features or marking that made the jacket unique from similar ones in the market.

31. The 2nd appellant relied on the case of, *Stephen Owino Opere v Republic* (2006) eKLR where the High Court held that the identification of the appellant therein by the green T-shirt with white stripes was not tenable and amounted to gross injustice as similar T-shirts were readily available in the open market and anyone could but them.

32. The 2nd appellant submitted that the complainant was allowed to see him in the police cells when she went to identify her property therefore an identification parade should have been conducted.

33. Further that the trial court failed to consider his defence corroborated by the 1st appellant and labelled it as a defence of alibi and then rejected it due to failure to raise it at the earliest opportunity. That the prosecution did not invoke the provisions of section 309 of the *Criminal Procedure Code* and adduce additional evidence to rebut his defence.

34. Lastly, the appellant submitted that the sentence of twenty (20) years imposed by the trial court is harsh and excessive taking into account the fact that he was not properly identified.

35. However, in response submissions dated 29th May 2025, the respondent argued that the appellants were positively identified based on the evidence adduced and unchallenged. That the scene had street lights and in addition there was a children's playground and a posho mill that had lights that lit the scene. That in addition, the complainant was able to identify the clothes the robbers wore and gave a description of their physique.

36. That the identification was based on recognition and the fact that an identification parade was not conducted did not weaken the prosecution's case. That in the case of; *Ajononi & others v Republic* (1980) KLR the Court of Appeal stated recognition of an assailant was more satisfactory, assuring and reliable than identification of a stranger.

37. That similarly in the case of; *Oluoch v Republic* [1985] eKLR the Court of Appeal set out the element of the offence of robbery with violence being; that the offender was armed with a dangerous and offensive weapon, or was in the company of one or more persons, or immediately before or after the robbery wounds, beats, strikes or uses personal violence and that the prosecution proved all the elements beyond reasonable doubt.

38. The respondent further submitted that the evidence of the complainant was corroborated by the evidence of PW2 Samuel Mureithi Boda Boda rider that he heard screams and rushed to the scene where he saw three people running away. That the fact that the complainant was screaming proved that she had been robbed.

39. Further, PW5 the Investigating officer testified that the appellants were found in a rented house and recovered several stolen items including the Huawei phone stolen from the complainant.

40. Finally, the respondent submitted that the sentence of twenty (20) years imprisonment was lenient noting that the 2nd appellant was not a first time offender and the probation officer's report was negative and concluded that he was not suitable for a non-custodial sentence.

41. Furthermore, that the death penalty is still lawful in Kenya and is reserved for the highest and most heinous levels of the offence such as where excessive and brutal force is employed as stated by the High Court in the case of *James Kariuki Wagana v Republic* [2018] eKLR.

42. At the conclusion of the arguments and/or submissions on appeal, it is noted that the role of the first appellate court is to re-evaluate the evidence adduced in the trial court afresh and arrive at its own conclusion taking into account the fact that this court did not have the benefit of the demeanour of the witness.

43. In that regard, the court stated in the case of *Okeno v Republic* (1972) EA 32 that;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R.*, [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R.*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was

some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] EA 424."

44. To revert back to this matter, the appellants were convicted of the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The subject provision state as follows: -

> "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".

45. Pursuant to the afore provisions to the offence of robbery with violence, the prosecution must prove inter alia: -

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

46. In the instant matter, there is no dispute that the complainant was robbed of inter alia; a Huawei phone which was later recovered. However, it noteworthy that despite the particulars of the charge indicating that she was robbed of Kshs 87,000, King mobile phone, and other personal effects, no evidence was led to prove that the subject items existed before the robbery.

47. However, the complainant's evidence confirmed the robbers were two (2), armed with knives and threatened to hurt her if she screamed.

48. Be that as it may, the key issue is whether the appellants were properly and adequately identified as having been involved in the offence. In that regard, I note that the trial court in convicting the appellants stated as herebelow: -

> "On identification of the accused persons, PW1 testified that at the time of the offence, she identified the two accused persons and stated that one of them had the same leather jacket he had been wearing as he strangled her using his elbow. She described the jacket which he stated was worn by the 2nd accused person at the time of the offence and when she next saw him after they were arrested and the same was marked as PMFI 2.
>
> PW1 proceeded to state that the other person who had been coming from behind and cut her bag and took it away had a maroon marvin that she saw his face as he approached her and again saw him among the two arrested persons. She testified that the latter had been at her shop the same day to withdraw Kenya Shillings 50 and bought and drank a soda and hence she did not only identify him in court but also recognized him as stated."

49. However, it suffices to note that it is only the complainant who witnessed the commission of the offence as such there is no eye witness.

50. However, the complainant stated that she could identify the robbers with the aid of light at the scene and the clothes they were wearing. That, there was light from the children playground and posho mill. Further PW2 Samuel Mureithi stated that the place was well lit while PW3 Ezekiel Kiplangat stated that there were shops near where the complainant was and security lights at the butchery which was near. But, PW3 Ezekiel Kiplangat went on to state that, the shops were closed and that "where she was robed was dark, as no one has built houses there". Thus, the evidence of the complainant as to the light at the scene is contradicted by that of PW3 Ezekiel Kiplangat evidence that the scene was not lit.

51. In addition, PW3 Ezekiel Kiplangat categorically stated he had never seen or known the appellants. That the following day 9th September 2021, he saw four (4) robbers trying to open the complainant's shop. He stated as follows: -

> " Those who came to open Ann's door on 9th, it was dark. I did not see them. I have never seen the accused persons herein before. I don't know them".

52. In addition, PW2 Samuel Mureithi stated that, he did not identify the robbers at the scene. Furthermore, PW5 the investigating officer testified in cross-examination that when he visited the scene, noted "it was about 50-100m from complainant's shop". But he did not testify as to the lighting at the scene of crime.

53. Even more so, no effort was made by the prosecution to establish how far the light was form the scene and intensity thereof. Consequently, the identity of the appellants by aid of lights at the scene remains fluid.

54. As regards, identifcation of the appellants by the clothes they were wearing, it is not clear from the evidence of the complainant who among the appellants was wearing the leather jacket. The record of the trial court indicates that, when the complainant was testifying she stated as follows: -

> " The one I see (points) had the leather jacket on the date and strangled me. The other one (points) is the one who had been the maroon marvin, approached from behind, cut and took away my bag. He had been at my shop earlier. I was about 5 steps from him"

55. The reference to; "the one I see (points)" is not clear as to which of the accused the complainant was referring to. Furthermore, PW4 PC Ellan Wekhulu stated that, the leather jacket was worn by the 1st accused when arrested, yet, PW5 the investigating officer testified that the 2nd appellant; Stephen Muhika Mwangi was still wearing the said jacket when arrested. The evidence is thus clearly contradictory. Consequently, the complainant having failed to identify who was wearing the leather jacket at the time of offence, identification of the appellants by clothes worn was not adequate.

56. Furthermore, it is noteworthy that, the trial court stated in the judgment that, the complainant also identified the accuseds by their "physique and dressing even as she reported the matter and again in court" However, the complainant's evidence does not reflect the same.

59. It suffices to note that identification of an assailant is a very critical component of any criminal offence. In cases of this nature, where the suspects are not arrested at the scene, or during the commission of the offence, the complainant should at the time of reporting the offence, give a clear and detailed account of the description of the suspects.

60. If the suspects are not known, then it is paramount that an identification parade be conducted to ascertain the real suspects, and accord the complainant an opportunity to identify them and to protect

the suspects from mistaken identity. In the instant matter no identification parade was conducted. The investigating officer conducted this matter very casually.

61. That said, the issue of recovery of the phone is clear. PW4, PC Ellan Wekhulu who recovered it did not know the appellants prior to their arrest. He testified that he recovered the phone from the 1st accused. The 1st accused/appellant's denial thereof holds no water. Further the complainant identified the phone as the one stolen during the robbery.

62. However, I note that the offence was committed on 8th September 2021 and the phone recovered on 17th September 2021, consequently, there was a substantive lapse of time after the incident. In the circumstances the doctrine of recent possession is not tenable, but the evidence supports the charge of handling suspected stolen property holds.

63. Pursuant to the aforesaid I quash the 1st appellant's conviction on 1st count and I substitute it with conviction on the alternative count Furthermore, sentence imposed is set aside for two reasons, the appropriate sentence for robbery with violence is death. Therefore twenty (20) years meted out is not lawful. Secondly, having quashed conviction on main count, the twenty (20) years imprisonment isset aside.

64. Pursuant to the aforesaid, and taking into account the circumstances of the case herein and the period the accused has been in custody. I sentence the 1st appellant to serve five (5) years' imprisonment. This period has already considered the period he was in custody during trial. The sentence run from the date of sentence in the trial court.

65. On the other party the 2nd appellant Stephen Muhika Mwangi be set free unless otherwise lawfully held.

66. It is so ordered.

DATED, DELIVERED AND SIGNED THIS 23RD DAY OF JUNE 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

The appellants present virtually

Ms. Chepkonga for the respondent

Ms. Hannah: court assistant