



REPUBLIC OF KENYA



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**Gakanga v Republic (Criminal Appeal 37 of 2020)  
[2024] KEHC 5098 (KLR) (7 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5098 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NANYUKI  
CRIMINAL APPEAL 37 OF 2020  
DAS MAJANJA, J  
MAY 7, 2024**

**BETWEEN**

**PETER GAKANGA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence dated 29th May 2020 by Hon. L. Mutai, CM at the Magistrate's Court at Nanyuki in Criminal Case No. 132 of 2017)*

**JUDGMENT**

**Introduction and Background**

1. The Appellant was charged, convicted and sentenced to death for the offence of Robbery with Violence contrary to section 296(2) of the Penal Code (Chapter 63 of the Laws of Kenya). It was stated in the charge that the Appellant, together with others, on 05.01.2017 at Umande in Laikipia East Sub County within Laikipia County while armed with dangerous weapons namely crowbars robbed off one Benson Gatitu Wachira (Deceased) of his motor vehicle registration number KBR \*N make Probox colour white valued at Kshs. 550,000.00 and immediately before or after the time of such robbery murdered the Deceased.
2. The Appellant is dissatisfied with this decision and now appeals against the conviction and seeks that the same be set aside in whole. His appeal is set out in the Petition of Appeal filed in court on 09.06.2020 and is supported by his oral and written submissions. The Respondent ("the Prosecution") opposed the appeal through the written submissions of its counsel.

**Analysis and Determination**

3. In determining this appeal, I am mindful that I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither



heard nor saw the witnesses testify in order to assess their demeanour (see *Okeno v Republic* [1972] EA 32, *Kiilu and Another v Republic* [2005] 1 KLR 174). In order to proceed with this task, it is necessary to reprise the evidence emerging before the trial court.

4. The Prosecution produced 12 witnesses in a bid to prove its case against the Appellant. Mary Wambui Kariuki (PW 1), the wife of the Deceased, recalled that on the material day at 8.00am she was with the Deceased at her place of work in a shop at Nanyuki town. At 2.00pm, she called the Deceased who told her that he was already at home repairing a pump and that he was heading to Mugumo area. PW 1 then received a call from her neighbour who told her that her cow had disappeared and he wanted PW 1 to call the Deceased and inform him. PW 1 tried calling the Deceased but he was not picking up his phone. When she called the Deceased at 5.00pm, she received an SMS which read that he had some customers. PW 1 continued calling the Deceased but his calls went unanswered. In the morning, their employee Muriuki told her that the Deceased had left in the company of the Appellant. Her brother-in-law has also tried to contact the Deceased but in vain.
5. PW 1 recalled that on 06.01.2017 she received another call from the Deceased's number 0721\*789. An SMS said that the Deceased had gone to Ethiopia to buy goods. PW 1 replied and asked him to send the Appellant's number which she received from the Deceased's number. Another SMS read that she should not wait for her husband as he was on his way to Uganda while another read that PW 1 should not call him as he had a sore throat and he could only connect through SMS. When she received the Appellant's number, 0774\*694, PW 1 called him to inquire about the Deceased and he replied that they had parted company at Maili Sita.
6. On 08.01.2017 another SMS said that the Deceased was in Ethiopia and he was fine and later, he called and said the phone was off and they should talk the following day. Later he sent an SMS and said he would come the following day. On the same day, PW 1 reported the disappearance of the Deceased to Umande Police Station. She tried to call the Appellant but he was not available. She testified that the Deceased had never sent an SMS to her since she married him 12 years earlier and that he would always call. That it was not usual for him to leave without informing her. She further stated that the Deceased had left in a motor vehicle KBR \*N Probox.
7. On 10.01.2017, PW 1 stated that she reported the disappearance of the Deceased at Nanyuki Police Station in the company of her brother-in-law. On the way and in the company of 2 police officers, they passed through the Appellant's home. They did not find anyone in the compound. When one of the officers opened the door of the house whose window was open, PW 1 stated that she noted blood stains at the door covered in saw dust. She also noted that there was something burnt in the compound. One officer found a freshly dug out place and when PW 1's brother-in-law and the police officers dug the area, they informed her that they had found a body. The body was taken to the mortuary from where PW 1 identified the body as that of the Deceased.
8. A casual labourer employed by the Deceased in 2017, Jackson Muriuki Kagura (PW 2), testified that on 05.01.2017 between 8 - 9 am, he found the Deceased at home with PW 1. That he loaded 6 bags of maize and they left for Mugumo where the Deceased operated a shop. PW 2 confirmed that they went with the Deceased's motor vehicle to Nanyuki town. The Deceased left him offloading maize and went to repair a water pump. PW 2 recalled that while they were in town, the Appellant, who he knew, came and found him outside the hardware and they exchanged pleasantries.
9. When the Deceased came, PW 2 told the court that he heard him inform the Appellant that he wanted to buy a drum at Depotes as he wanted to start selling fuel. PW 2, the Appellant and the Deceased went with the Deceased's motor vehicle to have lunch. Thereafter they went to the Appellant's house at Karadi in Umande but they did not find anyone. PW 2 recalled that the Appellant went into one



of the houses in the compound, removed 2 plastic tanks which they loaded on the vehicle and went to the Deceased's house. They also went to the river where the Deceased's son, Geoffrey Njoroge Gatitu (PW 3), was and they connected the pump and left him irrigating. PW 2 stated about 2 hours after the Deceased had left, the Deceased's herder came and told him and PW 3 that one cow had disappeared. The Deceased's brother (Gachugu) tried to call the Deceased but his phone was not going through. Gachugu called PW1 and informed her about the lost cow and PW 1 came in a motor cycle and they left to search for the cow.

10. On the following day, PW 2 called the Deceased but his phone was not being answered. He called PW 1 who told him that the Deceased had also not picked her calls. Later PW 1 called PW 2 and asked him to go to her home where PW 1 came with police officers who arrested him. PW 2 had informed PW 1 that the Deceased had left with the Appellant. The following day, he was shown a tank which they had picked at the Appellant's home. PW 2 restated that the Appellant is the one who opened the gate to his home which is fenced as the Appellant used to keep pigs before he left the area. He stated that the Deceased was wearing a khaki doted t/shirt, brown and dark brown jacket.
11. PW 3 told the court that the Deceased used to run a posho mill at Mugumo. That on 05.01.2017, he was at their farm irrigating it in the company of the Appellant. He informed the Deceased that the pump had broken down whereupon the Deceased asked him to wait for PW2 so that they could take the pump for repair in Nanyuki. They brought the oil pump to Nanyuki for repair and that PW 2 and the Deceased left in the motor vehicle KBR \*N and he was left with the Appellant. That the Deceased and PW 2 then came back at 2.00 pm and the Appellant was also present. That PW 2 and the Deceased fixed the pump and that the Appellant assisted the Deceased and that at that time, the Appellant had left. PW 3 stated that the Deceased asked PW2 to be left behind as the Appellant had not come and that the Deceased said he was going to Depotes to pick some drum. That the Deceased left together with the Appellant and that at 5.00pm, Alex the herdsman came and said that one cow had disappeared. He asked PW 3 to call the Deceased and inform him but when he called, the Deceased was not answering.
12. PW 3 stated that PW 2 informed him that the Deceased was to travel to Depotes and that the Deceased texted him on his phone that he could not talk to him as he had a sore throat. PW 3 stated that they recovered the cow later and that they also informed PW 1. PW 3 stated that the following day, he tried to call the Deceased but he still insisted that he should text him. PW 3 was surprised because the Deceased always talked to him on phone. PW 3 stated that he texted the Deceased and told him to send him Kshs.20,000.00 to buy tomatoes as he wanted to confirm if he was the one texting. That is the time he sent PW 3 a text and said they could talk once he came back from Moyale. PW 3 stated that he showed his uncle the SMS and that later he received information that the Deceased had been found dead. PW 3 stated that he had known the Appellant for about 1 year, that he did not call him and that they had no differences. PW 3 restated that the Appellant came to the shamba together with the Deceased and PW2 at 2.00pm and that he left with the Deceased at 4.00pm. He denied that there was a dispute over water among farmers or that on the material day the Deceased was to attend a meeting to resolve the water dispute.
13. A brother to the deceased and farmer in the area, Joseph Gachugu Wachira (PW 4), told the court that on 05.01.2017 at 5.00pm, the Deceased's herdsman, Sang, came to ask him about a missing cow. PW 4 called the Deceased but his call went unanswered. Later on, when PW 1 came to see him, she told him that she had also tried calling the Deceased but without success. PW 4 testified that on 07.01.2017 he went to the Deceased's home where he found PW 1 with his sister. PW 1 told him that the Deceased had not come back. They went and reported the matter at Nanyuki Police Station. He was later informed that the Deceased's motor vehicle had been recovered in Malaba and the Appellant had been arrested.



- PW 4 stated that he accompanied police officers to Nanyuki mortuary but he did not see the Deceased's body.
14. On the following day, PW 4 accompanied police officers to the Appellant's home. The gate had been locked and they entered through the window but they did not see anything. One of the officers went behind the home and called to show them some saw dust on the ground. He stated that the saw dust was covered in blood stains and they followed a path that led them to the shamba from the home. They found a place that had been dug out and covered with napier grass. They borrowed a jembe and a spade, removed some soil and then saw a body which had been buried. The police officer came and removed the body. PW 4 stated that he identified the body as the one of the Deceased. The police officer then broke into the Appellant's home and recovered pieces of metal bars which were blood-stained.
  15. A Narumoru businessman, Jackson Muriuki Maina (PW 5 but stated as PW 4), recalled that on 06.01.2017 at 4.30pm, the Appellant came to his shop and asked him to store for him two tanks and a spare wheel as he wanted to take the motor vehicle to the car wash opposite his shop. PW 5 also stated that he knew the Appellant as he used to sell herbicides to him. PW 5 stated that at the time, the Appellant was in a white Toyota Probox. PW 5 stated that the Appellant did not come back so he decided to keep the items in the shop. On 09.01.2017, police officers came and inquired about the Appellant's items. He told them it was normal to keep items for a person known to him. He however handed over the items to the police. PW 5 stated that he did not see any blood stains on the items the Appellant left with him and that he saw the rungu when the police came for the items.
  16. An employee of PW 5, James Wambugu Mwangi (PW 6 erroneously stated as PW 5), recalled that the Appellant came to the shop on 06.01.2017 in a white Toyota Probox and asked PW 5 to keep some items; a spare wheel, two plastic tanks and a rungu and said that he would come back after going to the car wash. PW 6 stated that he did not know the Appellant before and that he did not come back after leaving the items. He stated that they closed the shop at 6.30 pm and stored the items in the shop until 09.01.2017 when the police officers came and took the items.
  17. IP Patrick Waweru at the material time Deputy OCS Umande Police Station (PW 7 erroneously stated as PW 6) told the court that on 11.01.2017 at 9.30am a man and a woman reported that two culprits had been arrested in relation to an earlier report of a missing person. They suspected that the missing person, the Deceased, was at the home of one of the suspects. PW 7 stated that together with PC Mutuma, they went to the home of the suspect where they found the gate closed as well as the home in the compound. PW 7 peered into the window and noticed some saw dust in the sitting room. At the front door he saw sawdust and red stains. He decided to call his colleagues. PC Mutuma called PW 7 and told him there was a freshly dug place whereupon they started removing the soil until they saw a human body which they exhumed and took to Nanyuki Teaching and Referral Hospital Mortuary. PW 7 recalled that the body had started decomposing and appeared to have been tied and there were injuries on the head. They also broke into the suspect's home and recovered a blood-stained metal bar. PW 7 stated that the Deceased's wife, PW 1, is the one who led them to the home of the suspect who she referred to as 'Peter'.
  18. PC Mohammed Hassan Abdi of Teso DCI (PW 8 erroneously referred to as PW 7) recalled that on 08.01.2017 at 11.00am he received a call from CPL Kemili of Laikipia DCI who informed him of a person and his Toyota Probox KBR \*N white in colour missing and phone signal of that person was at Malaba town. PW 8 stated that the motor vehicle was found parked outside Yasin Supermarket but there was no one in the motor vehicle. They laid an ambush and after 2-3 hours, the Appellant came and opened the motor vehicle and sat inside it whereupon he was arrested. He told the police officers that he was a mechanic and that the owner was around. They recovered the Deceased's driving license. At the police station, the police conducted a search of the motor vehicle and recovered others



document including a copy of motor vehicle KAL \*A, 2 pair of pliers, spanner, handsaw, rubber stamp, HP flash disk and 3 mobile phones.

19. IP John Mugo from DCI Central Laikipia (PW 9 erroneously stated as PW 8) stated that on 10.01.2017 he went to Gateru village in Daiga Location, Laikipia where he accompanied the DCIO Laikipia and other security team to parcel No. Kalolu settlement scheme Plot No. 339 registered in names of Joseph Waweru. According to the DCIO, the land had been sold to the Appellant and that on the farm, there was a newly dug grave where the security team reported the Deceased was buried. The team also noted blood stains in the home of the Appellant which was in the farm and that under the request of the DCIO, PW 9 took photos including the General view of the home where blood stains was recovered, a clear view of the blood stain partially carried with blood stains, Close up view of the blood stained metal bar and sickle, close up view of blood stem as the 2 metal bar, General view of the partially dug area in the farm, General view of the body after the grave was dug, General view of the shallow grave and Close view of the injury on the face eye and right jaw. PW 9 confirmed that he found the body of the Deceased at the subject land.
20. Joshua Kibera Chege (PW 10), a pathologist and doctor conducted the post mortem of the Deceased on 16.01.2017 at Nanyuki Teaching Referral Hospital after the body was identified to him by Samuel Muthoni and Julius Karuhi. PW 10 noticed that the clothes were dirty and had blood stains, there was no rigor mortis, the body had been dead for a couple of days. There was dirt on the body, fresh blood on the hand, multiple cut wounds on both ears, cut wounds on the temporal region occipital region, bruises on the left eye abrasions on the back probably caused by dragging. Two dentures and 3 loose tooth on the mouth, the lungs had blood deposits, bruises of the 3-5 ribs, hematoma (collection of blood) at the back of the head, a fracture extending from one ear to the other frontal fractures, the base of the skull had a committed fracture and the brain had started decomposing. PW 10 concluded that the cause of death was severe head injury due to cut wounds and blunt force trauma. PW 10 stated that it was not possible to tell the exact time the Deceased died, that it is difficult to determine the last person who touched the body and that his job was only to determine the cause of death. That as a pathologist, he could tell which injury can cause death and that the injuries on the head were apparent to cause the death.
21. Henry Kiptoo Sang (PW 11), a Government Analyst based at Government Chemist Department Nairobi stated that he was given a piece of Liver, muscle and tendon in a white plastic container mold of the Deceased, a Brown jacket wrapped in a khaki paper, 3 blood stain cotton wool swabs in a paper bag, 2 iron bars wrapped with a swab paper, sickle wrapped with a khaki paper, Soil sample in a khaki envelope, Orange/green/yellow carton in a white envelope, a blood sample on FTA paper, Blood sample on FTA paper marked Antony Mwangi, Blood sample in TFA paper marked Joseph Kimathi, Blood sample of FTA paper marked Jonshon Muchiri, Blood sample on FTA marked George Kingori and Blood samples on FTA marked Githinji Mugwima. That they were accompanied by a memo which required them to examine the items, determine presence of blood and relationship. PW 11 stated that he examined the items and came up with the following findings; No blood stain was detected on the jacket, attempt to generate DNA profile on the liner, muscle and tendon were unsuccessful as they were decomposed, the blood stains on the items had gone bad and could not generate a DNA profile, the iron bars had been stained in human blood, the sickle was also slightly stained in human blood and that no blood stain was detected on the soil sample. PW 11 further stated that he did a D.N.A analysis on the blood stains and based on the D.N.A profile he made a conclusion that the D.N.A profile generated and the sickle and curtain all matched despite from 1 unknown swab paper. PW 11 determined that the blood on the carton, iron bar and sickle belonged to an animal. He stated that if someone touched an item, you could leave D.N.A on the items but PW 11 could not confirm who had touched the item



- before the court. He further stated that they do not do dusting in their laboratory and he confirmed that the body part was from a human being but he did not identify the owner of the body.
22. CI Jacob Murithi (PW 12), the DCIO Laikipia East and the investigating officer stated that on 07.01.2017, PW 1 came to his office upon being referred to him by the OCS Umande Police Post. She informed him that the Deceased had gone missing from 05.01.2017 together with his motor vehicle registration NO.KBR \*N Toyota Probox white in colour. She said that she was suspicious because whenever she called the Deceased's mobile number 0721\*789, the phone was not being answered and replied through SMS. She showed him the SMS in her phone that read, 'I am a terrorist, en-route to Moyale and then Ethiopia'. PW 12 called Interpol officers checked the mobile phone which was located at Malaba in Uganda border. That the SMS was talking about Malaba and he called the DCIO Teso North and gave him the registration number of the motor vehicle. After 30 minutes they called PW 12 and told him that the motor vehicle was recovered and 2 suspects arrested. That earlier, when PW 1 called PW 12's office, she stated that the Deceased had gone to shop in Nanyuki and had returned home in the company of the Appellant who was a good friend of the Deceased.
23. PW 12 stated that he was told that the two left home together but did not know where they were going. PW 1 later sought assistance from Timau Police Post and asked that the home of the Appellant be visited. That she was accompanied by the Deputy O.C.S Timau to the home of the Appellant and while there, they told PW 12 that they could see blood stains in the house. PW 12 went to the scene and inside the house, he discovered a lot of blood stains covered with soil. That in the farm there was napier grass and he discovered the Deceased's body buried in a short grave and covered with soil and napier grass planted. PW 12 called scene of crime officers and they exhumed the body and took it to Nanyuki Teaching and Referral Mortuary. That inside the home, they received 2 iron bars which had blood stains and he called the officers from Malaba and informed them what they discovered. The Appellant then informed the officers that the spare tyre of the Deceased's motor vehicle was at a Agrovet at Narumoro and he also said that they had also left the plastic drum at the same place. PW 12 went to Narumoro and the owner of the Agrovet. She told him that the Appellant had gone to the shop on a Friday and left a spare tyre and 2 plastic drums.
24. PW 12 stated that he took the items to Nanyuki and asserted that the last person with the Deceased was the Appellant. That when they arrived at the Appellant's home, the door was locked and they forced the door open. He stated that there were some neighbours near the home and the napier grass on the ground was newly planted. PW 12 stated that he was the one who exhumed the body and that the Appellant was at Malaba at the time. That on 10.01.2017 when the Appellant was brought from Malaba he implicated 7 other people and those people were present when they exhumed the body. PW 12 stated that they were doing business with the Deceased and the Appellant but they found out that they were not involved in the Deceased's death. He further stated that the scene of crime officer was present when they exhumed the body and he confirmed that they also took samples which were taken to PW 11. PW 12 stated that the officers from Malaba gave him the driving license of the Deceased which was recovered in the motor vehicle. He identified and produced the sketch plan of the scene that showed a main home where the Deceased was murdered. From the main house, they found a pig shed and the grave that was 200 meters away. From the shed, the body was 50 m away and the grave was 10 meters from the boundary fence. They noted something had been buried in the compound and that the Deceased had injuries on the left side of the head. There were also no pigs in the shed. PW 12 stated that he did not establish any grudge between Appellant and the complainant. PW 12 produced the motor vehicle registration no. KBR \*N white Toyota Probox, the plastic drums, the tyre, the spade, the rungu, the sickle and iron bar, carton, the jacket and diving license.



25. PW 12 denied that he called the Appellant vide mobile phone number 0774 \* 674 and that the Appellant told him that he was in Malaba. He stated that he located the Deceased's mobile phone in Malaba but stated that he did not have any evidence that the Appellant was found in possession of the Deceased's phone. He confirmed that the Deceased's phone sent an SMS to PW 1 and that the Deceased's phone number was 0721 \*781. However, he did not see the need to prove the phone belonged to the Deceased. He also stated that PW 1's number was 0710 \*764 but he did not have anything to prove the phone belonged to PW 1. PW 12 stated that the motor vehicle KBR \*N belonged to the Deceased but did not also see the need to prove ownership of the motor vehicle. He stated that he called the DCI Teso on 07.01.2017 and that the Appellant was arrested around 5 pm but PW 12 did not know what time the motor vehicle was recovered. PW 12 further testified that the motor vehicle before the trial court was registration no. KBR \*R and that the person who was in possession of the Deceased's phone is the one who wrote the SMS to PW 1 but PW 12 could not tell who had the phone and he did not know whether some SMSs were sent through the Deceased's phone after the Appellant was arrested. PW 12 also admitted that no inventory was signed when the Appellant was arrested.
26. PW 12 further testified that he was told by the police officer from Malaba that the Appellant had told them that the spare tyre and tank was at Narumoro in an Agrovot. That PW 12 went to Narumoro in the Appellant's absence, that the officers called PW 12 while the Appellant was at Malaba with the officers and that the items collected from Narumoro did not have blood stains as they had already taken them for DNA analysis. PW 12 confirmed that the Appellant was brought to Nanyuki on 10.01.2017 but that it was not true that his constitutional rights was violated by not being brought to court within 24 hours. He asserted that the Deceased's body was found on 07.01.2017 and he was with other officers and PW 1 when they retrieved the body. He further asserted that the Deceased was buried in the Appellant's land and PW 12 stated that he did not need to know that the land is registered to the Appellant. PW 12 stated that he was not aware if the scene of crime officer testified about the ownership of the land and did not know if the said land is registered under Joseph Waweru as per Pexhibit 7 produced.
27. PW 12 told the court that the Deceased's motor vehicle was stolen and taken to Malaba to be to be sold in Uganda and that the Appellant thought that no one would find him as he had killed the Deceased. He confirmed that the motor vehicle was intact when it was recovered. He clarified that the Deceased's motor vehicle was KBR \*N and that it was the same motor vehicle that was brought from Malaba. That PW 1 testified that the motor vehicle belonged to the Deceased and the witness at Narumoro referred to a Probox white in colour. PW 12 stated that he was not present when the Appellant was arrested, that PW 1 reported on 07.01.2017 that her husband was missing and she was not aware that the Appellant had been sent to Malaba by the Deceased. PW 12 stated that he found the Appellant at Narumoro as he had been told and PW 1 knew the Appellant's homestead and she was the one who led the O.C.S and other officers to the Appellant's home.
28. After the close of the Prosecution's case, the trial magistrate put the Appellant on his defence. He testified on his own behalf and called one witness. The Appellant testified that he was a truck driver and that between 23.12.2016 and 10.01.2017 he was off duty with his family when on 03.01.2017 he received a call from the Deceased whom he had known since 2013. The Deceased asked if he would bring a pump he had bought in Malaba. The Appellant told him he was tired. The Deceased called him again on 04.01.2017 at 5.00am asking him if they could meet but he told the Deceased that he was taking his child to Narumoru. On 05.01.2017 at 8.00am the Deceased called him again and told him that he was coming to Nanyuki and he wanted them to meet. The Deceased called him 10.00am and informed him was at shop in Kugeria. The Appellant stated that he met the Deceased there together with his worker called Maina and PW 3 and they proceeded to a hotel where the Appellant revisited



the request of the pump in Malaba. They agreed on the payment of Kshs. 10,000.00 and the Appellant agreed to pay a deposit of Kshs. 5,000.00, fuel the vehicle and pay him Kshs. 2,000.00 for expenses.

29. The Appellant stated that his vehicle had goods which he wanted dropped at his home. The Deceased then told him that he had received a phone call from a Kalulu and that they were to have a meeting. The Appellant and the Deceased went back to his vehicle where he called his worker Maina and he gave him some work-related instructions. The Appellant stated that the meeting with Kalulu was at Maili Sita and he confirmed that he accompanied the Deceased to Maili Sita at about 4.30pm. That they met Kalulu who was with five other people he knew well. The Appellant stated that the meeting was to be held within Sirimon area — Homegrown farm and that after the Deceased paid for the refreshments he requested the Appellant to proceed to Malaba as he went for the meeting. He then paid the Appellant for the assignment as agreed and gave him the key to his motor vehicle in the presence of the Kiosk owner. The Appellant stated that he then left for Nanyuki and at Narumoru, he met PW 5 and left him with some tanks and spare wheel at his shop as he took the motor vehicle for a wash. That the motor vehicle was cleaned and at 6.30 he went back to the said shop and found it closed. He contacted PW 5 but he said that he had already left and he then proceeded with the journey and he was in Nakuru at 9.30pm. While there, Deceased called him and the Appellant explained that he was on the way. He stated that he left at 11.00pm and by 6.30am on 06.01.2017 he was in Malaba. That he contacted the Deceased who promised to give him the contact number of the person with the pump.
30. When he called again, the Deceased told him that the person with the pump had travelled to Nairobi until 08.01.2017. As the Deceased wanted him to wait for the person, he promised to send him more money. The Appellant booked a lodging opposite Malaba Police Station and parked the motor vehicle outside. At 1.00pm he received a call from PW 1 about Kshs. 1000.00 that she had sent to him as promised by the Deceased and that he also confirmed receipt of the same to the Deceased. That on 07.01.2017, he called the Deceased about the contact person but the Deceased told him to wait. At 11.00am they talked again and the Deceased sent a phone number of the contact whom he called and who told him he was still in Nairobi. The Appellant stated that he also spoke to PW 1 about the trip to Malaba to which she retorted that only the Deceased knew about it. Later, the Deceased texted the Appellant asking him to wait. On 08.01.2017 he called the contact person but he never responded. He later contacted PW 1 and she told him that the Deceased had not returned home since 06.01.2017 but that he was sending her messages and that she had reported of the Deceased having been missing at Umande Police Post and at Nanyuki Police Station and had given the police his phone number.
31. The Appellant decided to drive back to Nanyuki but he received a call from PW 12. The Appellant told him that he was in Malaba and that he was communicating with the Deceased until 07.01.2017. He explained to him how the Deceased had sent him to Malaba with his motor vehicle and how he had been told to wait by the contact person who was not available. The Appellant recalled that as he was starting the motor vehicle, three men came and asked him whether he was the one with the motor vehicle. When he answered in the affirmative, he was requested to accompany them to the police station where he was locked up. While at the police station, the Appellant stated that he spotted somebody that he knew from Narumoru. The Police also arrested him.
32. On 09.01.2017, the Appellant stated that he was picked by DCI Nanyuki. That he met PW 12 whom he claimed hit him. That while under arrest, he was asked about PW 1 whom he knew. He was informed that the Deceased's body had been recovered where PW 1 and PW 4 had taken the police. The Appellant denied committing the offence as charged and asserted that he was an innocent person and that he never robbed anybody violently.
33. When cross-examined, the Appellant stated that he did not have any document from the Deceased for the pump, nothing to show that the Deceased and PW 1 sent him money when he was in Malaba or that



they and the said contact person even called him. He restated his position that he was in contact with PW 1 who even asked him if he had arrived safely and that he spoke to the Deceased on 07.01.2017.

34. The Appellant's witness, Gerald Mathu Wanjiru (DW 2 but erroneously stated as DW 4) testified that he had known the Appellant since the year 2000 as he was a KCC driver. DW 2 stated that he worked at Maili Sita then and that he ran a hotel and shop. That on 05.01.2017, at 4.00pm he had six customers from Daiga and they had a vehicle, a grey Toyota Probox and that after 10 minutes, the Appellant and the Deceased arrived in a white vehicle KBR \*N. After ordering refreshments, the Deceased gave the Appellant keys to the car and an unknown amount of money. DW 2 heard them discussing a long distance journey. Thereafter, the Appellant left in the Deceased's vehicle and the Deceased was left with a Muchina and Githinji who left in the grey vehicle after the Deceased paid the bill. DW 2 stated that on 10.01.2017, he heard that somebody had been killed and burned within Daiga area and that it was the Deceased. He also heard about the arrest of the Appellant. DW 2 insisted that the Deceased gave out his vehicle to the Appellant.
35. At the conclusion of the trial, the parties also relied on their written and oral submissions. In the judgment, the trial magistrate was convinced that the Appellant was guilty of the offence of robbery with violence and convicted him accordingly. I have gone through the record, that is, the evidence, submissions and judgment of the subordinate court. The question before this court is whether the prosecution proved the offence beyond reasonable doubt.
36. I agree with the trial magistrate that the offence of robbery with violence is committed in any of the following circumstances:
- a. The offender is armed with any dangerous and offensive weapon or instrument; or
  - b. The offender is in company with one or more person or persons; 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.

Further, the above ingredients or circumstances of the offence are to be applied disjunctively and that any one of them is enough to base a conviction as was held by the Court of Appeal in *Dima Denge Dima & Others v Republic* [2013] eKLR.

37. The Prosecution case before the Subordinate Court was anchored on circumstantial evidence based on the doctrine of recent possession and the doctrine of last seen. The Court of Appeal, in *David Mugo Kimunge v Republic* NYR CA CRA No. 4 of 2014 [2015] eKLR cited with approval, the Supreme Court of Canada's case in *R v Kowkyk* (1988) 2 SCR 59 while explaining the doctrine of recent possession where the said Canadian apex court held as follows:

Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must– draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.

38. The appellate court then went on to state that:



19. There is no significant disparity between the English /Canadian position and what has been accepted as the applicable doctrine in our courts. Applying that learning to the case before us, we are of the view that the inference arising from the unexplained possession of stolen goods is one of fact. The trier of fact in this case was the Principal Magistrate's court which had the advantage of seeing and hearing the witnesses testify before it. As always, the first appellate and the second appellate courts must of necessity give allowance for this advantage and be slow to interfere unless there was no evidence to support the findings or the findings were perverse. It is also clear from the decisions that the truth of the explanation alluded to in the doctrine is not the standard applicable. Nor is it acceptable that any fanciful or concocted explanation will suffice. The explanation must pass the muster of reasonableness and plausibility. Did it do so in the case before us?
39. In an earlier case, the Court of Appeal, in *Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005* [2006] eKLR summarised the essential elements of the doctrine of recent possession as follows:
- In our view, 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 the 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.
40. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be a plausible (see *Paul Mwita Robi v Republic KSM CA CRA No. 200 of 2008* and *Kelvin Nyongesa & 2 others v Republic HC KKG CRA No. 176 of 2016*).
41. The doctrine of last seen was discussed in the case of *Kimani v Republic* [2023] KECA 1390 (KLR) where the Court of Appeal stated that:
- The doctrine of 'last seen alive' is based on circumstantial evidence where the law prescribes that the person last seen with the deceased before their death was responsible for his or her death and the accused is expected to provide an explanation as to what happened...
42. In *Chiragu and Another v Republic* [2021] KECA 342 (KLR), the Court of Appeal discussed the doctrine of last seen and cited with approval the Nigerian case of *Moses Jua v The State* (2007) LPELR-CA/IL/42/2006 where the court observed as follows:
- Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the last seen theory in the prosecution of murder or culpable homicide cases is that where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his or her death. In the absence of any explanation, the court is justified in drawing the inference that the accused killed the deceased.
43. It is against this background that I turn to consider the case. The Appellant did not dispute that he was found in possession of the Deceased's motor vehicle in Malaba. His explanation was that the Deceased had given him the car to run errands for the Deceased in Malaba by picking up a pump from a third



party. However, this evidence is negated by the fact of the body of the Deceased being recovered in what was known by PW 1, PW 2, PW 3 and PW 4 as the Appellant's home. The Appellant was also found with the Deceased's motor vehicle which had his personal property including a jacket which PW 1 and PW 2 stated the Deceased wore on the material day. The said witnesses also stated that there was never an indication that the Deceased had planned to send the Appellant to Malaba as claimed by the Appellant. PW 8 and PW 12 testified that they traced the signal of the Deceased's phone in Malaba, the same place where PW 8 found and arrested the Appellant with the Deceased's motor vehicle. The trial magistrate who heard the Appellant's testimony stated that he was not credible and that the evidence of DW 2 was doctored.

44. On the basis of the entirety of the evidence, I find that the Appellant was not able to give a plausible and reasonable explanation as to how he was in possession of the Deceased's motor vehicle in Malaba which contained the Deceased's personal items and clothing including the jacket that he wore on the material day. He was not able to credibly explain what he was doing in Malaba when none of the Deceased's closest people, including his wife, PW 1, his worker, PW 2 and his son PW 3 ever knew of such plans. He was also not able to explain why the Deceased's body and objects believed to have been used in killing the Deceased were found at his compound and house. What is on record is that PW 2 and PW 3 testified that the Appellant was the last person seen with the Deceased when they left the Deceased's farm. PW 2 reported the same to PW 1 who in turn informed PW 4 hence the initial search of the Appellant's home by them and the police.
45. Therefore, the fact of the Deceased's body and blood stained metal crow bars being recovered at the Appellant's compound, the Deceased's motor vehicle and his personal belongings being recovered with the Appellant and the Appellant being the last person seen with the Deceased unerringly leads to a conclusion that it is the Appellant who killed the Deceased and violently robbed him of his personal properties including the motor vehicle KBR \*N. I find that this conclusion by the trial court was sound and supported by the evidence on record.
46. The Appellant complains that he was prejudiced since the succeeding magistrate who took over the case midway did not hear the Prosecution's witnesses. He submitted that even though his rights under section 200(3) of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya) were read to him, he was still prejudiced. The said provision provides as follows:

Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resummoned and reheard and the succeeding magistrate shall inform the accused person of that right.
47. The Appellant submitted that he demanded that witnesses be resummoned to testify afresh but that this was not done. I have gone through the record and note that on 30.10.2019, the Appellant was okay with the trial court proceeding from where the matter had reached and on 18.11.2019 he requested for the previous magistrate to continue with the case. He did not demand that the prosecution witnesses be recalled to testify and he did not do so even by the time he was giving his defence testimony. There is therefore no prejudice that was occasioned on him as claimed.
48. The Appellant also pointed out that there was no evidence from Safaricom Limited to prove where the Deceased's phone was and that this evidence was improperly admitted. The trial magistrate observed in the judgment that the Deceased's phone was not produced although PW 12 stated that it was recovered from the Appellant. Having reviewed the evidence, I find that it was not necessary to produce this data from Safaricom to prove that the Appellant was in Malaba because the Appellant had already admitted



that he was there when he was arrested and he was in possession of the Deceased's other personal items and properties which were sufficient to implicate him.

49. As to whether the land where the Deceased's body was recovered belonged to the Appellant, I have already found that evidence was given by PW 1, PW 2, PW 3 and PW 4 who knew the said place as having belonged to the Appellant since they were his neighbours and knew him some time. PW 2 gave evidence that on the material day, the Appellant even took them to the house where he retrieved two tanks. It is also important to note that the Appellant, when cross-examining these witnesses never disputed that this was his house. Thus, even without evidence of a title deed or lease certificate, there was oral testimony by people known to the Appellant that he used to live in the house where the Deceased's body and blood-stained metal bars were recovered and that this evidence was not challenged. Ultimately, I find that the Subordinate Court's conviction was sound and is affirmed.
50. Since the Appellant's appeal was largely based on the grievance of his conviction and since the sentence of death meted was that prescribed by law and as guided by the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others* [2021] KESC 31 (KLR), I see no reason to interfere with the same.

### **Disposition**

51. The conviction and sentence are affirmed. The appeal is dismissed.

**SIGNED AT NAIROBI**

**D.S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NANYUKI THIS 7<sup>TH</sup> DAY OF MAY 2024.**

**A.K. NDUNG'U**

**JUDGE**

