



REPUBLIC OF KENYA



**Kithendu v Republic (Criminal Appeal E046 of 2022)  
[2024] KEHC 4976 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 4976 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CRIMINAL APPEAL E046 OF 2022**

**RK LIMO, J  
MAY 9, 2024**

**BETWEEN**

**JOSEPH MULYUNGI KITHENDU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. Joseph Mulyungi Kithendu, the appellant herein was charged and convicted for the offence of robbery with violence contrary to Section 296(2) of the Penal Code vide Mwingi SRM's Court Cr No. 616 of 2024.
2. The particulars of the charge are that on the night of 30<sup>th</sup> and 31<sup>st</sup> of May 2024 at Mwingi Township in Mwingi Central Subcounty within Kitui county jointly with one John Kimanzi Mwendaka (a co accused) jointly robbed JACOB WAMBUA MUTIANZEI of one mobile phone make Nokia 1280 imei 354-630-052-343-247 valued at Kshs. 2,000/= and at or immediately before or after such robbery killed the said JACOB WAMBUA MUTIANZEI.
3. The appellant who was the 2<sup>nd</sup> accused at the trial denied committing the offence but after trial he was found guilty and sentenced to death.
4. The prosecution called a total of 13 witnesses and its case against the appellant as well as his co-accused was based on doctrine of recent possession. The mobile phone owned by the deceased (the victim of the robbery) was traced to the appellant and his co-accused and while the trial court found that the appellant's co-accused gave a plausible reason as to how he was found in possession of the victim's mobile phone, the appellant failed to give any explanation and therefore was found to be linked to the robbery and the murder of JACOB WAMBUA MUTIANZEI.
5. Below is a summary of the evidence tendered by the witnesses at the trial court.



6. Fredrick Munyoki Ngethea, a Manager of club named “White House” testified he was sleeping at the said club when a watchman at the club called him and reported to him that a person had been seen dumped in a trench 100 meters from the club and stated he went to the spot and actually found a person lying in the trench but could not identify. He stated that the police later in the morning came and he recorded his statement.
7. Gideon Muimi Muli (PW 2), told the trial court that he worked at Paradise Hotel and that on 30<sup>th</sup> May 2014 at about midnight he received a call from the appellant who told him one Jacob Mutua Nzai wanted to talk to him using the same phone and that Jacob asked him to go and take 5 goats in the morning from Kimanzi Nzage and drive them to slaughter house which he did early in the morning. He stated that he left at 6am, the following day and met the appellant at Paradise Hotel and he informed him that someone had been beaten outside the hotel and that shortly Kimanzi called the appellant and asked him what had happened after he left him with Jacob (the deceased). He testified that the appellant reported that they both went to “white House” and bought drinks before going separate ways.
8. He further testified that later on 20<sup>th</sup> September 2024 a police officer known as Tunai called him and asked him if he knew the mobile phone Jacob (the deceased) used and that he responded that he know it as a Nokia 1280 black in colour and that when he was shown the phone he recognized it having worked with the deceased for 5 years prior to the incident and had seen him with the phone. He identified the phone in court as the one that belonged to the deceased.
9. Mwendwa Kiragala (PW3) on his part testified that he was sleeping in his house on 31<sup>st</sup> May 2014 when at about 3am went to a house he shared with PW1 and told him he wanted to rest. He stated that the appellant rested for about an hour and left to unknown destination. He stated that at about 8 a.m Gideon Muimi (PW1) informed him that Jacob had died.
10. Dorcas Zena (PW4) a worker at “white House Villa” testified that he was asleep at the club when the watchman woke her up telling her that someone was lying down near Paradise Hotel. She stated that she then called the Manager of the “White House” club named Munyoki and proceeded to the scene where the deceased lay before going to the police to report. She stated that at the time she could not tell who the person lying on the ground was and whether he was dead or alive. She recalled that the appellant went to the “White House” villa on 30<sup>th</sup> May 2024 with some revelers.
11. Mwalili Nzaki PW5, owner of Paradise butchery testified that the appellant worked for him and that on the night of 30<sup>th</sup> May 2014, the deceased and the appellant escorted him to his home. He testified that the witness learnt that of the death of the deceased the following morning and identified his body at Migwani District Mortuary.
12. On cross examination, the witness maintained that the appellant and the deceased escorted him to his home on the night of 30<sup>th</sup> May 2014. He also testified about a criminal case he had lodged against the appellant for breaking and entering into his business premises. He maintained the criminal case he had earlier lodged against the appellant about theft had no connection with the robbery case and the two cases occurred on different occasions. He denied the appellant’s suggestion that he had sacked him from employment on 29<sup>th</sup> May 2014.
13. Mary Muwia PW6 & Francis Kilonzo Mutwanzei PW7 the wife and brother of the deceased identified his body to the pathologist at Migwani District Hospital on 12<sup>th</sup> June 2014 before a post mortem was conducted.
14. Anastacia Kanira Munuve (PW8) on part testified that she was in a church service in a house belong to one of a church member on 15<sup>th</sup> July 2024 when he met the appellant’s co-accused who also was



her immediate neighbor. She stated that the appellant co-accused was also their church member and she asked him for his mobile phone since hers had run out of power. She stated that the neighbor lent her the phone and allowed her to use it which she did by removing the sim card inside inserting hers. She stated that she used the phone for 3 days and returned the same to the same neighbour and had no knowledge where the appellant's co-accused had gotten the phone from. She stated that on 20<sup>th</sup> September 2014, police officers in the company of the appellant's co-accused went to her house and arrested her telling her that the mobile phone she had used for 3 days belonged to someone who had been murdered after being robbed. She identified the phone in court as the same one she had used and stated that she honestly believed that the same belonged to the appellant's co-accused when she borrowed it and had no reason to suspect that it was obtained through robbery.

15. Wamba Nguli PW9 was working as a watchman at White House bar at the material time when a boda boda rider met him at his work station and informed him about the body of the deceased which lying next to the bar. He testified that the deceased had a polythene bag covering his face.
16. Gregory Maina PW10 from Migwani Police Station testified that he accompanied PW6 & PW7 to Migwani District Hospital and witnessed as the two identified the body of the deceased before the post mortem was conducted.
17. CPL Tunai Keitany PW11 the investigating officer testified that he was attached to CID offices at Mwingi. He narrated of how he interrogated employees of "white house bar" and gathered information that the deceased had been seen in the company of the appellant at the night of his death. He testified that he obtained the deceased's mobile phone number which was 0705564689 and wrote to Safaricom service provider vide letter dated 25<sup>th</sup> July 2014 (PEXH 3) to ascertain the mobile phone numbers that the deceased was communicating with at the material time. He proceeded that he received a report (PEXH 4) from Safaricom on 28<sup>th</sup> July 2014 with call log data from the phone of the deceased between 29<sup>th</sup> -30<sup>th</sup> May 2014 together with the phone's Imei number which he established was 354603052343242. That he wrote to Safaricom again vide letter dated 4<sup>th</sup> August 2014 (PEXH 5) seeking information on the handlers of the robbed phone after the death of the deceased. That he received a report from Safaricom dated 5<sup>th</sup> August 2014 (PEXH 6) which established that the deceased's phone had been used on the night of 1<sup>st</sup> June 2014 until 2.32pm on 1<sup>st</sup> June 2014 by Mulyungi of ID number 24133217 and this was after the deceased had been murdered. He proceeded that the phone changed hands from Mulyungi to John Mwendaka of ID number 31249510, the appellants co-accused on the same date 1<sup>st</sup> June 2014 at 2.38pm a period of six (6) minutes after the appellant had used it and his co-accused continued to use the phone until 15<sup>th</sup> July 2014 before it changed hands to Anastacia Munuve of ID No. 9932923 (PW8) who used it until 17<sup>th</sup> July 2014 then returned it to the appellant's co-accused. The witness proceeded that he wrote to the Registrar of Persons vide letter dated 8<sup>th</sup> September 2014 (PEXH 7) seeking to establish the identities of the people who had used the phone and he received a report from registrar of persons (PEX 8) on the owner of national ID 24133217 as Mulyungu Kithendu (the appellant herein). The proceeded that police arrested the appellant's co-accused on 20<sup>th</sup> September 2014 and found him in possession of the phone of the deceased. The witness testified that the appellant's co-accused claimed to have obtained the phone from individual who needed fare to Garissa from Mwingi Town at the cost of Kshs 600/-. The investigating officer produced an inventory of the same and a police abstract marked as PEXH 9& PEXH 10 as well pictures of the crime scene and a certificate of the photographs taken marked as PEXH 11 & PEXH 12.
18. On cross examination by the appellant, the witness maintained that he was able to establish that the appellant was in the company of the deceased on the night of his death. That through data obtained from Safaricom, the officer established that the appellant was the first person to use the deceased's phone immediately after his death. The officer clarified that although data from Safaricom



only revealed one name being Mulyungi, the officer obtained further identification particulars with regards to the appellant from the Registrar of Persons. The officer also testified that the bar manager and attendant, “White House bar” confirmed that the appellant was in the company of the deceased on the night of his death.

19. CPL Kenneth Barasa PW12 from Mwingi Police Station testified that he was called by PW4 while on night patrol with his colleagues and she informed them that a body of a male adult had been spotted next to the hotel. That the officers proceeded to the scene and took photographs of the scene and thereafter took the body to Migwani District Mortuary. On cross examination by the appellant, the officer testified that he did not see the appellant at the scene.
20. Dr Christopher Waihenya PW13 from Migwani District Hospital testified that he conducted a post mortem on the body of the deceased on 12<sup>th</sup> June 2014 upon it being identified to him by PW6 & PW7. The witness testified that the deceased sustained a deep cut on the left lower jaw of about 7 centimetres which fractured his lower jaw and that all his other systems were normal save for the veins on the lower jaw which had been severed on the arteries. The doctor established the cause of death as haemorrhage shock due to heavy bleeding and produced the post mortem report marked as PEXH 2

### **Defence Case**

21. John Kimanzi DW1 the appellants co-accused testified that he was at his home on 30<sup>th</sup> May 2014 with his in-laws and that on 1<sup>st</sup> June 2014, he was in the company of his daughter in Mwingi Town at a phone repair shop where he sought to charge his phone. That while there, the shop attendant a lady who was to repair his phone because it had a mouth piece problem. That he also met a man at the shop and the shop attendant informed him that he had an old phone on sale because he needed money for bus fare to Wajir. He testified that he purchased the phone for Kshs 600/- and left. He stated that he used the phone interchangeably with his but he was arrested while undertaking construction work at Ndaluni Secondary School. He blamed the appellant for the robbery and testified that when he met the appellant at Waita Prison he recognized him as the person who had sold him the phone at Mwingi town.
22. The appellant herein on his part raised alibi as his defence denying being at the scene of crime at the material time. He stated that he was in Nairobi between 30<sup>th</sup> and 31<sup>st</sup> May 2024. He stated that he left his work Paradise Butchery on 27<sup>th</sup> April 2014 and headed to Nairobi for casual jobs. He stated that on 29<sup>th</sup> June 2014 he called his former employer at Mwingi and asked him whether he could return to work for him and was told to go back and went back to Mwingi on 30<sup>th</sup> June 2014. He stated that when he went back his former employer alleged that some machines in his hardware shop had been stolen and reported the matter to the police upon which he was arrested for theft and placed in custody.
23. He testified that on 23<sup>rd</sup> September 2014, he arranged together with DW1 for robbery. He stated that the data from Safaricom had only one name Mulyungi adding that his name is Joseph Kithendu Mulyungi. He stated that his employer had retained his Identity Card when he left employment and accused the co-accused, DW1 for having a grudge against him claiming that he had tried to poison him while in prison custody together at Waita GK Prison. He however stated that he never reported the attempted poisoning incident to the prison authorities.
24. He insisted that DW1 colluded with the police to implicate him adding that the data from Safaricom was forged. He denied selling the stolen phone to DW1.
25. On cross examination by prosecution counsel, the appellant maintained that he had been fired on the period between 27<sup>th</sup> April 2014 and 30<sup>th</sup> June 2014 and that he was in Nairobi. He however testified



- that he was called by his employer on 29<sup>th</sup> June 2014 and he returned to Mwingi. He denied escorting PW5 to his house in the company of the deceased on the material night and working for PW5. He admitted to working with PW2 but denied being at work on the material night or taking drink with the deceased before escorting PW5 (who was his employer).
26. The trial court evaluated the evidence rendered and found that the appellant co-accused (DW1) had given sufficient explanation on how he was found with the phone robbed from the deceased and rebutted the doctrine recent possession but found that the doctrine applied on the appellant and further found direct evidence linking him with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The appellant was convicted as a result and sentenced to death.
27. Being dissatisfied with the conviction and sentence meted out against him, the Appellant filed his Petition of Appeal on 18<sup>th</sup> October 2022 raising the following grounds of appeal;
- i. That the trial court convicted and sentenced the appellant of the offence charged notwithstanding prosecution failed to prove the case beyond reasonable doubt.
  - ii. The trial court convicted and sentenced the appellant of the offence charged notwithstanding the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence that resulted in a selective judgment.
  - iii. That the trial court convicted and sentenced the appellant of the offence charged notwithstanding the plausible defence of the appellant was not given due consideration where his defence was not displaced by the prosecution as required by law in section 212 of the Criminal Procedure Code.
  - iv. That the trial court convicted and sentenced the appellant of the offence charged notwithstanding the vital ingredients of the offence were not proved as stipulated by law.
28. The appellant proceeded in this appeal through written submissions dated 12<sup>th</sup> June 2023. He however added new additional in the submissions grounds without leave of this court as provided under Section 350(2) of the Criminal Procedure Code. The additional grounds therefore are improper raised because the appellant should have first sought leave.
29. The appellant submits that he was not guided on his right to legal representation. He also faults forensic evidence tendered from Safaricom service provider and submits that the same was not attested to with a certificate of electronic records.
30. He submits that the evidence on his identification as the perpetrator was not safe and contends that it is co-accused who had implicated him.
31. He contends that the sentence was too harsh and excessive adding that he has since changed after conviction saying that he is now a person with good character.
32. This court has laid out the evidence tendered in this case, the grounds of appeal and the written submissions by the appellant. The respondent through the Office of the Director of Public Prosecution opted not to file any submissions but that notwithstanding this court is inclined to determine this appeal on merit.



33. This being the first Appellate Court, this court is required to examine and analyse all evidence adduced in the trial court and arrive at its own independent finding. This principle was upheld in the case of *Okeno V. Republic* [1972] EA 32 where the court stated as follows:

The first appellate court must itself weigh conflicting evidence and draw its own conclusions (*Shantilal M. Ruwala -V- R.* (1975) EA 57). 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.

34. The issues arising from this appeal are basically two;

- i. Whether the appellant was informed of his right to legal representation and whether he suffered prejudice because he was not accorded one.
- ii. Whether the prosecution proved its case against the appellant to the required standard.

35.

- (i) Whether the accused was informed of his right to legal representation.

The Appellant submits that he had right of legal representation and a right to being informed of the same promptly. He contends that his constitutional rights under Article 50 (2) (g) and (h) were infringed upon as he was neither informed of his right to legal representation nor accorded legal representation.

36. Article 50(2)(g) and (h) of *the Constitution* provides as hereunder:

- (2) Every accused person has the right to a fair trial, which includes the right—
  - (g) To choose, and be represented by, an advocate, and to be informed of this right promptly;
  - (h) To have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

37. Section 43 of the *Legal Aid Act* of 2016 also lays down the duties of the court before which an unrepresented accused person is presented. It provides as follows;

“A Court before which an unrepresented accused person is presented shall;

- a. Promptly inform the accused of his or her right to legal representation
- b. If substantial injustice is likely to result, promptly inform the accused of the right to an advocate assigned to him or her; and
- c. Inform the service to provide legal aid to the accused person”.

1A in determining whether substantial injustice referred to in paragraph (1) (b) likely to occur, the court shall take into consideration;



- a. the severity of the charge and sentence
  - b. the complexity of the case; and
  - c. the capacity of the accused to defend themselves.
  - d. .....
- (6) Despite the provisions of this section, lack of legal representation shall not be a bar to the continuation of proceedings against a person.

38. This court has gone through the proceedings from the lower court and finds that the appellant acted in person and the record does not indicate that he was informed of his right to legal representation. The question posed is does failure to inform an accused person his right to legal representation render the case against him a mistrial? In my considered view though an accused person has a right to be represented by an advocate and have one assigned to him at state expense, (where he is unable to hire one), it would lead to a miscarriage of justice and a total mess in criminal justice system if a position was taken that any criminal trial where an accused person is not informed of his right to be represented by an advocate is automatically a mistrial. The right to legal representation in itself is not absolute. The victims of crimes would be at a loss if that right was to be held to be absolute. That is why a court must balance the scale of justice cautiously by considering the seriousness of the offence and the circumstances surrounding the case and check if an accused suffered prejudice as a result of lack of legal representation.

39. The direction taken by this court is informed and guided by the supreme court decision in the case of Republic -vs- Karisa Chengo & 2 Others (2017) eKLR where that court made the following observations: -

“...it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include;

- i. the seriousness of the offence
- ii. the severity of the sentence
- iii. the ability of the accused person to pay for his own legal representation
- iv. whether the accused is a minor
- v. the literacy of the accused
- vi. the complexity of the charge against the accused”

40. In light of Supreme Court’s decision, the right to legal representation is not absolute and there are situations it can be limited. Certain considerations must be factored for example it must established that the accused will suffer substantial injustice if one is not accorded legal representation, it is also necessary to consider the gravity of the offence, the nature of the reality or severity of the sentence must



be taken into account; and whether accused is a minor or illiterate and not able to understand the court proceedings is also a factor to be considered.

41. The Court of Appeal In *Katana & Another -vs- Republic* (2022) eKLR has as follows: -

“...The holding of the court was that the operative circumstance that triggers the necessity of legal representation in criminal proceedings arising from the examination of the cited articles and decisions, is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or and the incapacity and inability of the accused person to participate in the trial. The court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since *the Constitution* demands it. Similar sentiments were expressed by this court (PO Kiage, M Ngugi & F Tuiyott, JJA) in *Sutse v Republic (Criminal Appeal 158 of 2016)* [2022] KECA 678 (KLR)

In the present appeal, it is notable that the issue of a violation of the right to a fair trial was not raised by the appellants in their appeal before the High Court, and therefore cannot be the basis for vitiating the High Court’s decision. Be that as it may, the record of the trial court shows that the appellants indicated they were ready to proceed with the trial, actively participated in the trial and cross-examined all the witnesses, and it is not evident that they suffered any or any substantial injustice. For these reasons, we do not find any merit in the appellants arguments that their rights to a fair trial on under articles 50(2)(g) and 50(2)(h) of *the Constitution* were violated.”

42. Having legal counsel is not an absolute right. There is nothing on record that any substantial injustice was occasioned on the Appellant and save for the failure to be informed of his right to legal representation, the Appellant was afforded all rights under Article 50 (2) of *the Constitution*. The Appellant cross-examined all the witnesses extensively including his co accused and his witnesses at the trial court. This demonstrates that the Appellant properly understood the trial process and the charges preferred against him and he was able to defend himself. The trial process was fair and he suffered no prejudice owing to lack of legal representation.

43.

(i) i) Whether the prosecution’s case was proved to the required standard. The ingredients necessary to establish and prove an offence of robbery under Section 296(2) of the Penal Code were re-stated in the case of *Oluoch -vs- Republic* [1985] KLR where the court held as follows:

“Robbery with violence is committed in any of the following circumstances:

- a. the offender must be armed with any dangerous or offensive weapon or instrument; or
- b. the offender must be in the company of one or more other person or persons or;
- c. 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...” the use of the word “or” in the above is used as a conjunction which means prove of one ingredient suffices to found in conviction



44. In the case of *Dima Denge Dima & Others v Republic* [2013] eKLR, the Court of Appeal stated that;
- “The elements of the offence under Section 296 (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction.”
45. This court is therefore called upon to establish whether the prosecution was able to prove beyond reasonable doubt that;
- i. the offenders were armed with dangerous and offensive weapon or instrument;  
or
  - ii. the offender was in company with one or more person or persons; and/or
  - iii. at or immediately before or immediately after the time of the robbery the offenders wounded, beat, strike or used other personal violence them.
46. It is clear from the evidence tendered that there was use of an offensive weapon and use of violence on the attack occasioned against the deceased. PW13 Dr Christopher Waihenya from Migwani District Hospital testified that he conducted a post mortem on the body of the deceased on 12<sup>th</sup> June 2014. The doctor testified that the deceased sustained a deep cut on the left lower jaw of about 7 centimetres which fractured his lower jaw and that all his other systems were normal save for the veins on the lower jaw which had been severed on the arteries. The doctor established the cause of death as haemorrhage shock due to heavy bleeding and produced the post mortem report marked as PEXH 2.
47. It is clear therefore that the element of violence was well established because the victim of the robbery as narrated by prosecution witnesses was killed during the robbery.
48. The other criminal element in case of robbery with violence is the identification of the offender. The appellant in this appeal raised a defence of alibi in his defence and the question before the trial court was whether he was positively linked to the offence.
- The appellant’s testimony was that he was not in Mwingi on the night of 30<sup>th</sup> May/31<sup>st</sup> May 2014 but PW3 and PW5 testified to having interacted with him on the material night in Mwingi. PW3 Mwendwa Kiragala testified that the appellant went to his house on 31<sup>st</sup> May at 3.00am inquiring about PW2 and the witness informed the appellant that PW2 had taken some goats to the slaughter. Besides PW2 who says he saw him, PW5 Mwalili Nzaki testified to the effect that the appellant and the deceased both escorted him to his house on the material night. PW2 also testified to the effect that the appellant called on 30<sup>th</sup> May 2014 at around 10.30pm and informed him that the deceased wanted to talk to him and the witness proceeded to speak to the deceased who was in the company of the appellant
- The evidence of PW3 in particular was quite detailed and displaced the alibi raised by the appellant. PW3 was firm in his evidence that the appellant went to the house he shared with Gedion Muimi (PW1) and that he told him to take a rest and indeed rested for one hour after which he left. The appellant has not raised any issue with PW3 or whether he had a grudge against him.
49. The trial court rightly dispelled allegations by the appellant that Mwalili Nzaki (PW5) who was appellant’s employee was motivated to lie against him because of a previous case he had against the him. There was no connection between the two cases.
50. The evidence of PW5 that the appellant and the deceased escorted his home and left together was key in the prosecution’s case because it introduced the element of “last seen” which positively connected



the appellant with the commission of offence particularly in light of the fact that he was later found with the mobile phone belonging to the deceased.

51. From the evidence tendered by the prosecution which I have highlighted above the appellant was the last person seen by PW3 and PW5 late on the material night (30<sup>th</sup> May 2014). The doctrine of “last seen” applies. In Republic -vs- EKK [2018] eKLR, Lesiit J (as she then was) explored the doctrine in detail and observed as follows:

“Regarding the doctrine of “last seen with deceased” I will quote from a Nigerian Court case of Moses Jua V. The State (2007) LPELR-CA/IL/42/2006. That court, while considering the ‘last seen alive with’ doctrine held:

“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.”

In yet another Nigerian case the court considering the same doctrine, in the case of Stephen Haruna V. The Attorney-General Of The Federation (2010) 1 iLAW/CA/A/86/C/2009 opined thus:

“The doctrine of “last seen” means that the law presumes that the person last seen with a deceased bears full responsibility for his death. Thus where an accused person was the last person to be seen in the company of the deceased and circumstantial evidence is overwhelming and leads to no other conclusion, there is no room for acquittal. It is the duty of the appellant to give an explanation relating to how the deceased met her death in such circumstance. In the absence of a satisfactory explanation, a trial court and an appellate court will be justified in drawing the inference that the accused person killed the deceased.”

52. In light of the above a court is entitled to make a presumption of a fact where no other reason is given or provided. This is underlined in Section 119 of *Evidence Act* which provide as follows;

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

53. Additionally, under Section 111 of the *Evidence Act*, an accused person is legally duty bound to explain, matters or facts which are within his own knowledge. The section provides;

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

The appellant did not rebut the doctrine of last seen after the prosecution established that he was the last person seen with the deceased before he was found dead and robbed.

54. The trial court evaluated the evidence rendered well in respect to the doctrine of “last seen” and arrived at the right conclusion.



55. The other doctrine that applied in this matter against the appellant was the doctrine of recent possession. The appellant was found with a mobile phone Nokia phone 1280 model black in colour which was tendered in court as P EX1 by CPL Tunai Keitany who was the investigating officer in the case. Gideon Muimi Muli (PW2) and Mwalili Nzaki (PW5) prosecution identified the phone in court stated that it belonged to the deceased and had seen him with it prior to the robbery incident.
56. Anastacia Kanira Munuve (PW8) and the appellant's co accused in their evidence positively connected the recovered phone with the appellant. The co accused of the appellant was able to give a good explanation on how he was found with the stolen phone but the explanation given by the appellant was a mere denial that he sold the phone to his co-accused. His attempt to get away by trying to fault his co-accused and investigating officer of compromising to nail him failed for the simple reason that he failed to show or demonstrate the basis of any ill will by the police or his co-accused. This court finds that both the doctrine of "last seen" and "recent possession" applied and linked the appellant to the offence.
57. The only legitimate issue raised in this appeal by the appellant is the fact that the evidence in the form of call data generated from Safaricom and tendered by the investigating officer (PW11) appears to contravene the provisions of Section 68 (8) of the *Evidence Act*. That provisions provides as follows;

"In any proceedings under this Act where it is desired to give a computer print- out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say-

- a. Identifying a document containing a print-out or statement and describing the manner in which it was produced;
- b. giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by the computer
- c. dealing with any of the matters to which conditions mentioned in subsection (6) relate.

The call data from Safaricom should have been accompanied by certification as provided above to be admissible in evidence. That requisite certificate was not tendered.

58. In *Charles Matu Mburu v Republic* [2014] eKLR, the Court of Appeal held that;

"In this case, the computer print-outs that were produced by the prosecution of the call history on the deceased's mobile phone do not contain the certification mentioned in the above provision. Further, no evidence was tendered on how the said print-outs were generated. We agree with the appellant's submission that the said print-outs had not been verified by Safaricom, hence they were inadmissible. We find that the two lower courts erred in relying on the said print-outs."

59. This court however finds that notwithstanding the inadmissibility of the damning evidence from Safaricom clearly showing that the appellant was the first person to use the stolen phone belonging to the victim, this court is satisfied that the doctrine of "recent possession" applied for the reason that there was positive evidence showing that though he was not found in direct possession of the stolen phone indirectly the prosecution was able to trace and to connect the stolen found to the appellant.
60. This court having re-evaluated the evidence tendered by the prosecution at the trial finds that the evidence tendered was sufficient to find a conviction against the appellant and it was safe for the trial court to render conviction against him for the offence of robbery with violence.



61. On sentence, this court finds that owing to the fact that someone lost his life in the hands of the appellant, severe sentence was justified. I have looked at the reasons given by the trial court which was the fact that the provision of Section 296 (2) of the Penal Code provided for a mandatory death sentence and the trial found that its hands were tied by the statute. Going by the recent jurisprudence regarding mandatory sentences, the current position is that a discretion of a trial court is not taken away and can still mete out appropriate sentence despite the stipulated sentence. It is only in that regard that I will interfere and vary the death sentence passed and substituting it with a jail term of 38 years after factoring in the period the appellant served in custody awaiting trial. The conviction is upheld for the reasons aforesated. He has 14 days right of appeal.

Dated, signed and delivered at Kitui this 9<sup>th</sup> day of May, 2024

**Hon. Justice R. K. Limo**

**JUDGE**

Page 7 of 7

