



**Ndirangu v Republic (Criminal Appeal 212 of 2007)  
[2024] KEHC 12593 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12593 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CRIMINAL APPEAL 212 OF 2007  
RC RUTTO, J  
OCTOBER 18, 2024**

**BETWEEN**

**DANIEL MAINA NDIRANGU ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. E. J Osoro (SRM) at the Nyeri Chief Magistrate Court Criminal Case No 5242 of 2005 delivered on 3rd August 2007)*

**JUDGMENT**

**A. Introduction**

1. Pursuant to the Judgment of the Court of Appeal dated 9<sup>th</sup> July 2021, this matter was remitted back to the High Court for re-hearing of the appeal by a judge with requisite jurisdiction pursuant to section 359 of the Criminal Procedure Code.
2. This court, having perused the record, notes that the Appellant had appealed to the High Court via Criminal Appeal No. 212 of 2007, which matter was consolidated with High Court Criminal Appeal Petition No. 223 of 2007 Joseph Kinja Muhari Vs Republic. The High Court in the consolidated appeal upheld the trial court's findings. The Appellant herein, being aggrieved proceeded to appeal the High Court's decision to the Court of Appeal in Criminal Appeal No. 18 of 2015. The Court of Appeal found that the High Court bench, consisting of Justice Wakiaga and Justice A. Ombwayo, lacked jurisdiction to hear the appeal. This was due to Justice A. Ombwayo being a judge appointed to the Environment and Land Court, which ousted the jurisdiction of the High Court. Consequently, the proceedings at the High Court were declared a nullity and were therefore quashed. In its judgment, the Court of Appeal remitted the case back to the High Court for rehearing under Section 359 of the Criminal Procedure Code, which is the subject matter herein. Consequently, this judgment is limited to Nyeri High Court Criminal Appeal No. 212 of 2007, Daniel Maina Ndirangu vs Republic.



3. The Appellant (Daniel Maina Ndirangu) being aggrieved by the decision of the trial court that convicted him for the offence of robbery with violence contrary to section 296 (2) of the Penal Code lodged this appeal. He seeks that the conviction be quashed and the death sentence set aside. The appeal is premised on the following six (6) grounds: -
- a. That the Learned Trial Magistrate erred greatly in both points of law and fact by convicting the Appellant in a case where there was no any identifying witness.
  - b. That the Learned Trial Magistrate erred in both law and fact by not considering that the alleged phone was not recovered in my possession and yet no documents or evidence was shown to prove that he was the owner.
  - c. That the Learned Trial Magistrate erred in both points of law and fact by not finding that the prosecution side was extreme economical with details and evidence to prove that I was associated with the phone since the Safaricom personnel who alleged to have assisted in tracking the phone was not summoned to testify.
  - d. That the Learned trial Magistrate erred in both law and fact by not finding that the tracked sim card alleged to have connected, I, the Appellant to the crime was not exhibited and thus the prosecutor case remained doubtful.
  - e. That the Learned trial Magistrate erred greatly in both points of law and fact by rejecting my defence without giving adequate reasons as law requires and I humbly urge the honourable court to uphold it.
  - f. That the Learned Trial Magistrate erred in both points of law and fact by not considering my mode of arrest.

## **B. Background**

4. Before the trial court, the appellant, jointly with ten others, were charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. The particulars of the offence were that on the night of 22<sup>nd</sup> and 23<sup>rd</sup> day of November 2005 at Irima-ini village Othaya Division in Nyeri District of the Central Province, jointly with others not before court while armed with dangerous weapons namely metal rods, robbed Monica Wachinga Muchemi of her Mobile phone make Motorola C115 valued at Kshs 4, 999/= and at or immediately before or immediately after the time of such robbery, fatally wounded the said Monica Wachinga Muchemi.
5. He also faced an alternative charged of handling stolen goods contrary to Section 322 (2) of the Penal Code. The particulars of the offence were that on 24<sup>th</sup> November 2005 at Kayole Estate in Nairobi within Nairobi area Province otherwise than in the course of stealing, dishonestly assisted in the disposal of one mobile phone handset make Motorola C115 IMEI No. 35368600403xxxxx knowing or having reasons to believe to be stolen or unlawfully obtained.
6. The appellant pleaded not guilty to all the charges and the prosecution called 24 witnesses in a bid to prove its case. All accused persons were placed on their defence where upon the Appellant herein chose to give unsworn statement and called no witness.
7. Upon conclusion of the trial case, the trial court all the other accused persons, save for 1<sup>st</sup> accused and the appellant herein who was accused No. 11 were convicted and sentenced.



### C. The Prosecution case

8. The prosecution's case before the trial court was as follows: PW1, Simon Mathenge Nderitu, the Chief of Mahiga Location, testified that they were informed that a woman known to him had been attacked and cut by robbers during the night. He proceeded to the scene and found the victim lying in the corridor near the door, with blood stains all over the area. She had passed away and was partly covered. He noted that the attacker had gained entry by breaking through the wall. The witness produced photographs of the house as exhibits MFI 1(a), (b), and (c). PW2, John Kombo Mukunya, the Assistant Chief of Gatururu Sub-location, testimony was similar to that of PW1.
9. PW3, Anna Wambui Nthumbi, was a casual laborer employed by the deceased. She stated that on 22/11/2005, after finishing her work at the deceased's home, she went back to her own home. The following day, when she returned to work, she found the door broken and two small bags outside the house. She called out for the deceased but received no response. When she knocked on the front door and slightly pushed, it opened. She saw the deceased lying near the door in a pool of blood. She immediately raised the alarm.
10. PW4, Gerald Kingori Muchemi, and PW5, Emily Wangui Muchemi testified that the deceased was their mother. They stated that they were informed that their mother had been involved in a serious incident and had been killed and her body had been taken to the mortuary. PW4 attended the post-mortem. Additionally, he stated that he had purchased a mobile phone for the deceased, which he identified as MFI4(a), and brought the box in which it was purchased, which was marked as MFI(b). He testified that the mobile phone, MFI(a), was recovered from a suspect.
11. PW6, Paul Kiriro Maina, testified that on 24/11/2005 at 7:15 a.m, upon arriving, at the deceased home he met the deceased's casual laborer, PW3, who was screaming and informed him to check inside the house. When he did, he found the deceased lying half naked. He then took a blanket and covered her. He made reference to photographs, marked MFI5 (a), (b), and (c), to illustrate how he found the scene and the victim's body. Additionally, he referred to MFI1 (a), (b), and (c), which depicted the point of entry used by the attackers.
12. PW7, Joan Muthoni Gathu, testified that the deceased was her mother-in-law and in December 2004, she purchased a Motorola C115 but had since misplaced the receipt. She explained that she used the phone (MFI 4 (a) for a while before giving it to the deceased.
13. PW8, No. 58640 CPL John Mugo, the Scenes of Crime officer, testified that on 23/11/ 2005, they proceeded to Gaturuturu village, where they found the deceased lying in a pool of blood, in what was a case of robbery with violence. He stated that the deceased's underpants were partially removed. He conducted a search for fingerprints and photographed the scene. He identified and produced the photos he took.
14. PW9, James Mwangi Macharia, testified that on 3/3/2006 he borrowed a phone from Lucy Muthoni, a vegetable seller and friend of his, at the market. He inserted his SIM card into her Motorola C115 and made a call. A week later, he was arrested and he led the police to Lucy's location, where they recovered MFI 4(a).
15. PW10, Lucy Wakini Mwangi, stated that she purchased a phone from Joseph Kanyi and used it for a day and afterwards returned it to the 1<sup>st</sup> accused (Joseph Kanyi) as it had defects. That, Joseph Kanyi took the Motorolla T190 and in return gave her the Motorolla C115 which she started using on 26/11/2005 with no problems. Later, on 13th July 2006, police officers introduced themselves to her and informed



- her that the phone she was using had been stolen during a robbery. She led the officers to PW11, who had sold her the phone. Lucy confirmed that the IMEI number of the phone was 35368600403xxxxx.
16. PW11, Joseph Kanyi Kariuki, stated that in October 2005, while at his friend Wambugu Ndungu's shop, Wambugu's cousin asked if he was interested in purchasing a phone from him. That he purchased the phone from him for Kshs 1,800 and acquired MFI 4. He stated that he kept the phone for a while before giving it to PW10, who later surrendered it to the police. He stated that the individual who sold him the phone was named Maina Ndirangu, the 11<sup>th</sup> accused person and the Appellant herein.
  17. PW12, Dr. Anthony Njuguna, testified on behalf of Dr. Mbutia, who conducted the post-mortem on the deceased Monica Wachinga. He observed that there was massive intracranial hemorrhage and that the rest of the systems appeared normal. He concluded that the deceased died due to severe head injuries. The post mortem was witnessed by PW15, No. 51430 Joseph Ndungu, Shelmith Wangui and David Kingori.
  18. PW13, No. 90088755 A.P.C Samuel Nyamu was one of the arresting officer, together with James Ngenge and Muriu. PW14, 58247 David Mugo, was part of the investigating team and visited the scene. He stated that a mobile phone was recovered, along with an empty box for a Motorola C115. It was his testimony that the condition of the scene suggested that more than one person had been present.
  19. PW16, Peter Ndurangu Wambugu, testified that the 11<sup>th</sup> accused person, the Appellant herein was his cousin. Further, that he accompanied him to the shop, where they met PW11. He stated that he heard that the Appellant and PW11 were involved in a transaction concerning a mobile phone.
  20. PW17, Daniel Muriuki Mwangi, stated that he knows PW11 and became acquainted with the Appellant through his cousin, PW16. He stated that when the Appellant visited PW11's shop, he was in the company of PW11. The Appellant called PW11 aside for a brief conversation, during which he observed the two-exchanging money for a mobile phone, which he recognized in court as the Motorola C115, marked as exhibit MFI 4(a).
  21. PW18, No. 47709 Peter Gaitho, stated he was conducting investigation duties and upon receiving a tip about a murder, specifically that of one Monica Wachinga, and that items had been stolen from her. They proceeded to the 6<sup>th</sup> accused's house, but did not recover anything, he was then arrested as a suspect.
  22. PW19, Joseph Kabati Ndirangu, stated that he was arrested after receiving a phone call from a certain number that his brother, the Appellant herein had previously used to contact him. He stated that his brother, the Appellant, had instructed him to reach him through the number 07211XXXXX, which he had noted in his notebook, marked as MFI 11.
  23. PW20, Gerald Muchiri Gichuki, stated that the deceased, was his neighbor, and on the way to the deceased's house, they stopped by the 1<sup>st</sup> accused's house, where they arrested him as a suspect due to his previous behavior as he frequently insulted the deceased. He also noted that the 4<sup>th</sup> and 5<sup>th</sup> accused were neighbors of the deceased, while the 6<sup>th</sup> to 10<sup>th</sup> accused were from Wangige Location.
  24. PW21, No. 64966 PC Luka Kimai, stated that he was part of the investigation team and were given the names of the 7<sup>th</sup> and 9<sup>th</sup> accused whom they arrested from their respective homes but did not recover any items. Likewise, PW22, No. 89118424 Senior Sergeant Paul Mwenda Nkanatha, stated that he arrested the 2<sup>nd</sup> and 4<sup>th</sup> accused, who were handed over for further investigations.
  25. PW23, No. 657769 Fredrick Mundia, testified that he was partially involved in investigating this case. He stated that on 13/7/2006, he received a report regarding a mobile phone that was allegedly stolen



- from the deceased during a robbery that occurred on the night and the morning of 22nd and 23rd November 2005, at Gatururu, Mahiga, Othaya. The report indicated that the deceased had been robbed of items and died during the ordeal, though no one could ascertain what had been stolen apart from the mobile phone. The serial number of the mobile phone was 35368600403xxxxx (MFI 4(a)).
26. PW23 explained that the phone's usage revealed a certain line, 07234XXXXXX, registered to a James Mwangi, (PW9) who had been using the stolen phone. That he proceeded to arrested PW9 who then directed them to Lucy Muthoni (PW10). PW23 stated that upon interrogation, PW9 admitted to using a Motorola C115, having borrowed it from PW10 when his own battery was low. PW9 then led them to PW10 in Kayole, where she was arrested, and the Motorola C115 (MFI 4(a)) was recovered from her. PW10 was found to be using MFI 4(a) with her phone number, 07211XXXXXX, and she explained that she had obtained the phone from a dealer, PW11 Joseph Kanyi, who was subsequently arrested after admitting to selling the phone to PW10.
  27. PW23 further testified that PW11 informed him that he had purchased the phone from the Appellant, Daniel Maina Ndirangu, on 24/11/2005. PW11 revealed that the Appellant had removed his SIM card from MFI 4(a), and the SIM card number for the Appellant was 07211XXXXXX. PW11 then led them to the Appellant's brother, PW19, who had recorded the Appellant's phone number in a notebook. Upon inspecting the notebook (MFI 6, page 11), it was found to contain the entry: "07211XXXXXX Maina Bro." PW23 stated that this phone number had been used on the day the deceased was murdered, and PW19 had confirmed that the Appellant had instructed him to contact him via the number 07211XXXXXX.
  28. He stated that later they apprehended the Appellant, who was in King'ong'o for a different offence. The Appellant admitted that the phone number 0721151182 belonged to him but claimed it was lost in December 2005 after the deceased had been attacked. PW23 clarified that he did not know the other accused persons, except for the Appellant, who had other robbery cases pending in Othaya and Nyeri. He produced MFI 4(a) as PExh 4(a), MFI 4(b) as PExh 4(b), MFI 8 as PExh 8, MFI 9 as PExh 9, and MFI 16.
  29. PW24, No. 231427 Inspector of Police Jonah Nzau, the investigating officer in this case stated that in response to the robbery with violence report at Gaturuturu, he proceeded to the deceased's home, accompanied by other officers, and found the deceased lying by the door with an injury to her face. He observed a gaping hole by the door, through which the robbers had gained entry into the semi-permanent house. He explained that the wooden panels had been wetted to reduce resistance, allowing a crowbar to pry them open more easily. He further stated that during the investigation, the 1<sup>st</sup> accused came up as a suspect, and officers were dispatched to arrest him. The 1<sup>st</sup> accused, a neighbor of the deceased, was known to have been on bad terms with her. Photographs 1 to 7 were presented to detail the layout of the house and the position of the deceased as they were found at the scene.
  30. Inspector Nzau mentioned that a meeting was immediately convened, during which 41 informers identified the 1st accused. Additionally, the area chief and his assistant reported that the 1st accused had conflicts with the deceased. On 24th and 25th November 2005, a search for the suspects named in the report was conducted, with operations led by different officers. PW24 arrested the 5th, 6th, and 10th accused.
  31. Later, in July 2006, Inspector Nzau received information that the stolen mobile phone was being used in Nairobi. They traced the user of the phone resulting in the recovery of the mobile phone and the arrest of suspects Lucy Muthoni and James Mwangi. Upon interrogation, these suspects led the officers to John Kanyi, then Wambugu Ndirangu, and finally to the 11th accused, who was located in Othaya.



That on 17<sup>th</sup> July 2006, all the suspects were brought to Othaya, where PW11, identified the Appellant as the person who sold him the phone on 24<sup>th</sup> November 2005.

32. With these 24 witnesses, the prosecution rested its case. Upon the closure of the prosecution case, the accused persons were placed on their defence. They chose to give un-sworn statements and did not call any witnesses, with the 4<sup>th</sup> accused person opting to remain silent.

#### **D. Defence case**

33. DW1, Joseph Kinya Muhari, stated that on 23/11/2005, he woke up early and found four individuals at his gate who identified themselves as police officers. The officers conducted a search of his house, after which they took him to an awaiting police vehicle, informing him that details would be explained later. He was then taken to Othaya Police Station, where officers inquired if he knew Monica Wachinga Muchemi, to which he responded that she had been their neighbor for many years. He was subsequently detained.
34. That the following day, he was taken to Othaya Sub-District Hospital, where his blood, saliva, and other samples were collected. He was later transferred to Nyakianga Police Station, where he remained for four days, after which he was transferred back to Othaya Police Station. On 16/12/2005, he was presented in court, where he denied the charges against him.
35. Notably DW2, Peter Maina Njoroge, DW3, Daniel Kimotho Njogu, DW5, David Mungaria Kuria, DW6, Joseph Nderitu Ndunyu, DW7, David Gichaga Mirugu, DW8, James Munene Kiama, DW9, Jacob Ndirangu, and DW10, Joseph Mwangi Minjire, all gave evidence of how they were arrested, how search was conducted and how blood and saliva samples were collected before being returned to the cells and later arraigned in court, to face the charges at hand.
36. DW11, Daniel Maina Ndirangu, the Appellant herein, stated that on 12/4/2006, he had left home for Othaya to purchase medicine for his father. While in Othaya, he encountered police officers on patrol who demanded to see his identification and subsequently ordered him into their Land Rover. The following day, he was taken to the Othaya Law Courts and released on a personal bond. However, being unable to raise the bond, he was remanded at Kingongo. He further stated that on 7/6/2006, while attending a mention of his case at Othaya, he met other co-accused in the cells, specifically Joseph Kanyi and Lucy Muthoni. When asked if he knew them, he denied any familiarity. Two days later, he was taken to the CID offices, where he was questioned about a mobile phone. He informed the police officers that he had never been to Nairobi. He claimed that he was asked to pay Kshs 10,000 to have the case resolved against him, and that Kanyi and Muthoni each raised Kshs 10,000 and were released. Due to his inability to raise the required amount, he was charged with selling a mobile phone to them. He later faced charges for selling a mobile phone that had been lost in a robbery with violence. He stated that PW11, Joseph Kanyi, alleged that he sold him the mobile phone, but Kanyi did not produce any receipt or documentation to support his claim.
37. Ultimately, on 3<sup>rd</sup> August 2007, the appellant together with the 1<sup>st</sup> accused were convicted of the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. After mitigation, they were all sentenced to suffer death as by law prescribed.

#### **E. The Appeal**

38. The appeal is as set out in the earlier paragraphs of this judgment. The appellant seeks that his conviction be quashed and sentence set aside. The 1<sup>st</sup> Appellant seeks to rely on his written submissions dated 29<sup>th</sup> September 2022 and filed on 3<sup>rd</sup> October 2022. I note that as at the time of writing of



this judgment, the Respondent's submissions were not on record. The Appellant's submissions are therefore as follows:

### **Appellant's Submissions**

39. In his submissions, the Appellant has clustered his grounds into three, to wit: Ground 1, Ground 2, 3 & 4 jointly, and Ground 5 & 6 jointly.
40. On ground 1, on whether the trial Magistrate erred greatly in both points of law and fact by convicting the Appellant in a case where there was no any identifying witness, the Appellant submitted that no one witnessed the commission of the offense. He asserts that it was only after receiving the report of the robbery on 23/11/2005 that PW1, the area chief, and PW2, the Assistant Chief, convened security meetings in which suspects were named and subsequently arrested. That the Appellant was not arrested until 17/7/2006 when he was identified by PW11 at Othaya Police Station, who alleged that the Appellant sold him a Motorola cellphone on 24/11/2005. Therefore, the Appellant urges this court to conclude that he was not identified as one of the individuals who robbed the complainant.
41. On Grounds 2, 3 and 4, the Appellant submitted that the court relied on the doctrine of recent possession of the cellphone alleged to have been stolen from the deceased. He argued that the court was persuaded by the circumstances of the case, which revealed that he was a principal offender in the robbery; however, this conclusion was erroneous. The Appellant contended that it is established law that in order to justify an inference of guilt based on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and must not be capable of explanation by any reasonable hypothesis other than that of guilt. To support this argument, he cited the case of Ahmad Abolfathi Mohammed and Another versus Republic [2018] eKLR.
42. The Appellant further submitted that PW23 testified that he received a report on 13/7/2006 indicating that the telephone robbed from the deceased on the night of 22/23/11/2005 was being used in Nairobi. This information led him to PW9, PW10, and PW11, who were subsequently arrested. Upon cross-examination, PW23 stated that the Appellant had used his SIM card in the stolen cellphone. The Appellant argues that when testing the circumstances of the case against the established criteria for circumstantial evidence, the circumstances are disjointed and capable of several explanations other than the guilt of the Appellant.
43. The Appellant further contended that the mobile service provider was not called to support the testimonies of PW9, PW10, PW11, and PW23. He asserts that if the record of the calls made using the stolen Motorola phone had been produced, it would have exonerated him. Additionally, that PW23 could not explain why he had not accessed the report from the mobile service provider from the date of the robbery until July 2006, which was an eight-month gap. The Appellant relied on the case of June Ngodia versus Republic [1982-88] KAR to argue that all witnesses who implicated him were suspects themselves. Further, he asserted that despite PW23 being a witness, he did not produce any records or investigation diary to show that he had previously been in custody or that he was actually arrested at the police station.
44. Also, he submitted that it was possible that PW9, PW10, and PW11 were acting in their own interests by implicating him. The Appellant submitted that PW11 only identified him after seeing him at Othaya Police Station, yet he testified that he knew a cousin of the Appellant who assisted in searching for him. The Appellant relied on the case of Gerald Muchiri Kiruma v Republic [2007] eKLR. He emphasized that he was not found in possession of the cellphone, the SIM card allegedly used by him was not produced as evidence, and no credible evidence was presented to confirm that he indeed used his SIM card.



45. On Grounds 5 and 6, the Appellant submitted that the prosecution failed to prove its case against the Appellant beyond reasonable doubts and urges this court to make that finding.
46. Ultimately, the appellant urged the court to allow the appeal and set aside the conviction and sentence.

## **F. Analysis and determination**

47. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusions. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of *Pandya v R* {1957} EA 336; *Ruwalla v R* {1957} EA 570 and *Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic* [2010] eKLR.
48. Having considered the record of appeal as well as the Appellant's submissions, I discern the only issue for determination to be: whether the prosecution proved its case beyond reasonable doubt to warrant the Appellant's conviction.
49. Guided by the above principle, this Court will re-evaluate the evidence. From the record, PW5 was with the deceased on 22/11/2005, the last time she saw her alive. During her visit, she confirmed seeing her mother with a Motorola C115 mobile phone. On 23/11/2005, in the morning PW3 returned to work, and found the door broken and two small bags outside the house. She called out for the deceased but received no response. When she knocked on the front door and slightly pushed it open, she saw the deceased lying near the door in a pool of blood. She immediately raised an alarm. PW1 and PW2 testified to immediately visiting the scene and all confirmed that the deceased had been robbed. According to PW23 the deceased had been robbed of items and died during the ordeal, though no one could ascertain what had been stolen apart from the mobile phone.
50. Later, on 13/7/2006, the investigation officer PW23 received a report regarding a mobile phone that was allegedly stolen from the deceased during the fatal robbery. PW23 explained that the report indicated that the phone's usage revealed a certain line, 07234XXXXX, registered to a James Mwangi, who had been using the stolen phone. James Mwangi (PW9) was located at Wakulima Market. The serial number of the mobile phone was 35368600403xxxxx (MFI 4(a)).
51. Following this turn of events, James Mwangi (PW9) was arrested and upon interrogation, he led them to Kayole Estate and directed them to one Lucy Muthoni (PW10) who he had borrowed the phone, the Motorola C115 to insert his SIM card.
52. Upon interrogation, PW10, Lucy Muthoni, confirmed that in October 2005, she purchased a phone from one Joseph Kanyi and that she used it for a day and afterwards returned it to the 1<sup>st</sup> accused (Joseph Kanyi) as it had defects. Joseph Kanyi then took to her a Motorola C 115 which he gave her in return for the Motorola T 190. She stated that she officially started using it on 26/11/2005 and on 13th July 2006, she received two visitors who introduced themselves as police officers. The officers informed her that the phone she was using had been stolen during a robbery. They confirmed that the IMEI number of the phone was 35368600403xxxxx. PW10 then led the officers to PW11, who had sold her the phone, and he was subsequently arrested.
53. Upon the arrest of PW11, he stated that sometime in October 2005, Wambugu's cousin named Maina Ndirangu, the Appellant herein, asked if he was interested in purchasing a phone from him and sold him the phone for Kshs 1,800 and that is how he acquired the phone which had been marked MFI 4. He confirmed keeping the phone for a while and later giving it to PW10, who later surrendered it to the police. He confirmed the IMEI number of the phone was 35368600403xxxxx.



54. Notably PW16, who identified himself as the Appellant's cousin confirmed accompanying the Appellant to the shop where they met PW11. In addition, PW17 a friend of PW11 corroborated the evidence of PW11, and PW16 by stating that, he became acquainted with the Appellant through his cousin, PW16. He also stated that when Appellant visited PW11's shop, he was with PW11 and he saw the Appellant calling PW11 aside for a brief conversation, during which he observed the two exchanging money for a mobile phone, which he recognized in court as the Motorola C115, marked as exhibit MFI 4(a). Later, he heard that PW11 had been arrested concerning a mobile phone, which he stated was the one he saw being exchanged.
55. This court also notes the evidence of PW19, the Appellant's brother who stated that he was arrested after receiving a phone call from a certain number that his brother, the Appellant herein, had previously used to contact him. He stated that his brother, the Appellant, had instructed him to reach him through that number 07211XXXXX, which he had noted in his notebook. The notebook was produced in court..
56. In his defence the Appellant stated that he was in Othaya purchasing medicine for his father when he encountered police officers on patrol who demanded to see his identification and subsequently ordered him into their Land Rover. The following day, he was taken to the Othaya Law Courts and released on a personal bond. However, being unable to raise the bond, he was remanded at Kingongo. He further stated that on 7/6/2006, while attending a mention of his case at Othaya, he met other co-accused in the cells, specifically Joseph Kanyi and Lucy Muthoni. When asked if he knew them, he denied. That two days later, he was taken to the CID offices, where he was questioned about a mobile phone. He informed the police officers that he had never been to Nairobi. He claimed that he was asked to pay Kshs 10,000 to have the case resolved against him, and that Kanyi and Muthoni each raised Kshs 10,000 and were released. Due to his inability to raise the required amount, he was charged with selling a mobile phone to them. He later faced charges for selling a mobile phone that had been lost in a robbery with violence. He stated that PW11, Joseph Kanyi, alleged that he sold him the mobile phone, but Kanyi did not produce any receipt or documentation to support his claim.
57. This Court also notes the evidence of the investigating officer PW24 in piecing together the evidence. PW23 stated that he received information that the stolen mobile phone was being used in Nairobi. On 13th July 2006, officers were sent to trace the user of the phone, resulting in the recovery of the mobile phone and the arrest of suspects Lucy Muthoni PW10 and James Mwangi PW11. Upon interrogation, these suspects led the officers to John Kanyi, then Wambugu Ndirangu, and finally to the Appellant, who was located in Othaya. On 17th July 2006, after all the suspects were brought to Othaya, PW11, identified the Appellant as the person who sold him the phone on 24th November 2005. A day after the Robbery incident. He also stated that the Appellant was the first person to use the deceased's mobile phone on the day of the robbery and murder, as his SIM card was inserted into the deceased's phone. This was confirmed by the Appellant's brother PW19, who stated that the Appellant had called him with his number which he recorded in a notebook, further corroborating the Appellant involvement. He concluded by stating that there was no doubt about the Appellant's participation, as he had sold the phone to a witness, and the evidence against him was solid. He also clarified that there was no animosity between the Appellant and his brother and hence his testimony was credible.
58. The trial court in making a finding of guilt held that;
- “ In the case before court accused 11 did not explain how the mobile came into his possession. The fact that accused 11's mobile number activated the same after it was robbed from the deceased coupled with the fact that he disposed it to PW 11 the following day raises solid circumstantial evidence which is incompatible with the innocence of the 11<sup>th</sup> accused and



incapable of explanation upon any other hypothesis than that of guilt. I have relied on *Republic v Kipkeng Arap Koke* [1949] 16 EA CA 155 and *Nyeri Criminal Appeal No. 12/02 Daniel Gikundi Rukunga v Republic*. Cour of Appeal Judges Omolo Githinji and Deverel JJA. The defence by the 11<sup>th</sup> accused was evasive, his defence hold no water and it is rejected.

The upshot I find that all the prosecution witnesses were truthful, I believe their evidence in which they outlined the circumstances linking accused 1 and accused 11 to the offence. I therefore find accused 1 and accused 11 guilty for the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. They are accordingly convicted”

59. From the foregoing, the trial court relied on purely the doctrine of recent possession and circumstantial evidence which the appellant has submitted is erroneous. The law as to the principles to be applied by the courts when considering a case based purely on the doctrine of recent possession and circumstantial evidence is now well settled. In the case of *Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005* [2006] eKLR, the Court of Appeal stated 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.

13. 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 *Malingi v Republic* [1988] KLR 225. In *Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008*, the Court of Appeal observed that;

Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.”

60. The chain of circumstances leading to the inference of guilt overwhelmingly points to the Appellant's culpability. Based on the evidence presented, I find that the prosecution proved its case beyond reasonable doubt. Flowing from the foregoing caselaw, what the appellant needed to do was to just give a plausible explanation as to how he came to be in possession of the deceased's mobile phone, so soon after the robbery. Notably, the police first arrested PW10. Without any plausible explanation, she was a key suspect. She gave an explanation pointing and leading the police to PW11. Immediately, PW11 now became the key witness. He equally gave a plausible explanation and pointed and led the police to the appellant. The appellant failed to discharge his evidentiary burden that had now shifted to him, focusing on how he was arrested. Therefore, I see no reason to disturb the findings of the trial court.
61. Consequently, the trial court's reliance on the doctrine of recent possession is justified. This doctrine allows the court to infer guilt when an accused person is found in possession of recently stolen property under unexplained circumstances. The subject phone was sold to PW11 by the Appellant, indicating



that it was found in the possession of the suspect. It is undisputed that the subject phone belonged to the deceased. The circumstances surrounding the loss of the Motorola C115 clearly indicate that the property was stolen from the deceased. Since the Appellant has not provided any justification for his possession of the phone, and in light of the evidentiary burden shifting to him, I am guided by the aforementioned Court of Appeal's decision to uphold the trial court's conviction.

62. As regard to the sentence, the Appellant is seeking that the same be set aside, but since the conviction has been upheld and the Appellant did not challenge its validity, this court will uphold the sentence.
63. The upshot is that the appeal on conviction fails for lack of merit. As regards sentence, the death sentence is upheld.

Orders accordingly.

**RHODA RUTTO**

**JUDGE**

**DELIVERED, DATED AND SIGNED THIS 18<sup>TH</sup> DAY OF OCTOBER 2024**

For Appellant:

For Respondent:

Court Assistant:

