Maina v Republic (Criminal Appeal E033 of 2022) [2023] KEHC 20510 (KLR) (21 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20510 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E033 OF 2022

LM NJUGUNA, J

JULY 21, 2023

BETWEEN

JOEL IRUNGU MAINA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The appellant herein was charged with the offence of robbery with violence contrary to section 295 as read together with section 296(2) of the *Penal Code*. The particulars of the offence were that on 16.09.2021 at Ngaru village in Nyeri South Sub-county within Nyeri County while armed with a dangerous weapon namely meko metal grill robbed Zipporah Wamugi Gikonyo of mobile phone make Techno IMEI No. [paericulars withheld] valued at Kshs. 10,700/- and immediately before the time of such robbery fatally injured Zipporah Wamugi Gikonyo. He further faced an alternative count of handling stolen goods contrary to section 322(1)(2) of the *Penal Code*. The particulars were that on 18.09.2021 at Kiinu village in Chinga location otherwise than in the cause of stealing dishonestly received a mobile phone make Techno IMEI No. [particulars withheld] knowing or having reasons to believe it to be stolen mobile phone.

2. The appellant was arraigned in court and he pleaded not guilty to both the main and the alternative counts and the matter proceeded to full hearing. The prosecution called 12 witnesses to prove its case and after which the accused was placed on his defense. The court in its judgment found that the offence of robbery with violence had been proved and the appellant herein was convicted and subsequently sentenced to serve life imprisonment.

3. It is the said conviction and sentence which necessitated the filing of the instant appeal and which was commenced by way of a petition of appeal filed in court on 31.08.2022. However the appellant filed an amended petition of appeal and wherein he condensed the earlier grounds of appeal into four grounds to the effect that the trial court erred in failing to appreciate that there was no direct evidence linking

him to the offence but only weak circumstantial evidence; that the trial court erred in failing to find that the charge sheet was duplex; that the trial court erred in failing to find that the doctrine of recent possession did not apply in the instant case; and that the sentence was harsh and excessive.

4. The appeal was canvased by way of written submissions.

5. The appellant submitted that the charge sheet was duplex. He submitted that charging him under section 295 of the *Penal Code* as read together with section 296 of the *Penal Code* amounted to duplicity. He relied on the cases of *Joseph Njuguna Mwaura & another v Republic* (2013) eKLR and *Simon Mwangi Kamako v Republic* (2019) eKLR. He further submitted that the circumstantial evidence was weak and unreliable and reliance was placed on the cases of *Musoke v R* (1958) EA 715 and *Eric Odhiambo Okumu v Republic* CR App No 84 of 2014. Further, that, the doctrine of recent possession was not applicable as the alleged mobile phone had been lent by the deceased and that he had not stolen the same and thus the element of recent possession was absent. On sentence, it was submitted that the same was harsh, excessive and not based on the actual evidence and that the same ought to be reviewed. The appellant relied on *Muruatetu 1* and *Muruatetu 2* and the case of *Isaac Mwangi Wamuyu v Republic* Criminal Appeal No. 96 of 2015.

6. The respondent on the other hand submitted that the issue of duplicity was conceded but submitted that there was no miscarriage of justice as the appellant participated in the trial through an advocate and cross examined the witnesses. On the issue to do with circumstantial evidence, it was submitted that the same was overwhelming and that the chain of events had not been broken at any point. That the evidence tendered clearly led to an inference of guilt of the appellant. As to the application of the doctrine of recent possession, it was submitted that the same was applicable and that the appellant did not explain how he recently came into possession of the deceased's phone. Reliance was placed on the case of *Athuman Salim Athuman v Republic* (2016) eKLR. As for the sentence, it was submitted that the sentence was proper and that the appellant ought to have been sentenced to suffer death.

7. The duty of this court while exercising its appellate jurisdiction (1st appellate court) as was set out by the Court of Appeal in *Okeno v Republic* [1972] EA 32 and re-stated in *Kiilu and another v R* (2005) 1 KLR 174 is to submit the evidence as a whole to a fresh and exhaustive examination and weigh conflicting evidence and draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. The court should be guided by the principle that a finding of fact made by the trial court shall not be interfered with unless it was based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See *Gunga Baya & another v Republic* [2015] eKLR).

8. PW1 Julius Gikonyo Mwangi testified that the deceased was his daughter and that on 16.09.2021, he woke up and went to work and when he came back he found his daughter's bedroom open and the room was ransacked. That the deceased was seated in a sofa set and was bleeding from the nose and had an injury at the back of her head. That he ran out and raised alarm and Julia Wambui and other neighbours went to the scene and took the deceased to KNH Othaya. That police conducted investigations and took in their possession a broken meko metal grill, a box for a mobile phone he had bought the deceased and the receipt for payment of the same. That one village elder called Macharia was the one who went and reported that the deceased had died. That later the police said that the phone was found with Irungu, the appellant herein.

9. PW2- Julia Wambui testified that on 16.09.2021, at around 6pm, she was at home when she heard screams from PW1's home and when she went to check together with one Joyce, found Zipporah (deceased) and she had blood on her face and hands. That they screamed and other people went and

they took her to Gicheche police station and later to KNH, Othaya where she was pronounced dead on arrival.

10. PW3 Zipporah Wanjiku testified that on 16/9/2021 the appellant went to her home at 11.30p.m and called her son one Antony and told him to open the door. Antony opened the door and the appellant said that he was hungry and he wanted to eat. That Antony went and told her (PW3) that the appellant wanted some food. That she called the appellant and he went to her house, she gave him supper and he spent the night in her house. That on the same night, the appellant gave Antony his phone and she was able to see photos of the deceased. That the next day the appellant took breakfast and left. That she (PW3) informed her brother Phillip Kihara that the appellant had spent the night at her home and he had bought a new phone and she was advised to report the matter to police and which she did. That in the evening, the police officers went to her house and in the company of the appellant and the appellant showed them where he had hidden the phone in her house under a cushion in her living room. In cross examination, she testified that when the appellant went to her house, she looked drunk.

11. PW4 Kipngetich Benard, a government analyst at government chemist testified that he was given exhibits to wit a dress, skirt, blouse, cardigan and meko grill for DNA analysis and that the blood stains on the said items had their DNA profile generated which matched with the DNA profile generated from the finger and clippings marked C belonging to the deceased.

12. PW5 Luke Kiminda Thuita testified that on 16.09.2021, the appellant called him and he opened his door and the appellant requested that he sell alcohol to him and the agreement was that he would be sent excess money so that he could give the appellant the balance. He was to be sent Kshs. 1,050/- and since the alcohol was worth Kshs. 250/- he would give him the extra 750/-. That the money was sent and he honoured his part of the bargain and they left. He then heard about the murder of the deceased and he told people of his interactions with the appellant. That he checked on the Mpesa a phone record and confirmed that the money the appellant had sent was reflecting the names of the deceased. He reported the matter to the area Assistant Chief who referred him to the OCS and he was advised to record a statement. He identified his MPesa statement.

13. PW6 Anthony Mwangi Ngechu testified that on 16.09.2021 at around 11.30pm, he was asleep when the appellant went to their home and said that he was from a funeral and he was hungry. That he called his mother and she told him to tell the appellant to go to the main house and while they were in the said house, he was able to see the appellant with a different phone and which was a smart phone. That he requested for the same and when he scrolled, he saw photos of the deceased who he had already received information on her demise and when he asked him about the said photos, he grabbed the phone and began to delete the photos. That he left the appellant and his mother and went to sleep and on the following day he was called to record statements.

14. PW7- Dr. B Chitayi testified as having conducted mental assessment on the appellant herein and found him fit to plead.

15. PW8- PC Martin Murimi testified that he visited the scene and secured the same so as DCI officers could arrive and that when DCI officers arrived, they took over the investigations. That the appellant herein was arrested by the members of the public and the police took him to Othaya Police station and later the appellant took them to his sister's (PW3) house where he had hidden the phone.

16. PW9- Dr. Jackson Mwangi testified that he conducted postmortem on the body of the deceased herein and upon examination he formed the opinion that the cause of death was severe head injury due to blunt force trauma.

17. PW10- C.I Justus Nzuka testified that he recorded the appellant's statement and which he gave voluntarily, without force, inducement, coercion or any promise of any kind and upon recording the same, he handed over the report to Cpl. Mutisya.

18. PW11- Cpl. Phillip Mutisya, the Investigating Officer testified that on observing the scene, he came to a conclusion that the person who stole the phone committed the murder. His evidence was basically on how he conducted the investigations and how he collected the various exhibits and produced the same.

19. PW12 was Sgt. David Chege and who produced the certificate of photographic imaging from the crime scene and the photographs as exhibits.

20. The prosecution proceeded to close its case.

21. The appellant was placed on his defense and wherein he gave unsworn evidence and testified that there was no witness who saw him commit the offence and that the phone was neither found in his home nor in his possession. That the owner of the house and her son framed him. That at the time of commission of the offence, he was at work and on his way home he passed by his sister's home. That he did not go to the deceased's home and only heard about the incident later. He denied having committed the offence.

22. The trial court found the appellant guilty and was convicted of the main count of robbery with violence and later sentenced to serve life imprisonment.

23. I have considered and analyzed the evidence which was tendered in the trial court by both the appellant and the prosecution (in compliance with the duty of this court as was laid down in *Okeno v Republic* (*supra*) and re-stated in *Kiilu and another v R* (*supra*)), the grounds of appeal as raised on the petition of appeal and the rival written submissions, it is my view that the issues this court ought to determine are;-

    i. Whether the charge sheet was defective for duplicity

    ii. Whether the prosecution tendered sufficient evidence to prove its case to the required standards

    iii. Whether the sentence meted on the appellant was excessive.

Whether the charge sheet was defective for duplicity

24. The appellant raised a ground and proceeded to submit that the charge sheet was defective for duplicity on the grounds that he was charged under section 295 as read together with section 296(2) of the *Penal Code*. The respondent on the other hand submitted that the issue of duplicity was conceded but submitted that there was no miscarriage of justice as the appellant participated in the trial through an advocate and cross examined the witnesses and as such, the duplicity is curable under section 382 of the *Criminal Procedure Code*.

25. I have perused through the said charge sheet and I note that it is indeed correct that the charge sheet reads that the appellant herein was charged with "robbery with violence contrary to section 295 as read together with section 296(2) of the *Penal Code*."

26. The court in *Joseph Njuguna Mwaura & 2 others v Republic* [2013] eKLR held as thus:

> " We reiterate what has been stated by this Court (sic) in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the *Penal Code*. This is the section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others, or if he uses personal violence to any person. The offence of robbery with violence is totally different from the offence defined

under section 295 of the *Penal Code*, which provides that any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296(2) as this would amount to a duplex charge".

27. The Court of Appeal sitting in Eldoret in *Philemon Kipkosgei Kimaiyo v Republic* [2019] eKLR in finding the charge sheet defective explained the situation as thus;-

> "(18) From the provisions of law quoted above, it is clear that section 295 creates the offence of simple robbery, the punishment for which is outlined in section 296(1). However, section 296(2) provides for a different offence, that of aggravated robbery, by providing that where during the commission of a robbery the offender is armed, is in the company of another person, and either uses or threatens to use violence, then the punishment is death."

28. It is my finding that there was duplicity of charges on the charge sheet.

29. Having determined that, the next question is as to what is the effect of such duplicity.

30. In *Philemon Kipkosgei Kimaiyo v Republic* (*supra*), the court while citing with approval its earlier decision in *Paul Katana Njuguna vRepubli*c [2016] eKLR (Criminal Appeal No 37 of 2015) held as thus;-

> "[20] We agree with this holding. It is important to consider whether or not any prejudice was suffered by the appellant, whether he understood the charge against him in order to properly mount a defence and overall, whether there was a failure of justice that was occasioned. This Court in *Paul Katana Njuguna v Republic* (*supra*) stated as follows:
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> > "40. In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.

> [21] Our consideration of the charge as well as the evidence leads us to conclude that Joseph did not suffer any prejudice. He fully understood the case that was against him, and we note from the record that he fully participated in the trial. As a result, the duplicity of the charge was not fatal and as such, this ground of appeal fails."

31. Judge D. K Kimei in *Peter Mungai Ngeseria v Republic* [2017] eKLR when faced with a similar situation held as thus (and which I find persuasive);-

> "The court in *Shah v Republic* [1969] EA 197 held that a duplex charge does not necessarily vitiate conviction. That the important question a court faced with such an issue should address itself to is whether or not there was a miscarriage of justice. I note that the court dismissed the appeal in *Joseph Onyango* (*supra*) a clear indication that the issue of duplicity was not key to the decision. Applying the test in *Shah* (*supra*), it is noteworthy that the appellant herein did not raise the complaint of duplicity at the trial. Further, the appellant conducted his case in as though he understood he was facing the charge of robbery with violence. In the circumstances, I am unable to find that he was prejudiced by the duplicity. That ground must therefore fail."

32. In the instant case, the appellant took plea and throughout the trial he was represented by an advocate and who did not raise the issue of duplicity. All the witnesses were cross examined. The accused was aware of the charges facing him during the trial process and failed to raise the issue of defective charge sheet at trial and his advocate proceeded to cross-examine the witnesses accordingly. This is a clear indication that there was no confusion during the trial. It is clear from the particulars of the charge quoted above that they support the offence of robbery with violence. I am satisfied that there was no issue of confusion in the mind of the appellant as to the charge framed and the evidence presented against him. I have no doubt in my mind that he faced a charge of robbery with violence under section 296(2) of the *Penal Code* as the evidence tendered pointed to such a charge and not section 295 of the said Act and therefore I find that he was not prejudiced in any way. In any event if any such prejudice would be cured by section 382 of the *Criminal Procedure Code* which provides as follows:

> "Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge proclamation, order, judgement or other proceedings under this code, unless the error, omission or irregularity has occasioned a failure of justice; provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."
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> (See *Ezekiah Omurende Munyenya v Republic* [2020] eKLR)

33. On whether the prosecution tendered sufficient evidence to prove its case to the required standards, I note that the appellant raised a ground to the effect that the circumstantial evidence was weak and that the doctrine of recent possession was wrongly applied as there was no theft which was proved. As such, in covering the issue as to whether the elements of the offence of robbery with violence were proved, I will be concentrating mostly on these two issues.

34. The elements of the offence of robbery with violence were set out by the Court of Appeal in the case of *Oluoch v Republic* [1985] KLR thus:-

> "Robbery with violence is committed in any of the following circumstances:
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> a. The offender is armed with any dangerous and offensive weapon or instrument; or
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> b. The offender is in company with one or more person or persons; or
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> 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 ... "

35. In *Dima Denge Dima & others v Republic*,Criminal Appeal No. 300 of 2007, the court held that the elements of the offence under section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.

36. However, even before considering the above elements, it is prudent to first consider whether the appellant herein is the offender? I say so having noted that he submitted that the circumstantial evidence in that respect was so weak.

37. It is clear that no one saw the appellant herein commit the offence. The evidence by PW1 was that when he went home at about 6pm, he found his daughter bleeding while on the sofa. As such, the only evidence available is circumstantial evidence.

38. In the case of *Ahamad Abolfathi Mohammed and another v Republic* [2018] eKLR, the Court of Appeal held as follows on circumstantial evidence:-

> "However, it is a truism that the guilt of an accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in *R v Taylor, Weaver and Donovan* [1928] Cr. App. R 21: -
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> > "It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

39. The conditions for the application of circumstantial evidence in order to sustain a conviction in any criminal trial have been laid down in several authorities of this court. It is trite law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established, (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused; (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else. (See *Abanga alias Onyango v Republic* CR. App no. 32 of 1990(UR). In order to convict on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that

of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shift to the party accused. (See *Sawe v Republic* [2003] KLR 364)

40. In *Neema Mwandoro Nduzya v R* [2008] eKLR the Court of Appeal reiterating the probative value of circumstantial evidence and the attendant duty of the trial court, stated that:

> "It is true that circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by intensified examination is capable of proving a proposition with the accuracy of mathematics as was said in *R v Taylor Weaver and Donovan* (19280 21 Cr. App. R. 20). But circumstantial evidence should be very closely examined before basis of a conviction on it.

41. In *Mwangi and another v Republic* (2004) 2 KLR 32, the Court of Appeal exhorted that:

> "In a case depending on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved is incapable of explanation on any other reasonable hypothesis except the hypothesis that the Accused is guilty of the charge"

42. The question therefore is whether the circumstantial evidence available herein can lead to a conclusion that it is the appellant who committed the offence he was being charged with. In my view, if I find in the negative, there will be no basis of proceeding to consider the other elements of the offence.

43. The evidence tendered by the prosecution was that PW1 left home on the material day and when he went back home at around 6pm, he found the deceased (his daughter) in her room unconscious and that she was bleeding from the nose and she had head injuries. That he screamed and people went to his rescue. They were able to take the deceased to Othaya KNH and where she was pronounced dead on arrival. I however note that the offence the appellant herein was facing was not murder but robbery with violence. The evidence by the prosecution was that PW1 had bought a phone for the deceased together with screen protector, cover and sim card and that her number was [particulars withheld]. That after the incident he was called by the DCI (on 20.09.2021) and he was shown a phone, make Techno with a green cover and which was similar to the one he had bought and that the IMEI on the phone was similar to the one on the box cover of the phone and when it was switched on, there was a photo of the deceased. The police informed him that they had found the phone with the appellant herein.PW8 testified that on 18.09.2021, after arresting the appellant, they proceeded to the appellant's sister (PW3) house and the appellant showed them where he had hidden the mobile phone. PW11 who was the investigating officer testified that when they visited the scene they found an empty box of a Techno phone but which did not have a phone and that her father had told them that he had bought the phone for the deceased. The witness produced the said receipt as exhibit.

44. The evidence by PW3 was to the effect that the appellant went to her home and woke her son and asked for food and that the witness called them to the main house. That the appellant sat on the opposite seat but her son sat on the arm rest next to her. That the appellant gave her son (Antony-PW6) the phone he had and when Antony was scrolling the phone, she was able to see the photos of the deceased. The evidence as to the appellant having visited the home of PW3 and further having had a phone at that time was corroborated by the evidence of PW6 who testified how the appellant woke him up and they went to PW3's house and when he was given food, he gave him his phone and he could see the deceased's photos before the appellant deleted the same. Further corroborating evidence was by PW5 and who corroborated this evidence as to the appellant having been the one who had stolen the

phone. He testified that the appellant visited his home and requested that he be sold alcohol and be given some money in cash and that the appellant sent the money using the phone number belonging to the deceased.

45. In my view, the series of events disclosed by the above evidence are satisfactory that the deceased owned a phone being serial number 354498510715714/22 as was described by the witnesses and that the same had been purchased by her father (PW1). That the evidence is further clear that the same was taken and later recovered at the home of PW3 by the police. Further the evidence is clear that the appellant had the same phone the previous night and he is the one who led the police to PW3's house where he had hidden the phone. There is no way that he could be having the phone on the night the offence took place without him having stolen the same.

46. Section 268 defines stealing as;-

> " A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property."

47. In the case of *Wycliffe Anyona Nyabuto v Republic* (2014) eKLR the court stated that:-

> " Essential element in charge of theft is that the person accused fraudulently converts a property which is capable of being owned so as to deprive the owner of such property"

48. There was no evidence which was tendered to prove that the owner of the said phone had consented to the appellant taking of the phone. The appellant in his submissions submitted that the deceased was the one who had given him the phone but I find the said evidence as an afterthought as he never tendered such evidence in the trial court. In my view, I find that the element of stealing was proved.

49. The appellant submitted that the trial court relied on the doctrine of recent possession but according to him the deceased could have given him the phone as they were in a cordial relationship and further she had given him the PIN long before she met her death. However, as I have already stated, this evidence was never tendered before the trial court. The only defense the appellant tendered was that on the date of the incident, he was at work and he passed through his sister's home before going home. The said defense was an afterthought and which was raised too late in the day.

50. In my view, by the reasons that the appellant had been seen with the phone the previous night and further transacted with the same, the doctrine of recent possession was applicable and the burden shifted upon him to explain how the said phone got into his possession.

51. The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarised the essential elements of the doctrine of recent possession in *Eric Otieno Arum v Republic* KSM CA Criminal Appeal No. 85 of 2005 [2006]eKLR, where the court 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.

52. 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.

53. 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 plausible (See *Kelvin Nyongesa & 2 others v Republic* [2017] eKLR).

54. Despite the overwhelming evidence that he was the one who was found with the said phone, a day after the deceased was killed, he never tendered any evidence before the trial court to explain how he came to be in possession of the phone. In my view, the doctrine of recent possession was applied properly by the trial court and I agree with the trial court.

55. Having found that the stealing was proved, the other question is whether any of the elements under section 296(2) were proved. The evidence by the Investigating Officer was that he forwarded the metal meko grill for analysis and the blood samples on the same upon DNA profiling matched that of the deceased. PW4 testified that he conducted postmortem and the findings were that the deceased died as a result of severe head injury due to blunt force trauma. It is the same date of the death that the appellant was found with the phone belonging to the deceased. In my view, from the chain of events, it can only be said that the appellant herein inflicted the injuries which lead to her death. He could have either used the said metal meko grill or (armed with a dangerous or offensive weapon) or at *or immediately before or immediately after the time of the robbery, he did wound, beat, strike or used other personal violence to the deceased.*

56. Considering all the above, I find that the prosecution was able to prove the elements of the offence of robbery with violence to the required standards. Further, I find that the circumstantial evidence tendered was solid and consistent and the same was strengthened by the fact that the appellant was the one who had been seen with the deceased's phone and that he was the one who led the police to where the phone had been hidden. I therefore find that the conviction by the trial court was save and that the evidence tendered by the prosecution was sufficient to prove the said elements of the offence beyond any reasonable doubts.

57. As to whether the sentence meted on the appellant was excessive, as I have already noted elsewhere, the trial court sentenced the appellant to life imprisonment. The sentence provided for under the law for the offence the accused was charged with is death by hanging. However, I have perused through the sentence ruling and I note that the court under paragraph 4 of the same recognized that it had powers to exercise discretion in sentencing. The ruling is clear that the trial court indeed considered the mitigating factors and aggravating factors in the sentencing.

58. However, I am aware of the jurisprudence in relation to mandatory minimum sentences as was pronounced by the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR – (Muruatetu-1) to the effect that mandatory minimum sentences are unconstitutional for taking away the discretion of the court in sentencing but the Supreme Court did not outlaw mandatory sentences. Courts can still impose in deserving cases. The said reasoning was earlier applied to other offences which provided for mandatory minimum sentences and for robbery with violence, the same was applied in *William Okungu Kittiny v Republic* [2018] eKLR.

59. In the premises, I hereby set aside the life sentence. The appellant is sentenced to 35 years imprisonment.

60. It's so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.

L. NJUGUNA

JUDGE

……………………… for the Appellant

……………………… for the State