



**Kinuthia v Republic (Criminal Appeal E020 of 2021)
[2021] KEHC 305 (KLR) (11 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 305 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E020 OF 2021
DAS MAJANJA, J
NOVEMBER 11, 2021**

BETWEEN

JULIUS MUTUNGA KINUTHIA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the original conviction and sentence of Hon. E. Riany, SRM dated 29th June 2020 in Criminal Case No. 4157 of 2016 at the Magistrates Court at Thika)

JUDGMENT

1. The Appellant was charged, convicted and sentenced to serve 20 years' imprisonment for the offence of Robbery with Violence contrary to Section 296(2) of the Penal Code. It was stated in the charge that the Appellant, together with others, on the 11th May 2016 at Thugi River Estate in Gatanga Sub County within Murang'a County while armed with dangerous weapons namely pangas, machettes and knives robbed off one Patrick Ndung'u Mwangi of a mobile phone make Nokia 1280 serial number 355930040302431 valued at KES 1,800.00 and immediately before the time of such robbery killed the said Patrick Ndung'u Mwangi ("the Deceased").
2. The Appellant is dissatisfied with this decision and now appeals against both the conviction and sentence and seeks that the same be set aside in whole. His appeal is set out in the Petition of Appeal dated 13th August 2021 and is supported by the written submissions of his counsel. The Respondent has opposed the appeal through the written submissions of its counsel and it has also filed a notice for prayer of enhancement of sentence dated 12th August 2021.
3. In determining this appeal, I am mindful that I am required to review all the evidence and come to my own conclusions as to whether to uphold the conviction and sentence bearing in mind that I neither heard nor saw the witnesses testify in order to assess their demeanour (see *Okeno v Republic [1972] EA*



32, *Kiilu and Another v Republic* [2005] 1 KLR 174). In order to proceed with this task, it is necessary to reprise the evidence emerging before the trial court.

4. The Respondent marshalled six witnesses in a bid to prove its case against the Appellant. Joseph Kiptisia (PW 1) testified that on 10th May 2016, he received a phone call from one Loko that the Deceased was missing and could not be traced. They then decided to look for him in his house which they found locked and when they grew suspicious, they called the Chief and police at Kandara. PW 1 stated that when the police came, they took some clothes that had been recovered in a nearby bush by some ladies and the Deceased was later found dead in a nearby river and that he had injuries on his head and mouth. PW 1 later learnt that two people had been arrested with the deceased's phone and that he knew them; which persons included the Appellant.
5. Priscilla Ngendo (PW 2) recalled that on 17th May 2016, the Appellant left a phone with her father as security for some money the father lent the Appellant and that on 27th May 2016, the Police officers came to their house seeking the phone which they said was being tracked. PW 2 stated that her father was arrested for being in possession of the phone but was later released after he identified the Appellant at the police station. PW 2 stated that she also identified the Appellant at the police station and knew the Appellant as someone who used to buy and sell macademia and that they used to interact at her shop for a while.
6. John Ndung'u Kagibi (PW 3) testified that he is a hotelier and that on the material date, he saw the Appellant and the Deceased eating at his hotel, only to later hear that the Deceased was had been found dead. James Kamau Gathitu (PW 4) recalled that the Appellant, who is known to him as a seller of macademia, came and told him that he was in need of cash. PW 4 gave him KES 250.00 and the Appellant gave him a Nokia 1280 phone as security and that he was to take it back once he refunds the money. After some days, the police came and asked for the phone, which they said was being looked for as the owner was dead. PW 4 was taken to the police station and told to produce the owner of that phone and that his wife looked for the Appellant, who was brought in and PW 4 was able to identify him. PW 4 stated that the phone was able to be traced to him as he put in his sim card and started using the phone
7. PC Muthoka Ngolya (PW 5), a DCI officer previously attached at Gatanga was tasked with investigating the death of the Deceased. He confirmed that they found a body recovered by the river had injuries on the right neck below the ear. PW 5 stated that they got a phone number from the watchman who reported the death and further got a statement from Safaricom which showed that the phone was in use at Kandara area. They went there and PW 4 was then arrested and he explained that the phone was given to him as security by the Appellant for a loan of KES 250.00 taken by the Appellant. PW 5 also confirmed that PW 2 and PW 4 gave a description of the Appellant which led to his arrest. In cross-examination, PW 5 stated that there was a phone recovered at the scene but the same had nothing to do with this case and reiterated that the Appellant gave the phone to PW 4. PW 5 added that PW 4 had the phone from 16th May 2016 until his arrest on 22nd May 2016 and that the phone belonged to the deceased.
8. Jane Nungari (PW 6) and stated that on 17th May 2016, "mzee" was left for a phone by the Appellant who was in need of cash. PW 6 stated that she was not in when the Appellant brought the phone but that the Appellant came in three days later looking for mzee to get the phone and that is when PW 6 learnt that the phone was his. On 27th May 2016, the police came to their home stating that they were following up on a phone that they were holding and that they took to looking for the Appellant who was traced and PW 6 was able to identify him at the police station.



9. In his sworn testimony, the Appellant (DW 1) denied the offence. He stated that he used to sell macadamia nuts and that on the material day, he was in Kandara visiting his cousin. He finished work at 5.30pm, got home at 6.00pm and at 9.00 pm while he was doing his calculations, a police officer came and arrested him. He was later charged with the offence.
10. The offence of robbery with violence under section 296(2) of the *Penal Code* is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR*, *Oluoch v Republic [1985] KLR 549* and *Ganzi & 2 Others v Republic [2005] 1 KLR 52*).
11. From the totality of the evidence, the prosecution proved all the elements of robbery with violence. The evidence shows that the Deceased was killed as evidenced by the injuries inflicted and his phone stolen. The question is whether it is the Appellant who committed the offence.
12. From the facts and evidence I have rehashed above, the case against the Appellant was anchored on circumstantial evidence based on the doctrine of recent possession. The Court of Appeal, in *David Mugo Kimunge v Republic NYR CA CRA No. 4 of 2014 [2015] eKLR* cited with approval, the Supreme Court of Canada's case in *Republic v. Kowkyk (1988)2 SCR 59* while explaining the doctrine of recent possession where the said Canadian apex court held as follows:

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

13. The Appellate Court then went on to state that:
 19. There is no significant disparity between the English /Canadian position and what has been accepted as the applicable doctrine in our courts. Applying that learning to the case before us, we are of the view that the inference arising from the unexplained possession of stolen goods is one of fact. The trier of fact in this case was the Principal Magistrate's court which had the advantage of seeing and hearing the witnesses testify before it. As always, the first appellate and the second appellate courts must of necessity give allowance for this advantage and be slow to interfere unless there was no evidence to support the findings or the findings were perverse. It is also clear from the decisions that the truth of the explanation alluded to in the doctrine is not the standard applicable. Nor is it acceptable that any fanciful or concocted explanation will suffice. The explanation must pass the muster of reasonableness and plausibility. Did it do so in the case before us?



14. In an earlier decision, the Court of Appeal, in *Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR* summarised the essential elements of the doctrine of recent possession as follows:

In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.

15. 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 one (see *Paul Mwita Robi v Republic KSM CA CRA No. 200 of 2008* and *Kelvin Nyongesa & 2 others v Republic HC KKG CRA No. 176 of 2016*).
16. From the evidence on record, more so Exhibit 2, I find that the subject phone was registered and belonged to the deceased. PW 4, who was found in possession of the phone explained that the same was given to him by the Appellant as security for a loan. This evidence was corroborated by PW 2, PW 5 and PW 6 whose testimony I find to be firm and consistent. It follows that the evidential burden shifted to the Appellant to explain how the deceased's phone came to his possession, so soon after the deceased's death which was confirmed by the post mortem report, Exhibit 3. The Appellant never offered any explanation for this. There is also the credible and unchallenged testimony of PW 3 that the Appellant had been seen with the Deceased just before his death. All these unerringly point towards the Appellant's guilt and in the absence of a reasonable or plausible explanation by the Appellant, I find that in the circumstances, the trial court was not wrong to draw an inference that it was the Appellant who violently killed the deceased, stole his phone and soon after came with it to PW 4 and offered it as security for a loan of KES 250.00.
17. The Appellant raised an alibi defence. In the case of *Sekitoleko v Uganda [1967] EA 531* it was held that as general rule, the burden of proving the guilt of an accused never shifts whether the defence set up is an alibi or something else and the burden of proving an alibi does not lie on an accused. In such a case, the prosecution must disprove the alibi beyond reasonable doubt. In light of the clear finding that the Appellant is the person who was seen with the Deceased before his death and was in recent possession of the Deceased's phone in circumstances the lead to an irresistible inference of guilt, the mere allegation that he was away on the day the Deceased is said to have died is paper thin and collapses on its own weight. I therefore affirm the conviction.
18. On the sentence, I note that the Respondent has sought an enhancement of the same and it invites the court to invoke section 354(3)(b) of the *Criminal Procedure Code* which gives the court the discretion to 'increase or reduce the sentence or alter the nature of the sentence;' in an appeal. It is common ground that the offence of Robbery with Violence under section 296(2) of the Penal Code carries a mandatory death sentence and that the learned trial magistrate was guided by the Supreme Court's decision in *Francis Karioko Muruatetu & another v Republic SCK Petition No. 15 of 2015 [2017] eKLR* in sentencing the Appellant to twenty years' imprisonment.
19. On 6th July 2021, the Supreme Court issued directions in the Muruatetu Case (*Supra*) where it was stated that the decision and subsequent guidelines only apply in respect to sentences of murder under



Sections 203 and 204 of the Penal Code and not in respect of other capital offences such as Robbery with Violence. The Supreme Court also dispelled the interpretation that the Muruatetu Case (Supra) is an authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution.

20. In the foregoing, it follows that other than the offence of murder, courts do not have any discretionary power when it comes to sentencing of offences that provide for mandatory sentences such as the present one. However, I would point out that at the time the court imposed the sentence of 20 years' imprisonment, it was a valid sentence as the Appellant was entitled to benefit from precedents of the Court of Appeal (see for example *Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR* and *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*). Those precedents were binding on this Court and the subordinate court. In the circumstances, I decline to interfere with the sentence.
21. The conviction and sentence are affirmed. The appeal is dismissed.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 11th day of NOVEMBER 2021.

M. KASANGO

JUDGE

Appellant in person.

Mr Kasyoka, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.

