Sogota v Republic (Criminal Appeal E053 of 2024)
[2025] KEHC 13309 (KLR) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13309 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E053 OF 2024

WA OKWANY, J

SEPTEMBER 18, 2025

BETWEEN

GILBERT NYAMBANE SOGOTA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Sentence at the Chief Magistrate's Court in Nyamira CMCCR Case No. 339 of 2015 delivered by Hon. M.O. Wambani, Chief Magistrate on 12th August 2021)

JUDGMENT

1. The Appellant and a co-accused were charged with the offence of Robbery with Violence contrary to Section 296 (2) of the Penal Code. The particulars of the charge were that on the 6th April 2015 at Mokomoni sub-location in Nyamira North District within Nyamira County, jointly with others not before the court, while armed with dangerous weapons namely pangas robbed Joseph Nyaisa Maosa of cash Kshs. 5,800/= and mobile phone make Nokia valued at Kshs. 1,500/= and after the time of such robbery killed the said Joseph Nyaisa Maosa.

2. The Accused persons also faced a second count of Robbery with Violence contrary to Section 296 (2) of the Penal Code the particulars being that on the same date, they robbed one Joyce Nyaisa of one Techno mobile phone valued at Kshs. 2,500/=.

3. The Appellant pleaded not guilty to both charges and a full trial was conducted in which the prosecution called a total of 8 witnesses. In the course of the trial and after the prosecution had called 4 witnesses, it successfully made an Application to withdraw the charge in the second count under Section 87 (a) of the Criminal Procedure Code on the basis that the victim in the second count, namely, Joyce Nyaisa, could not be traced to tender her testimony.

The Prosecution's Case

4. A summary of the Prosecution's case was that on 6th April 2015, at around 10:00 p.m., PW1 David Okero Nyanumba, heard screams and rushed to Joseph's home where, with Joyce Maosa, Joseph's wife, he found Joseph lying dead on the bedroom floor with cut wounds on his neck and chest. Shortly after, PW2 John Okero Maosa, Joseph's brother, also responded to Joyce's screams and found Joseph dead with severe cut wounds on his body. He later reported the matter to the police, who arrived at 10:45 p.m. PW2 later identified Joseph's phone, recovered months later, as it had a defective charging system and damaged SIM slot.

5. PW3 Mose Moseti Makori, testified that he purchased the same phone from the 2nd Accused, known as "Onyari," in August 2015 and later led police to him. PW4 Emily Kwamboka, PW3's sister, confirmed using the phone briefly before it was seized by police in September 2015, after which the 2nd Accused admitted to having sold it to her brother.

6. PW5 Wilson Matunda, a night guard, recalled that on the night of the murder, he escorted the 1st Accused to a clinic after he arrived with an injured palm and head bruises, claiming he had accidentally cut himself.

7. PW6 Dr. Samwel Ombati Atandi conducted the post-mortem on 10th April 2015 and found multiple deep cut wounds, particularly to the neck severing the carotid arteries, concluding that Joseph died from cardiopulmonary failure and massive haemorrhage.

   PW7 PC Steven Muovi testified that the 1st Accused was arrested by villagers after being seen injured on the night of the robbery and that blood-stained clothes were recovered from his house. Investigations traced Joseph's stolen Nokia 1280 phone to the 2nd Accused, who was found using it weeks later. Blood and other samples from the crime scene and suspects were forwarded for DNA analysis. PW7 produced the following exhibits: -

   1. Black Nokia Mobile Phone – P.Exh 1
   2. Exhibit Memo Form dated 17th April 2015 - P.Exh3(a)
   3. Letter for transfer of samples to Kisumu - P.Exh3(b)
   4. Blood Sample of the 1st Accused marked 'A'- P.Exh 4
   5. Blood Sample of the Deceased, marked 'B' – P.Exh 5
   6. Blood Stains collected from the Deceased's house marked 'C1-C3' - P.Exh 6 (a-c)
   7. Blood Stains collected from the cloths from the Accused's house marked 'D' - P.Exh 7
   8. Blood stains extracted from the stool in the shop marked 'E' (not produced)
   9. Blood stains collected from the floor of the victim's house marked 'F' – P.Exh 8

8. PW8 Richard Kimutai Langat, a Government Analyst, confirmed through DNA profiling that blood stains from the suspect's house matched the Appellant, while stains from the deceased's house matched Joseph. He produced a report dated 23rd August 2016.

The Defence Case

9. The Appellant (DW1) testified that his name is Felix Manchaba Sogota (ID No. xxxxxxxx) and not Gilbert Nyambane Sogota (whom he said was a convict at Kisii G.K. Prison). He stated that he is

sofa-set maker who also ran a salon/barbershop, he said he was arrested on 2nd April 2015 following a dispute over a motorcycle he had borrowed from the sub-chief to ferry timber and that after returning it, the sub-chief's son allegedly crashed it and DW1 contributed Kshs. 1,000 for treatment at St. Luke's Hospital. He stated that he was then taken to Bonyunyu AP Camp, where rain prompted his confinement on 3rd April 2015.

10. The Appellant explained that on 5th April 2015 the sub-chief allegedly demanded Kshs. 20,000 to settle the matter and that even though his wife brought Kshs. 5,000, he remained in custody until 6 April 2015 when, at 10:00 a.m., officers took him in a G.K. vehicle to his house where nothing was recovered and then to the same hospital where officers entered while he, the sub-chief, her husband, and his wife stayed in the vehicle, and later to Nyamira Police Station. He added that his wife was released using the money while he stayed in custody. He maintained his innocence and added that he had been in custody for four years. He produced his National ID card (marked DMFI-1 after objection) and five church certificates (D.Exh 2a-e) in support of his defence.

Reopening of the Prosecution's Case

11. At the close of the defence case and following the Appellant's insistence that his name is Felix Manchaba Sogota (ID No. xxxxxxxx) and not Gilbert Nyambane Sogota, the prosecution applied to reopen its case to adduce evidence on the Appellant's identity. The trial court allowed the application on 13 June 2019. DW1 then withdrew his church certificates. On 2nd October 2019, the court also allowed an amendment of the charge sheet to reflect the name "Gilbert Nyambane Sogota alias Felix Manchaba Sogota," whereupon the accused took fresh plea and denied the charge.

12. PW7 (PC Steven Muovi) was recalled and testified that on 3rd April 2019 the accused produced an ID in the name Felix Manchaba Sogota, prompting PW7 to write to the National Registration Bureau on 10th April 2019. He explained the accused had earlier given the name Gilbert Nyambane Sogota, ID 22411613, on Police Form 20 dated 9th February 2015 during fingerprinting. The Bureau's reply of 23rd May 2019 confirmed the fingerprints and correct name as Felix Manchaba Sogota, ID xxxxxxxx, with "Gilbert" treated as an alias.

13. PW7 added that the accused was arrested on 7th April 2015 and booked at Bonyunyu AP Post (OB No. 3 of 7/4/2015) under the name Gilbert, having been brought by sub-chief Agnes Osebe and his stepfather Ronald Masese as a murder suspect from the 6th April 2015 incident. He produced: the letter to NRB (P.Exh 9), the fingerprint/identity confirmation (P.Exh 10), OB No. 3 of 7/4/2015 (P.Exh 11), and OB No. 4 of 7/4/2015 (P.Exh 12).

14. After a full trial, both accused were convicted on Count I and sentenced to life imprisonment. The Appellant challenges the conviction and sentence.

The Appeal

15. Aggrieved by the trial court's findings on conviction and sentence, the Appellant filed the present Appeal vide a homemade Petition of Appeal dated 20th September 2024 in which he listed the following grounds of appeal: -

    1. That the trial court erred in law in fact in not proving the ingredients of the offence in the instant case beyond reasonable doubt.

    2. That the trial court erred in law and in fact in relying on fanciful and remote possibilities to convict the Appellant.

3. That the trial court erred in law and in fact in not weighing the conflicting evidence in the Prosecution's case that was/is inconsequential to conviction.

4. That the trial court erred in law and in fact in not appreciating the Appellant's cogent defence that overwhelmed the Prosecution's case.

16. The Appellant subsequently filed Supplementary Grounds of Appeal dated 27th March 2025 in which he raised four other grounds as follows: -

1. That the trial court erred in law and in fact in admitting the evidence of the DNA results that was obtained in a manner that was detrimental to justice, contrary to Section 122A and 122D, 122C of the Penal Code Cap 63 Laws of Kenya. Hence rejection of such evidence pursuant to Article 50(4) COK 2010.

2. That the trial court erred in law and in fact in not acquitting the Appellant due to the fact that no direct evidence placed the Appellant at the vicinity of this crime.

3. That the trial court erred in law and in fact in convicting the Appellant relying on DNA results of exhibits that were not produced or equivocally produced in court.

4. That the trial court erred in law and in fact in denying the Appellant his absolute constitutional right to a least prescribed sentence pursuant to Article 25(c) and 50 (2) (p) in sentencing him to indefinite and indeterminate life sentence thus unfair trial.

17. The Appeal was canvassed by way of written submissions which I have carefully considered.

Duty of a First Appellate Court

18. As a first appellate court I must re-evaluate the evidence presented before the trial court afresh and draw my own independent conclusions while bearing in mind the fact that I did not see or hear the witnesses testify. (See Okeno vs. R [1972] EA 32).

Issues for Determination

a. Whether the prosecution proved identification/placement of the Appellant at the scene of crime beyond reasonable doubt.

b. Whether the circumstantial and forensic (DNA) evidence met the legal threshold.

c. Whether reliance on doctrine of recent possession via the deceased's phone implicated the Appellant.

d. Whether failure to call Joyce and gaps in the chain of custody were material.

e. Consequence for conviction and sentence.

Analysis and Determination

19. As a preliminary issue, I note that the prosecution initially charged the Appellant with two counts of robbery with violence even though one victim, Joseph Nyaisa Maosa, died during the incident. My take is that while the more appropriate charge should have been murder, as a first appellate court, I will re-evaluate whether robbery with violence under Section.296(2) of the Penal Code was proved.

20. Section 296 (2) of the Penal Code stipulates as follows on the offence of robbery with violence: -

296. Punishment of robbery

(1) _

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, 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, he shall be sentenced to death.

21. In Johana Ndungu vs. Republic CRA. 116/1995, [1996] eKLR the Court of Appeal outlined the ingredients of the offence of robbery with violence as follows: -

> " In order to appreciate properly as to what acts, constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is 'use of or threat to use' actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore -described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296 (2) which we give below and any one of which if proved, will constitute the offence under the subsection:
>
> i. If the offender is armed with any dangerous or offensive weapon or instrument; or
>
> ii. If he is in company with one or more other person or persons; or
>
> iii. If at or immediately before, or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person."
>
> (See also Oluoch vs. Republic [1985] KLR)

22. In Dima Denge & Others vs. Republic Criminal Appeal No. 300 of 2007 (2013) eKLR the Court of Appeal further explained that the elements of the offence under sub section (2) must be considered conjunctively and not disjunctively. The court held thus: -

> " 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."

23. It was not disputed that a violent robbery occurred at Mokomoni area on 6 April 2015 and that the deceased lost property and suffered fatal cut wounds. Indeed, the deceased's Nokia 1280 (IMEI 351928052927289) phone was later traced to the 2nd accused through third parties.

24. The central Issue is whether the evidence tendered by the Prosecution identified or placed the Appellant at the scene of the robbery, beyond reasonable doubt. This court is reminded of the standard of proof that is expected in criminal cases as was stated in the case of Miller vs. Minister of Pensions [1947] 2 All ER 372 where it was held thus: -

> " Whereas in the latter case Lord Denning stated on this phrase of beyond reasonable doubt as follows: "It need not reach certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadows of doubt. The law would fail to protect the community if it admitted forceful possibilities to deflect the course of justice. If the evidence is so forceful against a man to leave only a remote possibility in his favour which can be dismissed with the sentence, of course it is possible but not in the least probable, the case is proved beyond reasonable doubt but nothing short of that will suffice."

25. I am guided by the decision of the Federal Court of United States in the case of United States vs. Smith, 267 F. 3d 1154, 1161 (D.C. Cir. 2001) (Citing In re Winship, 397 U. S. 358, 370, 90 S. Ct. 1068, 1076 (1970) (Harlan, J., concurring) where it was held thus: -

> " The burden is upon the state to prove beyond reasonable doubt that the defendant is guilty of the crime charged. It is a strict and heavy burden. The evidence must overcome any reasonable doubt concerning the defendant's guilt, but it does not mean that a defendant's guilt must be proved beyond all possible doubt. A reasonable doubt is a fair, actual and logical doubt based upon reason and common sense. A reasonable doubt may arise either from the evidence or from a lack of evidence. Reasonable doubt exists when you are not firmly convinced of the defendant's guilt, after you weighed and considered all the evidence. A defendant must not be convicted on suspicion or speculation. It is not enough for the state to show that the defendant is probably guilty. On the other hand, there are very few things in this world that we know with absolute certainty. The state does not have to overcome every possible doubt. The state must prove each element of the crime by evidence that firmly convinces each of you and leaves no reasonable doubt. The proof must be so convincing that you can rely and act upon it in this matter of the highest importance. If you find there's a reasonable doubt that the defendant is guilty of the crime, you must give the defendant the benefit of that doubt and find the defendant not guilty of the crime under consideration." (Emphasis added)

26. Applying the standard of proof expressed in the above cited cases to the instant case, I note that the prosecution did not present any eyewitness to the attack. PW1 and PW2 arrived at the scene of the robbery after the fact. It is apparent that the Prosecution's case was mainly based on circumstantial evidence prompted by the Appellant's alleged hand injury.

27. Circumstantial evidence was explained by Lord Heward, C.J. in R. vs. Taylor, Weaver and Donovan [1928] Cr. App. R 21 as follows: -

> " 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."

28. In Abanga alias Onyango vs. Republic CR.A No. 32 OF 1990 (ur), the Court of Appeal set out the applicable principles to determine whether circumstantial evidence adduced in a case is sufficient to sustain a conviction as follows: -

> " It is settled 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."

29. It is trite that circumstantial evidence must exclude any reasonable hypothesis of innocence and that mere suspicion, however strong, is not sufficient to sustain a conviction. In Sawe vs. R [2003] it was held that circumstantial evidence must point irresistibly to guilt and exclude any reasonable hypothesis consistent with innocence.

30. Similarly, in Kipkering arap Koske vs. R (1949) 16 EACA 135 it was held that inculpatory facts must be incompatible with innocence.

31. In the present case, the only witness who attempted to connect the Appellant to the robbery incident was PW5, a security guard at a hospital/clinic where the Appellant allegedly sought treatment for a cut wound on the hand on the material night. Medical records were however not presented to corroborate the alleged injuries. Internal contradictions emerged when PW5 testified as follows: -

> " On 6th April 2015 I was on duty when somebody came with an injury on his hand. It was 10.30 p.m. The injury was on the left hand, on the palm. It was a cut wound.....He was treated and told to return the next day. The patient returned... The patient who came that day is the 1st accused before the court..."

32. I find that the testimony of PW5 that the "patient returned the next day" contradicted the evidence by the arresting officers who placed the Appellant in custody then.

33. It is also instructive to note that no identification parade was conducted to enable PW5 properly identify or pick out the Appellant as the late-night hospital visitor considering that the witness did not know the Appellant prior to his alleged visit to the hospital. In this regard, I find that the Appellant's dock identification by PW5 without an identification parade or prior description was of little or no probative value. I am guided by the decision in Gabriel Kamau Njoroge vs. Republic (1982-1988) 1KAR 1134 where the Court of Appeal held as follows:-

> " A dock identification is generally worthless and the court should not place much reliance on it unless this has been preceded by a properly conducted parade. A witness should be asked to give the description of the accused and the police should then arrange a fair identification parade."

34. In Wamunga vs. R [1989] KLR 424 it was held that courts must exercise special caution with identification evidence; mistaken identity is a known source of injustice. (See also R vs. Turnbull [1977] QB 224; Gabriel Kamau Njoroge vs. R (1982-88) 1 KAR 1134). In the instant case, no visual identification occurred at all and the trial court therefore relied entirely on circumstances and forensics.

35. Furthermore, none of the arresting/material witnesses, namely; Joyce Kerubo Nyaisa (the deceased's widow who was present during the attack), the sub-chief, elders or step-father testified so as to shed light on the exact date, time and circumstances under which the Appellant was arrested considering the Appellant's claim that he was already in custody, long before the date of the alleged robbery. Joyce, who was the only surviving victim and the first narrator of events, was not availed as a witness. The prosecution withdrew Count II on the basis that she was "untraceable," yet her account was central to timeline, attackers' number, and theft particulars. While the Prosecution need not call a superfluity of witnesses, where a vital witness is withheld, the court may draw an adverse inference that their evidence would have been unfavourable. (See Bukenya vs. Uganda [1972] EA 549). My finding is that failure

to call the material witnesses invites an adverse inference that their evidence would not have aided the prosecution.

36. Turning to the forensic/DNA evidence, the State relied on: -

    i. an injury on the Appellant's palm,

    ii. alleged blood-stained clothes recovered from his house, and

    iii. a DNA report (PW8) linking some exhibits to the Appellant and others to the deceased.

37. My observation is that three issues arise from the DNA evidence tendered by the prosecution. Firstly, there is the issue of chain of custody and integrity of the exhibits presented for the DNA analysis. The exhibits are reported to have been moved from Nairobi to Kisumu more than a year later; one listed item ("E", blood from stool) was not produced as an exhibit and the dates and labels ("C1–C3", "D", "F") shifted hands with scant sealing/handling particulars.

38. Courts have taken the position that they should be slow to rely on scientific results where the chain is not shown with reasonable assurance. In Paul Mwangi Maina vs. R [2013] eKLR, the court set out the chain-of-custody requirements and held that prosecution should demonstrate preservation, handling, and movement of exhibits to sustain reliability while in Kiarie vs. R [1984] KLR 739 it was held that gaps or inconsistencies in the prosecution's case that create reasonable doubt must benefit the accused.

39. Secondly, there was a problem with the sampling provenance as the key collector of the samples (PC Muriithi) did not testify and no contemporaneous scene photographs, seal numbers, or exhibit register were produced to anchor transfer and continuity thus lowering the evidential integrity of the samples.

40. Lastly is the exclusionary caution since forensic proof must connect the accused to the crime scene. In this case, DNA analysis was allegedly conducted on unspecified "clothes from the suspect's house" only proved the clothes had his blood which was unsurprising. The analysis does not however show that blood was acquired during the robbery, nor that he was present at the locus. Without an unbroken chain, the probative value of the analysis is diminished. I am guided by the decision in Musili Tulo vs. R [2014] eKLR where it was held that forensic/medical evidence must be linked by proper foundation and chain and that where links are missing, probative value diminishes.

41. I further note that the "escape route" samples do not appear in the forwarding memo and that there were no scene photographs. I therefore find that the trial court misapprehended the evidence when he stated that the deceased's blood was on the Appellant's clothes. I find that in the circumstances of this case, the DNA results lacked the integrity necessary to ground a conviction. In sum, this court finds that material gaps existed in the circumstantial web of the scientific results and that the same does not meet the test set in the Sawe case (supra).

42. This court cannot complete this judgment without commenting on the identity/alias dispute and the belated identification of the Appellant as an alias following the amendment of the charge after the Appellant had presented his testimony. The Appellant raised identity concerns (Gilbert vs Felix). I note that PW7 later obtained a fingerprint confirmation linking the Appellant to ID No. xxxxxxxx. I find that even though the amendment resolved the issue of the identity of the Appellant, it does not cure the proof of participation deficit.

Disposition

43. In sum, having regard to the findings and observations that I have made in this judgment, I find that the prosecution evidence, absent direct identification, with material chain-of-custody defects, and without

a clean circumstantial arc excluding innocence, did not attain the threshold of proof beyond reasonable doubt.

44. Consequently, I find that the instant appeal is merited and I hereby allow it by quashing the conviction and setting aside the sentence. I direct that the Appellant be set at liberty forthwith unless he is otherwise lawfully held.

45. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 18TH DAY OF SEPTEMBER 2025.

W. A. OKWANY

JUDGE