Gitonga v Republic (Criminal Appeal 35 of 2017)
[2025] KECA 1550 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1550 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 35 OF 2017

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

OCTOBER 3, 2025

BETWEEN

MARTIN GITONGA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the conviction and sentence of the High Court of Kenya at Nanyuki (Kasango, J.) dated 28th July, 2016 in Criminal Appeal No. 31 of 2015)

JUDGMENT

1. A background of this appeal is that the appellant was charged before the Chief Magistrate's Court at Nanyuki, in Criminal Case No. 192 of 2011, with the offence of robbery with violence contrary to Section 296 (2) of the Penal Code. The particulars of the offence alleged that on 30th January 2010, at Timau Township in Buuri District within Eastern Province, jointly with others not before court, the appellant, being armed with offensive weapons, namely a metal bar and clubs, robbed Sospeter Kinuthia of a Motorola mobile phone, a pair of safari boots, a jacket, a National Identity Card, two pairs of long trousers, an Equity Bank ATM card, and cash Kshs.6,500, all of a total value of Kshs. 12,200, and at, or immediately before, or immediately after the time of such robbery, used actual violence on the said Sospeter Kinuthia.

2. The appellant denied the charges, prompting the trial in which the prosecution called a total of four (4) witnesses. The brief facts of the case according to the prosecution were as follows: The complainant (PW1) told the court that on 30th January 2011, at 9. 00 p.m., he was on his way home from Panama Club in Timau, when he was waylaid by four assailants. Two of them were walking ahead of him while two others were behind him. PW1 stated that he saw the two people ahead of him running after another person, and realized that they were thieves. He turned around and the two people who were behind him held him and started beating him. They dropped him to the ground and started searching his pockets. At this point the other two assailants showed up. They removed his jacket and took a paper

bag in which he was a carrying a pair of trousers. They then hit him with something on the right side of his head and he fell down unconscious.

3. When he came to, PW1 stated that he found himself at his friend's house. His trousers, shoes, phone, and wallet were missing. He stated that the wallet contained Kshs.6,500, his identity card, Equity Bank ATM card, NSSF card and NHIF card. He reported the incident at Timau Police Station. It was the complainant's evidence that the appellant, who was his colleague at work, on 3rd February 2011, told him that he tried to help him when he found him being attacked by the assailants. The following day, he saw the appellant wearing the pair of trousers that were stolen from him. With the help of PW3, Samuel Mugo, a security guard at Timau Flower Farm, they arrested the appellant and took him to Timau Police Station. PW1 stated that he did not identify his assailants during the robbery, but that he heard the appellant's voice during the robbery. PW2, Henry Kimathi, was the tailor from who PW1 had collected the trouser he was carrying on the material date. PW2 confirmed that the trouser recovered from the appellant was the same one he gave to PW1.

4. The investigating officer, Sgt. Mugabe Nyawacha (PW4), stated that he was at Timau Police Station on 30th January 2011, at 11. 30 p.m., when three members of the public reported that they found their colleague (PW1) naked and unconscious. The following morning, PW1 came to the station and reported that he had been robbed the previous night, and that the assailants made away with cash Kshs, 6,500, his identity card, ATM card, safari boots, and a pair of trousers that he was carrying in a paper bag.

5. It was PW4's evidence that on 4th February, 2011, PW1, accompanied by security guards from Timau Farm, brought the appellant to the station. PW1 informed him that the appellant was in possession of a pair of trousers that were stolen from him on the night of the robbery. PW1 told him that he had taken the trousers to a tailor earlier in the day. PW4 interrogated the tailor (PW2) who confirmed that the recovered trousers were the same ones PW1 had brought to him for repairs. PW4 produced the pair of trousers in court, as well as a piece of cloth which had been cut from the said trousers by the tailor. PW4 testified that the complainant was not able to identify his assailants on the night of the attack.

6. After close of the prosecution's case, the trial magistrate found that the prosecution had established a prima facie case to warrant the appellant to be placed on his defence. He elected to give sworn evidence and called one witness. It was the appellant's testimony that on the material night of 30th January 2011, at 9.00 p.m., he was at home with his mother and brother. They watched television and went to bed at round 1.00 a.m. The appellant stated that he bought two pairs of trousers, including the one the complainant claimed belonged to him. He produced receipts for the two trousers. The appellant stated that he had a disagreement with the complainant over women, sometime in December 2010, but that they had reconciled. Upon cross-examination, the appellant stated that the trousers that were produced in court were of the same colour as his (black), but that his trousers did not have the same sewing as the one produced in court.

7. The appellant called his mother as a witness, Esther Muthoni, who testified as DW2. She stated that she was at home with the appellant on the night of 30th January 2010, and that she went to bed at 9.00 p.m. It was her evidence that she left the appellant watching television when she went to sleep.

8. The trial court (Nyaga, CM), in a judgment dated 30th April, 2013, found that the appellant was guilty as charged, on the application of the doctrine of recent possession. The appellant was sentenced to death.

9. The appellant, aggrieved by this decision, filed an appeal before the High Court at Nanyuki. His appeal was founded on fourteen grounds. The gist of the appellant's appeal was that the prosecution failed to

prove their case beyond any reasonable doubt. The appellant faulted the trial magistrate for convicting him on the basis of the doctrine of recent possession which was not supported by the evidence on record. He took issue with his conviction, stating that the prosecution failed to adduce evidence of the alleged injury or use of violence. He was aggrieved that his conviction was founded on unsubstantiated allegations, and that the case against him was aimed at settling personal scores. He was aggrieved that the trial court rejected his alibi defence which was corroborated by DW2. The appellant was of the view that the sentence awarded by the trial court was harsh and excessive.

10. The learned Judge (Kasango J.) determined that the appellant was properly convicted by the trial court. The learned Judge found that the appellant failed to sufficiently displace the prosecution's evidence against him, and that he failed to offer an explanation as to why he was found in possession of the pair of trousers that were stolen from the complainant.

11. The appellant is now before this Court seeking to overturn the decision of the High Court, and has proffered five (5) grounds of appeal in his supplementary memorandum of appeal dated 27th February, 2023. In summary, the appellant faulted the learned Judge for upholding his conviction whereas the evidence of identification and the doctrine of recent possession were not sufficiently proved. The appellant was aggrieved by the High Court's determination that the trousers he was wearing on the day of his arrest belonged to the complainant. He was of the view that there were material discrepancies in evidence adduced by the prosecution witnesses. He complained that his sentence was harsh and excessive.

12. The appeal was canvassed through written submissions, duly filed by both parties. The firm of S. K. Njuguna Advocates was on record for the appellant. Counsel for the appellant submitted that the prosecution's evidence was marred by material inconsistences. He asserted that the charge sheet alleged that the offence took place on 30th January, 2010, while the evidence on record was to the effect that the alleged robbery took place on 30th January, 2011. It was counsel's submission that the complainant had been drinking on the night he alleged he was robbed. He argued that though the complainant stated that he heard the appellant's voice during the robbery, he did not mention it to anyone, or even the police, in his first report.

13. Counsel submitted that the trousers recovered from the appellant had been purchased from an open-air market, and that the piece of cloth recovered from the tailor, cannot be said with certainty, that it was cut from the complainant's trousers as alleged.

Counsel submitted that the search conducted at the appellant's house did not yield anything connecting him to the robbery. He asserted that the appellant's defence was plausible, as he produced receipts as proof of purchase of the recovered pair of trousers.

14. With respect to the sentence, counsel was of the view that the mandatory nature of the death sentence was unconstitutional, as it takes away the discretion of the Court, and that the reasoning of the Supreme Court in Francis Karioko Muruatetu & another v Republic [2017] eKLR ought to be applicable in robbery with violence cases. Counsel cited a decision of the High Court in Baragoi v Republic [2022] eKLR, and urged that there should be no attempt to discriminate against any cadre of offenders.

15. In rebuttal, learned state counsel, Mr. Naulikha, urged that the two courts below considered the fact that the appellant was arrested in possession of a pair of trousers that was recently stolen from the complainant, and that he failed to prove ownership of the same. He was of the view that the discrepancies pointed out by the appellant were immaterial, and curable under Section 382 of the Criminal Procedure Code. Regarding the sentence, Mr. Naulikha submitted that the same was legal,

and that it was not harsh or excessive in the circumstances of this case. He urged us to dismiss the appeal for lack of merit.

16. This is a second appeal. The mandate of this Court on a second appeal was aptly stated in the case of Dzombo Mataza v Republic [2014] eKLR, where this Court expressed itself in the following terms;

> "As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court.... By dint of the provisions of section 361(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

17. We have considered the appellant's grounds of appeal, the submissions made on this appeal, and the proceedings before the trial court in light of our mandate as a second appellate court.

18. The issues that come to the fore for determination is whether the prosecution established its case on the charge brought against the appellant based on the evidence of identification and the application of the doctrine of recent possession as upheld by the two courts below.

19. The appellant was aggrieved that he was convicted on the basis of the evidence of identification which does not stand up to legal scrutiny. In particular, the appellant pointed out that from the evidence adduced, it was apparent that the complainant was drunk on the material night he was robbed and could not have been in a position to identify his attackers. The appellant further submitted that the long trousers which was alleged to have been robbed from the complainant and found in his possession was a trouser that he had purchased from the open- air market. He produced a receipt as proof of purchase. The appellant urged us to find that the evidence adduced by the prosecution witnesses could not have formed a basis for his conviction because it did not meet the threshold to enable the prosecution discharge its burden of proof.

20. On their part, it was the prosecution's case that it had adduced sufficient evidence which established the appellant's guilt on the charge of robbery with violence contrary to section 296(2) of the Penal Code to the required standard of proof beyond reasonable doubt. The prosecution submitted that the appellant, in company of others, accosted the complainant and robbed him of cash and other items among of which was a pair trousers which he was carrying having collected it from a tailor who had refitted it. The piece of cloth that had been cut from the trouser was produced as evidence by the tailor and upon comparison of the two pieces, it was clear that they were from the same trousers. Further, the complainant, who knew the appellant prior to the robbery incident, testified that he recognized the voice of the appellant as one of his assailants during the night of the robbery.

21. From the evidence adduced, it was apparent that the robbery took place at night. The complainant was robbed while walking home. He was accosted by a gang of four robbers who assaulted him and robbed him of his personal belongings including a pair of trousers. The complainant testified that he did not see who his attackers were but identified the voice of the appellant among the gang that robbed him. The assault caused the complainant to lose consciousness. He regained his consciousness in a friend's house. He made a report to the police at Timau police station. On 4th February, 2011, he saw the appellant wearing the pair of trousers that had been robbed from him. The appellant was arrested. The investigating officer PW4 interviewed PW2, the tailor who had rectified the trousers and was able to get the pieces that was cut from the trousers that was recovered from the appellant. When the two pieces of cloth was compared they were found to match hence the decision to charge the appellant.

22. The appellant relied on the evidence of voice identification in support of its case that the appellant had been identified by the complainant during the night of the robbery. Voice identification is admissible in evidence provided the person identifying the voice was well known to the appellant prior to the commission of the offence. Indeed, this Court in Mbelle v. Republic [1984] KLR 626 this Court held:

> " In dealing with evidence of identification by voice, the court should ensure that: (a) the voice was that of the accused. (b) the witness was familiar with the voice and recognized it. (c) the condition obtaining at the time it was made were such that there was no mistake in testifying to what was said and who had said it."

22. Further, this Court in Vura Mwachi Rumbi vs. Republic [2026] eKLR stated:

> " In the case of Choge v. Republic [1985] 1, this Court held that evidence of voice identification is receivable and admissible and it can, depending on the circumstances, carry as much weight as visual identification. In receiving such evidence, however, care and caution should be exercised to ensure that the witness was familiar with the appellant's voice and recognized it and that the conditions obtaining at the time the recognition made were such that there was no mistake in testifying to that which was said and who had said it…"

22. In Karani v. Republic [1985] KLR 290 this Court held that:

> " Identification by voice nearly always amounts to identification by recognition. Yet here as in any other cases care has to be taken to ensure that the voice was that of the appellant, that the complainant was familiar with the voice and that he recognized it and that there were conditions in existence favouring safe identification"

22. In the present appeal, the complainant testified that he knew the appellant by virtue of the fact they were work mates. He was familiar with his voice and was able to identify the voice during the night of the robbery. We have taken cognizance of the fact that the circumstances in which the said voice identification was made could be said to be less than ideal. On its own, this evidence of voice identification may not have been sufficient to secure the conviction of the appellant in light of the circumstances that the robbery took place.

23. However, there was other evidence which corroborated the complainant's testimony that he had identified the appellant during the robbery. It should be noted that the complainant's evidence of identification was that of a single witness made in difficult circumstances. In

> Abdalla bin Wendo and another vs. Republic [1953], 20 EACA.166 this court stated:
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> "Subject to certain well known exceptions, it is trite law that a fact may be proved by testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances, what is needed is other evidence, whether it be circumstantial or direct pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the probability of error."

22. The other evidence that was adduced by the prosecution related to the pair of trousers that were found in the appellant's possession four days after the robbery incident. According to the complainant, he retrieved the long trousers from PW2, the tailor where he had taken the trousers to be trimmed so that

it could fit him. He was carrying the trousers at the time of the robbery. He was robbed of the trousers. Four days later, he saw the appellant wearing the trousers. He identified it by the manner in which the trimming was done by PW2. The piece that was cut from the trouser was recovered from PW2 by the investigating officer. When the cut piece was compared with the trousers, it matched.

22. We agree with the finding reached by both the trial court and the first appellate court that the prosecution indeed established to the required standard of proof that the trousers that was found in the appellant's possession a few days after the robbery incident was the one that was robbed from the complainant.

23. In William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) v. Republic (Criminal Appeal No. 49 of 2020 [2022] KECA23 (KLR) this court held thus:

> " We start with the question whether the doctrine of recent possession was properly invoked. As regards the circumstances under which the doctrine of recent possession may apply, in Athuman Sakim Athuman v. Republic [2016] eKLR, this Court held that:
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> "The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of the property, a presumption of fact arises that he is either the thief or receiver. (See Malingi v. Republic [1989] KLR 25 H.C. and Hassan v. Republic [2005] 2KLR 151). The circumstances under which the doctrine will apply were considered in Isaac Ng'ang'a Kahiga Alias Peter Ng'ang'a Kahiga v. Republic, CR. APP. No. 272 of 2005, where this Court stated:
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> "It is trite that 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 to the other."

22. It is clear from the above decision that the doctrine of recent possession was properly applied by the two courts below. This Court cannot interfere with such finding where the evidence adduced received concurrence finding by the two courts. The appellant's appeal against conviction lacks merit and is hereby dismissed.

23. As regards sentence, the Supreme court in Muruatetu 2 held that the sentence of death meted after a conviction for the offence of robbery with violence contrary to section 296(2) of the Criminal Code is legal unless overturned by the Supreme Court or varied by legislation.

24. In the circumstances, therefore, this Court lacks jurisdiction to interfere with the sentence of death that was awarded by the trial court and confirmed by the first appellate court.

25. It is clear from the foregoing that the appeal lacks merit and is hereby dismissed.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF OCTOBER, 2025.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR