



REPUBLIC OF KENYA



**Kamau v Republic (Criminal Appeal E120 of 2023)
[2025] KECA 1532 (KLR) (3 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1532 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E120 OF 2023
PO KIAGE, LA ACHODE & JM NGUGI, JJA
OCTOBER 3, 2025**

BETWEEN

JAMES MUNGAI KAMAU APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from the Judgment of the High Court of Kenya at Nairobi,
(Ogembo, J.) dated 29th September, 2021 in HCCRA No. 23 of 2016)*

JUDGMENT

1. This is a second appeal arising from the conviction and sentence of the appellant, James Mungai Kamau, for the offence of robbery with violence contrary to section 296(2) of the *Penal Code*.
2. The appellant was charged before the Chief Magistrate's Court at Makadara in Criminal Case No. 1298 of 2014. It was alleged that on 8th January, 2014 along Uhuru Highway in Nairobi, jointly with another not before court, he robbed Geoffrey Ndeto Mutuku of a Motor Cycle Registration Number KMDG 508M make Honda valued at Kshs. 99,000 and at the time of such robbery used personal violence upon him.
3. Upon a full trial, the learned trial magistrate was satisfied that the prosecution had proved its case beyond reasonable doubt, convicted the appellant, and sentenced him to death as prescribed under section 296(2) of the *Penal Code*.
4. Aggrieved, the appellant preferred an appeal to the High Court at Nairobi in Criminal Appeal No. 23 of 2016. The High Court (Ogembo, J.) re-evaluated the evidence and dismissed the appeal, affirming both conviction and sentence.
5. Still dissatisfied, the appellant lodged this second appeal to this Court, faulting the concurrent findings of the two courts below.



6. The appeal was argued before us by way of written submissions and oral highlights. Ms. Naliaka, learned counsel, appeared for the appellant and provided the oral highlights during the plenary hearing on 4th March, 2025; while Mr. Omirera, Senior Prosecution Counsel, appeared for the respondent.
7. In his supplementary memorandum and written submissions, the appellant contends that his conviction was unsafe and based on wrongly acquired evidence contrary to Article 50(4) of the Constitution.
8. He argues that the identification evidence was unreliable and in effect amounted to dock identification, as no identification parade was conducted. He asserts that the complainant (PW3) did not give a description of his assailants at the earliest opportunity, and that the identification at the police post was orchestrated by the police showing him to PW3.
9. The appellant also maintains that critical witnesses, particularly one Ng'ang'a, who allegedly handed the motor cycle to PW5, were not called. According to him, this omission left the case with gaps that ought to have been resolved in his favour.
10. Further, it is argued that the complainant's testimony was inconsistent and not corroborated by medical or documentary evidence of violence.
11. On the whole, the appellant urged this Court to find that the prosecution failed to prove its case beyond reasonable doubt and to quash the conviction and sentence.
12. Learned prosecution counsel opposed the appeal. It was submitted that the conviction of the appellant was sound and based on overwhelming evidence that pointed irresistibly to his guilt.
13. Counsel emphasized that the doctrine of recent possession was properly invoked by both the trial court and the High Court. The motor cycle was traced through a tracking system to Thigio bus stage barely two hours after the robbery. The appellant was found in possession of the motor cycle and later led the police to the recovery of its carrier and invoices at PW4's garage.
14. The respondent further submitted that under section 119 of the Evidence Act, a presumption arises against a person found in possession of recently stolen property unless he gives a plausible explanation. The appellant's explanation, that he was only a mechanic repairing the motorcycle, was rejected by both courts below as implausible.
15. Citing authorities including Muiruri & Others v Republic [2002] eKLR and Republic v Ahmed Abolafathi & 2 others [2019] eKLR, counsel argued that the concurrent findings were firmly grounded on the evidence and disclosed no error of law to warrant interference.
16. This being a second appeal, our jurisdiction is circumscribed. Section 361(1)(a) of the Criminal Procedure Code provides that a second appeal lies on matters of law only.
17. The guiding principle was aptly set out in Samuel Warui Karimi v Republic [2016] eKLR as follows:

“This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong v R [1984] KLR 611.”
18. We have carefully considered the record of appeal, the submissions of both parties, and the applicable law. The issues that arise are:



- (i) Whether the appellant was positively identified as one of the robbers;
 - (ii) Whether the doctrine of recent possession was properly applied;
 - (iii) Whether the conviction was based on illegally obtained evidence; and
 - (iv) Whether the sentence was lawful.
19. The appellant argues that he was not properly identified and that no identification parade was conducted. It is true that the complainant was attacked suddenly by two men along Uhuru Highway. However, the identification at the police post was not the sole basis of the conviction. PW3 identified the appellant as the one who snatched the ignition key from him.
20. More importantly, the recovery of the motor cycle shortly after the robbery, coupled with the appellant's own conduct in tightening its steering and subjecting it to a road test, provided corroboration. Both courts below were satisfied that the identification was reliable when considered alongside the other evidence.
21. Both the trial court and the High Court anchored their findings on the doctrine of recent possession. In *Isaac Ng'ang'a Kabiga alias Peter Ng'ang'a Kabiga & Another v Republic*, Nyeri Cr. App. No. 272 of 2005, this Court restated the principle as follows:
- “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 person to another.”
22. Applying that test to the present case, the High Court carefully considered the evidence of PW3, PW4, PW5 and PW7. The complainant testified that he was robbed of his Motorcycle Reg. No. KMDG 508M around 4:45 p.m. on 8th September, 2014. The tracking system placed the Motor Cycle at Thigio bus stage barely two hours later. PW7, acting on this information, intercepted the motorcycle at that very location.
23. The motor cycle was positively identified by PW3, not only by its registration number but also by the invoices tied to the carrier. The appellant was seen tightening its steering and conducting a road test before inviting others to test it. On the following day, the appellant led PW7 to PW4's garage, where the carrier and some invoices belonging to the complainant were recovered.
24. Given this evidence, the trial court and the High Court were, therefore, correct in finding that the four elements in *Isaac Ng'ang'a Kabiga (supra)* were satisfied: the appellant was found with the stolen motor cycle; the property was positively identified; it was the property of the complainant; and it had been stolen only a short while earlier.
25. Once those facts were proved, the burden shifted to the appellant to give a reasonable explanation for his possession. His defence, that he was a mechanic merely repairing the Motor Cycle for strangers, was considered but found implausible, particularly in light of the recovery of the carrier and invoices through his own disclosure. Both courts below rejected his explanation, and rightly so.



26. We agree with the High Court that the chain of evidence was cogent and left no room for reasonable doubt. The appellant’s possession of the stolen property so soon after the robbery irresistibly pointed to his guilt, and the presumption under section 119 of the *Evidence Act* properly arose.
27. On the allegations of illegally obtained evidence, we find that the appellant’s reliance on Article 50(4) of the *Constitution* is misplaced. There was no evidence of torture, coercion, or deception in the conduct of the investigation. PW7’s interrogation of the appellant about the whereabouts of the carrier was part of legitimate police work. The recovery of the exhibits was not tainted.
28. The admission of such evidence was consistent with the Supreme Court’s observations in *Abmed Abolafathi Case* (*supra*).
29. On the totality of the evidence, we are satisfied that the prosecution proved the offence of robbery with violence under section 296(2) of the *Penal Code*. The essential ingredients — theft, use of violence, and the presence of more than one assailant — were established.
30. The appellant was sentenced to death as provided under section 296(2) of the *Penal Code*. The Supreme Court in *Muruatetu 2* clarified that its earlier decision declaring the mandatory death penalty unconstitutional applies only to murder under section 204 of the *Penal Code*. In respect of robbery with violence under section 296(2), the Court expressly held that the death penalty remains the only sentence prescribed in law.
31. Accordingly, the trial court and the High Court imposed the only lawful sentence, and we have no jurisdiction to interfere with it.
32. In view of the foregoing, we find no error of law in the concurrent findings of the trial court and the High Court. The appellant’s conviction was safe, and the sentence was lawful.
33. The appeal is, therefore, dismissed in its entirety. The conviction and sentence of death are hereby upheld.
34. Orders accordingly.

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

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

