Muhia v Republic (Criminal Appeal E010 of 2022)
[2025] KECA 1572 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1572 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL E010 OF 2022

JM MATIVO, PM GACHOKA & GV ODUNGA, JJA

OCTOBER 3, 2025

BETWEEN

JOSEPH NJUGUNA MUHIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Naivasha (R. Mwongo, J.) dated 26{{^th}} May, 2021 in Criminal Appeal Nos. 29 & 34 of 2019)

JUDGMENT

1. Even though this appeal arises from a judgment rendered in two consolidated appeals, that is, Naivasha High Court Criminal Appeal Nos. 29 and 34 of 2029. This appeal only relates to the appellant before us, namely, Joseph Njuguna Muhia, who was charged jointly with another person with the offence of robbery with violence contrary to section 296 (2) of the Penal Code at the Chief Magistrates' Court at Naivasha in Criminal Case No. 378 of 2017. The particulars of the offence were that, on 9th May 2014 at Muimui Village in Kipipiri Sub- County within Nyandarua County while armed with dangerous weapons namely, a pistol, they jointly robbed Margaret Wanjiru Kung'u a mobile phone make Samsung Duos and Cash Ksh.800/- all valued at Ksh.6,800/- and immediately before or after the time of such robbery they wounded the said Margaret Wanjiru Kung'u.

2. The appellant faced a second count of unlawfully possessing a firearm and ammunition without a firearms certificate contrary to section 4 (1) as read with section 4 (3) of the *Firearms Act*. It was alleged that on 10th May 2014 at Ndunyu Njeru Township in Nyandarua within Nyandarua County, jointly with another person not before Court, they were found in possession of two (2) pistols serial numbers EP 1294191 and ET 11122246 without a firearms certificate.

3. The appellant pleaded not guilty to both charges and in the ensuing trial, the prosecution called a total of 10 witnesses while the appellant gave unsworn defence. He did not call any witnesses. The evidence

as presented before the trial court is aptly summed up in the judgments rendered by the two courts below. Accordingly, we will briefly rehash the said evidence only to the extent necessary so as to provide the necessary context in our analysis of the issues urged in this appeal.

4. The complainant, Margaret Wanjiru Kung'u (PW1) testified that on 9th May 2014, they closed their Agrovet shop at Ndinda in Kinangop at 7.00 p.m. Together with her 9-year-old daughter, they boarded their lorry which was driven by their driver, Joseph Kariithi (PW2) and started the journey to their home. At the gate to their home, with the aid of the vehicle headlights, she saw two men emerging from the fence. Suddenly, the men smashed the window on her side and shot at her. She screamed and one of the attackers who was unarmed came to her side and demanded money from her. She said she had none. Nevertheless, he took her Kshs.800/- and her Samsung Duos phone. He was a stranger to her. He passed in front of the lorry and disappeared.

5. PW1's husband, Francis Ngumu Githonge (PW3), was at home at the material time. He saw vehicle lights at their gate and asked his worker, Mr. Kamau, to go and open the gate. Immediately, he heard two gunshots, then he heard his wife screaming from the vehicle. He rushed into his neighbours compound 200 metres away and made calls for help. He heard a third gunshot, then he heard his wife shout "wameniua". At this point he saw two people running from the vehicle towards the main road but he did not recognize them. He heard a fourth gunshot, and the roar of a motor bike, which took off. He went to where the vehicle was and found his wife walking in pain towards the house bleeding from her back. He called neighbours who responded to the screams. He went to the vehicle and noted its windows were smashed and the ignition key was not there. He rushed for spare keys from his house. PW2, (his driver) emerged. They put PW1 into the vehicle and took her to Kinangop Catholic Hospital. The doctor found a bullet lodged in her back, and admitted her for the bullet to be removed the following day.

6. PW3 further testified that a day after the incident, neighbours at their Agrovet shop told him that they saw a motor cycle which they recognized and tried to stop it in vain. Later, they saw it parked at Orida Petrol Station. PW3 relayed this information to Corporal Njagi of Kipipiri Police Station who advised him to detain the motorcycle. Accordingly, they locked it in his vehicle. Corporal Njagi came for it the following morning. The police picked spent cartridges from the scene. In cross-examination, he said that: (i) he did not attend any police identification parade, (ii) he heard about five gunshots on the material night, (iii) the motorbike was seen by neighbours, (iv) he carried the motorcycle to his shop and it was not dusted for fingerprints, (v) neighbours recognized the motorcycle by its colour and by the fact that it had a puncture and they had followed it.

7. PW2, Joseph Kariithi was PW1 's driver. He testified that as they reached PW1 's home, they were confronted by two men. The men fired at the vehicle and the left side window was shattered. They ordered him to stop, which he did. They demanded money, but he said he had none. One of them passed by the front of the lorry to the left side and the other came towards him. The one near him took the vehicle ignition keys, his wallet and his Alcatel phone, then he went to the other side of the vehicle. PW2 fled and hid in a bush some 20ft away, but from there, he could see what was happening at the vehicle. After a few minutes, the men left, leaving PW1 in the vehicle. The two men were picked up by a motorcycle. The moon was bright and he saw them clearly as they boarded it and it took off. He could hear PW1 crying, saying she had been shot. PW1 was taken to North Kinangop Hospital where she was admitted. The next day, he recorded a statement at the police station. During the incident, he was robbed his phone and Shs.1,040/=. After a day, the police collected cartridges from the scene. Also, the police told him that his phone had been recovered. Some suspects were brought to him at home at about 12.00 noon. One of the suspects had his phone which he had tied with a rubber band. It was an Alcatel telephone and it had a sim card. He recognized his phone (MFI 1) in court. He said

the 1st accused is the one who took his phone, but he was not in court since he had died. Upon cross-examination, he stated that the vehicle headlights were on during the incident and the moonlight was also very bright. However, he did not see either the appellant or his co-accused. He only identified the deceased.

8. PW4, Senior Sergeant AP, James Kiprop Cheptogoch based at Nyandarua North stated that on 10th May 2014, while at Ndunyu Njeru Centre he received information from members of the public that some young men at Nyama Villa bar were acting suspiciously. He alerted his supervisors, then he organized with some other officers and they went to the bar. They were directed to room 5. They ordered the occupants to open the door and made them lie down. They interrogated the men who gave their names as Paul lrungu and Joseph Njuguna. They searched the room and found a hole in a blue mattress (MFI 6) where they found two guns (MFI 7 (a) and MFI 7 (b) serial numbers EP1294191 and ET11122246), respectively. MFI 7(a) had two rounds of ammunition and MFI 7 (b) had six rounds ammunition (MF 9 a-f). They searched the bathroom where they recovered three phones. An Alcatel blue (MFI 4), Samsung Duos MFI 10 which the appellant claimed to be his and a Samsung Galaxy S2 (MFI 11) which Paul lrungu claimed was his. PW4 arrested the two. The suspects told them that another suspect called James Nganga was at Engineer. PW4 confirmed that Joseph Njuguna Muhia (the appellant) was one of the persons he arrested. In cross- examination, he stated that the appellant is the one who told him that there was another suspect, James Nganga Nyakaria, but he, PW4, was not the one who arrested the said suspect. In re-examination, PW4 said that James Nganga Nyakaria was mentioned by both the suspect who is now deceased and the appellant herein.

9. PW5 SSP Lawrence Ndhiwa, a Firearms Examiner with 18 years' experience testified that he received two pistols with serial numbers EP1294191 (MF I7 a) and ET11122246 (MFI 7 b); two magazines 81 and 82, two rounds C1 and C2; 6 rounds 01-02, spent cartridges E, F1, F2, and F3 and a metallic bar. It was his evidence that the pistols were found to be capable of firing. Further examination through compaction microscopic examination found firing pin(s) which were similar and he concluded that exhibit E (the bullet that was removed from PW1) was fired from Al (i.e. one of the guns). He prepared his report produced as Exhibit 14 (a) and 14 (b).

10. PW6, Dr. Julius Ndwiga, the Medical Superintendent at Engineer District Hospital was familiar with the signature of Dr. Maingi who examined and filled PW1's P3 form. The examination revealed that PW1 had a deep wound on the left upper back which was inflicted by a sharp object. She underwent surgery on 10th May 2014 to remove the bullet. He produced her discharge summary dated 15th May 2014 as Exhibit 2 and the P3 Form as Exhibit 1. According to the medical report, PW1 was treated for a gunshot wound. A medical report by Dr. Philip confirming her admission at North Kinangop Hospital on 9th May 2014 was produced as exhibit 3.

11. PW7, APC Peter Njogu was attached to Ndunyu Njeru AP Post.

    He testified that on 10th May 2014 at 7pm while in the office, he received a report from members of the public that there were suspicious people at a bar. Together with Inspector Chelangat and Rono, they proceeded to Nyama Villa Bar at Ndunyu Njeru. On arrival, the caretaker told them that the men were in room 5. They proceeded to room 5 and knocked on the door. The occupants opened and they noted there were two men in the room. They ordered them to surrender. They were searched and found with nothing. They saw a cut in the mattress (MFI 6). Inside the cut they found 2 pistols 7a and 7b and recorded the serial numbers. They recovered 8 rounds of ammunition MFI 8 a - b and 9 a - b. They also recovered 3 phones MFI 11, 4 and 10. The suspects gave their names as Paul lrungu Kamau and Joseph Njuguna (the appellant). In cross-examination, he said he received information from the public that some suspicious persons were in the said bar for 2 days.

12. PW8 Martin Gathuo, a vendor at Engineer testified that on 9th May 2014 at 6pm, he lent his motorbike KMCU 195P make Lion, colour red to one Joseph Nganga to go and see his brother Moteira. He was to return it at 8pm, but at 8.30pm he called to say it had a puncture. The next morning, he told PW8 the motorbike was at the Nector Petrol Station, but PW8 did not find it there. He changed the story and told him it was at another station. PW8 decided to report to the police. Later, a friend told him he had seen it at Tulaga Petrol Station and it had a puncture. Later police from Kipipiri called him seeking to confirm details of the motor cycle and told him it had been used by robbers and they needed to arrest Nganga. However, Nganga had disappeared. After 3 days he was told Nganga was at Chuma. He was arrested on 15th April, 2014. PW8 identified Nganga as the 2nd accused. In cross-examination, he said he knew Nganga as Joseph Nganga, but heard in court that he was James.

13. PW9 Sergeant John Rono was on general duties at Kinangop Police Station on 10th May, 2014. While at AP Camp at Ndunyu Njeru, he was told by Sergeant Cheptogot that there were two suspects armed with guns in a bar called Villa. They searched the room and Sergeant Cheptogot found 2 guns and ammunition (Exhibit 7 a, 7 b and MFI 6 hidden in a mattress). They arrested Paul lrungu (deceased) and Joseph Njuguna (the appellant) and took them to the police station. The two suspects told them that one Nganga Njokeria was their accomplice.

14. PW10 Corporal Pius Njogu was at Kipipiri Police Station at 8p.m. on 9th May 2014 when the Deputy OCPD called him and told him there was a robbery at Mumui area. He mobilized three officers, namely, PC Mwita, Mwalimu and Kamau and they went to Mumui where they met the Deputy OCPD. At the scene, he retrieved one cartridge 22 mm. On 10th May 2014, he went back to the scene and found 2 more cartridges one of 22 mm and one of 9 mm. At 11.00 a.m. he was told a motor bike was parked at Ndinda Petrol Station from the previous night. He found the Motorbike Registration No. KMCU 195P, make, Lion. Further inquiry showed that the motorcycle was owned by Martin Kirima Githua who said he had lent it on 9th May 2014 to James Nganga Njokerio but he never returned it.

15. After considering the prosecution, the trial Magistrate was persuaded that the appellant had a case to answer. Upon being put on his defence, the appellant gave an unsworn statement. He said that on 10th May 2014 he went to buy potatoes in Kinangop and met a farmer at Ndunyu Njeru at about 12.00 p.m. They harvested potatoes till 6.00 p.m. At

8. 00 p.m. he went to the club at Ndunyu Njeru, ordered a drink and asked to be directed to the toilet. While inside, he heard noises and when he came out, he found some people lying down and, as he passed, the police demanded to know where the gun was. They arrested him despite his protests that he was a bar patron. He was taken to police station. He was accused of robbery and charged.

16. Upon analyzing the totality of the evidence against the appellant and upon considering his defence, the trial Magistrate was satisfied that the prosecution had proved its case to the required standard and convicted him on both counts. In mitigation, the appellant stated that he has a family and a 9 month-old baby and parents who relied on him and prayed for leniency. In passing the sentence, the learned Magistrate stated:

> "I have considered the mitigation by the accused and the probation officer's report which includes the views of the community and the victim's views. I have also taken into account the circumstances that led to the offence. I hereby sentence the accused to death as prescribed by law."

17. Even though the appellant was also convicted of the offence of being in possession of fire arms and ammunition without a licence, the trial court did not pronounce a penalty or whether it was held in abeyance owing to the death penalty. The issue was not raised before the first appellate court.

18. Dissatisfied by the above verdict, the appellant appealed to the High Court in Naivasha HCCRA No. 34 of 2019 contending that: (a) the identification evidence was unsatisfactory; (b) the conviction was based on contradictory and uncorroborated evidence; (c) it was not conclusively proven that he committed the robbery; (d) the evidence of possession was not proved to the required standard; (e) his defence created a reasonable doubt on the prosecution case; and (f) his mitigation was not considered and the court failed to consider the Supreme Court's decisions in Francis Karioko Muruatetu and others. He prayed that the appeal be allowed and the conviction and sentence be set aside.

19. In the impugned judgment dated 26th May 2021, Mwongo, J. found the appellant's appeal against both conviction and sentence devoid of merit and dismissed it. Aggrieved by the said verdict, the appellant is now before this Court in this second appeal seeking to overturn the said decision citing the following grounds in his amended memorandum of appeal dated 13th May 2025, namely: (a) that the learned Judge failed to appreciate that the identification was not free from error; (b) the learned Judge erred in finding that the prosecution proved its case beyond reasonable doubt; (c) the doctrine of recent possession was wrongfully applied; (d) the learned Judge erred in upholding the disproportionate sentence yet there were no aggravating circumstances contrary to paragraph 3 of the Sentencing Policy Guidelines; (e) the learned Judge erred in upholding a conviction that was against the weight of the evidence; (f) the learned Judge erred in upholding a harsh sentence imposed without considering mitigating factors. The appellant prays that the appeal be allowed, the conviction be quashed and the sentence be set aside, and that he be set at liberty. Alternatively, he prays that the sentence be set aside and or it be substituted with a definite prison term.

20. We heard this appeal virtually on 14th May 2025. The appellant who attended virtually from prison was represented by learned counsel Ms. Lilian Ekesa while the respondent was represented by learned counsel Mr. Omutelema, Senior Assistant Director of Public Prosecution. Both parties adopted their respective written submissions.

21. In her written submissions dated 13th May 2025 in support of the appeal, Ms. Ekesa condensed the grounds of appeal into two issues, namely; (a) whether the conviction was supported by the evidence, and (b) mitigation and sentence (sic).

22. Regarding the first issue, Ms. Ekesa maintained that the prosecution evidence was not sufficient to sustain a conviction because the circumstantial evidence adduced by the prosecution did not conclusively prove the offence. She cited this Court's decision in Henry Kaindio v Republic [2016] eKLR in support of the proposition that for the court to convict on the basis of circumstantial evidence, the inculpatory facts must be incompatible with the accused's innocence and incapable of any other reasonable hypothesis than that of the accused's guilt. Counsel also cited Neema Mwandoro Ndurya v Republic [2008] eKLR and Bernard Mulwa Musyoka v Republic [2019] KECA 1021 (KLR) in support of the principles a trial court should consider before convicting on circumstantial evidence.

23. She maintained that the circumstantial evidence presented related to recovered guns and cell phones despite the absence of conclusive evidence in support of possession of the said items. She argued that the first appellate court failed to appreciate the circumstances that weakened the inference of guilt. Counsel questioned why no member of the public was called to testify yet the police claimed they were acting on information from the public, nor was an employee of Nyama Villa Bar called to testify. Further, no fingerprint evidence was adduced to prove that the appellant handled the guns, nor was

evidence adduced to show that any of the recovered cell phones belonged to PW1. Counsel contended that the said omissions left gaps in the prosecution case.

24. Regarding sentence, Ms. Ekesa argued that the death penalty is harsh, it erodes the right to dignity and it offends international law and article 26 (1) of *the Constitution* and cited this Court's decision in Imutoka v Republic [2024] KECA 259 (KLR) in support of her foregoing assertion and implored this Court to interfere with the sentence imposed on the appellant who is now aged 36 years. Lastly, counsel urged this Court to be guided by The Sentencing Policy Guidelines, 2016 and allow the appeal, quash the conviction and set aside the death penalty. Alternatively, counsel prayed that the death penalty be substituted with a definite prison term.

25. Mr. Omutelema, in his submissions dated 7th July 2025 maintained that the prosecution proved all the elements of the offence to the required standard. He stressed that the prosecution case was founded on the doctrine of recent possession of firearms used in the commission of the offence and PW2's mobile phone which was stolen during the robbery and the appellant's failure to explain the possession of the incriminating items and his false alibi. Counsel cited section 4 of the Penal Code which broadly defines possession to include not only physical possession but also constructive possession, which means that a person can be considered to be in possession of something even if it's not in their immediate physical control, but rather in the custody of another person or in a place under their control. Furthermore, if two or more people possess something with the knowledge and consent of each other, it is considered to be in the possession of all of them. Counsel relied on Hussein Salim v Republic [1980] KECA 9 (KLR) in which this Court cited Young Kibae v Republic [1992] eKLR where this Court cited Stephen's Digest of the Criminal Law which defines possession as the state of having or holding property, either physically or constructively which entails both the act of having something and the mental element of knowing that you have it. Counsel maintained that it was proved by evidence that the appellant and the deceased were found in Nyama Villa Bar, Room No. 5 where the police recovered firearms and PW2's Alcatel mobile phone hidden in a mattress and in the adjacent birth room respectively, barely a day after the robbery, therefore, the appellant was in constructive possession.

26. It was Mr. Omutelema's submission that a court of law can properly rely on the doctrine of recent possession provided the following elements are proved: (a) the property was found with the suspect, (b) the property is positively identified as belonging to the complainant; and, (c) the property was recently stolen from the complainant. In support of the foregoing assertion, counsel relied on Erick Otieno Arum v Republic [2006] eKLR. Counsel emphasized that the two courts below correctly applied the doctrine of recent possession. He also stated that both courts were satisfied that the firearm was used in the robbery while the phone was stolen during the robbery. Counsel rehashed the evidence tendered by PW4, PW7 and PW9 in support of the recovery of the said items. He also recalled the testimony of PW10 and PW1 relating to the recovery of the bullet lodged in PW1's body and the ballistic evidence linking the said bullet with the Firearm. He maintained that the appellant's defence was considered and urged this Court not to interfere with the concurrent findings of the two courts below.

27. Regarding sentence, counsel argued that the appellant's mitigation was considered and maintained that the circumstances of the offence called for a severe punishment and urged this Court to dismiss the appeal in its entirety.

28. This is a second appeal; therefore, our jurisdiction is limited to consideration of matters of law as stipulated by section 361 of the Criminal Procedure Code. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at by the two courts below unless such findings are based on no evidence. (See this Court's decisions in David Njoroge Macharia v Republic [2011] eKLR), Chemogong v R. [1984] KLR 611 and Ogeto v R. [2004] KLR 14).

29. A reading of the appellant's grounds of appeal and his submissions leaves no doubt that this appeal will stand or fall on one fundamental ground, namely, whether the circumstantial evidence adduced by the prosecution met the required threshold to sustain a conviction. Of course, like any other criminal case, at the heart of this issue remains the question whether the prosecution established the ingredients of the offence to the required standard. Therefore, as we determine this germane issue, we must also satisfy ourselves that the ingredients of the offence were proved beyond reasonable doubt.

30. This Court in Johana Ndungu v Republic [1996] eKLR determined the three sets of circumstances, which any one of them if proved, constitute the offence of robbery with violence under section 296 (2) of the Penal Code as follows: "(i) if the offender is armed with any dangerous or offensive weapon or instrument; or (ii) if he is in company of 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 v Republic [1985] KLR). Likewise, this Court in Dima Denge & Others v Republic [2013] eKLR stated: "the elements of the offence under section 296 (2) of the Penal Code are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to sustain an offence of robbery with violence."

31. As alluded to earlier, pivotal to this appeal is the question whether the circumstantial evidence tendered by the prosecution established the appellant's culpability to the required standard. None of the 10 prosecution witnesses gave direct evidence identifying the perpetuator (s) of this crime. In fact, PW1 and PW2 were categorical that the attackers were unknown to them. PW3, who watched the scene from a distance of 200 meters did not recognize them. Therefore, the prosecution evidence was purely circumstantial.

32. Circumstantial evidence is indirect evidence that suggests a fact is true but doesn't directly prove it. It relies on inference and deduction rather than direct observation or proof. Essentially, it's a type of indirect evidence that implies a connection between a fact and the event in question. Therefore, circumstantial evidence is evidence of a fact or facts in issue from which the Court is asked to infer that the accused was the perpetrator of the crime. (See Zeffert and Paizes, The South African Law of Evidence, 3rd Edition at page 101.)

33. The determination of the secondary facts is, as mentioned above, a matter of inferential reasoning, premised on the primary fact (s) and such other fact (s) as may be found to have been proved. The focus of the inquiry is on the weight to be given thereto in the wider factual context of the matter in determining the soundness of the inference to be drawn from the primary fact (s). We should also mention that the court must always bear in mind that proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused's guilt or, which, as it is also expressed, is consistent with his/her innocence. Ultimately, it is sufficient for the prosecution to prove by evidence that there exists no reasonable doubt that the accused committed the offence. Therefore, an accused person's claim to the benefit of doubt, when it may be said to exist, must not be derived from speculation, but must rest upon a reasonable and solid foundation created by either positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.

34. In his definitive finding, after evaluating the totality of the evidence, the learned Magistrate stated:

> " However, there is testimony from Sergeant Kiprop who testified that, acting on information he proceeded to Nyama Villa Village and specifically room number 5 where he arrested the 1st accused. The room had been locked and the occupants were ordered to open the room. The weapons were recovered concealed inside a mattress within the same room. Sergeant

Kiprop together with APC Peter Njuguna and Sergeant John Rona all confirmed that the 1st accused person was inside the room where the weapons were recovered. The mobile phone and specially the one stolen from Joseph was also recovered in the same room. The evidence against the accused person is circumstantial. There is well established jurisprudence to the effect that in such scenarios the prosecution ought to establish that;

a. The accused had an opportunity to commit the offence,

b. That the accused to the exclusion of all others committed the offence and;

c. No other person had a similar opportunity. There is overwhelming evidence as analyzed earlier showing that the 1st accused Joseph Njuguna was in room no. 5 where the weapons were recovered. He was in charge and control of that room. It therefore follows he was in constructive possession of the weapons. The two guns have been linked to the robbery by the ballistic experts report in that the spent cartridges recovered from the scene upon testing were found to have been fired from the two guns. Secondly the Alcatel phone stolen from Joseph was also recovered in room no. 5. Clearly the accused persons' defence is not tenable in this (sic) circumstances. He could not have been visiting the washroom at the time of his arrest as he claimed in his defence. There is overwhelming evidence showing he was inside room no. 5 which was locked prior to the arrival of the police. There are three independent witnesses who confirmed he was arrested inside the said room."

35. Addressing the same issue, the first appellate court (Mwongo, J.) stated:

"67. Thus, the link between the 1st appellant and the actual bullet that was used in shooting the complainant is so close to all but ascertain that the gun used to shoot the bullets in the cartridges (F1 - F2) fired from the same gun, and which cartridges were found at the scene."

68. The trial Magistrate found that the accused was in constructive possession of the weapons which were linked to the robbery. A thing is in possession of someone when he has power to deal with it as owner to the exclusion of others. This was held in Hussein Salim v Republic [1980] eKLR where the Court of Appeal said: ...

69. It was properly argued by the Appellants that the trial court relied on circumstantial evidence to reach its conclusion to convict. Circumstantial evidence may be properly relied upon when the evidence so strongly points to an inference of guilt that no other reasonable hypothesis could be made. This has been the position of the law for many years and was recently restated by the Court of Appeal in PON v Republic [2019] eKLR where the Court said: ...

70. In the present case there is no escaping the fact that the 1st Appellant had unexplained possession of the firearms which were specifically proved to have been used in the robbery. The conviction on that basis by the trial court was not farfetched when all the circumstances are taken into account.

....

71. On the issue of identification, the Appellants submitted that the prosecution had not proved that the Appellants had been properly identified or an

identification parade done. In response, the OPP argued that neither identification nor recognition played any part in their prosecution, as none of the witnesses claimed to have identified or recognized any of the accused persons.

72. Having carefully perused the decision of the trial court, I do not see that there was any reliance on identification or recognition in this case. The night was dark and none of the witnesses claimed to have been able to identify or recognize their assailants. Instead, this was a case where the offence was committed by persons who left tell-tale signs having used guns that were discharged and their cartridges were matched to the guns that were found in possession of the accused.

73. With the matching having been effectively done by a ballistics and firearms expert, the issue of recognition is a non-issue herein. The 1st Appellant having been found in constructive possession of the guns and ammunition in his hotel room, he was properly connected to the two offences of robbery and being in possession of a firearm without a firearms certificate.

74. On the issue of alibi and as to whether the defendant's defence was properly considered,I note that the trial Magistrate considered the defences at page 5 of his judgment. He said of the 1st Appellant's defence:

> "Clearly the accused persons defence is not tenable in the circumstances. He could not have been visiting the washroom at the time of his arrest as he claimed in his defence. There is overwhelming evidence showing he was inside Room No. 5 which was locked prior to the arrival of the police. These are three independent witnesses who confirmed he was arrested inside the said room."

75. I see nothing to criticize concerning the trial court's assessment of the defence evidence, and that finding. As to the issue of alibi raised by the Appellant on appeal, that again is a non-issue. The reason is that neither the 1st Appellant nor the 2nd Appellant offered an alibi as a defence. Both availed in their testimonies, as pointed out by the OPP, only evidence of what they did and where they were on the day or days after the material date of the offence." (Emphasis added)

36. The appellant faults the above finding on the ground that the circumstantial evidence adduced by the prosecution did not meet the required threshold. In order to properly resolve the appellant's contention, it is useful for us to highlight the primary facts discernible from the prosecution evidence. As mentioned earlier, the determination of the secondary facts is a matter of inferential reasoning, premised on the primary facts and such other facts as may be found to have been proved.

37. From the evidence, the following facts were established.

(a) PW1 and PW2 were attacked by unknown persons at their gate on the material day;

(b) the attackers violently broke their vehicle window on the left side;

(c) one of the attackers robbed PW1 cash Kshs.800/- and her mobile phone while another one robbed PW2 cash Kshs.1,040/- and his mobile phone;

(d) the attackers were armed with guns;

(e) one of the attacker shot PW1 at her back;

(e) PW1, PW2 and PW3 did not identify any of the attackers;

(f) the next day after the robbery, police acting on a tipoff arrested the appellant and the deceased at a room in a hotel;

(g) during the arrest, the police recovered two guns and ammunition concealed in a hole in a mattress and a mobile phone which was identified by PW2 as his phone which was stolen during the attack, and,

(h) ballistic evidence linked the bullet that was removed from PW1's body and the spent cartridge collected from the scene to one of the guns recovered from the said room. The two courts below were persuaded that the doctrine of possession of recently stolen goods applied in the circumstances of this case and that the ballistic evidence put the gun that fired the appellant at the scene of the crime.

38. In assessing circumstantial evidence, one needs to be careful not to approach evidence in a piecemeal manner but to subject each piece of evidence to a consideration whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in totality.

39. From the above facts established by the circumstantial evidence, several inferences can be drawn. First is the doctrine of recent possession. This doctrine allows an inference of guilt for theft or related offenses when an accused is found in possession of stolen property shortly after the theft. For this doctrine to apply, as was stated by this Court in Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic [2006] eKLR, the possession must be positively proved. In other words, there must be positive proof:

(i) that the property was found with the suspect;

(ii) that the property is positively proved to be the property of the complainant;

(iii) that the property was stolen from the complainant; and

(iv) that the property was recently stolen from the complainant.

40. PW7 and PW9 gave a detailed account of the items they recovered from the room number 5, Nyama Villa Bar. One of the recovered items was a mobile phone which PW2 identified as his phone which was stolen during the robbery. It is important to mention that the robbery took place on 9th May 2014. The items were recovered on 10th May 2014, barely a day after the incident. What constitutes "recent" depends on the nature of the property and the circumstances of the case. In the circumstances of this case, the short period after the robbery and the circumstances under which the recovery was made is a relevant consideration.

41. Equally important is the prerequisite that the accused must provide a reasonable explanation for their possession of the stolen goods. After the prosecution proves by way of evidence that the recently stolen item(s) was found in possession of the accused, the evidential burden shifts to the accused to demonstrate how he legitimately acquired the property. In other words, as was stated by this Court in Mwangi v Republic (Criminal Appeal E054 of 2023) [2024] KEHC 3113 (KLR) (15 March 2024) (Judgment), the doctrine of recent possession places a duty on the accused to explain possession on the property. This arises from the requirements of section 111 of the *Evidence Act*, which, in simpler terms shifts the burden of proof to the accused in specific situations. It stipulates that the burden of proving

the existence of circumstances that bring the case under an exception, exemption or qualification to the law creating the offense, as well as proving any fact especially within the accused's knowledge lies with the accused. However, this burden is considered discharged if the prosecution's evidence, including cross-examination, satisfies the Court of the existence of those circumstances or facts. Furthermore, the accused is entitled to acquittal if the evidence, either from the prosecution or the defense, creates a reasonable doubt about their guilt.

42. Once possession is established as it was in this case, no one other than the accused is in a vantage point to explain where or how he got the stolen items. Such items must be shown to have causal link to the crime, which was demonstrated in this case. In other words, 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. The explanation expected from the accused person only needs be plausible (see Malingi v Republic [1988] KLR 225. In Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008, the Court 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."

43. We must clarify that that the doctrine of recent possession is not a presumption of guilt but an inference that can be drawn if the above elements are met. In essence, the doctrine of recent possession is a tool that helps courts establish guilt in theft-related cases when the accused is found with recently stolen goods and cannot offer a credible explanation. The specific circumstances of each case determine whether the doctrine is applicable and how it is applied. The shorter the time between the theft and the discovery of the goods, the stronger the inference of guilt. In this case, the items were recovered barely a day after the robbery. The appellant's defence was that he was in the said bar as a patron and that he was arrested as he came out of a toilet. This explanation was disbelieved by the two courts below. We have also examined this line of defence and weighed it against the prosecution evidence. In our view, this defence did not dislodge the compelling evidence tendered by the prosecution leading to the recovery of the recently stolen mobile phone.

44. The recovery of the mobile phone, important as it is, was not the only evidence relating to recent possession. Also, on record is the evidence that two guns and ammunition were recovered concealed in a hole in a mattress in the room the appellant and the deceased were occupying. This mattress was one of the exhibits. The prosecution evidence was that the robbers were armed with guns. PW1 was shot at the back and she was hospitalized and a bullet was removed from her back. Spent cartridges were collected from the scene. PW3 also heard gun shots. The guns recovered from the said room were forwarded for ballistic examination. The prosecution case essentially turned on the ballistic evidence which identified the firearm recovered from the room occupied by the appellant as the one used to shoot PW1. Similarly, a spent cartridge collected from the scene was found to have been fired from the same gun. Again, this piece of evidence is circumstantial in nature, hence the need for us to satisfy ourselves that it irresistibly points to the accused.

45. When there is only circumstantial evidence, the circumstances from which the verdict of guilt is to be drawn must first be thoroughly determined, and all the facts thus established must only be consistent with the belief of the accused's guilt. There must be a convincing chain of evidence demonstrating the accused person's guilt beyond a reasonable doubt and that there is no plausible explanation for believing that the accused is innocent.

46. Regarding the probative value of the ballistic evidence, the following excerpt from an article entitled Ensuring the Reliability of Fire-Arm Identification Evidence, authored by Mutsavi T and Meintjes van der Walt L. is instructive. It reads:

> " If a firearm is fired, a number of the gun's features are conveyed to the cartridge casings and bullets, thereby making distinctive patterns called striae or scratch marks. These marks, also called tool marks, are made each time the firearm
>
> is fired and they are formed as a result of the primer which detonates and the gunpowder which burns, resulting in the expansion of the casing in all directions, causing the imprinting of the casing and ammunition by the breech face of the gun. The internal part of a gun is hard and that is why, when it gets into contact with the softer metal of the bullet and casings, it results in the making of marks on the casings and ammunition. A firearm examiner purports to match bullets and cartridges to the weapon from which they originated by comparing bullets test- fired from a recovered gun with the spent bullets from the scene, using a comparison microscope to do so."

47. We may also usefully refer to an article by Fred E. Inbau, entitled Scientific Evidence in Criminal Cases, 24 Am. Inst. Crim. L. & Criminology 825 [1933-1934], in which the author writes:

> " ...It is rather difficult to realize the fact that discharged bullets and shells possess certain characteristic markings, which unmistakably identify the weapon in which they were fired- this being determined by comparing the evidence bullet or shell with a test bullet or shell fired from a suspected weapon. Nevertheless, only a superficial understanding of the process of gun manufacture is needed to appreciate the possibility of this phenomenon. One step in the manufacture of pistols and rifles is the boring of a hole through a cylindrical steel bar and reaming it, after which certain spiral grooves of uniform depth, width, and spacing are cut into the inner surface of the barrel, in order that a bullet fired through the barrel may have imparted to it rotational velocity, either to the right or left, which produces gyroscopic stability and consequently greater accuracy than it could otherwise have. The instrument used for this purpose is known as a "rifling cutter," a sharp tool whose arc-shaped edge, though flawless to the naked eye, when studied under a lens reveals minute 'saw-like teeth. And when this cutter is scraping out the grooves its serrated edge leaves small scratches on the inner surface of the barrel. Moreover, the same cutter will never leave identical scratches in any other barrel, or in two areas of the same barrel, for that matter, because of the fact that with every stroke the contour of this edge undergoes microscopic but none the less definite changes rendering it incapable of duplicating any given set of markings.
>
> Since the bullet is of a softer metal than the barrel of the gun, through which it passes, it naturally receives certain impressions from the irregular surface over which it travels. These constitute the "telltale" characteristics which form the basis for the science of firearms identification by a comparison of fired bullets.
>
> The mathematical probability of a duplication of the markings on a fatal bullet by those made upon another bullet fired from a different weapon is so remote as to permit an assumption that it is impossible. The mathematical calculation in this respect may be readily explained by considering the example used by Osborn regarding the possibility of two individuals having only eight distinctive physical characteristics exactly alike (such as a five-inch scar on the right forearm, a mole on the left temple one-half inch in diameter etc.).

Applying Newcomb's formula-that the probability of concurrence of all the events is equal to the continued product of the probabilities of all the separate events-and even with an extremely small fraction representing how frequently each point may be found, Osborn concludes that the possibility of a duplication is one in thirty-eight trillion four billion, or something more than thirty thousand times the total population of the earth. The same principle holds true in the science of firearms identification. So, when a fatal bullet contains not eight but a hundred or more individual and characteristic markings, all matched by a bullet fired from the weapon of an accused individual, it is indeed safe to conclude that only a bullet fired from that particular weapon could duplicate these markings. Identification may likewise be made from an examination of a discharged shell found at the scene of a crime, whether this be from a shotgun, machine gun, or pistol. The distinctive marks made upon the head of a shell by a firing pin, and by the breech face of the gun afford the evidence for a comparison of fatal and test shells.

The firing pin of a weapon is that part of the mechanism, which strikes the shell, causing the explosion. Because it is a machined down bit of steel, its surface presents characteristic scratches, which are impressed upon the primers of the shells it discharges. The breech markings also found on the primers and shell heads arise when the empty shell is hurled violently back against the breech face (also a machined and filed surface) by the force of the recoil. Either of the two sets of impressions are distinctive of the particular weapon used and of no other, just as much' so, and just as valuable from the standpoint of identification, as bullet markings.

A specially designed instrument-the comparison microscopies used for the purpose of firearms identification. It consists of two ordinary compound microscope tubes so arranged that images passing through both are brought together in one eye-piece midway between them. Under one of these tubes is placed the fatal bullet or shell, and beneath the other the test bullet or shell, fired from the weapon belonging to, or in possession of, the accused. Then, by properly focusing the instrument and moving the bullets or shells into their correct positions, the comparison microscope will transmit the fusion of both fatal and test bullets or shells, If they were fired in the same weapon, there will be found a coincidence, in the case of the two bullets under scrutiny, not only of the major characteristics-the lands and grooves, which after all may only be indicative of the general type of weapon involved-but also of the numerous minute marks described above, which latter features afford unmistakable evidence as to the part, if any, played by the suspected weapon. Similarly, in the case where shells are examined, the presence or absence of a coincidence of the sets of impressions previously described will determine whether or not a particular weapon was used in the commission of the crime under investigation. After fatal and test bullets or shells have been "matched" under the comparison microscope, enlarged photographs of them may be made for the purpose of illustrating to court and jury the similarities upon which the expert bases his opinion concerning the identity of the weapon used; and often these enlarged photographs assist the examiner in satisfying himself as to the correctness of his conclusions." (Emphasis added, foot notes omitted).

48. From the above excerpts, it is clear that firearm identification experts rely on markings on cartridges and projectiles to determine the link with a particular weapon. Where firearm identification evidence is involved the Court is concerned with how the marks associated with the suspect weapon were matched with other evidence. We have carefully studied the evidence relating to the recovery of the firearms, the manner in which the exhibits were handled, recorded and forwarded to the ballistic examiner and

the ballistic report. The evidence on the recovery of the two firearms, the ammunition and a mobile phone is on record. It will add no value for us to rehash it here. Importantly, the bullet which was removed from PW1 was upon examination found to have been fired from one of the guns found in Room Number 5, Nyama Villa Bar. In this regard, we agree with Mwongo, J. in his finding that "... the link between the appellant and the actual bullet that was used in shooting the complainant is so close to all but ascertain that the gun used to shoot the bullets in the cartridges (F1 - F2) fired from the same gun, and which cartridges were found at the scene." We find no basis at all upon which we can fault the ballistic evidence. We agree with the learned Judge that the gun places the appellant at the scene, and as stated earlier, the evidential burden shifted to him to explain how the said guns came into his possession. Possession as defined in section 4 of the Penal Code includes not only direct physical possession but also knowingly having something in the possession of another person or in any place for one's own or another's use or benefit, and this leads us to the next question, which is whether the learned Judge correctly held that the appellant was in possession of the said items. On this issue, the learned Judge said:

> " 68. The trial Magistrate found that the accused was in constructive possession of the weapons which were linked to the robbery. A thing is in possession of someone when he has power to deal with it as owner to the exclusion of others. This was held in Hussein Salim v Republic [1980] eKLR where the Court of Appeal said: ..."

49. Section 4 of the Penal Code defines possession as follows:

a. "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

b. if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;

50. Also relevant is section 20 (1) of the Penal Code which provides:

20.

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say:

a. every person who actually does the act or makes the omission which constitutes the offence;

b. every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

c. every person who aids or abets another person in committing the offence;

d. any person who counsels or procures any other person to commit the offence; and in the last-mentioned case he may be charged either with committing the offence or with counselling or procuring its commission.

51. A reading of section 20 (1) of the Penal Code leaves us with no doubt that the word "deemed" used in the said provision creates a rebuttable presumption. To our mind, the prosecution adduced credible evidence which proved possession. Therefore, as mentioned earlier, the burden shifted to the appellant to rebut the said presumption by adducing credible evidence which would cast doubts on the prosecution case.

52. In a case grounded on circumstantial evidence as this one, all the circumstances cited by the prosecution must unavoidably and solely point to the accused's guilt, and there should be no event that could be rationally viewed as consistent with the accused's innocence. To put it another way, circumstantial evidence is not directly related to the point at hand but instead consists of evidence of a number of unrelated facts that are so closely related to the fact at hand that when they are all considered, they produce a chain of circumstances from which it is possible to lawfully infer or presume the existence of the fundamental reality. Having considered the circumstantial evidence tendered by the prosecution and the appellant's defence, we are satisfied that:

    (a) the circumstances from which guilt is to be inferred were fully established and that the relevant circumstances were proven beyond a reasonable doubt,

    (b) the circumstances are decisive type;

    (c) the facts proven are consistent with the appellant's guilt, that is, they cannot not be able to be explained by any other possibility than the appellant's guilt;

    (d) the proven facts eliminate every other possibility than the one that has to be proven, and,

    (e) the circumstances should are conclusive in nature.

53. Having concluded as herein above, we have no doubt that the ingredients of the offence of robbery with violence were proved beyond reasonable doubt against the appellant. Therefore, we find that the conviction was supported by evidence.

54. Regarding sentence, it is our view that the sentence imposed upon the appellant is the penalty provided by the law for the offence of robbery with violence. (See the Supreme Court decision in Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024). Consequently, we find no basis upon which we can interfere with the sentence.

55. The totality of our findings is that, we find no merit in this appeal. Accordingly, we hereby dismiss it in its entirety.

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

J. MATIVO

JUDGE OF APPEAL

.....

M. GACHOKA C.Arb, FCIArb.

JUDGE OF APPEAL

.....

G. V. ODUNGA

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.