

**IN THE COURT OF
APPEAL AT KISUMU**

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A.)

CRIMINAL APPEAL NO. 91 of 2020

BETWEEN

LEVI JUMA WANYONYI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an Appeal from the Judgment of the High Court of
Kenya at Bungoma, (Kiarie Waweru Kiarie. J.)) dated 4th
October, 2018)*

in

HCCR No. 26 of 2017)

JUDGMENT OF THE

COURT

[1] On the night of 24th July 2014, a coordinated series of violent robberies unfolded across Runda and Bilaha villages in Bungoma North District, Bungoma County. The attacks occurred between the hours of 2:00 a.m. and 4:30 a.m., targeting multiple households and involving a gang of five or so robbers armed with offensive weapons including pangas and rungus. They were also armed with torches. The victims were subjected to threats, physical violence, and theft of their personal properties ranging from mobile phones to a

motorcycle and other household items.

[2] Following investigations, **Levy Juma Wanyonyi**, alias **“Boyi”**, **“the appellant”**, was arrested and charged alongside, Philip Blinda Wafula and Wyclife Wafula with seven counts of robbery with violence contrary to **Section 295** as read with **Section 296(2)** of the Penal Code in the Senior Principal Magistrate’s Court at Kimilili. The specific particulars of the offences being that on the 24th day of July 2014 at about 3:30 a.m., at Bilaha village in Bungoma North District within Bungoma County, the appellant, jointly with others not before the court and while armed with offensive weapons namely rungas and pangas, robbed the seven complainants named in the counts of various personal items particularized in the charge. However, and specific to the appellant was count 3. The particulars thereof alleged that he had robbed, Aunyasi Sammy Emukule of one mobile phone make Nokia Asha 200 and one motorcycle registration number KMCJ 957H, make TVS Star, red in color, all valued at Ksh. 93,000/-. It was further alleged that immediately before or immediately after the time of such robbery, he used personal violence on the said Aunyasi Sammy Emukule. The appellant and fellow co-accused entered a plea of not guilty on all the counts, and their trial thereafter ensued in earnest. After the prosecution had called five witnesses, it withdrew the charges against the co-accused and the case thereafter proceeded against the appellant

only.

[3] The prosecution presented six witnesses to support its case. Elias Simiyu Wafula (PW1), a motorcycle taxi operator, testified that he was ambushed by five armed men outside his house at around 2:00 a.m. and robbed of his Samsung mobile phone. He identified the appellant from the light emitted from his stolen phone and later picked him out in a police identification parade. Sammy Emukule Aunyosi (PW2) recounted that at approximately 3:30 a.m., he was misled by people posing as police officers to open the door. Upon doing so, those people entered and ordered him to lie down. He was thereafter robbed of a Nokia Asha 200 phone, a thermos flask and a motorcycle TVS Star, registration KMCJ 957H. He was able to identify the appellant in the process and subsequently during a formal police identification parade.

[4] On the material day as well, Paul Ole Aunyosi's house, (PW3), was broken into and he was robbed of a Nokia phone, torch, and solar panels, though he could not identify any of the robbers in the process. Susan Chelimo Emukule (PW4), a wife to PW2, described how she was ordered to surrender money and her belongings, including a Nokia phone and Ksh. 500 in cash. She was also able to identify the appellant in the course of the robbery, based on torchlight visibility.

[5] Inspector Paul Kimani (PW5) conducted the identification parade

and confirmed that both PW1 and PW2 positively identified the appellant on

the police identification parades. He ensured procedural compliance with regard to the conduct of police identification parades and allowed the appellant's wife, Maureen Apiyo Juma, to witness the parade at the request of the appellant who thereafter signed the parade forms.

[6] PC Wesley Korir (PW6), the investigating officer, received a tip-off about the appellant's suspicious early morning return to his house and in the company of other police officers raided the house. A search of the house led to the recovery of five mobile phones, including the Nokia Asha 200 belonging to PW2. The appellant signed an inventory of the recovered items voluntarily. He was then arrested and subsequently charged with the Offences.

[7] In his defence, the appellant denied involvement in the commission of the offences claiming that he was framed up for allegedly aiding a suspect named Wafula to escape from lawful police custody. He alleged flaws in the conduct of the identification parade, and stated that he was arrested while herding his cattle. His wife, Monica Apiyo (DW2), supported his alibi defence asserting that he was at home throughout the night that the robberies were committed, and only left the house early for work the following morning.

[8] The trial court upon evaluation of the evidence presented by the prosecution and defence, found that the prosecution had proved its case

against the appellant in relation to Count III and acquitted him on Counts I, II, IV, V, VI, and VII due to insufficient evidence.

[9] The trial court reasoned that although the identification evidence from PW1 and PW2 was not entirely watertight and particularly due to procedural concerns about their conduct, the recovery of PW2's stolen mobile phone from the appellant's house so soon after the robbery was compelling and placed the appellant at the scene of crime. That the appellant had signed an inventory acknowledging possession of the phone, and failed to offer a credible explanation as to how he came by it. The trial court in the premises invoked the doctrine of recent possession in dispelling the appellant's alibi defence which was deemed unconvincing and was in any event raised too late to displace the prosecution's case. The trial court upon convicting the appellant as aforesaid sentenced him to death as mandatorily then required.

[10] The appellant being dissatisfied with the decision, lodged an appeal before the High Court of Kenya at Bungoma on grounds that the trial court erred in relying on flawed identification evidence to convict him, failed to properly evaluate the appellant's alibi defence and wrongly invoked the doctrine of recent possession.

[11] In its judgment, the High Court, (Kiarie Wa Karie. J.) upheld both the conviction and sentence. While the court acknowledged

procedural

weaknesses in the identification evidence particularly the absence of prior description of the appellant before the conduct of the police identification parade, it found that the recovery of the stolen Nokia Asha mobile phone from the appellant's residence shortly after the robbery was compelling and in the premises the doctrine of recent possession was properly invoked. The defence of alibi, was deemed insufficient to rebut the prosecution's case, especially in light of the recovery of the recently stolen goods from the appellant's house belonging to PW2. In the ultimate the first appellate court concluded that the trial court's findings were sound, the conviction was safe, and the sentence was lawful. The appeal was therefore dismissed in its entirety. We must however point out that the first appellate court erroneously indicated that the appellant upon conviction had been sentenced to 15 years imprisonment. The proper sentence imposed was actually death.

[12] The appellant being aggrieved again by the decision of the first appellate court, has now appealed the said decision in this court. The appellant complains that the two courts below erred by convicting and sentencing him for the reasons that the: evidence presented did not meet the threshold; the conviction was premised on illegally obtained evidence; alibi defence advanced was not properly considered and that the sentence imposed was contrary to law.

[13] The appeal was heard by way of written submissions only. When called out, **Ms. Awuor**, learned counsel appeared for the appellant, while, **Ms. Kibet**, learned Prosecution counsel appeared for the respondent.

[14] Counsel for the appellant submitted that the prosecution failed to discharge its burden of proof beyond reasonable doubt, as required in criminal proceedings. She cited the case of **Republic v David Ruo Nyambura & 4 Others [2001] eKLR**, in support of the proposition that the legal onus of proof in criminal cases always rests with the prosecution, and the standard is one of beyond reasonable doubt.

[15] According to the appellant, the evidence presented did not meet this evidentiary threshold, particularly in relation to the elements of robbery with violence under **Section 296(2)** of the Penal Code. She further challenged the reliability of the identification evidence, noting that the offence occurred at night and the witnesses relied solely on torchlight and phone screen illumination to allegedly identify the appellant. Counsel argued that the identification parade was flawed as it lacked procedural safeguards. In support thereof, counsel relied on the case of **R v Turnbull & Others [1976] 3 All ER 549**, where the court emphasized the need to scrutinize the circumstances under which identification is made carefully.

[16] The appellant also disputed the application of the doctrine of recent possession, asserting that there was no direct evidence proving that the recovered items, if at all, did not belong to him. He cited the case of **Isaac**

Ng'ang'a Kahiga & Another v Republic [2006] eKLR, to posit that the essential elements for the application of doctrine were not established. He further relied on the case of **David Mugo Kimunge v Republic [2015] eKLR**, to argue that the inference of guilt from the application of the doctrine was permissive, not mandatory, and must be supported by corroborative evidence.

[17] In addition, counsel argued that the prosecution's case was based entirely on circumstantial evidence, which was insufficient to sustain a conviction. She cited the case of **Joan Chebichii Sawe v Republic [2003] eKLR**, where the Court held that for circumstantial evidence to justify a conviction, the facts must be incompatible with innocence of the accused and incapable of any other explanation. She submitted that the chain of evidence presented against the appellant was very weak and failed to meet this threshold.

[18] Counsel also submitted that the two courts below failed to consider the appellant's defence and the evidence tendered in support thereof, thereby denying him a fair hearing. She relied on the case of **Oketch Okale v Republic [1965] EA 555**, where the

court held that courts must

evaluate the evidence of both parties to avoid injustice being engendered. Lastly, counsel challenged the legality of the mandatory death sentence imposed upon the appellant, citing the Supreme Court's decision in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**, which declared the mandatory nature of the death sentences unconstitutional. She also relied on the case of **William Okungu Kittiny v Republic [2018] eKLR**, where this Court held that **Sections 296(2) and 297(2)** of the Penal Code must be interpreted as providing for discretionary, not mandatory, sentencing. She submitted that the courts below erred in failing to exercise judicial discretion and consider mitigating factors offered in sentencing the appellant to death.

[19] In conclusion, counsel prayed that the appeal be allowed, conviction quashed and the sentence set aside. Alternatively, she sought a lesser or non-custodial sentence, citing the appellant's remorse and the rehabilitation he has undertaken whilst behind bars and the need to be reintegrated into society therefor.

[20] In opposition to the appeal, counsel for the respondent submitted that the conviction of the appellant was lawful, well-founded, and supported by overwhelming evidence. Relying on the case of **Johana Ndungu v Republic [1996] eKLR**, in which this Court clarified the elements of robbery with violence which the

prosecution must prove,

counsel submitted that the prosecution had proved all three statutory ingredients as the appellant was: armed with dangerous weapons (metal bars, rungas, and pangas) during the robberies, in the company of others during the robbery, and visited violence on the complainants named in the charge sheet. That PW1 to PW4 gave consistent accounts of the events on the material night and positively identified the appellant as one of the perpetrators. Their testimonies were corroborated by the identification parade conducted by PW5. She maintained therefore that the identification of the appellant was reliable and free from possibility of error.

[21] Regarding the sentence, counsel maintained that the death penalty imposed was lawful and proportionate to the gravity of the offence. She cited the case of **Ambani v Republic [1990] KLR 161**, where the court held that sentencing must reflect the moral blameworthiness of the offender and consider the totality of circumstances. She also referred to the case of **Republic v Jagani & Another [2001] KLR 590**, to emphasize the objectives of sentencing, including deterrence, denunciation, and rehabilitation. She submitted that the trial court had considered the facts and mitigation before imposing sentence, and that the sentence was consistent with the provisions of **Section 296(2)** of the Penal Code. In the alternative, she argued that should the Court be inclined

to

interfere and impose a lesser sentence, counsel urged the Court to be guided by the case of **Maritim v Republic (Criminal Appeal E024 of 2021) [2022] KEHC 10256 (KLR)**, where a death sentence was substituted with life imprisonment. Otherwise, and in conclusion, counsel prayed that the appeal be dismissed in its entirety.

[22] This is a second appeal. **Section 361(1)(a)** of the Criminal Procedure Code restricts the consideration of a second appeal to this Court to matters of law only, thereby voiding interrogation of such appeals on matters of fact or severity of a sentence unless the first appellate court illegally enhanced it. See also the cases of **Daniel Kyalo Muema v Republic [2009] eKLR** and **David Munyao Mulela & Another v Republic [2013] eKLR**.

[23] Similarly, this Court has consistently held that in so doing it will resist the temptation to interfere with concurrent findings of fact by the two courts below unless it is demonstrated that such findings were based on no evidence, were arrived at arbitrarily, plainly wrong or perverse. See for instance the case of **Samuel Karanja Kihara v Republic [2017] eKLR**.

[24] Having considered the record, the submissions of both parties, and the applicable law, the following issues arise for our determination, whether: the prosecution proved its case against the

appellant beyond

reasonable doubt; the doctrine of recent possession was properly invoked; and whether the sentence imposed was unlawful and unconstitutional in the circumstances.

[25] On the first issue, both courts below found that the prosecution had proved the offence charged against the appellant to the requisite standard. Both courts relied in particular on the testimony of PW2, who was robbed of a Nokia Asha 200 mobile phone and a motorcycle, and who positively identified the appellant at the scene of crime as well as during the police identification parades. Both courts below, however acknowledged procedural weaknesses in the identification process, particularly the absence of a prior description of the appellant by the identifying witness before the police identification parades were carried out and properly opted not to base their conviction on such evidence. Instead, the conviction was founded solely on the application of the doctrine of recent possession.

[26] Was the doctrine of recent possession properly invoked to nail the appellant? There was evidence that after the Nokia Asha 200 phone had been stolen from PW2 during the robbery, it was thereafter recovered from the appellant's house the following morning after the police officers raided the house following a tip-off. This was indeed very few hours after it had been robbed from PW2. At the conclusion of the raid the appellant

willingly and voluntarily signed the inventory form acknowledging and confirming that the mobile phone had been recovered in his possession and in his house. The issue as to whether the phone was not recovered from his house or that there was no evidence linking it to him does not therefore arise.

[27] The phone was positively identified by PW2 as belonging to him.

Due to the nature of the item and the limited time frame from the time of the robbery and when it was discovered in the possession of the appellant rules out the possibility of it having exchanged hands beyond the appellant. In any event the appellant did not claim that he owned it. Therefore, the appellant having failed to offer a credible explanation as to his possession thereof as was required of him, the two courts below properly invoked the doctrine of recent possession in the conviction of the appellant.

[28] As already stated, before invoking the doctrine, the trial court was satisfied that the prosecution proved that: the property had been stolen; the accused was in possession of it; the property was recently stolen; the property was positively identified as belonging to the complainant and that the appellant had failed to provide a reasonable explanation for his possession. See the case of **Isaac Ng'ang'a Kahiga and Another vs**

Republic [2006] eKLR. Given all the foregoing, we're are satisfied that all the requirements for the invocation of the doctrine were met.

[29] On the third issue, the trial court imposed the mandatory death sentence on the appellant pursuant to **Section 296(2)** of the Penal Code. The High Court upheld the sentence, noting that it was the only and lawful sentence. However, the appellant has challenged it, relying on the case of **Francis Karioko Muruatetu & Another v Republic (supra)**, where the Supreme Court held that the mandatory nature of death sentences was unconstitutional. The appellant also cited the case of **William Okungu Kittiny v Republic, (supra)**, where this Court of Appeal extended the reasoning in **Muruatetu case (supra)**, to robbery with violence Offences. However, this is no longer a brainer following the Supreme Court's clarification in **Francis Karioko Muruatetu & Another v Republic [2021] eKLR**, in which it was expressly stated that the application of the original **Muruatetu case** was limited to murder cases only. The Court stated unequivocally that the reasoning in the earlier **Muruatetu case** did not extend to other capital offences such as robbery with violence under **Section 296(2)**. Accordingly, the mandatory death sentence imposed upon the appellant remains lawful and constitutionally valid.

[30] Having considered the grounds of appeal, the record of proceedings, and the concurrent findings of the two courts below, we are satisfied that the conviction of the appellant for the offence was based on credible and corroborated evidence. The doctrine of recent possession was properly invoked.

[31] In the absence of any constitutional or statutory infirmity in the conviction or sentence, and having found no error of law in the proceedings of the two courts below, we find no merit in the appeal. Accordingly, it is dismissed in its entirety.

Dated and delivered at Kisumu this 21st day of November, 2025.

ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H.A. OMONDI

.....
**JUDGE
OF APPEAL**

L. KIMARU

.....
**JUDGE
OF APPEAL**

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

DEPUTY REGISTRAR