

**IN THE COURT OF
APPEAL AT NYERI**

(CORAM: KANTAI, LESIIT & MUCHELULE, JJ.A.)

CRIMINAL APPEALS NOS. 123, 124 & 125 OF

2018 BETWEEN

**JAMES MWIKA MUTUA.....1ST
APPELLANT FREDRICK KIRUJA KINYUA alias SIKATAI... 2ND
APPELLANT**

YUSSUF KABERIA PAUL alias MAN YES.....3RD

APPELLANT AND

REPUBLIC.....RESPONDENT

*(Being an appeal against the judgment and decree of the High Court at
Nanyuki*

*(S. Chitembwe, J.) dated 29th October
2018 in*

Criminal Appeals Nos. 5, 8 & 9 of 2017)

JUDGMENT OF THE COURT

1. The appellants, James Mwika Mutua, Fredrick Kiruja Kinyua alias Sikatai and Yussuf Kaberia Paul alias Man Yes, were jointly charged with two others before the Chief Magistrate's Court at Maua with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code**. The particulars were that on 21st February 2011 at Maua Township in Igembe District of the Meru County, jointly with others not before the court, while armed with dangerous weapons namely *pangas* and *simis* robbed Joseph Mihari Maina of unknown amount of money and a mobile phone make Nokia valued at Kshs.5,000/= and at or immediately

before or immediately after the time of such robbery killed the said Joseph Mihari Maina.

2. Following trial, the appellants were found jointly guilty of the charge, convicted and each sentenced to death. Their two co-accused were acquitted of the charges. The appellants were the 2nd accused, 3rd accused and 1st accused, respectively, before the trial court.
3. The appellants were aggrieved by their conviction and sentence. They appealed to the High Court which, upon the reconsideration of the evidence, found no merit in the appeals and dismissed them.
4. The appellants are now before us on second appeal. The appeals Nos. 123 of 2018, 124 of 2016 and 125 of 2018 were consolidated. Their complaint was that the learned Judge erred in finding that the circumstantial evidence upon which they had been convicted was sufficient, and that it had unerringly pointed to them as the persons who had robbed the deceased; that it had not been proved beyond doubt that the recovered phone belonged to the deceased, and was the one that he had been robbed of in the attack; that the non-production of the sim card and non-production of the airtel data had not helped the prosecution in linking the alleged phone with the deceased; and that the death penalty that the appellants were ordered to suffer was illegal and unconstitutional under **Articles 28** and **50(2)** of the **Constitution**.
5. Our jurisdiction under **section 361(1)(a)** of the **Criminal**

Procedure Code is limited to the consideration of matters of law

only. As was reiterated by this Court in **Alvan Gitonga Mwosa**

-vs- Republic [2015]eKLR, we will not interfere with the concurrent findings of fact by the two courts below unless such findings were based on no evidence, or were based on a misapprehension of the evidence, or the two courts below are shown demonstrably to have acted on wrong principles in arriving at their findings.

6. The record shows that on 21st February 2011 at about 5.15am Joseph Mihari Maina (the deceased) left his house at Maua. He wanted to go to Thika to buy eggs. He normally parked his vehicle outside Beta Shop in Maua Town. He was going to use the vehicle to go to Thika. Herman Mbaabu M'Imathiu (PW 5) was a watchman at Beta Shop. He would watch over the vehicle. This morning the deceased came, greeted him and went into his vehicle. The vehicle drove off but stopped after a short distance. The engine continued running. His phone was ringing but he was not answering it. PW 5 went to the vehicle and found the deceased leaning on the seat. One John came, got a motorist who drove the deceased to Maua Methodist Hospital where he died almost immediately. This John is the one who informed the deceased's wife Margaret Nkithiegeni Warutere (PW 1) of the death. John was not called to testify.
7. The post mortem performed on the deceased's body on 24th February 2011 showed that a sharp object had been used to

cut the deceased's vertex. The skull was cut and fractured. The dura mater was lacerated, the superior surgical sinus was cut

and the cerebral cortex was lacerated. The deceased had died from hemorrhagic shock.

8. There was no witness to the attack. PW 5 did not know who had cut and injured the deceased. It was not known whether had lost anything in the incident. The prosecution case was based on circumstantial evidence. This Court in **Sylvester Mwacharo Mwakeduo & Another -vs- Republic [2019] eKLR** had this to say on circumstantial evidence:-

“Over the years, courts have set the threshold that has to be met if circumstantial evidence is to be relied on to prove a case to the required standard of beyond reasonable doubt. For circumstantial evidence to form the basis of a conviction, several conditions must be satisfied to ensure that it points only to the guilt of the accused to the exclusion of others. This test has previously been applied by this Court in a myriad of cases for instance in the case of Judith Achieng’ Ochieng’ -vs- Republic, Criminal Appeal No. 128 of 2006, this Court stated as follows:-

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy four tests:

- (i) The circumstances from which the inference of guilt is sought to be drawn must be cogently and firmly established;***
- (ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.***
- (iii) The circumstances taken cumulatively should form a chain so complete that there is no escape***

***from the conclusion that within all
human probability the***

crime was committed by the accused and no one else;

(iv) In other words, in order to justify a finding of guilt, the circumstantial evidence, in its totality, ought to be such that the incriminating facts lead to the unimpeded conclusion of guilt and that there were no co-existing facts that are capable of explanation upon any reasonable hypothesis other than that the accused's guilt."

9. The evidence upon which the appellants were convicted, and the conviction upheld by the 1st appellate court, was that on 21st February 2011 at about 1.30pm the 3rd appellant called Kennedy Mburugu Kunjine (PW8) using the deceased's phone number 0733470383. This was the same day the deceased had been attacked and killed. According to the deceased's widow, the deceased's phone was Nokia 2600 (Exhibit 1). According to Eugenia Kinya (PW 2), on 25th February 2011 he exchanged his phone Nokia 900 with the 2nd appellant's Nokia 2600 (Exhibit 1) and added the 2nd appellant 1,200/= . The transaction was witnessed by Joseph Kirini Bedan (PW 3). The 2nd appellant removed his sim card number 0700554420.
10. When the police interrogated the 3rd appellant about the call to PW 8 on 21st February 2011, he said that, to be able to make the call, he had borrowed the sim card from the 1st appellant.

11. The prosecution case was that the appellants had, or dealt with, the deceased's phone soon after he was attacked and robbed of the phone. Learned counsel Ms. Brenda Mutegi for the

appellants submitted before us that the two courts below fell into error when they convicted her clients on the basis of receipt possession. This was because, according to counsel, there was no evidence called to prove that either the phone or the sim card belonged to the deceased. Reliance was placed on the decision by this Court in ***Erick Otieno Arum - vs- Republic, Kisumu CA Criminal Appeal No. 85 of 2005 ([2006] eKLR)*** in which it was reiterated that before a court can rely on the doctrine of recent possession as a basis for a conviction in a criminal case there has to be proof that the property in question belonged to the complainant; that the property was found with the accused; and that the property was recently stolen from the complainant.

12. This is what the State submitted in response to the appeal: -

“Even though the evidence that was relied on to convict the appellants was circumstantial, the learned trial magistrate considered and rightly so, the deceased phone that was used by Yussuf Kaberia alias “Yes Man” (the 1st appellant) who had inserted his sim card the first seven (7) hours after commission of the offence an action that assisted the police in pulling together their investigations that ultimately led to the arrest of the other appellants (then 1st, 2nd and 3rd accused persons) during the trial ”

13. The doctrine of recent possession is a principle of circumstantial evidence, meaning it relies on inferences drawn from other facts rather than direct evidence. It is a

legal principle used in criminal cases, particularly those involving theft and handling stolen goods. It allows the court to infer that a person who

possesses recently stolen property, without a reasonable explanation, is either the thief or a receiver of the stolen goods. In **Erick Otieno Arum -vs- Republic** case this is what the court stated:-

“In our view, before a court of law can rely on the doctrine of recent possession as a basis for a 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 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 the other.”

14. We began with the question whether there was proof beyond doubt that the phone and sim card that linked the appellants with the attack belonged to the deceased and was stolen in the attack. According to the record, this is what PW 1 told the trial court:-

“I said I was called to DCIO’s Office and I identified my husband’s phone. This is the one Nokia 2600 (MFI-1). I have the phone. When I scrolled, I got one of the numbers in the phone book - the number of Mr. Njoroge his friend.”

15. The complaint by the appellants was that there was no effort to conclusively link this phone with the appellants by calling evidence to show when he bought it, and from where, and evidence from Airtel or Zain to show in whose name the

phone

had been registered. We consider the lapse on the part of
the

investigator to check these details regarding the phone to have been material. There was nothing distinctive about exhibit that conclusively linked it to the deceased. That number of “Mr. Njoroge” was found in the phone did not make it distinctive. We consider that there was insufficient evidence the phone and the sim card belonged to the deceased, and therefore the first appellate court failed in its duty of re-evaluation when it accepted the trial court’s finding on the issue.

16. The record revealed a more troubling aspect of the prosecution case. When PW 5 noticed that the deceased’s vehicle had stopped and the engine was running, he moved there. This is what he told the court:-

“The vehicle continuing running. I heard his phone calling and he was not answering it ”

By this time, we observed, the deceased had been injured in the vehicle, was bleeding, was leaning on the seat in the vehicle and could not respond when called by PW 5. If his phone was ringing and he could not answer it, how can it be said that the attackers had stolen the phone? We ask the question because there was no evidence of a second phone. If PW 5’s evidence was to be accepted, then the phone cannot be linked to the people who cut and injured the deceased. It cannot be said that the phone (Exhibit 1) was stolen in the attack. Again, we find that the conclusion reached by the two courts below that the phone or sim card

found with the appellants was stolen in the attack was without any basis.

17. We reiterate that John did not testify. He is the one who took the deceased to hospital. Did he find the deceased with a phone? Did he take away the deceased's phone? He was a material witness. His non-calling did not help the prosecution case.
18. We hope we have said enough to show that the evidence on which the appellants were convicted, and the conviction confirmed by the 1st appellate court, was not based on conclusive and unimpeachable evidence. We find the appeal on conviction merited. We quash the conviction and set aside the sentence. The appellants shall be set free forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 28th day of November 2025

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

.....
JUDGE OF APPEAL

A.O. MUCHELULE

.....
JUDGE OF APPEAL

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

Signed
DEPUTY REGISTRAR