Gamburu v Republic (Criminal Appeal 108 of 2016)
[2025] KECA 2153 (KLR) (11 December 2025) (Judgment)

Neutral citation: [2025] KECA 2153 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 108 OF 2016

S OLE KANTAI, A ALI-ARONI & AO MUCHELULE, JJA

DECEMBER 11, 2025

BETWEEN

ELIUD WANDARI GAMBURU .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the Judgment of the High Court at Nanyuki (A. Mshilla, J.) delivered on 8th December, 2016 in H.C. CRA No. 201 of 2008 Consolidated with CRA Nos. 203 and 238 of 2008)

JUDGMENT

1. This is a second appeal arising from the judgment of the High Court of Kenya at Nanyuki which confirmed the appellant's convictions and sentences for the offences of robbery with violence and indecent assault. Being a second appeal our mandate was as stated by this Court in the case of George Morara Achoki vs. Republic [2014] eKLR where the Court stated:

   > The jurisdiction donated to this Court by Section 361 (1) (a) Criminal Procedure Code in a second appeal like this one is to consider only issues of law raised in the appeal. We must avoid the temptation to deal with matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court unless it is shown that there has been misdirection on the treatment of facts or the findings of fact are not based on evidence."

2. A reading of the record of appeal shows that the appellant was charged as 1st accused in Nyeri Chief Magistrate's Criminal Case No. 1735 of 2007 alongside two others. He was charged in Count 1 with the offence of robbery with violence contrary to section 296(2) of the Penal Code against Lucy Wambui Mwangi; Count 2 was robbery with violence against James Wanjama Maina; Count 3 was robbery with violence against Stephen Kibicho Kingori; and Count 4 was robbery with violence against Simon Rubia Mathini. The particulars were that on 13th June, 2017 the appellant and his co- accused, with

others not before the court, and while armed with dangerous weapons like pangas, swords, rungus and pistols robbed the aforementioned victims of various items namely cash, phones, alcohol, wrist watches, radio, TV, VCDs, radio, speaker, shoes, a jeans jacket, a torch and cigarettes.

3. The appellant faced a further Count V for committing an indecent act with an adult against Lucy Wambui Mwangi. The particulars were that during the robbery, the appellant tore the said victim's underwear and his co-accused inserted his fingers in her vagina.

4. The appellant and his co-accused faced alternative charges of handling stolen goods; the particulars being that on 14th June, 2007, they were found with a radio speaker, a mobile phone, watches, alcohol, black leather shoes and VCDs belonging to the victims in the charge sheet.

5. The prosecution called 7 witnesses in support of its case. Lucy Wambui Mwangi (PW1-Lucy) told the court that at the material time, she worked as a bar maid at Jacaranda Bar in Nyeri. 0n 13th June, 2007 at around 10.40 p.m., she had 4 remaining customers but she had closed them in the premises as a security measure and that the bar was about to close. She told the court that when the 4 customers were ready to leave, she opened the bar door, only to be forcefully confronted and pushed back by 5 people who entered the bar. The electricity was on inside and outside the bar and she reportedly identified the appellant as he pushed her back into the bar as he had previously been her customer. The appellant was holding an axe and cut her on the head and hand. She fell and he pulled her up to open the counter. Four other persons entered the bar armed with pistols, pangas and axes. Lucy identified the 2nd and 3rd co-accused who were wielding pangas. She lay on the ground near the counter as the robbers took away 48 bottles of Kane spirit, 20 CDs, a speaker, and her mobile phone Motorola C117. The appellant then took her to her room adjacent to the bar and ordered her to remove her clothes and he cut her underwear with an axe. His co-accused inserted his fingers in her private parts saying he was looking for money. They then left her and stole from the room. She told the court that Kshs.3200 was taken from the bar counter. She and other customers lay on the floor naked until members of the public came to the scene after the robbers had left and they were assisted. She said that she identified the appellant by his ears although he was wearing a mask; she had seen him drinking alcohol in the bar before.

6. James Wanjama Maina (PW2-James), was one of the patrons in the bar on the night of the robbery in question. He told the court that when he and other patrons were about to leave, the appellant opened the door and he was followed in by other robbers. James saw the people armed with an axe, a pistol and a panga. The 1st appellant and 2nd accused hit him on the chest with their weapons. The robbers ordered everyone in the bar to undress. James had his Nokia 2600 mobile phone, a blue pair of shoes, a wrist watch, and a blue jeans jacket as well as Kshs.5100 stolen from him. He noted that Lucy was taken to an adjacent room and returned later. He told the court that the thieves locked them all behind the counter and left. James later identified the appellant at an identification parade.

7. Stephen Kibicho (Stephen-PW3), another patron who got caught up in the robbery confirmed that as Lucy opened the bar door to let PW5 leave, the door was forced open by 5 robbers who ordered them to lie down. He said that he did not identify the attackers due to panic. He lost a wrist watch and a torch to the robbers.

8. Inspector of Police Charles Marangu (PW4), who conducted an identification parade which James and Stephen participated in.

9. James is said to have pointed out the appellant while Stephen did not identify any person.

10. Simon Mubea (Simon-PW5) who was also a patron in the bar on the night of the robbery told the court that he was heading to leave the bar when 5 thieves entered and ordered everyone to lie on the floor. He noted that they were armed with crude weapons and he identified the appellant and his co-

accused using the electricity that was on in the bar. He identified the appellant as the one who pulled off his clothes and he was wearing a mask but his face was otherwise uncovered.

11. Ochieng Omollo (Omollo-PW6), a prison warder, told the court that on 14th June, 2007 at 11.30 a.m., he was at Viceroy Bar in Nyeri town when the appellant and his co-accused offered to buy him beer. They then offered to sell him some Kane spirit which they claimed they had bought on wholesale. They also offered to sell him some VCDs. They asked him to help them look for market for the items. Omollo said that the appellants and 2nd accused left and he remained drinking with the 3rd accused. Police came in and arrested the 3rd accused. He testified that he had known the appellant and his co-accused persons previously.

12. Sergeant Jacob Muremi (PW7), who received a report of robbery with violence at a bar and was the investigating officer in the case stated that he and his officers arrested the appellant and his co-accused at another bar and the stolen alcohol and VCDs were in the possession of the 3rd accused in the case. The 3rd accused was also wearing shoes that had been reported stolen. Investigations led the police to recover other stolen items from the appellant and the 2nd accused person in the case. The police recovered an iron box and a speaker from the appellant's house, items that were identified by Lucy as items stolen from her on the material night. The police reportedly recovered Lucy's mobile phone, wrist watches, torch and jeans in the 2nd accused's house.

13. At the close of the prosecution case, the three accused persons were placed on their defence.

14. The appellant testified as DW1 in his defence and told the court that the 2nd accused is a friend but he only met the 3rd accused at the police station. He told the court that on 13th July, 2007 he was at home from 9.45 p.m. in the company of his 12-year- old brother and was not at Jacaranda Bar at all. He said that the speaker taken from his house belonged to him as did the rungu, but he did not know the other items referred to. He denied that the torch and the speaker were recovered from his house. He said that one Ndirangu who was arrested and is at large, framed him because he thought the appellant slept with his wife.

15. After considering all the evidence before it, the trial court delivered judgment on 31st July, 2008. The court held that the ingredients of robbery with violence were proved against the 3 accused persons and the offences of indecently assaulting Lucy were proved against the appellant and the 2nd accused. The three were sentenced to death on the robbery with violence charges and the sentencing for the conviction for the indecent assault was held in abeyance.

16. The 2nd and 3rd accused persons in the case although convicted by the trial court and whose appeals at the High Court were consolidated with the appellant's appeal and which appeals were all dismissed have not appealed to this Court.

17. Being dissatisfied with the judgment, the appellant filed Nyeri HCCRA No. 238 of 2008. He stated that identification was un- favourable as the witnesses had been drinking, that there was contradictory evidence as to what the robbers were wearing and that the evidence of identification with a mask on was doubtful. He also stated that the speaker recovered was a common item and nobody testified as to seeing police recovering it from his house. He also faulted the Identification parade as un-procedural and faulted the court for failing to give his defence due consideration.

18. The High Court considered the appeals and in a judgment delivered on 8th December, 2016, all the appeals on conviction were dismissed and the convictions affirmed. The sentences of death for robbery with violence were upheld. The court imposed 2 years' imprisonment each for the indecent act against Lucy, but the sentences were held to be in abeyance.

19. The appellant is aggrieved by the High Court judgment and proffered this second appeal.

20. The appellant, in an amended Memorandum of Appeal states that the first appellate court failed in its duty to re-evaluate the evidence with regard to identification and recognition together with the doctrine of recent possession so as to reach its own independent conclusions on the evidence. Further, that the trial court and the first appellate court erred in law by imposing the mandatory death sentence "…which was later commuted to life imprisonment…" was an indeterminate sentence which results to inhumane treatment and vitiates right to dignity under Article 28 of *the Constitution*.

21. The issues identified for determination in written submissions flow from the grounds of appeal we have just set out. It is submitted that identification at night must be treated with greatest care; that it was evident that Lucy testified that the appellant was wearing a mask during the robbery. We are invited to take judicial notice that "…a bar always contains artificial blinking lights…"; that brightness of the light in the bar was not described; that there was no evidence on sufficiency of light and the High Court erred in law in not so finding. It is submitted that both Lucy and James were hit and cut with an axe and that it would be difficult for victims in such circumstances to identify their attacker. The case of Wamunga vs. Republic [1989] KLR 423 is cited for the proposition:

> …where the only evidence against a defendant is identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from any possibility of error before it can safely make it the basis of the conviction."

22. The case of Maitanyi vs. Republic [1986] KLR 198 is cited in support of the same proposition.

23. It is submitted that clothes the appellant was wearing were not described; that Lucy said she identified the masked appellant because of his big ears; that those circumstances did not favour positive identification.

24. On the doctrine of recent possession, it is submitted that it was necessary for the prosecution to establish first, that the appellant was in possession of stolen goods, and secondly, whether those goods belonged to Lucy; that the goods were stolen from Lucy and that the items were recently stolen. Further, that the trial court needed to consider whether the appellant put forth a plausible explanation as to how he came into possession of the items. Further, that Jacob Murithi (PW7) identified recovered items as a speaker (MFI8), an iron box (MFI 14) and a blue mask (MFI 11); that the appellant testified that the speaker belonged to him as he had bought it but had not been issued with a receipt; that this was a reasonable explanation. The appellant further submits that there were inconsistencies on the colour of the mask which was recovered (he denied that it belonged to him) and the case of Erick Otieno Arum vs. Republic [2006] eKLR is cited for the following proposition on the doctrine of recent possession:

25. In our view, 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 as we found with the suspect, secondly that; that property is positively the property of 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 the other. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses."

    It is submitted that the doctrine of recent possession was not proved in the case.

26. On the imposition of the death sentence by the trial court as affirmed by the High Court it is submitted that that was the only sentence available for an offence under section 296(2) of the Penal Code at the time the sentence was imposed but that death sentence was subsequently commuted to life imprisonment. This information is contained in written submissions and there is nowhere in the record where that information on committal of sentence can be found.

27. It is submitted that the death sentence denied the appellant an opportunity to mitigate; that this Court has found death sentence in such cases to be harsh and has imposed custodial sentences. It is further submitted that life sentence is unconstitutional for not being a determinate sentence and the case of Evans Nyamari Ayako vs. Republic Kisumu CA CRA No. 22 of 2018 is cited for that proposition.

28. We are asked to pronounce ourselves on the evolving jurisprudence on what constitutes life imprisonment but we observe here that we have not been addressed on that issue. It is submitted that the appellant has been rehabilitated while in prison; has become a preacher and gives motivational talks to other prisoners and that he should be sentenced to the term he has already served.

29. In its written submissions the respondent identifies the role of the Court in a second appeal and it is submitted that Lucy was able to identify the appellant as she opened the door to allow the customers to leave; that she identified the appellant as he had been her customer before; that James also identified the appellant at the identification parade; that there was sufficient light in the bar to enable prosecution witnesses to identify the appellant. It is submitted that ingredients of the offence of robbery with violence were established as set out in Oluoch vs. Republic [1985] eKLR that:

    (1) The offender is armed with any dangerous and offensive weapon or instrument; or

    2. The offender is in company with one or more person or persons; or

    3. At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person…"

30. It is submitted by the respondent that the prosecution is only required to prove one ingredient of the said offence and that the offence of robbery with violence was proved beyond reasonable doubt.

31. On the doctrine of recent possession the respondent submits that the stolen items were recovered within a short period of time after the robbery.

32. It is submitted on the sexual offence charge that section 11(6) of the *Sexual Offences Act* which the appellant was charged had since been repealed and replaced with section 11A of the said Act pursuant to Act No. 7 of 2007 published on 15th October, 2007; that the provision of law existed when the appellant was charged; that the issue had been noted and clarified by the Judge on first appeal. The sentence on that charge was ordered to be in abeyance.

33. The respondent asks us to be guided on the issue of sentence by directions of the Supreme Court issued on 6th July, 2021 in Muruatetu & Another vs. Republic Petition 15 and 16 of 2015 [2021] 31 KLR where the Court stated that provisions of law prescribing mandatory or minimum sentences are not unlawful. We are asked to dismiss the appeal.

34. This appeal was heard on 11th June, 2025 on the Court's virtual platform. Learned counsel Mr. Kuria appeared for the appellant while learned State counsel Ms. Kaniu appeared for the respondent. Both sides relied entirely on their written submissions.

35. We have considered the record of appeal as well as the submissions and the relevant law relating to this matter. As earlier stated, this is a second appeal and our mandate involves matters of law.

36. The first ground of appeal is an attack by the appellant on the upholding of the finding by the High Court that he had been properly identified as the robber. It was Lucy's evidence that there was bulb light in the bar; that as she opened the door to let out a customer she was suddenly confronted by 5 robbers who entered the bar and that she was attacked with an axe where she was hit and fell down. She testified that the appellant wore a mask and that she identified him because of his big ears. The appellant submits that identification was difficult in those circumstances where intensity of light was not described; Lucy was hit with an axe and must have been in panic making it difficult for her to identify her attacker. We agree. The intensity of the light was not described. It is possible that the light was a single electric bulb in the bar; there was no evidence of the size of the room and in those circumstances it is possible that Lucy could be confused and the possibility of positive identification may be difficult as held in Wamunga vs. Republic (supra). We think that positive identification of the appellant in those circumstances was difficult; there was possibility of error and we agree that identification of the appellant in those circumstances was not properly established.

37. When the robbery took place various items as set out in the charge sheet were stolen from Lucy and the other prosecution witnesses who were in the bar on the night in question. It was the prosecution evidence that the appellant was found the day after the robbery with stolen items which included a VCD, an iron box and a speaker stolen from the bar which Lucy identified as items stolen from her by the appellant on the night of the robbery. Possession of these stolen items was conclusive proof that the appellant was at the scene of the robbery the previous night; he was in possession of recently stolen items. This Court discussed the doctrine of recent possession in the case of William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) vs. Republic [2022] KECA 23 (KLR) as follows:

> As regards the circumstances under which the doctrine of recent possession may apply, in Athuman Salim Athuman vs. Republic [2016] eKLR, this Court held that:
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> > "The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. (See Malingi V. Republic (1989) KLR 225 H.C and HASSAN V. REPUBLIC (2005) 2 KLR 151). The circumstances under which the doctrine will apply were considered in ISAAC NG'ANG'A KAHIGA ALIAS PETER Ng'ang'a Kahiga V. Republic, CR. APP. NO. 272 of 2005, where this Court stated: "It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other."

38. Lucy identified the said items which had been stolen from her the previous night; the items were found in the appellant's possession and he had no claim to the stolen items at all. We find that the prosecution discharged its burden of proving that the appellant was in possession of recently stolen items and that he must have been the person who stole the items from Lucy. The conviction of the appellant on the charges of robbery with violence on the basis that he had properties that were stolen during the robberies was sound and the High Court was right in upholding the conviction.

39. We find that nothing turns on the conviction for the sexual offence charge where the sentence imposed was held in abeyance.

40. On the issue of sentence the appellant makes an attractive argument that the death sentence or a life imprisonment is unconstitutional and invites us to be persuaded by some holdings of this Court sitting in Malindi and Kisumu on that issue.

41. The appellant was charged with the offence of robbery with violence under section 296(2) of the Penal Code which prescribed the death sentence upon conviction.

42. The Supreme Court of Kenya in Francis Karioko Muruatetu & Another vs. Republic Petition 15 and 16 of 2015 was asked to pronounce whether the mandatory nature of the death sentence was constitutional. It returned that mandatory death sentence was unconstitutional. When that matter went back to that court in what is today commonly referred to as "Muruatetu 2" (Francis Karioko Muruatsetu & Another vs. Republic [2021] eKLR), that Court pronounced that its earlier decision was only applicable to murder cases; that those sentenced to mandatory sentences in respect of other charges were entitled to a re-hearing on the issue of sentence. The appellant here has not taken that route at all on the issue of applying for a hearing on the issue of sentence.

43. We find no merit in this appeal which we hereby dismiss.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF DECEMBER, 2025.

S. ole KANTAI

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JUDGE OF APPEAL ALI – ARONI

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR