



**Matanda alias Wicky v Republic (Criminal Appeal E039 of 2021)
[2025] KECA 2285 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2285 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL E039 OF 2021
DK MUSINGA, PO KIAGE & GV ODUNGA, JJA
DECEMBER 19, 2025**

BETWEEN

WYCLIFFE WAFULA MATANDA ALIAS WICKY APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Bungoma
(Tuiyott & Mabeya, JJ.) dated 12th November 2014 in HCCRA No. 76 of 2011)*

JUDGMENT

1. The appellant and four others were charged and tried by the Principal Magistrates' Court at Webuye on a charge of robbery with violence contrary to section 296(2) of the Penal Code in that on the night of 25th and 26th day of June 2009 along Nyange Street, Webuye Township in Bungoma East District within Western Province, jointly with another not before court, while armed with offensive weapons namely, pangas and iron bars, they robbed Joseph Chumaki Talo of, three monitors S/No. 7SC7521000240, 207LC26SC536, CZZ02703KM; two central processing units S/No. 220CR43M9527, 220CR43M9532; one interrupted power supply S/No. 5BO827T14992 and, one roll of network cable, all valued at Ksh.50,000 and at, or immediately before or immediately after the time of such robbery, murdered the said Joseph Chumaki Talo (deceased), who was guarding Concepts Cyber Café, owned by Gladys Nanyama Muyundo (PW5).
2. The evidence that was adduced before the trial court in support of that charge was that on 26th June 2009 at 3.30am, Paul Kikame Abwoba (PW1) was woken up from sleep by his cousin and his wife, who had gone out for a call of nature, and informed that the door to a cybercafé in the neighbourhood was open. They looked around for the guard who usually guarded the premises but they could not see him. PW1 decided to call the owner of the cybercafé, one Gladys Nanyama Muyundo (PW5), but she was unreachable. He then called a neighbour who, after a short while, called back and told him that he had informed the security guard of a neighbouring lodge about the incident. Janet Nabwire



- Okumu (PW2), a chang'aa vendor, recalled that on 26th June 2009 at 7.00am, the appellant and his colleague who were her customers went to her house and asked for the changaa drink. PW2 noticed that the appellant had a cut on his left ear with blood oozing from it. She then overheard the appellant narrating to his friend that on the night of 25th June 2009, while in the company of a friend, they stole two computers from a cybercafé on Nyange Street. That while at it the guard who was securing the place bit his ear and his friend fought back by hitting him with a metal bar and a panga.
3. Elly Barasa (PW3), a security guard, testified that on 25th June 2009 at 6.30pm, he went to work and while on duty at around 4.00am, a neighbour asked him whether he was aware that a computer shop by the name Gladys Concept Cybercafé had been broken into. Knowing that the security firm that he worked with was the same one that guarded the computer shop, he asked for the whereabouts of the guard who was manning the shop but the neighbour told him that he was not aware of his whereabouts. Together they went to the Cybercafé and as they approached it from the rear door, he noticed that there were foot prints of blood outside. When he flashed the inside of the shop with a spotlight, he saw his colleague lying dead on the floor. PW3 called his employer's office and notified them what had happened.
 4. Tobias Wanyonyi (PW4), a manager at the security firm which had employed the deceased recalled assigning duties to their security guards on 25th June, 2009 in the evening. He assigned the deceased to Concept Cybercafé. Later in night, at 4.21am, he received a phone call from his boss who informed him that a theft had taken place at the Cybercafé. PW4 called his supervisor and asked him to go and check what had happened. 10 minutes later, the supervisor called back and told him that things were bad. PW4 decided to go to the scene where he found the deceased lying on the floor with blood oozing from his head. There were also computers scattered on the floor. Accompanied by his supervisor, he reported the incident to the police.
 5. PW5, the owner of the Cybercafé, testified that on 26th June 2009 at 3.00am, she was in her house sleeping when she received a phone call from a neighbour to her Cybercafé informing her that he had seen the rear door of the Cybercafé open and the guard was nowhere to be seen. In response, PW5 called the security firm that was guarding the premises and informed them of the same. The security firm said they were sending their supervisor to check. She also decided to visit the premises accompanied by a young man who was working for her at the shop. When they arrived at the Cybercafé, they found the Manager of the security firm and members of the public. She then learnt that the security guard who was taking care of the premises had been killed. On 10th July, 2009 at around 2.00pm, she was called by one Sergeant Mutie to identify some computers which had been recovered following the theft at the Cybercafé. She went to Webuye Police Station where she was able to identify a computer, a UPS, a damaged monitor and key board, using the serial numbers on the carton boxes in which she had bought the items, as well as the purchase receipt. Philip Omondi Wafula (PW6), a nephew to PW5, and the boy who worked for her at the Cybercafé, corroborated her evidence.
 6. Johnes Mogesi Ayienda (PW7), an employee of the security firm which guarded the premises that was robbed recalled receiving a call from PW5 at 4.00am, on 26th June 2009, informing him that she had been told that her shop was open. PW7 woke up and went to the shop where he found their Company Manager and some neighbours. He learnt that one of his colleagues had been killed. Jeremiah Maktum Talo (PW8), a brother to the deceased testified that on 27th June, 2009, at 11.00am, he was called by his sister-in-law and notified that his brother had been killed during a robbery. Accompanied by the deceased's son he went to Webuye District Mortuary where he identified the deceased's body.
 7. No. 47941 PC Alfred Kipoyaso Rubia (PW9), the assistant investigating officer in the matter, gave testimony that on 26th June 2009, at around 5.00am, while he was at his work station, his senior



informed him that there was a guard who had been killed at Concept Cybercafé along Nyange Street. He woke up and in the company of the OCS and other colleagues went to the scene of crime. When they arrived, they found the deceased lying on the ground in a pool of blood. He had a cut wound in the neck and three cut wounds in the head. They also noticed that his collar bone had been fractured. The OCS called the scene of crime officers from Bungoma who went and took photographs of the scene and did other investigations before the body of the deceased was moved to Webuye District Mortuary. PW9 and his colleagues commenced investigations in the course of which they were informed that there was a young man who had mentioned that the deceased had bitten his ear. They went to the man's house and arrested him. The man, who happened to be the appellant, had a fresh wound on the ear. PW9 and his colleagues took him to the police station where they interrogated him. Following the interrogation, the appellant took them up a hill and showed them a broken computer and a battery back-up. PW9 took the items to the police station where he prepared an inventory which the appellant also signed.

8. No. 61384 PC Mulongo Tali (PW10) of Bungoma CID office, Scenes of Crime Section, testified that on 26th June 2009, at around 6.00am, he accompanied PC Michael Kerich and PC Charles Muchuku of CID Webuye to attend to a scene of robbery with violence at Concepts Cybercafé on Nyange Street. Upon arrival, they found the body of an adult lying in a pool of blood in the rear room of the Cybercafé. The body had a deep cut on the left side of the neck and on the head. PW10 photographed the scene and examined the door counter, the TV and the computers within the premises for finger prints. He later processed the photographs and prepared a report. He also prepared Form C46 which accompanies finger prints and took them to the CID headquarters for analysis.
9. No. 47264 Inspector Protus Onyango (PW11), a gazetted finger print expert, testified that upon analysing the finger prints, he found that they belonged to the appellant's co-accused. Dr. Edward Vilembwa of Webuye District Hospital gave evidence on behalf of Dr. Stephen Kimani Ngugi, the doctor who performed a post-mortem on the deceased. He stated that he had worked with the said Doctor from the year 2004 till when he was transferred to Taveta District Hospital the previous year and was thus conversant with his handwriting and signature. PW11 explained that based on the post-mortem report, the body of the deceased was found to have a deep cut wound at the base of the neck posteriorly with some brain tissue herniation from the sides; and, multiple deep cut wounds on the frontal and parietal region measuring 5X4 and 3X4. When the body was bisected, his lungs and heart were found to have collapsed. Further, his head had a severed brain stem with a penetrating injury measuring about 5X6 cm. The doctor concluded that the deceased died due to cardiopulmonary arrest and hypovolemic shock following a severe head injury.
10. At the close of the prosecution's case, the learned Magistrate (E.C. Cherono, PM, as he then was) found that a prima facie case had been established against the appellant and his co-accused persons and placed them on their defence.
11. The appellant (DW1) gave a sworn statement and denied committing the offence that he was charged with. He stated that on 10th July 2009 at 6.00am while he was closing the door to his house, some police officers from Webuye Police Station approached him and told him that they wanted to search his house for something. They handcuffed him and proceeded to do the search but did not find what they were looking for. The police then arrested the appellant and took him to Webuye Police Station. The appellant claimed that the police forced him to have his finger prints dusted and thereafter he was arraigned in court where he was charged with the offence herein.
12. The trial Magistrate evaluated the evidence tendered before him and found the appellant and one of his co-accused guilty as charged. He then sentenced them to death. Two other accused persons were acquitted for lack of sufficient evidence.



13. Aggrieved by the judgment and sentence of the trial court, the appellant and his co-accused preferred an appeal to the High Court at Bungoma. By a judgment rendered by Tuiyott and Mabeya, JJ, on 12th November 2014, the appellant's appeal was dismissed while his co-accused's succeeded and he was set at liberty.
14. Still dissatisfied with that decision, the appellant preferred the instant appeal. In a memorandum of appeal dated 30th March 2021, lodged on behalf of the appellant by the firm of Lore & Company Associates, three (3) grounds of appeal are raised while in an undated, self-crafted document by the appellant, titled 'Supplementary grounds of appeal in accordance with section 65(1) CAP 9 of the Appellate Jurisdiction' four (4) grounds are advanced. In summary, the combined grounds are that the learned Judges erred by;
 1. Affirming the trial Magistrate's finding that the prosecution discharged its burden of prove, when there is no witness who observed the commission of the offence.
 2. Holding that the evidence adduced by PW2 and PW4 was worthy of sustaining a safe conviction against the appellant.
 3. Failing to find and hold that the trial Magistrate failed to comply with the mandatory provisions of section 169(1) of the Criminal Procedure Code.
 4. Failing to note that visual identification was not free from the possibility of error.
 5. Failing to note that an identification parade was not conducted.
 6. Failing to note that the sentence of death which was later commuted to life imprisonment was harsh and excessive in the circumstances.
 7. Confirming the conviction and sentence of death but failing to evaluate conclusively the defence of alibi.
15. During the hearing of the appeal, learned counsel Mr. Lore appeared together with Ms. Mawinda for the appellant, while Ms. Matere, Principal Prosecution Counsel, appeared for the state. Both parties sought to rely on their filed written submissions.
16. The appellant contends that the learned Judges failed to comprehensively re-evaluate the evidence tendered at trial as required by law so as to arrive at their own independent decision. The learned Judges are faulted for making a finding that even though the stolen computer that was seen with the appellant by PW2 was never identified by the owner, the conviction by the subordinate court was still sound and safe as against the appellant. The learned Judge's reliance on the evidence of PW2 to uphold the conviction by the trial court is contested. The decision in *WATETE Vs. UGANDA* [2000] EA 559 (SCU) is relied on for the argument that an appellate court ought to quash a conviction that is based on an accomplice's evidence if it is uncorroborated. It is urged that no evidence was properly led as to identification of the appellant. Moreover, PW2 only overheard what the appellant was saying about the robbery incident but she did not witness the occurrence of the incident. Additionally, PW4, whose evidence was equally relied on by the learned Judges to uphold the conviction of the appellant, does not have any probative value since he did not witness the incident and neither did he identify the items that were stolen. It is urged that this appeal should succeed due to the trial court's non-compliance with section 169(1) of the Criminal Procedure Code (CPC).
17. On identification, the appellant contends that the identification evidence was unreliable since the evidence of PW1 and PW2 lacked consistency and failed to place the appellant at the scene with sufficient certainty. He cites various decisions on the question of identification arguing that PW1



did no indicate the brightness or intensity of light at the scene of crime and neither did PW2 give the description of the attackers in her initial report and statement. Further, the prosecution is faulted for failing to conduct an identification parade. While recognising that the Supreme Court in *MURUATETU & ANOTHER Vs. REPUBLIC; KATIBA INSTITUTE & 4 OTHERS* (Amicus Curiae) [2021] KESC 31 (KLR) (Muruatetu 2) limited the applicability of its decision in *MURUATETU & ANOTHER Vs. REPUBLIC; KATIBA INSTITUTE & 5 OTHERS* (Amicus Curiae) [2017] KESC 2 (KLR) (Muruatetu 1) to the death sentence under section 204 of the Penal Code, the appellant urges that the mitigating factors in the instant case outweigh the aggravating factors and thus the sentence meted out is harsh; the mitigating factor being that the items that were stolen were recovered with the assistance of an informer. Further that the Court should take into account section 333(2) of the Criminal Procedure Code. It is contended that the appellant raised an alibi which was never dislodged by the prosecution. In the end we are urged to allow the appeal, quash the conviction, set aside the sentence and set the appellant at liberty.

18. In opposition to the appeal, it is submitted that the conviction of the appellant was well founded and the prosecution proved its case against him beyond reasonable doubt. Counsel urges that the doctrine of recent possession was applicable to the stolen computer that was recovered, in the absence of any meaningful rebuttal by the appellant. Further, the prosecution witnesses were consistent in their testimony, as rightly observed by the trial Magistrate. Concerning the alleged non-compliance with section 169 of the CPC which prescribes the contents of a judgment, while acknowledging that the trial Magistrate may not have clearly stated the issues for determination, counsel asserts that the trial court complied with requirements of that provision by aptly reproducing all the evidence, analysing it and reaching a verdict with reasons. In conclusion, it is submitted that the appeal lacks merit and thus it should be dismissed.

19. This being a second appeal our jurisdiction is limited to a consideration of matters of law only by dint of section 361(1)(a) of the Criminal Procedure Code. This was affirmed by the holding of this Court in *DAVID NJOROGI MACHARIA Vs. REPUBLIC* [2011] eKLR;

“That being so only matters of law fall for consideration—see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings - see *Chemagong v. R* [1984] KLR 611.”

20. We think the substantive issues that lie for our determination in this appeal are, whether the appellant was properly identified as the offender; whether the trial court failed to comply with section 169(1) of the CPC, and whether this Court can interfere with the sentence meted out.

21. It is trite that in cases of robbery with violence, the court may convict an offender where only one of the ingredients is proved.

22. This was the holding of this Court in *DIMA DENG DUMA & OTHERS Vs. REPUBLIC* [2013] KECA 480 (KLR) where we rendered ourselves as follows;

“The elements of the offence under Section 296(2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction.



This was considered at length by this Court in JOHANA NDUNGU Vs. REPUBLIC Criminal Appeal No. 116 of 1995 (unreported;)

‘In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with section 295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore- described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in section 296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section.

1. If the offender is armed with any dangerous or offensive weapon or instrument, or
2. If he is in company with one or more other person or persons, or
3. 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.”

23. The appellant contests his identification as the offender arguing that no witness observed him commit the offence.
23. Further, PW2, one of the witnesses whose evidence the courts below relied on, only overheard what the appellant was saying about the robbery incident but she did not witness the occurrence of the incident. Being well aware that identification is crucial in cases of robbery with violence, we note that the trial court observed in its determination that the witnesses were consistent and their testimony uncontroverted in cross- examination. The court further took into account PW2’s evidence concerning what the appellant had said when he visited her business. That information led the police to the appellant who then directed them to where they recovered one of the stolen computers and battery backup. Those items were later identified by PW5, the owner. The 1st appellate court equally upheld the appellant’s conviction based on, the evidence of PW2 as to what she heard him say when he visited her business to take chang’aa; the evidence of PW2 as to how she saw him injured and in possession of a computer; and, the evidence of his arrest by PW9 and how he led them to where some stolen items were.
24. Much like the trial court, the learned Judges observed that the evidence of PW2 was not debunked or shaken in cross- examination. PW2 testified that on 26th June 2009 at 7.00am, the appellant and one Symon Wafula, who were her customers, went to take chang’aa, a local liquor, at her house. She sold to them the drinks, and while they were partaking, she noted that the appellant had a cut on his left ear which was oozing blood. After they had consumed the drink, the appellant went to a kiosk nearby and bought Elastoplast bandage which he placed on the wound. PW2 then overheard the appellant saying that on the night of 25th June, 2009, while in the company of his colleague, Simon, they stole two (2) computers from a cybercafe on Nyange Street. The appellant was also heard stating that in the course of the brawl, the watchman who was manning the place bit his ear and in retaliation his accomplice hit him with a metal and panga. PW2 further indicated that he saw the appellant with a computer, which, after drinking, he hit with a hammer.
25. As did the learned Judges, we note that PW2’s evidence was in particular aspects corroborated by PW9. It was PW9’s evidence that when they went to arrest the appellant, they noticed that he had a



fresh wound on the ear. Further, when the appellant led them to where the stolen items were hidden, one of the items that they recovered was a broken computer. PW5, the proprietor of the cybercafe, later identified that computer among other items. Our analysis of the foregoing evidence is that it was sufficient to link the appellant to the offence with which he was charged and therefore we are satisfied that he was properly identified. The recovery of the computer so soon after the robbery at the place where the appellant led the police to, also brings into play the doctrine of recent possession which was properly invoked and relied on in convicting the appellant and lending further credence to the prosecution case.

26. The appellant contends that his alibi defence was not dislodged by the prosecution. To the contrary, the record does not bear out any alibi defence that was advanced. The appellant never mentioned his whereabouts on the material dates, that is 25th and 26th June 2009. He only indicated that he was arrested on 10th July 2009. It has also been urged that the learned Magistrate failed to comply with section 169(1) of the CPC. We think that, with respect, while the trial Magistrate's judgment may not be elegant in terms of style, he was able to make a judicious determination on the germane issues in the matter and his decision was affirmed by the learned Judges in a judgment that fully complied with the said provision. We in the result are of the considered view that the appellant's conviction was safe, and there is nothing warranting our interference with it.
27. On the ground that the sentence meted out was harsh and excessive, as rightly appreciated by the appellant, the Supreme Court was categorical in MURUATETU 2 that its decision in MURUATETU 1 is not applicable to cases of robbery with violence. We, therefore, have no jurisdiction to interfere with the sentence that was meted out, being a mandatory sentence. Moreover, since the sentence is indefinite and indeterminate as opposed to a term sentence, the provisions of section 333(2) of the CPC for the reckoning of time in custody do not apply.
28. In the result, the appeal wholly fails and stands dismissed in entirety.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

