

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
HCCRA NO. E043 OF 2024

MOHAMMED KAMAU

APPELLANT

VERSUS

REPUBLIC

RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case No. 2027 of 2018 at the Chief Magistrate's Court at Naivasha delivered on 28th November 2024)

JUDGMENT

1. The Appellant herein, **Mohammed Kamau**, was jointly charged, as the 1st Accused, alongside his co-accused, **Paul Kuhora Hinga** (an Appellant in a related case Naivasha HCCRA E041 of 2024) before the Chief Magistrate's Court at Naivasha with two counts of robbery with violence contrary to Sections 295 as read with 296(2) of the Penal Code. The Appellant also faced additional counts 3, 4 and 5 relating to possession of firearms and ammunition without a firearm certificate contrary to Section 4(2) as read with Section 4(3) of the Firearms Act.

2. After full trial, the Appellant was convicted on the robbery with violence counts and sentenced to death. He was also convicted for the offences in counts 3, 4 and 5 for being in

possession of firearms and ammunition without a Firearms Certificates. The sentences relating to the firearms counts were held in abeyance.

3. Dissatisfied with the both conviction and sentence, the Appellant lodged this appeal raising several grounds of appeal that may be summarized as follows:

- 1. Identification was not properly proved.**
- 2. No identification parade was conducted.**
- 3. Crucial witnesses were not called.**
- 4. No stolen property was recovered from him.**
- 5. His alibi defence was not considered.**
- 6. Sentence was unconstitutional and excessive.**
- 7. Time spent in remand custody was not considered under Section 333(2) CPC.**

4. The appeal was canvassed by way of written submissions which I have considered.

Duty of the First Appellate Court

5. As a first appellate court, this court is required to reconsider and evaluate the evidence afresh and draw its own conclusions while bearing in mind that it did not see or hear the witnesses testify. This is the position that was taken in the case of **Okeno vs. Republic [1972] EA 32**, where the Court of Appeal stated:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive

examination (Pandya v R [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala v R [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions."

6. This Court will accordingly subject the entire record to fresh scrutiny. A summary of the prosecution's case was as follows: -
7. PW1, **Elijah Karoki Njiru** (Complainant) testified that on 1st June 2018 at about 11.40 p.m., he arrived at his home in Kayole, Naivasha, driving motor vehicle registration number KBP 112N Subaru Outback. After he called his wife to open the gate, about five men entered the compound, one of whom was armed with a firearm (pistol) ambushed them.
8. The attackers ordered PW1 and his wife to lie down and later forced them into the house where they were tied using curtain blinds. The attackers demanded money and PW1 informed them that he had approximately Kshs. 13,000 in M-Pesa, whereupon he gave them his phone PIN and bank PIN.

9. The robbers stole several items including; a Lenovo laptop, television set (Sony), DVD player, camera, mobile phones, cooking gas, clothes, plumbing fittings, cash and motor vehicle registration number KBP 112N. The total value of the stolen property was estimated at Kshs. 1,145,800.
10. PW1 testified that the robbers remained in the house for about three to four hours. He stated that security lights and motor vehicle headlights were on, enabling him to see the attackers clearly.
11. PW1 testified that he identified Accused 2 as the person armed with a firearm who approached him at the vehicle and ordered him to lie down. He also identified Accused 1 as the person who participated in tying them up and moving them into the house.
12. PW1 later saw the accused persons on television and reported to the police that he had recognized them. He stated that no identification parade was conducted.
13. PW2, **Caroline Abwomi Wasike**, the Complainant's wife, testified that on the material night she opened the gate for PW1 when several men forced their way into the compound.
14. She testified that the attackers tied her and PW1, demanded money, took PW1's M-Pesa PIN, stole household items which they loaded into the vehicle. She added that the attackers attempted to rape her.

15. PW2 testified that Accused 2 tied them up and took a knife from the kitchen while Accused 1 gathered items in the house
16. She stated that the security lights and vehicle headlights were on, enabling her to see the attackers clearly. She remained in close proximity with them for several hours and spoke with them.
- 17.** PW2 testified that she later saw the accused persons on television and identified them as among the robbers. She did not attend an identification parade. She was treated in hospital and a P3 form was issued.
18. PW3, **Lydia Kwamboka Nyabuto**, a house help employed by PW2, testified that she heard screams and was confronted by robbers who ordered her to lie down. She was taken downstairs where she found PW1 and PW2 tied up.
19. PW3 testified that she saw Accused 1 seated on a sofa while Accused 2 was in the kitchen wearing a Maasai shawl. She stated that the robbers stayed in the house for several hours and that Accused 1 took her upstairs, tied her hands and legs, blindfolded her and sexually assaulted her by forcing her to perform oral sex. She added that she later identified the accused persons from photographs shown to her.

20. PW4, **Elvis Mangwana**, a Minor aged about 10 years, testified after a voire dire examination. He stated that he heard screams and went downstairs where he found his parents tied up. He testified that one robber wore a red Maasai shawl. The robbers tied him and his parents. The robbers stole household items and the family motor vehicle. He later untied himself and untied his parents.

21. PW4 testified that the lights were on and he could see the attackers.

22. PW5, **PC David Njogu**, the Arresting Officer testified that on 14th August 2018, acting on information that a house was being used as a criminal hideout, he visited the premises with another officer where they found three suspicious persons. One escaped and two suspects were arrested, including the accused persons.

23. PW5 testified that the following items were recovered; a pistol found on a bed, another pistol recovered from Accused 1, five spent cartridges, one live round and a racket.

24. He testified that the 2nd accused was arrested at the scene.

25. PW6, **Inspector Hillary Ngetich**, testified that on 14th August 2018, after receiving information from members of the public, he visited a makeshift house near Lake Naivasha where he found three suspects, one of them escaped, while the accused persons were arrested. PW6 testified that the following items were recovered; two

pistols including a baby browning pistol, ammunition, spent cartridges, mobile phones, SIM cards, Identity cards, illuminating gadget and two sachets containing a brown substance

26. An inventory was prepared and signed by the 2nd accused. PW6 testified that the accused persons were later identified by witnesses.

27. PW7, **Benjamin Kuria**, a Clinical Officer, produced medical evidence showing that PW1 suffered the following injuries; bloody nose, swelling on chest and hands and bruises on the legs. He stated that the injuries were caused by blunt and sharp objects and classified the injuries as harm. He stated that PW2 had tenderness on forehead and chest pain which injuries he also classified as harm. He produced P3 forms as exhibits.

28. PW8, **Alex Mudindi Mwandawiro**, a Firearms Examiner, examined firearms and ammunition submitted to him. He made the following conclusions:

- i) ***Exhibit A was a Smith and Wesson pistol***
- ii) ***The pistol was damaged and incapable of firing***
- iii) ***Exhibit C was a starter pistol capable of firing 8mm PAK ammunition***
- iv) ***Ammunition and cartridges examined were consistent with the firearms***
- v) ***Magazines were functional***

29. PW8 produced a ballistic report.

30. PW9, **PC Japheth Ariga**, the Investigating Officer, testified that he received a report at about 3.20 a.m. that PW1's home had been attacked. He visited the scene and found PW1, PW2 and PW3 inside the house having been tied up. He confirmed that several household items had been stolen and that the stolen motor vehicle was later recovered at Ndabibi. He also confirmed that firearms and ammunition were recovered after the arrest of the accused persons and that the witnesses identified the accused persons
31. PW9 testified that no identification parade was conducted, and that identification was based partly on witness recognition and television footage.

Defence Case

32. Accused 1, **Mohammed Kamau**, the Appellant herein, testified on oath that he was a businessman from Bondeni, Nakuru. He stated that on the date of the alleged offence he was at home with his family.
33. He testified that on 14th August 2018 he was arrested at Kihoto where he had gone for business and that the police alleged he had been found with a gun.
- 34.** He denied involvement in the robbery and stated that he had been charged with an offence he did not commit. He did not call any witnesses.
35. Accused 2, **Paul Kuhora Hinga**, testified on oath that he was a casual labourer from Kihoto.

36. He stated that on 14th August 2018 he had gone to Baharini looking for work when a person invited him into a compound where several people were present.
37. Police officers later arrived and arrested him alleging that he had been involved in illicit brewing.
38. He testified that a search was conducted and items were recovered but he denied ownership of the items.
39. He produced an OB extract showing that the complainant initially did not identify the attackers and photographs and certificate showing that he had been shown in the media before trial.
40. He testified that an identification parade had been conducted but he was not identified.
41. He denied committing the offence.

Appellant's Submissions

42. On identification, the Appellant submitted that the conviction was founded on dock identification which, he argued, is unreliable in the absence of a properly conducted identification parade. He relied on Court of Appeal authorities including ***Peter Mwangi Mungai vs. Republic [2000] eKLR***, ***Owen Kimotho Kiarie vs. R Criminal Appeal No. 93 of 1983*** and ***Charles O. Maitanyi vs. Republic [1985] 2 KAR 75*** which emphasize caution when relying on identification evidence even where dock identification is preceded by a properly conducted identification parade.

43. He further submitted that the offence occurred at night and that inconsistencies existed in the complainants' testimony regarding when and how they allegedly identified the assailants on television. He questioned why no television footage was produced in court and why no identification parade was conducted.
44. On failure to call crucial witnesses, the Appellant contended that the prosecution failed to call essential witnesses, including the maker of the P3 form and persons who allegedly informed the police about suspicious individuals. He relied on the principles in ***Bukenya vs. Uganda [1972] EA 549*** and other authorities for the argument that failure to call crucial witnesses entitles the court to draw an adverse inference against the prosecution.
45. He further argued that admission of the P3 form, without calling its maker, violated his right to cross-examination and fair trial guarantees under Article 50 of the Constitution.
46. On the ingredients of robbery with violence, the Appellant submitted that the prosecution did not prove the elements set out in ***Oluoch vs. Republic [1985] KLR***, namely; that the offender was armed with a dangerous weapon, that the offender was in company of one or more persons and that personal violence was used.
- 47.** He argued that although witnesses alleged that the perpetrators were armed, no conclusive evidence linked him to the robbery. He further submitted that no call data,

forensic evidence, or identification parade evidence connected him to the offence.

48. On recovery of stolen property, the Appellant maintained that none of the stolen items, including the vehicle, were recovered from him. He argued that no forensic dusting results were produced linking him to the vehicle and that there was no direct evidentiary nexus between him and the alleged robbery.

49. On consideration of the defence, the Appellant contended that the trial court failed to adequately analyze his sworn defence, including his alibi. He submitted that the defence was not displaced by the prosecution and that the trial court did not give it proper consideration before arriving at a conviction.

50. On sentence, the appellant argued that although Section 296(2) of the Penal Code prescribes the death sentence, the trial court failed to meaningfully consider mitigation and constitutional principles relating to fair trial and proportionality of punishment.

51. He argued that the death penalty imposed was harsh and excessive. He relied on recent authorities including ***Yawa Nyale vs. Republic (2018) eKLR, Benjamin Kahindi Changawa & Another vs. Republic (2019) eKLR*** and ***Francis Karioko Muruatetu & Another vs. Republic (2016) eKLR.***

52. He submitted that courts now have discretion to impose lesser sentences in capital offences and urged this Court to consider mitigation and proportionality.

53. He further raised the issue of time spent in remand custody, submitting that the seven years allegedly spent in remand were not taken into account pursuant to Section 333(2) of the Criminal Procedure Code.
54. He urged that the sentence be set aside or substituted with a lesser term should the conviction be upheld.
55. In his supplementary submissions, the Appellant challenged the conviction primarily on the basis of identification and sufficiency of evidence. On identification, he submitted that identification in criminal cases must be free from error. He noted that PW1 testified that the robbers were masked, thereby rendering visual identification unreliable. He further noted that PW1's written statement contradicted his oral evidence as while the statement referred to identification of one suspect, oral testimony suggested identification of two suspects.
56. He took issue with identification that was allegedly based on a television broadcast and photographs shown on a mobile phone which, he argue, is not a lawful identification procedure.
57. He reiterated that no identification parade was conducted as required under the Criminal Procedure Code and Police Standing Orders. He faulted the conviction on the basis that it was founded on dock identification.
58. The appellant invoked the principles in ***R vs. Turnbull (1977) QB***, for the argument that courts must exercise caution in cases dependent substantially on visual identification. He submitted that the trial court failed to

apply these safeguards, including warning itself of the danger of mistaken identification and examining the circumstances in which identification was done.

59. On the doctrine of recent possession, the Appellant submitted that no stolen property was recovered from him and that the doctrine was therefore inapplicable.

Respondent's Grounds of Opposition and Submissions

60. The Respondent opposed the appeal and urged the Court to uphold both conviction and sentence.

61. The respondent submitted that:

i) The conviction and sentence were lawful and supported by cogent evidence.

ii) PW1, PW2, and PW3 positively identified the appellant, stating that the robbery occurred at night but the lights were on and the appellant spent over three hours in their presence.

iii) The appellant was armed with a Baby Browning pistol which was recovered and produced in court after forensic examination.

iv) The complainants sustained injuries during the robbery, and P3 forms were produced to confirm the same.

v) The ingredients of robbery with violence were proved, namely:

o The appellant was armed with a dangerous weapon;

- o ***He was in company of more than one person;***
- o ***Violence was used against the complainants.***
- vi) ***The appellant's alibi defence was considered and dismissed for lack of supporting evidence.***
- vii) ***The sentence imposed was prescribed by law, and the circumstances of the offence justified its imposition.***

62. The Respondent therefore urged the court to dismiss the appeal and uphold the trial court's decision.

Issues for Determination

63. I have carefully considered the record of appeal and the parties' written submissions. I find that the following issues fall for my determination.

- a) ***Whether robbery with violence was proved.***
- b) ***Whether the offence of being in possession of firearms and ammunition was proved***
- c) ***Whether the appellant was positively identified.***
- d) ***Whether the defence was properly considered.***
- e) ***Whether sentence was lawful and proportionate.***

Analysis and Determination

64. Section 296(2) Penal Code requires proof that the offender was armed or was in the company of one or more persons or used personal violence.

65. The elements of robbery with violence were set out in ***Oluoch vs. Republic (1985) KLR***, where the Court held:

“Robbery with violence is committed in any of the following circumstances:

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

(b) The offender is in company with one or more other person or persons; or

(c) At or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses any other personal violence to any person.”

66. The evidence on record established that the attackers were several in number, that firearms were used, and that the complainants sustained injuries confirmed by medical evidence. I find that the ingredients of the offence under Section 296(2) of the Penal Code were therefore established.

67. The critical question, however, is whether the Appellant was positively identified as one of the perpetrators.

Identification

68. The law regarding visual identification is settled. Courts must exercise the greatest caution, particularly where identification is made at night.

69. In ***R vs. Turnbull [1977] QB 224***, the English Court of Appeal stated:

“Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.”

The Court further stated:

“The judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way...?”

70. The Court of Appeal in Kenya adopted these principles in ***Charles O. Maitanyi vs. Republic [1986] KLR 198***, stating:

“It must be emphasized that it is not enough to say that the conditions were favourable for identification. What is needed is evidence of the nature of the light available, what sort of

light, its size and its position relative to the suspect.”

The Court added:

“There is a second line of inquiry which ought to be made and that is whether the complainant was able to give some description or identification of his assailants to those who came to his aid or to the police.”

71. Similarly, in ***Wamunga vs. Republic [1989] KLR 424***, the Court of Appeal cautioned:

“Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger.”

72. In the present case, the robbery occurred at night. Although witnesses stated that security lights and vehicle headlights were on, there was no detailed inquiry into the intensity, positioning, or adequacy of the lighting as required by ***Maitanyi*** (supra).

73. Further, no identification parade was conducted. In ***Peter Mwangi Mungai vs. Republic [2000] eKLR***, the Court held:

“Dock identification is generally worthless unless it has been preceded by a properly conducted identification parade.”

74. The Appellant was a stranger to the witnesses. Identification was allegedly made after the witnesses saw the suspects on television. Such identification is unsafe as it risks suggestion.

75. In **Owen Kimotho Kiarie vs. Republic Criminal Appeal No. 93 of 1983**, the Court held:

“It is trite law that where the only evidence against a defendant is evidence of 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 possibility of error before it can safely make it the basis of conviction.”

76. In the present case, PW1, PW2 and PW3 all testified that the robbery occurred at about 11.40 p.m. and that security lights and motor vehicle headlights were on. They further testified that the robbers remained in the house for between three to four hours and that they were in close proximity with them during that period.

77. PW1 stated that he was able to see the attackers clearly and that Accused 1 participated in tying them up and moving them into the house. PW2 testified that Accused 1 gathered items in the house and was present for several hours. PW3 stated that she saw Accused 1 seated on a sofa and that he later took her upstairs where he tied her

and sexually assaulted her. Their evidence places the Appellant at the scene for a prolonged duration.

78. The duration of the encounter, the proximity between the witnesses and the attackers, and the fact that there was lighting from security lights and vehicle headlights are factors which, in principle, may enhance the reliability of identification.

79. However, the record confirms that no identification parade was conducted. PW1, PW2 and PW3 all stated that they later saw the accused persons on television and identified them as among the robbers who attacked them. PW3 also testified that she identified the accused from photographs shown to her. It is instructive to note that neither the television footage nor the photographs were produced as exhibits during the trial.

80. It is settled law that where a suspect is not previously known to the witnesses, an identification parade serves as an important safeguard to test the accuracy of the witnesses' recollection. Dock identification, without a prior properly conducted identification parade, is generally of little evidential value unless it is preceded by some other reliable identification.

81. In this case, the prosecution did not demonstrate that the Appellant was known to the witnesses prior to the robbery. The identification was therefore that of strangers.

82. Further, the identification allegedly made after viewing the suspects on television or through photographs cannot substitute a properly conducted identification parade.

Such exposure creates a real risk of suggestion and mistaken identity.

83. The Investigating Officer (PW9) candidly testified that no identification parade was conducted and that identification was partly based on recognition through television footage.

84. While the witnesses stated that the lights were on, the trial court was required to interrogate in detail the nature, intensity and positioning of that lighting in accordance with the principles set out in **Maitanyi** (supra). From the record, there is no detailed inquiry as to the brightness of the security lights, their exact position, or whether they illuminated the attackers' faces clearly.

85. There was also an inconsistency noted by the Appellant regarding whether the attackers were masked. PW 1 testified as follows during cross examination: -

“Then the other robber warmed some food and they all ate. The robbers covered their faces. They were casually dressed.”

86. I note that even though the issue of whether the robbers were masked was not exhaustively clarified at trial, the possibility that they had disguised themselves would further weaken the reliability of visual identification.

87. Given that no identification parade was conducted, that identification was influenced by media exposure, and that the Appellant was a stranger to the witnesses, I find that the identification evidence was not tested in the manner

required by law and therefore fell short of the threshold of proof beyond reasonable doubt.

88. The conviction for robbery with violence was substantially anchored on that identification evidence. I find that in the absence of other independent evidence directly linking the Appellant to the robbery, the conviction cannot safely stand.

89. Turning to recovery and the doctrine of recent possession, I note that no stolen property was recovered from the Appellant. The stolen motor vehicle was recovered at Ndabibi, but no evidence was adduced linking the Appellant to its possession.

90. The firearms and ammunition recovered upon arrest on 14th August 2018 were not shown to have been used in the robbery of 1st June 2018. No forensic or ballistic evidence connected those firearms to the robbery scene.

91. The doctrine of recent possession was therefore not applicable in respect of the robbery counts.

Possession of Firearms and Ammunition

92. With regard to counts 3, 4 and 5 on possession of firearms and ammunition, the evidence of PW5 and PW6 was that upon arrest at a makeshift house near Lake Naivasha, two pistols and ammunition were recovered. PW8 confirmed, through ballistic examination, that one of the pistols (a starter pistol) was capable of firing 8mm PAK ammunition and that the ammunition was consistent with the firearms examined.

93. The Appellant denied ownership of the firearms and contended that he was merely present at the premises.

94. The trial court found that the firearms were recovered from the house where the accused persons were arrested and that one pistol was recovered from Appellant herein who did not produce a firearm certificate.

95. I find that the prosecution proved, beyond reasonable doubt, that the Appellant was in possession of a firearm and ammunition without a valid firearm certificate. The conviction on counts 3, 4 and 5 was therefore safe.

Consideration of the Defence

96. The Appellant raised an alibi defence, stating that on the date of the robbery he was at home with his family. An alibi need not be proved by the accused; it only needs to raise reasonable doubt. However, once properly raised, the prosecution bears the burden of displacing it.

97. In light of my finding that identification was not proved beyond reasonable doubt, the alibi defence was not effectively displaced in relation to the robbery counts.

Sentence

98. In view of my finding that the conviction on the robbery with violence counts is unsafe, I find that the sentence of death imposed thereon cannot stand.

99. As regards counts 3, 4 and 5, Section 4(2) of the Firearms Act prescribes a custodial sentence of not less than seven years and not more than fifteen years for possession of a firearm without a certificate.

100. The trial court held the sentences on these counts in abeyance in view of the death sentence. This court is now required to impose appropriate sentences.

101. Taking into account the circumstances of recovery, the nature of the firearm and ammunition, and the fact that the Appellant has been in custody since 2018, I find that a custodial sentence is appropriate.

Disposition

102. In the end, I make the following final orders: -

a) The appeal against conviction and sentence for robbery with violence in counts 1 and 2 is allowed. The convictions are quashed and the sentences of death set aside.

b) The convictions on counts 3, 4 and 5 for possession of firearms and ammunition without a firearm certificate are upheld.

- c) On sentence for counts 3, 4 and 5, the Appellant is sentenced to Twelve (12) years imprisonment on each count, the sentences to run concurrently.***
- d) Pursuant to Section 333(2) of the Criminal Procedure Code, the sentence shall run from the date of arrest, namely 14th August 2018.***

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 5TH DAY OF MARCH, 2026.

**HON. W. A. OKWANY
JUDGE
05/03/2026**

**FOR APPELLANT present
Chepkonga for the state
COURT ASSISTANT Karani**

File closed