

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MARSABIT
CRIMINAL APPELLATE DIVISION
CRIMINAL APPEAL NO. E043 OF 2025

BARAKO CHACHU DIDA.....
APPELLANT

VERSUS

REPUBLIC.....
.....RESPONDENT

(Being an appeal arising from the conviction and sentence dated 23.10.2025 and 19.11. 2025 respectively delivered by Hon S.K AROME (PM) in Marsabit SPMCR No E043 of 2025

BETWEEN

REPUBLIC.....PROSECUTOR

VERSUS

BORU WAKO DIDA Alias BORU ABAKULA1st

ACCUSED

ABDIRAHMAN HUSSEIN Alias CHURKA

BARAKO CHACHU.....2nd

ACCUSED

JUDGEMENT

A. Introduction

1.The Appellant and his co-accused were charged with the offence of robbery with violence contrary to **section 295 as read with section 296(2) of the Penal Code**. The particulars were that on the 3rd day of September 2024 at Marsabit Town in Marsabit central sub county within Marsabit county, jointly with others not before court, being armed with dangerous weapon namely rifle robbed **ADAN GABRE YAYO** off motorcycle registration number **KMFA 742Z** boxer red in colour valued at **Kshs.116,000/=** (One hundred and sixteen thousand only) and immediately after such robbery used actual violence to the said **ADAN GABRE YAYO**.

2.The Appellant and his co accused took plea and denied the charge. The prosecution called five (5) witnesses to prove their case and upon considering the said evidence, the appellant was placed on his defence and gave sworn evidence. Upon considering the same, the Appellant was convicted of the offence of robbery with violence contrary to **section 295 as read with Section 296(2) of the**

Penal code and after mitigation was sentenced to serve a term of twenty (20) years imprisonment.

B. EVIDENCE AT TRIAL

(i) Prosecution Case

3. **PW1 Adan Gabre Yako** stated that on 03.09.2024 he borrowed Juma Robe Shiko's motorcycle registration number **KMFA 742Z** (Boxer- Red in colour and headed towards Kiwanja ya Ndege to attend a burial ceremony. When he reached near cemetery he was stopped by two people, who were wearing long black coats and one of the said persons did point a gun at him and ordered him to alight from the said motorcycle and to kneel. As he did so the appellant kicked him on the face, after which the said robbers took possession of the said motorcycle and drove off. He reported this matter to the police and later on 09.11.2024 received a call that the said motorcycle had been traced and recovered at Horobota. He informed the owner and they did proceed to the said recovery sight and confirmed that indeed it was the stolen motorcycle, but its number plate had been converted to read **KMDC 628U**.

4. Under cross examination PW1 confirmed that the appellant was not a person previously known to him but had seen him on the day of the robbery, he but also contradicted himself by stating that he had worn a mask during the said robbery. **PW2 Juma Robe Shiko** confirmed that the stolen motorcycle was his and had bought it from Wako

enterprise for **Kshs.116,000/=**. He had allowed PW1 to use the said motorcycle to attend a funeral near Kiwanja Ndege, but unfortunately, he had been robbed of the said motorcycle, which was later recovered at Horobota and both the accused were eventually arrested in connection with the same and arraigned before court.

5.**PW3 Musa Hussein** recalled that 03.09.2024 he was informed that PW2 motorcycle had been stolen and later on had seen the said motorcycle being used by **Boru wako Dida** to ferry containers of water. He called PW2 and informed him of the same and they agreed that next time he saw the said motorcycle, he would stop its rider and inform him so as to enable him recover the same. Later in November 2024, he again chanced on **Boru Wako** riding the same motorcycle and with the help of members of the public had him arrested. He called PW2 who came and identified his motorcycle and the 1st accused thereafter was escorted to the police station for further investigation.

6.**PW4 PC Evans Kilonzo** the investigating officer confirmed that 1st accused before the trial court was arrested for being in possession of the stolen motorcycle, which after crosschecking its chassis number at NTSA, was ascertained to belonged to PW2. He did interrogate the said suspect, and he volunteered that he had been put into possession of the said motorcycle by **Abdirahman Hussein** and the appellant. Based on this information he

later arrested the appellant and had them both charged in court with the offence of robbery with violence.

7.PW5 PC Julius Njoroge recalled that they were on patrol with his colleagues, when the OCS Marsabit central Police station C.I Mabonga, called and informed them that a suspect had been arrested on suspicion of having stolen a motorcycle. They rushed to the scene and found that the 1st accused before the trial court had been arrested by members of the public and they did proceed to rearrest him and escorted him to Marsabit Police station.

8.The prosecution closed their case at this point and the court having established that a prima facie case had been made out did place both accused persons on their defence

(ii) Defence case

9.DW1 Boru Wako stated that he was given the stolen motorcycle by the appellant, which he was to use to go check on his livestock. While refuelling at the petrol station member of the public did approach him and informed him that the said motorcycle had been stolen, which fact he was not aware of. He denied robbing PW1 of the said motorcycle and insisted that he had been wrongly implicated in the said offence.

10.DW2 Barako Chachu also insisted that he had not commit any offence and pointed out that he had not been positively identified by any witness to have so acted. He

also denied handing over the said motorcycle to the 1st accused person and pointed out that his co accused had contradicted himself by stating initially that it was **Abdirahman Hussein Hurka**, who had handed over possession of the stolen motorcycle to him. Under cross examination, he reiterated his evidence in chief and insisted that he was away in Moyale at the time of the alleged offence.

C. Judgement of the Trial Court

11. At the close of the defence case, the learned trial magistrate considered all the evidence adduced and held that the 1st accused person had given an explanation as to how he came into possession of the stolen motorcycle, and that the burden fell on the appellant to explain how he initially got possession of the stolen motorcycle, but had failed to do so. Guided by the doctrine of recent possession and in absence of a proper exculpatory explanation, the trial court held that it was satisfied that the appellant was amongst the person who robbed PW1 of the said motorcycle and was therefore guilty of the offence of robbery with violence. After mitigation, the appellant was sentenced to serve twenty (20) years in prison.

D. THE APPEAL

12. Dissatisfied by the conviction and sentence passed, the Appellant filed his petition of Appeal and raised the following grounds of Appeal ;

a. THAT the learned trial magistrate erred in law and fact by convicting him, yet he was not found in possession of the alleged motorcycle, that the conviction was against the weight of the evidence, that the learned Magistrate shifted the burden of proof on him.

b. THAT the learned trial magistrate erred in both matters of law and fact by believing the evidence of DW1 that the appellant is the one who gave him the motorcycle without any prove.

c. That the learned trial Magistrate erred in both matters of law and facts by favouring DW1 despite him being the person who was found in possession of the alleged motorcycle.

d. THAT the trial court erred in both matters of law and facts by failing to note that the appellant was not found in possession of any property stolen from the complainant.

e. THAT the learned trial Magistrate erred in both matters of law and facts by failing to take into consideration the defence of the appellant.

13. The Appellant prayed that his conviction and sentence be quashed and he be set free.

E. SUBMISSIONS

14. The Appellant relied on his submissions dated 08.05.2026 where he respectfully submitted that the trial court had fallen into a fundamental error in its evaluation of the evidence tendered, by wrongly applying the doctrine of recent possession and using uncorroborated evidence to convict him, which rendered the said conviction to be wholly unsafe. He emphasised that the trial court had wrongly shifted the burden of proof on him and dismissed his alibi defence as “mere denial” yet he had pointed out to the court that he had long standing differences with his co accused, which grudge had led to him being wrongly implicated as the person who had prior possession of the stolen motorcycle. Reliance was placed in the case of **Mwangi Vs Republic (2024) KEHC 12807 (KLR), Elizabeth Waithiegeni Gatima Vs Republic (2015) Eklr and Erick Otieno Meda Vrs Republic (2019) Eklr** for emphasis.

15. Secondly the prosecution had failed to prove the ingredients of the offence of robbery with violence as he was not identified as being amongst the person who robbed PW1, nor was it established that he was armed

and/or had he accompanied others who had committed the said robbery. Reliance was placed in the case of **Mwingirwa & Another Vs Republic (2025) KECA 1253 (KLR), John Matunga Mueni Vs Republic (2020) KEHC 1607 (KLR) , Wamungu Vs Republic (1989) KLR, Dima Denge Dima & Others Vs Republic (2013)KECA 480 (KLR)** amongst others where the key ingredients of the offence of robbery with violence and identification was discussed.

16.Thirdly, the Appellant further noted that the trial court had wrongly applied the doctrine of recent possession to convict him, when the said motorcycle had not been found in his possession and no proof was lead to show that he was the person, who had given his co accused the said motorcycle. The element of recent possession equally failed as the robbery had taken place on 03.09.2024 and the said motorcycle had been recovered about two months later on 08.11.2024. The time lapse was not short, and the stolen item could have changed hands severally with easy during this period. Reliance was placed in the case of **John Mutunga Mueni Vs Republic (2020) KEHC 1607 (KLR), Malingi Vs Republic (1989) KLR 225 & Andrea Obonyo & Others Vs Republic (1962) EA 543** for emphasis.

17. Finally on sentencing the appellant stated that the sentence imposed was manifestly excessive and was passed without proper exercise of judicial discretion as the

court had failed to consider his personal circumstances, his status as a first offender, time already spent in remand and other mitigating circumstances. Reliance was placed on **Francis Karioko Muruatetu & Another Vs Republic (2017) Eklr & William Okungu Kittiny vs Republic, Court of Appeal Criminal Appeal No 56 of 2013 (2018) Eklr.**

18. The appellant also relied on the landmark decision of **Joseph Kaberia Kahinga & Others Vs Attorney General (2016) KEHC 3130 (KLR)**, where **Sections 295, 296(1) and 296(2) of the Penal code, Cap 63** were declared unconstitutional for not specifying with precision which of the three disjunctive elements was to be proved as against the accused and thus ran foul of **Article 50(1),(2) of the constitution** by contravening the principals of fair trial.

19. The appellant thus urged the court to find that this Appeal had merit and be pleased to allow the same in its entirety by quashing both his conviction and the sentence passed by the trial court.

(ii) **The Respondents Submissions**

20. This Appeal was opposed by the state, who also relied on their submissions dated 21ST January 2026. They emphasized that the appellant was properly convicted on the grounds of recent possession of stolen property and

when placed on his defence had not given a plausible explanation as to how he had come into possession of the said motorcycle . Reliance was placed in the court of Appeal case **of Athumani Salim Athumani Vs Republic (Criminal Appeal No 44 of 2015 & William Oongo Arunda Vs Republic, Criminal Appeal No 49 of 2020 (2022) KECA 23 (KLR)**, where it was held that a reasonable explanation had to be offered to how the accused came into possession of the stolen property.

21.The sentence passed too was not harsh, when the circumstance so the case were considered, but conceded that the time spent in custody could considered in line with **Section 333(2) of the criminal procedure Code**.

22. The state thus urged the court to find that the Appellants conviction and sentence to be safe and proceed to dismiss this Appeal.

F. ANALYSIS & DETERMINATION

23.The being the first appeal, this court is as a matter of law enjoined to analyze and re-evaluate a fresh all the evidence adduced before the lower court and to draw its own conclusion while bearing in mind that it neither saw nor heard any of the witnesses. **See Okeno versus Republic (1072) EA 32, Pandya versus Republic (1957) EA 336) & Shantital M Ruwala versus**

Republic (1957) EA 570, where the court of appeal set out the duties of the first appellant court.

24. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions by the Appellant and the respondent Counsel's and find that the following issues arise for determination.

a. Whether the ingredients of the offence of attempted robbery with violence were proved.

b. Whether the sentence passed was harsh and excessive.

(i) **Whether the ingredients of the offence of robbery with violence were proved**

25. In criminal cases, the burden of proof lies with the prosecution, and they have to persuade the court either by preponderance of evidence or beyond reasonable doubt, that the material facts that constitute their whole case are true, thus consequently have established their case and deserve to have judgment given in their favour. See **Miller vs. Ministry of Pensions (1947) 2 All ER, 372, Republic Vs Edward Kirui (2014) eKLR, and Murugan & Another Vs State by Prosecutor, Tamil Nadu & Another (2008) INSC 1688**

26.The offence of Robbery with Violence is provided for under the **Section 296(2) of the Penal Code**, which states as follows:

“296. Punishment of robbery

- (1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.**
- (2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”**

27.The ingredients of this offence were aptly discussed by **Cockar, C.J.,Akiwumi & Shah, JJ.A.** in the case of **Johana Ndungu vs. Republic CRA. 116/1995, [1996] eKLR** where the Court of Appeal in Mombasa stated as follows:-

“In order to appreciate properly as to what acts constitute an offence under Section 296 (2) of one must consider the subsection in conjunction with Section 295 of the PC. 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. Thereafter, the existence of the afore -described ingredients constituting robbery are presupposed 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 subsection:

(i). If the offender is armed with any dangerous or offensive weapon or instrument; or

(ii). If he is in company with one or more other person or persons; or

(iii). 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.”

28. What constitutes the offence of robbery with violence was also well captured in the case of **Olouch vs Republic (1985)KLR** where the Court of Appeal stated as follows:-

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

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

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

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.”

29. PW1 did not identify the appellant as being one of the person's who attacked him on the material evening of 03.09.2024 and robbed him off the motorcycle registration Number **KMFA 742Z** boxer red in colour, which belonged to PW2. The said motorcycle was later recovered in possession of the appellants co accused person one (**Boru Wako Dida**) who offered an explanation that he had borrowed the said motorcycle from the appellant to enable him go check on his livestock and paid him Kshs.500/= as hiring fee. It is on this basis that the appellant neck so to speak, remained on the hanging noose and he was convicted.
30. I do find that the evidence linking the appellant to this crime to be extremely weak, as PW3 had seen the appellants co accused (**Boru Wako Dida**) with stolen motorcycles on the first occasion, while he had gone to fetch water and informed PW2 of his hunch/discovery and after some time meet him again at a petrol station where, with the help of other members of the public effected public arrest. According to PW4, when he interrogated the

appellants co accused (**Boru Wako Dida**) did inform him that he had been put in possession of the said motorcycle by one **Abdirahman Hussein** and the appellant. Unfortunately, the said **Abdirahman Hussein** was not interrogated and/or called to verify the said assertions,

31. PW3 having sighted the appellant on two different occasions with the stolen motorcycle, it was an incorrect finding for the trial court to hold that it was the appellant who had put the said **Boru Wako Dida** in possession thereof without independent evidence to corroborate the same. It is emphasized that when the said **Boru Wako Dida** was arrested, he also mentioned one **Abdirahman Hussein** as the person who put him into possession of the stolen motorcycle and later changed his story that it was the appellant. Evidently **Boru Wako Dida** could not be termed as a trustworthy person and his explanation regarding possession had to be taken with a pinch of salt.

(iii) DISPOSITION

32. The upshot, having considered the entire record of appeal and parties submissions, I do find and hold that the evidence presented by the prosecution has too many unexplained gaps, and fell far short of advancing convincing grounds upon, which the appellant would have been safely identified as the person who had recent

possession of the stolen motorcycle and put **Boru Wako Dida** in possession thereof.

33. The Appellant's conviction is therefore not safe. The judgment dated 19th November 2025 delivered by Hon Mr S.K. Arome (PM) in **Marsabit CMCR No E043 of 2025** is hereby set-aside in its entirety and the Appellant is set free forthwith unless otherwise lawfully held.

34. Right of Appeal 14 days.

35. It is so ordered

Judgment read, signed and delivered in Open Court at **MARSABIT** this **12TH** day of **MAY 2026**.

FRANCIS RAYOLA OLEL
JUDGE

Delivered on the **virtual platform, Teams** this **12TH** Day of **MAY 2026**.

In the presence of:-

Present n courtAppellant

Mr. MburuguFor O.D.P.P

Mr. JarsoCourt Assistant

ORIGINAL