



**Luli alias Adu Ibrahim Luli v Republic (Criminal Appeal
E083 of 2023) [2025] KECA 908 (KLR) (23 May 2025) (Judgment)**

Neutral citation: [2025] KECA 908 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL E083 OF 2023
KI LAIBUTA, GWN MACHARIA & FA OCHIENG, JJA
MAY 23, 2025**

BETWEEN

LULI ADU LULI ALIAS ADU IBRAHIM LULI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the Judgment of the High Court of Kenya at Malindi (Njagi,
& H. A. Omondi, JJ.) dated 9th March, 2009 in HCCRA No. 32 OF 2007)*

JUDGMENT

1. The appeal herein originates from the judgment of the High Court, in which the court upheld the conviction and sentence from Criminal Case No. 541 of 2006 at the Senior Resident Magistrate's Court at Kilifi.
2. The appellant was convicted of robbery with violence contrary to Section 296(2) of the [Penal Code](#), and sentenced to death.
3. The trial court had convicted the appellant, Luli Adu Luli, and sentenced him to death for robbery with violence. His co-accused, Dume Malumbo Chai, was acquitted under Section 215 of the [Criminal Procedure Code](#).
4. The particulars of the offence were that, on 20th January 2006 at Mtomondoni Village in Mtwapa Location within Kilifi District, the appellant and his co-accused, while armed with dangerous weapons (metal rods and stones), robbed Justus Njoroge Mbugua of a mobile phone, cash, a shirt, and a cap, all valued at Kshs. 10,050/-, and used actual violence on him.
5. In re-evaluating the evidence adduced, the High Court noted that the complainant, Justus Njoroge Mbugua, stated that he was attacked at night after closing his business and was robbed by two men. He identified the appellant at an identification parade.



6. The complainant's hat and shirt, which he identified, were found in the appellant's house.
7. The appellant claimed that he was at home sleeping on the material night and was arrested later. His co-accused also stated that he was at home when the police arrested his brother.
8. PW2, Inspector Owino, conducted the identification parade where the complainant positively identified the appellant.
9. PW3, Moses Karisa, a taxi driver, confirmed taking the complainant home and later to the station where he reported the incident.
10. PW4, PC Wilson Fondo, and PW5, Cpl. Sulubu Kalume, were involved in the arrest and recovery of the stolen items.
11. PW6, Dr. Kimanga, filled the P3 form detailing the complainant's injuries.
12. The High Court considered the grounds of appeal, which raised issues of defective charge, flawed identification parade, and the prosecution's failure to prove the case beyond a reasonable doubt.
13. Regarding the identification parade, the High Court found that it was properly conducted. The complainant positively identified the appellant, and the appellant's claim that he was forced to participate was not substantiated. The court also noted the recovery of the complainant's clothing from the appellant's house as corroborating evidence.
14. The High Court addressed the appellant's defence and found that it lacked substance. The court concluded that the prosecution had proved the case against the appellant beyond any reasonable doubt and that the conviction for robbery with violence was proper.
15. Ultimately, the High Court dismissed the appeal against conviction and upheld the death sentence imposed by the trial court.
16. Being dissatisfied with the judgment of the High Court, the appellant filed the present appeal. He raised the following grounds of appeal:
 - a. The first appellate court erred in law by failing to find that the identification by the complainant may have been honest but mistaken.
 - b. The first appellate court erred in law by finding that the doctrine of recent possession was applicable in the circumstances.
 - c. The first appellate court erred in law by finding that the prosecution had proved the offence of robbery with violence as against the appellant.
 - d. The first appellate court erred in law by failing to re-analyze and re-evaluate the prosecution's evidence on record.
 - e. The first appellate court erred in law by rejecting his defense, which was reasonable enough to cast doubt upon the poor, shoddy, and fabricated prosecution case, which lacked corroboration.
 - f. The first appellate court erred in law by failing to consider the Judiciary Sentencing Policy Guidelines 2016 by handing down a manifestly harsh sentence of death.
 - g. That the first appellate court erred in law by failing to find that the appellant was a minor below the age of 18 years when the offence was committed.



17. When the appeal came up for hearing on 26th November 2024, the appellant was represented by Mr. Ngumbao Mutua, while Ms. Nyawinda represented the respondent. Parties relied on their respective written submissions, which the appellant's counsel orally highlighted.
18. Mr. Ngumbao highlighted ground number 7 of the appeal, which argued that the appellant was a minor at the time of his trial, as he was born on 4th February 1990. In effect, he was 17 years old at the material time. Counsel submitted that the appellant ought to have been afforded the protection of the law under the Children's Act. Counsel submitted that the appellant had mentioned his age in his unsworn statement in the trial court.
19. In his written submissions, the appellant was of the view that the first appellate court failed to properly re-analyze the evidence. He specifically claimed that there was no proof that the recovered items (cap and shirt) belonged to the complainant; that PW3 and PW5 did not testify about the condition of the complainant immediately after the attack; and that the prosecution failed to prove that the house they visited was the appellant's residence. The appellant submitted that this evidence was insufficient for conviction.
20. The appellant submitted that the identification evidence was unreliable, and that the first appellate court erred by relying on the complainant's identification without verifying the lighting conditions or other crucial factors as required by case law. He relied on the case of Maitanyi vs. Republic [1986] KLR 198, in support of this submission.
21. He reiterated that there was no corroborating evidence to support the identification.
22. The appellant submitted that the first appellate court incorrectly applied the doctrine of recent possession, as the prosecution did not prove that the appellant was in possession of the stolen property. He was of the view that the ownership of the property and whether it was stolen were not sufficiently established.
23. The appellant was of the view that there ought to have been presented before the trial court other proof to establish ownership of these items. There was nothing peculiar or unique in these items, which were disclosed to the trial court, that could have led the court to unmistakably conclude that those indeed were the items stolen from the complainant.
24. The appellant asserted that the first appellate court failed to consider the sentencing guidelines, which should have been applied to determine a proportional sentence. He submitted that the death sentence was excessive given the minimal injuries sustained by the complainant and the fact that the stolen property was returned.
25. The appellant claimed that he was 17 years old at the time of trial, and he should have been treated as a minor under the *Children Act*, which prohibits sentences like death or life imprisonment for minors. The appellant was of the view that this protection was not afforded to him, thereby affecting the fairness of the trial.
26. In conclusion, the appellant sought to have the appeal allowed, taking issue with the evidence, identification, the application of the doctrine of recent possession, sentencing, and his status as a minor under the *Children Act*.
27. Opposing the appeal, the respondent submitted that the prosecution established all the elements of robbery with violence. According to PW1's evidence, the appellant, in the company of others, attacked and stole from him using violence. PW3 corroborated this evidence, and the complainant's stolen items



- (shirt and cap) were recovered from the appellant's house. The complainant also sustained injuries as evidenced by the P3 form. Therefore, the prosecution proved its case beyond a reasonable doubt.
28. The respondent submitted that PW1 knew the appellant, had sufficient light to identify him, and that the stolen items were found in the appellant's house. The respondent was of the view that this evidence supported the identification as accurate. The respondent relied on the cases of *Anil Phukan vs. State of Assam* [1993] AIR 1462; and *R vs. Turnbull* [1973] 3 ALL ER 549, in emphasizing that the complainant knew the appellant and had sufficient light to identify him.
 29. The respondent acknowledged that the first appellate court did not explicitly apply the doctrine of recent possession, but argued that the recovered stolen items were sufficiently linked to the appellant. The items were identified as the complainant's and found in the appellant's house shortly after the robbery. In support of this submission, the respondent relied on the case of *David Mugo Kimunge vs. Republic* [2015] eKLR.
 30. The respondent pointed out that the offence of robbery with violence carries the death penalty under Kenyan law. He asserted that the death sentence was lawful, and that the Court of Appeal could not interfere with the sentence unless there were legal errors, which they argued were absent in this case.
 31. The respondent submitted that the appellant's age (17 years) was only mentioned in an unsworn statement with no proof. The appellant did not raise this issue at the first appellate court, making it an afterthought. Therefore, the age claim should not affect the sentence. To buttress this submission, the respondent relied on the case of *Joseph Kariuki Ndungu & Another vs. Republic* [2010] eKLR.
 32. In conclusion, the respondent urged the court to dismiss the appeal and affirm the conviction and death sentence as lawful and well-supported by evidence.
 33. This being a second appeal, we are legally constrained to consider only issues of law raised in the appeal and not matters of fact that had been determined by the trial court and the appellate court on the first appeal. This is by dint of Section 361(1)(a) of the *Criminal Procedure Code*. This position was reiterated in the case of *M'Riungu vs. Republic* [1983] KLR 455, where the court stated thus:

“Where the right of appeal is confined to the question of law, an appellate court has loyalty to accept the findings of fact of the lower courts and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the 1st appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision was bad in law.”
 34. We have carefully considered the record, the submissions by counsel, the authorities cited, and the law. The issues for determination are: whether the identification of the appellant was reliable; whether the doctrine of recent possession was properly applied; whether the prosecution proved its case beyond a reasonable doubt; whether the sentence imposed was harsh and disproportionate; and whether the appellant's alleged age ought to affect the sentence.
 35. The appellant challenged the reliability of the identification by the complainant, arguing that it was made under uncertain conditions, and that the first appellate court failed to properly assess the lighting conditions and other factors that might have affected the identification.
 36. However, the respondent submitted that the complainant knew the appellant well as they lived in the same area, and that the lighting was adequate for proper identification. Furthermore, the complainant positively identified the appellant in an identification parade, which was properly mounted by PW2, Inspector Owino.



37. Upon careful consideration, it is evident that the appellant was well known to the complainant. In this instance, there was no need for an identification parade to be conducted as the same had been rendered moot. We are in agreement with the following words as stated in *Githinji vs. Republic* [1970] E.A 231:
- “Once a witness knows who the suspect is, an identification parade is valueless.”
38. Similarly, in the case of *Ajode vs. Republic* [2004] 2 KLR 81, this Court stated thus:
- “Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition.”
39. By conducting an identification parade in a matter where the assailant was well known to the victim, the police were conducting the parade in futility, as there was no need for the identification parade, given that the complainant was able to recognize his assailant.
40. Be that as it may, the complainant had sufficient opportunity to observe the appellant during the robbery. The complainant’s prior knowledge of the appellant and the subsequent recovery of the stolen items from the appellant’s house strengthen the identification. In the case of *Wamunga vs. Republic* [1989] KLR 424, this Court held that:
- “... 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 a conviction.”
41. In the circumstances, we find that the High Court was correct in finding that the identification by recognition was reliable.
42. The appellant contended that the first appellate court wrongly applied the doctrine of recent possession. He argued that the prosecution failed to prove that the items recovered from his house were indeed the stolen property, as they lacked any distinguishing marks that would link them unmistakably to the complainant.
43. It is trite that the doctrine of recent possession allows the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. In the case of *Eric Otieno Arum vs. Republic* [2006] eKLR, the court stated as follows:
- “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 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 person to the other.”
44. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for being in possession of the stolen property. The explanation need only be a plausible



one. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. In *Paul Mwita Robi vs. Republic*, (supra), the court observed that:

“Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.”

45. In this case, the complainant's shirt and cap were recovered from the appellant's house shortly after the robbery and were positively identified by the complainant. The appellant did not rebut the claim that the shirt and cap were recovered from his house; he only contended that there was no proof they belonged to the complainant. In the circumstances, we find that the doctrine of recent possession was correctly applied, and that the recovery of the complainant's belongings in the appellant's house provided strong corroborative evidence of his involvement in the robbery.
46. The appellant asserted that the prosecution failed to prove its case beyond a reasonable doubt, particularly with regard to the ownership of the stolen items and the evidence surrounding the appellant's residence. The prosecution's evidence, however, was consistent and supported by testimony from multiple witnesses, including the complainant (PW1), the taxi driver (PW3), and the police officers involved in the arrest (PW4 and PW5).
47. The offence of robbery with violence is provided for under Section 296(2) of the *Penal Code* as follows:

“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.”
48. In the case of *Dima Denge & Others vs. Republic* [2013] eKLR, this Court stated as follows:

“The elements of the offence under Section 296(2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to found an offence of robbery with violence.”
49. In this case, the appellant was in the company of his co-accused; they attacked the complainant and, as a result, he sustained injuries; and they stole from the complainant. Some of the stolen items were recovered in the appellant's house. Therefore, we find that the prosecution proved its case beyond a reasonable doubt.
50. The appellant submitted that the death sentence imposed by the trial court was excessive, especially given the circumstances of the case, where the complainant sustained minimal injuries, and the stolen property recovered. The respondent, in turn, submitted that the death sentence is lawful under Section 296(2) of the *Penal Code*, which mandates the death penalty for robbery with violence.
51. It is not in dispute that the trial court sentenced the appellant to death, a sentence that was subsequently affirmed by the High Court on first appeal. However, ground 7 of the present appeal raises a significant issue, namely that the appellant was a minor at the time of the commission of the offence and, accordingly, the imposition of the death sentence was unlawful and unconstitutional.
52. The appellant contends that he was born on 4th February 1990, and that the offence occurred on 20th January 2006, making him 17 years old at the time. Although this assertion was not verified with formal documentation during the trial, it was mentioned in his unsworn defence statement. The respondent



submitted that this issue was an afterthought, raised for the first time during this second appeal, and without any documentary proof.

53. The law applicable at the time was clear. Section 190(2) of the *Children Act*, 2001 (now repealed and replaced by the *Children Act*, 2022) prohibited the imposition of the death penalty on a child convicted of any offence. It provided:

- a. No child shall be ordered to imprisonment or to be placed in a detention camp;
- b. No child shall be sentenced to death; and
- c. No child under the age of ten years shall be ordered by a children's court to be sent to a rehabilitation school.

54. Similarly, Article 53(1)(f)(ii) of *the Constitution* affirms that:

Every child has the right, not to be detained, except as a measure of last resort, and when detained, to be held:

- i. for the shortest appropriate period of time; and
- ii. Separate from adults and in conditions that take account of the child's age and sex.”

55. While the trial court did not carry out an age assessment to confirm the appellant's age, and no birth certificate was tendered into evidence, the fact remains that the question of age touches on a fundamental right. It is trite that where age is raised as an issue, especially where it could have a bearing on sentence, the trial court is obligated to conduct a proper age assessment. This obligation is heightened where the sentence could amount to capital punishment. In *Koi & 2 Others vs. Republic* [2024] KECA 1485 (KLR), this Court held:

“However, in the case of the 3rd appellant, it was submitted that the trial Judge failed to appreciate that though the 3rd appellant had attained the age of majority at the time of sentencing, he was a child when he was charged with the offence and therefore the sentence imposed was contrary to the provisions of Articles 53(1) (b), (c), (d) and (f) of *the Constitution* and section 7(1) (2) of the *Children Act*, as well as Article 28 of the United Nations Convention on the Rights of the Child. Our consideration of the grounds of appeal does not disclose that the issue was raised and, additionally, there were no submissions from the respondent in respect of the issue.

61. But the question of the 3rd appellant's sentence having been raised, we consider that it would be remiss of us not to address it for the reason that *the Constitution* and the *Children Act* are unequivocal on how child offenders in the criminal justice system should be dealt with. As stated earlier, the age assessment report dated 23rd May 2018 indicated that the 3rd appellant was 17 years old by the time of commission of the offence. He was therefore below the age of 18 years at the time. And by the time of sentencing two years later, he had attained the age of majority.”

56. In this case, it is evident from the record that the appellant did testify as to his date of birth, which would imply that he was 17 years old at the material time. The trial court, unfortunately, did not seek to verify this claim nor order for an age assessment. The failure to do so amounts to a serious omission,



particularly because the appellant's minority status, if established, would have barred the imposition of the death penalty.

57. On this basis, we are satisfied that the appellant ought to have been treated as a child under the *Children Act* and should not have been sentenced to death or life imprisonment. We find that the sentence imposed upon the appellant was unlawful. Section 191 of the *Children Act* provides the punishments available for a child offender as follows:

191

- (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways-
- a. By discharging the offender under section 35(1) of the *Penal Code* (Cap. 63);
 - b. by discharging the offender on his entering into a recognisance, with or without sureties;
 - c. by making a probation order against the offender under the provisions of the *Probation of Offenders Act* (Cap. 64);
 - d. by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;
 - e. if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;
 - f. by ordering the offender to pay a fine, compensation or costs, or any or all of them;
 - g. in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;
 - h. by placing the offender under the care of a qualified counsellor;
 - i. by ordering him to be placed in an educational institution or a vocational training programme;
 - j. by ordering him to be placed in a probation hostel under provisions of the *Probation of Offenders Act* (Cap. 64);
 - k. by making a community service order; or
 - l. in any other lawful manner.

Of significance is Section 191(l) that empowers a court to sentence an offender "...in any other lawful manner."

58. Similarly, Section 25(2) of the *Penal Code* provides that:

2. Sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such



place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.

2. When a person has been sentenced to be detained during the President's pleasure under subsection (2), the presiding judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make.

59. In *Bernard Kimani Gacheru vs. Republic* [2002] eKLR, this Court held that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle.”

60. Since the two courts below did not take into account the fact that the appellant was a child offender at the time of committing the offence, we find it necessary to intervene. We note that the appellant has now been in custody for approximately 18 years since the time of his arrest in 2006. During that time, he has already served a significant portion of what would be considered a long custodial term for a minor under the law. A custodial sentence aims to rehabilitate and help offenders recognize the seriousness of the offence they committed.

61. We believe that the period spent in custody gave the appellant an opportunity to acquire knowledge and skills for his own self- development, ultimately benefiting both his community and the country as a whole in the future. In the circumstances, it would be imprudent to subject him to detention at the President's pleasure.

62. Accordingly, we hereby dismiss the appellant's appeal on conviction. However, we hereby allow the appeal against sentence and, therefore, set aside the death sentence and substitute it therefor with the imprisonment period already served. For that reason, the appellant is hereby set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025.

DR. K. I. Laibuta CARb, FCIArb.

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

