



REPUBLIC OF KENYA



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**Gatura & another v Republic (Criminal Appeal 29 of 2017)
[2025] KECA 1402 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1402 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CRIMINAL APPEAL 29 OF 2017
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
JULY 31, 2025**

BETWEEN

ELIUD NJURE GATURA 1ST APPELLANT

PATRICK MUCHOKI MUGAMBI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from conviction and sentence by the High Court of Kenya
(J. Ngaah J.) delivered on 17th January 2017 in HCCRA No. 60 of 2014)*

JUDGMENT

Background

1. This is a second appeal. Patrick Muchoki Mugambi (the 2nd appellant) withdrew his appeal by a notice dated 17th February 2020 leaving Eliud Njire Gatura as the only appellant in this appeal. The appellant is aggrieved by the conviction and death sentence meted upon him for the offence of robbery with violence. The appellant was charged alongside 2 others with the offence of robbery with violence contrary to Section 295 as read with Section 296(2) of the [Penal Code](#).
2. The particulars of the offence were that on the 27th October 2011, at Nakuru township within Nakuru County jointly with others not before court, while armed with dangerous weapons namely, wooden bars and clubs, he robbed Kenneth Malakwen of a pistol, make Ceska, serial number H4297 loaded with 15 rounds of 9mm ammunition, a driving licence and a wallet, cash of Kshs.300 and at or immediately before or immediately after the time of such robbery, used actual violence on the said Kenneth.
3. The appellant also faced a 2nd charge of attempted robbery with violence contrary to section 297(2) of the [Penal Code](#). The particulars of the charge were that on 5th July 2012, at Karatina township in



- Mathira East district within Nyeri county, while armed with a dangerous weapon, namely a pistol, attempted to rob Grace Nyaguthi Mwangi of cash from her shop and at or immediately after the time of the said robbery, threatened to use actual violence to the said Grace.
4. The appellant faced a 3rd count of possession of a firearm contrary to section 89(1) of the *Penal Code*. The particulars of the charge were that on 7th July, 2012, at Ihwangi trading centre in Mathira East district within Nyeri County without a reasonable excuse was in possession of a firearm namely a ceska pistol, serial number H4297 in circumstances which raised a reasonable presumption that the said firearm was intended to be used in a manner prejudicial to the public order.
 5. Lastly, the appellant was charged with the offence of being in possession of ammunition without a firearm certificate contrary to section 4(1) of the *Firearms Act*. The particulars of the charge were that on 7th July 2012, at Ihwagi trading centre in Mathira East district within Nyeri County the appellant was found in possession of 3 rounds of ammunition of 9mm without a fire arm certificate.
 6. A concise background of the case mounted before the two courts below will suffice to place the appeal in context. In an effort to substantiate the charges against the appellant, the respondent called a total of nine (9) witnesses.
 7. Grace Nyaguthi Mwangi (PW1) testified that on 5th July 2012 she was at her shop with her worker, Hilda Nyaguthii (PW2) when the appellant and 2 others entered her shop at Karatina and enquired about a phone which was out of stock. It was PW1's evidence that the three left and returned about 10 minutes later and drew a pistol to PW1 demanding money from her. PW1 and PW2 managed to escape and call for help, and a person named Evans (PW4) came to their aid. The attackers shot in the air to disperse people and fled. It was PW1's evidence that she positively identified the appellant during an identification parade at Karatina Police Station. It was her further evidence that she did not know the appellant before the incident but she was able to identify him as when he entered her shop together with his fellow assailants, they took time in the shop and their faces were not covered. It was PW1's further evidence that police arrived at the scene and collected the cartridge from the shop. The evidence of PW1 was corroborated by the testimony of her worker, PW2.
 8. No. xxx PC Kenneth Malakwen (PW3) a police officer attached to Parliament Police Station who worked as a guard to a Member of Parliament testified that on 27th October 2011, he collected a firearm, Ceska Pistol H4297 with 15 rounds of ammunition. That in the course of his work in Nakuru, he was accosted by armed robbers at about 11:30p.m as he walked into a hotel for the night. It was his evidence that he got injured, fell down and was robbed of his personal effects among them a pistol. He made a report at Nakuru Police Station. It was his further evidence that he came to learn that the pistol stolen from him had been recovered around mid-year 2012 within Karatina.
 9. Evans Muriuki (PW4) testified that on 5th July 2012 he heard a scream from a shop. That he went to assist and saw the appellant draw a pistol and shoot in the air. PW4 testified that he saw the attackers well and that he gave a description of the appellant to the police.
 10. Charles Koilege (PW5) a firearm examiner gave his evidence regarding the examination of a spent cartridge with test cartridge fired in the ceska pistol H4297 which revealed sufficient matching firing pin identification markings. His opinion was that the spent cartridge was fired from a ceska pistol serial No. H4297.
 11. Inspector Makau (PW6) and Inspector Lucas Simbolei (PW8) testified having conducted an identification parade where the appellant was identified by PW1. Police Constable Damiano Mbithi (PW7) testified that on 6th July 2012 he was on patrol within Karatina township when he was informed about a dangerous robbery gang within Karatina area and that the robbers had taken refuge at a house



in Ihwagi centre. It was PW6's evidence that together with his colleagues from Ihwagi police patrol base, they planned and raided the robbers on 7th July in their hideout. It was his further evidence that they went to the house, broke its door and found the appellant and his 2 co-accused asleep. That they conducted a search in the house and recovered the lost ceska pistol serial No. H4297 loaded with 3 rounds of ammunition hidden under a mattress on the bed. It was his evidence that they also found a metal cutter hidden in a basin and 2 chisels. That they arrested the occupants and took them to the police station where he prepared an inventory of items recovered which was signed by the appellant and his co-accused.

12. Sergeant Thomas Muthui (PW9), the Investigating Officer corroborated the evidence of PW8 that on 6th July 2012 he was at Karatina market when he received information about robbers that were terrorising Karatina residents and were in hiding. It was his evidence that together with his colleagues, an informer directed them to a house at Ihwagi area owned by one of the accused persons. That they raided the house and found 2 men and a lady sleeping. It was his evidence that they conducted a search and recovered the ceska pistol H4297, a metal cutter and 2 chisels.
13. After close of the prosecution's case, the appellant and his 2 co-accused were found to have a case to answer. In his defence, the appellant tendered sworn evidence denying the charges and did not call any witness. He testified that he was working as a mason and lived in Ihwagi. That he got some work to do on 5th July 2012 and due to work load, he called his colleague (the 2nd appellant herein) to work with him. That the 2nd appellant joined him in Karatina on 6th July 2012 and they spent the night at the appellant's rented house. Further, that on 7th July 2012, some men broke into his house and introduced themselves as Flying Squad officers. It was his further evidence that he was arrested alongside the 2nd appellant and his girlfriend (the 2nd and 3rd accused persons). It was his evidence that an identification parade was carried out and he was pointed out by a lady. It was his further evidence that he saw the subject pistol for the first time in court.
14. Upon the conclusion of the evidence, the trial court found the appellant and the 2nd appellant, guilty as charged and sentenced them to death for count I and II - and 7-years' imprisonment for count 3 and 4 to be held in abeyance. The 3rd accused person (the appellant's girlfriend) was acquitted under Section 215 of the *Criminal Procedure Code* for lack of evidence. Aggrieved by this finding of the trial court, the appellant and the 2nd appellant appealed to the High Court contending inter alia that the trial court erred in law and fact in relying on identification evidence which was not favourable for positive identification; accepting evidence in respect of identification parade which was conducted in violation of the police standing orders; that critical witnesses were not called by the prosecution; that the prosecution failed to prove its case beyond reasonable doubt; convicting the appellant based on contradictory evidence of the prosecution; disregarding the defence; and failing to take into account that the appellants' constitutional rights under Article 50(2)(j)(k) were violated. After re-evaluation of the evidence and considering the grounds of appeal, the High Court (J. Ngaah, J.) found that the 1st appeal had no merit and dismissed it. The High Court held in part as follows:

“...the evidence of dock identification could not itself be sufficient in identification of the appellant but it could properly be taken into account if it was considered alongside the evidence that the appellants were in possession of the pistol from which the cartridge found in the complainant's shop was established to have been fired. For these reasons, I am inclined to conclude that considering the prosecution evidence in its entirety, the appellants were properly identified as the people who attempted to violently rob the 2nd complainant.



They were therefore properly convicted of the second count of attempted robbery with violence.”...

“Based on this doctrine of recent possession, the appellants were properly convicted of the offence of robbery with violence.”

15. Aggrieved by this decision, the appellant raises 5 grounds of appeal that the High Court erred in law and fact:
 - a. in upholding the appellant’s conviction on count 2 by relying on purported identification at the scene, which was intertwined with the alleged recovery of the firearm, without addressing the unresolved doubt arising from the complainant’s failure to identify his assailants;
 - b. in affirming the trial court’s finding on the identification parade in count 2, notwithstanding the absence of evidence of an initial first report containing a description of the appellant to support such identification;
 - c. by failing to properly re-evaluate and analyze the prosecution’s evidence as required, thereby occasioning a miscarriage of justice;
 - d. by misdirecting itself by relying on the evidence of the alleged recovery and inventory without considering that the inventory was not signed by the owner of the premises, which was a rental house; and
 - e. by being unduly influenced by the prosecution’s evidence and unjustifiably rejecting the defence case, contrary to Section 212 of the *Criminal Procedure Code*.

Submissions by Counsel

16. The appeal was heard by way of written submissions which were highlighted by counsel for the parties. Learned counsel, Mr. Wahome Gikonyo represented the appellant while Mr. Solomon Naulikha the Assistant Director of Public Prosecutions represented the State. Mr. Gikonyo submitted that the identification of the appellant by PW1 and PW2 was unsafe. That the said prosecution witnesses testified that they neither knew the appellant before the attacks nor gave the appellant’s description to the police. That as such, there was no purpose of identification parade. That the presence of PW9 during the parade was an interference with the process and aided PW2 to identify the appellant. That it was an error of law for the High Court as the 1st appellate court to affirm the appellant’s conviction based on the evidence of PW1 and PW2 on identification of the appellant without testing the said evidence. Counsel cited the case of *Maitanyi v Republic* (1986) KLR 96 where the court stated that:

“Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult.”

17. Counsel further submitted that the appellant was not found in possession of the pistol, he was not the owner of the house and the doctrine of recent possession was not applicable. Counsel asserted that PW7 and PW9 testified before the trial court that the house where the appellant and his co-accused were allegedly found in belonged to the 3rd accused person (the appellant’s girlfriend). That the pistol was not found in possession of the appellant and from the evidence of PW7 and PW9 the pistol was found under the bed where the appellant and his girlfriend (the 3rd accused) were sleeping. Counsel



asserted that the High Court fell into error in finding that the house belonged to the appellant yet the evidence tendered showed that the house belonged to the 3rd accused person. Counsel submitted that the appellant was a mere visitor in the house.

18. Counsel further submitted that the High Court failed to consider the appellant's defence of alibi without giving reasons. Counsel cited the case of *Kiarie v Republic* (1984) KLR 739 where the court stated that:

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable.... The errors of law on finding on identification and on alibi were of such a nature that it was reasonably probable that without them the trial magistrate would not have convicted the appellant.”

19. Further, counsel asserted that the prosecution did not prove its case beyond reasonable doubt.
20. As regards sentence, counsel submitted that the death sentence is unconstitutional and urged this Court to consider that the appellant has served over 11 years in custody and therefore quash the death sentence imposed by the trial court and upheld by the High Court and set the appellant at liberty.
21. On the other hand, the respondent through Mr. Solomon Naulikha, the Assistant Director of Public Prosecutions submitted that the identification of the appellant was without error, it was safe and not mistaken. That PW1, PW2, PW3 and PW5 placed the appellant and his accomplice at the scene of crime on the material day. As regards the doctrine of recent possession, counsel submitted that the appellant was found in possession of a recently violently stolen ceska pistol that was issued to PW3. Further, that the firearm movement register was produced in court to demonstrate that the subject pistol was issued to PW3. Counsel asserted that the appellant failed to offer a satisfactory explanation how he came into possession of the pistol.
22. Counsel further submitted that the appellant's defence of alibi was considered and it was found to consist full of denials. That the prosecution evidence was direct and consistent. Counsel asserted that identification of the appellant was through the identification parade. Counsel stressed that the prosecution evidence tendered was hybrid made up of both direct and circumstantial evidence. As regards sentencing, counsel submitted that the application of Francis Muruatetu II guidelines is specific and limited to murder cases and the Muruatetu case did not therefore apply to the appellant's case. Counsel asserted that the prescribed penalty for robbery with violence under section 296(2) of the *Penal Code* is death. Counsel urged this Court to dismiss the appeal.

Determination

23. We have considered the record of appeal, the submissions by counsel, the authorities cited and the law. This is a second appeal and as such we are limited to consideration of matters of law only. Accordingly, we are generally bound by concurrent findings of fact by the two courts below departing therefrom only in the rarest of cases where they are not based on any evidence or proceed from a misapprehension of the evidence or are plainly untenable. See *Karingo v Republic* [1982] KLR 219 and Section 361(1) (a) of the *Criminal Procedure Code*.
24. We discern the main issues for determination to be: whether the offence of robbery with violence was proved beyond reasonable doubt against the appellant; and whether this Court should interfere with the death sentence imposed by the trial court and upheld by the High Court.



25. Section 295 and 296 (2) of the *Penal Code* provides that:

295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296(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 it; at or immediately before or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

26. The elements of the offence of robbery with violence were clearly articulated by this Court in the case of *Olouch v Republic* (1985) KLR that:

"...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."

27. It is well settled that the said elements should be proved separately and demonstration of one element is sufficient to prove the offence of robbery with violence. See *Dima Denge Dima & others v Republic*, Criminal Appeal No. 300 of 2007.

28. From the evidence on record, it is not in doubt that PW3, a police officer, who was attached to the Parliamentary Police Station and a guard of a Member of Parliament was violently robbed of his ceska pistol H4297 and other valuables and the incident was reported at Nakuru Police Station. The firearm movement registered showed that PW3 was allocated the said pistol by virtue of his duties. According to PW3, he was attacked by a group of thugs who were armed with rungun. As such, we are in agreement with the finding of the two court below that the offence of robbery with violence was committed upon PW1. The question then is whether the prosecution proved beyond reasonable doubt that the offence of robbery with violence was committed by the appellant and his co-accused?

29. It is also not in doubt that there was an attempt to rob PW1 at her shop.

The evidence of PW2 and PW4 corroborates the attempted robbery at PW1's shop. The prosecution evidence tendered showed that the ceska pistol stolen from PW3 was the one used during the attempt to rob PW1. The firearm examiner, PW5 confirmed that the spent cartridge collected from PW1's shop when the assailants shot in air to disperse the crowd, were fired from the lost PW3's pistol. The two incidents were alleged to have been committed by the appellant and his co-accused.

30. As regards the robbery with violence, counsel for the appellant contended that PW3 did not identify the attackers as the incident took place at night at about 11: 30p.m. That the prosecution relied upon circumstantial evidence to prove the charges under count 1 against the appellant. Further, that the appellant and his accomplices attempted to rob PW1 during the day and PW1 was able to identify one of the robbers as the appellant. Counsel for the appellant submitted that the identification of the appellant as the perpetrator was not free from possible error. Further, that PW1 was assisted by PW9



who was present during the identification parade and interfered with the process. From the record, the appellant's testimony did not challenge his identification by PW1 during the identification parade. His evidence was that he was touched by a lady (PW1) during the identification parade.

31. From the record, the appellant and his co-accused appeared at PW1's shop and posed as customers and had a chat with PW2 in the presence of PW1. Further, that they left and returned to the shop this time drawing a pistol on PW1 and demanding for money. Further, that PW1 and PW2 screamed and PW5 came to their rescue. As such, the appellant was seen in a broad day light by PW1, PW2 and PW5. We agree with the two courts below that from the circumstances of the case, the conditions were favourable for proper identification of the appellant in respect of count 2. The High Court appreciated the law on identification parades and the circumstances that may water it down and be regarded as a dock identification citing this Court's decision of *Muiruri & 2 Others v Republic* (2002) 1KLR 274 that:

“...Courts have emphasized the need to test with greatest care such evidence to exclude the possibility of mistaken identification before such evidence is accepted and acted upon to find a conviction. We do not think that evidence will be rejected merely because it is dock identification evidence. The court might base a conviction on such evidence if satisfied that the facts and circumstances of the case the evidence must be true and if prior thereto the court duly warns itself of the possible danger of mistaken identification.”

32. From the record, the two courts below took all the necessary care and caution and properly found that the appellant was positively identified. The appellant's identification by PW1 was corroborated by PW2 and PW4 coupled with the evidence of being in possession of the pistol that was used in firing the cartridges that were found at PW1's shop.

33. As regards count 1 of robbery with violence, the appellant challenges the application of the doctrine of recent possession applied by the High Court in upholding his conviction. The appellant's contention is that the house where the pistol was found belonged to the 3rd accused in the trial court (Nancy Nyaguthii) and that the pistol was not found in his possession. Further, that he was forced to sign the inventory of items collected in the house and the doctrine of recent possession did not therefore apply.

34. The essential elements of the doctrine of recent possession were succinctly articulated by this Court in the case of *Eric Otieno Arum v Republic* [2006] eKLR, that:

“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.”

35. Applying the above to the instant appeal, it was established beyond reasonable doubt that the subject pistol was allocated to PW3 and that the same was lost during an attack. Further, that the same pistol was used during the attempted robbery of PW1 and the appellant was properly identified as the one who had the pistol during the said attack. The prosecution evidence was that the pistol was found



hidden under a mattress during a search of the appellant's house. In his own evidence, the appellant testified that:

“... At 5:30pm on the 6th the 2nd accused called me and said he had come and I told him to pick a boda boda (motorcycle) and go to my house (sic) Ihwagi where I stay ...”

The above evidence no doubt confirms that the appellant was the owner of the house where he was arrested alongside his accomplices. We find that the High Court did not err in finding that the prosecution proved its case to the required standard. In the circumstances, we are satisfied that the appellant's conviction was based on proper analysis of the law and the evidence.

36. As regards sentence, counsel for the appellant urged us to reduce the sentence to the period already served or that spent in custody. This Court in the case of *Wamwoma V Republic* (Criminal Appeal 19 of 2018 [2024] KECA 546 (KLR)) stated as follows:

“On the issue of sentence, the appellant was sentenced to the mandatory death sentence as provided for the offence of robbery with violence under Section 296(2) of the *Criminal Procedure Code*. The appellant contended that the sentence imposed upon him was unconstitutional. However, in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 Others (amicus curiae)* (2021) eKLR, (Muruatetu 2), the Supreme Court clarified that notwithstanding its holding in Muruatetu that the mandatory nature of the death sentence under Section 204 of the Penal Code is unconstitutional, the death sentence in regard to the offence of robbery with violence under Section 296(2) remains valid until the constitutional validity of that sentence is fully argued before the High Court and escalated to the Court of Appeal. As this is yet to be done, the sentence of death that was imposed upon the appellant, remains a lawful sentence.”

37. From the foregoing, we find that the appeal lacks merit and is hereby dismissed in its entirety. The conviction and sentence imposed by the trial court and upheld by the High Court are hereby affirmed.

38. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY, 2025

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true Copy of the original

Signed

DEPUTY REGISTRAR

