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Mwingirwa & another v Republic (Criminal Appeal 11 & 12 of 2017 (Consolidated)) [2025] KECA 1253 (KLR) (4 July 2025) (Judgment)

Neutral citation: [2025] KECA 1253 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 11 & 12 OF 2017 (CONSOLIDATED)

J MOHAMMED, JW LESSIT & A ALI-ARONI, JJA

JULY 4, 2025

BETWEEN

SAMSON MWINGIRWA .... 1ST APPELLANT

MICHAEL MURUNGI .... 2ND APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the conviction/sentence of the High Court of Kenya at Meru (Kiarie, J.) dated 20th December 2016 in HCCRA No. 50 of 2016)

JUDGMENT

1. Samson Mwingirwa and Michael Murungi, the appellants in this case, are before us for a second appeal after their first appeal was dismissed by the High Court (Kiare, J.) on 20th December 2016. The appellants were initially charged before the Chief Magistrate's Court at Isiolo with two counts of robbery with violence, contrary to Section 295, as read with Section 296 (2) of the *Penal Code*. The particulars of the 1st count were that, on 6th August 2014, at the Sun Africa Bar and Restaurant in Isiolo County, within the Eastern region, jointly armed with offensive weapons namely; a panga and rungu they robbed David Kinoti of Kshs. 700, and during the robbery, they used actual violence against David Kinoti.

2. The particulars of the 2nd count were that on the same day and place, while armed with offensive weapons namely; a panga and rungus, they robbed one Karuru (deceased) of two crates of Guinness, two crates of Tusker, one crate of Balozi, one crate of White Cup, an LG television set, a TY 328A amplifier, a subwoofer with two extension speakers (Premier brand), a keg pump, two remote controls, one Sony DVD player, and various brands of beer, whose total value was Kshs. 100,000, being the property of Paul Gitonga Karimi, and during the robbery, they used actual violence against Karuru,

resulting in fatal injuries. They each also faced an alternative charge of handling stolen goods, contrary to Section 322(1) and (2) of the *Penal Code*.

3. To put the case into perspective, we summarise the case as it was presented to the trial court. According to David Kinoti (PW1), on 4th August 2014, he joined one Karuru (since deceased) at 'Sun Africa Bar' (the bar) for a drink. He ended up spending the night and in the morning of 5th August 2014, at around 2 a.m., while they were sleeping, they were attacked. The attackers ordered them to remain silent. PW1 complied and stayed quiet, but Karuru continued to scream. As a result, he was struck on the forehead with a panga. PW1 was also hit on the shoulder with a panga. It was dark, and he was not able to see if the assailants were armed with other weapons. They searched him and took Kshs. 700 from him. He was able to see the person who removed the money from his pocket as one of them used a flashlight to illuminate the area. Afterwards, they covered him and the deceased with a blanket. In the morning, he noted that the deceased was still bleeding. He also noticed that the door had been broken. He escaped to get his medication. He was later arrested and booked in the police cells.

4. PW2 Paul Gitonga Kirimi, the owner of the bar, testified that on the material day, the 5th of August 2014, he worked until 11:00 p.m., by which time customers had left, except for PW1 and the deceased. On 6th August 2014, he received a call from Faith Kendi (PW3), who informed him that the bar had been broken into. He went to the bar, where he found the door had been completely removed, the electrical wire at the back of the bar had been cut, the counter had been broken, and all alcoholic drinks stolen: six crates of beer, two crates of Guinness; two crates of Tusker; two crates of White Cap and one crate of Balozi that were all full, a TV Set, a Woofer, DVD, Keg Pump, and remote control. A group of people surrounded the place. He also found the deceased injured and in very weak condition.

5. PW2 further testified that he asked two of his workers, PW3 and Joy Makena (PW4), to take the deceased to Isiolo District Hospital. At the same time, he proceeded to the Isiolo Police Station to file a report. Later, two officers accompanied him to the scene of the crime. Subsequently, he learnt that some items had been recovered and he was asked to go and identify them, which he did. He also knew that some suspects had been arrested. He went to see them and was able to identify them. The 1st appellant (Michael Murungi) and another individual were his neighbours, while the 2nd appellant (Samson Mwingirwa) and another person frequently visited his bar. He had receipts for the electric items stolen.

6. PW3 testified that she worked at the bar, and on 5th August 2014, the bar closed at approximately 11:00 p.m. The following morning, she received a call from PW4 and headed to their workplace around 7:00 am. Upon arrival, she found a crowd gathered outside. She heard them say that the deceased had been attacked and cut with a panga on his head. On entering the bar, she saw PW4 holding the deceased, who was bleeding. She went to the back of the bar and saw that the door had been removed and placed on the ground. She learnt from PW2 that several items were stolen.

7. PW2 asked her and PW4 to take the deceased to Isiolo District Hospital, which they did. He was admitted to hospital and they returned to their workplace. On 7th August 2014, PW2 informed her that the deceased had passed away. On 8th August 2014, she learned that some items had been recovered and were at the Isiolo Police Station. She went to identify them. She recognised the TV, DVD player, woofer, keg pump, and assorted beer.

8. PW4 Joy Makena testified that on 6th August 2014, she heard some noise coming from outside her house and, upon checking, saw people gathered. She went out, and on asking, she learnt that the bar had been broken into. She noticed the bar's metallic door had been removed and was on the ground. PW2 soon arrived and opened the bar, and they found the deceased inside, having been cut on the forehead. The witness assisted in getting a taxi, and accompanied him to the hospital, along with PW3.

The deceased was unable to speak. Later, she learnt that some stolen items had been recovered. She accompanied PW2 to the police station to identify the items. She did not know who broke into the bar.

9. PW5 Doreen Kathambi, testified that she worked in the kitchen at Sun Africa Bar. On 5th August 2014, she closed the kitchen at about 11:00 pm and went home. The next day, 6th August 2014, she arrived at work around 9:00 am and found a crowd gathered in the compound. After making inquiries she learnt that the bar had been broken into during the night. She saw that the back door of the bar had been removed, she also noted that 5kg of meat and a sufuria had been stolen from the kitchen. She did not know who had broken into the bar either.

10. PW6 PC Nixon Kiprop, assigned to the Petty Crimes Office at Isiolo Police Station, testified that on 6th August 2014, at around 10:30 a.m., they were informed by the Officer in Charge (OCS), Isiolo Police Station, that PW2 had made a report regarding a robbery. The OCS instructed him and PC John Baptista (PW7) to visit the crime scene. Upon arriving at the bar, they found that the door had been removed. PW2 reported that several items had been stolen, including a keg pump, assorted beers, a television, and a woofer. While they were inspecting the scene, they learnt that a person had been injured and taken to the hospital. They proceeded to Isiolo District Hospital, where they found a man named Karuru, who had injuries to his head and was unable to provide much information. He told them that a person named Mwingirwa had the torch that was used to light the place as he was being cut.

11. The following day, under the command of C.I. Ochido and other officers, PW6 and his team went to the Bula Pesa area, where they were informed of the suspects' whereabouts. They found the 2nd appellant and the 4th accused in the trial sleeping in one of the houses, where they recovered a video deck and an empty beer crate. They then searched the home of the 1st appellant, where they found the keg pump and the television. Next, they searched the house of the 2nd accused in the trial, where they recovered crates of beer and some metal bars. After completing the search, the four suspects were arrested and taken to Isiolo Police Station, where they were subsequently charged. Later, they received the report that the deceased, who had been injured during the robbery, had died.

12. PW7 Dr. Mohamed Abdikadir Guyo of Isiolo County Referral Hospital, produced the postmortem report prepared by Dr. Mogaka, with whom he had worked for over 2 years. He testified that the postmortem examination of the deceased was performed on 26th August 2014, at 6:00 pm. Dr. Guyo informed the court that upon external examination, the deceased was found to have a cut wound on the forehead. The wound extended from the posterior to the frontal bones and measured approximately 9 cm in length. On the tarsal anterior aspect, he had a large continual bruise, and the postmortem aspect had bruises. He also had multiple bruises on both upper and lower extremities. The cause of death was given as cardiopulmonary arrest due to severe head injury and a cut wound on the head frontal region.

13. PW8, PC John Baptista K. Wanjiku, attached to Isiolo Police Station, testified that on 6th August 2014, PW2 reported that his bar, Sun Africa, had been broken into during the night. Together with PW6, they visited the bar, where they confirmed that it had indeed been broken into. They found that the door had been hit by a stray metal bar and had been removed; the counter door had been broken, and that theft had occurred.

14. PW2 provided a list of the stolen items and detailed information about the incident. They were further informed that one person had been injured while sleeping inside one of the cubicles situated along the fence and had been taken to Isiolo District Hospital. He noticed a significant amount of blood on the clothes that the injured person had been sleeping on. Together with PW6, they proceeded to Isiolo District Hospital, where they found that the injured person had been taken to the theatre due to a severe cut on the head. They enquired from the deceased who had assaulted him, and he identified Mwingirwa

as one of the attackers. He appeared to be in much pain, and they were not able to interrogate him much.

15. They also searched for PW1, whom they found sleeping at his sister's house, not far from the scene of the crime. They arrested him. They also noticed that he had a swollen eye and was struggling to see properly. They took him to the police station, and on interrogating him, he also named the 2nd appellant as one of the assailants. When questioned about how he was able to identify the 2nd appellant, he explained that after the deceased was attacked, he was forced to lie face down. The 2nd appellant searched his pockets, and while searching, one of them used a flashlight to help the 2nd appellant to see. The flashlight enabled him to see and identify 2nd appellant.

16. PW8 further testified that during the investigations, they learnt that the 2nd appellant was a shoemaker at the market. They trailed him and determined his location, then laid an ambush between 3:00 a.m. and 4:00 a.m. and conducted searches in three neighbouring houses, where they recovered the stolen items. An inventory of the recovered items was prepared, and the two appellants signed it. Subsequently, they were arrested and escorted to Isiolo Police Station.

17. PW8 testified that on 8th August 2014, they returned to Isiolo District Hospital to check on the deceased but learnt that he had passed away. The postmortem examination confirmed that the deceased had died from injuries sustained to his head.

18. When put on his defence, the 2nd appellant (DW1) gave a sworn statement and testified that on 7th August 2014, he arrived home at around 7:00 p.m. At approximately 7:30 pm, his uncle came from Nairobi and spent the night at his house. Around 4:00 am the next morning, he heard a knock on the door. When he inquired who it was, he was informed that they were police officers, and they asked him to open the door. His uncle woke up and opened the door. The police officers entered the house, confiscated his TV and DVD player, and demanded receipts for them, which he provided. However, the OCS stated that the receipts were not genuine and ordered him to be arrested. After this, the officers continued the search of all the houses in the plot, where they confiscated several items, which were loaded into a police vehicle and taken along with the appellants to Isiolo Police Station. He was asked to sign the inventory for all the other items; he refused and was beaten.

19. It was also his case that if he had been seen during the robbery, it would have been reported to the police. Additionally, PW1 knew him; he would not have been called to identify him in an identification parade. He contested that the deceased had told the police that he had attacked him, basing the argument on the fact that those who took the deceased to the hospital claimed he was not speaking at the time. Thus questioning the police allegation that the deceased communicated with them. Lastly, he contended that if the amplifier had been removed from his house, the arresting officer would have stated so, but he did not.

20. On his part, the 1st appellant testified that on 7th August 2014, he took food to his family after work. After this, he visited a house where alcohol was being sold, and while drinking, the woman who owned the place asked him to wait so that he could escort her home. He ended up spending the night at her house. And later that night, he heard a knock on the door. His host inquired and was informed that the individuals knocking were police officers. They instructed her to open the door. When she opened, the officers entered and handcuffed him. They told him to lie down outside, alongside the 2nd accused in the trial. The officers conducted searches and removed various items from houses in the area, which were then loaded into a vehicle. He was then taken to his own home, where the police searched but found nothing. Eventually, he accompanied the officers to record his statement.

21. In its determination, the court was satisfied that all the ingredients of the offence of robbery with violence were proved. Further, the court found the appellants' defence were a mere denial and rejected them. The appellants were found guilty and sentenced to suffer death.

22. The appellants were dissatisfied with the trial court's judgement and preferred an appeal to the High Court. Upon considering the appeal, the learned Judge affirmed both the conviction and sentence.

23. Aggrieved by the decision of the High Court, the appellants lodged the instant appeal. The appellants filed separate grounds of appeal, both of which were lodged on 22nd December 2016. In addition, the 1st appellant filed supplementary grounds of appeal dated 25th June 2024. The appeals were heard together. The grounds of appeal are similar and are summarised as follows: the learned Judge erred in law by failing to recognise that the identification of the appellants did not meet the necessary threshold; the doctrine of recent possession was incorrectly invoked and applied; the burden of proof was improperly shifted to the appellants; there were procedural irregularities during the trial; the appellants strong and plausible defence was dismissed, by relying on contradictory testimonies to uphold the conviction instead of resolving these inconsistencies in favour of the appellants; by relying on uncorroborated circumstantial evidence in count II; failing to consider that key witnesses were not called; and for the 1st appellant, a complaint that the sentence was upheld based on the testimony of a co-accused person.

24. The matter proceeded by way of written submissions with brief oral highlights. Learned counsel, Mr. Muchangi, appeared for both appellants while Miss Adhi represented the State. Learned counsel for the appellants filed submissions dated 24th June 2024. Regarding identification, learned counsel for the appellants submitted that the conditions were not favourable, as detailed in PW1's testimony. In support of this proposition, he referenced the case of R vs. Turnbull & Others [1976] 3 All ER 549, in which Lord Widgery CJ outlined what the court should consider when evaluating evidence of identification. Learned counsel argued that the only source of light at the scene was a torch. He contended that the strength and position of the torchlight relative to the suspects was a critical factor that the court ought to have considered. He urged that since the victims who were being robbed were facing downward, the light must have been directed towards them. Under these circumstances, the only person positioned to see clearly with the torchlight was the holder of the torch and the individual searching the victims. The torchlight was behind the victims, and any attempt by the victims to turn around would have resulted in the eyes encountering the beam, which condition would make it very difficult to recognise anyone.

25. Regarding the death declaration by the deceased, learned counsel asserted that PW4 testified that the deceased was unable to talk, and this is further supported by the fact that the complainant did not mention any statements made by the deceased before he was taken to the hospital. Learned counsel added that given the circumstances surrounding the deceased during the robbery, he was not in a position to identify the attackers as he must have been in great distress due to the shock from the attack and the severe cut on his forehead.

26. On recovery of stolen items, learned counsel pointed out that none of the other witnesses testified that any stolen item was recovered from the 1st appellant. Neither did any of the witnesses corroborate the evidence provided by the arresting police regarding the removal of items from the 1st appellant's house. To support his argument, learned counsel relied on the case of Kelvin Nyongesa & 2 Others vs. Republic [2017] KEHC 1406 (KLR), where the learned Judge noted that the doctrine of recent possession allows the court to infer guilt if the accused is found in possession of the recently stolen property under unexplained circumstances. He also cited the case of Eric Otieno Arum vs. Republic

[2006] KECA 385 (KLR), in which the court stated that before a court can rely on the doctrine of recent possession as a basis for conviction in a criminal case, possession must be positively proved.

27. Regarding whether there was contradicting evidence, learned counsel submitted that the charge sheet indicated that all the stolen items recovered were valued at Kshs. 100,000, while PW8 stated that their worth was Kshs. 50,000. It also remained unclear whether the 1st appellant possessed a torch, based on the testimonies of PW1 and PW6.

28. As for the 1st appellant's defence, learned counsel contended that the court did not adequately address the same, particularly the assertion that he did not sign the inventory voluntarily. Further, the evidence provided by the 1st appellant, including receipts, was not taken into account at all.

29. Miss Adhi, learned prosecution counsel, filed both submissions and a list of authorities dated 20th June 2024. She isolated three issues for determination based on the grounds of appeal, namely, whether the first appellate court properly re-evaluated the evidence, whether the appellants were identified correctly, and whether the doctrine of recent possession was applicable.

30. On the duty of the second appellate court, learned counsel drew the court's attention to the case of Hillary Ndugutho Mwai & Anor vs. Republic [2021] KECA 1002 (KLR), where this Court held that on a second appeal, by dint of Section 361 of the *Criminal Procedure Code*, the court only considers matters of law and that therefore, the main ground raised by the appellant seeking re-evaluation of evidence will not stand this being a second appeal, as this Court's jurisdiction is limited. She contended that the two courts below considered the elements that constitute the offence of robbery with violence and established that the prosecution had proved them sufficiently. In support of this proposition, learned counsel relied on the case of John Kariuki Gikonyo vs. Republic [2019] KECA 1016 (KLR), where this Court outlined the ingredients of the offence of robbery with violence and further submitted that the trial court was aware of the ingredients of the offence of robbery with violence. The first appellate court, likewise, cannot be faulted for coming to such a conclusion.

31. On the participation of the appellants in the crime, the learned prosecution counsel submitted that the doctrine of common intention is crucial in determining criminal culpability. She contended that proof of guilt against the accused could be established through direct or circumstantial evidence, as was tendered by the prosecution against the appellants. In support, she cited the case of Uganda vs. Hussein Hassan Agade & 12 Others, Criminal Session Case No. 0001 of 2010, where the court held that for accused persons to be considered joint offenders, there must be proof of a common intention to engage in an unlawful purpose.

32. On the doctrine of recent possession, the learned prosecution counsel submitted that the doctrine is applicable only where the inculpatory facts, namely the possession of the stolen goods, are incompatible with innocence and incapable of explanation upon any other reasonable hypothesis than that of guilt. The court must also be sure that there are no other co-existing circumstances that weaken or destroy the inference of guilt. The State placed reliance on the Court of Appeal case of David Mutune Nzongo vs. Republic [2014] KECA 699 (KLR) & Francis Kariuki Thuku & 2 Others vs. Republic [2010] eKLR in support of the argument that there is a rebuttable presumption of fact that the appellant if found in possession of a stolen item, he is either the robber or a guilty receiver unless he offers a reasonable explanation as to his possession of suspected stolen items.

33. As regards the appellants' defence, the learned prosecution counsel submitted that they are a sham meant to hoodwink the court and should thus be dismissed. Further, she asserts that the evidence tendered by the prosecution displaces the defence raised by the appellants as they were placed squarely at the scene.

34. Learned prosecution counsel submitted further that the complaint concerning Section 169 of the *Criminal Procedure Code* should be dismissed as the appellants did not point out specifically what was lacking in the judgment.

35. On whether there were contradictions or inconsistencies in the testimonies, the learned prosecution counsel submitted that there were none, and even if there were any, they were minor and did not go to the root of the prosecution case. Hence, this Court should ignore them.

36. On sentencing, the Learned prosecution counsel submitted that based on the aggravating circumstances of how the crime was committed and the fact that the deceased succumbed to injuries inflicted on him during the attack, the death sentence is appropriate. Further, the State submits that the trial court's hands were tied due to the mandatory nature of the sentence. The sentence was legally sound, as provided for in Section 296(2) of the *Penal Code*, and the court below cannot be faulted for imposing and upholding the sentence.

37. Having duly considered the record, the appellants' grounds of appeal and the rival submissions, we start by reminding ourselves of the role of this Court in a second appeal, where the court is restricted to addressing itself to matters of law only as provided in Section 361 of the *Criminal Procedure Code*. This Court will not usually interfere with concurrent findings of fact by the two courts below unless such findings are not based on evidence, they are based on a misapprehension of the evidence, or the courts below acted on wrong principles in making the findings. In Karingo vs. Republic [1982] KLR 213, this Court stated as follows:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."

38. In revisiting the record and in light of the rival arguments set out in the submissions by the appellants and the respondent, we discern two issues for our consideration namely: whether the identification of the appellants was proper and whether the doctrine of recent possession was applied correctly.

39. To satisfy that the offence of robbery with violence occurred, it must be proved that more than one person was involved in the act; the theft took place, the attackers were armed with dangerous weapon(s), and before or after the attack, they threatened or used violence. This Court, in the case of John Kariuki Gikonyo vs. R [2019] eKLR, restated the ingredients as follows; -

> "The ingredients for the offence of robbery with violence contrary to section 296 (2) of the *Penal Code* were set out in Johanna Ndung'u vs Republic- Criminal Appeal No 116 of 2005 (unreported) as follows: -
>
> a. if the offender is armed with any dangerous or offensive weapon or instrument, or;
>
> b. if he is in the company with one or more other person or persons, or;
>
> c. if at or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person.
>
> Proof of any one of the ingredients of robbery with violence is enough to sustain a conviction. See Oluoch vs Republic (1985) KLR 549. Evidential facts tendered for proof of

the ingredients of the offence must however be cogent and consistent save for such minor flaws as are curable under section 382 of the *Criminal Procedure Code*."

40. The two courts below made a finding of fact that there was a break-in at the bar on the night of 5th August 2014; two persons were injured, leading to the death of one of them; property was destroyed, and several items were stolen. This has indeed not been challenged.

41. PW6 & PW8 police officers who investigated the crime informed the court that the person who was fatally injured gave the name of one of the attackers, who happens to be the 2nd appellant. The evidence of PW3 & PW4, who accompanied the deceased to the hospital, is that he was severely injured and was unable to talk. Indeed, PW6 & PW8, in their testimony, confirmed the injuries that the deceased had undergone surgery and that though he did not speak much, he gave the name of the 2nd appellant as one of the attackers. The 2nd appellant doubts that the deceased gave his name.

42. PW1, on his part, testified that although it was dark, he was able to see the person who removed money from his pocket as one of the other attackers illuminated the torchlight as he was being searched, and he identified the 2nd appellant. He had seen him before as he had repaired his shoe at the Nanyuki stage. PW8 corroborated this information and informed the court that the information from PW1 enabled them to trail the 2nd appellant to his house, where the recovery was made.

43. Both appellants took issue with identification in the High Court as they have done in their appeal to this Court. The 2nd appellant also took issue with the conduct of the identification parade. There is evidence that PW1 identified him at an identification parade. However, the 2nd appellant did not raise any question on this issue while cross-examining PW1, and neither did the officer who conducted the identification parade adduce evidence; the trial court gave it no weight. The issue was not raised before the trial court, and the learned counsel did not further address it in his submissions to us. We can safely say nothing much turns on the identification parade. We shall address the issue of identification of the assailants at the time of the robbery, as that is crucial and has been raised by both parties.

44. The first appellate court did not believe the evidence of PW1 in totality. On the other hand, in its judgment, the trial court had this to say on identification of the assailants:

> "… In my considered opinion though the robbery took place at night and the only source of light was a torch according to PW1's evidence he was however able to identify one Mwingirwa and upon investigations recoveries were made from the house …."

45. In the case of Wamunga vs. Republic [1989] KLR 424, this Court had this to say:

> " Evidence of visual identification in criminal cases can bring about miscarriages of justice, and it is of vital importance that such evidence is examined carefully to minimise this danger. Whenever the case against a defendant depends wholly or to a greater extent on the correctness of one or more identifications of the accused which he alleges to be mistaken the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification … 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 conclusion …"

In the case of Maitanyi vs. R [1986] KLR 198, the court was of the following view:

> "That may sound too obvious to be said, but the strange fact is that many witnesses do not properly identify another person even in daylight. It is at least essential to ascertain the nature of the light available. What sort of light, its size, and its position relative to the suspect, are all important matters helping to test the evidence with the greatest care. It is not a careful test if none of these matters are known because they were not inquired into. In days gone by, there would have been a careful inquiry into these matters, by the committing magistrate, state counsel and defence counsel. In the absence of all these safeguards, it now becomes the significant burden of senior magistrates trying cases of capital robbery to make these enquiries themselves."

46. PW1's evidence that he saw the 1st appellant, by the aid of a torchlight, was not sufficient. It was necessary to determine the size of the torch, its brightness, and the distance between the source of light and the assailant. In this case, PW1 stated that he was facing down; he did not specify whether the light was shown in his direction or the direction of the assailants, whether it was bright enough, or even how far the light was. As seen in the cited cases, the evidence of identification in difficult circumstances needs to be treated with utmost care. We find that the two courts below treated the question of identification in a casual manner.

47. We concur with the trial court's observation, which differs from the first appellate court's finding that PW1 was a victim and not one of the attackers or someone who acted in collusion with them. We respectfully disagree with the learned Judge's sentiments. We believe, as did the trial court, that PW1 was a victim alongside the deceased. He may have been shocked by the incident and was injured, as confirmed by PW6 & PW7; he had a swollen eye and was struggling to see. When the police caught up with him, he was found sleeping at his sister's house. His account of what happened and how he identified the 2nd appellant is consistent and believable. He repeated to the trial court the same information he gave to the police.

48. As for the naming of the 1st appellant by the deceased, the trial court treated it as a dying declaration. A dying declaration is admissible as seen in Section 33(a) of the *Evidence Act*, which states:

> When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

49. Courts, in considering dying declarations, have stated the need to be cautious and to consider whether there is evidence corroborating the same, depending on the circumstances surrounding the case. In the case of Peter Kimathi Kanga vs. Republic [2015] eKLR, this Court gave guidance on how to handle dying declarations as follows:

> "Courts have on their part formulated rules to guide the reception and weight to be attached to dying declaration, and it is sensible that one makes when death is imminent will be accorded a high degree of credit since in the extremity of life's ebbing away, it is expected that one has a strong motive to be truthful. In the interests of fairness to an accused person, a rule has also developed that a court should approach a dying declaration with caution and act

on it only if satisfied as to its veracity, and if there is corroboration, but only as a cautionary rule of practice, not a legal on requirement.” (Emphasis added)

50. In this instance, there is a contention whether the conditions were favourable to identification. There is no dispute that the place was dark and a touch may have been used. The 1st appellant says he was robbed after the deceased was attacked, and that is when the torch was illuminated to allow him to be searched. There is a need to test the dying declaration against the conditions at the time. The place was dark as the deceased was attacked, and we do not have evidence that he knew the attacker. This, coupled with the evidence that he was not able to speak after the attack, and that he had had surgery just before PW6 & 8 visited, leaves doubt in our minds whether the deceased spoke, and if he did, that he identified the 1st appellant.

51. In their judgments, the two courts below considered the doctrine of recent possession based on the evidence of PW6 & PW8, who testified that they trailed the 2nd appellant to the plot where he and the 1st appellant resided. In his testimony, PW6 informed the court that when they laid an ambush in the house where the 2nd appellant and the 4th accused in the trial were sleeping, they recovered a video deck and an empty crate of beer. In the 1st appellant’s house, they recovered a keg pump and a TV. PW8 was not clear.

52. In their defence, the appellants denied that they were caught with stolen items. The 2nd appellant testified that he had produced receipts for his TV and the DVD player. On his part, the 1st appellant maintained that nothing was recovered from his house. The two courts below believed that recoveries were made from the appellants’ houses as detailed by PW6 and PW8 in their respective testimonies. It is said that PW2 identified the items. These, other than the keg pump, are everyday household items. However, there is no evidence that PW2 produced receipts to prove ownership of the recovered items. In the case of William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) vs. *Republic (Criminal Appeal 49 of 2020)* [2022] KECA 23 (KLR), the court cited with approval the case of Athuman Salim Athuman vs. Republic [2016] eKLR, the laid down circumstances where the doctrine of recent possession is applicable, in the following terms; -

> “ It is trite that 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 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 to the other.”
>
> (emphasis added)

In the case of David Mugo Kimunge vs. Republic [2015] KECA 730 (KLR), this Court stated:

> “The doctrine of recent possession has been applied in numerous decisions of this court, and the High Court properly cited the Kahiga case (supra) as one for the elements necessary for proof. We may reproduce the elements from that case:
>
> “It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.

In other words, there must be positive proof: i). that the property was found with the suspect;

ii. that the property is positively the property of the complainant;

iii. that the property was stolen from the complainant;

iv) 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 ease with which the stolen property can move from one person to the other."

53. The question is whether the necessary ingredients of recent possession have been proved? We find, in all fairness to the appellants, that there was no concrete proof by way of receipts to prove that indeed the recovered item belonged to the complainant. As noted above, the items were everyday household items, and pointing them out was not adequate. The complainant should have produced the receipts with serial numbers, etc.

54. Ultimately, we allow the appeal, set aside the conviction and the sentence. The appellants are set free unless otherwise lawfully held.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF JULY, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL ALI-ARONI

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR