



**Epeyon & another v Republic (Criminal Appeal 117 of 2020)
[2024] KECA 287 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KECA 287 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 117 OF 2020
F SICHALE, FA OCHIENG & WK KORIR, JJA
MARCH 8, 2024**

BETWEEN

LOKITO EPEYON 1ST APPELLANT

ZAKARIA EPUR EKIRU 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Lodwar (J. Wakiaga, J.) delivered and dated 3rd April 2019 in HCCRA No. 14 of 2018)

JUDGMENT

1. Lokito Epeyon (1st appellant) and Zakaria Epur Ekiru (2nd appellant) are before us exercising their right of appeal for the second time. The two appellants were first charged alongside one Isaac Nyongesa with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars of the charge were that on 22nd March 2016 at Loturerei area in Turkana Central Sub-County within Turkana County they jointly robbed Peter Ekarani of his motorcycle registration number KMDS xxxxK valued at KSh. 130,000 and at, immediately before or immediately after the time of such robbery used actual violence on the said Peter Ekarani.
2. Before the trial Court, the appellants pleaded not guilty and upon trial, they were found guilty, convicted and sentenced to suffer death. Being dissatisfied with the judgment of the trial Court, the appellants lodged an appeal before the High Court. After hearing the appeal, the High Court affirmed the conviction of the appellants finding that they were positively identified. The first appellate Court additionally relied on the doctrine of “last seen” as well as the confession of the 2nd appellant to affirm the conviction. The High Court consequently dismissed their appeal in its entirety.



3. The appellants are dissatisfied with the judgment of the first appellate Court and they have approached this Court challenging that decision on the grounds: that the evidence against them was inconclusive; that the alleged confession did not conform to the provisions of the law; that the elements of the offence were not proved; that there was no proof of the element of violence; that the evidence tendered by the prosecution did not link them to the offence; that the learned Judge did not consider their mitigation or the fact that the sentence was illegal; and, that they were not afforded a fair trial.
4. In a nutshell, the case against the appellants was that one Peter Ekarani who is believed to have died during the robbery was employed by Felix Ibuya (PW4) as a motorcycle rider. We shall henceforth refer to Peter Ekarani as the deceased. Josephat Ekai Edung (PW1) was a brother to the deceased and on the material day, he came back home from escort duties and realized that his brother was not around. The deceased failed to return home and the next day he started looking for him. PW1 later got wind of somebody having been murdered and his body mauled by wild animals. He proceeded to the scene where he found his deceased brother's clothes. He reported the matter and later went to the scene alongside Robert Lokwawi (PW6) and the OCS of Lodwar Police Station.
5. On her part, Cynthia Lokichar (PW2) testified that on the day that the deceased disappeared she was at her kiosk when she saw the 1st and 2nd appellants seek transport services from the deceased.

Her testimony was that she sold the 1st appellant a packet of cigarettes and also assisted the trio with a jerrycan. Shortly thereafter the two men left being carried on a motorbike by the deceased. On 16th May 2016, PW2 spotted the 1st appellant. She alerted police officers who came and arrested him. The 2nd appellant was also later arrested from his hideout.
6. The 2nd appellant then led the police to the home of Epem Ewoi Lochodo (PW3) in Kitale where the 2nd appellant claimed they had spent the night on the date of the robbery. PW3 in turn led police officers to the home of the 3rd accused person (Isaac Nyongesa) from where the stolen motorcycle was recovered. The 2nd appellant also recorded a confession before Chief Inspector of Police Safari Katana (PW8) detailing how the robbery took place.
7. In his testimony, Omar Alila (PW5) confirmed having seen the deceased in the company of the appellants on the day the deceased went missing. He stated that he even assisted them with an air pump. He also saw the appellants leaving in the company of the deceased.
8. When this matter came up for hearing on 7th November 2023, learned counsel Mr. Oyaro appeared for the appellants while learned counsel Mr. Kakoi appeared for the respondent. They had filed written submissions which they sought to rely on.
9. In the submissions dated 31st October 2023, learned counsel Mr. Oyaro commenced by submitting that the appellants were not afforded a fair trial. Counsel argued that although the appellants were arrested during a crackdown on illicit brews, they were instead charged with robbery with violence. Counsel also submitted that the appellants were held in police custody from 15th May 2016 to 23rd May 2016 in contravention of the constitutional requirement that suspects should be presented to court within 24 hours of their arrest. Counsel relied on the case of *Ann Njogu & 5 others v. Republic* [2007] eKLR in support of the submission that detention beyond the constitutional limit is a violation of the right to fair trial guaranteed by Articles 49 and 50 of [the Constitution](#).
10. Turning to another ground of appeal, counsel submitted that the appellants were convicted despite the elements of the offence of robbery with violence not being proved. Counsel asserted that none of the exhibits produced at the trial was recovered from the appellants and neither did any of the witnesses see the appellants commit the offence. Counsel stressed that the evidence on record never linked the



appellants to the offence. Counsel additionally faulted the trial Court for relying on the evidence of a single witness. He also argued that the police were complacent in their investigations. In support of his argument that the investigator was complacent, counsel relied on the cases of *John Kenga v. Republic*, Criminal Appeal No. 1126 of 1984 and *Ramson Ahmed v. Republic* [1955] Vol. 2 (EACA) 22 to submit that the prosecution did not avail all the witnesses and evidence thereby leading to failure to establish all the elements of the offence.

11. Concerning the question of the sentence, learned counsel Mr. Oyaro acknowledged that at the time the trial Court and the first appellate Court sentenced the appellants, the death sentence under section 296(2) of the Penal Code was deemed mandatory. Counsel, however, urged us to set aside the sentence based on the appellants' mitigation and the decisions in the cases of *Francis Karioko Muruatetu & Another v. Republic* [2017] eKLR and *William Okungu Kittiny v. Republic* [2018] eKLR. In the end, learned counsel Mr. Oyaro urged that the appeal should be allowed and because the appellants have reformed, their sentences should be reduced to period already served.
12. For the respondent, learned counsel Mr. Kakoi relied on written submissions dated 31st October 2023. In response to the appellants' submission that they were not accorded a fair trial, counsel relied on *Peter Kihia Mwaniki v. Republic* [2010] eKLR and urged us not to address the issue as it was not raised before the first appellate Court.
13. Opposing the appellants' contention that the prosecution failed to establish the elements of robbery with violence, counsel submitted that the prosecution proved its case through circumstantial evidence and the application of the doctrine of recent possession. Counsel cited the case of *Augusti Erasmi v. Republic* [2016] eKLR and submitted that the doctrine of recent possession was properly invoked by the trial Court and the first appellate Court. Relying on *Oluoch v. Republic* [1985] eKLR, learned counsel submitted that the elements of the offence of robbery with violence were sufficiently proved by the prosecution.

Additionally, counsel submitted that the confession of the 2nd appellant was properly recorded and produced before the trial Court without any objection.
14. Finally, learned counsel Mr. Kakoi urged us to maintain the death sentence asserting that it was the appropriate punishment in the circumstances of this case. It was counsel's ultimate submission that this appeal is for dismissal in its entirety.
15. This being a second appeal, our mandate as prescribed in section 361(1) of the Criminal Procedure Code is limited to considering matters of law. Matters of fact which include severity of sentence are not within our purview. However, questions surrounding the legality of a sentence are deemed to be matters of law. The role of this Court on a second appeal has been stated in several decisions including *Adan Muraguri Mungara v. Republic* [2010] eKLR where it was held that:

“As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere.”

16. We have given due consideration to the record of appeal, the memorandum of appeal and the rival submissions of the parties. In our view, the following issues determine this appeal: whether the doctrine of recent possession was properly applied; whether the principle of “last seen” was properly invoked; whether the elements of the offence of robbery with violence were established; and, the legality of the sentence.



17. Before addressing the issues identified above, we note that the 1st appellant has, albeit, for the first time raised the issue of the violation of his right under Article 49(1)(f) of *the Constitution*. The 1st appellant contends that he was arrested on 15th May 2016 and was arraigned in Court on 23rd May 2015 hence he was held in custody for about 7 days contrary to the constitutional provision that required that he be presented to court within 24 hours of his arrest. We agree with learned counsel for the respondent that we should avoid a determination of this issue. Our position finds support in *John Kariuki Gikonyo v. Republic* [2019] eKLR where the Court held that:

“[17] Similarly from the grounds of appeal and the submissions by counsel for the appellant the question of whether the amended charge sheet was signed by a qualified person and whether the charge sheet was fatally defective for failure to describe the property was also not raised before the two courts below. Though the appellant was represented by counsel, no mention of this was made before the first appellate court nor has any explanation been given for such failure. We also find some of the contestations with regard to procedural irregularities such as whether the substance of the charge was explained to the appellant; whether the appellant ought to have been informed of his right to recall witnesses and/or of his right to counsel; and whether the trial court properly weighed the propriety of allowing the amendment of charge prior to allowing it; are all issues that only sprung up in the present appeal. The question that follows is how then can the learned first appellate Judge be faulted for having failed to address issues that were never placed before her” This Court when faced with a similar issue in *Alfayo Gombe Okello v. Republic* [2010] eKLR Criminal Appeal No. 203 of 2009; held as follows:

“...the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.”

(18) In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues introduced for the first time on a second appeal.”

18. This Court being an appellate court can only entertain issues that were considered by the court being appealed from. Thus, at page 118 of the 10th Edition of *Black’s Law Dictionary* an appeal is defined as seeking “review (from a lower court’s decision) by a higher court.” In other words, an appeal is the process of asking a higher court to review the decision of a lower court because the appellant does not agree with the decision. That means that an appeal can only lie where there is a decision of a lower court. Where the court appealed from made no determination on an issue because that issue was not raised before it, the determination by the appellate court would not constitute a judgment on an appeal. The importance of raising issues at the trial or on first appeal was explained in *Peter Kihia Mwaniki v. Republic* [supra] as follows:

“The remaining ground of appeal concerns delay in presenting the appellant to the trial court after his arrest. Section 72(3)(b) of the old Constitution stipulates that a person arrested for a capital offence should be presented to the court as soon as is reasonably practicable. There is a time frame of 14 days, beyond which the prosecution may be required to offer proof to show that the delay beyond that period was necessary for the conclusion of investigations and the delay was not unreasonable...Neither the appellant nor the prosecution raised any issue concerning the delay in bringing the appellant to court. Nor was the issue raised before the superior court on first appeal. It was in either of those courts that the issue should have been raised so that an inquiry would be made regarding the issue, when both sides would



possibly call evidence on the matter...By raising the issue at this late stage the appellant has, in a way denied the prosecution the Constitutional opportunity to explain the delay. This ground likewise has no merit.”

19. Next, we address the issues as to whether the doctrine of recent possession was properly applied, whether the principle of “last seen” was properly invoked and whether the elements of the offence of robbery with violence were proved. The evidence adduced against the appellants was circumstantial in nature and the main question therefore is whether the circumstantial evidence met the threshold to sustain conviction of each of the appellants. This Court in *Chiragu & Another v. Republic* [2021] KECA 342 (KLR) cited with approval the decision in *Abanga alias Onyango v. Republic* CR. App NO. 32 of 1990 (UR) which set the factors that a court faced with circumstantial evidence must consider. It was stated that:

“It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established,
- (ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (iii) the circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else.”

20. In holding that the chain of events was complete and linked the appellants to the offence charged, the first appellate Court considered two doctrines, that of recent possession and that of “last seen”. With regard to the doctrine of recent possession, we refer to the decision of the Canadian Supreme Court in *Republic v. Kowkyk* (1988) 2 SCR 59, as cited by the Court in *David Mugo Kimunge v. Republic* [2015] eKLR, where it was held as follows:

“Upon proof of the unexplained possession of recently stolen property, the trier of fact may –but not must-- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatory, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.”

21. The doctrine of recent possession was applied in relation to motorcycle registration number KMDS xxxxK. This motorcycle belonged to PW4 and he was able to identify it using its chassis/frame number. This motorcycle was recovered with the help of the 2nd appellant who led the police to the home of PW3. PW3 confirmed having played host to the appellants who had the same motorcycle. PW3 then led the police to the home of Isaac Nyongesa who was the 3rd accused person from where the motorcycle was recovered. PW3 testified that the appellants had requested him to look for a purchaser of the said motorcycle and that is when he led them to Isaac Nyongesa who purchased the motorcycle. From this chain of evidence, only one conclusion can be reached, that the events create a complete chain linking the appellants to the motorcycle in question. By virtue of the provisions of section 111(1) of the *Evidence Act*, the appellants were under an obligation to tender an explanation of how they



came to be in possession of the motorcycle which was in the custody of the deceased on the day he disappeared. However, the appellants having been found in possession of the stolen motorcycle soon after it disappeared, did not offer any explanation on how the same came to be in their hands. This being the case, we find no fault on the side of the trial Court and the first appellate Court in the manner in which they invoked and applied the doctrine of recent possession in this case.

22. The other complaint by the appellants is that the courts below erred in the manner in which they invoked and applied the doctrine of “last seen”. Regarding the application of the doctrine of “last seen”, the Court in *Moingo & another v. Republic* (Criminal Appeal 90 of 2018) [2022] KECA 6 (KLR) stated that:

“The fact that the deceased was last seen in the hands and restraint of the appellants, a prima facie case was established to require the appellants to give a reasonable explanation as to what befell him. Even though the onus of proof in criminal cases always rests squarely on the prosecution at all times, the Last Seen doctrine in the prosecution of murder or culpable homicide cases is that, where the deceased was last seen with the accused, there is a duty placed on the accused to give an explanation relating to how the deceased met his/or her death. In the absence of any explanation, the court is justified in drawing an inference that the accused killed the deceased (see the Nigerian case of *Moses Jua v the State* [2007] PELR-CA/11 42/2006).”

23. We are aware that in the cited case, the Court was dealing with the application of the “last seen” doctrine in relation to a murder charge. The rationale however remains the same, as even in this case the victim of the crime was still missing and was presumed dead. In this case, PW2 and PW5 testified that they knew the appellants quite well. They also testified that on the day the deceased disappeared, he left in the company of the appellants. Later on, PW1 identified the clothes of his brother next to mauled remains of a human being. In this instance, the evidence on record placed the appellants and no other person in proximity to the deceased’s disappearance and the theft of his motorcycle. In their defence, the appellants merely denied ever meeting the deceased. In light of the evidence of PW2 and PW5, they owed the court an explanation of what happened to the motorbike rider who had last been seen leaving in their company. This, they did not do, and therefore we find that the two courts below properly applied the doctrine of “last seen” in linking the appellants to the theft of the motorcycle.

24. The final question on the issue of conviction is whether the evidence on record established the offence with which the appellants were charged. It should be recalled that the three ingredients of the offence of robbery with violence under section 296(2) of the Penal Code are disjunctive and proof of any one of them is sufficient to sustain a conviction. Thus, in *Dima Denge Dima & others v. Republic* [2013] eKLR it was stated that:

“The elements of the offence under Section 296

- (2) are, however, three in number and they are to be read not conjunctively, but disjunctively. One element is enough to found a conviction.”

25. In this case, there is no doubt that there was theft of motorcycle registration number KMDS xxxxK. The evidence on record also linked the appellants to the theft of the said motorcycle. There is no doubt that the appellants were together before and after the commission of the offence. This was proved by the evidence of PW2 and PW5 who last saw the deceased with the appellants and that of PW3 who played host to the appellants and later took them to Isaac Nyongesa who bought the stolen motorcycle. Therefore, the only plausible conclusion is that the appellants were together during the commission of the offence.



26. Section 296(2) of the Penal Code provides that:
“(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

(Emphasis ours)

From the cited provision, it follows that even without establishing whether violence was used at the time of the theft, there is conclusive evidence that the appellants were in the company of each other hence fulfilling the ingredient which states that the offence of robbery with violence is established if the thief “is in company with one or more other person or persons”. This alone is sufficient to sustain a conviction for robbery with violence under section 296(2) of the Penal Code. The appellants’ complaint that the charge of robbery with violence was not proved is therefore without merit and is dismissed.

27. On the basis of the foregoing, we find the appeal against conviction to be without merit. Both the trial Court and the first appellate Court correctly applied the law in finding the appellants guilty of the offence of robbery with violence as legislated in section 296(2) of the Penal Code. The appeal against conviction is therefore dismissed and the conviction upheld.

28. The final issue is in relation to the sentence. We commence by reiterating that under section 361(1) of the Criminal Procedure Code, severity of a sentence is a matter of fact and matters of fact do not fall within our jurisdiction. However, the question of the legality of a sentence squarely falls within our jurisdiction. The appellants were sentenced to suffer death, and as appreciated by their counsel, the prevailing jurisprudence at that time was that the death sentence was mandatory for adults of sound mind convicted for robbery with violence. However, the emerging jurisprudence is that courts are slowly moving towards imposing definite jail terms. It is on this basis that we find that matters of law have been raised with regard to the appellants’ sentences.

29. In sentencing the appellants, the Court is required to consider both the aggravating and mitigating factors. Concerning the aggravating factors, we note that the deceased in this case has never been found and is presumed dead. We also note that the appellants were known and trusted by the rider and despite all that, they, as per the confession of the 2nd appellant, killed him in the thicket and left his body to be mauled by wild animals. On the other hand, whereas the 1st appellant had nothing to say in mitigation, the 2nd appellant stated that he was a breadwinner to his ageing parents who depended on him. Considering the heinous manner in which this offence was committed, a custodial sentence was indeed called for. An imprisonment for a term of 45 years in prison for each of the appellants would be appropriate.

30. The upshot of the foregoing is that the appeal against conviction is without merit and is hereby dismissed. The appeal against sentence partially succeeds. The death penalty is set aside and substituted with a sentence of 45 years’ imprisonment.

31. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 8TH DAY OF MARCH, 2024

F. SICHALE

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JUDGE OF APPEAL



F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

