Gichunge & another v Republic (Criminal Appeal 44 of 2018)
[2024] KECA 614 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 614 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 44 OF 2018

PO KIAGE, FA OCHIENG & WK KORIR, JJA

MAY 24, 2024

BETWEEN

JAMES KAHIGA GICHUNGE ..... 1ST APPELLANT

SAMUEL KIPROTICH KIRUI ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Bomet, (M. Muya, J.) dated 29th June 2018)

JUDGMENT

1. The appellants herein were charged jointly with others not before the court, with three counts of robbery with violence contrary to Section 296(2) of the Penal Code.

2. The particulars of the offence in Count I were that on 15th March 2013 along Mosiro-Ntulele road in Narok East District in Narok County, the appellants jointly with others not before court, while armed with dangerous weapons namely, firearms, robbed Dickson Moseti Mirieri of Kshs. 5,000 and one mobile phone make Nokia 1100 valued at Kshs. 2,000, and immediately before or immediately after the time of such robbery, threatened to use actual violence against the said Dickson Moseti Mirieri.

3. In Count II, the appellants were accused of robbing Tate Nkaratoi Kshs. 30,000.

4. In Count III, the appellants were accused of robbing PC David Lialo of one G-3 rifle service No. 96-081908 and 20 rounds of

7. 62 x 5 mm ammunitions, all valued at Kshs. 96,900.

5. In the alternative to Count I, the 1st appellant was charged with being in possession of a firearm without a firearm certificate contrary to Section 4(2)(a) as read with Section 4(3)(a) of the *Firearms Act*.

6. In the alternative to Count II, the 2nd appellant was charged with being in possession of a firearm and ammunition without a permit or licence contrary to Section 4A(1) (a) of the *Firearms Act*.

7. The appellants denied the charges and soon thereafter, a trial ensued. The prosecution called 11 witnesses in a bid to advance their case against the appellants. The appellants each gave an unsworn testimony and called no witnesses. After the trial, the appellants were found guilty of the three Counts of robbery with violence and convicted accordingly. They were sentenced to death as provided for by the law at the time.

8. The prosecution case was that Dickson Moseti Mirieri, (PW1) was a driver based in Narok town at the time of the incident. On the material date at about 6:30 pm, while on his way back from transporting goods to Mosiro area, he, his conductor, and a passenger were confronted by four people who were wearing AP uniforms and were each armed with a gun. There were four other people in civilian clothes. They were ordered to raise their hands as their assailants demanded money and ransacked their pockets. They took his mobile phone and Kshs. 5,000. They were ordered to crouch behind a pickup van where they were subsequently tied with ropes and driven to a forest where they were guarded by two people.

9. After about an hour, the pickup was driven to the main road where it was used to block other vehicles. The first vehicle to be blocked was ferrying police officers. They exchanged a few words and thereafter there was a shootout. A KWS van appeared and proceeded to call for reinforcement. In the meantime, they managed to untie themselves and went to Narok police station where they reported the incident.

10. CPL Peter Ngure, (PW2) was based at Narok KWS Offices. On 15th May 2014, he received information that there was a man in possession of an elephant tusk who was looking for a buyer. They arrived at Kilindoni area of Transmara at about 9:30 pm where four men appeared on a motorbike. They alighted and chased the men leading to the arrest of the 2nd appellant. He was found with a G-3 rifle in his inner jacket pocket. The rifle had 12 rounds of ammunition. He was taken to Bomet police station.

11. CPL Ibrahim Dido, (PW3) was based in Narok at the material time. He went with PW2 and other police officers to meet the seller of an elephant tusk. They met four men who arrived on motorbikes and agreed on the price of Kshs. 8,000/- per kilogram. While going to collect the tusks, they laid an ambush and managed to arrest the 2nd appellant. He was found with a G- 3 rifle which had 12 rounds of ammunition. He was taken to Bomet police station.

12. PC David Lialo, (PW4) was based at Ntulele police station. On 13th March 2013 while in the company of the late CPL Otieno, the father of an abducted girl, the boy who had allegedly abducted the girl, and the driver heading to Turumet area following up on an abduction report, their vehicle was blocked by a pickup whose occupants started firing at them. He escaped by rolling out of the vehicle through the passenger door. He lost consciousness and later learned that his companions were all killed.

13. When he woke up a day later, he was at Narok Hospital. His rifle, serial No. 081908 was missing but it was later recovered. The arms movement register showed that he had been given a rifle serial No. No. 96081908 with 20 rounds of ammunition. He was not able to identify the assailants as it was dark but he noticed that they were wearing police uniforms. His colleague's AK 47 also went missing after he was shot.

14. CPL Rashid Isaac Ali, (PW5) was based at Narok KWS. He was on patrol on 15th May 2014 at about 9:00 pm when they received information that there were four people in possession of elephant tusks. They proceeded to Kilindoni where they met the four men and managed to arrest the 2nd appellant. He was found with a G- 3 rifle which had 12 rounds of ammunition. He was taken to Bomet police station.

15. Michael Mutuo, (PW6) worked with KWS. He was in the company of his three colleagues in a landrover on the material date. They were on their way to Mosiro. They saw two vehicles stationed on the road. One person lay dead inside the vehicle while the other lay close to the vehicle. The occupants of the pickup had their hands tied. They reported the matter at Narok police station.

16. Anthony Njoroge, (PW7) was in the company of PW6 and others.

    He reiterated the testimony of PW6. He stated that three people had been killed.

17. PC Peter Mulwa, (PW10) was based at Narok police station. He was on patrol with PC Erastus Macharia on 29th April 2013 when they received information that suspected thieves were hiding in vegetable stalls. They proceeded to the stalls where they arrested the 1st appellant who had in his possession a Baretta gun with 9 rounds of ammunition, 2½ inches nails, and a torch. He was taken to Narok Police Station.

18. Put to his defence, the 1st appellant stated that he was on his way home on 29th April 2014 at about 9:00 pm after buying two rolls of bhang when he met two police officers. The officers searched him and found the bhang. They arrested him and took him to Narok Police Station. He stated that he was charged with an offence he did not commit.

19. The 2nd appellant stated that he did not know the 1st appellant and that the charges against him were not correct.

20. The learned Judge held that the evidence linking the 1st appellant to the robbery was the recovery of the Baretta gun allegedly in his possession when he was arrested. The report by PW9, a ballistic expert showed that the gun was used in the incident on 13th March 2013 where a police officer and two civilians were killed.

21. The 2nd appellant was linked to the robbery because the rifle he was found with was stolen during the incident on 13th March 2013 and had been given to PW4 on the material date but he had lost it while he was unconscious.

22. These two firearms found in possession of the appellants on separate occasions were examined and found to match the happenings of 13th March 2013.

23. The learned Judge proceeded to hold that the 1st appellant was arrested about a month after the incident and he was found in possession of a Baretta gun which upon examination was found to have been used in the robberies at Ntulele, while the 2nd appellant was arrested close to two years later with a rifle which had been stolen from PW4.

24. The learned Judge addressed the issue of contradictions as follows:

> "It is the contention by the defence that the evidence by PW2, PW3, and PW4 was contradictory. It is further contended that a G-3 rifle cannot fit in a jacket pocket whereas PW3 testified that it was on a shoulder and covered with a jacket. It is further submitted the PW11 gave the serial No. of the G-3 rifle as KPG 81908 whereas PW4 gave the serial No. as 96081908.
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> It is further submitted that if the G-3 rifle was used and produced in Githunguri court how come it was later recovered at Kilgoris? It is also contended that the movement of firearm register No. 3 was tampered with
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> as a serious rubbing and alterations stating that the firearm was lost."

25. The learned Judge held that there were minor discrepancies as to where exactly the G-3 rifle was recovered and the said contradictions were not fatal to the prosecution case. The learned Judge also held that only the cartridge case was produced in Githunguri court and not the rifle itself, and that there were no serious alterations in the firearm movement register.

26. The learned Judge held thus on his satisfaction that the doctrine of recent possession had been properly invoked;

> "This court is of the view that a gun is not an item in the league of a mobile phone, a computer, or a pair of shoes which can be used in the ordinary course of everyday life but it is a lethal weapon which when it falls illegally in the hands of third parties it can cause untold havoc like what happened at Ntulele on the fatal day.
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> The appellant was found in possession of the G-3 rifle stolen from PW4 a police officer in circumstances whereby another police officer was shot and killed."

27. Consequently, the learned Judge held that the appellant's conviction was safe, and the sentence was lawful and upheld the same.

28. Dissatisfied with the judgment, the appellants lodged the present appeal. The 1st appellant raised the following grounds of appeal:

> "a) The learned Judge erred in law by finding that the doctrine of recent possession in the circumstances of this case was properly invoked.
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> b. The learned Judge failed in law when he failed to determine that the prosecution failed to prove their case beyond any reasonable doubt."

29. The 2nd appellant raised the following grounds of appeal:

> "a) The learned Judge erred in law by upholding the conviction of the appellant despite lack of proper identification.
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> b. The learned Judge erred in law by upholding the conviction of the appellant despite the wrong application of the doctrine of recent possession.
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> c. The learned Judge erred in law by upholding an unproportional sentence with no aggravating circumstances contrary to paragraph 3 of the Sentencing Policy Guidelines.
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> d. The learned Judge erred in law in upholding the conviction of the appellant despite the failure of the prosecution to prove the offence of robbery with violence beyond a reasonable doubt."

1. When the appeal came up for hearing on 14th February 2024, Mr. Bhansali, learned counsel appeared for the 1st appellant, Mr. Mongeri, learned counsel appeared for the 2nd appellant, whereas Mr. Omutelema, the Senior Assistant Director of Public Prosecutions was present for the respondent. Counsel relied on their respective written submissions which they briefly highlighted.

31. Mr. Bhansali submitted that the 1st appellant was found in possession of a gun that was allegedly used to commit an offence. No witness testified about the 1st appellant's arrest. Counsel submitted that in

the event the conviction is upheld, the sentence be reviewed from death to a custodial sentence as the circumstances justify a lenient sentence.

32. While citing the case of Isaac Ng'ang'a Kahiga alias Peter Kahiga Ng'ang'a v Republic, Criminal Appeal No. 272 of 2005, the 1st appellant submitted that the doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of the recently stolen property in unexplained circumstances. However, the doctrine is not an absolute rule, and it must be applied judiciously considering the circumstances of each case.

33. The 1st appellant submitted that the prosecution failed to present any evidence in court substantiating the allegation that he was found in possession of the firearm in question. As far as he was concerned, he was arrested for having two rolls of bhang. He raised the question as to why only the arresting officer testified and not any other individual concerning the circumstances of the arrest and the discovery of the gun. He argued that his arrest was purely circumstantial as there was no proof that he was arrested while in possession of the Barretta gun.

34. The 1st appellant relied on the case of Gideon Meitekin Koyiet v Republic [2013] eKLR in submitting that the doctrine of recent possession was improperly applied in this case leading to an erroneous inference of his guilt.

35. While citing the provisions of Section 296(2) of the Penal Code, the 1st appellant was of the view that the evidence presented by the prosecution was insufficient and lacked the necessary quality and reliability to meet the high standard for proving guilt beyond reasonable doubt.

36. Also citing the case of Boniface Mutinda Mwema & Another v Republic [2003] eKLR, the 1st appellant submitted that in the said case the charge of robbery with violence was downgraded as the prosecution had not successfully established the offence of robbery with violence.

37. The 1st appellant also relied on the provisions of Section 107 of the *Evidence Act* in stating that the prosecution fell short of establishing his guilt beyond any reasonable doubt. He urged that his appeal be allowed.

38. On his part, Mr. Mongeri submitted that none of the prosecution witnesses identified the assailants. The conviction was based on recent possession but the evidence on recovery was shrouded in doubt, and there was no inventory. Counsel submitted that the 2nd appellant has been in custody for 20 years, and that should serve as a sufficient sentence.

39. The 2nd appellant submitted that no identification parade was conducted in this instance and no evidence was adduced to establish whether the 2nd appellant was a KWS officer or how he came to be in possession of the KWS uniform.

40. The 2nd appellant contended that the G-3 rifle which was the basis of his conviction was not the property stolen in the robbery and that it was not the property of the complainant in this case. Relying on the case of Athumani Salim Athumani v Republic [2016] eKLR, the 2nd appellant submitted that the doctrine of recent possession was wrongly applied in this case.

41. While citing the case of Charo Ngumbao Gugudu v Republic, Criminal Appeal No. 358 of 2008, the 2nd appellant submitted that the court was wrong in sentencing him to death even though he was a first-time offender who can be rehabilitated and integrated back to the society as a valuable member.

42. Opposing the appeals, Mr. Omutelema submitted that the evidence was overwhelming. Both appellants were in possession of stolen items, in this instance, guns. Even though the 2nd appellant was

found in possession of the G-3 rifle a year later, guns do not change hands easily. Both appellants failed to explain how they came into possession of the guns.

43. Counsel submitted that three victims lost their lives and therefore, the sentence should be upheld and if it is reduced, the sentence should not be less than 35 years.

44. The respondent submitted that identification was not the basis of the appellants' conviction, they were convicted on the strength of circumstantial evidence, anchored on the doctrine of recent possession. The 1st appellant was in possession of the Barretta gun that was used in the shooting during the robbery, while the 2nd appellant was found in possession of the G-3 rifle that had been stolen from PW4 during the robbery.

45. The respondent submitted that the 1st appellant was arrested less than a month after the robbery while in possession of a Barretta gun. When the gun was examined, it was discovered that eight cartridges that were recovered from the scene of the robbery were fired from the said gun.

46. The respondent submitted that the 2nd respondent was arrested while in possession of a G-3 rifle which had been stolen from PW4 during the robbery.

47. The respondent further submitted that Section 111 of the *Evidence Act* places the burden of explaining how the possession of the gun shifted to the appellants since these were facts, especially within their knowledge.

48. While relying on the case of Erick Otieno Arum v Republic [2006] eKLR, the respondent submitted that the duty to analyze evidence and accept or reject it was wholly on the trial court and the first appellate court and not this Court, unless the Court is satisfied that the duty was not fully discharged.

49. The respondent submitted that the prosecution had proved all the ingredients of the offence of robbery with violence that the offenders were armed with dangerous and offensive weapons, namely, a Barretta gun; the offenders were four in number; and three people were fatally wounded during the robbery.

50. This being a second appeal, we are legally constrained to consider only issues of law raised in the appeal and not to consider matters of fact tried 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 v 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."

51. We have carefully considered the record of appeal, submissions by counsel, the authorities cited, and the law. The main issues for our determination are; whether or not the circumstantial evidence was sufficient to sustain a safe conviction; whether or not the doctrine of recent possession was applicable to the circumstances of this case; whether or not the case against the appellants was proved beyond reasonable doubt; and whether or not the sentence meted against the appellants was harsh and unconstitutional.

52. It is common ground that no prosecution witness saw or identified the appellants at the scene of crime. The prosecution case against the appellants was primarily based on circumstantial evidence. It is trite law that before a court can draw, from circumstantial evidence, the inference that the accused is guilty,

it must satisfy itself that there are no other co- existing circumstances that could weaken or destroy the inference of guilt. In the case of Sawe v Republic [2003] KLR 364, the Court held that;

> " In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of
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> circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remains with the prosecution. It is a burden which never shifts to the party accused."

53. It is not uncommon for legal practitioners to discredit circumstantial evidence in criminal cases, suggesting it has little probative value compared to direct evidence. In the case of Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR, the court stated thus:

> " However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -
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> "It has been said that the evidence against the Applicant is circumstantial. So, it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

54. The court proceeded to lay down the test to be applied in considering whether circumstantial evidence placed before a court can support a conviction. The Court stated thus:

> "Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the Accused person, and to no other person, as the perpetrator of the offence. In Abanga alias Onyango v R Cr. App. No 32 of 1990, this court set out the conditions as follows:
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> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests:
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> i. the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
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> ii. those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused;
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> 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.
>
> (see also Sawe v Republic (2003) e KLR and GMI v R Cr. App. No. 38 of 2011).

> In addition, the prosecution must establish that there are no other co-existing circumstances, which could weaken or destroy the inference of guilt."

55. In this instance, the 1st appellant was arrested while in possession of a Barretta gun that was traced back to the shootout that happened on 15th March 2013 when PW1's assailants had taken them hostage on a pickup while they engaged in a shootout with the police which resulted in three fatalities. The prosecution led evidence through a ballistic expert to demonstrate that the said gun had been used during the incident.

56. The 2nd appellant on the other hand was arrested while in possession of a G-3 rifle which was positively identified as the weapon that had been issued to PW4 on 15th March 2013 and was also stolen on the material date.

57. These issues were extensively interrogated by the trial court and the first appellate court in their judgments. The appellants did not explain how they came to be in possession of the gun and the rifle respectively. It is trite that once the primary facts are established and the prosecution discharges its legal burden of proof, the accused bears the evidential burden to offer a reasonable explanation for the same. In this case, the appellants ought to have provided reasonable explanations about how each of them came into possession of the weapons found on them.

58. The statutory rebuttable presumption is spelled out under Sections 111(1) and 119 of the *Evidence Act* as follows:

> "111(1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact, especially within the knowledge of such person is upon him:
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> Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross- examination or otherwise, that such circumstances or facts exist:
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> Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence."

59. Section 119 provides that:

> " The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

60. We find that the trial court and the first appellate court duly considered the evidence which was adduced by the appellants in their respective defences and found that the defences did not cast any shadow of doubt on the evidence by the prosecution. The 1st appellant and the 2nd appellant in their evidence did not give any plausible explanation as to how they came to be in possession of the Barretta gun and G-3 rifle, respectively.

61. It follows that the circumstances in this instance, taken cumulatively, form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the appellants and no one else.

62. It is well settled that the doctrine of recent possession allows the court to infer guilt when the accused is found in possession of recently stolen property under unexplained circumstances. In the case of Eric Otieno Arum v 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;
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> 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."

63. In the case of Republic v Kowkyk [1988] 2 SCR 59, by a majority, the Canadian Supreme Court 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."

64. The elements of the doctrine of recent possession were laid out in the case of Isaac Ng'ang'a alias Peter Ng'ang'a Kahiga v Republic, Cr App. No. 272 of 2005 (UR) where this Court held

thus:

> " 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;
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> i. that the property was found with the suspect;
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> ii. that the property is positively the property of the complainant;
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> iii. that the property was stolen from the complainant;
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> iv. that the property was recently stolen from the complainant.
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> 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."

65. It follows that 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 v 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."

66. In this case, the 2nd appellant was found in possession of a G-3 rifle that was positively identified by PW4 as his, and which was stolen on 15th March 2013 while he was injured and unconscious. At the time of his arrest, the 2nd appellant was carrying it on his body as a weapon. Although that was almost two years from the time the rifle was stolen, we are of the considered opinion that a rifle is not something that can easily exchange hands.

67. We find that the 2nd appellant did not give any plausible explanation of how he came into possession of PW4's stolen property.

68. In the result, we find that all the aforesaid elements of recent possession were proved against the 2nd appellant.

69. 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."

70. The ingredients of this offence were aptly discussed in the case of Johana Ndungu v Republic [1996] eKLR where the learned Judges stated that:

> "In order to appreciate properly as to what acts constitute an offence under Section 296(2) of the Penal Code, one must consider the subsection in conjunction with Section 295 of the PC. The essential ingredient of robbery under Section 295 is 'use of or threat to use' actual violence against any person or property at or immediately after to further in any manner the act of stealing. Thereafter, the existence of the afore-described ingredients constituting robbery are presupposed in the three sets of circumstances prescribed in Section 296(2) which we give below and any one of which if proved, will constitute the offence under the subsection:

71. Similarly, this Court in the case of Dima Denge & Others v Republic [2013] eKLR 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."

72. From the evidence on record, we are satisfied that all the elements of robbery with violence were proved beyond any reasonable doubt. The appellants were in the company of two other people. They were armed with a Barretta gun. They also used violence during the robbery which resulted in three fatalities.

73. In the circumstances, we find that the prosecution's case against the appellants was overwhelmingly credible.

74. We now move on to consider the appeal against the sentence.

The Supreme Court in the case of Francis Muruatetu & Another v Republic [2017] eKLR held that:

> "Consequently, we find that Section 204 of the penal code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum penalty."

75. Section 296(2) of the Penal Code provides that an offender convicted for robbery with violence in circumstances stipulated therein; "shall be sentenced to death."

76. In the case of William Okungu Kittiny v Republic (supra), this Court held that:

> "From the foregoing, we hold that the findings and holding of the Supreme Court, particularly in para. 69, applies Mutatis Mutandis to section 296
>
> (2) and 297 (2) of the penal code. Thus, the sentence of death under section 296 (2) and 297(2) of the penal code is a discretionary maximum punishment."

77. In our view, what renders a sentence unconstitutional is the fact that the prescribed mandatory sentence completely precludes the court from exercising any discretion, regardless of whether or not the circumstances so require.

78. The current jurisprudence on the issue of mandatory sentences is that it is unconstitutional, as it deprives the court of the mandate to exercise its discretion in such a manner as to do justice in a way that imposes a sentence that is appropriate to the circumstances of the particular case which is at hand.

79. In the light of the current jurisprudence on sentencing, and after giving due consideration to the circumstances in which the offence was committed, we note that during the robbery, three people were killed. To our minds, that is a serious aggravating factor. We find that the sentence meted against the appellants was lawful. We also find that the appellants have not demonstrated that the trial court had acted upon wrong principles, or overlooked some material factors or considered irrelevant factors, or that the sentence was illegal or was so inordinately excessive to be an error of principle. (See: Wilson Waitegei v Republic [2021] eKLR).

80. Accordingly, we uphold the convictions and sentences of the appellants. The appeal is dismissed in its entirety.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF MAY, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.