



**Kingora v Republic (Criminal Appeal 41 of 2017)
[2024] KECA 739 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 739 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 41 OF 2017
F TUIYOT'T, FA OCHIENG & WK KORIR, JJA
JUNE 21, 2024**

BETWEEN

PAUL MUNGAI KINGORA APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Hon. M.A. Odero, J.) delivered and dated 24th April 2017 in HCCRA No. 39 of 2014)

JUDGMENT

1. The appellant, Paul Mungai Kingora, was first charged before the Chief Magistrate's Court at Naivasha for the offence of robbery with violence contrary to section 296(2) of the Penal Code. The particulars of the offence were that on 27th February 2012 at Site Estate in Naivasha Municipality within Nakuru County, the appellant jointly with another person not before court robbed Richard Mutiso Wambua of assorted items valued at Kshs. 7,000 and at, or immediately before, or immediately after the time of such robbery used actual violence upon the complainant.
2. The appellant denied the charges and after the trial, he was found guilty, convicted and sentenced to life imprisonment. Dissatisfied with the decision of the trial Court, the appellant appealed to the High Court at Naivasha. His appeal was, however, unsuccessful as it was dismissed by M.A. Odero J. in a judgment delivered on 24th April 2017. The learned Judge also enhanced the sentence from life imprisonment to the death penalty.
3. The appellant is now before us raising 10 grounds of appeal which we summarize as follows: that the charge was not proved beyond reasonable doubt; that the appellant was not properly identified; that the trial court relied on uncorroborated and contradictory circumstantial evidence; that the appellant was not accorded a fair hearing; and that the sentence was enhanced without notice and without considering the appellant's mitigation.



4. The prosecution called 3 witnesses in support of its case. The complainant, Richard Mutiso Wambua, who testified as PW1 stated that on 27th February 2012 at about 10.00pm he arrived at Naivasha from Nairobi. He then secured the services of a motorbike rider from a group of 6 to take him to his residence. The rider carried along another pillion passenger who was a lady. Along the way, the lady alighted but immediately claimed to have forgotten her key. They then went back to a bar where the lady allegedly picked her key. On their way back and upon reaching the lady's gate, the appellant and the lady alighted. Soon thereafter, the appellant demanded to know what the complainant was carrying. He also held the complainant by the neck and fell him down. The lady passenger came and took from the complainant's pockets, a Nokia mobile phone valued at Kshs. 6,200 and a wallet containing cash Kshs. 1,800 and various documents. During the scuffle, the motorbike hit the complainant's leg. The duo then jumped onto the motorbike and fled the scene. The complainant, despite bleeding from the leg, went back to the motorcycle stage where he had boarded the motorbike and informed the other motorbike riders of his ordeal. He was escorted to Naivasha District Hospital for treatment and thereafter to Railways Police Station where he reported the incident. The next day, he was informed that the appellant had been arrested. The complainant also went to the appellant's house where he had been arrested and thereat, they recovered a copy of his identity card, employment contract, KRA Personal Identification Number (PIN) certificate, elector's card, Equity Bank ATM card, pay slip, Old Mutual card and NSSF receipt.
5. Evans Mungai Njoroge (PW2) testified that on the material date at about 3.00am, he was at Wambuku motorcycle stage, when the complainant went and reported to them that he had been robbed. The complainant also informed them that the motorcycle which had carried him was red in colour. They then investigated the matter and traced the alleged motorcycle to Kabati Mosque. They informed the chairman of the Boda Boda Association after which the Deputy chairperson informed them to report the matter to the police. Upon reporting the matter to the police they proceeded to where the motorcycle was. The appellant was then arrested by the police from his house.
6. PC Nicholas Barasa (PW3) on his part testified that on 28th February 2012 at about 9.00am he met the complainant who had an injury on one of his legs. The complainant was in the company of members of the public and motorcycle riders. PW3 was informed of the whereabouts of the suspect and they proceeded to his house where they arrested him. Although the appellant initially denied committing the offence, he later led them near a toilet where from underneath a stone they recovered the complainant's documents. PW3 produced the recovered documents as exhibits and gave the registration number of the appellant's motorcycle as KMCS 078P.
7. In his defence, the appellant testified that he was a small-scale charcoal trader from Kabati area in Naivasha. He recalled that on 28th February 2012 after setting up his trade, police officers arrived soon thereafter and called him to go outside his house. They inquired from him whether he knew of any motorcycle rider who lived in their plot and he answered in the negative. The police officers nevertheless requested to search his house, which they did but recovered nothing. He was then handcuffed and escorted to the station where he was processed, shown the exhibits and later charged for committing an offence unknown to him.
8. In finding the appellant guilty of the offence, the trial Court invoked the doctrine of recent possession in linking the appellant to the recovered items. The first appellate Court affirmed this finding and also discounted the appellant's defence. The first appellate Court also found that no prejudice was occasioned to the appellant by the trial Court's denial of the appellant's request to have the case start de novo. The High Court noted that the relevant witness in respect to the contents of the Occurrence Book was PW3 who had been cross-examined on the issue by the appellant.



9. This appeal came up for hearing on the Court’s virtual platform on 27th February 2024. Learned counsel Mr. Matoke represented the appellant while learned counsel Mr. Omutelema appeared for the respondent. Counsel relied on their written submissions accompanied by brief oral highlights.
10. Through the submissions dated 28th October 2023 counsel for the appellant faulted the two courts below for failing to apply the six principles governing identification at night as set down in Peter Mwangi Mungai v. R [2002] eKLR. Counsel stated that that no initial description of the appellant was given by the complainant on his first report as required and as set in Francis Kariuki Njiru & 7 others v. R [2001] eKLR. According to counsel, the evidence of identification did not meet the threshold for proper identification of the appellant as the perpetrator of the offence.
11. Turning to the next issue, counsel submitted that the prosecution did not prove the offence beyond a reasonable doubt. Counsel reiterated his submissions on the issue of identification and asserted that the evidence on record did not meet the threshold required before a conviction can be based on circumstantial evidence as set in the case of Ahamad Abolfathi Mohammed & Another v. Republic [2018] eKLR. According to counsel, the evidence on record had glaring gaps, hence the chain cannot be said to be complete so as to exclusively point to the appellant as the only person who could have committed the offence.
12. The appellant also raised an issue of jurisdiction. Counsel argued that the trial Court was not properly constituted as required under Article 157 of *the Constitution* and sections 85 and 86 of the Criminal Procedure Code because the prosecution was conducted by a police officer.
13. Finally, on the issue of sentence, counsel submitted that the enhancement of the appellant’s sentence by the High Court contravened his right of reply under section 354(2) of the Criminal Procedure Code as he was not given notice before the sentence was enhanced. Counsel further relied on Natse v. Republic [2022] KECA 417 (KLR) to urge that the appellant ought to have been warned of the possibility of his sentence being enhanced but that was not the case. Additionally, counsel took issue with the mandatory nature in which the High Court passed the death sentence stating that in doing so, the Court failed to take the appellant’s mitigation into account. It was counsel’s ultimate submission that the appeal should be allowed.
14. Relying on the submissions dated 19th February 2024, the respondent’s counsel acknowledged the duty bestowed on the prosecution to prove its case beyond reasonable doubt and asserted that the prosecution had indeed discharged this onus. According to counsel, all the ingredients of the offence were proved. Further, that after a consideration of the appellant’s defence, it was found wanting.
15. Rejecting the appellant’s claim that his identification was not proper, counsel stated that the two courts below correctly appreciated what amounts to a proper identification and that the appellant was properly identified. Counsel relied on Maitanyi v. Republic [1986] eKLR to point out what the courts should inquire into in determining whether the evidence of identification by a single witness was sufficient to warrant a conviction.
16. On the application of the doctrine of recent possession, counsel cited Erick Otieno Arum v. Republic [2006] eKLR to highlight the factors that must be established before the doctrine of recent possession can be invoked. Counsel submitted that all the conditions were met and the doctrine was therefore properly invoked.
17. Mr. Omutelema rejected the appellant’s claim that he was not accorded a fair hearing, asserting that the appellant was indeed accorded a fair trial. Counsel consequently urged us to dismiss the appeal against conviction for lack of merit.



18. Turning to the issue of sentence, counsel submitted that the appellant was issued with the notice of enhancement and chose to proceed with his appeal. Counsel nevertheless conceded that a sentence of 10 years' imprisonment would be sufficient considering the circumstances under which the offence was committed.
19. This being a second appeal, our mandate under section 361 (1)
- a. of the Criminal Procedure Code is to consider only issues of law and approach with deference the concurrent findings of fact by the two courts below. The exception is where the conclusions on matters of fact are not supported by the evidence or where there is a misapprehension of the law. This principle has been stated by the Court in many of its decisions, including *Adan Muraguri Mungara v. Republic* [2010] eKLR, where the Court held that:
- “Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 Criminal Procedure Code). 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.”
20. We have reviewed the record of appeal and the submissions of the parties and we find that the questions that fall for our determination are whether the appellant was accorded a fair hearing, whether the charge against the appellant was proved and if the conviction is sound, whether we should interfere with the sentence.
21. The appellant has raised the question of fair hearing arguing that he was denied an opportunity to recall witnesses. Still, on this issue, the appellant submitted that the trial Court was not properly constituted as the prosecution was undertaken by a police officer in contravention of Article 157 of the Constitution and sections 85 and 86 of the Criminal Procedure Code. On the denial of the request to recall witnesses, we note that the appellant has not submitted on this issue. Nevertheless, having gone through the proceedings as well as the determination on the said issue by the trial Court and the first appellate Court, we are satisfied that no prejudice was occasioned to the appellant. We concur with the findings of the first appellate Court that the questions which the appellant intended to ask the witnesses were specific to PW3 and the recall of this witness was sufficient. The other aspect of this ground of appeal relates to composition of the trial Court. Counsel for the appellant submitted that the appellant was prosecuted by a police officer as opposed to an attorney from the Office of the Director of Public Prosecutions (ODPP). Counsel for the respondent did not address this issue.
22. Under section 26(3) of the repealed Constitution, prosecutorial powers were reposed on the Attorney General. With the enactment of the current Constitution, prosecutorial powers were shifted to ODPP vide Article 157. Parliament operationalized Article 157 of the Constitution by enacting the Office of the Director of Public Prosecutions Act, 2013 (ODPP Act) which came into force on 16th January 2013. Section 57(2)(c) of the Act provides that all public prosecutors appointed under the Criminal Procedure Code or those who were appointed according to the operation of any other law ceased to hold such offices subject to a notice which was to be issued by the DPP. However, section 57(3) of the Act provided a rider thus:

“Notwithstanding the provisions of subsections (1) and (2) of this section, the operation of an authority, sanction or consent given before the commencement of this Act by the



Attorney General, Director, or any other person so empowered, to commence proceedings in relation to an offence shall not be abated or affected thereby”

23. The proceedings before the trial court started in February 2012 prior to the enactment of the ODPP Act 2013 and were concluded in January 2014 after the Act had come into force. It is therefore possible that some courts still had police prosecutors whose appointments had been regularized pursuant to the provisions of section 57(3) of the ODPP Act. In the circumstances, we find that the trial Court was duly constituted. See *William Rutto v. Republic, Nakuru CRA No. 29 of 2017* (Delivered on 2nd February 2024). Therefore, this particular ground of appeal also fails.
24. The issue we next address is whether the charge was proved against the appellant. Under this issue, the appellant has advanced three arguments with regard to identification, the invocation of the doctrine of recent possession, and the quality of the circumstantial evidence. Starting with the issue of identification, the appellant contends that the circumstances prevailing during the commission of the offence were not favourable to enable identification of the robber. The decisions in *Peter Mwangi Mungai v. Republic* [2002] eKLR, *Francis Kariuki Njiru & 7 others v. Republic* [2001] eKLR and *Maitanyi v. Republic* [1986] eKLR, which were cited by both sides, are relevant to the issue of identification. Having gone through the judgment of the first appellate Court, we are satisfied that the learned Judge’s consideration of the issue of identification was in line with the stated authorities. Peter Mwangi Mungai (*supra*) speaks of the need for the Court to be keen about the source of light and the time spent together by the complainant and the aggressor. Francis Kariuki Njiru (*supra*) speaks to the need for prior description of the assailant, while Maitanyi (*supra*) speaks to the need to test the impression received by the witness at the time of the incident. The first appellate Court considered all these by taking note of the duration the complainant took with the appellant prior to the robbery, the source of light at all the three scenes where the parties stopped and the prior description that enabled the motorcycle riders to arrest the appellant. We are thus satisfied that the appellant was properly identified by the complainant and there is therefore no merit on this ground of appeal.
25. The next question is whether the doctrine of recent possession was correctly applied. We concur with the decision in *Sakwa v. Republic* [2023] KECA 732 (KLR) where the Court explained the methodology of applying the doctrine of recent possession as follows:

“The cited authorities lead us to the conclusion that whether the appellant was a thief or just a possessor of the stolen items is a matter of fact which was for determination by the trial court and subject to review by the first appellate court. To aid in determining this aspect, it was necessary for the prosecution to establish that, first, the appellant was in possession of stolen items; second that upon considering all the relevant factors, the court was satisfied that the items belonged to PW1; third, that the items were stolen from PW1 during the robbery; and fourth, that the items were recently stolen. Next, the trial court was required to consider whether the appellant put forth a plausible explanation as to how he came into possession of the items. We must however appreciate, as was done by the courts in the authorities already cited, that such an explanation must not necessarily be satisfactory but should be reasonable. Therefore, where a reasonable explanation is put forth, then the doctrine of recent possession should not be invoked.”

26. In the present case, the appellant was arrested from his house.

He led PW1, PW2 and PW3 to a stone next to the toilet from where the lost items were recovered underneath the stone. PW1 identified the recovered items as his. The items had been robbed from the complainant hardly 12 hours ago. Furthermore, the appellant in his defence stated that he informed the police that no motorcycle rider lived in the compound. He was therefore the only rider who lived there.



The appellant was therefore under an obligation to tender an explanation of how he became aware that the items were hidden underneath the stone. This he did not. We are thus satisfied that the first appellate Court properly invoked the doctrine of recent possession to link the appellant to the offence.

27. The other issue is whether the evidence met the threshold upon which circumstantial evidence can be used to return a guilty verdict. The three tests that circumstantial evidence must satisfy before it can be used to convict were enunciated in *Abanga v. Republic*, [1990] LLR 3975 (CAK) as follows:

“It is settled law that when a case rests on entirely 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.”

28. In this case, the first appellate Court relied on the doctrine of recent possession, the evidence of identification and the evidence of recovery to link the appellant to the offence. Having affirmed the findings on identification and the possession of the recently stolen items by the appellant, we have no doubt that the evidence on record created a complete link pointing to no one else but the appellant as the person who committed the offence. However, we cannot depart from this issue before considering the question as to whether the evidence presented to the trial Court established the ingredients of the offence with which the appellant was charged.

29. For the offence of robbery with violence to hold, the prosecution must prove the ingredients found in section 296(2) of the Penal Code. It must be established that the accused person was armed with a dangerous or offensive weapon, or was in the company of another or other, or deployed actual violence against the victim immediately before, during or after the theft. It should be recalled that these ingredients are disjunctive and the proof of any of them is sufficient to sustain a conviction—see *Dima Denge Dima & others v. Republic* [2013] eKLR. In this case, PW1 testified that he was attacked by the appellant while the co-conspirator ransacked him. The appellant violently strangled him. “Kupigwa ngeta” as they say in street lingo. Thus, the offence was proved on this evidence alone. Another ingredient of the offence proved was that the appellant was in the company of another person. That being the case, we find that the prosecution ably discharged the burden of proving that the offence of robbery with violence was committed. This puts to rest, through an order of dismissal, the appeal against conviction.

30. We now turn to the question as to whether the appellant has established grounds for our interference with the sentence. The appellant raises two grievances, namely, that the sentence was enhanced without his being issued with a notice of enhancement and that the sentence was passed in mandatory terms thereby ignoring his mitigation. The first limb of the appellant’s grievance was rebutted by the respondent’s counsel who submitted that the appellant was served with an enhancement notice before the first appellate Court but opted to proceed with the appeal. The other limb concerning the imposition of the sentence in its mandatory nature was conceded and the respondent’s counsel proposed that the death sentence be set aside and substituted with imprisonment for ten years.



31. We have gone through the record and we are satisfied that indeed a notice of enhancement of sentence was issued to the appellant on 10th October 2016. His grouse that the sentence was enhanced without notice is therefore unfounded and without merit. It therefore follows that the only remaining ground for consideration is in relation to the appropriateness of the death sentence. Having read the judgment of the High Court, we conclude that the death sentence was issued in a mandatory nature. We also appreciate the fact that courts are now moving away from the death penalty and life sentence and are embracing not only definite term sentences but also the exercise of discretion in passing sentences appropriate to the circumstances of each case.
32. In this case, the appellant was not grievously harmed and neither was a P3 form produced to help in ascertaining the intensity of the injury. We also note that all the items that were stolen were recovered save for the mobile phone and the money. Furthermore, there was no mention of any weapon used during the commission of the offence. The appellant was also a first offender who mitigated that he was the only child and that his parents depended on him. On the flipside, we find that the appellant camouflaged himself as a boda boda transporter in order to prey on those who sought his services. In the circumstances, we find a prison sentence of 15 years to be appropriate and reasonable.
33. The upshot of the foregoing is that the appeal against conviction is without merit and is dismissed. The appeal against sentence partially succeeds. Consequently, the death penalty is set aside and substituted with one of 15 years in prison. The proviso to section 333(2) of the Criminal Procedure Code to apply to the sentence if the prisons records confirm that the appellant was held in custody during his trial.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024

F. TUIYOTT

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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

