



**Arwa v Republic (Criminal Appeal 70 of 2017)  
[2024] KECA 960 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KECA 960 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CRIMINAL APPEAL 70 OF 2017  
FA OCHIENG, GWN MACHARIA & WK KORIR, JJA  
JULY 26, 2024**

**BETWEEN**

**JACKSON MAMBO ARWA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Naivasha  
(C. Meoli, J.) dated 14th July, 2017 in HC.CRA. No. 128 of 2015)*

**JUDGMENT**

1. Jackson Mambo Arwa, the appellant, was charged before the magistrate's court and convicted of five counts. In count 1, the appellant was charged with robbery with violence contrary to section 296(2) of the Penal Code. The particulars being that on the 20<sup>th</sup> October 2013 at Site Estate in Gilgil District within Nakuru County, the appellant, jointly with another person already before court, while armed with dangerous weapons, namely an AK47 rifle and a machete, robbed Salim Hemed Fundi of a Ceska pistol, a 21-inch Sony TV, a 6 kg gas cylinder and a sub-woofer all valued at Kshs. 80,250/= and immediately before the time of such robbery threatened to use actual violence upon the complainant.
2. In count 2, the appellant was charged with being in possession of a firearm without a firearm certificate contrary to section 4(A)9A) as read with section 4(2) of the *Firearms Act*. In counts 3 and 4 the appellant was charged with being in possession of ammunition without a firearm certificate contrary to section 4(A)9A) as read with section 4(2) of the *Firearms Act*. In count 5 the appellant was charged with being in possession of government stores contrary to section 324(2) as read with section 36 of the Penal Code. We do not deem it necessary to reproduce the particulars in respect to these four counts.
3. At the conclusion of the trial, the appellant was found guilty and sentenced to suffer death in count 1. On counts 2, 3, and 4, he was sentenced to serve to 7 years imprisonment on each count.



The appellant received a sentence of 1 year's imprisonment on count 5. His appeal to the High Court failed on conviction but the learned Judge corrected the irregularity in the appellant's sentences by affirming the death sentence for the 1<sup>st</sup> count and holding in abeyance the sentences in respect of the 2<sup>nd</sup> to 5<sup>th</sup> counts.

4. Before us, the appellant raises three grounds of appeal, to wit, that he was greatly prejudiced during the trial as his rights under Article 50(2)(g) and (h) of *the Constitution* were violated; that his mitigation was not considered; and that his right to legal representation was violated.
5. In a nutshell, the case against the appellant was that on 20<sup>th</sup> October 2013, while Salim Hemedi Fundi (PW1), a police officer, was asleep in his house, two men walked into his bedroom brandishing an AK47 rifle and a panga. As PW1 attempted to reach for his pistol which was under the mattress, he was hit on the head with the panga. He was then ordered to lie on top of his female companion facing the wall and he complied. The intruders then took his Ceska pistol plus 15 rounds of ammunition and left. When he attempted to chase after them, one of the robbers cocked the pistol forcing him to retreat. The intruders also made away with PW1's 20-inch Sony LCD TV, his subwoofer and gas cylinder.
6. Sometime in December 2013, the appellant approached Jared Onyango (PW2), a boda boda operator based at Site Estate within Gilgil town for a loan of Kshs. 500/= . The appellant left a Nokia phone as security for the loan. After some time, PW2 inserted his sim card in the phone with the intention of using it. He was later arrested after a police officer lured him on the pretext that he was a customer.
7. Inspector of Police Nzioka Singi (PW3) was the Officer in Charge of Flying Squad, Gilgil. On 17<sup>th</sup> November 2014 he received information that a signal had been received from a Nokia mobile phone that had been stolen during a different robbery incident that had taken place on 18<sup>th</sup> October 2013. The signal was traced to PW2 and the phone recovered from him. PW2 in turn led them to the appellant as the man who had given him the phone. When they arrived at the appellant's house, he attempted to retrieve a pistol but the police officers wrestled him to the ground and subdued him. From the appellant's house, they recovered the pistol which had been stolen from PW1 with 6 rounds of ammunition. They also recovered 10 rounds of 7.62mm ammunition usable in a G3 rifle and assorted military and police gear.
8. The last prosecution witness was Chief Inspector Alex Mwandawiro (PW4), a ballistics expert attached to Ballistics Laboratory at the CID Headquarters. He confirmed that the recovered Ceska pistol and the ammunitions were functional.
9. In his defence, the appellant stated that police officers went to his house and conducted a search where they only recovered his phone, a wallet and a bottle. He was thereafter taken to another house then to the car where they took pictures of him. He denied the charges and stressed his innocence.
10. When the appeal came up for hearing, the appellant who was virtually present from prison was represented by learned counsel Mr. Owuor while learned prosecution counsel Mr. Omutelema appeared for the respondent. Counsel for the parties opted to wholly rely on their respective written submissions.
11. Through the submissions dated 9<sup>th</sup> October 2024, Mr. Owuor submitted that under Article 50(2)(h) of *the Constitution*, the appellant who was faced with a capital offence was entitled to have an advocate assigned to him by the State. Counsel relied on the case of *Douglas Kinyua Njeru v. Republic, Nyeri CRA No. 28 of 2013* to urge that the failure to accord the appellant legal counsel during his trial was prejudicial to him, hence the appeal should be allowed.



12. Turning to the appeal against sentence, counsel submitted that the death sentence meted upon his client was harsh and excessive. Counsel argued that the sentence was passed without the court exercising its discretion or considering the mitigating circumstances. Counsel urged us to take into account the sentencing principles established by the Supreme Court in *Muruatetu & Another v. Republic* [2017] eKLR in reviewing the appellant's sentence. Relying on the decisions in *Jackson Wanyoike Njuguna & Another v. Republic* [2019] eKLR and *Swaley Muhaya Lubanga v. Republic* [2021] eKLR, counsel proposed that a prison term of 15 to 20 years would be adequate in the circumstances of this case.
13. Mr. Omutelema urged for the dismissal of the appeal through submissions dated 11<sup>th</sup> March 2024. Counsel rehashed the evidence on record and submitted that the doctrine of recent possession was correctly called into play in finding the appellant guilty of the offences charged. Reference was made to the case of *Erick Otieno Arum v. Republic* [2006] eKLR to highlight the circumstances under which a person found with stolen property can be convicted. Further, that the prosecution had established all the offences with which the appellant was charged.
14. Responding to the appellant's claim that his right to legal representation was violated, Mr. Omutelema submitted that because the constitutional right to legal counsel was actualized with the enactment of the [Legal Aid Act](#), 2016, the provisions of the Act did not apply to the appellant who was tried and convicted before its enactment.
15. In response to the appeal against sentence, counsel urged that the death sentence should be left undisturbed.
16. As this is a second appeal, our mandate as prescribed under section 361(1) of the Criminal Procedure Code is limited to consideration of matters of law. Matters of fact which includes the severity of sentence are not within our purview. However, questions surrounding the legality of a sentence are deemed to be matters of law. As was stated in *Adan Muraguri Mungara v. Republic* [2010] eKLR, we can only delve into factual matters where findings are not based on the evidence on record or where the decision is clearly contra the evidence. In such situations, we do so because the decision is said to be bad in law.
17. Upon review of the record of appeal and the submissions by counsel for the parties we find that the question as to whether the appellant's conviction should stand turns on the determination of the questions as to whether his right to legal representation under Article 50(2)(h) of [the Constitution](#) was infringed and whether the doctrine of recent possession was properly applied. It is only upon determining the propriety of the conviction that we may turn to the question as to whether the appellant has made out a case for our interference with the sentence.
18. The appellant contends that pursuant to the provisions of Article 50(2)(h) of [the Constitution](#) and section 43 of the [Legal Aid Act](#), 2016, he was entitled to legal representation. It was his counsel's submission that since the appellant faced a capital offence, the failure to inform the appellant of his right to counsel and to provide him with counsel during the trial was prejudicial. Counsel for the respondent on the other argued that first, the [Legal Aid Act](#), 2016 was not in place when the appellant was tried and secondly, that the right to legal representation is not absolute and is dependent on an accused person making a request for counsel. Counsel for the respondent also submitted that no prejudice was suffered by the appellant as a result of the failure to accord him counsel at the State's expense.



19. In dealing with this issue, we wish to appreciate and be bound by the Supreme Court pronouncement in *Charles Maina Gitonga v. Republic* [2020] eKLR that:

“(32) In order to determine whether this Appeal is proper before us therefore, we must confirm that the issues of Constitutional interpretation and application being raised before us have risen through the normal appellate mechanism so as to reach us. It is in that regard not disputed that the question as to whether the Appellant’s right to fair trial was infringed by failure to accord him legal representation at the expense of the state or by failure to inform him of the right to legal representation was raised for the first time at the Court of Appeal. We have also interrogated the record before us and confirmed that the issue was neither raised at the Resident Magistrate’s Court nor at the High Court. None of the Articles of *the Constitution* in the present appeal was also the subject of interpretation and application at the High Court...

(35) We thus fault the Court of Appeal for entertaining the question of legal representation as one of the grounds of appeal despite acknowledging that it was never raised in the Courts below. To allow the Appellant ignore the normal hierarchy of courts would amount to abuse of the process of Court. We consequently lack jurisdiction to entertain this appeal pursuant to Article 163(4)(a) of *the Constitution*.”(Emphasis ours)

20. We are bound by the Supreme Court decision. In this appeal, we note that the question of the appellant’s right to legal representation is being raised for the first time before this Court. It follows then that that issue was not considered by the High Court so that it can be said that there is a decision which the appellant is challenging. This statement finds support in numerous decisions of this Court, including *AT v. Republic* [2023] KECA 1393 (KLR), where it was held that:

“The reason why this Court shies away from interfering with decisions of the trial court or the first appellate court on matters not raised before the said courts is that this Court deals with the appellant’s grievances based on allegations of errors of omission or commission committed by the said courts. Where the issues being raised are not matters which were placed before the lower courts and therefore the said courts did not address their minds to them, it would be improper to interfere with their decisions when they had no chance of dealing with the same and no finding was made in respect thereof.”

We therefore decline the appellant’s invitation to consider an issue that is not based on the decision of the court whose judgment is being appealed.

21. The next issue is whether the doctrine of recent possession was properly invoked in this case. Both the trial court and the first appellate court applied the doctrine of recent possession in finding the appellant guilty of the five offences charged. The trial court appreciated the ingredients of the doctrine as elaborated in *Arum v. Republic* EALR 2006 EA while the first appellate court relied on the case of *Ogembo v. Republic* [2003] 1 EA. These two authorities align with the views of the Court in *Sakwa v Republic* [2023] KECA 732 (KLR) that:

“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.”

22. Applying the doctrine to the present case, we find that PW1 had been robbed of a Ceska pistol and as testified by PW3, an operation for the recovery of the pistol had been put in place. PW3 and his team were led to the home of the appellant by PW2. PW1’s pistol was recovered from the appellant’s house. The appellant confirmed in his defence that the police raided his home on the day of his arrest. The items that were recovered from the appellant’s house were produced as exhibits as listed in the inventory prepared by PW3. PW4 also attested to subjecting the gun and ammunitions recovered in the appellant’s house to ballistic examination. He confirmed that the ammunitions were live and that the Ceska pistol was not only capable of being fired but was the one stolen from the PW1. The evidence up to this point confirmed that the appellant was in possession of items stolen from PW1 during the robbery and that the other items were government stores. When placed on his defence, the appellant did not rebut the evidence. He failed to explain how he came into possession of the pistol that was violently stolen from PW1. His defence, as was correctly held by the two courts below, was a mere denial. In the end, we find that the doctrine of recent possession was properly applied.
23. The evidence also met the threshold for conviction on circumstantial evidence as laid down in *Abanga v. Republic* LLR No. 3975 (CAK) thus:

“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.”
24. Based on the foregoing, we arrive at the conclusion that the appellant’s appeal against conviction lacks merit and is destined for dismissal.
25. The remaining issue is in respect to the submission by the appellant’s counsel that the death sentence imposed upon the appellant in respect to the first count is harsh and excessive. The answer to that argument is that under Section 361(1)(a) of the Criminal Procedure Code, the severity of sentence is a matter of fact outside the scope of a second appeal. This Court can only interfere with sentence where it was enhanced by the first appellate court or where the magistrate’s court had no jurisdiction to pass the sentence. None of these factors have been demonstrated to exist in this appeal. We therefore find the appeal against sentence to be without merit and we dismiss it.
26. In short, the appellant’s appeal has no merit and is dismissed in its entirety.



DATED AND DELIVERED AT NAKURU THIS 26<sup>TH</sup> DAY OF JULY 2024

.....

**F. OCHIENG**

**JUDGE OF APPEAL**

.....

**G.W. NGENYE-MACHARIA**

**JUDGE OF APPEAL**

.....

**W. KORIR**

**JUDGE OF APPEAL**

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

*Signed*

Deputy Registrar

