



**Wanga & 4 others v Republic (Criminal Appeal 15 of 2020)
[2023] KECA 296 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KECA 296 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CRIMINAL APPEAL 15 OF 2020
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
MARCH 17, 2023**

BETWEEN

**GODDRICK SIMIYU WANGA 1ST APPELLANT
MAURICE KIOGORA RIUNGU ALIAS MBOSHO 2ND APPELLANT
JUMA MUTINDA KITONGELA 3RD APPELLANT
IBRAHIM YAA MANGI 4TH APPELLANT
PHILIP NGALA TSUMA 5TH APPELLANT**

AND

REPUBLIC RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Malindi (R. Nyakundi J.) dated and delivered on 5th March 2020 in High Court Criminal Appeal No 24 of 2017 arising from the original trial in Kilifi Criminal Case 546 of 2013)

JUDGMENT

1. The appellants herein have challenged the dismissal of their first appeal by the High Court, which they had lodged against their conviction for the offence of robbery with violence, and sentence of death imposed by the Senior Principal Magistrate at Kilifi (hereinafter ‘the trial court’). there were originally nine accused persons in the trial court, in which the 1st appellant, Goddrick Simiyu Wanga was the 1st accused person; the 2nd appellant, Maurice Kiogora Riungu alias Mbosho, was the 8th accused person; the 3rd appellant, Juma Mutinda Kitongela, was the 3rd accused person; the 4th appellant, Ibrahim Yaa Mangi, was the 6th accused person; and the 5th appellant, Philip Ngala Tsuma, was the 7th accused person.



2. All the appellants faced two counts of the offence of robbery with violence in the trial court, while the 2nd appellant faced additional counts of having stolen property contrary to section 323 of the [Penal Code](#), and of possession of a firearm contrary to section 89 of the [Penal Code](#), and the 5th appellant was charged with an additional count of having stolen property contrary to section 323 of the [Penal Code](#). The 2nd and 5th appellants were also charged with alternate counts of handling stolen property, contrary to section 322(1) and (2) of the [Penal Code](#).
3. The particulars of the offences of robbery with violence were that on December 4, 2013 at Bofa area in Kilifi county, the appellants, jointly with others not before the court and while being armed with dangerous weapon namely a pistol, robbed Yul Wegner of his pistol make Glock serial number DED 882, revolver make Smith & Wesson Serial Number CEU 9665, cash of Kshs 760,000/-, seven (7) golden wrist watches, one (1) iPad, one (1) iPad mini, civilian firearm certificate number 2256, 65 rounds of ammunition calibre 9mm, wedding ring and several personal effects, all valued at Kshs 8,500,000/-, and immediately before the time of such robbery threatened to use personal violence to the said Yul Wegner. The Appellants were also charged of robbing Heike Wenger of her iphone, ipad, reading glasses, mobile phone make Nokia E66IMEI number 357976035722073, pair of earrings, gold chain, diamond ring, cash of Kshs 26,000/= and other personal effects all valued at Kshs 3,800,000=, and immediately before the time of such robbery threatened to use personal violence to Heike Wenger.
4. The particulars of the additional charges against the 2nd Appellant of having stolen property and of possession of a firearm, were that on March 2, 2014 at Shella Jua Kali area in Malindi in Kilifi County , having been detained by No. 70534 CPL James Ochola, No. 70420 CPL James Mwaniki and No. 80914 PC Samuel Kamiti as a result of powers conferred by section 26 of the Criminal Procedure Code, he had in his possession one (1) jungle green hat, one (1) blue lanyard with whistle, one (1) jungle belt, one (1) Jungle green shirt, one (1) Sonny battery charger serial number 946820, one (1) brown leather travelling bag, a bunch of keys, five (5) rounds of ammunition as follows - two pieces for 9mm and three pieces for 38mm caliber, one (1) ipod touch box bearing serial number 1B743QSHW4T, one (1) black head phone, make Condor, one (1) blue purse - ipad carrier with world map on it, and one (1) small black porch reasonably suspected to have been stolen or unlawfully obtained; and that without reasonable excuse, he had in his possession ammunitions namely two pieces 9mm calibre, three pieces 38 mm calibre in circumstances which raised reasonable presumption that they said ammunitions were intended to be used in a manner prejudicial to public order.
5. With respect to the additional count against the 5th Appellant of having stolen property, the particulars were that on January 20, 2014 at Kwachacha in Malindi in Kilifi County, having been detained by No. 80914 PC Samuel Kamiti as a result of powers conferred by section 26 of the Criminal Procedure Code, he had in his possession one (1) black pistol holster, one (1) pistol magazine carrier, one (1) Samsung TV serial number AIGK3DBKB00126R, one (1) LG DVD machine model number DV 5525, one (1) leather bag grey in colour, one (1) hair straightener appliance, one (1) grey iPod pouch reasonably suspected to have been stolen or unlawfully obtained.
6. The Appellants entered pleas of not guilty in the trial Court, whereupon the prosecution called nine (9) witnesses to testify in support of their case, while the 1st Appellant gave sworn testimony and the 2nd to 5th Appellants gave unsworn testimony in their defence. The Appellants did not call any witnesses. In summary, the facts presented by the prosecution's witnesses were as follows. Yul Wenger (PW 1), a resident at Bofa in Kilifi County where he stayed with his wife Heike Wenger, 2 house girls, 2 watchmen and 3 gardeners, testified that on December 4, 2013, on or about 11.00 pm in the night, he left his business premise in Mombasa with his wife, and they arrived at Bofa at around 11.45pm, and he opened the gate of their house with a remote control and drove his car to the garage. The 1st Appellant, whom



- PW1 had employed as a watchman, followed him to the garage and to the house, and that 3 metres to the door of the house, they were ambushed by thugs who emerged from the flowers which were around the house, where they had been hiding.
7. PW1 and his wife were each held by two robbers, and one robber removed PW1's wedding band from his right hand, his wrist watch from his left hand, his wife's watch from her left wrist and her two rings, earrings and chain. Further, that PW1's two guns including his Glock 19 Pistol were taken by the robbers, who were armed with crow bars, a mason hammer, a revolver calibre 38 special and special LED torches. They also took 2 extra magazines for the firearms with about 15 rounds for the pistol and 2 with 16 rounds for the revolver that he had in his bag, Kshs 760,000/- in cash, his inhaler and an iPad that he had in another bag. PW1's wife's iPad, handbag that had her iPhone 5, sunglasses and a Nokia phone E66 black in colour were also taken by the robbers.
 8. According to PW1 at one moment he was able to see the 1st Appellant standing behind the robbers, and that the said Appellant who had a rungu (club) in his hand never pressed the alarm, and when he realized that PW1 had seen him, he jumped on the floor and started screaming, pretending to be hurt. PW1 recalled that there was a short man with a moustache among the robbers who wore a mask and who demanded for the security code for the safe which PW 1 gave him, and the robber took 6 collector watches which were in the safe. That on their way out, the robbers took some liquor namely, a bottle of Johnnie Walker, Red Label and Gilbey's Gin, and locked PW1 and his wife in their daughter's room.

However, that the robbers did not search the pockets of PW1's shorts which had his Nokia and iPhone phones, and PW1 was able to call a friend at midnight who called the County Police Commander, a Mr. Bosire. That when the police came, they found the 1st Appellant standing in the garage, and he told them his phone had been taken by the robbers.
 9. PW1 further testified that the police found a hole on the wall that the robbers had made in the wall by removing the stones, and which they used to access the compound, and they tried pursuing the robbers to no avail. That when the police came back, they found that the 1st Appellant had disappeared and left his uniform behind. He stated that he recorded his statement with the police, and he was later told that some of the stolen items had been recovered, namely the blue pouch, headphones, the E66- Nokia phone, a black bag, Black gun holster, Magazine holder, house keys, shotgun case berretta, HD - bag, black shirt, black jacket, Sudoku Book, white envelope, black spectacles, notebook, firearm certificates, and alien certificates, which he positively identified to be part of the items stolen on the night of the robbery. Further, that he was able to recognize the 3rd Appellant when he visited the County Commander's, office to identify the items as the short man among the robbers from his eyes and moustache, and also his voice. That together with armed police officers and in the company of the 3rd Appellant, they went to old town where the 3rd Appellant pointed out the persons he had sold the stolen watches to for Kshs 380,000/-. However, that the stolen watches and guns were not recovered.
 10. The investigations into the crime were led by Cpl James Ochola (PW4) who was assisted by PC Samuel Kamiti (PW5). They also had assistance from Inspector Kemboi Rop, the then Malindi Deputy DCIO (PW8), and IP Nahid Suleiman Hashim (PW9), a data analyst and cybercrime expert based at Nairobi who was sent to Kilifi on December 4, 2013, and obtained phone numbers from the CID of some of the suspects to analyse and confirm their location. PW9 produced the request to Safaricom for data by a letter dated December 6, 2013, and the data records from Safaricom as exhibits. The gist of the evidence from the investigations was that the 1st Appellant was traced to Malindi and on examination of his phone records, it was found to have been in communication with the 3rd Appellant, who was known to the police as a criminal. Further, that the 1st Appellant informed them that the 3rd Appellant



had participated in the robbery, and upon the arrest of the 3rd Appellant and examination of his phone records it was found that he had communicated with the phone stolen from PW1's wife.

11. PW1 wife's phone was traced to one Francis Mwangangi Mbithe, who was the 5th accused person in the trial Court, and who told them that he had bought the phone from one Ruth Kabutha Kyalo, who was the 4th accused person, and who in turn stated that she had been given the phone by her husband, namely the 3rd Appellant. The 3rd Appellant when arrested, confirmed knowing the 1st Appellant, and also mentioned the 2nd Appellant and 4th Appellant among others, as having been involved in the robbery. The 2nd and 4th Appellants were then arrested, and while under arrest at the police station, two girls came to see the 4th Appellant, and were accompanied by the 5th Appellant, who was the 4th Appellant's brother. The police suspected the said visitors and searched their premises, whereupon they recovered various items from the 5th Respondent's house, namely, a Samsung TV screen, 1 red pair of sport shoes, 1 red Adidas sport shoes, 1 CAT sport shoes, 1 black box (watch carrier), 1 LG DVD machine, 1 leather bag, a driver's license for Joel Tsuma, hair straighter, 1 black pistol holster, 1 black plastic courier, 1 grey iPad pouch, 1 black mobile carrier (Golla Make) and a County Government Ward Sokoni Ward Scholarship application form. That they thereupon located the 4th Appellant's house, and upon searching it recovered a khaki jungle shirt and hat, a whistle with black strip, a phone box, a bunch of keys to PW1's house that were stolen during the robbery, a shotgun carrier medicines, a brown leather bag, sunglasses case, a sony charger, 5 rounds of ammunition and the 2nd Appellants phones. All the items were recorded in exhibit memos.
12. Senior Sergeant Johnson Musyoki (PW3), a ballistic expert having had 18 years' experience stated that he received 5 rounds of ammunition on 26th May 2014 which were marked as exhibit A1, A2, B1, B2 and B3, and were forwarded by Cpl James Ochola of CID Kilifi, together with exhibit memo form marked as LAB 323/2014, asking him to ascertain whether the exhibits were ammunition under the Firearms Act. On examination, he formed the opinion that Exhibit A1 & A2 were 2 rounds of ammunition in calibre 9 by 19mm and were used in pistols and machine guns while Exhibits B1-B3 were 3 rounds of ammunition I calibre 38 special used in revolvers, and fell within the definition of ammunitions as defined in the Firearms Act.
13. Some of the stolen items namely 2 ipad tablets were found by a shamba boy (gardener) employed by Rehema Said Maitha (PW6) on her farm, and PW6 called the DCIO Kilifi who instructed her to wait at the scene. When the police officers arrived, PW6 took them to where the items were, and she recorded a statement. Pushar Savi Jayani (PW2) on his part confirmed that he sold one motorcycle to the 3rd Appellant on 9th December 2013 at Kshs. 106,500/= model Bajaj Boxer DM150cc chassis number MD2A21BZXDF73374; while Richard Mwika Mutuli (PW7) a motorcycle rider, stated that he was employed by the 3rd Appellant in December 2013 on the day the said motorcycle was purchased, and did not know the 3rd Appellant prior to that date.
14. When put on his defence, the testimony of the 1st Appellant (DW1) was that he was at work as a night guard at the scene, when there was an attack by five persons who emerged from the bushes; that the attackers entered the house and left after 15 minutes. He told court that the police arrived and days later he was arrested because he was a watchman at the scene on the day of the incident. The 2nd Appellant (DW8) told court that he was arrested on March 2, 2014 when he was at the market waiting for a vehicle ferrying miraa. He denied the offence. The 3rd Appellant testified as DW3. He told court that he was arrested on December 15, 2013 when he went to deliver scrap to a customer, while the 4th Appellant who testified as DW6, stated that his house was searched on January 19, 2014 by police officers after he had sustained a gun shot. He also denied the offence. The 5th Appellant testified as DW7 to the effect that his kiosk was broken into and he was arrested. He denied committing the offence.



15. The learned trial Magistrate, Hon. R. Ondieki SPM, in the judgement delivered on December 6, 2017, noted that the charge sheet indicated the charging section as Section 295 as read with Section 296(2) of the *Penal Code*, which resulted in there being a duplex charge as there are two different offences in the mentioned sections. However, that the accused persons were not prejudiced because the statement of offence and the particulars relate to the offence of robbery with violence and further that this defect is curable under Section 382 of the Criminal Procedure Code. The learned Magistrate was satisfied that there was no mistaken identification of the 3rd Appellant as he was known to the complainant and his features were articulated in PW1's evidence. In addition, the period spent with the 3rd Appellant leading him to the safe where the said Appellant took the 6 watches gave PW1 enough time to identify the 3rd Appellant. It was noted that under the doctrine of recent possession as was applied in the case of *Isaac Nganga Kabiga alias Peter Ng'ang'a Kabiga v R*, Criminal Appeal 272 of 2005, the unexplained possession by the 1st, 2nd, 3rd and 5th Appellants of items stolen during the robbery and the lack of a satisfactory account of how they ended up in their possession led to an inference that the said persons were the robbers.
16. On the circumstantial evidence, it was noted that the cyber crime witness (PW9) presented evidence that the 3rd Appellant was in communication with the 1st Appellant and 2nd Appellant among other accused persons before and after the commission of the offence. It was also noted that the 3rd Appellant purchased a brand new motorcycle using the stolen money; that the 1st Appellant was found with a mobile phone that was used to communicate with the 3rd Appellant. It was concluded that the evidence pointed towards all the Appellants as participants in the robbery. It was however found that the 4th and 5th accused persons were not connected with the robbery as they gave a satisfactory account of how the Nokia E66 phone came to their possession, and that there was no direct evidence linking David Garama Mwaro, the 2nd accused person, with the offence, and the said accused persons were acquitted under section 215 of the Criminal Procedure Code. The 1st to 5th Appellants were consequently convicted of the first count of robbery with violence, while the 2nd Appellant was also convicted of the count of possession of a firearm. The 1st to 5th Appellants were sentenced to death, with the 2nd Appellant's sentence for the conviction of possession of a firearm being left in abeyance.
17. The 1st to 5th Appellants were dissatisfied with the decision of the learned trial Magistrate and appealed to the High Court. The 1st Appellant appealed on the grounds that the death sentence was illegal; there was contradiction in the prosecution case; PW1 was not recalled despite a request by the 1st Appellant and that his defence was not considered. The 2nd, 3rd, 4th, and 5th Appellants raised identical grounds in their respective memoranda, and challenged the trial Court for convicting them based on improper identification at the dock without an identification parade; for failing to note that the recovered items were never identified in court and for rejecting their defences. Nyakundi J. vide judgement rendered on March 5, 2020 found that there was ample evidence that the Appellants robbed PW1 while armed with offensive weapons; that the recovered items were identified as items capable of being stolen. It was added that the denials by the Appellants did not displace the prosecution evidence against them.
18. On the issue of identification, the learned Judge found that the evidence of PW1 who saw and knew the 1st and 3rd Appellants meant they were properly identified as the assailants. It was also found that the doctrine of recent possession was properly applied to convict the 1st and 3rd Appellant; that the denial by the Appellants did not displace the prosecution evidence against them and failed to meet the test under Section 111 of the *Evidence Act*. It was added that the circumstantial evidence on Safaricom Call data placed the Appellants at the scene of the crime. The learned Judge concluded that there was no error of law or principle committed by the trial Court in its finding that the Appellants committed the robbery. The 1st to 5th Appellants' appeal against conviction was dismissed, while the death sentence



was set aside and substituted with a 30-year imprisonment sentence with effect from December 23, 2013, in light of the concerns expressed in *Francis Karioko Muruatetu v R* (2017) eKLR.

19. The 1st to 5th Appellants are also aggrieved with the decision of the High Court, and have filed their respective second appeals in this Court. The initial grounds of the second appeal by the 1st Appellant were that he was convicted on a duplex charge; amendments of the charge sheet did not comply with section 275 of the *Criminal Procedure Code*; a capital offence was erroneously heard by a single judge contrary to section 359 of the *Criminal Procedure Code*; that the failure to recall PW1 led to miscarriage of justice; that the 1st Appellant's defence was not considered, and that there was contradiction in the evidence as to whom the spiral book was recovered from. The 1st Appellant also filed supplementary grounds on his deprivation of the right to legal representation; his conviction on weak circumstantial evidence; the misapplication of the doctrine of recent possession; the lack of certificate of electronic evidence for the Safaricom Call data statement by dint of Section 106 B(4) of the *evidence*; the failure to indicate the recovered items in the charge sheet; the rejection of his defence, and the harsh 30-year imprisonment sentence.
20. In respect of the 2nd Appellant, the learned Judge was assailed for improperly relying on the doctrine of recent possession; for failing to evaluate the evidence on record; and for erroneously disregarding the appellant's defence. In respect of the 3rd Appellant, the grounds of appeal are that the learned Judge erroneously relied on the evidence of a single witness; failed to find that withholding witness statements was a breach of Article 50(2)(j) of the *Constitution*; failed to stay the trial on the grounds of the 3rd Appellant's torture claim that was raised during trial; failed to note that the Safaricom data relied upon by the prosecution was never produced in evidence; erroneously relied on the 4th accused (Ruth Kabutha Kyalo's) incriminating defence against him and for failure to find that the 3rd Appellant's arrest did not link him with the offence he was charged. In respect of the 4th Appellant, that the Safaricom data was not in accordance with Section 110 of the *Evidence Act*; that the court did not consider that nothing was recovered from the 4th appellant during his arrest. In respect of the 5th appellant, that the capital offence was tried by a single judge contrary to section 359 of the *Criminal Procedure Code*; the doctrine of recent possession was improperly applied on him and that his defence was not considered.
21. It is notable that many of the above grounds raised by the Appellants were not raised in the High Court, and cannot therefore be raised in a second appeal. During the virtual hearing of the appeal on September 29, 2022, learned counsel Ms Aoko, the advocate for the 1st to 5th Appellants, informed us that she would rely on supplementary grounds of appeal dated July 5, 2022 she filed in court, in which the grounds raised are the failure by the 1st appellate court to re-examine and re-evaluate the evidence from the trial court; the failure to find that the offence was not proven; the failure to find that the doctrine of recent possession did not pass the test; the failure to consider the harsh sentence meted by the trial court; the failure to consider the lack of a sentence hearing; the failure to note the defective charge sheet; the failure to note the lack of legal representation of the appellants and the failure to consider the unconstitutionality of the death sentence meted by the trial court. The learned counsel collapsed the said grounds to two grounds, namely, failure by the High Court to re-examine and re-evaluate the evidence from the trial court and thereby reaching a wrong conclusion, and that the sentence passed was manifestly excessive and harsh.



22. This being a second appeal, our mandate is limited under Section 361 of the [Criminal Procedure Code](#) to consideration of matters of law only. The role of this Court was in this regard set out in *Karani v R* (2010) 1 KLR 73 as follows:
- “ By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior Court on fact unless it is demonstrated that the trial court and the first appellate Court considered matters they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law.”
23. Ms Aoko highlighted her written submissions dated July 11, 2022 in support of the two grounds. Learned senior prosecution counsel Ms Mutua holding brief for Mr. Nyoro, also a senior prosecution counsel, appeared for the Respondent, and relied on their submissions dated July 8, 2022. The Appellants’ counsel raised three issues under the ground of failure to re-analyse and reconsider the evidence in the trial court. The first was whether the High Court analysed the charge sheet, and whether the learned Judge failed to note that it was defective and that there was duplicity and multiplicity of charges. The second issue was whether there was a proper application of the doctrine of recent possession, and the last issue was whether the phone data analysis was admissible.
24. On the propriety of the charge sheet, it was urged by the Appellants’ counsel firstly, that the 2nd Appellant was charged with possession of a firearm in the 4th count, yet the particulars indicated possession of ammunition; and that the said charge was defective as the offence was misdescribed and was incurable under Section 382 of the [Penal Code](#). The counsel cited section 134 of the [Criminal Procedure Code](#) and the decisions in the cases of *Sigilani v R* (2004) 2 KLR 480, *Mary Waitibera Kamuiru & 3 others v R* (2016) eKLR and *Yongo v R* (1983) KLR 319 on the framing of charges and defective charges in this regard. It was added that there was no evidence to support the charge therefore the charge is defective. Secondly, it was pointed out that the Appellants were charged under Section 295 as read with Section 296(2) of the [Penal Code](#); that these were 2 counts and therefore duplex charges, resulting in the inability of the appellants to prepare for their defence and a miscarriage of justice. The Appellants’ counsel relied on the decision by this Court in *Joseph Njuguna Mwaura & 2 others v R* (2013) eKLR. The prosecution counsel on her part submitted that the prosecution called eight witnesses who testified as to the robbery with violence, and proved its case beyond reasonable doubt, and did not address the issue of the charges against the Appellants.
25. Thirdly, the Appellants’ counsel submitted that there was a multiplicity of charges, as the Appellants were charged with two counts of robbery with violence, handling stolen property, handling stolen goods, and possession of a firearm, which confused both the Appellants and trial magistrate, who as a result failed to comply with the requirements of section 169(1) and (2) of The [Criminal Procedure Code](#) as it did not state or specify the counts on which the Appellants were either convicted or acquitted. That the failure of the trial court to comply with section 169 was fatal to the prosecution’s case, and occasioned injustice to the Appellants as they do not know the fate of the other counts and have been in legal custody since 2013.
26. The propriety of a charge is a matter of law, and section 134 of the [Criminal Procedure Act](#) requires a charge to contain a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged. In addition, the charge must be supported by evidence. On the count of possession of a firearm brought against the 2nd Appellant, it is notable that the offence as defined and



described in section 89(1) of the [Penal Code](#) does not only include firearms, but also other offensive weapons, as follows:

“Any person who, without reasonable excuse, carries or has in his possession or under his control any firearm or other offensive weapon, or any ammunition, incendiary material or explosive in circumstances which raise a reasonable presumption that the firearm, ammunition, offensive weapon, incendiary material or explosive is intended to be used or has recently been used in a manner or for a purpose prejudicial to public order is guilty of an offence and is liable to imprisonment for a term of not less than seven years and not more than fifteen years.”

27. Ammunition is specifically included in the definition of the offence, and the particulars of the charge in this regard were that the 2nd Appellant was found with 5 rounds of ammunition, and there was evidence provided by PW5 and PW3 as to the recovery of the said ammunition and its examination. To this extent the charge was properly framed and described. We will however, later on in this judgment, address the irregularity we noted with respect to the charge when dealing with the aspect of multiplicity of the charges.
28. On whether the charges were duplex, it was indeed noted and explained by this Court (Mwera, Warsame, Kiage, Gatembu & J. Mohammed JJ.A) in [Joseph Njuguna Mwaura & 2 Others v Republic](#) [2013] eKLR that charging an accused person with the offence of robbery with violence under sections 295 and 296(2) of the [Penal Code](#) would amount to a duplex charge as follows:

“Indeed, as pointed out in *Joseph Onyango Owuor & Cliff Ochieng Oduor v R* (Supra) the standard form of a charge, contained in the Second Schedule of the Criminal Procedure Code sets out the charge of robbery with violence under one provision of law, and that is section 296. We reiterate what has been stated by this Court in various cases before us: the offence of robbery with violence ought to be charged under section 296 (2) of the Penal Code. This is the section that provides the ingredients of the offence which are either the offender is armed with a dangerous weapon, is in the company of others or if he uses any personal violence to any person.

The offence of robbery with violence is totally different from the offence defined under section 295 of the [Penal Code](#), which provides that any person who steals anything, and at, or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or to property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296 (2) as this would amount to a duplex charge.”

29. It was further explained by this Court (Kihara Kariuki, P.C.A, Okwengu & Azangalala, JJA.) in [Paul Katana Njuguna v Republic](#) (2016) eKLR that the offence of robbery with violence includes the elements of the offence of robbery, and if the particulars of the charge sheet show the elements of the offence of robbery with violence which are proved, then this is a defect that is not fatal and can be cured by this Court under section 382 of the [Criminal Procedure Code](#).
30. In the present appeal, as demonstrated by the particulars of the charge sheet reproduced in the foregoing, the charge sheet did have elaborate particulars of the offence of robbery with violence, and there was no record of any confusion on the part of the Appellants, who pleaded that they were not guilty to the two counts of robbery with violence, cross examined the witnesses on the evidence presented on the circumstances of the said robbery, and presented their defence. In addition, the Appellants did not raise any grounds or complaint on appeal to the High Court on the findings by the



trial Court on the duplex charge sheet. Therefore, while it was undesirable to charge the Appellants under both sections, it was not prejudicial as correctly found by the trial Court, and therefore not fatal.

31. We are however constrained to agree with the Appellant’s counsel that there was multiplicity and a defect in some of the counts brought against the Appellants. Multiplicity is defined in *Black’s Law Dictionary* Ninth Edition at page 1112 as “the improper charging of the same offence in more than one count of a single indictment or information”. Therefore multiplicity in a charge sheet is the charging of a single criminal act or offence as multiple separate counts, and raises the risk of violating the double jeopardy principle against receiving multiple sentences for a single offence, that is enshrined in Article 50 (2) (o) of the *Constitution*. This error or mistake in a charge is also one that can be cured on appeal under section 382 of the *Criminal Procedure Code*, where it is shown that no prejudice has been occasioned by the multiplicity of charges. In this respect, the 2nd and 5th Appellant were charged with a count of having stolen property. The evidence that was adduced during the trial of stolen items was that of PW1, in his account of the robbery at his house. Consequently, the particularization of the items stolen from PW1 during the robbery in the count of having stolen property that was brought against the 2nd and 5th Appellants made the charge multiplicitous, as the 2nd and 5th Appellant had also been charged with two counts of robbery with violence with respect to the same items. This outcome also applies to the count of being in possession of a firearm against the 2nd Appellant, since the ammunition that was the subject of the said charge was also stolen during the said robbery.
32. One could argue that there were items included in the count of “having stolen property” against the 2nd and 5th Appellant that were not stolen during the robbery at PW1’s house, and therefore that the charge was still valid. Indeed there was as regards the 2nd Appellant particulars of items namely “(1) jungle green hat, one (1) jungle belt, one (1) Jungle green shirt, one (1) Sonny battery charger serial number 946820”, and for the 5th Appellant there were particulars of some items being “one(1) Samsung TV serial number ALGK3DBKB00126R, one (1) LG DVD machine model number DV 5525, and one (1) hair straightener appliance” which were not among the items stolen from PW1. However, no evidence was called as to how, when or where the said items had been stolen, and this made the count of having stolen property against the 2nd and 5th Appellants defective.
33. A charge that is not disclosed by evidence is defective, for the reason that the object of a charge is to give the accused notice of the matter he is charged with and to convey the necessary information that will enable him to make his defence or prepare his case before court. Section 214 of the *Criminal Procedure Code* in this respect provides as follows for this reason:
 - (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that—
 - i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;
 - ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last-mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination..”



34. Lastly, as pointed out by the Appellants' counsel, while the 2nd Appellant was convicted of the offence there was no finding or pronouncement made by the trial Court as regards the counts brought against the 2nd and 5th Appellant of having stolen property. In addition, even though there was evidence adduced on the robbery against PW1's wife and items stolen from the wife, some of which were recovered, there was no finding made by the trial Court on the second count I of robbery with violence. It is also notable that after substituting the sentence of death imposed on the Appellants with that of 30 years' imprisonment, the High Court did not make any pronouncement on the sentence for possession of a firearm that had been left in abeyance because of the sentence of death. We therefore find that there were lapses made by the High Court in its re- evaluation and analysis of the evidence adduced in, and findings made by the trial Court in light of the existence of defective and multiplicitous charges, and the lack of a decision and findings on some of the counts brought against the Appellants.
35. We are however of the view that the above defects did not vitiate the entire trial, as they only affected the 2nd and 5th Appellants and as there was no adverse effects on the 2nd and 5th Appellants arising therefrom, they were also not prejudicial. Being defects of law, they are also curable on appeal under sections 361(2) and 382 of the *Criminal Procedure Code* by way of setting aside the conviction of 2nd Appellant for the offence of being in possession of a firearm, and acquitting the 2nd and 5th Appellants of the counts of having stolen property.
36. The second issue raised on the High Court's re-evaluation and analysis of evidence was that of the application of doctrine of recent possession. It was urged by the Appellant's counsel that there was neither proof of possession nor proof that the property was stolen from the complainant recently and that the property belonged to the complainant. It was pointed out that there were no receipts of purchase or certificates of warranties; that there was no evidence of ownership of the items recovered, and that the 1st Appellant was not arrested with anything. According to the counsel, the 1st and 4th Appellants ought to have been charged with handling stolen property and reliance was placed on the decision in *Isaiah Ng'ang'a Kabiga alias Peter Ng'ang'a Kabiga v R* (supra) Cr Appeal 272 of 2005.
37. The doctrine of recent possession applies where there is unexplained possession of recently stolen goods which raises an adverse inference that the possessor is guilty of their theft, and was explained at length by the Canadian Supreme Court in *Republic v Kowkyk* (1988)2 SCR 59. The elements of the doctrine were set out in *Isaiah Ng'ang'a Kabiga alias Peter Ng'ang'a Kabiga v R* (supra) as follows:
- “It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.
- In other words, there must be positive proof:
- i. that the property was found with the suspect;
 - ii. that the property is positively the property of the complainant; iii). that the property was stolen from the complainant;
 - iv). that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”
38. The evidence adduced in the trial Court was that items were stolen from PW1 and his wife on the night of December 4, 2013, and some of the items were recovered from the 5th Appellant on January 21, 2014, and from the 2nd Appellant on March 2, 2014 as shown by the inventories produced by the prosecution witnesses as exhibits. The phone belonging to PW1's wife that was stolen during the robbery was sold



to DW5 the 5th accused person, by the wife of the 3rd Appellant on January 12, 2014. PW1 identified the items recovered as those stolen from him and his wife during the robbery, and the 2nd 3rd and 5th Appellants did not provide any explanation as to how the items came to be in their possession within a span of 1 to 2 months of the robbery. We therefore find that there is no basis to disturb the trial Court's and High Court's findings on the application of the doctrine of recent possession, and conviction of the 2nd, 3rd and 5th Respondents for the offence of robbery with violence based on the application of the doctrine.

39. The last issue raised by the Appellants' advocate arising from the re-evaluation of evidence by the High Court was on the reliance on the phone data analysis, and counsel cited section 106B (4) of the *Evidence Act* to submit that the reliance was erroneous in the absence of a certificate identifying the electronic records. Section 78A of the *Evidence Act* provides that electronic messages and digital material shall be admissible as evidence in any legal proceedings. Sections 106A and B of the *Evidence Act* in addition provides for the conditions for admissibility of electronic records.
40. In summary, section 106A of the *Evidence Act* provides that the contents of electronic records may be proved in accordance with the provisions of section 106B. Section 106 B on the other hand requires any information contained in an electronic record (which is defined as the contents of a document or communication printed on a paper, or stored, recorded, copied in optical or magnetic media produced by a computer), is deemed to be a document and is admissible in evidence without further proof of the production of the original, providing the conditions set out in section 106B (2) for the admissibility of evidence are satisfied. Section 106B (4) further mandates the production of a certificate of authenticity of electronic evidence which is signed by a responsible person who was responsible for the computer on which the electronic was created or stored. The certificate must uniquely identify the original electronic record, describe the manner of its creation, describe the particulars of the device that created it, and certify compliance with the conditions of sub-section (2) of section 106B.
41. PW9 in this respect produced letters sent to Safaricom, one of the telecommunications providers requested for the phone data of the various accused persons. Under section 27A (3) of the *Kenya Information and Communications Act*, a telecommunications operator may disclose the registration particulars of a subscriber in connection with the investigation of any criminal offence or for the purpose of any criminal proceedings. The said data was then analysed by PW9, who stated as follows:

“I am number 235235 IP Nahid Suleiman Hashim. I work with the Directorate of CID attached to the Criminal Intelligence Unit my duties include to conduct investigations on data, help investigations, track criminals analysing data, cyber crime. Have done this issue for the past 11 years since the year 2005”

The said witness testified that she analyzed the phone data that she received from Safaricom and Airtel to locate the suspects, including some of the Appellants and also provided the said data analysis to the Appellants during the trial. In this respect her opinion was rightly admitted as that of an expert by the trial Court, and being primary evidence prepared by PW9, no certificate was required by section 106B(4) of the *Evidence Act* in the circumstances.

42. It is notable in this respect that the data analysis from the phone records is the evidence that connected the 1st and 4th Appellant to the offence of robbery as PW7 testified that the 1st and 4th Appellants were communicating with the 3rd Appellant before and after the robbery and also placed the 4th Appellant in the vicinity of the scene of crime at the time of the robbery. We are of the view that the conviction of the 1st Appellant was safe as the phone data was sufficient evidence of a common intention to commit the offence; as he was present at the scene of the crime before and during the robbery; and there was



additional circumstantial evidence adduced against the 1st Appellant, being the recovery of his phone which he had said was stolen after the robbery from his house, and the evidence by PW1 on the 1st Appellant's conduct during and after the robbery.

43. However as against the 4th Appellant we find that the circumstantial evidence adduced did not meet the threshold set in *R v Kipkering Arap Koske* [1949] 16 EACA 135 and *Sawe v Rep* [2003] KLR 364, which is that such circumstantial evidence must exclude co-existing circumstances which would weaken or destroy the inference of guilt. In *Abanga alias Onyango v Republic* Cr. Appeal No. 32 of 1990 (UR) the Court of Appeal set out three tests to be applied to determine whether the circumstantial evidence relied on by the prosecution can lead to a conclusion that it is the accused who committed the offence under consideration. The said tests are:
- 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.”
44. There are unknowns and gaps as regards the 4th Respondent's activities and whereabouts during the time of the robbery that were not explained by the prosecution, and it is our view that the evidence adduced was not sufficient for one to reach a firm conclusion without any reasonable doubt that the 4th Appellant participated in the robbery.
45. On the sentence imposed on the Appellants, the Appellants' advocate urged that the 30 years was excessive because there was no sentence hearing; there were no aggravating circumstances like death or injury; that the stolen items were recovered; that the stolen items were neither identified nor their value known; that the appellants were first offenders who were identified under difficult circumstances; the age of the appellants was not considered, and that the time in custody was not taken into consideration before sentencing. The advanced age of the appellants was pointed out for the proposition that their sentence be reduced, and the decision in the case of *Abdalla Mwanza v R* (2018) eKLR was relied upon in this regard.
46. Under Section 361(1)(a) of the *Criminal Procedure Code*, severity of sentence is a matter of fact outside the scope of a second appeal, and given that there is a mandatory sentence of death for the offence of robbery with violence provided under section 296(2) of the Penal Code, and in light of the clarification by the Supreme Court of Kenya in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR that its decision on the unconstitutionality of the death sentence only applied to murder convictions, we find that the sentence that was meted by the High Court was lenient.
47. We accordingly partially allow the appeal only to the extent that we set aside the conviction of the 2nd Appellant for the count of possession of a firearm contrary to section 89 of the Penal Code, and quash the sentence for this offence that had been held in abeyance by the trial Court. We also acquit the 2nd Appellant and 5th Appellant of the counts of having stolen property contrary to section 323 of the Penal Code. Lastly, we quash the conviction of the 4th Appellant for the counts of robbery with violence contrary to section 296(2) of the of the Penal Code, and set aside the sentence of 30 years' imprisonment imposed upon him. The 4th Appellant shall be set at liberty forthwith unless otherwise lawfully held.



48. We however uphold the conviction of the 1st 2nd 3rd, and 5th Appellants for two counts of robbery with violence contrary to section 296(2) of the Penal Code and affirm the sentence imposed on each of the 1st 2nd 3rd, and 5th Appellants of 30 years imprisonment for each count, which sentences shall run concurrently.

49. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is True copy of the original

Signed

DEPUTY REGISTRAR

