



**Mwangi v Republic (Criminal Appeal 54 of 2021)  
[2023] KECA 668 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 668 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CRIMINAL APPEAL 54 OF 2021  
AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA  
JUNE 9, 2023**

**BETWEEN**

**BEN MACHARIA MWANGI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the Judgment of the High Court of Kenya at Nairobi (Mbogholi-Msagha & Ochieng, JJ.) dated 25th July, 2013 in HC. CR.A. No. 284 of 2008)*

**JUDGMENT**

1 The appellant Ben Macharia Mwangi was presented before the Principal Magistrates Court at Kikuyu where he was charged with the offence of robbery with violence contrary to section 296(2) of the [Penal Code](#) particulars being that on the April 22, 2007 at Kabete Rehab School in the then Kiambu district, jointly with others not before court while armed with offensive weapons namely pangas and rungas they robbed Dominic Mbogo Nganga of a television set, a radio, a mobile phone, a battery, one three-piece suit, two pairs of shoes, a jeans jacket, a bunch of keys and cash Ksh.20,000 and that immediately before or immediately after the time of such robbery they threatened to use actual violence to the said Dominic Mbogo Nganga. He pleaded not guilty to the charge and a trial took place where the prosecution called four witnesses; he was put on his defence; he gave unsworn testimony in defence; the trial court found that the case had been proved to the required standard and the appellant was convicted and sentenced to death. He filed an appeal to the High Court of Kenya at Nairobi and in a Judgment delivered on July 25, 2013 (Mbogholi-Msagha and Fred Ochieng, JJ. – as they then were) the appeal failed and was dismissed.

2 This is a second appeal from those findings. Our mandate in such an appeal is limited by section 361(1) (a) [Criminal Procedure Code](#) to consider only issues of law if we find any and to resist the temptation to



go into facts which have been tried by the first court and re-evaluated on 1<sup>st</sup> appeal – See *John Kariuki Gikonyo v Republic* [2019] eKLR where this court held on that mandate:

“(15) This being a second appeal as we have already stated, our jurisdiction is limited to matters of law only. In *David Njoroge v Republic*, [2011] eKLR, this court stated that under section 361 of the Criminal Procedure Code:

“Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (See also *Chemagong v Republic* (1984) KLR 213.”

3. We shall briefly visit the facts of the case to ascertain whether the two courts below carried out their mandate as required in law and to see whether any points of law are raised in this appeal calling for our consideration.
4. Dominic Mbogo Nganga (Nganga – PW1) was asleep in his house in the night of April 22, 2007 when between 1 – 2 a.m. he was rudely awoken by a loud noise made by a big stone that was used to break the window next to his bed. He took a torch which he flashed and immediately realized that there was an intruder in his bedroom who had entered through the broken window. That intruder was holding a panga and he ordered him to switch off the torch, get into bed and not utter a sound. The intruder opened the main door and Nganga realized that there were now many people in the house. The original intruder re-entered the bedroom and, according to Nganga, he recognized him by voice when he demanded for money. There was a lantern in the bedroom but its power had been reduced so there was no sufficient lighting. Upon the robber demanding money, Nganga told him to get money from a three-piece suit that he had worn the previous day. The robber also took Nganga’s phone, make Motorola C113 and a camera that was in the bedroom. The robber left and when Nganga realized that the robbers had all left, he got out of bed and went out to his children’s house located about 20 metres away and found it locked from outside. He opened for his children and when they inspected his house they found various items stolen including a big radio, 2 radio speakers, a coloured television set, 2 pairs of shoes, a jeans jacket, office keys, a car battery and documents that were in the stolen suit. He reported the robbery that very night to the Administration Police Post within the Approved School where he lived. When he woke up in the morning and because it had rained heavily that night he and his son Daniel Njoroge Mbogo (Njoroge – PW2) were able to follow footprints that led from their compound to a nearby stream where they recovered the stolen car battery and battery plug. They followed the footprints which led them to a nearby village and they decided to seek police help from Kabete Police Station where APC Maurice Ndiema (PW4) and another officer accompanied them to the said village where a search was conducted. Nganga spotted his stolen trouser next to a flower pot outside the second house to be searched. The whole party entered the house where the stolen radio was recovered. Nganga also identified the panga that the robber had threatened him with at the time of the robbery and the rest of the three-piece suit and muddy shoes were recovered hanging behind the main door and in the house. The appellant was found sleeping in that house and was arrested.
5. Njoroge (PW2) corroborated that narration of facts adding that he was the one who had bought the stolen radio. He took a loan from Equity bank and gave the radio as security for the loan. He gave to the court the serial number of the radio from records at the said bank having misplaced the receipt issued when he purchased the radio.
6. APC Ndiema confirmed having accompanied Nganga and Njoroge; he recovered the stolen items and arrested the appellant.



- 7 The other witness was Corp. Rogers Lumile who investigated the case and charged the appellant with the said offence of robbery with violence. He produced the recovered items as part of the prosecution case.
- 8 When he was put on his defence the appellant stated in an unsworn statement that he was a casual labourer and that he was asleep on April 22, 2007 at 11 a.m. when his wife woke him up and told him that they had visitors. He found 2 police officers waiting for him and he was arrested and charged in court. He was surprised that exhibits were produced by the prosecution when no exhibits had been recovered from his house.
- 9 The trial court considered both sides of the case and as we have seen convicted the appellant, a conviction that was upheld on first appeal.
- 10 The homemade “Amended Grounds of Appeal” are structured as submission which run into 8 pages.
- 11 When the appeal came up for hearing before us on a virtual platform on February 6, 2023, the appellant appeared from Kamiti Maximum prison and was represented by learned counsel Miss Irungu while learned counsel Mr. O.J. Omondi appeared for the office of Director of Public Prosecutions. Both sides had filed written submissions which they fully relied on without finding it necessary to give a highlight.
- 12 Learned counsel for the appellant pointed to a Supplementary Memorandum of Appeal drawn by Pauline Irungu & Company Advocates dated February 5, 2023 where 4 grounds of appeal are set out. It is said in the first ground that the learned Judges on first appeal erred in law by relying on circumstantial evidence which was insufficient to prove the case; that the Judges erred in upholding the appellant’s conviction based on the doctrine of recent possession; that the identification of the appellant was not proved beyond reasonable doubt as no identification parade was conducted; and, finally, that the Judges erred in law by giving the appellant a harsh sentence and violated his right to mitigate.
- 13 In the said submissions the appellant cites the cases of *Ibrahim Chacha Mwita v Republic* [2004] eKLR and *Simon Musoke v Republic* [1958]EA 715 for the proposition that there is need to ensure that there are no co- existing circumstances before convicting an accused person based on circumstantial evidence. It is submitted for the appellant that the circumstantial evidence offered by the prosecution did not prove the case to the required standard. It is further submitted on the issue of identification that Nganga was not able to identify the robber who entered his bedroom and it is said that he did not give any description of the robber. On sentence it is submitted that sentence under Section 296(2) of the *Penal Code* is contrary to article “50(20) (p)” (sic) of the *Constitution* and the Supreme court of Kenya decision in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR is cited for a proposition that the mandatory nature of a death sentence is unconstitutional.
- 14 The respondent submits that the conviction was safe as footprints from Nganga’s house led him and the police to the appellant’s house where some of the stolen items were recovered; that there were no other co-existing circumstances weakening the chain of circumstances relied on. The case of *Sawe v Republic* [2003] eKLR 364 is cited in support of that proposition.
- 15 We recognize in this appeal that the points of law calling for our consideration are whether the doctrine of recent possession was properly applied in the case; whether circumstantial evidence proved the case; whether the appellant was identified as one of the robbers who robbed Nganga of his goods and finally the issue of sentence.
- 16 The first three issues relating to application of the doctrine of recent possession, whether circumstantial evidence proved the case and the issue of identification are closely linked and intertwined and can be discussed together.



- 17 Nganga stated that he was ordered by the robber who was already in his bedroom to switch off a torch he had flashed upon waking up. Although he said that he recognized the robber's voice this line was not pursued by the prosecution and was not an issue before the two courts below. What was considered was testimony by Nganga, his son Njoroge and the police officer that because it had rained heavily that night they were able to follow footprints from Nganga's house which led to a stream where some of the stolen items were recovered. The footprints then led to a village where stolen items were recovered from the appellant's house.
- 18 This is what the trial Magistrate found on that issue in the Judgment:  
"I find given the complainants property was recovered within 8 hours in possession of the accused and having cautioned myself again that there was no visual identification by the complainant the doctrine of recent possession will apply appropriately herein coupled with the circumstantial evidence. Lastly consider it to be sufficient basis to found a conviction and I find the accused guilty as charged on the main count and I shall convict him accordingly."
- 19 The High Court (on first appeal) agreed with those findings holding:  
"The appellant was not able to give any or any reasonable explanation as to his possession of the property which did not belong to him. The property was recovered within hours of the robbery. This is not coincidental and the only irresistible conclusion is that he was one of the people who stormed into the house of the complainant and robbed him of the property set out in the charge sheet.  
Circumstantial evidence in this particular case led to only one destination and this was the house of the appellant. He had wet clothing and muddy shoes. The only conclusion is that he was one of the people who robbed the complainant."
20. We are in total agreement with the findings of the High Court. Robbers stormed Nganga's house at night in circumstances where he was not able to identify any of them. They were many and they were armed. Nganga, Njoroge and the police followed footprints that led them to the appellant's house where items stolen a few hours earlier were recovered. The appellant who was in possession of recently stolen items did not give any explanation on how the items came to be in his house. In the case of *Isaac Nganga Kabiga alias Peter Nganga Kabiga v Republic* [2005] 2 KLR 151 this court on the doctrine of recent possession:  
"It is trite that 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; 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 to the other."
21. Nganga identified the recovered items as his; stolen clothes and shoes were still wet from the rain that pounded the area that night; documents in support of ownership of the recovered radio were produced. It was proved to the required standard that the appellant was one of the robbers who entered Nganga's house that night and stole from him after threatening him with a panga. Those grounds of appeal relating to identification and the application of the doctrine of recent possession have no merit and are dismissed.



- 22 On the issue of harshness of sentence awarded section 361(1) (a) *Criminal Procedure Code* provides that severity of sentence is a matter of fact for which we have no jurisdiction in a second appeal like this one.
- 23 The appellant complains that his right to offer a mitigation was violated.
- 24 The record shows that after convicting the appellant the trial court asked for his mitigation and it is recorded that he said that he had suffered in remand, that he did not commit the offence and “... pray court to look my side.” It is then recorded that the trial court considered mitigation before pronouncing sentence. We can see no violation of right to mitigate. Mitigation was taken, recorded and considered.
- 25 This appeal has no merit and we dismiss it accordingly.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of June, 2023.**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**M. GACHOKA, CIArb, FCIArb**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

