Lwande & another v Republic (Criminal Appeal 33 of 2021)
[2023] KECA 1139 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1139 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 33 OF 2021

S OLE KANTAI, AK MURGOR & PM GACHOKA, JJA

SEPTEMBER 22, 2023

BETWEEN

JOSEPH OTIENO LWANDE ..... 1ST APPELLANT

PATRICK MBURU GATHITE ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement by the High Court at Nairobi (Khaminwa, Warsame, JJ.) delivered on 16th May 2011 in HCCRA No. 100 & 101 of 2007)

Sufficiency of single-witness identification in robbery with violence cases corroborated by possession of stolen property

The appellants were convicted of robbery with violence under section 296(2) of the Penal Code. The appellants allegedly violently robbed the complainant of his motor vehicle and personal belongings. They were arrested the next day in possession of the stolen vehicle with altered number plates. The trial court convicted them, and the High Court upheld the conviction and death sentence. On appeal, the Court of Appeal determined that the evidence, including identification and the doctrine of recent possession, was sufficient to sustain the conviction. The death sentence was upheld as lawful, and the appeal was dismissed.

Reported by John Ribia

Criminal Law *– robbery with violence – ingredients – conviction - whether proof of any one ingredient of the offence of robbery with violence was sufficient to warrant a conviction – Penal Code (Cap 63) section 296(2).*

Criminal Law *– charge sheet – drafting of charge sheet – main charge vis-à-vis alternative charge – robbery with violence as the main charge and handling of stolen goods as the alternative charge - whether a charge sheet of robbery with violence was defective due to the inclusion of the alternative charge of handling stolen goods - whether a court was required to render judgment on an alternative charge after convicting an accused on the main charge – Penal Code (Cap 63) sections 296(2), and 323.*

Criminal Law *– sentencing – mandatory sentences – lack of mitigation – conviction of robbery with violence - whether the imposition of a death sentence in a robbery with violence case was unconstitutional for lack of consideration of mitigating circumstances - Penal Code section 296(2); Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021).*

Criminal Procedure *– identification – identification of an accused person – identification by a single witness – where person identified was found in possession of the stolen goods - whether the evidence of identification of an accused person by a single witness would suffice considering the accused was found in possession of the stolen property – Criminal Procedure Code (cap 75) section 134, 215, and 361; Penal Code (Cap 63) sections 296(2), and 323; Evidence Act (cap 80) section 111.*

Constitutional Law *– fundamental rights and freedoms – rights of accused persons - right to legal representation – where an accused person mounted a good defense that included full participation in the trial and cross examining witnesses - whether accused persons who fully participated in their trial, including cross-examination of witnesses, could claim their right to legal representation was violate - Constitution of Kenya articles 25(c), and 50(2)(a).*

Brief facts

The appellants were charged with robbery with violence contrary to section 296(2) of the Penal Code. The offence occurred on December 17, 2004, when the complainant was violently robbed of his motor vehicle, cash, and personal items at gunpoint along Moi Drive, Umoja II. The appellants were arrested the following day in possession of the stolen vehicle, which had altered number plates. They denied the charges and offered sworn defences. The trial court convicted them, and their subsequent appeal to the High Court was dismissed, upholding both the conviction and death sentence. Aggrieved, they appealed to the Court of Appeal.

Issues

i. Whether a charge sheet of robbery with violence was defective due to the inclusion of the alternative charge of handling stolen goods.
ii. Whether a court was required to render judgment on an alternative charge after convicting an accused on the main charge.
iii. Whether proof of any one ingredient of the offence of robbery with violence was sufficient to warrant a conviction under section 296(2) of the Penal Code.
iv. Whether the imposition of a death sentence in a robbery with violence case was unconstitutional for lack of consideration of mitigating circumstances.
v. Whether the evidence of identification of an accused person by a single witness would suffice considering the accused was found in possession of the stolen property.
vi. Whether accused persons who fully participated in their trial, including cross-examination of witnesses, could claim their right to legal representation was violated.

Held

1. The alternative charge against the appellants was for handling stolen property contrary to section 323 of the Penal Code. The particulars specified that they were found in the course of stealing, knowingly or having reason to believe that motor vehicle Registration No. KAS 335 F was stolen and dishonestly handled. In effect, though section 323 of the Penal Code concerned the offence of being in possession of suspected stolen property, the alternative charge prejudiced them in the manner suggested thereby denying them the ability to mount an appropriate defence. Both offences were connected to the robbery of the stolen motor vehicle and were with reference to the same incident. Hence the question of being unable to discern the nature of the offence that they faced did not arise.
2. The trial court having convicted the appellants on the main charge of robbery with violence was not required to make a finding on the alternative charge which was rendered superfluous given the holding on the main charge.

3. The appellants were not represented in either the trial court or in the High Court, but there was no evidence on record to show that they requested for legal representation, and neither was the issue at any time raised. During the trial, the appellants vigorously conducted their defence, and participated fully in the trial. They ably cross examined the prosecution witnesses without faltering. The appellants had not demonstrated that substantial injustice was occasioned to them due to lack of legal representation.
4. Proof of any one of the ingredients of the offence of robbery with violence would warrant a conviction. The complainant was hit with the butt of a gun when being robbed. The medical report indicated that he sustained injuries which were assessed as harm. The complainant was violently robbed on the night in question.
5. A Court must warn itself of the dangers of acting on the evidence of a single identifying witness and the need for great circumspection when dealing with cases based wholly or mainly on identification evidence and in particular seeking other corroborative evidence. The appellant was identified by the complainant and the stolen property was found in his possession. It beccame evidentially incumbent on the appellant to provide a reasonable explanation for how he came to be in possession of the stolen items. The appellants were found with the stolen motor vehicle connected them to the robbery, thereby conclusively determining the issue of identification.
6. The High Court in the first appeal properly re-analysed the evidence by weighing the prosecution's case against the appellants' defence, which it found to be implausible and disingenuous, and came to its own independent conclusion that the offence of robbery with violence was proved to the required standard and that the conviction was safe.
7. The death sentence imposed on the appellants, ought not to have been reduced. The case of *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)* did not apply to mandatory death sentences in offences other than murder.

Appeal dismissed.

Citations

Cases

Kenya

1. *Arum, Erick Otieno v Republic* Criminal Appeal 85 of 2005; [2006] KECA 385 (KLR) - (Explained)
2. *Kevevo , Obedi Kilonzo v Republic* Criminal Appeal 77 of 2015; [2015] KECA 127 (KLR) - (Explained)
3. *Kinyanjui, Geoffrey & another v Republic* Criminal Appeal 144 of 2019; [2020] KECA 342 (KLR) - (Explained)
4. *Macharia , David Njoroge v Republic* Criminal Appeal 497 of 2007; [2011] KECA 406 (KLR) - (Explained)
5. *Mohammed Abudullahi v Republic* [2019] KECA 772 (KLR) - (Explained)
6. *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* Petition 15 & 16 of 2015; [2021] KESC 31 (KLR) - (Explained)
7. *Mutune , Thomas v Republic* Criminal Appeal 126 of 2019; [2020] KECA 11 (KLR) - (Explained)
8. *Robi, Paul Mwita v Republic* Criminal Appeal 200 of 2008; [2010] KECA 381 (KLR) - (Explained)
9. *Severin v Republic* Criminal Appeal 180 of 2018; [2023] KECA 355 (KLR) - (Applied)

Uganda

Bogere Moses & another v Uganda [1998] UGSC 22 - (Explained)

Regional Court

1. *Abdallah Bin Wendo & another v R* (1953) 20 EACA 166 - (Explained)
2. *Roria v R* [1967] EA 583 - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 25(c); 50(2)(a)(g)(h)- (Interpreted)
2. Criminal Procedure Code (cap 75) sections 134, 215, 361 - (Applied)
3. Evidence Act (cap 80) section 111- (Interpreted)
4. Penal Code (Cap 63) sections 296(2); 323; 329 - (Interpreted)

Advocates

Mr Ondieki for the appellants

Mr Okachi for the respondent

JUDGMENT

1. This is a second appeal from the trial magistrate's court, where the 1st and 2nd appellants, Joseph Otieno Lwande and Patrick Mburu Gathite were jointly charged with the offence of robbery with violence contrary to section 296(2) of the *Penal Code*. The particulars were that on December 17, 2004 at about 11.30 AM along Moi Drive Umoja II, while armed with dangerous weapons to wit; pistols, the appellants jointly with others not before court robbed Brian Nungo Akwir of one motor vehicle reg No KAS 335 F Toyota Carina silver in colour valued at Kshs. 810,000, cash Kshs 5,000, Casio watch valued 1,800, Burundian Francs 6,000, Zambian Kwacha 4,000, Zimbabwe dollars 1,000, Ugandan shillings 2100, mobile phone Nokia valued Kshs 15,000 all valued Kshs.833,000 and at or immediately before or immediately after the time of such robbery used actual violence to Brian Nungo Akwir, PW1.

2. They were also charged with an alternative count of handling stolen property contrary to section 323 of the *Penal Code*. The particulars were that they were found otherwise in the course of stealing, knowing or having reason to believe that motor vehicle Reg. No. KAS 335F was stolen and dishonestly handled.

3. The appellants pleaded not guilty and at the hearing, the prosecution called 8 witnesses while the appellants gave sworn defences. After a full trial, the trial magistrate convicted the appellants for the offence of robbery with violence and sentenced them to death.

4. Dissatisfied with the conviction and the sentence, the appellants appealed to the High Court which considered their appeal, dismissed it and upheld both the conviction and sentence.

5. The appellants were aggrieved by that decision and have appealed to this courton grounds set out in a supplementary Memorandum of appeal that; the High Court failed to re-evaluate the evidence and draw its own independent conclusions; misdirected itself on the applicable legal principles to the prejudice of the appellants; failed to consider the appellant's plausible defence; wrongly relied on the doctrine of recent possession which did not meet the legal threshold; wrongly found that the charge of robbery with violence was proved beyond reasonable doubt; failed to appreciate that the alternative charge was defective; failed to reduce the sentence to the period served.

6. Both the appellants and the respondent filed written submissions. When the appeal came up for hearing on a virtual platform, learned counsel for the appellants, Mr. Ondieki submitted that the High Court failed to re- evaluate and analyse the entire evidence and draw its own independent conclusions; that identification was not proved beyond reasonable doubt; that the incident occurred at 11 PM when there were no lights; that the vehicle had no lights; and that during the identification parade it was wrong and highly prejudicial to use the same parade members in all the parades that were conducted. It was also asserted that PW 1 did not at any time identify the 2nd appellant, Patrick Mburu Gathite as one of the robbers.

7. Counsel submitted that it was wrong to find and hold that section 296(2) of the *Penal Code* provides only one sentence, yet section 329 allows the Court discretion to consider the facts of each case with

a view to administering an appropriate sentence; that new and emerging jurisprudence allows courts to interfere with the sentence and reduce it appropriately.

8. It was further submitted that in the judgment, the trial magistrate convicted the appellants of possession, yet under section 215 of the *Criminal Procedure Code*, the court did not reach a finding on the alternative charge of handling stolen goods, which was a gross misdirection.

9. Counsel went on to submit that the charge sheet was defective due to the inclusion of the alternative Counts of handling stolen goods contrary to section 323 of the *Penal Code* for which the trial Court failed to issue a pronouncement, that as a consequence, the appellants did not understand the nature of the offences they faced which was contrary to the dictates of article 50(2) (a) of the *Constitution*; that further, they were not represented by counsel which violated their right to fair hearing under article 25(c) of the *Constitution*.

10. Counsel went on to submit that the prosecution evidence did not connect them with the robbery, and that the appellants' identification was mistaken since they were not found in possession of any currency, phones or other stolen items except the motor vehicle and that therefore the doctrine of recent possession did not apply.

11. In response, learned counsel for the State, Mr Okachi submitted that PW1 positively identified the 1st appellant as the person who hit him on his mouth; that he sat with him at the back seat of his vehicle, and with the help of the vehicle interior lights which the 1st appellant had switched on in the vehicle, PW1 clearly saw him as he demanded his items from him; that PW1 complied with each demand submissively while looking at the 1st appellant, and as a result had sufficient opportunity to identify him.

12. Counsel submitted that the appellants were caught red handed with the vehicle, and that both had no explanation as to how PW1's motor vehicle came to be in their possession. The question was posed if they were genuinely in possession of the vehicle, why had they changed its number plates; and when ordered to stop by law enforcement officers, why had they driven off? It was submitted that their actions pointed to them as being responsible for the robbery, more particularly since PW1 had positively identified the vehicle which was recovered in their possession. Counsel submitted that the prosecution had proved its case beyond doubt, and that the appellants were rightly convicted.

13. Regarding the failure by the trial court to determine the alternative charge, counsel stated that the trial court having found that the offence of robbery with violence was established, this being a substantive charge that carried a death sentence, it was not necessary to delve into the lesser charge of stealing.

14. We have considered the evidence, the grounds of appeal and the parties' submissions. As a 2nd appellate court, this Court's jurisdiction is limited to matters of law only as set out in section 361 of the *Criminal Procedure Code* and affirmed in the case of *David Njoroge Macharia vs Republic* [2011] eKLR thus;

> " That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. As this court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see *Chemagong v R* [1984] KLR 611."

Given these circumstances, the issues that are for consideration are:

i. Whether the charge sheet was defective on account of the inclusion of the alternative charge of stealing;

ii. Whether the failure to provide the appellants with legal counsel violated their rights;

ii Whether the ingredients of the offence of robbery with violence were established and whether the 1st appellate court properly considered the evidence of identification, and the appellants' defence;

iii. Whether the 1st appellate court properly reconsidered the evidence which was adduced before the trial court, and arrived at its own independent conclusion; and

iv. Whether the High Court should have reduced the appellants' sentence.

15. Before determining the issues raised, a brief highlight of the facts that were before the trial court is crucial. PW1, the complainant was driving back home from an office party at Safari Park Hotel in his motor vehicle Reg No KAS 335 F a Toyota Carina, silver in colour, at about 11.30 PM, when at Umoja, he saw 2 people as he approached a bump. The two people who had guns prevented him from passing, and ordered him to stop.

16. As he tried to reverse, another person tapped the driver 's window with a gun, pulled open the door and hit him on the lip with the gun butt. He was then forced into the rear seat. Two of the assailants sat in front, and one sat at the back with him. The person in the back seat took his Nokia mobile phone 3310 valued at Kshs 15,000, wrist watch, Casio by make, 2 ATM cards from Barclays Bank, Zambian Kwach 4000, Burudian Franc 6000, Zimbabwian dollars 1000, Kenyan currency Kshs 5000, a driving licence, and an Identity card.

17. At one point, they switched on the vehicle's interior lights, and he managed to see the person who robbed him. Thereafter, he was taken from the back seat and put in the boot. The robbers were on the move the entire night, and at about 5.30 AM they abandoned him at Njiru. He walked through Ruai to Buru Buru police station, and at about 8.00 AM reported the robbery.

18. On December 19, 2004, at about 6.30 AM a friend informed him that the vehicle was recovered. He went to Pangani police station and identified it but it had different registration number plates of KAQ 300 D, and was extensively damaged from an accident. But the windscreen and windows bore the registration numbers of his vehicle KAS 335 F.

19. On December 21, 2004, he attended an identification parade, where he identified the 1st appellant as the assailant who had sat with him at the rear of the vehicle and robbed him of cash and other valuables and hit him on his mouth. He could identify him because the 1st appellant switched on the vehicle's interior lights. He confirmed that the vehicle was his, by producing a log book and photographs, and vide the vehicle's chassis number.

20. Corporal Otieno Odera, PW 2 attached to Flying Squad, CID Pangani was on duty on December 18, 2003 accompanied by PC Talam, PC Gisemba and driver, RC Peter Kyalo. At about 11.00 PM, while on mobile duties within Buru Buru/Umoja area, they came across a motor vehicle while on Moi Drive with a suspicious Registration No KAQ 300 D coming from the opposite direction. They turned, overtook the vehicle, and ordered the occupants to identify themselves. Instead, the driver accelerated and drove off towards Donholm at high speed. They chased after it until the vehicle which was being driven very badly lost control at Mutindwa, and over turned. The officers apprehended the two appellants. The 2nd appellant was the driver. They inspected the vehicle and found that though it bore a number plate KAQ 300 D, the number indicated on the windows was KAS 335 F. A set of number plates (front and rear) bearing Reg No KAS 335 F, which were the numbers on the windows of the vehicle, were recovered on the back seat. The appellants and the vehicle were taken to Pangani

police station, and they informed PW1 of the arrest and recovery of the motor vehicle. Corporal Odera stated that the 1st appellant informed him that the vehicle was his.

21. IP Jennifer Kivunga, PW 3, of Pangani Flying Squad conducted an identification parade, involving the 1st appellant, and a witness who was to participate in the identification parade was PW1. The 1st appellant who did not object to the conduct of the identification parade was subsequently identified by PW1.

22. Dr Zephaniah Kamau, PW 4, examined PW1 on December 29, 2004. The medical report indicated that he had a huge bruise on the right ear tube, his right eye was red, and he also had a healing wound on the inner aspect of the right side of his inner lip, and on the internal aspect of his left elbow. He produced the P3 form after assessing the degree of injury as harm.

23. Edwin Onserio PW 5, and Stella Moraa Oponi PW 7, from Kenya Revenue Authority, Office of the Registrar of Motor Vehicles produced print outs of motor vehicle Reg No KAS 335 F, and motor vehicle Reg. No. KAQ 300 D, that showed that the particulars in the engine and chassis numbers for motor vehicle Reg motor vehicle KAS 335 F, and KAQ 300 D differ, and that the number plates found on the motor vehicle, reading KAQ 300 D did not originate from their office, but the number plates for KAS 335 F 2 were genuine.

24. Corporal Reuben Kimani, PW 8, based at Eldoret Flying Squad, but previously based at Pangani Flying Squad, investigations department reiterated the evidence leading to the arrest of the appellants who were in possession of the stolen vehicle on 18th December 2004, with registration number plates bearing the letters and numbers KAQ 300D. Upon scrutiny of the vehicle, he saw the registration number KAS 335 F inscribed on the lights and windows of the vehicle. He also found the number plates bearing these numbers in the boot of the vehicle. He traced the owner of the motor vehicle, PW I who had been robbed the previous day. The complainant identified the 1st appellant as one of his assailants.

25. PC Shem Ondieki Mugaki, PW 9, attached to scenes of crime support office, CID offices took several photos of the vehicle which were produced in evidence.

26. Both appellants gave sworn evidence and did not call any witnesses. The 2nd appellant, Patrick Mburu Gathite stated that on December 18, 2004 while working as a mechanic at Umoja estate, he was repairing a vehicle that had been left with him by a client. When he finished the repairs at about 6.30 PM, the client asked him to take the vehicle to him at "Jam Rescue", that he used the vehicle to drive home, changed and then drove to "Jam Rescue". On the way, he met the 1st appellant whom he knew waiting for a matatu at the stage. He offered him a lift, and as they drove towards Mutindwa, they met people in a vehicle who were armed who ordered them to stop, and when they attempted to escape, the vehicle blocked the road and their vehicle overturned. The people identified themselves as police officers, and despite his attempts to explain how he came to be in possession of the vehicle, they were arrested and charged with the present offences. He denied committing the offence.

27. The 1st appellant, DW 2 also denied committing the offence. On that day, he reported to his place of work at a food kiosk in Umoja, from Embakasi and worked upto 10.00 PM when he closed business and went to the stage to get a matatu to go home, and was given a lift by one of his clients, the 2nd appellant who was one of his customers. As they headed towards Donholm, the vehicle overturned, and he was arrested and charged with the present offence.

28. We begin with the appellants' contention that the respondent included alternative counts of handling stolen goods contrary to section 323 of the *Penal Code* and on which the trial court did not pronounce itself in its judgment; that as a result, the appellants did not understand the offence to which they

faced within the meaning of article 50(2)(a) of {the *Constitution*; that they were not represented which violated their rights to a fair hearing under article 25(c) of {the *Constitution*.

29. On the drafting of a charge sheet, section 134 of the *Criminal Procedure Code* is explicit. It specifies that;

> " Every charge or information shall contain, and shall be sufficient if it contains, 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."

30. In the case of *Obedi Kilonzo Kevevo v Republic* [2015] eKLR this court laid out the test for determining a defective charge sheet and the effect of the appellant's conviction that;

> " The test applicable by an appellate court when determining firstly the existence of a defective charge, and secondly its effect on an appellants' conviction is whether the conviction based on the alleged defective charge occasioned a miscarriage.

31. In the case of *Thomas Mutune vs Republic* [2020] eKLR this court observed;

> " The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence which such an accused is charged with should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to a specific charge that he can understand. It will also enable an accused person to prepare his defence to the charge. This principle of the law has a constitutional under pinning.
>
> However, whatever the irregularity, it is not to be regarded as fatal unless there is prejudice to the person who is charged. It is the substance that the court must seek to ascertain. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the ball is lost in the labyrinth of insubstantial technicalities."

32. Of relevance is whether, the alternative charge specified in the charge sheet prejudiced the appellants to the extent that they were not aware of the nature of the charges preferred against them and as a result, were unable to put up an appropriate defence.

33. In this case, the alternative charge against the appellants was for handling stolen property contrary to section 323 of the *Penal Code*. The particulars specified that they were found in the course of stealing, knowingly or having reason to believe that motor vehicle Registration No KAS 335 F was stolen and dishonestly handled. In effect, though section 323 of the *Penal Code* concerned the offence of being in possession of suspected stolen property, we do not consider that the alternative charge prejudiced them in the manner suggested thereby denying them the ability to mount an appropriate defence. Both offences were connected to the robbery of the stolen motor vehicle and were with reference to the same incident. Hence the question of being unable to discern the nature of the offence that they faced did not arise.

34. We would add that, the trial magistrate having convicted the appellants on the main charge of robbery with violence was not required to make a finding on the alternative charge which was rendered superfluous given the holding on the main charge. This ground lacks merit and therefore fails.

35. On the issue that they were denied legal representation which was a violation of their rights, article 50(2)(g) and (h) specifies that;

> (2) Every accused person has the right to a fair trial, which includes the right –
>
> g. to choose, and be represented by, an advocate, and to be informed of this right promptly:
>
> h. to have an advocate assigned to the accused person by the State and at State expense if substantial injustice would otherwise result, and to be informed of this right promptly."

36. It is true that the appellants were not represented in either the trial court or in the High Court, but there is no evidence on record to show that they requested for legal representation, and neither was the issue at any time raised.

37. In the case of *Mohammed Abudullahi v Republic* [2019] eKLR, this Court expressed itself thus;

> " Having perused the record, it is clear that from the onset up to the conclusion of the trial the appellant was not represented by counsel. There is no evidence of him requesting the court for legal representation. Maybe he did not feel prejudiced by lack of representation. Article 50(1) of {the *Constitution* does not in our view make appointment of counsel for an accused person at State expense automatic. If that were so, then such advocates would be appointed even before plea to appear for an accused person regardless of whether an accused person was in need of free legal aid or not. It is imperative for an accused person who feels he needs free legal representation to place such an application before the trial court for consideration. When the matter went to the first appellate Court the appellant did not seek legal counsel either. The learned Judges who heard the first appeal do not appear to have held the view that the appellant needed legal representation. Was the appellant entitled to legal representation at State expense as of right" Was his right to legal representation at the State's expense violated"

See also *Severin vs Republic* [2023] KECA 355 (KLR).

38. It is not lost on us that during the trial, the appellants vigorously conducted their defence, and participated fully in the trial. They ably cross examined the prosecution witnesses without faltering. In our view, the appellants have not demonstrated that substantial injustice was occasioned to them due to lack of legal representation. This ground accordingly fails.

39. With respect to whether the ingredients of the offence of robbery with violence were established, section 296(2) of the *Penal Code* provides that;

> " If the offender is armed with any dangerous or offensive weapon or instrument, or is in the company of one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other personal violence to any person, he shall be sentenced to death."

40. It is trite that proof of any one of the ingredients of the offence of robbery with violence would warrant a conviction. In the instant case, PW1 stated that before robbing him of his money, personal items and the motor vehicle KAS 335 F, the 1st appellant hit and injured him on the lip with the butt of a gun which demonstrated that the robbers were armed and dangerous. Indeed, PW4, the doctor's medical report indicated that he sustained injuries which were assessed as 'harm'. On re-evaluation of

the evidence, as did the trial court and the High Court, we too reach the conclusion that PW1 was violently robbed on the night in question.

41. As to whether it was the appellants that robbed PW1, counsel for the appellant contended that the 1st appellant was not identified by PW 1, and that the 2nd appellant was not identified at all; that since it was late at night and dark in the vehicle, PW1 could not have been in any position to identify the assailants.

42. In this regard, the trial court and the High Court had this to say;

> "The question for our determination is whether there is sufficient evidence to sustain the conviction entered by the trial court. It is clear that the complainant was robbed of his motor-vehicle and other valuables at gunpoint by three armed men on 17th December 2004. It is undisputed that the vehicle was found the following day driven by the two appellants. The two appellants themselves confirmed that they were found in possession of a motor-vehicle earlier robbed from the complainant. At the time that the two appellants were found in possession of the said, motor-vehicle, its registration numbers had been changed. No doubt the original and actual registration numbers of the motor vehicle stolen from P W 1 was found under the seat. It is also important to note that some of the items earlier stolen from PW 1 were found inside the motor vehicle leading the police to contact the complainant. The motor vehicle was positively identified by the complainant. His testimony was reinforced by the evidence of PW5 and PW7."

43. It was on the basis of the sole evidence of PW1 that the 1st appellant was identified. In the case of *Roria vs R* [1967] EA 583 the court warned on the dangers of convicting on the evidence of a single identifying witness thus;

> "A conviction resting entirely on identity invariably causes a degree of uneasiness...That danger is of course, greater when the only evidence against an accused person is identification by one witness and although no one would suggest that a conviction based on such identification should never be upheld, it is the duty of this Court to satisfy itself that in all circumstances it is safer to act on such identification."

44. In the case of *Abdallah Bin Wendo & Another vs R* 20 EACA 168, the Court expressed the need for a court to warn itself of the dangers of acting on the evidence of a single identifying witness and the need for great circumspection when dealing with cases based wholly or mainly on identification evidence and in particular seeking other corroborative evidence thus;

> "Subject to certain well-known exemptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is the evidence, whether it was circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from error."

45. In the instant case, PW1 stated that he identified the 1st appellant whilst being robbed of his money and personal items in the back of the motor vehicle where he was seated with him when, he (the 1st appellant) switched on the interior lights of the motor vehicle to inspect the items that were demanded from PW1. The available light enabled PW1 to see the 1st appellant and later identify him at an

identification parade. No doubt from the evidence, PW1 had sufficient time and opportunity to see and observe his assailant, and to positively identify him.

46. But the question of the appellants' involvement in the robbery does not end there. They were found in possession of the stolen vehicle by PW 2 and PW6 shortly after they robbed PW1. Consequently, the doctrine of recent possession becomes applicable to the circumstances of the case.

47. In determining the case of *Eric Otieno Arum vs Republic* [2006] eKLR this court set out guidelines for the application of the doctrine of recent possession thus;

> " In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

48. Upon establishment of the above considerations, it becomes evidentially incumbent on the accused to provide a reasonable explanation for how he came to be in possession of the stolen items. See *Paul Mwita Robi vs Republic* KSM Criminal Appeal No 200 of 2008, where this court observed that, an accused person found in possession of a recently stolen property has to discharge that burden pursuant to the provisions of section 111 of the *Evidence Act* and explain how it came to be in their possession.

49. The motor vehicle was established to belong to PW1, evidenced by the log book, and other identification particulars produced by PW7 and PW8. The appellants were arrested at about 11.00 PM the next day after PW1 had reported it stolen, when they were found driving it, and it overturned with them. In their defences, they sought to explain how they came to be in possession of the stolen vehicle. The 2nd appellant stated that he was in lawful possession of the motor vehicle as it was entrusted to him to repair by one of his clients, (whom he did not name). The 1st appellant claimed to have been given a lift by the 2nd appellant and did not know that the motor vehicle was stolen. In this regard the High Court stated that;

> " As rightly pointed out by the trial court, the defence of the appellants is quite unbelievable and extremely farfetched. No doubt that the two appellants were found in possession of the motor vehicle earlier robbed from PW1. It was barely 24 hours after the incident and they did not give a reasonable explanation as to how they came to be in possession of the vehicle stolen from PW1. We agree that the only presumption or inference that can be drawn is that the two accused persons, either participated in the robbery or received and handled the vehicle knowing it, to be stolen since they did not give any account or explanation for their possession"

50. The observations in the Supreme Court of Uganda in *Bogere Moses & Another v Uganda*,Cr App No 1 of 1997 are pertinent;

> " It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witness evidence of identification in a nocturnal event. This is

especially so because invariably the former is independently verifiable, while the latter solely depends on the credibility of the eye witness."

51. Additionally, the case of *Geoffrey Kinyanjui & another vs Republic* [2020] eKLR made it clear that, the fact that the appellants were found with the stolen motor vehicle connected them to the robbery, thereby conclusively determining the issue of identification.

52. Bearing the aforegoing in mind, we have also re-evaluated the evidence and like the lower courts, we have come to the conclusion that the appellants were the assailants that robbed PW1. This is evident not only because the 1st appellant was positively identified by PW1, but also because the record shows that after PW1 was robbed of the vehicle by three assailants, two of them were later found in possession of the motor vehicle recently stolen from him. PW2 and PW6 apprehended both appellants in the motor vehicle after it overturned, and PW 5 and PW7 confirmed that it was registered in PW1's name. And since, the appellants did not provide any explanation as to how they came to be driving PW1's car, their possession of the stolen motor vehicle served to prove beyond reasonable doubt, whether they were identified or not, that they were the robbers who violently robbed PW1 the previous night.

53. In relation to whether the High Court properly re-evaluated the evidence, the court upheld the appellant's conviction having found that the prosecution adduced sufficient evidence. The Court observed that;

> "As was rightly pointed out by the trial court, the defence of the appellants is quite unbelievable and extremely farfetched. No doubt that the two appellants were found in possession of motor vehicle earlier robbed from PW1. It was 24 hours after the incident and they did not give a reasonable explanation as to how they came into possession of a vehicle stolen from PW1. We agree that the only presumption or inference is that the two accused persons either participated in the robbery or received and handled the vehicle knowing it to be stolen since they did not give any account or explanation for their possession. We therefore think that the two appellants were convicted on sound and credible evidence. In our view, the trial court correctly and rightly so convicted the two appellants."

54. From the above, it is evident that the High Court properly reanalysed the evidence by weighing the prosecution's case against the appellants' defence, which it found to be implausible and disingenuous, and came to its own independent conclusion that the offence of robbery with violence was proved to the required standard and that the conviction was safe. Contrary to the appellants' assertions, we are satisfied that the High Court properly reconsidered the evidence that was before the trial court. As such, this ground is without merit, and is dismissed.

55. With reference to the complaint that the death sentence imposed on the appellants, ought to have been reduced, under section 296(2) of the *Penal Code*, pursuant to the Supreme Court's directions of July 6, 2021 in the case of *Muruatetu & another v Republic; Katiba Institute & 4 others (amicus curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions), it was stated thus;

> (15) To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40(3), robbery with violence under section 296(2), and attempted robbery with violence under section 297(2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached.

Muruatetu as it now stands cannot directly be applicable to those cases.

56. Cognizant of the above guidance, we have no basis upon which to disturb the sentence of death imposed by the trial court and upheld by the High Court. The appeal against the sentence imposed has no basis and is accordingly dismissed.

57. In sum, the appeal is without merit and fails in its entirety.

58. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR