



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndiema v Republic (Criminal Appeal 76 of 2017)  
[2023] KECA 1255 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1255 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 76 OF 2017  
PO KIAGE, M NGUGI & JM NGUGI, JJA  
OCTOBER 6, 2023**

**BETWEEN**

**LEONARD JEREMIAH NDIEMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal against the judgment of the High Court of Kenya at Bungoma (Ali-Aroni, & Tuiyott, JJ.) dated 17th March, 2016 in HCCRA No. 43 of 2013)*

**JUDGMENT**

1. On 27<sup>th</sup> August 2010, Godfrey Agosa Agesa (PW1), a businessman, employed Boaz Kosik Mayongo (deceased) as a boda boda rider of his motorbike registration number KMCG 508S, make King Bird. The motorbike was in the deceased's custody and they had agreed that he would surrender to PW1 Ksh. 300 every day. On 11<sup>th</sup> January 2012, however, PW1 received news that a certain boda boda rider had been found murdered. He decided to call the phone number of his rider, considering that he had not surrendered money for the previous day, which was unusual. The rider's phone was off, and, concerned he chose to send someone to check whether the person who had been murdered might be he. It was confirmed that indeed the deceased was his rider.
2. PW1 was called and he identified himself to the police as the employer of the deceased. Mutahani Shashallah (PW2), a nephew to the deceased, also identified the body. The following day, PW1 went to view the body of the deceased at Kitale District Hospital. He observed that his head had been hit. Dr. Odhiambo Edward (PW6), stationed at Kitale District Hospital, produced a post-mortem report prepared by a Dr. Kawa, his colleague who was on transfer. The report indicated that upon examination, the deceased's body was found to have a deep cut in the right temporal region, and dried clotted blood on his face. His head also had fractures. The doctor concluded that the deceased died due to severe head injuries.



3. PW1 was informed by the police that a motorbike had been retrieved and it was at Kimilili Police Station. He went to the police station where he was asked to identify the motorbike as the owner by Michael Nyamboki (PW3), the investigating officer. He produced the purchase receipts of the motorbike and a copy of its log book. He was then informed that the motorbike had been found with two people who were arrested by police officers Pius Chirchir (PW4) and Janet Cherkoech (PW5). On 10<sup>th</sup> January 2012, at around midnight, PW4 and PW5 were patrolling Matunda Centre when they met the appellant pushing a motorbike. They ordered him to stop and upon interrogating him, he informed them that he had run out of petrol. PW4 and PW5 did not believe him since he had just passed a petrol station. They ordered him to lie down and called for reinforcement. The police officers arrested the appellant and took him to the police station together with the motorbike. On the carrier of the motorbike they found a metal bar covered with a nylon paper. Those are the facts that were established by the prosecution when the appellant was arrested, charged and tried for the offence of robbery with violence before the Resident Magistrate's Court at Kimilili. The trial magistrate found that a prima facie case had been made out and placed the appellant on his defence. The appellant gave evidence on oath but called no witness. He denied the charges and claimed that on 9<sup>th</sup> January 2012, he met some people near Matunda Police Station who asked him why he was making noise but he did not respond since he was drunk. The appellant testified that he was arrested and taken to Matunda Police Station where his Ksh. 130, 150 was seized. On 11<sup>th</sup> January 2012, he was moved to Kitale where his fingerprints were captured and he was charged in court.
4. At the conclusion of the trial, the learned magistrate found the offence proved, convicted the appellant and sentenced him to suffer death. The appellant filed an appeal against conviction and sentence before the High Court at Bungoma. The same was heard by Ali-Aroni and Tuiyott, JJ. (as they were then) who, by a judgment dated 17<sup>th</sup> March 2016, dismissed it and upheld the conviction and sentence.
5. Aggrieved by that decision, the appellant lodged the instant appeal. In a memorandum of appeal dated October 2, 2019, prepared by his advocate, Mr. Wilberforce Wangoda, the appellant raised four grounds of appeal but later abandoned one of them in the written submissions. He complains that the learned judges erred by; Convicting the appellant without proper identification. Relying on the doctrine of recent possession. Failing to consider the appellant's mitigation on record and thereby passing a sentence which was manifestly harsh and excessive in the circumstances.
6. During the hearing of the appeal, learned counsel Mr. Wangoda appeared for the appellant while the respondent was represented by Mr. Okango, the learned Senior Principal Prosecution Counsel. Both parties had filed written submissions which they highlighted orally.
7. Mr. Wangoda submitted that there was no direct evidence that was adduced by the prosecution linking the appellant to the scene of crime, save for his arrest with the motor cycle which was believed to have been used by the deceased before his death. Counsel faulted the learned judges for relying on the doctrine of recent possession to convict the appellant yet the prosecution had not proved the elements of the doctrine as identified by this Court in *ISAAC NG'ANG'A KAHIGA & ANOTHER Vs. REPUBLIC [2006]* eKLR;

“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 that 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.”

8. To counsel, there were material contradictions in the prosecution case which made reliance on the doctrine of recent possession inapplicable. Counsel argued that the contradictions were first, that no definite time and place was given for the arrest of the appellant; whereas PW4 testified that they arrested the appellant at midnight on January 10, 2012, at Matunda Primary School, PW5 stated that the arrest was done on the same day but at 10pm and at a private hospital.
9. Counsel argued that no sufficient evidence was adduced to prove ownership of the said motorbike by PW1. Further, the murder weapon which was allegedly recovered from the appellant, that is the iron rod, contradicted the post mortem report which indicated that the deceased was cut with a panga. Concluding on the doctrine of recent possession, Mr. Wangoda asserted that the appellant was not positively identified as the person who robbed the deceased and therefore his conviction based on the doctrine was not safe.
10. We sought to know from counsel what more evidence was required regarding the doctrine of recent possession considering that the appellant was allegedly found pushing a motorcycle in the night; he was asked why he was pushing it; he said it had run out of fuel which the police thought a bit strange because he had just passed a petrol station, and all this shortly before the body of the deceased was found. Moreover, PW1 actually proved that the motorcycle was his and the deceased was his employee. In answer, counsel reiterated that the evidence of PW4 and PW5 was not in consonance as to the time and place of the arrest and that created doubt. We inquired whether those contradictions were material, eliciting the response that any doubt that is created should ideally go to the benefit of the appellant.
11. This being a second appeal and in view of the fact that as a second appellate court we are bound by the concurrent findings of fact by the two courts below, we sought to know from counsel whether he had anything to persuade us to depart from those concurrent findings. While acknowledging the jurisdiction of a second appellate court, Mr. Wangoda maintained that it was possible for the learned judges to have misapprehended some facts.
12. On sentencing, counsel contended that the learned judges failed to consider the appellant’s mitigation and passed a sentence which was manifestly harsh and excessive. He beseeched us to review the sentence in light of the appellant’s mitigation or remit the file to the High Court for resentencing on account of the Supreme Court decision in *FRANCIS KARIOKO MURUATETU & ANOR Vs. REPUBLIC [2017] eKLR (Muruatetu 1)*. To counsel, in that decision, the apex Court directed that mandatory sentences are unconstitutional, including Section 296(2) of the *Penal Code* under which the appellant was charged, and which provides for a mandatory death sentence.
13. In reply to the submissions by the appellant, Mr. Okango asserted that other than the ground on sentencing, the rest of the grounds raised by the appellant were never argued before the two courts below and hence were wrongly presented before this Court. All the same, counsel responded that the issue of identification does not arise in this case and is misplaced because the complainant did not recognize the appellant at the scene of crime. However, counsel added, the person PW4 and PW5 arrested on the night of 10<sup>th</sup> January 2012 with PW1’s motorcycle was the appellant, and he was not arrested in the company of other people so as to remotely argue that PW4 and PW5 might have confused the person they arrested that night. Accordingly, since the appellant was not placed at the scene of crime, the courts below were right to invoke the doctrine of recent possession.



13. Referring to the decision cited by the appellant’s counsel, that is, ISAAC NG’ANG’A KAHIGA (supra), Mr. Okango submitted that

the elements of the doctrine of recent possession were well established. There was proof that the motorcycle was found in the appellant’s possession, PW1 gave un rebutted evidence that he was the owner of the motorcycle by producing the purchase receipts and a copy of the logbook of the motorcycle, and it is on record that the deceased was the one in possession of the motorcycle. Further, when the deceased was found dead, he had been robbed of it and a short distance away, PW4 and PW5 had arrested the appellant in possession of that motorcycle. In the circumstances, counsel asserted that the appellant had a duty of giving a satisfactory explanation to show that he was rightfully in possession of that motor cycle. Since he failed to discharge that burden, counsel was resolute that the doctrine of recent possession was correctly invoked and applied.

14. Concerning the alleged contradictions on the exact time and place of arrest of the appellant, while conceding the same, Mr. Okango argued that the said contradictions were too remote and could not possibly negate the fact that the appellant was arrested pushing a motorcycle that was not his, and thus they do not fatally impact conviction. On sentencing, counsel pointed out that the Apex Court in Francis Karioko Muruatetu & Another Vs. Republic; Katiba Institute & 5 Others (*Amicus Curiae*) [2021] eKLR (Muruatetu 2) was categorical that its decision in Muruatetu 1 does not apply to the offence of robbery with violence. He urged that the death sentence as pronounced by the trial court and affirmed by the first appellate court is the legal and valid sentence for the offence. Consequently, the appeal should fail for lack of merit.

15. As this is a second appeal, our jurisdiction is confined to a consideration of questions of law only by dint of section 361(1)(a) of the *Criminal Procedure Code*. This has been restated in many decisions of the Court including *David Njoroge Macharia Vs. Republic* [2011] eKLR in which the Court stated: -

“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 Vs. R* [1984] KLR 611.”

16. We think the issues of law that fall for our determination in this appeal are twofold, namely; whether the doctrine of recent possession was properly invoked and whether the sentence imposed was unconstitutional.

17. The appellant criticized the learned judges for relying on the doctrine of recent possession, claiming that the elements of the doctrine were not proved by the prosecution. He argued that there were material contradictions in the evidence of PW4 and PW5 as to the time and place of arrest, and that no sufficient evidence was adduced to show that PW1 owned the motorcycle. The prosecution opposed those assertions and insisted that the doctrine was sufficiently proved, thus the learned judges were right in citing the doctrine.

18. We note that the learned judges found the evidence of PW4 and PW5 credible. The two gave an account of how they found the appellant pushing a motorcycle in the night and became suspicious of him after interrogating him. They arrested him and took the motorcycle with them to the police station. The carrier of the motorcycle was found to be bearing a metal rod, and a few meters away, the deceased who had lawful possession of the motorcycle was found dead. We further observe that the court found as



a matter of fact that the motorcycle belonged to PW1. The record shows that PW1 produced receipts of purchase for the motorcycle as well as a copy of its log book.

19. In the absence of a plausible explanation by the appellant as to how he came to be in possession of the motorcycle, we concur with the prosecution counsel that the elements of the doctrine of recent possession as set out in *Isaac Ng'ang'a Kahiga (supra)*, were satisfactorily proved and the court properly applied the doctrine. We do not think the alleged contradictions had an effect on the appellant's conviction as they were minor and immaterial. In the result, we are convinced that the conviction of the appellant was safe and the appeal against the same is accordingly disallowed.
20. Turning to the question of sentence, counsel for the appellant urged us to review the sentence in light of the decision in *Muruatetu 1* which held that mandatory sentences are unconstitutional for depriving courts of judicial discretion in sentencing, yet sentencing is a judicial function. Counsel however seems to have missed the directions of the Supreme Court issued on 6<sup>th</sup> July 2021 in *Muruatetu 2*. The Court explicitly pronounced itself thus;

“11. [...] We therefore reiterate that, this Court's decision in *Muruatetu*, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.

[...]

(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.” (Emphasis in original)

21. It is therefore clear that the decision is non-applicable to offences such as that which the appellant was charged with.
22. In the end, the appeal before us lacks merit and is dismissed in its entirety.

**DATED AND DELIVERED AT KISUMU THIS 6<sup>TH</sup> OF OCTOBER, 2023.**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

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**JUDGE OF APPEAL**



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

**DEPUTY REGISTRAR**

