



**Kiprotich v Republic (Criminal Appeal 28 of 2015)
[2023] KECA 1546 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1546 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 28 OF 2015
F SICHALE, LA ACHODE & WK KORIR, JJA
DECEMBER 15, 2023**

BETWEEN

JOSEPH KIPROTICH APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Hon. A.N. Ongeru & K.W. Kiarie, JJ) delivered and dated 24th July 2015 in HCCRA No. 185 of 2014)

JUDGMENT

1. The appellant, Joseph Kiprotich, is before us on a second appeal. He was first charged before the Narok Chief Magistrate's Court with the offence of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*. He also faced an alternative charge of handling stolen property contrary to section 322(1) of the *Penal Code*. He was found guilty of the main charge and sentenced to suffer death. Dissatisfied with the judgment of the trial court, the appellant moved to the High Court on appeal. The appeal was dismissed in its entirety.
2. The appellant is dissatisfied with the judgment of the High Court.
His appeal before this Court was initially premised on his self-generated grounds to wit: that the charge sheet was defective and insufficient; that the court erred in invoking the doctrine of recent possession to convict him; that his defence was dismissed without reasons; and, that his conviction was founded on the weakness of his defence and not the strength of the prosecution's case.
3. Later, the appellant's counsel filed amended grounds of appeal through which the first appellate court is faulted for: abdicating its duty to re-evaluate and independently analyse the entire evidence; relying on the doctrine of recent possession which was not proved to the required standard; failing to find that the appellant's right to a fair trial was prejudiced; and, upholding a harsh and excessive sentence in the circumstances of the case.



4. In a nutshell, the case against the appellant was that on 17th February 2014 at around 3.00am, the complainant John Maina Kamau (PW2) was walking home from his workplace when he was accosted by three men. The scene of the attack was dark and the complainant was not able to identify his attackers save for noticing that one of them had a bucket. The complainant was robbed of Kshs. 2,500 and an Itel mobile phone. The next day, the appellant asked PW3 Sindalo Jane Lange, a bar attendant, to charge his phone. Inside the appellant's phone was the SIM card that was in the complainant's Itel phone during the robbery. As the appellant's mobile phone was charging, a call came through and PW3 picked it. The complainant who was the caller asked for the directions of PW3's place of work. He proceeded there and that is when PW3 informed him that it was the appellant who had requested her to charge the phone. The appellant was then arrested by the complainant and escorted to the police station.
5. This appeal was heard on 25th July 2023 when Ms Mwangi held brief for Mr. Ooga for the appellant and Ms Kisoo appeared for the respondent. They opted to rely on their written submissions.
6. For the appellant, it was submitted that the doctrine of recent possession which was used to convict the appellant was improperly applied. Counsel referred to the case of *Isaac Ng'ang'a alias Peter Ng'ang'a Kabiga vs. Republic*, CR Appeal No. 272 of 2005 (UR) to urge that the four key elements of the doctrine of recent possession are inseparable and should all be proved. Counsel urged that the evidence on record did not establish the ingredients of the doctrine of recent possession hence the two courts below erred in invoking it to convict the appellant. Counsel also submitted that by relying on the unproved doctrine of recent possession, the courts below shifted the burden of proof to the appellant. According to the counsel, the trial court and the first appellate court erred in requiring the appellant to tender an explanation on how he came into possession of the alleged stolen SIM card notwithstanding the fact that the prosecution had failed to adduce evidence on the ownership and the identity of the SIM card.
7. Turning to a different ground of appeal, counsel submitted that the appellant's rights under Article 50(2)(b), (h) and (j) of the *Constitution* were trampled upon. Counsel argued that the appellant was not given adequate information about the charge. Counsel also contended that the appellant was never accorded adequate time to prepare his defence specifically in respect to the evidence of PW3. It was also submitted that the appellant was not informed of his right to be represented by an advocate at the trial.
8. As for the appeal against the sentence, counsel urged that the sentence was harsh and failed to take into account the mitigating factors of the case. In the end, counsel urged us to allow the appeal in its entirety.
9. On her part, Ms Kisoo set off by restating the duty of this Court when executing its mandate as a second appellate Court.

Counsel focused on the four issues raised in the amended memorandum of appeal. As to whether the first appellate court abdicated its duty, counsel submitted that the appellant had failed to support this ground of appeal. According to counsel, the first appellate court properly evaluated the evidence on record and properly applied the doctrine of recent possession.
10. In regard to the appellant's assertion that the doctrine of recent possession was wrongly applied, counsel submitted that the evidence on record satisfied the definition of "possession" under section 4 of the *Penal Code*. Counsel pointed out that the evidence of PW2 and PW3 was cogent as to the identity of the SIM card in question. Counsel further pointed out that when the burden shifted to the appellant, he only denied the charge without tendering any evidence to explain how he came into contact with the appellant's SIM card.



11. Regarding the appellant's assertion that his rights to fair trial as guaranteed under Article 50(2)(b), (h) and (j) of the *Constitution* were violated, counsel submitted that the appellant's rights were not trampled upon and that the appellant had not tendered any evidence of prejudice occasioned to him as a result of the alleged violation of rights.
12. Finally, with regard to the claim that the sentence imposed on the appellant was harsh and excessive, counsel submitted that as per the provisions of section 296(2) of the *Penal Code* the death sentence remains legal for the offence of robbery with violence. Counsel also argued that this being a second appeal, this Court lacks jurisdiction to determine whether the sentence is harsh and excessive. Counsel for the respondent therefore urged us to dismiss the appeal in its entirety.
13. As already stated at the outset of this judgment, this is a second appeal and therefore our mandate under section 361(1) of the *Criminal Procedure Code* is limited to consideration of matters of law.
14. Upon considering the record of appeal and the submissions of the parties herein we find that the issues for our resolution in this appeal are whether the first appellate court abdicated its duty; whether the doctrine of recent possession was properly invoked; whether the appellant's rights to fair trial were violated; and, whether the sentence meted upon the appellant is legal.
15. On the first issue, the appellant contends that the first appellate court abdicated the duty requiring it to review the evidence afresh and reach its own independent decision. There is no doubt that on a first appeal, an appellant is entitled to expect that the court will perform its duty of re-considering the evidence as if it was the trial court. This duty has been summarized by this Court (differently constituted) in *Dickson Mwangi Munene & another vs. Republic* [2014] eKLR to be a re-hearing which entails a re-evaluation of the evidence on record and a determination if the trial court's decision was based on evidence and is legally sound. It must also be noted that there is no specifically prescribed procedure on how the duty of the first appellate court should be conducted. In that regard it was stated in *David Njuguna Wairimu vs. Republic* [2010] eKLR that:

In *Okeno v. R* [1972] EA. 32 the Court of Appeal for East Africa, laid down what the duty of the first appellate court is. Its duty is to analyse and re- evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision."

[Emphasis ours]

16. From our own consideration of the record and the judgment of the High Court, we are not persuaded it failed in its duty. Rather, it appears quite clearly that the learned Judges fully and carefully considered all the evidence before arriving at their decision. The learned Judges of the High Court were alive to and recalled their duty as a first appellate court, they rehashed the evidence on record, cited authorities and analysed the available evidence in their own understanding and ultimately arrived at their own conclusion albeit similar to that of the trial court. They cannot therefore be said to have failed in discharging the hallowed duty of a first appellate court to reconsider the evidence afresh, mirror it against the law and arrive at its independent decision. This particular ground of appeal is therefore without merit.



17. The appellant also took issue with the fact that his conviction was largely based on the doctrine of recent possession. According to the appellant, all the elements of the doctrine of recent possession were not established and the doctrine was therefore not applicable in the circumstances. The respondent, however, holds a contrary view. Both parties have cited authorities establishing the elements of the doctrine of recent possession and which we have considered. This Court (differently constituted) in *Erick Otieno Arum vs. Republic* [2006] eKLR restated the principles underlying the doctrine of recent possession and the role of a second appellate court where the application of the doctrine has resulted in a conviction. The Court stated 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; 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. In order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view any discredited evidence on the same cannot suffice no matter from how many witnesses. In case the evidence as to search and discovery of the stolen property from the suspect is conflicting, then the court can only rely on the adduced evidence after analysing it and after it accepts that which it considers is the correct and honest version. That duty as has been said is wholly on the trial court and on the first appellate court. This court has no such duty on hearing a second appeal such as before us but if it be satisfied that that duty has not been fully discharged by the first appellate court then it will take the line that had it been done either or both courts would have arrived at a different conclusion.”

[Emphasis ours]

18. From the foregoing authority, it is clear that our duty as a second appellate court can be loosely translated to that of simply undertaking a review of the findings of the trial court and the first appellate court in light of the available evidence in order to confirm if they conform to the law. In the instant appeal, we need to be satisfied that the evidence adduced satisfied all the ingredients of recent possession. This is because a conclusion as to whether the doctrine of recent possession was established in a case is solely dependent on analysis of the evidence on record.
19. Considering the above summation, it then becomes necessary for us to restate the evidence that was adduced against the appellant in order to determine whether the doctrine of recent possession was correctly applied. In doing so, we must stick to our lane of “matters of law” and avoid veering off to “matters of fact” which are reserved for the trial court and the first appellate court.
20. The evidence that connected the appellant to the SIM card was the testimony of PW3 that barely hours after the robbery, the appellant gave her a phone to charge. Inside the said phone was the complainant’s SIM card. This evidence was not rebutted nor was any explanation offered by the appellant as to how he came into possession of the complainant’s stolen SIM card. In our view, no two versions of the recovery existed in this case. The evidence on record points to none other than the appellant as the person who was in possession of the SIM card that was stolen together with the complainant’s phone. As correctly submitted by Ms Kisoo for the respondent, the definition of “possession” in section 4 of the *Penal Code* is wide enough and includes knowingly having anything in the actual possession or custody of any other person. The phone with the SIM card in question may have been found with



PW3 but legally speaking it remained in the possession of the appellant as it was in his phone which had been temporarily left with PW3 for charging. We therefore find, as did the first appellate court, that the doctrine of recent possession was properly invoked by the trial court.

21. The next issue is whether the appellant's rights to a fair trial were violated. On this issue, the appellant contends that his rights under Article 50(2)(b), (h) and (j) of the *Constitution* were trampled upon. Counsel argued that the appellant was not provided with adequate information about the charge; that he was not accorded adequate time to prepare his defence, especially with respect to the evidence of PW3; and, that the appellant was not informed of his right to be represented by an advocate. These complaints are being raised for the first time in this appeal. They were not the subject of the first appeal. Grounds of appeal that were not argued before the High Court cannot be the basis of an appeal before this Court as the first appellate court was never afforded an opportunity to address the issues so that it can now be said that it erred in the determination of those issues. Our statement finds support in, among decided cases, the holding of the Supreme Court in *Charles Maina Gitonga vs. Republic* [2020] eKLR that:

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

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

We therefore decline the appellant's invitation to delve into issues not raised before the first appellate court.

22. Having dispensed with the third issue, we now turn to the final issue which is whether the death penalty imposed on the appellant was legal. We are aware that under section 361(1)(a) of the *Criminal Procedure Code*, severity of a sentence is not a matter within the jurisdiction of this Court in the discharge of its mandate as a second appellate court. According to counsel for the appellant, the death sentence was handed down in its mandatory nature thereby denying the appellant an opportunity to benefit from a sentence appropriate to the circumstances of his case. Further, that the trial court was also denied an opportunity to exercise its sentencing discretion. It is for these reasons that the appellant urged us to interfere with the sentence.
23. Although counsel for the respondent conceded that the sentence was issued in its mandatory nature she nevertheless urged us to find that the appellant was deserving of the death sentence considering the aggravating circumstances of the case. Further, that in any case the death sentence remains legal for



those convicted for robbery with violence. Counsel therefore beseeched us to uphold the appellant's sentence.

24. In our view, the arguments of the parties raise points of law which warrant our determination. We are therefore convinced that our jurisdiction to reconsider the appellant's sentence has been properly invoked in this appeal.
25. As of now, the constitutionality of the death sentence provided for the offence of robbery with violence in section 296(2) of the *Penal Code* has not been determined. However, whether the sentence is mandatory or not is a subject that has continued to attract varying opinions. In *Hassan Kabindi Katana & Another vs. Republic* [2022] eKLR, this Court (differently constituted) sitting in Malindi declined to interfere with a death sentence imposed under section 296(2) of the *Penal Code*. On the other hand, the Court (again differently constituted) sitting in Nairobi in the case of *Anthony Mwanzia Mbizi vs. Republic* [2020] eKLR interfered with a death sentence imposed under section 296(2) of the *Penal Code* and substituted it with a prison sentence.
26. In the *Hassan Kabindi Katana case*, the Court declined to rely on *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR (Muruatetu I) citing *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Muruatetu II) where the Supreme Court pointed out that its decision in *Muruatetu I* was only applicable to the death sentence provided for the offence of murder under section 204 of the *Penal Code*.
27. In Anthony Mwanzia Mbizi case, the Court relied on *Muruatetu I* to interfere with the sentence. We are cognizant that the decision in the Anthony Mwanzia Mbizi case was delivered before the Supreme Court rendered itself in *Muruatetu II*. It is, however, important to note that even in declining to interfere with the sentence in *Hassan Kabindi Katana case* the Court observed that:

We find it necessary to add that we find this outcome, predicated as it is upon *Muruatetu II*, to be unfair and disproportionate, in light of the rationale by the Supreme Court of Kenya for declaring the mandatory death sentence unconstitutional in *Muruatetu I*. There is need for urgent intervention in this regard by way of the necessary legal reforms, or determination by the Supreme Court of Kenya regarding constitutional validity of the mandatory death penalty in such cases as this.”

28. In *William Okungu Kittiny vs. Republic* [2018] eKLR, this Court (differently constituted) stated as follows:

“By Article 27 (1) of the *Constitution*, every person has inter alia, the right to equal protection and equal benefit of the law. Although the *Muruatetu*'s case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general. In the *Mutiso* case which was affirmed by the Supreme Court, the Court of Appeal said obiter that the arguments set out in that case in respect of Section 203 as read with Section 204 of the *Penal Code* might apply to other capital offences. Moreover, the Supreme Court in paragraph 111 referred to similar mandatory death sentences.

- (9) From the foregoing, we hold that the findings and holding of the Supreme Court particularly in paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the *Penal Code*. Thus, the sentence of death under Section 296 (2) and 297 (2) of the *Penal Code* is a discretionary maximum punishment. To the extent that Section 296(2) and 297(2) of the *Penal Code* provides for mandatory death sentence the Sections are inconsistent with Constitution.”



29. In *Stanley Khakubi Songa vs. Republic* [2018] eKLR, another bench of this Court held that:

“It cannot be gainsaid that *Francis Karioko Muruatetu & Another v. Republic* (supra) concerned the interpretation and application of section 204 of the Penal Code on the offence of murder. However, it is equally true that section 296(2) of the *Penal Code* on robbery with violence proceeds on the same footing as section 204 of the *Penal Code* by prescribing a mandatory sentence of death for a person convicted of the offence of robbery with violence or attempted robbery with violence. In terms of legal principle, we are persuaded that there is no reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional, should not apply to the offence of robbery with violence, in respect of which the *Penal Code* prescribes a mandatory sentence of death.”

30. We are aware that some of the authorities we have cited speak to the views held by this Court on this subject prior to clarification by the Supreme Court clarification in *Muruatetu II* that its decision in *Muruatetu I* was specific to the death sentence provided for murder in section 204 of the *Penal Code*. Even so, it is our respectful view that the jurisprudence in *Muruatetu I* applies in respect to all offences where the death sentence is to be mandatorily imposed. Our view on this issue finds support in the recent pronouncement on mandatory minimum sentences by this Court (differently constituted) in *Joshua Gichuki Mwangi vs. Republic*, Nyeri Criminal Appeal No. 84 of 2015 as follows:

“...We acknowledge the power of the Legislature to enact laws as enshrined in the *Constitution*. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.

This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in Article 160 of the *Constitution*. Further, the Judiciary has a mandate under Article 159 (2) (a) and (e) of the *Constitution* to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the *Constitution*. This includes the provision of Article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited...

In the end, courts have a duty to dispense justice not only to the complainants but also to accused persons.”

31. Considering the cited authorities, we are of the view that the trajectory of the prevailing jurisprudence frowns upon mandatory sentences, specifically the life and death sentences. As such, we find that the death sentence under section 296(2) of the *Penal Code*, where it is issued in its mandatory nature, defeats the very essence of judicial discretion in sentencing. Such a sentence when handed down in its mandatory nature denies an accused person an opportunity to enjoy the various constitutional safeguards and rights including the right to dignity and the right to fair trial. In saying so, we do not depart from the currently established jurisprudence that in appropriate and deserving instances, courts, upon considering the circumstances of the case, are still at liberty to hand down the death sentence.



- 32. Back to the present appeal, the appellant was sentenced to death. The sentence was affirmed by the first appellate court. At the time the two courts below delivered their judgments, this was the prevailing jurisprudence with regard to the provisions of section 296(2) of the Penal Code. Therefore, we cannot fault them for respectively imposing and affirming the death sentence. However, the new wave of progressive jurisprudence is here with us and the appellant is entitled to have his sentence reviewed in light of this jurisprudence.
- 33. In reviewing the appellant’s sentence, we are required to consider both the aggravating and mitigating factors. The appellant’s mitigation as captured in the record was that he was a young person from a poor background. He was also a first offender. We observe that the complainant was not injured during the robbery and neither was any weapon deployed. We also note that the stolen SIM card was recovered although the phone and money were not found. Notwithstanding these circumstances, we note that the offence of robbery with violence is a grave crime and a custodial sentence was merited for the appellant. In our considered view, a sentence of 15 years was adequate in the circumstances.
- 34. For the reasons stated in this judgment, the appeal against conviction is dismissed. However, we allow the appeal on sentence and set aside the death sentence and substitute it with a sentence of fifteen (15) years imprisonment. In line with the provisions of section 333(2) of the Criminal Procedure Code, the appellant’s sentence shall run from 20th February 2014 when he was first presented before the trial court, as the record shows that although he was granted bond he remained in custody throughout the trial.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....
JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

