



**Mulandi v Republic (Criminal Appeal 97 of 2019)
[2021] KECA 326 (KLR) (17 December 2021) (Judgment)**

Neutral citation: [2021] KECA 326 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 97 OF 2019
MSA MAKHANDIA, A MBOGHOLI-MSAGHA & HA OMONDI, JJA
DECEMBER 17, 2021**

BETWEEN

ONESMUS KALI MULANDI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Garissa (Mutuku & Korir, JJ.) dated 29th November, 2013) in Criminal Appeal No. 1 of 2013)

JUDGMENT

1. The appellant, Onesmus Kali Mulandi appeals against the conviction and sentence for the offence of robbery with violence contrary to Section 296 (2) of the *Penal Code*. The particulars of the charge were that on 20th September, 2010, at Kanzoaka village in Kyuso district within Kitui County, the appellant while armed with a dangerous weapon, namely a panga robbed Wilson Mbevo Muthangya of a bicycle and a mobile phone all valued at Kshs. 7,500/= and immediately after the said robbery killed the said Wilson Mbevo.
2. The appellant was tried in the Kyuso Principal Magistrate's court and convicted of the offence and sentenced to life imprisonment. Being dissatisfied and aggrieved with the conviction and sentence, the appellant filed Garissa High Court Criminal Appeal No.1 of 2013, by a petition of appeal which was subsequently amended. The appellant's contention before the High Court was that he was convicted on unsubstantiated, unreliable and contradictory evidence.
3. The evidence presented by the prosecution was that on 20th September, 2010, the deceased's brother Justus Syengo Muthui, (PW1) proceeded to Mitamisiy in the company of the deceased. They parted ways, and PW1 went home, whilst the deceased went to the land disputes tribunal where he was a member. Later PW1 received information at about 5pm, from his nephew who said he had seen a body which looked like that of his brother lying along the way. PW1 mobilized businessmen together with



- PW2 (the wife of the deceased), and proceeded to the scene where they confirmed that the body was that of the deceased. PW1 observed injuries on various parts of his body.
4. The matter was reported to the police who collected the body from the scene. Two days later PW1 was informed that the person who killed his brother had been arrested with a bicycle, mobile phone and Kshs.400/=. At the police station PW1 found the appellant who was a relative. PW1 also identified his brother's bicycle and mobile phone which he was familiar with.
 5. PW2, Beatrice Muindi testified that on the day in question at around 5.00pm she saw school children walking from school but deviating from their usual route, and upon inquiring, she learnt that there was a body lying on the road near the appellant's home. She later learnt of the appellant's arrest in connection with the death, and eventually identified her husband's bicycle and mobile phone.
 6. Also recovered from the appellant were a phone make Nokia 1200 and Kshs.400/= which was in a pouch belonging to the deceased. Upon interrogation, the appellant directed PW9 (Cpl Francis Mulai) to his grandfather's house in Mitamisyi from where he recovered a panga which was said to have been used to commit the offence. That Corporal Patrick Maina (PW11), had informed her of a phone, a bicycle and Kshs.400/-, which had been recovered from the appellant.
 7. PW4, Martha Simon, a cousin to the appellant described how on the material date, the appellant arrived at their grandfather's home without his shirt, and in a hostile/menacing state.
 8. PW3, Munyithya Kimanzi, PW5, Lydia Mbathi Mbeba, another wife to the deceased, PW6, Munywoki Musyoka and PW7 Joseph Kimanzi, all testified as to how the body of the deceased was found near lying near his home, and upon being identified it was taken to Mwingi for preservation, and eventual post-mortem the deceased's bicycle at the police station.
 9. It seems the trial court mixed up the numbering of witnesses, so that Raphael Mwanndwa Mathya, a nephew to the deceased, who identified the body for post mortem was recorded as PW7, when sequentially he should have been PW8.
 10. PW8, Corporal Bobby Nyariba testified that on 21st September, 2010, he was directed by his supervisor to go and arrest a suspect at Usueni market. He contacted his informer, who gave him the description of the clothes the suspect was wearing. He arrested the appellant with a bicycle and relayed the information of the arrest to Tseikuru police post, and one Corporal Maina was sent to collect the suspect. The appellant had a bicycle which was positively identified by PW1 (the deceased's brother) and the deceased's wives (PW2 and PW5) as belonging to the deceased.
 11. PW9, Corporal Francis Mulai told the trial court that on 21st September, 2010, he was instructed by the District Criminal Investigations Officer (DCIO), Mwingi to investigate the offence that had been committed at Mitamisyi. On 23rd September, 2010, he interrogated the appellant who directed him to Mitamisyi, from where he recovered a panga allegedly used to commit the crime. He also recorded statements of other witnesses including Cpl. Patrick Maina (PW11), who informed him that he had collected the appellant from Usueni with a phone, bicycle and Kshs.400/= and produced all recovered items as exhibits.
 12. PW11(Corporal Patrick Maina), testified that on 21st September, 2010, he was instructed by the officer in charge Tseikuru Police station to collect a suspect from Usueni GSU Camp. He collected the appellant and escorted him to Mwingi Police Station. Further, that he was given a bicycle, Nokia 1200 mobile phone and Kshs.400/= at Usueni and informed that the items had been recovered from the suspect at the time of his arrest.



13. PW10, Dr Nyambati Philomen Ogeto, of Mwingi District Hospital produced the postmortem report on behalf of Dr Allam BAlongo. The findings confirmed that the deceased had multiple cuts on the upper and lower limbs, with amputation of both arms, as well as cuts on the temporal region. The cause of death as indicated in the postmortem report (Exhibit V), was cardio-pulmonary arrest secondary / due to exsanguination
14. The appellant's defence was that on 19/9/2010 he was at a drinking den within Mitamisiyi until around 11.00pm, when he left for home. On the way, he met security officers who were carrying out raids on the brewery dens. He then travelled to Usueni to visit his aunt, and just as he was disembarking from the matatu, the conductor informed members of the public that he was suspected to have murdered somebody in Mitamisiyi, so he was apprehended and handed over to police. He maintained that nothing was recovered from him at the time of arrest.
15. On the claim that he led PW9 to the recovery of the panga allegedly used in killing the deceased, the appellant testified that on 23rd September, 2010, he was handcuffed and put in a vehicle and he led police officers to his home where they asked him to show them his grandfather's house. The officers then told his grandfather to give them his pangas, and two pangas were given out, and the police took the one with a wooden handle. When confronted with the OB entry of 21st September 2010, showing that the he had been arrested with a bicycle, a phone and Kshs.400/=, the appellant insisted that the entry was false. He called his witness DW2, Joseph Maluki, the chairman of the market at Usueni, who told the court that on 21st September, 2010, at about 4.00pm he was at the market when a matatu 'Safari Njema' arrived. Mr. Musembi the conductor, called him and informed him that a passenger in the matatu, who turned out to be the appellant, was suspected of having committed a crime at Usueni. DW2 organized the arrest, and stated that no bicycle or phone was recovered from the appellant at the time of arrest. DW3, the appellant's grandfather, testified that on 20th September, 2010, he had gone to the chief's camp to fill a bursary form. On his way back home, at Mitamisiyi, he heard that someone had been killed on the edge of his pathway. The following day, the appellant went to visit his aunt at Usueni. On 23rd September, 2010, police officers went to his home and asked for a panga that was allegedly used to commit murder, and he gave out two pangas. One of the officers took the one with the wooden handle. DW3 told the officers that he knew nothing of the murder as he was not present when the deceased was killed.
16. The High Court in its judgment while acknowledging that not a single witness saw the appellant at the scene of crime or in the company of the deceased, noted that although there were some inconsistencies in the prosecution case regarding recovery of some of the items, that did not blur the bigger picture in so far as it related to consistency of evidence by all the prosecution witnesses on recovery of the deceased's bicycle from the appellant. The High Court invoked the doctrine of recent possession, and pointed out that the period between the time of theft and recovery was too short to have given opportunity for the bicycle to have changed hands.
17. On the appellant's contention that the offence committed was murder, and not robbery with violence, the High Court held that the conviction was proper because evidence disclosed that the deceased's property was stolen at the time he was killed, and this met the ingredients of the offence under section 296 (2) of the Penal Code. The High Court in dismissing the appeal as having no merit, found that the ingredients of robbery with violence were adequately established, and there was sufficient evidence to link the appellant to the offence. However, on sentence, the High Court was of the view that the sentence provided by law for the offence was death, and the sentence of life imprisonment meted by the trial court was set aside, and substituted with a death sentence.



18. He has now filed this 2nd appeal before us and lists nine grounds of appeal, in the amended petition of appeal and a supplementary memorandum of appeal dated 28th April, 2021, based on grounds that the first appellate court failed to: evaluate the evidence presented, which did not conform to the ingredients of the charge of robbery with violence contrary to Section 296 (2) of the Penal Code; find that there was no evidence of an identification parade; to consider the ingredients of the doctrine of recent possession; evaluate and analyze the evidence; and adequately consider his defence.
19. The appeal was argued by way of written submissions. The appellant through Mr Thuku, learned counsel, submits that since he was not found with the murder weapon, which was actually chosen and arbitrarily fetched by PW9, and there being no eye witness at the scene of the crime to place the appellant there, then the circumstances did not inculpably point exclusively to the appellant to having committed the offence. That in any event, the charge sheet was defective as it was devoid of the particulars of the offence committed, place and weapon used. Further, that the appellant was not found in possession of the bicycle or the phone belonging to the deceased as confirmed by DW2 and DW3. That the appellant should have been charged with theft of the bicycle, as the charge sheet made no mention of the money (which it is submitted, was in any event returned to the appellant). Drawing from the decision in *R v Turnbull & Others* [1976] 3 All ELR 549 on identification, the appellant argues that an identification parade ought to have been conducted. It is also submitted that there were inconsistencies regarding recovery of the property said to belong to the deceased, that the evidence did not conclusively demonstrate that the appellant had the bicycle, and there was no basis for invoking the doctrine of recent possession. That if indeed he had used public means, then there was no basis for finding that he had the bicycle. On this limb, the appellant relies on the case of *Isaac Nganga Kabiga & Anor v R* [2006] KLR which held that:
- “It is trite that before a court of law can rely on the doctrine of recent possession as the basis of conviction, ...the possession must be positively proved...”
20. That the 1st appellate court did not analyze and evaluate the evidence to establish the whereabouts of the doctor who conducted the postmortem, and whether the doctor who eventually tendered in evidence the post-mortem report was conversant with the handwriting in the report. That in any event under Section 150 of the *Civil Procedure Code*, the prosecution is mandated to call all necessary witnesses, yet none of the persons who formed the mob which apprehended the appellant testified at the trial. As regards his defence, it is argued that his defence was not adequately considered, yet it was corroborated by the evidence of DW2 and DW3 with regard to the recoveries. In relation to the sentence, the appellant urges us to consider the Supreme Court decision in *Francis Karioko Muruatetu and Anor v R* [2017] eKLR and find the death penalty meted out and confirmed by the 1st appellate court is unconstitutional.
21. In opposing the appeal, Miss Matiru learned prosecution counsel for the State submits that all the ingredients of the offence of robbery with violence were proved, that the 1st appellate court duly considered the applicability of the doctrine of recent possession, and the appellant having been found with the bicycle, was unable to explain how he ended up with it.
22. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a second appeal, this Court is mindful of its duty as such, that a 2nd appeal must only be confined to points of law and this Court will not interfere with concurrent findings of the two courts below unless the findings were not based on any evidence. See *Karingo & 2 Others v Republic* [1982] eKLR.



23. The first issue raised by the appellant in the supplementary memorandum of appeal faults the finding that the ingredients of the charge of robbery with violence contrary to Section 296 (2) of the Penal Code were proved.
24. This Court has set out the ingredients of the offence of robbery with violence in *Oluoch v Republic* [1985] KLR and held that ‘Robbery with violence is committed in any of the following circumstances;
- a. the offender is armed with any dangerous or offensive weapon or instrument or
 - b. the offender is in company with one or more persons or
 - c. at or immediately before or immediately after the time of the robbery the offender wounds, beats, strikes or uses other personal violence to any person.
25. The use of the word OR in this definition means that any one of the above ingredients is sufficient to establish the offence of robbery with violence. In this case the evidence, although circumstantial shows that at the time the deceased’s body was recovered on the same day, he did not have his bicycle and his mobile phone. The only reasonable inference to draw is that the deceased’s property was stolen at the time of his death. Secondly, the body of the deceased presented with cut wounds on the ankle, wrists and forehead, clearly showing that a weapon had been used on the deceased and supports the other ingredient of the offence, that violence was visited on the deceased.
- Consequently, this ground of appeal must fail.
26. The other two related issues that were raised by the appellant was, failure by the prosecution to carry out an identification parade, and the failure of the trial court to consider the ingredients of the doctrine of recent possession. The High Court bore in mind that not a single witness saw the appellant either at the scene of crime or with the deceased. The only evidence that connected the appellant with the death was bicycle, a phone and Kshs.400/= allegedly recovered from the appellant at the time of his arrest, and as such an identification parade would have been of no value in any event.
27. Certainly recovery of the bicycle and phone belonging to the deceased, was the only evidence which linked the appellant to the deceased. On the issue of the ingredients of the doctrine of recent possession the High Court relied and agreed with the holding of this court in the case of *Murkiria & another v Republic* [2005] eKLR where this Court held that that the doctrine of recent possession can be used to prove an offence of robbery with violence. The High Court was of the opinion that possession of items recently stolen from someone can, unless explained, easily lead to the conclusion that the person found with the items is the thief. The question the 1st appellate court had posited was whether the appellant was found in possession of the deceased’s property, and if so, whether a reasonable explanation was proffered for such possession.
28. The 1st appellate court found that the bicycle that was taken from the deceased at the time of his death, was the same bicycle found with the appellant when he was arrested. It was the 1st appellate court’s finding that the period was too short for the bicycle to have changed hands and that the appellant’s contention that there was a conspiracy between the officers and the relatives of the deceased to fabricate evidence did not hold water. That court also noted that the appellant, simply denied being found in possession of the deceased’s property and did not offer any reasonable explanation as to how he came by the deceased’s items, or why such a link was being claimed.
29. In the present instance, the High Court duly considered that there was a blend of circumstantial evidence coupled with the doctrine of recent possession, and the appellant failed to offer an explanation as to how he got to be in possession of the deceased’s property, so soon after the attack. We find that



the evidence was water-tight on the doctrine of recent possession. In any event these were concurrent findings of the two courts below. Consequently, nothing turns on this point.

30. The trial court was also faulted for failing to give the appellant's defence adequate consideration. The High Court in its judgment in considering the evidence of DW2 pointed out that it could not understand how the appellant who was new in Usueni was able to identify DW2 as the market chairman. The 1st appellate court also evaluated the circumstances created by the defence and held that the appellant leveraged on the relationship he had forged with DW2 in remand to tilt the scales in his favour, and for that reason doubted the veracity of DW2's evidence.
31. The 1st appellate court also noted that the appellant in his own admission was present during the recovery, whereas DW3's testimony appeared to give the impression that the appellant was not present during the recovery. From the foregoing, we find that the appellant has no basis on which to lament that his defence was not given adequate consideration. We hold that from the detailed judgment, the 1st appellate court was keen in giving the appellant's evidence adequate consideration. Consequently, nothing turns on this ground.
32. As regards sentence, the High Court quoting this Court in *Joseph Njuguna Mwaura & 2 Others v Republic* Criminal Appeal No. 5 of 2008 noted that the only sentence provided by law for the offence committed by the appellant is death and accordingly set aside the sentence of life imprisonment to death in the manner subscribed by the law.
33. The issue regarding the mandatory sentences, and especially the death sentence has careened through a series of judicial pronouncements, oscillating between frowning at the said provision on sentence, to stating that the same ought to be left to the discretion of the judicial officer, who ought to take into account factors leading to the incident. More recently, the Supreme Court of Kenya made pronouncements that that the court's discretion as regards the death sentence in the now infamous decision in *Francis Karioko Muruatetu and Another v R* [supra] is only available for persons charged with the offence of murder (see directions by the Supreme Court in *Francis Karioko Muruatetu & Another v R; Katiba Institute & 5 Others (Amicus Curiae)* [2021] eKLR. It is therefore not hard to decipher why the appellant insists that he ought to have been charged for the offence of murder (which carries a mandatory death sentence) and not robbery with violence. We take into account the directions given by the Supreme Court and say no more, save that the sentence is as provided by law. We do not find any error in law as regards the outcome of the appeal in the High Court.
34. The upshot of the foregoing is that the appeal on conviction and sentence is without merit, and is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

