



REPUBLIC OF KENYA



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**Lesuuda v Republic (Criminal Appeal E003 of 2024)  
[2025] KEHC 3897 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3897 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARALAL  
CRIMINAL APPEAL E003 OF 2024  
AK NDUNG’U, J  
MARCH 26, 2025**

**BETWEEN**

**RASANO LESUUDA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from Original Conviction and Sentence dated 10/07/2018  
in Maralal PM Criminal Case No 1322 of 2016– R K Koech, PM)*

**JUDGMENT**

1. The Appellant, Rasano Lesuuda (1<sup>st</sup> accused during trial) was convicted after trial of robbery with violence contrary to Section 296 as read with section 296(2) of the *Penal Code*. On 10/07/2018, he was sentenced to life imprisonment. The particulars of the charge were that on 11/11/2016 along Suguta Lolmolog road at Ngare Ngiro area in Samburu Central Sub-County within Samburu County jointly with others not before court while armed with spears, Samburu swords, rungus robbed Dominic Lorinyok one motor cycle registration number KMDP 720L valued at Kshs.87,000/- and immediately at or after the robbery killed the said Dominic Lorinyok.
2. The Appellant was dissatisfied with the conviction and the sentence hence his appeal to this court. The petition of appeal is dated 05/02/2024 and it raises the following grounds;
  - i. The learned magistrate erred convicting the Appellant on hearsay and uncorroborated evidence.
  - ii. The learned magistrate erred in relying on the evidence of investigating officer purporting to result from a confession which was not produced in court.
  - iii. The learned magistrate erred convicting and sentencing the Appellant on evidence of mistaken identity.



- iv. The learned magistrate erred convicting the Appellant on evidence that was full of inconsistencies.
  - v. The learned magistrate erred convicting the Appellant in absence of murder weapon and Safaricom data showing communication between the Appellant, 3<sup>rd</sup> and 4<sup>th</sup> Accused persons.
  - vi. The learned magistrate erred by failing to consider Appellant's testimony.
  - vii. The learned magistrate erred sentencing the Appellant to life imprisonment which was harsh in the circumstances.
3. The appeal was canvassed by way of written submissions.
  4. The Appellant's counsel submitted that the informer who informed PW1 that the motor cycle had been sold at Barsoi was someone who would have given real evidence since he knew the Appellant and was aware that the motorcycle had been sold to help avoid admitting hearsay evidence produced by PW1. No single witness saw the Appellant kill the deceased or sell the alleged motorcycle. That the Appellant was victimised on account that he was the last person to leave with the deceased. No witness was called to confirm that the motor cycle was sold to the 4<sup>th</sup> accused person and there was no evidence of the instrument used to kill the deceased. Further, the persons who were found in possession of the motorcycle were released. That none of the accused during defence hearing mentioned purchase of the motorcycle. That the Appellant in his defence stated that he was arrested while having tea and not hiding as alleged. That none of the elders mentioned by PW11 testified and no photographs were produced to show cutting of the tree in the presence of the Appellant and if taking photographs was not necessary, how could PW11 prove that it is the Appellant who led them to the recovery of the number plate.
  5. He argued that the trial court convicted the Appellant based on a confession without conducting a trial within a trial which led to failure of justice. That SSP Vincent Egesa who allegedly recorded the confession did not testify after he was summoned by the court. That there was no satisfying information that the confession was made without any form of influence or that the procedure and requirements under Rule 4 of the Evidence (out of Court Confession) Rules, 2009 was followed. That there was no proof that the Appellant was requested to nominate a 3<sup>rd</sup> party to be present as no particulars of 3<sup>rd</sup> party were recorded. There was no signed certificate indicating that no threats or force, intimidation was used during the recording of the confession. Further, there is no indication that the Appellant was informed of the intention to rely on the said confession and there was no proof that the confession was made in a language that he understood or there was an interpreter.
  6. That the prosecution shifted the burden of proof to him through the use of an illegal and inadmissible confession which was a violation of his rights to fair trial. That in absence of evidence of the object used in killing the deceased, there is nothing else apart from the illegal confession. There was no evidence directly pointing to the Appellant as the informer did not testify and the sim cards and phones were not subjected to forensic examination to determine whether there was communication between the accused persons.
  7. In rejoinder, the Respondent's counsel submitted that the prosecution adduced direct and documentary evidence that linked the Appellant to the offence. That according to PW7's evidence, the Appellant was among the last person seen with the deceased. That even PW7 acted as an interpreter since the deceased did not understand Samburu and was therefore properly identified by PW7. He relied on the doctrine of the last seen as enunciated in the Nigerian case of Moses Jua vs. The State



(2007) (PELR-CA/11/2006). That the alleged confession was not produced neither relied by the court while convicting the Appellant.

8. That the testimony of PW11 shows that the Appellant was involved in the sale of the motorcycle and his arrest led the police to the recovery of the number plate. That there were no inconsistencies or contradictions in the prosecution's case and that the evidence of PW7 was well corroborated by PW10 and PW11. It is not mandatory for the murder weapon and Safaricom data to be produced to convict since there was direct evidence. That the Appellant's defence was an afterthought and could not shake the prosecution's case. It is urged that the ingredients of robbery with violence were established since he was in the company of 2<sup>nd</sup> accused and they inflicted injury to the deceased that led to his death. He submitted that the conviction and the sentence were proper and he urged the court to uphold the conviction and relook at the sentence.
9. This being the first appellate court, my duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. See *Okeno v Republic* [1972] EA 32.
10. The case before the trial court was that Raphael reported to the police on 12/11/2016 that the rider of his motorcycle was hired on 11/11/2016 by Morans and had not returned. A search for him at Lolmolok where they had been told the morans were taken was to no avail. On 16/11/2016, men from Heldunyai conservancy reported that they found a human body in the conservancy. Accompanied by the deceased's father, the owner of motorcycle and other officers, they headed to the conservancy where the body was. The father and the owner of the motor cycle identified the deceased. That they started receiving information of two morans who were ferried by the deceased through an informer. Information was received that the Appellant and another person, had been seen in a Manyatta of one Leleshebi. The team headed there. The description of the assailants had been given that one was brown with a scar on the face and the other one was dark.
11. The Manyatta was surrounded and when the suspects hid under the bed from where they were removed. They declined to identify themselves only to do so at the police station.
12. The informer had given information that the motorcycle was sold at Barsoloi which information he passed to the CID. The CID officers recovered the motor cycle and made arrests of those in possession.
13. That the owner of the motorcycle went to Maralal police station with the ignition spare key and he was able to switch on the engine using the spare key. He also brought other ownership documents. He took the photos of the deceased's body and drew a sketch plan which he identified in court. He identified the Appellant and the 2<sup>nd</sup> accused as the persons whom he arrested from underneath the bed and whom had hired the deceased to carry them using the motor cycle.
14. On cross examination by the Appellant, he maintained that the informer told him that the deceased was hired by two morans and he gave out their description. That there are many Morans in Samburu County and the Appellant was one of them. That he could not tell if the Appellant was in Nairobi on 11/11/2016. That there were many men within the manyatta and all people went out except him and the 2<sup>nd</sup> accused. They were inside hiding under Samburu bed and they ambushed them. That he had a club and a sword when he was arrested and it is a tradition for Samburu to carry such weapons. That the deceased was killed elsewhere and dumped at the scene since there were no signs of struggle. That he could not tell the distance from the Manyatta to where the deceased's body was recovered but it was in the same general direction as to the manyatta. That he did not find him with the motor cycle but after his arrest, he led the police to the recovery of the motorcycle number plate.



15. PW2 was the owner of the motor cycle registration no. KMDP 720L. He testified that he was informed by a neighbour that the deceased ferried a passenger and did not return. He contacted Joseph and told him to report which he did and he was told to wait and see whether the rider would return. By the next morning, he had not returned and Joseph went and informed the deceased's father who reported to police. He returned to Suguta and went to police station accompanied by boda boda riders and they started looking for the deceased. They did not succeed but was contacted days later by police that a body had been found and they were requested to accompany the police to identify the body and they were able to identify the deceased. On 24/11/2016, he accompanied the OCS to Maralal police station to try and identify if the motor cycle which had been recovered was his. He carried the spare key and he was able to start the engine but the number plate had been removed. That he was informed that the motorcycle was found at Barsaloi and he was later shown the number plate. He identified the motor cycle, the log book, the transfer form and an invoice, photocopy of his identify card, the photos showing the body of the deceased, the spare keys and fuel tank key and the motor cycle number plate.
16. On cross examination by the Appellant, he informed the court that the deceased had given his neighbour Kshs.200/- and told her that he was going to Lolmolog and by 4:00pm, he had not returned. He was informed that the deceased left at around 11:00 am and the neighbour did not know who the passenger was. That he did not see foot prints at the scene where the body was recovered. The body was in a forest and there were no houses there. That the photographs did not show that he killed the deceased and he was not present when the motor cycle was recovered.
17. PW3, the deceased's father testified that PW2 visited him and informed him that the deceased carried two morans to Lolmolog and he did not return and he did not know of his whereabouts. They waited until 10:00pm and they reported to police station and a search commenced. On 16/11/2026, he was called as the OCS had been informed that a body had been seen at Larengiro along the road to Lolmolog. He accompanied the police officer to the scene and he was able to identify the deceased's body. He had various injuries which he described to the court. He also identified the deceased's body for the purpose of postmortem. He testified that the deceased used to go home with the motor cycle. He identified the photos taken at the scene and the motor cycle.
18. On cross examination by the Appellant, he stated that he did not know the passengers the deceased carried on that fateful day. That he did not know the Appellant's home and did not know the distance between Angata and Larengiro and did not find him with anything to link him to the crime.
19. PW4, deceased's uncle only identified the deceased's body for post mortem purposes. He also described the injuries he noted on the deceased's body.
20. PW5 testified that he was a ranger at Itungai conservancy and they were on patrol when they saw a crowd of people. They inquired what had happened and they were informed that some boys herding goats had spotted a dead body. They headed to the scene and found a body lying face down. They took photos of the body as they had heard from the OCS Suguta that there was a missing person. They went to police station to report and showed the photos to the OCS who contacted the relatives of the missing person. The father looked at the photos and identified the deceased as his son. He also identified the deceased at the scene. That he added that the deceased was a boda boda rider and during market days he was moving goods using a wheel barrow.
21. PW6 a ranger at Itungai conservancy testified that on 13/11/2016, they met a police vehicle with several police and civilians and they were informed by the OCS that there was a missing person who had a motorcycle and they were looking for him and he requested that they help with the search. The rest of his testimony was similar to that of PW5.



22. PW7 Lawrence Loldepe testified that he was a boda boda operator at Suguta Marmar stage and on 11/11/2016 at around 10:00am, he was at the said stage with the deceased when two customers approached him and requested to be taken to Lolmolok. He referred them to the deceased since his motor cycle was not in a good state. They spoke to the deceased in Samburu and since the deceased could not understand, he interpreted what the customers were saying. They were arguing over the cost of transport which was settled at Kshs.400/-. One customer removed Kshs.300/- whereas the other one removed 100/- and the deceased bought fuel worth Kshs.200/- and took the passenger along the road leading to Lolmolok. He stayed at the stage till evening and the deceased did not return. The next day, the deceased's father asked him whether he had seen the deceased and he informed him that he was with him the previous day and he left with two pillion passengers. He started looking for him and he later heard that his body was found at Lolmolok and the motorcycle could not be traced. He later heard that the motorcycle was recovered and some suspects were arrested. That he could remember the customer and could recall their physical appearance. One was tall and black and the other one was short and brown. The tall one produced Kshs.300/- while the short one produced 100/-. He identified the Appellant and the 2<sup>nd</sup> accused as the customers. He testified that he identified them in an identification parade.
23. On cross examination by the Appellant, he testified that they arrived at 10:00am and they left at around 11:00 am. That he used to see the Appellant at Suguta Marmar since when he was young but he did not know his name and may have forgotten his family's name. That he had not done any business with him but would usually see him chewing miraa. That he saw him closely as he did interpretation as he communicated to the deceased in Samburu. That he left with the deceased and was the last time the deceased was seen alive. That he saw him well as he left with the deceased. He did not witness the killing and the they were the first passenger he carried that day and that when he recorded his statement, he told the police that he could identify those who left with the deceased. He denied that he was using someone's else name and testified that his name was Francis Laurent as per his identity card and Lawrence Loldepe and Francis Laurent were all his names. He maintained that he had known the Appellant for a long time, since childhood and that his family name is Lesuuda. That he knew him physically but not by name. He was bargaining to be taken at a cost of Kshs.350/- and he did interpretation while standing next to him. He saw him well that day and he pointed him out in the parade without hesitation. That he was taller than accused 2. That he is the one who called the deceased and informed him that the Appellant wanted to be taken to Lolmolok.
24. On re-examination, he testified that he recorded his statement with the police and told them that he was Lawrence Loldepe.
25. PW8, was the doctor who conducted post-mortem on the deceased's body. He testified that the deceased had a depressed skull fracture behind the head and the atlas bone was broken. The cause of death was head injury associated with intra cranial haemorrhage. That the depressed fracture was caused by a blunt object. He produced the post-mortem report as Pexhibit5.
26. PW9 testified that he is a herdsman and he owns a motor cycle. On 23/11/2016 when he returned home from herding, he saw the motorcycle number plate was missing and he asked his wife where the number plate was who informed him that someone had taken it saying that he had sent him to collect the same. That his wife informed him that Lelegwe (4<sup>th</sup> accused) took the number plate. That he knew him well and Lelegwe knew that PW9's motorcycle had broken down and that is why he left it at home. That Lelegwe told his wife that he had sent him to collect the number plate and the log book. He identified the number plate and the log book. That he later learnt that his log book was at Maralal police station and he was called to explain how it got lost. That he was also shown the engine



- component which he had removed and which was taken alongside the number plate. That he knew the 4<sup>th</sup> accused. He testified on cross examination that he did not know the Appellant.
27. PW10 testified that he was informed that three morans were seen riding a numberless motorcycle from Barsoloi toward Maralal. They sighted the numberless motorcycle outside Comrade hotel at Maralal town and they were informed that three morans who were with the motorcycle were inside Comrade hotel. They were the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused persons. They gave conflicting information as to ownership and so they arrested them. They also recovered a fake number plate, motorcycle log book and transfer of ownership form. On cross examination by the Appellant, he stated that he saw him in custody and he was not the one who arrested him.
  28. PW11 was the investigating officer. He corroborated PW10's testimony on how they arrested 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> accused with the stolen motorcycle. That when they interrogated them, they told them that they bought the motorcycle recently from two morans from Ledero whom they could identify physically. That the log book they had did not tally with the chassis number on the motorcycle. He produced the fake number plate as Pexhibit 10, the log book, a certificate of incorporation for premier motor cycle industries, a tax PIN for the company and transfer of ownership for Dorcan Moatam Alkolool as Pexhibit 9(a)(b)(c) and (d) and motor cycle engine component as Pexhibit 11, ignition key and fuel tank key as Pexhibit 12(a) and (b).
  29. The next day he interrogated 4<sup>th</sup> accused who informed him that he found in the police cells the two morans who had sold him the motor cycle at Ledero. He took the OB and cell register and noted that the Appellant and 2<sup>nd</sup> accused had been booked for robbery with violence from Suguta police station. They interrogated the Appellant and 2<sup>nd</sup> accused who revealed to them that on 11/11/2016, they met one Lerei and Ngamia and others from Wamba and Laikipia since they had a deal. They had planned to attack Turkana youths at Suguta Marmar. They informed them that they went to Suguta to get someone to take them to Lolmolok and other suspects were to wait along the way. That they knew the deceased was a Turkana and they left with the deceased who was carrying them as a rider. They requested the deceased to take them back to Suguta having arranged the attackers to wait at Ngare ngiro and on their way, they contacted Lerei and when they reached ngare ngiro comer, other morans emerged while armed with spears and clubs and jointly they attacked the deceased. The Appellant and 2<sup>nd</sup> accused took possession of the motorcycle and left the deceased at the mercy of the other Morans.
  30. They went to the Manyatta of the 3<sup>rd</sup> accused who was their friend where they expressed their fear of being found with the motor cycle and they requested the 3<sup>rd</sup> accused to remove the number plate who was left with it. They went to Barsoloi looking for a buyer where they met 5<sup>th</sup> Accused who informed them that his brother, 4<sup>th</sup> accused wanted to buy a motorcycle whom they met the next day at his manyatta. He agreed to buy at a cost of Kshs.60,000/- and he was to pay Kshs.40,000/- and give ten goats to the Appellant and 2<sup>nd</sup> accused. He informed them that he could only get cash at Maralal. When the 4<sup>th</sup> accused returned, he informed them that police were looking for them for murder and robbery with violence and he advised them to flee which they did and they returned to lolmolok where they were arrested. That they were read out their confession which they signed and agreed with it. They offered to take the police to 3<sup>rd</sup> accused's manyatta where the number plate was hidden. The Appellant took them to 3<sup>rd</sup> accused's manyatta who tried to flee and upon being asked where the number plate was, he led them to a tree with holes in its trunk where he had inserted the number plate. The elders in the manyatta assisted them with pangas and the tree was cut and they recovered the number plate.
  31. That the owner of the motor cycle brought the log book which the registration number tallied with the one they recovered and the chassis number matched the one on the log book, the name ranger matched and the colour red indicated on the log book matched the motorcycle. He also had transfer



form and invoice. He visited the scene and he was given the photos that were taken which he produced as Pexhibit 3(a) and (b). He produced the ownership documents as Pexhibit 1(a) (b) and (c), motor cycle as Pexhibit2, the recovered number plate as Pexhibit8 and the photos of the tree trunk where the number plate was recovered as Pexhibit 14 (a)(b)(c)(d)(e), and Appellant confession recorded by SSP Vincent Egesa as Pexhibit15. He testified that the 3<sup>rd</sup> accused was arrested after the Appellant led them to his manyatta and he showed them where he had hidden the number plate. That there was a witness who knew the Appellant and who saw them with the deceased and they could have conducted identification parade but they had already been arrested and the period they had asked to hold them had expired.

32. On cross examination by the Appellant, he testified that he used intelligence, witnesses and his confession and recovered stolen items in this case. That nobody assaulted the Appellant and he did not inform the court that he was tortured. That he led the police to the 3<sup>rd</sup> accused's house where recoveries were made. He was not photographed as there was no need to do so. That he did not know where he was arrested. That Lererei whom he had given out his umber was out of reach and that there was nothing significance regarding his sim card linking him to the offence.
33. In his unsworn defence, the Appellant testified that he was a livestock trader. That there were middle men who would transport livestock to other market and he gave them the livestock he had bought to take to another market and he went to Angata Rongai since there were some livestock he wanted to take to Laikipia. When he got home, an old woman approached and asked him whether there were other morans in the homestead. The old woman asked him to accompany her so that he can take tea with other morans which is according to Samburu culture. He proceeded to take tea with a colleague and before introduction, he saw a police land rover coming and the police asked two women whether there were morans within the homestead who confirmed that there were two morans. That the police called him and he was asked to board the land rover.
34. I have had the occasion to consider the grounds of appeal raised. I have read and considered the evidence as recorded in the trial court. In doing so, I have taken cognisance that I neither saw nor heard the witnesses testify and have given due allowance for that fact. I have at the same time considered the applicable law, the learned submissions made and case law cited.
35. Gleaned therefrom, the issues for determination are whether the prosecution proved its case to the required degree and if in the affirmative, whether the sentence meted out was legal and appropriate in the circumstances of the case.
36. Appellant was charged under section 296 as read with section 296(2) of the *Penal Code*. Our superior courts have on several occasions stated that drafting the robbery with violence count under the two sections amounts to duplicity. See Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR. The courts have also held that where the charge is deemed to be duplex, the test will be whether the defects occasioned any prejudice to the Appellant. The Court of Appeal in Paul Katana Njuguna v Republic [2016] eKLR while faced with a similar issue held thus;

“...In the matter before us, we are unable to detect any prejudice which the appellant suffered. The record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross-examined them. He raised no complaint before both the trial court and before the High Court. So, while it would be undesirable to charge an accused person under both sections in the alternative, it would not be prejudicial to that accused person if the offences are not framed in the alternative. As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused



is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective.”

37. In this case, the Appellant understood the charges against him, he participated in the hearing by cross examining the witnesses and mounted a defence at the close of the prosecution case. He raised no complaint before the trial court and in the circumstances, I find that there was no miscarriage or failure of justice.

38. Section 296(2) of the *Penal Code* provides as follows;

If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with 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.

39. The ingredients of the offence of robbery with violence were clearly set out by the Court of Appeal in the case of Oluoch –vs – Republic [1985] KLR where it was held:

“Robbery with violence is committed in any of the following circumstances:

- a. The offender is armed with any dangerous and offensive weapon or instrument; or
- b. The offender is in company with one or more person or 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 .....

40. The use of the word or in this definition means that proof of any one of the above ingredients is sufficient to establish an offence under section 296(2) of the *Penal Code*. The prosecution duty was therefore to establish any of the above ingredients and to show the court that the Appellant robbed the deceased.

41. It is in evidence that the body of the deceased was discovered few days after ferrying two morans. PW1 confirmed seeing the deceased’s body at the scene as well as PW5 and 6 which was identified by PW2 and PW3(deceased’s father). PW4 also identified the body of the deceased for the purpose of post-mortem. PW8 conducted post-mortem and his findings were that the cause of death was head injury associated with intra cranial haemorrhage and that the depressed fracture was caused by a blunt object.

42. The evidence before the trial court also reveals that the deceased was a motor cyclist popularly known as boda boda operator. PW2 was the owner of the motor cycle and PW11 produced the evidence of the log book, invoice and transfer form as Pexhibit1 (a)(b)(c). PW2 testified that he had employed the deceased as the rider of the subject motor cycle. There is evidence that the recovered motor cycle was ignited using the spare key in possession of PW2 and the details in the log book matched the subject motor cycle in all respects.

43. At the time the deceased’s body was recovered, the motor cycle was not recovered. The motor cycle was recovered on 22/11/2016 by PW10 and PW11 in possession of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Accused persons who were the Appellant’s co-accused. PW11 the investigating officer testified that after recovering the motorcycle from the mentioned accused persons, he took them in custody and in the following morning when interrogating the 4<sup>th</sup> accused, the 4<sup>th</sup> accused informed him that he saw the two morans



who sold the motor cycle to him at Ledero in the police cells. He made a follow up and perused the OB and the cell register and he noted that the Appellant and 2<sup>nd</sup> accused had been booked from Suguta police station for the offence of robbery in the same case. They interrogated the Appellant and 2<sup>nd</sup> accused who revealed the plan they had of killing Turkana youths with other people and how they lured the deceased to ferry them to Lolmolok and consequently killed him with other people. It was also revealed that the motor cycle was sold to 4<sup>th</sup> accused.

44. PW11 testified that the Appellant offered to take them to 3<sup>rd</sup> accused's house where they had left the number plate. The Appellant led them there and on arrival, the 3<sup>rd</sup> accused person saw them and started fleeing but he was ordered to return. They asked him where the number plate was and he led them outside the manyatta to a tree with holes in its trunk and told them that he inserted the number plate there. They peeped inside the trunk and they could see the number plate but it was out of reach and they had to cut the tree to recover the same. The said number plate was for the stolen motor cycle and he produced the same as Pexhibit8.
45. While convicting the Appellant, the trial magistrate linked the Appellant to the offence due to the fact that he led the police to the discovery of the number plate and that PW7 recognised him.
46. In respect to PW7 evidence, he testified that he recognised the Appellant and the 2<sup>nd</sup> accused who had approached him to be taken to Lolmolok but he called the deceased for them since his motorcycle had a problem. He testified that he recognised them well since he is the one who interpreted to the deceased since the deceased could not understand Samburu. Further, that he knew the Appellant since childhood but he did not know his name nor his family's name. He further testified that he identified the Appellant without hesitation during identification parade and that he had given his description to the police. That the Appellant and the 2<sup>nd</sup> accused person were the last to be seen with the deceased when he ferried them to Lolmolok but never returned and his body was discovered days later.
47. I however noted that PW11 testified that there was no ID parade that was conducted. Further, PW7 told the court that he was Lawrence Loldepe. On cross examination by the Appellant, he testified that his name was Francis Laurent as per his identity card which he showed to the Appellant. He denied using someone's else names and that he had not been bribed to testify against the Appellant. He testified that Lawrence Loldepe and Francis Laurent were his names and he is known by all his names at home. On re-examination, he testified that he recorded his statement with the police and he informed them that his name was Lawrence Loldepe. Whereas it was in my view necessary for PW7 to state at the onset that he had other names other than the names he gave in his statement, this in my view does not discredit the evidence and in any event the prove of the charges would be on the basis of further corroborating evidence not on the evidence of PW7 alone.
48. As to whether the Appellant was the perpetrator, the evidence on record points directly to his involvement. He told the police that they had left the number plate of the subject motor cycle with one Lepir. There is clear evidence by PW11 of how the Appellant led him to the manyatta of Lepir, the 3<sup>rd</sup> Accused at trial. In a vivid narration, PW1 explained how the said Lepir attempted to flee on sighting the team only to return when he was asked to do so. The said Lepir on being asked where the number plate of the stolen motorcycle was, readily answered it was in a hole in a tree trunk, and, on peeping, PW11 saw the number plate which was in a hole in a tree trunk and unreachable. This necessitated the cutting of the tree to retrieve the number plate using pangas and axes brought by elders in the manyatta.
49. The number plate thus retrieved was for the stolen motor cycle Reg. No. KMDP 720L. This recovery through the Appellant's leading of PW11 to the home of Lepir and when tied with the evidence of PW7 places the Appellant at the centre of the commission of the offence herein.



50. I have noted and considered the argument proffered by counsel for the Appellant to the effect that the trial court relied on alleged confession made by the Appellant without following the laid down procedure. This assertion is not borne out of the record. It has also been submitted that the photographs produced did not show that the Appellant was at the scene to show that indeed he led the police to the recovery of the number plate. To begin with, whereas it may be desirable that photographs are taken at recovery, it is not mandatory that photographs must be produced to prove the same. Cogent clear evidence would suffice and in this case I am satisfied with PW11's concise and clear evidence on the matter.
51. It behoves on this court at this juncture to restate the law on what evidence is required in prove of a fact. As held in the case of *Sewangana Livingstone v Uganda SCCA No. 19 of 2006*:
- “What matters most is the quality and not quantity of evidence required for the proof of any fact.”
52. This legal requirement was well stated in the case *Charles Kariuki Mure Vs. Republic High Court Nyeri Criminal Appeal No. 172 of 2007 (unreported)* thus:-
- “With regard to witnesses who were not called, as a matter of law, there is no requirement that any number of witnesses be called to prove a particular fact. See for instance section 143 of the *Evidence Act*. We are not aware of any requirement that a case cannot be proved on the evidence of a single witness. Indeed it is not the quantity but quality of the evidence that counts. In the circumstances of this case we do not see what would have been gained by the prosecution calling members of the public who responded to the distress call and or PW1's mother who was in the vehicle. With regard to the members of public, we should agree with the learned magistrate that, by the time they came to the scene, the offences had been committed, the appellant chased and arrested. Their evidence could not therefore have bolstered the prosecution case any further. As for PW1's mother's evidence, the evidence of PW1, PW21 and PW3 sufficed.”
53. In our instant case, the non-production of photographs does not in any way degrade the probative value of the evidence adduced which evidence links the Appellant squarely to this offence.
54. As to non-production of the murder weapon, this again is a non-issue. It is not always the case that a weapon used in a crime be produced for a conviction to lie. The logic is easy to see. It is not always that a crime weapon will be recovered. On this, the Court of Appeal in the case of *Karani v Republic (2010)1 KLR 73*, stated thus:
- “The offence as charged could have been proved even if the dangerous weapon was not produced as exhibit as indeed happens in several cases where the weapon is not recovered. So long as the court believes, on evidence before it, that such a weapon existed at the time of the offence, the court may still enter and has been entering conviction without the weapon being produced as exhibit.”
55. As to the sentence, I note the Appellant offered no mitigation when given the opportunity. He was sentenced to life imprisonment. Section 296(2) however provides for death sentence. The trial magistrate did not proffer any reason why he sentenced the Appellant to life imprisonment instead of death provided in law.



56. The prosecution has made what I can sum up as a feeble and an uncommitted invite to the court to ‘relook at the sentence.’ Considering the brutality and savage physical violence inflicted on the deceased during the robbery, I would be minded to enhance the sentence to one of a sentence to death. I however note that the state has not served any notice of enhancement of the sentence and the court did not forewarn the Appellant on this possible enhancement of the sentence. In the circumstances, I find apt not to disturb the sentence.

57. With the result that the appeal herein is dismissed in its entirety.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF MARCH 2025**

**A.K. NDUNG’U**

**JUDGE**

