



REPUBLIC OF KENYA



**Mwanzia v Republic (Criminal Appeal E002 of 2024)  
[2025] KEHC 6991 (KLR) (29 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6991 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CRIMINAL APPEAL E002 OF 2024**

**TW OUYA, J  
MAY 29, 2025**

**BETWEEN**

**JAMES MUOKI MWANZIA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal arising out of the conviction and sentence of Hon. L.M. Wachira (Chief Magistrate) in Gatundu Chief Magistrate's Court Criminal Case No. 1106 of 2017 delivered on 18th September 2019)*

**JUDGMENT**

1. The Appellant was charged with four counts of robbery with violence contrary to section 296(2) of the *Penal Code*. He was convicted on two counts and sentenced to serve fifteen years imprisonment. He was however acquitted on the other two counts. His conviction was wholly based on the doctrine of recent possession. The alternative count to the charge of robbery of violence in count 1 was handling stolen goods.
2. Being aggrieved with both conviction and sentence, he preferred an appeal to this Court based on the following grounds:
  - i. That the learned magistrate erred in both law and facts on whereby prosecution case was not proved beyond reasonable doubt as enshrined by section 107 of the *Evidence Act*;
  - ii. That the learned magistrate erred in both law and facts on whereby the main ingredients of robbery with violence that is, identification, armed with offensive weapon and in company with one or more than one person was not proved as required by law;
  - iii. That the learned magistrate erred in both law and facts by relying on the evidence of corroboration which did not have anything to do with the appeal;



- iv. That the learned magistrate erred in both law and facts by imposing conviction to the appellant relying on contradictory testimonies.
3. The Respondent filed written submissions dated 28<sup>th</sup> November opposing the appeal. On the part of the respondent counsel, the entire appeal is opposed in view of the overwhelming evidence presented before the trial Court establishing the charge of robbery with violence beyond reasonable doubt.

### **Evidence at trial**

4. The prosecution called nine (9) witnesses to support their case.
5. PW1 was James Waniala Kisa, a male adult of sound mind employed for gain as the farm hand to Peter Njuguna (PW2). He testified that on 4<sup>th</sup> October 2017 at 2.00am he was asleep at home when he heard some commotion from PW2's house. He proceeded to PW2's house using his phone's flashlight. At the entrance to PW2's house, he was knocked on the head and left hand causing him to fall down unconscious. He later woke up with his clothes soaked in blood surrounded by neighbours. The neighbours assisted him to a vehicle that took him to Gatundu level 5 hospital for treatment. He was stitched on the head, near the left eye, and released. He was not admitted. He testified that during the incident; he lost his phone make Itel Serial numbers 355799080526948 and 355799080536955 valued at Ksh. 1200.00 and Ksh 2,000.00. He did not recognize the people who robbed him on that night. He later learnt that the police had recovered his phone, he was able to identify it on account of a labelled battery and a broken charging port. The degree of injury he sustained during the incident was classified as harm.
6. PW2, Peter Kabuti Njuguna testified that he is a farmer and had engaged PW1 as a farm hand for over ten years. He testified that on 4<sup>th</sup> October 2017 robbers attacked him by cutting his bedroom window. He woke up to switch off the alarm but realised that the said robbers had disconnected the electricity. The robbers knocked his head and leg, he fell down and raised alarm by shouting. He then lost consciousness. He did not see the faces of the robbers during the incident. He was admitted to Kenyatta hospital for treatment till 14<sup>th</sup> October 2017. He sustained a head injury and a fracture of the leg and a crack at the ankle of the other leg. In the process, his mobile phone make: Alcatel worth ksh. 22,000.00 was stolen. The degree of injury he sustained during the incident was classified as harm.
7. PW3 Samuel Wainaina Wamindi testified that on 3<sup>rd</sup> October 2017 at 11.30pm he was in his house with his wife (Mary Njoki Karanja, PW4) when he heard people breaking the window glasses and knocking doors. He woke up and attempted to switch on the alarm but was unable to, since there was no power. The robbers broke into his house and forced them to lie down before demanding money. He was hit with a rungu on the shoulder. He handed over his phone, make Tecno, worth Ksh. 13,000.00 to the robbers. They also took his wife's phone, make Techno worth Kshs. 5,500.00 and handbag. He never identified the robbers.
8. PW5 Alphonse Mburi Muchiri, testified that he is the appellant's brother-in-law. He stated that on 4<sup>th</sup> October 2017 at around 8.00pm he was coming from work when he met the appellant. The appellant had a mobile phone that he wanted to sell to PW5, however, PW5 told him that he had no money to purchase the phone. The appellant then asked him to take possession of the phone and pay later, and he obliged. Two days later, PW5 purchased a Safaricom line 0790550897. While going to work, he met the appellant at the entrance of his workplace. The appellant asked for the phone to make a call to his wife; he handed over the phone to the appellant. However, the appellant never returned the phone to him. His efforts to reach the appellant were unsuccessful. After some time, police officers visited his work place and questioned him regarding the phone. He told them that it's the appellant who had given him the phone. He was emphatic that there is no existing grudge between himself and the appellant.



9. PW6 PC Albert Langat of DCI Thika testified that on 19<sup>th</sup> October 2017 he joined Corporal Ekiru to undertake investigations into an offence of robbery with violence. They proceeded to Ruiru while following the phone signal till they got to PW5. However, they did not recover the phone from him. Later on, 23<sup>rd</sup> October 2017, they got intelligence, through an informer who led them to the Appellants house. They recovered an Itel phone, with the appellant's SIM card, and an ID in the name of James Muoka Mwanzia. Hence, they arrested the owner of the house, the appellant herein. PW6 signed the inventory of the items recovered
10. PW7 PC Ruth Apondi of DCI Gatundu is the investigating officer in the case. She states that on 4<sup>th</sup> October 2017 at about 0700am she received a phone call from Charles Kanyuira, the Sub County Criminal Investigations Officer, informing her of an incident at Kiamworia. She proceeded to PW3's house, in the company of Cpl. Ekiru, and found that two phones make Techno had been stolen as well as a handbag belonging to PW4. They then proceeded to PW2's house where they were informed of robbery incident that had led to the stealing of a phone make Itel belonging to PW1 together with Ks. 2,000.00. They also learnt that PW2's phone make: Alcatel worth Ksh. 13,000.00 had been stolen. She further testified that they wrote to Safaricom as part of the investigation to assist in tracking the lost phones. they successfully traced PW1's phone to PW5 who upon interrogation said that he had bought the phone from the appellant but the appellant had repossessed it. PW5 led the officers to the appellants' house where the phone was recovered.
11. PW8 Dr. Mary Gichagua from Gtaundu Level 5 hospital produced P3 Forms belonging to PW1 and PW2 that had been duly filled by Dr. Kibathi. She stated that the said Dr. Kibathi had been her colleague for two years and was thus familiar with her signature. She testified on the injuries that both PW1 and PW2 suffered as a result of the assault occasioned on them on 4<sup>th</sup> October 2017 during the alleged robbery incident.
12. PW9 Ronald Nyamase from Safaricom Limited testified that as a liaison officer, he is involved in extracting data for police officers for purposes of investigation. On 9<sup>th</sup> October 2017, they received a letter from Gatundu DCI requesting for data from 1<sup>st</sup> October 2017 till the date of the letter for serial no.355799080526940. He processed the serial number and got that the 0790550897 was the phone number using the phone. the same was registered vide ID 12445313 in the names of Alphonce Musyimi. He confirmed that only Alphonce Musyimi used the phone during the period in question.
13. At the close of the prosecution case, the Appellant was found with a case to answer and was put on his defence.
14. The Appellant gave sworn statement in defence. He testified that on 23<sup>rd</sup> October 2017 he was at home when police officers came into his house and arrested him. They took his Nokia phone and his National ID and demanded for Ksh. 50,000.00 before releasing him, but he had no money. On 3<sup>rd</sup> November 2017 he was arraigned in court. He did not understand the reason why he had been taken to court. He denied that the Itel phone was recovered from his custody. He alleged that it is PW5 who had the phone, not him. he confirmed that PW5 was his brother-in-law. He disputed the inventory that showed that the Itel phone, a Nokia phone and an ID had been recovered from his house, despite signing the said inventory.

## ANALYSIS

15. The duty of the first appellate court was laid down in *Okeno v R* {1972} EA 32 that:

“ a first appellate Court is obliged to analyse and re-evaluate the evidence adduced before the trial Court, independently draw its own conclusions, overlooking or disregarding the



findings of the trial Court, and bear in mind that unlike the trial Court, it did not have the opportunity of hearing and seeing witnesses testify.”

16. In my view this appeal raises the following key issues.
  - a. The relation to the sufficiency of the evidence on record and whether that evidence was capable of supporting the conviction of the appellant, and
  - b. The importance of and correlation of the doctrine of recent possession to uphold the conviction of the appellant.
17. The offence of robbery with violence is a creation of Sections 296(2) of the *Penal Code*. The provisions provide as follows: -
  296. Punishment of robbery:
    1. ....
    2. 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 after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.
18. It follows therefore, for the offence under Section 296 (2) of the *Penal Code* to be proven, “the prosecution must establish that the appellant was armed with any dangerous or offensive weapon or instrument or he was in company with one or more other person or persons, or if at or immediately or immediately after the time of the robbery any one of them wounded, beat, struck, or used personal violence to the complainants.” (See *Oluoch v R* {1985} KLR 549). All what the prosecution is required to establish and proof is anyone of the three elements of the offence as provided for under Section 296(2) of the *Penal Code* which suffices to sustain a conviction of the appellants for the offence. (See *Daniel Muthimi v R* {2013} eKLR).
19. This Court is alive to the confusion which has lingered over time in distinguishing the offence of robbery from that of robbery with violence. The description of any of the two offences leads to the other. Indeed, that was one of the findings by an expanded Bench of the High Court in *Joseph Kaberia Kahinga & 11 others v Attorney General* [2016] eKLR which called for law reform to address the ambiguity.
20. This court therefore adopts the approach by *Mrima J* in *Kipsang v Republic* (Criminal Appeal E008 of 2023) [2024] KEHC 249 (KLR) where the learned judge stated as follows:
  27. For purposes of establishing the offences pending any law reform which is far too long overdue, the difference between the two offences ought to relate to the circumstances under which they are committed and the gravity of the injuries sustained. This Court will, therefore, adopt an intermediate approach. The approach is that whereas both offences connote theft and violence, for the offence of robbery with violence to be established, there must be evidence of actual use of violence on the person of the victim and not a threat to such violence.
  28. Therefore, if in the course of stealing, the offender only threatens to use violence on the victim, but no more than the threat, then the offence of robbery, and not robbery with violence, may be committed. Further, in such circumstances, the offence of robbery with violence cannot stand even if it is proved that the offender was armed with any dangerous or offensive weapon or instrument and/or the offender was in the company of one or more other person or persons as long as there was no evidence of actual use of violence.



21. Applying the above principles there was ample evidence which in my view the Learned trial Magistrate considered which showed that at the time of the robbery the appellant jointly with others robbed PW1 and PW2 while armed with offensive weapons and at the time of the said robbery used actual violence against PW1 and PW2. The medical evidence on record clearly demonstrates that both PW1 and PW2 sustained serious injuries during the theft. In fact, the trial court noted that PW2 still appeared weak and frail during his testimony. His face also appeared deformed as though he had suffered a stroke.
22. The prosecution therefore, brought their indictment within the scope of Section 296 (2) of the [Penal Code](#). In the circumstances, the evidence sufficiently displaces any denials presented by the appellant contending that the key ingredients of the offence of robbery with violence had not been met.
23. In fact, once the evidence of PW1, PW2 and PW5 were accepted, the conviction of the appellant was inevitable in terms of the provisions of Section 107 (1) and 108 of the [Evidence Act](#). In any case, the Appellant recalled PW1, PW2 and PW5 twice but they still maintained their testimony regarding the incident that led to the loss and recovery of PW1's phone.
24. I have noted from the record that the appellant's conviction turns on the doctrine of recent possession, being the person who was found with PW1's phone that got lost during the incident of robbery on 4<sup>th</sup> October 2017 at around 2.00am. The doctrine of recent possession was discussed at length by the Court of Appeal at Nyeri Criminal Appeal No. 4 of 2014 David Mugo Kimunge vs. Republic (2015) eKLR. The Learned Judges greatly rendered themselves as follows:

16. The doctrine of recent possession has been applied in numerous decisions of this Court and the High Court properly cited the Kahiga case (supra) as one for the elements necessary for proof. We may reproduce the elements from that case:-

It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof

- a. that the property was found with the suspect;
- b. that the property is positively the property of the complainant;
- c. that the property was stolen from the complainant;
- d. 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.”

18. In the end, the majority of that Supreme Court accepted the following summary of the doctrine: -

Upon proof of the unexplained possession of recently stolen property, the trier of fact may - but not must- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatorily, and when an explanation is offered which



might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.

25. Thus, for the prosecution to reliably sustain a conviction based on the doctrine of recent possession the following elements as stated in *Gideon Meiteken v R* {2013} eKLR ought to be proved beyond reasonable doubt:
  - a. That the property was found with the suspect.
  - b. That the property was positively identified by the complainant.
  - c. That the property was recently stolen from the complainant (See also *Isaac Nganga Kaluga alias Peter Nganga Kaluga v R* CR Appeal No. 272 of 2005)
26. Applying the above principles to this case, PW7 PC Apondi stated that the mobile phone initially traced to PW5 and recovered from the appellant's house was positively identified by PW1 as his phone that got stolen during the time of the robbery. Although the appellant denies the phone being recovered from his possession, the inventory that he signed indicated that the ITEL phone, a Nokia phone and his ID were recovered from his house at the time of his arrest.
27. Further PW5 testified that the mobile phone in question was sold to him by the Appellant on 4<sup>th</sup> October 2017, however, the appellant collected it about two days later to make a phone call to his wife but never returned it. The trial court noted that PW5 appeared to be telling the truth regarding the mobile phone as he was recalled twice but his testimony remained consistent. Moreover, though the appellant was PW5's brother-in-law, the trial court did not establish any reason that PW5 would have had to frame the appellant. It is therefore safe to say that PW1's lost phone was recovered from the appellant.
28. PW1 contended that the phone was his as he had engraved his name on its battery. Also, the phone's charging port had a broken charger. PW1 was clear that though other people might have had a phone of a similar make, they could not have those two distinct features that were only unique to his phone. The record bears that the trial court got to see both the broken charging port and the battery written 'James'.
29. In *Nancy Ayemba Ngaira –vs- Abdi Ali* [2010] eKLR the Court had the following to say on ownership:

..... In judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration.
30. In some instances, the law does not mandatorily require documentary evidence of ownership of property. Whereas PW1 did not avail ownership documents of the phone, there was ample evidence of actual and possessory ownership by PW1. Further, no one else laid claim over the ownership of the phone. Legally, it was, therefore, proved that the phone belonged to PW1.
31. Regarding the question on whether the phone was recently stolen from PW1. The theft was on 4<sup>th</sup> October 2017 at 2.00am. PW5 (whom the trial court noted that was telling the truth) testified that on the same day at 8.00pm, the appellant expressed his intention to sell to him the said phone, even if it meant that he would pay the purchase price later. The Safaricom data also showed that the phone in question was used by PW5 during the period that it had been stolen from PW1. In fact, it is PW5 that led the police to the appellant's house. Following PW5's lead, the phone was actually recovered from



the Appellant on 23<sup>rd</sup> October 2017. Approximately 19 days after the robbery. Suffice to say that the phone had been recently stolen.

32. There is an indefeasible inference that the appellant stole the phone from PW1, sold it to PW5 to hide his involvement, and then repossessed it when he was certain the blame of having the phone immediately after the robbery would fall on someone else.
33. The inference from recent possession of stolen property and in view of the circumstances it was proper for the trial Court to draw such a correct inference that the appellant had been present and had taken part in the robbery. Although, the appellant had put forth a case of denial, it was unreliable and failed the test under Section 111 of the Evidence Act Cap 80 of the Laws of Kenya.
34. Section 111 of the Evidence Act states thus:

111.

- (1) When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged and the burden of proving any fact especially within the knowledge of such person is upon him:

Provided that such burden shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether in cross-examination or otherwise, that such circumstances or facts exist:

Provided further that the person accused shall be entitled to be acquitted of the offence with which he is charged if the court is satisfied that the evidence given by either the prosecution or the defence creates a reasonable doubt as to the guilt of the accused person in respect of that offence.”

35. Though the statutory sentence of robbery with violence contrary to Section 296 (2) of the Penal Code is death, the trial court sentenced the Appellant to fifteen years imprisonment. The Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002] eKLR stated:

“It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

36. Bearing the above holding and having in mind the circumstances of this case, the question is whether there is any lawful reason to interfere with the discretion of the trial court in passing sentence.



37. The principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of *Ogolla s/o Owuor vs R*, (1954) EACA 270 wherein the Court of Appeal stated that:
- “The court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (*R v Shershowsky* (1912) CCA 28TLR 263).”
38. Sentencing is a discretion of the trial court. In *Ambani –Vs- Republic* (1990) KLR 161, Bosire J. (as he then was) stated that a sentence imposed on an accused person must be commensurate with the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirety before settling for any given sentence.
39. In *Republic –Vs- Jagani & Another* (2001) KLR 590, it was held that:-
- “The purpose of sentence is usually to disapprove or denounce unlawful conduct as a deterrent to deter the offender from committing the offence, to separate offenders from society if necessary to assist in rehabilitation of offenders, and in rehabilitation by providing for reparation for harm done to victims in particular to and to society in general. This is also seen as promoting a source of responsibility in offenders.”
40. The question is whether this court should interfere with the sentence meted by the trial court. In *James Kariuki Wagana –v- Republic* (2018) eKLR Prof. Ngugi.J (as he then was) while arguing that death penalty should be reserved for most heinous levels of robbery with violence stated:
- “...while the sentence of death is the maximum penalty for both murder and robbery with violence the court has the discretion to impose any other penalty that it deems fit and just in the circumstances...”
41. In the instant case, I see no reason to interfere with the trial court’s sentence as it was meted upon the trial court considering the pre-sentence report, the victim impact statement, the nature of the offence as well as the mitigation by the appellant.
42. Concerning the sentence, the Appellant was in custody for two years. The court did not indicate from whence the sentences were to begin. This effectively enhances the sentences without any basis contrary to the tenets set out in Section 333(2) of the *Criminal Procedure Code* that requires that where the convict was held in custody, prior to the sentence, the period spent in custody should be taken into consideration. This is not a fictional consideration but a mathematical question.
43. Section 333(2) of the *Criminal Procedure Code* provides:
- “Subject to the provisions of Section 38 of the *Penal Code*, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody.”



44. It is clear from the above provision that the law requires courts to take into account the period the convict spent in custody. According to The Judiciary Sentencing Policy Guidelines:

“The provision to section 333(2) of the [Criminal Procedure Code](#) obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.”

45. The provisions of section 333(2) of the [Criminal Procedure Code](#) were the subject of the decision in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR where the Court of Appeal held that:

“The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the [Criminal Procedure Code](#). By dint of section 333(2) of the [Criminal Procedure Code](#), the court was obliged to take into account the period that they had spent in custody before they were sentenced. ...

“Taking into account” the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the [Criminal Procedure Code](#) was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person.”

46. The court in sentencing the Appellant was not clear on when the sentence would start running. I share the same thoughts as the court in *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR that the trial court should have directed the applicant’s sentence of imprisonment to run from the date of arrest in 2017. Therefore, in consonance with Section 333(2) [Criminal Procedure Code](#); computation of the sentence ought to include the period the Appellant was in custody during hearing and determination of the case before sentence was meted out.

47. Consequently, the period the Appellant was in custody ought to be taken into consideration as per law required. In the circumstances, the concurrent sentence meted out shall commence on the date of arrest on 23<sup>rd</sup> October 2017.

48. I find that the conviction of the appellant was safe and the sentence of 15 years to run concurrently for both counts was appropriate.

### **Determination**

49. Based on the foregoing, I hereby determine that:

- i. The appeal herein lacks merit and is accordingly dismissed.
- ii. The sentences shall run concurrently and shall commence on 23/10/2017, the date of arrest.



**DATED, SIGNED AND DELIVERED VIRTUALLY on 29<sup>th</sup> MAY, 2025.**

**HON. T. W. Ouya**

**JUDGE**

For Appellant.....(In Person) James Muoka Mwanzia

For Respondent.....Ms Torosi

COURT ASSISTANT.....Doreen

