



REPUBLIC OF KENYA



KENYA LAW
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**Lagat v Republic (Criminal Appeal E119 of 2018)
[2023] KEHC 2221 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2221 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E119 OF 2018
SM MOHOCHI, J
FEBRUARY 28, 2023**

BETWEEN

STANLEY KOSKEI LAGAT APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal against the Conviction and Sentence in CMCC SO No. 1335 of 2018 - Eldoret, Republic v Stanley K. Lagat, delivered by C. Obulutsa, C.M. delivered on 30.11.2018.)

JUDGMENT

Introduction

1. The Appellant, Stanley K. Lagat and another were charged with three offences under the Penal Code. They were charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code. The particulars of the first count was: -

“That on the night of 9th February 2018, at 10.00om at Jua Kali Market in Eldoret West District within Uasin Gishu County, jointly with others not before court, while armed with a dangerous weapon namely panga robbed Nichodemus Khisa Khafafa off one LG Television set, one DSTV Decoder, two Remote Controls all valued at Kshs 60,000/- and immediately before the time of such robbery assaulted Caroline Bwoya with a panga. “

2. The particulars of the second count of robbery with violence were: -

“That on the 9th February 2018, at 10.00om at Jua Kali Market in Eldoret West District within Uasin Gishu County, jointly with others not before court, while armed with a dangerous weapons namely pangas robbed Rose Nelima Khafafa off one Mobile Phone Samsung, National Identity Card, two ATM’s Cards, one Driving Licence, on Smart Card,



and one Easy Catch Housing Finance Card, all valued at Kshs 15,000/- and immediately before the time of such robbery assaulted Caroline Bwoya with a panga “

3. The Appellant was alternatively charged with handling stolen property contrary to Section 322(2) of the Penal Code. The particulars were: -

“That on the 15th of March 2018, at Jua Kali Market in Eldoret West District within Uasin Gishu County, otherwise than in the course of stealing, jointly and dishonestly retained one LG Television set, one mobile phone make-Samsung, one DSTV Decoder, Two ATM Cards, One Driving Licence, One National ID Card, and one easy catch Housing Finance Card knowing or having reason to believe them to be stolen goods”.

4. When the Appellant and his Co-accused were arraigned before the Trial Court’s, He pleaded not guilty to all the three charges facing him. After a full trial, the Appellant was convicted on the two main charges of robbery with violence and was accordingly sentenced to the mandatory death sentence as prescribed by the law.
5. The Appellant being aggrieved of his conviction and sentence, has appealed to this Court, against both the said conviction and sentence and in his amended Petition of Appeal dated 8th September 2022, which was admitted “suo motu” by the Court and consent of the Respondent-State in the interest of justice, the Appellant has raised basically three (3) grounds faulting the decision of the Trial Court in convicting him for the offence(s) charged: -

- a. Misdirection by the Trial Court in convicting the Appellant without full satisfaction of and/appreciation of the essential ingredients of the offence of robbery with violence as is provided for under Section 296(2) of the Penal Code and further that the ingredient of the Appellant being together with others not before the court during the commissioning of the offence was not fulfilled in evidence;
- b. The Circumstantial evidence relied upon to convict him was insufficient, Identification at the scene of crime. The Appellant was aggrieved that the Trial Court had relied on the evidence of a sole identifying witness to convict him, especially putting into consideration the fact that the said identification was made in circumstances which were difficult and not conducive for a positive identification and that the doctrine of recent possession was not satisfied or corroborated; and
- c. The Appellant’s defense was not analyzed or considered by the Trial court in arriving at its determination to convict him.

6. The Appellant presented written submissions filed on 8th September 2022 urging this Court to allow their appeals arguing that the prosecution had not established the charge of robbery with violence against him to the required standard of proof of beyond reasonable doubt.
7. On her part, Ms Ursula Kimaru- Prosecution Counsel, opposed the Appeal by filing written submissions on the 16th January 2023, she urged the Court to uphold the conviction of the Appellant by the Trial Court stating that all ingredients of the charge were satisfied as the said conviction were based on the circumstantial evidence of recent possession.
8. Ms Ursula submitted that, the items which were robbed of the complainants were recovered from the Appellant soon after the said robbery pursuant to investigation (phone tracking of PW1) by PW4 a



police officer and therefore the Appellant was presumed to have stolen the said items from the said complainants.

9. The Respondent sought reliance Odunga J holding in Cri App No. 49 of 2011 R -Vs- Jamal Masaku Ngea as follows: -

“Proof in criminal cases can either be by direct evidence or circumstantial evidence, when witnesses such as eye witness, asserts actual knowledge of a fact, that witness testimony is direct evidence. On the other hand, evidence of facts circumstances from where reasonable..... may be drawn in circumstantial evidence. Therefore, where circumstantial evidence meets the legal threshold it may well be a basis for finding the accused person culpable of the offence charged”.

10. The Respondent further urged, that the principles to be applied in order to determine whether circumstantial evidence adduced in a case are sufficient to sustain a conviction were applied by the Trial Court as is enshrined in Abanga Alias Onyango vs R CRA32 of 1990 (UR) as follows: -

“it is settled law that when a case vests solely on circumstantial evidence such evidence must satisfy three (3) tests.....i)the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii)those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and (iii) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that, with all human probability the crime was committed by the accused and non-else”

11. The Respondent sought reliance Odunga J holding in Cri App No. 49 of 2011 R -Vs- Jamal Masaku Ngea as follows: -

“Proof in criminal cases can either be by direct evidence or circumstantial evidence, when witnesses such as eye witness, asserts actual knowledge of a fact, that witness testimony is direct evidence. On the other hand, evidence of facts circumstances from where reasonable..... may be drawn in circumstantial evidence. Therefore, where circumstantial evidence meets the legal threshold it may well be a basis for finding the accused person culpable of the offence charged”.

Prosecution Case

12. I have carefully considered the submissions made. Before I give the reasons for my decision, we shall set out the facts of this case, albeit briefly. On the 9th of February 2018 at 10.00pm, while Rose Khafafa (PW1) was being massaged her legs by her house-help Caroline Boiya (PW3) in her house before briefly leaving to the corridor, she heard her screaming running back to the room having been attacked and injured while bleeding on her hands, she went into the corridor and was accosted by a person with a coat retreating back to the room and locking herself and her husband in the room, before her husband called for a police response and they were rescued after their ordeal.
13. PW1 narrated how she was unable to identify any of the thugs and after being rescued she discovered the robbers ransacked the house and stole several items including, her mobile phone, hand bag, wallet, remote black, a television a TV decoder, electric kettle and personal documents that included Barclays Bank ATM Card, National Identity Card, HFCK Card.



14. That PW gave the Police who responded the telephone number of her stolen mobile phone and that days later she was called to the police station to identify some recovered items where she identified her mobile phone-PMFI,1, wallet-PMFI,2, TV-decoder and remotes-PMFI,3, electric kettle-PMFI,4, and jack repair phone- PMFI,5.
15. She was never shown the suspects at the station but identified the Appellant from the dock as her guard-Koskei. On cross-examination she stated that she saw one assailant but could not identify any of the accused. It is noteworthy that the witness never identified the Appellant as having been involved in the crime.
16. The 2nd complainant Nicodemus Khisa Khafafa (PW2) stated that on the material day he went to bed at 9.00pm before being awoken by screams from PW3 that she had been attacked. He responded by opening the door to the corridor and saw a man with a “panga” quickly reacting and locking the door, he called his son who is a contractor with KK Security Guards who responded with police and upon their arrival he noted that they had been robbed off an assortment of items.
17. PW2 in his testimony did not have any exhibit marked for identification, he concluded his evidence by narrating how the next morning he further discovered a ladder by the perimeter wall and pieces of cloth that the assailants had used in scaling-up the wall to enter the compound, how he attended to PW3 by taking her to hospital and recording his statement with the police. He concluded his testimony by stating that, days later, he was called to the police station where some recovered items were shown to him and he identified one TV-decoder. He was not shown any suspect at the police station.
18. On Cross-examination PW2 admitted that he did not know who stole the items, that he knew the Appellant as he gave him odd-jobs before.
19. PW3- Caroline Boya a house-help to PW1 and PW2, testified how on the material day she was on her way to pour some water and as she was closing the door she saw a man with a “panga” who attacked her and slashed her hands forcing her to raise alarm while screaming running back into the house while calling PW1. That the assailant had concealed himself and she could not identify him. After the KK Guards and police responded she noted that an assortment of items had been stolen and that days later were informed of recovered items at the police station. She identified the Appellant on the dock as Koskei who does odd jobs.
20. PW3 on cross examination admitted that she could not identify the attacker as he had covered himself.
21. PW4 Police Constable Centar from ATPI Eldoret, testified that on the 9th February 2018 they got a report of a robbery in Turbo and he and one Keter, rushed to the scene and found that robbers had entered the complainants compound and that subsequently on the 15th March 2018 based on information they arrested the Appellant who led them to his house in Jua Kali and they recovered part of the missing items namely; TV, mobile phone, Barclays card, smart card, brown purse, 3 sufurias, TV guard, TV remote, silver electric kettle, visa cards and identification cards. On cross examination, he stated that they found him in town and he led them to his house where the Items were recovered and further that, they had monitored the stolen phone leading them to him.
22. At this juncture the Appellant sought to recall the three witnesses PW1, PW2 and PW3 for cross-examination, while the prosecution sought to amend the charges which Applications were allowed.
23. Amended charges were read out afresh, and the Appellant pleaded not guilty before PW1 was recalled in cross examination to re-state that he could not identify any of the attackers but that the Appellant knew of the layout of the home and in re-examination stated that the Police were called after the KK Security Guards had been summoned. PW2 recalled on cross examination that he heard a man



- scream, got to the corridor saw a man with a panga and returned to his room while PW3 stated in cross examination that she was outside the house when she was attacked by the panga wielding assailant.
24. PW5 Inspector of Police Olga the then Officer in Charge of Turbo Police Post testified how on the 9th February 2018 at 10.30pm he got information of a robbery in Turbo town, responded with one unnamed officer to the home where he found a ladder, rope and cushions that had been used to scale the wall.
 25. PW5 further testified that that the victims had been robbed an assortment of goods like TV, DSTV decoder, personal documents and a mobile phone PEXH 31, the remote control and power which had been left behind as PEXH7, clothes PEXH5(a & b) and further testified that the stolen mobile was tracked to the Appellant at Jua Kali where the recovered items were found and inventory was made PEXH8 and the Appellant arrested.
 26. In cross examination the witness conceded that the Appellant was traced with others and the officer had testified.
 27. PW6 Jane Lamakoko a scene of crime officer Turbo Police Post testified that she had prepared a P3 Form of one complainant who reported being attacked and proceeded to produce it in evidence that she had been injured and it was marked as PEXH2. In cross examination the witness stated that the “the victim came with the P3 Form after a month and that she had been attached elsewhere.
 28. The appellant was found with a case to answer and placed to his defense.

Defense Case

29. The Appellant gave unsworn evidence, stating that he is aged 52 years old resident of Eldoret, a contractor and was working for the complainant, denying involvement in the crime or having been found with anything. He was not cross-examined.

Judgment

30. The Trial Court fleshed four (4) issues for determination to wit: -
 - i. Whether the accused persons were jointly with others not before court?
 - ii. Whether they were armed with offensive weapons?
 - iii. Whether they robbed the complainants of the items stated? and
 - iv. Whether they used actual violence at the time?
31. The Trial Court in its analysis and determination found circumstantial evidence against the Appellant, that he had been working for the Complainants, he was tracked using the stolen phone and stolen items were recovered from his house one month after the crime and that the Appellant could not explain how the items were found in his possession a month after the crime.
32. The Trial Court further found that PW3 was not robbed but injured as exhibited by the P3 form sustaining a cut on the left palm and the degree of injury being assed as “harm”.
33. Flowing therefrom the Trial Court held; that to sustain the charge the prosecution had to prove any of the ingredients as held in the case of Titus Wambua vs Republic eKLR (2016) and was satisfied that circumstantial evidence against the Appellant was overwhelming in respect to two (2) counts and that the prosecution had proved the charges beyond reasonable doubt and thus convicted the appellant and informed him of his right to appeal within 14 days.



Analysis and Determination

34. This is a first appeal. The duty of the first appellate court in criminal cases was restated in the case of Charles Mwita –vs- Republic, C. A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that: -

“In Okeno v R [1972] E.A. 32 at page 36 the predecessor of this Court stated: - “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –v- R [1957] EA. 336) and to the appellate court’s own decision on the evidence”.

35. Being a 1st Appeal Court I must, weigh conflicting evidence and draw conclusions, (Shantilal M. Ruwalla –v- R [1957] EA 570) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the Trial Court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E.A. 424.”

36. The Court has re-valuated the entire body of evidence as it is enjoined to do and as it was established in the case of Gabriel Njoroge v. Republic [1988-85]1 KAR 1134, that: -

“As this Court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on the question of law to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and to make due allowance in this respect (see Pandya v. R. [1957] E.A 336, Ruwala v. R [1957] E.A. 570). If the High Court has not carried out its task it becomes a matter of law on second appeal whether there was any evidence to support the conviction. Certainly, misdirection and non-directions on material points are matters of law.”

37. The fresh and exhaustive examination of this Appeal has given rise to the following issues for determination: -

- i. Whether the Prosecution established proof beyond reasonable doubt?
- ii. Whether Circumstantial evidence can sustain a charge and conviction in the absence of positive identification?
- iii. Whether Circumstantial evidence can sustain a charge and conviction in the absence of Production of exhibits in evidence?
- iv. Whether the trial court in conclusion misdirected itself in convicting the appellant, without imposing any sentence and the implication?

38. This Court has agonized while evaluating the Trial Court record, recalling the seriousness of the charges facing the Appellant and the irreversible penalty subsisting upon conviction. The Appellant was unrepresented while the Respondent was represented by Prosecution Counsel.

39. The Prosecution’s case did not have any positive identification of the robbers and further, it is trite law that an identification made at the scene of a crime is useless, unless the said identification is confirmed by an identification parade held by the police. In Kiarie –versus- Republic [1984] KLR



739 at page 744, the Court of Appeal held that, an identification made in Court by a complainant (i.e. dock identification) is almost worthless without an earlier identification parade. After reevaluating the evidence on record, we discount this evidence of identification. The Appellant was not properly identified. It would be unsafe to convict the Appellant based on PW1's evidence on identification.

40. Positive identification of an accused person is an indispensable element where only circumstantial evidence is to be relied upon to sustain a charge of Robbery with Violence and consequently satisfy the ingredients of the charge.
41. The Court finds that the prosecution had a cardinal obligation to demonstrate ownership of the recovered stolen items numbering twenty-four (24) items as per the inventory of search dated 15th March 2018 at page 10 of the Record of Appeal, the analysis however reveals that PW1 only identified five (5) items that were accordingly marked as (PMF11,2,3,4 and 5) but the items were never produced as exhibits.
42. PW5 IP Olga who was neither in the team that conducted a search in the Appellants house nor was he the owner of the recovered items purported to Identify and produce three (3) recovered items at line 19 and 20 of the record of Appeal PEXH31, PEXH7 and PXH5 (a & b).
43. It is equally noteworthy that the Record of Appeal at page 7 (list of exhibits) marks for identification five (5) exhibits as PMF11,2(a-k) 3(a-d), 4 and 5(a & b), the Court however finds that the list of exhibits remains blank as to the exhibits produced and properly marked as exhibits.
44. In the case of *Kenneth Nyaga Mwise v Austin Kiguta & 2 others* [2015] eKLR the Court of Appeal extensively dealt with the issue by holding as follows: -

“The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case” Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved?

First, when the document is filed, the document though on file does not become part of the judicial record.

Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.

Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document.

When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record”.

45. The Court thus finds that no exhibits were produced and proved by the prosecution to demonstrate ownership and that the mere marking of a document does not dispense with the proof of the document and as such circumstantial evidence alone cannot sustain a charge and conviction in the absence of Production and proof of ownership of exhibits in evidence.



46. Having re-evaluated the evidence, the Court finds that the prosecution relied on basically a single strand of evidence in support of the charge of robbery with violence against the Appellant. The entire prosecution case revolved on circumstantial evidence, doctrine of recent possession for items recovered from the Appellant five (5) weeks after the incident. No evidence of phone tracking was presented.
47. As regard the second limb of the evidence relied on by the prosecution, (that of the application of the doctrine of recent possession), the prosecution adduced evidence to the effect that the properties which were robbed from the two complainants were recovered in the possession of the Appellant. It was the prosecution's case that due to the fact that the said items were recovered from the Appellant so soon after the robbery, then the Appellant were presumed to have robbed the Complainants. What are the applicable circumstances of the doctrine of recent possession" Bosire J (as he was then) held in *Malingi -v- Republic* [1989] KLR 225 at page 227 that: -

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution have proved certain basic facts. Firstly, that the item he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item the circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been possession of the item.

The doctrine being a presumption of fact is a rebuttable presumption. That is why the accused is called upon to offer an explanation in rebuttal, which if he fails to do an inference is drawn that he either stole it or was a guilty receiver.” This decision was cited with approval by the Court of Appeal in the recent case of *Joshua Otieno Dala -vs- Republic C. A. Cri. Appeal No. 133 of 2002 (Nairobi) (unreported)*”.

48. In *Maina & 3 others -v- Republic* [1986] KLR 301, the Court of Appeal held at page 306 that: -

“the doctrine of recent possession could not be applied in a case where a pistol was found in possession of the appellant two and a half months after the robbery.....The time lag between the date of the theft and the discovery of the pistol was so much that it would be unreasonable to hold that the mere possession of the pistol on this date is sufficient to found a conclusion that the appellant participated in the robbery.”

49. If the stolen property is a type normally and commonly traded in lawful channels, a relatively brief time interval between the theft and the finding of an accused in possession is required. *Hamlet*, 316 N.C. 41; *State v. McQueen*, 165 N.C. App. 454 (2004). Thus, the doctrine was inapplicable when a defendant was found in possession of eight-track tapes 19 days after they were stolen and a rifle 30 days after it was stolen and the State conceded that both items are frequently traded in normal channels.
50. This Court further associates itself with the Canadian case of *State v. Parker*, 54 N.C. App. 522 (1981); where the Court found that (possession after 30 days was insufficient to invoke doctrine given that the items were normally and frequently traded in lawful channels). When the item is not normally or commonly traded in lawful channels, the doctrine may apply after the passage of a longer period of time between the larceny and the defendant's possession.
51. Upon careful re-evaluation of this evidence, I do not agree with the prosecution's case that the Appellant was in recent possession of the said properties so as to connect them with the robbery which took place five weeks prior to the recovery of the items in possession of the Appellant. The said items recovered from the possession of the Appellant cannot be said to have been recovered in his possession



so soon after the said robbery. As was stated by the Court of Appeal in Maina's case (supra), soon has to be considered as the time approximate and close to when the robbery was committed.

52. In the circumstances of this case, although there is strong suspicion that the Appellant could have participated in the robbery, the circumstances of this case excludes the application of the doctrine of recent possession. The time lapse is too great to enable this Court, in good conscious, to apply the said doctrine of recent possession. The Court therefore hold, that the prosecution failed to prove, to the required standard proof beyond reasonable doubt, that it is the Appellant who robbed the two complainants.
53. The Court equally finds that the failure to pronounce a sentence upon conviction was in itself a fatal misdirection by the Trial Court and further that the sentencing upon conviction is an integral part of a criminal trial process Section 169 of the Criminal Procedure Code provides for the contents of judgment inter alia: -
- i. Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
 - ii. In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.
 - iii. In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.
54. The Court holds and finds that sum effect of the analysis reveals that the conviction by the Trial Court was unsafe, I hasten to add that it is a constitutional requirement to safeguard, promote and protect fundamental rights of accused person and that a miscarriage of justice occurred with the plethora of misdirection(s).
55. This Court thus finds favor with the Appellant, shall allow the appeal, quash the conviction of the Appellant, the offence of robbery with violence contrary to Section 296(2) of the Penal Code.
56. The Appellant shall be forthwith set free from prison custody unless he is otherwise lawfully held.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 28TH FEBRUARY 2023

MOHOCHI S.M
JUDGE

