



REPUBLIC OF KENYA



KENYA LAW
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**Republic v Tuwei (Criminal Appeal E053 of 2022)
[2023] KEHC 25539 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEHC 25539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CRIMINAL APPEAL E053 OF 2022
JR KARANJA, J
NOVEMBER 22, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

SAMWEL KIMAIYO TUWEI ACCUSED

JUDGMENT

1. Samwel Kimaiyo Tuwei (Appellant), was the fifth Accused when he and others appeared before the Chief Magistrate in Kapsabet CMCRC no 2331 of 2019 charged with Burglary and Stealing Contrary to Section 304 (2) and Section 279 (b) of the *Penal Code* and in the alternative, handling suspected stolen property, Contrary to Section 322(1) of the *Penal Code*.
2. It was alleged that on the 16th April, 2019 at Kamoron Administration Police Post in Nandi South – Nandi County, the Appellant and others broke and entered the dwelling house of AP. CPL. Rodgers Maziwa with intent to steal and did steal from therein a mobile phone make Alcatel S/no 35627009xxxxxx valued at ksh 5,999/-, a 42 Inch Television set valued at ksh 32,000/-, a 13kg gas cylinder valued at ksh 5000/- belonging to the said Corporal Maziwa as well as three firearms (G3 rifles(S/no 770xxxxx, 770xxx and F91879 all valued at ksh 350,000/- together with sixty (60) rounds ammunitions valued at ksh 6,000/- all belonging to the National Police Service.
3. Alternatively, the Appellant otherwise than in the course of stealing did on the 21st April, 2019 at Mususa area Nandi South Nandi County dishonestly dispose of a G3 rifle S/no 7709xxx the property of the National Police Service.

After a full trial, the Appellant was convicted on the main count and sentenced to a concurrent term of five (5) years imprisonment on the first limb of the offence (Burglary) and seven (7) years imprisonment on the second limb of the offence (Stealing).



4. Being dissatisfied with the conviction and sentence, the Appellant preferred the present appeal on the basis of the grounds set out in the Petition of Appeal filed herein on 6th December 2022 through Chumba & Koech Advocates.

Generally, the Appellant complains that the trial court erred in law and fact by convicting him on the basis of evidence which was insufficient, uncorroborated and incapable of proving the charge beyond reasonable doubt.

5. The appeal proceeded by way of written submissions with brief oral highlights. The Appellant filed his submissions on 15th November 2023 through Messrs. Kipkorir, Kipkorir CK & Company Advocates.

The State/Respondent opposed the appeal and filed its written submissions on 20th September, 2023, through the Learned Senior Principal Prosecution Counsel (SPPC) Ms. Brenda Oduor who appeared on its behalf at the hearing while Learned Counsel, Mr. Kipkorir and Mr. Rotuk, appeared for the Appellant.

6. Having given due consideration to the appeal on the basis of the supporting grounds and the rival submissions, the duty of this court was to revisit the evidence and arrive at its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses (see, *Okeno v Republic* (1972)EA 32 and *Achira v Republic* (2003) KLR 707).

7. In summary, the Prosecution case was to the effect that CPL Rodgers Maziwa (PW1), was at the material time the Officer in Charge of Kamoron AP Camp and on the material date at about 9:30p.m he proceeded to the nearby Cheptulu Trading Centre to watch a football match while in the company of his colleagues including APC Erick Sitonik (PW2) and APC Daniel Kosgei (PW3). Upon their return to the camp later in the night CPL. Rogers (PW1) noted that his house had been broken into and property stolen from therein. The property included his personal effect and three firearms S/no 77094458, F91879 and 77095029 together with rounds of ammunitions belonging to the National Police Service.

8. A report to that effect was made at the Nandi Hills Station and PC Kennedy Maiyo (PW9) commenced investigations. In the process, he visited the scene and established that the offence had indeed been committed and that CPL Maziwa's (PW1) stolen mobile phone had been used by Calistus Wamalwa Simiyu (Accused one) in whose name it was registered and who was traced at Langas – Eldoret. After being arrested, he led the investigations team to a shop in Kisumu Ndogo - Langas where Solomon Ombacho (Accused two) was pointed out as the person who had sold the stolen phone to the first Accused.

9. Accused two was arrested. He led the police team to Isaac Nyongesa (Accused three) who in turn led the team to Fredrick Khamisi (Accused four). The two (Accused 3 and Accused 4) were said to have been together when they sold the stolen phone to Accused two. Three metal bars were found in the house of Khamisi (Accused 4) at Muranda Location. Thereafter, he volunteered to lead the police team to where the three stolen firearms and ammunitions had been hidden. He thus led the team to the house of Gladys Charo (PW6) a business lady in Eldoret town who after being arrested led the police team to a semi-permanent house where the stolen firearm no F91879 with two rounds of ammunitions was recovered.

10. Both Accused three and four also led the police team to the house of Martin Esembele (Accused six) situated in Musasa – Nandi County.

The house was apparently pointed out by Samwel Kimaiyo (Accused five) (Appellant).



The sixth Accused led the police team to a farm where the second stolen firearm S/no 77095029 was recovered wrapped in a magazine.

11. Again, the third and fourth Accused led the police to Yamumbi - Langas where they arrested Hinga (PW5), a welder. He notified them that one Mrefu who was identified as Fredrick Khamisi (Accused 4) went to him to collect a key for a store. He (PW5) referred him to Njoroge (PW4) who was confronted by the police and informed them that Mrefu was an employee of his neighbour and had approached him requesting for a hoe (Jembe). He (Mrefu) was given the jembe and proceeded with it to a farm where fresh dug soil was visible. He (PW4) dug the same place and a green sack containing a firearm was found. This was the third firearm S./no 7794858 which was recovered by the police investigations team including detective Inspector Nahib Suleiman Hassan (PW8) of the Directorate of Criminal Investigations Nairobi and Detective P.C. Ouingo Odeke (PW10), also of DCI but seconded to the Security Department of Safaricom Company Limited.
12. On completion of the police investigations the Appellant (Accused 5) and his Co-Accused were charged with the present offence. He denied the charge and stated that he hails from Serem where he does farming and deals in timber. He was at his place in the month of June 2019 when police officers went there and indicated that they wanted to see one Samela. He led them to the persons place and was released. Later he was arrested and charged with the present offence.
13. After having considered the evidence in its totality the trial court concluded that the charge had been proved beyond reasonable doubt as against the third, fourth, fifth and sixth Accused. The four were accordingly convicted of the main count and sentenced accordingly. Accused one and two were found not guilty as charged and acquitted accordingly.

The Appellant was the fifth Accused and together with his three Co-Accused he was convicted primarily on account of the fact that they were found in recent possession of some of the property stolen from the dwelling house of AP. CPL. Rodgers (PW1).

14. The conviction was clearly based on the legal doctrine of recent possession. And being alive to the doctrine, the trial court relied on the decision of the superior courts in *Isaac Nganga Kahiga alias Peter Nganga Kahiga v Republic* Criminal Appeal no 82 of 2004 and *Malinga v Republic* (1989) KLR 225, had made findings to the extent that the first and second Accused gave satisfactory explanation of their possession of the stolen item/items but not the third, fourth, fifth and sixth Accused.
15. In so doing, the trial court found that the prosecution had provided sufficient, consistent and corroborative evidence in proving the fact of possession against the Appellant and indeed his three convicted Co-Accused.

With regard to the Appellant, the trial court found that he led to the recovery of the firearm G3 S/no 77095029 and did not give any explanation on how he got possession of the same.

16. The applicable principles on which a trial court can convict a suspect on the basis of the doctrine of recent possession were clearly set out in the Isaac Nganga Kahiga case (*supra*) to wit:

“.....it is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a Criminal Case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant.



..... in order to prove possession there must be acceptable evidence as to search of the suspect and recovery of the allegedly stolen property, and in our view, any discredited evidence on the same cannot suffice no matter from how many witnesses.”

17. In every Criminal trial, a conviction can only be based on the weight of the actual evidence adduced (see *Okoth Okela & Others v Republic*(1965) EA 555).

In the instant case, it was apparent that the prosecution adduced cogent evidence through the Complainant (PW1) and his colleagues (PW2 and PW3) establishing that the twin offence of Burglary and Stealing was actually committed and assorted items stolen from the Complainants’ dwelling house. These included his personal effects and three government issue firearms.

18. There was also sufficient evidence through Stephen Njoroge (PW4), Josephat Hinga (PW5), Gladys Charo (PW6), IP Suleiman Hassan (PW7) PC Kennedy Maiyo (PW0) and PC Odere (PW10) establishing that some of the stolen items including the three firearms were ultimately recovered from some of the arrested suspects initially comprising of one of the prosecution witnesses (PW4, 5 and 6) whose note was plainly to lead the police to persons who were in actual possession of the stolen items a few day or months after the theft and/or places where the items had been hidden.

19. Undoubtedly, the recovery of the stolen items from some of the suspects provided a basis for their conviction by the trial court on account of the doctrine of recent possession thereby implying that they were the persons who committed the offence. This was credible and sufficient circumstantial evidence against them in establishing their actual possession of the stolen items for which they were in law duty bound to offer a reasonable explanation of how they came to be in possession of the items, otherwise that as the thieves or guilty handlers/ receivers thereof. Such is a rebuttable presumption of law based on the provisions of Section 119 of the *Evidence Act*.

20. The said provision provides that:

“ the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”

With regard to the Appellant, the evidence against him did not give rise to the said presumption for the reason that the ingredient or element of actual possession was not established against him even though he was instrumental in leading the police in to recovering one of the stolen firearms from a Co-Accused.

21. The Appellant, in actual sense, led the police to the person who was in actual possession of the stolen firearm. He did not lead the police to where the firearm was hidden or concealed thereby implying that he was not in actual possession of the firearm before it was actually recovered from his Co-Accused rather than himself.

Consequently, unlike the trial court, this court does not hold the opinion that possession on the part of the Appellant was established and proved by the prosecution. It would therefore follow that the doctrine of recent possession could not apply to him and that his conviction was not based on very sound evidence of recent possession of stolen property.

22. Hence, it was a misdirection on the part of the trial court in finding that the fact of possession had been established against the Appellant by dint of the fact that he led the police to the recovery of a stolen firearm.

The evidence showed that he led the police into arresting the person who was found in actual possession of the firearm rather than to recovering the firearm.



In the upshot, this court must now find and hold that the Appellant's conviction by the trial court was neither sound nor safe and is hereby quashed with the resultant effect that the concurrent sentence imposed upon the Appellant be and is hereby set aside.

23. In sum, the appeal is allowed in its entirety. The Appellant shall forthwith be set at liberty to "fly like a blue bird in the sky" unless otherwise lawfully held.

Ordered accordingly.

DELIVERED AND DATED THIS 22TH DAY OF NOVEMBER, 2023.

J. R. KARANJAH,

JUDGE

