



**Saroni v Republic (Criminal Appeal 61 of 2019)  
[2022] KEHC 17245 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 17245 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
CRIMINAL APPEAL 61 OF 2019  
SN MUTUKU, J  
DECEMBER 20, 2022**

**BETWEEN**

**JOHN SARONI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Appellant was charged alongside two others with three (3) counts of Robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code*, count four of having in possession of suspected stolen goods contrary to section 323 of the *Penal Code* and an alternative count of handling stolen goods contrary to section 322(1) as read with section 322 (2) of the *Penal Code*.
2. The particulars of Count 1 are that on the October 18, 2016 at Lemelepo Close in Ongata Rongai Township within Kajiado County jointly while armed with dangerous weapons namely Masai sword, a club and a metal bar robbed Everline Nthemba Kamuya of gas cylinder make Lake gas, 20 litres of salad cooking oil assorted shop goods, one jacket and cash Kshs 4000/= all valued at Kshs 27,300/= and at the time of such robbery used force and threatened to use actual violence to the said Everline Nthemba Kamuya.
3. The particulars of Count 2 are that on the October 18, 2016 at Lemelepo Close in Ongata Rongai Township within Kajiado County jointly while armed with dangerous weapons namely Masai sword, a club and a metal bar robbed Samuel Mugambi Njeri of gas cylinder of 6kg make Hashi gas valued at Kshs 4,500/=. Mobile phone make Tecno valued at Kshs 1,500/= , cash Kshs 200/= all valued at Kshs 6,200/= and at the time of such robbery used force and threatened to use actual violence to the said Samuel Mugambi Njeri.



4. The particulars of Count 3 are that on the October 18, 2016 at Lemelepo Close in Ongata Rongai Township within Kajiado County jointly while armed with dangerous weapons namely Masai sword, a club and a metal bar robbed Peter Gacemi Macharia two mobile phones make Samsung all valued at Kshs 10,300/=, cash Kshs 8,350/= all valued at Kshs 18,650/= and at the time of such robbery used force and threatened to use actual violence to the said Peter Gacemi Macharia.
5. The particulars of Count 4 are that on the October 18, 2016 at Rimpa area in Ongata Rongai Township within Kajiado County having been detained by No 77081 PC Erickson Nyamweya and No 101047 PC Eliud Ngetich as a result of the powers conferred by Section 26 of the *Criminal Procedure Code* had in their possession one electric guitar (tender strato caster), TV flat screen make West pool, 6 kg of gas cylinder make K-gas, 2 extension cables, a heater, 7kgs of cooking flour, 5kgs of baking flour (Pembe), 1 shaving machine, 3 packets of kensalt, 3 packets matchbox, 4kgs of sugar, 2 packets of spaghetti, 2 pieces of candle, 3 plastic torches reasonably suspected to have been stolen or unlawfully obtained.
6. The particulars of the alternative count are that on the October 18, 2016 at Rimpa area in Ongata Rongai Township in Kajiado County, otherwise than in the course of stealing, dishonestly received or retained 2 gas cylinders 6kgs make Lake gas and Hashi, two mobile phones make Samsung, assorted shop goods, one jacket, cash (coins) Kshs 2,000/= knowing or having reason to believe them to be stolen goods.
7. The Appellant was the first accused in the trial before the lower court. He pleaded not guilty to the four counts and the alternative charge.
8. After a full trial, the accused was found guilty of the three counts of robbery with violence. He was sentence to death on the first count while the sentence in count two and count three was held in abeyance. The other accused persons were acquitted.

### **Memorandum of Appeal**

9. The Appellant is aggrieved by the conviction and sentence and has preferred this appeal. He filed the Memorandum of Appeal on October 18, 2019. He has raised seven (7) grounds of appeal as follows:
  - i. That the learned trial magistrate erred in law and fact for failing to see that the matter was surrounded with contradictions.
  - ii. That, the learned trial magistrate erred in law and fact for failing to find that the elements of robbery with violence did not meet the threshold.
  - iii. That the learned trail magistrate erred in matters of law and facts for failing to find that the prosecution did not prove their case beyond reasonable doubt as required by the law.
  - iv. That the learned trial magistrate erred in matters of law and fact for not finding the case against the Appellant is premised on mere suspicion, unsafe to base a conviction on.
  - v. That the learned trial magistrate erred in matters of law and fact for not finding that the Appellant's mode and circumstances of arrest are not justifiable.
  - vi. That the learned trial magistrate erred in matters of law and fact for not finding that the case against the Appellant was premised on hearsay evidence and generally inadmissible in a criminal trial.



- vii. That the learned trial magistrate erred in matters of law and fact for not finding that there was variances between the evidence given to the police and that adduced in court.

### **Submissions**

10. The Appeal was canvassed by way of written submissions. The Appellant filed his submissions on February 17, 2022 as per the directions of the court (Mwita, J) given on July 7, 2021. The DPP has not filed submissions despite the numerous times they were allowed more time to do so as the court record shows. On October 11, 2022, this court fixed a date for judgment as December 7, 2022 and indicated that the DPP should file their submissions on or before October 18, 2022.
11. I have confirmed from the court record that the DPP was served with the Appellant's Submissions by the Process Server on June 9, 2022. As at November 11, 2022 when this judgment was prepared, there are no submissions in the court file from the office of the DPP.
12. The Appellant has clustered his submissions. He has submitted that the identification evidence was not sufficient to base a conviction on. He has cited numerous authorities and submitted at length on this issue. He has concluded that the learned trial magistrate did not consider all the guidelines that affected the prevailing conditions at the scene at the time when the robbery occurred and failed to consider whether the witnesses had ever seen the Appellant before, and if so, how often, and if only occasionally, whether the witnesses had any specific reasons for remembering the Appellant.
13. He submitted that the credibility of the witnesses is questionable and that the witnesses did not identify which assorted goods belonged to them. He has submitted that crucial witnesses were not called to testify. He singled out the officer who conducted the identification parade submitting that this officer was not called to testify. He has submitted the prosecution shifted the burden of proof to the Appellant to prove that the Appellant was in possession of the stolen items.

### **Determination**

14. Although the Appellant is aggrieved by the conviction and sentence, he has not submitted on why he is challenging the sentence meted out.
15. After my careful reading of the submissions, it is clear to me that the Appellant's submissions are more of theoretical writings. He has cited very many authorities without relating them to the evidence on record or to the issues he is raising in this appeal.
16. My understanding of the grounds of appeal show that the Appellant is questioning the inadequacies of the evidence, that it has contradictions; that it is insufficient to prove the case beyond reasonable doubt and the manner he was arrested.
17. I am sitting on this appeal as the first appellate court. My mandate as such is very clear to me. In exercise of that mandate I have subjected the evidence of the trial court to fresh scrutiny and analysis with a view to arriving at my own independent findings.
18. Everline Kamuya was the first witness (PW1). She testified to how around 2.00am on October 17, 2016 she saw torch light from her bed and woke up. She put on the lights. She heard the intruders asking the neighbours where to find the door to the shop. The intruders were directed and shortly the door to her shop was knocked open. One of the intruders told her that they wanted her. He slapped her demanding money. She directed him to the shop counter to look for the money. She said the rest of the intruders were in the shop ransacking and removing shop goods after which they left.



19. She testified further that after a short while a police officer called her and told her that police had arrested some suspects and that they were coming with them to the shop for her to identify them. She testified that three suspects were brought back. She was able to identify the Appellant who was the 1<sup>st</sup> accused in the lower court. She testified that the Appellant was the one beating her and demanding money from her.
20. The evidence of PW1 is not clear as to whether there was any light in the sitting room. The only time she mentioned light in her evidence is when she testified that she woke up and put on the lights. I understand this to mean that she put lights on in the bedroom. Her evidence does not clarify how she moved from the bed room to the sitting room and whether there was light in the sitting room, what was the nature of that light and its intensity. She mentioned that the intruders had torch light but she did not clarify whether that torch was aimed at the intruders or to the Appellant for her to see them well.
21. PW1 was able to identify the 20 kg jerrycan of cooking oil, 6 kg Hashi gas cylinder, bar and powder soap, pair of bathroom sandals, gray jacket and other assorted shop goods as some of the items stolen from her shop.
22. Samuel Mugambi was the second witness (PW2). He testified to how on October 17, 2016 at 2.15am he heard a commotion outside his house. His door was hit with a big stone and three men entered and demanded for money. They took Kshs 200/=. They also demanded the mobile phone belonging to PW2's wife after they heard the sound of the phone ringing after someone called PW2's wife. The intruders left after locking PW2 and his family from outside. PW2 heard the intruders move to the neighbour's house. PW2 texted a police officer and reported the matter. After a short while police came and chased after the robbers. At around 5.00am police returned to the scene with three people and the stolen items: gas cylinder and Tecno mobile phone.
23. It is clear from the evidence of PW2 that he did not identify the intruders when they entered his house. He testified that he saw able to see the people who police brought back to the scene after they had been arrested. He was able to identify some of the items found with the people arrested and brought to the scene by the police.
24. Beatrice Wawira, PW3, testified that on October 18, 2016 she was in her house sleeping with her family when she heard screams. She looked through the window and saw two men standing near the door to mama Mary's house. She saw one person slap mama Mary; that after a while the thugs entered her house and demanded for money, her husband gave them Kshs 200/= and left after searching the house and failing to get any money. She testified that her husband called police who arrived at the scene but found the robbers had left.
25. She testified that at around 5.00am the police brought three people after arresting them. She testified that when the robbers entered her house her lights were not on but she could see them using the light from their torches. She told the court that they robbers stole their Hashi gas, Tecno mobile phone and Kshs 200/= from her husband.
26. It is clear from the evidence of PW3 that the issue of identification of the robbers is not proved. There was no light from her house and only torch light from the torches the robbers had that PW3 claims to have been able to identify the robbers.
27. Peter Gacheru, PW4, testified that on October 18, 2016 when around 1.00am stopped his car in order to open a gate to his home at Kamasura Ongata Rongai when he saw three men. Peter was a taxi operator at the time of the attack. He was asked whether he worked there and he said No He was ordered to lie down. The three men ransacked his car and took Kshs 3,000 from the car and Kshs 750 from him. The men demanded to know where Peter lived. He showed them. They knocked at the door



- and Peter's daughter opened the door and they all went inside and demanded money but Peter did not have any more money. He was locked inside a shop. He also testified that the suspects stole his two Samsung Mobile Phones. He identified his phones in court.
28. The following morning Peter went to the Police Station and saw the three suspects at the Police Station. He identified them at the Police Station. He said that the lights from his car were on and that he was able to see the attackers because they had not covered their faces. He did not know them before that day.
  29. Jackson Kamuya Sila, PW5, was visiting his daughter Everline Kamuya, PW1, at her house in Ongata Rongai. He confirmed the evidence of PW1 on what happened on the night of October 18, 2016 when robbers forced their way into his daughter's house and robbed them. He told the court that the robbers stayed inside their house for 10 to 15 minutes ransacking the house and that he was able to identify the Appellant. He said that the police brought the robbers back to the scene after arresting them and that he was able to identify the first and second accused persons. The Appellant was the first accused in the lower court.
  30. Margaret Njeri, PW8, was a victim of robbery on October 18, 2016. Her evidence is that she was attacked at 10.00pm when two men knocked at the door and entered her house. She was slapped and warned not to shout. Her Kshs 600 was stolen in the course of the attack. She told the court that the men stayed in her house for one hour, ransacking the house and that she was able to identify the Appellant and one other robber.
  31. APC Stephen Chege, PW7, received a text message from Samuel Mugambi, PW2, at 2.50am on 18<sup>th</sup> October, 2016 that robbers had attacked them. He informed his fellow officer, CPL Peter Thuku, PW6, about the text message. PW6 called and informed his boss, the OCS at Kiserian Police Station who sent a motor vehicle and three police officers. At the scene, police followed the robbers to a plot made up of iron sheets. They followed footprints to a toilet where they found three men whom they arrested. The three men led them to where they had hidden the stolen goods. Police recovered assorted shop goods listed in Count IV and the Alternative Count of Handling Stolen Goods.
  32. The evidence of PC Erisson Nyamweya, PW9, corroborates that of PW6 and PW7 on the tracking and arresting of the Appellant and his co-accused persons. It also corroborates the evidence of PW6 and PW7 on the recovery of stolen goods from the Appellant. PW9 narrated the items recovered from the house of the Appellant as 6kg gas cylinder (Ex 2); water heater (Ex 16); two extension cables (Ex 17 (a) and (b)); 7kgs maize flour; 5kg wheat flour; Samsung shaving machine (Ex 18) 2 packets of Kensalt 200 grams each; 3 packets of match boxes; 4kgs sugar; two packets of spaghetti; 2 pieces bar sops; 2 pressure pumps (Ex 19 (a) and (b) and 2 plastic torches (Ex 20 (a) and (b)).
  33. The Appellant's ground of appeal relates to contradictions in prosecution evidence; whether elements of robbery with violence have been proved beyond reasonable doubt and the manner in which he was arrested. His submissions centre on identification of the Appellant; identification of stolen goods and crucial witnesses (officer conducting identification parade) left out.
  34. I have read the entire lower court record. I have read the judgment of the lower court. the trial magistrate relied mainly on the doctrine of recent possession to find that the offence of robbery with violence was proved beyond reasonable doubt. He found that the prosecution evidence has weaknesses in respect of the identification of the robbers and based his conviction of the Appellant on the doctrine of recent possession.
  35. The trial court properly found that the elements of robbery with violence were present in this case in that the persons were more than one and physical violence was used and that the robbers were also armed. Either one of these elements was sufficient to found the offence of robbery with violence under



section 296 (2) of the Penal Code proved. I am satisfied that all the elements of robbery with violence were present in this case. I am alive to the fact that even one element is sufficient and that the three elements must be considered disjunctively, (see Dima Denge Dima & Others v R [2013] eKLR).

36. The trial magistrate was alive to the weaknesses in evidence in respect to the identification of the suspects. This is captured in the judgment in paragraph 27 as follows:

“On identification it is noted that the offence occurred at night. The witnesses gave the time of the attack as between 2 and 3 am. That they used torch lights held by the accused persons to identify them. PW1 stated that she was able to see 1<sup>st</sup> accused as he slapped her. The complainant in the 2<sup>nd</sup> count also stated that he was able to see the 1<sup>st</sup> accused person. PW3, who is PW2’s wife stated that she saw all the three accused persons from the light of their torches. PW4 stated that he saw the three using torch light and his motor vehicle head lights.

.....

The question is whether the circumstances identification were and free from error. The witnesses did not give any description to the police officers. It is not clear how the officers moved in on the three accused persons. They said they followed footsteps....”

37. The trial court concluded by stating that:

“As noted, the evidence on record is not of recognition. In my view the circumstances in this case were not favourable for positive identification and the evidence on identification is not water tight.”

38. I totally agree with the trial court on those findings. From my own evaluation of the evidence tendered, I arrive at a conclusion that the evidence on the identification of the robbers was not watertight. It cannot conclusively be said that the evidence proves beyond reasonable doubt that the Appellant was one of the robbers at the scene.

39. But the evidence of witnesses on who attacked and robbed them was not the only evidence on record. There is evidence that on the same night police acted quickly on the report of the robbery and arrested suspects that night. These suspects were found soon after the robbery and through them assorted items including shop and household goods were recovered. Some of these items were identified by the complainants as shown in the record of the lower court.

40. The evidence of the arresting police officers, specifically PW6, PW7 and PW9 is clear on the items recovered from the house of the Appellant as shown under paragraph 32 of this judgment. In paragraph 33 of the judgment of the lower court the trial magistrate stated as follows:

“The items found with the 1<sup>st</sup> accused were identified by the complainants as the ones taken forcefully from their houses and shops. The Samsung phones robbed off the 3<sup>rd</sup> complainant were also recovered from the 1<sup>st</sup> accused.....”

41. The trial magistrate applied the doctrine of recent possession to convict the Appellant. In Simon Kanui Mwendwa v Republic [2020] eKLR, the Court of Appeal cited with approval the case of Isaac Ng’ang’a Kabiga & Another v Republic, Criminal Appeal No 272 of 2005 where it was stated that:

“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; that property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; 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.”

42. The evidential burden of proof shifts to the accused to explain his possession of the items recovered from him and suspected to have been stolen. In *Peter Kariuki Kibue v Republic* [2001] eKLR relied on by the trial court, it is stated that:

“The appellant was in law duty bound to offer a reasonable explanation as to how he came to be in possession of the items otherwise than as the thief or guilty receiver. This is a rebuttable presumption based on Section 119 of the *Evidence Act*.”

43. Further the trial court cited *Malingi Katana Malingi v Republic* [1989] eKLR where the Court of Appeal had this to say on the doctrine of recent possession:

“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 and circumstances of the case, recent; that there are no co-existing circumstances which point to any other person as having been in 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.”

44. The Appellant did not offer evidence in rebuttal to explain how he came by the said goods. To my mind the requirement to call upon an accused to give an explanation how he came by the suspected stolen goods is meant to satisfy the court that he did not steal the goods or to raise doubts in the court’s mind that he did not steal the goods. The Appellant in this case did not explain how or why the items recovered from him came to be in his possession.

45. I am satisfied that the trial magistrate correctly applied the doctrine of recent possession and found the Appellant guilty based on that doctrine. On my part, I am satisfied that all the elements relevant for the doctrine to apply are present in this case. I find no merit in the grounds of appeal relied on by the Appellant. The evidence on record is sufficient to prove beyond reasonable doubt that the offence of robbery with violence was proved and that the Appellant participated in that robbery. The items recovered from his house were stolen that night from various complainants and were properly identified. The Appellant was implicated by the application of the doctrine of recent possession.

46. Consequently, this appeal lacks merit and must fail. It is hereby dismissed. The conviction and sentence of the lower court is upheld.

47. It is so ordered.

**Dated, signed and delivered on 20<sup>th</sup> December, 2022.**

**S.N. MUTUKU**

**JUDGE**

