



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CRIMINAL APPEAL NO. 16 OF 2019**

**VICTOR ONYANGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from original conviction and sentence by Hon. S.M. Shitubi, (CM) dated 11<sup>th</sup> December, 2018, in criminal case No. 1139 of 2017 in the Chief Magistrate's Court at Kajiado)***

**JUDGMENT**

1. The appellant, was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code. Particulars were that on the 10<sup>th</sup> day of September, 2017 at Olomoiyan farm within Lele area of Kajiado Central Sub-County, in Kajiado County, while armed with a pistol, stole cash Kshs. 20,000, one mobile phone, Samsung S-7 serial number 358430078004048 worth Kshs. 60,000 from Chavasse Desmond Claude, and immediately before the time of such robbery, threatened to use actual violence to the said Chavasse Desmond Claude.

2. He pleaded not guilty to the charge and after a trial in which the prosecution called nine witnesses and his sworn testimony, he was convicted and sentenced to twenty years imprisonment. He was aggrieved with both conviction and sentence and filed a petition of appeal in person on 11<sup>th</sup> March 2019.

3. His advocate filed an amended Petition of Appeal dated 9<sup>th</sup> September, 2020 on 19<sup>th</sup> September 2020, raising five grounds of appeal as follows:

***1. The learned trial magistrate erred in law and fact when she applied and relied on a doctrine of recent possession that was not proved beyond reasonable doubt***

***2. The learned trial magistrate erred in law and fact when she relied on secondary evidence that was not advanced in accordance with section 68(5) of the Criminal Procedure Code***

***3. The learned trial magistrate erred in law and in fact in convicting the accused person basing on evidence that was contradictory and inconsistent***

***4. The learned trial magistrate erred in law and in fact in failing taking into consideration the evidence adduced by the appellant and finding that the prosecution had proved its case against the accused person beyond reasonable doubt***

***5. The learned trial magistrate erred in law and fact in imposing an excessive sentence in the circumstances of this case***

**Appellant's submissions**

4. Miss Ngania, learned counsel for the appellant submitted highlighting their written submissions dated and filed on 2<sup>nd</sup> December, 2020, that the prosecution did not prove the doctrine of recent possession beyond reasonable doubt. According to counsel, the appellant was neither identified at the scene of robbery, nor was anything recovered from him. It was submitted that when police officers arrested PW4, he claimed that it was the appellant who had sold the stolen phone to him for cash as well as in exchange for a Huawei phone. However, there was no written agreement to show that the stolen phone originated from the appellant.

5. It was submitted that it is a requirement that before an accused is called upon to explain his possession, the prosecution must show that there are no co-existing circumstances which point to any other person as having been in possession of the stolen property.

6. Counsel argued that the prosecution needed also to establish constructive or exclusive possession by the appellant of the cheque and mask.

According to counsel, evidence on recovery did not sufficiently connect the appellant to the house where the cheque and mask were found, and therefore, the doctrine of recent possession could not properly apply to connect the appellant with the robbery.

7. It was submitted that possession is circumstantial evidence. For that reason, there must be other corroborative evidence and a court has to be cautious in invoking this doctrine as recent possession is not the principal offence. Reliance was placed on *Daniel Muthomi v Republic* (Criminal Appeal No.166 of 2011) for the argument that when an individual is found with a stolen article, presumption cannot be drawn based on just recent possession. There is need to look for further corroborative evidence.

8. According to counsel, the phone was found in the possession of PW4; there was no cogent evidence how it came to him from the accused; there was also no evidence of robbery with violence or that the accused was at the scene of the crime the prosecution did not prove its case against the appellant.

9. Counsel again submitted that the appellant was convicted on the basis of contradictory and inconsistent evidence. It was argued that PW5 stated that on the day they arrested the appellant, PW6 remained in the vehicle; that there were two men and two ladies in the appellant's house, and that the mask and cheque were found in a compartment below the table. On the other hand, PW6 stated that she entered the house together with PW5; that there were four men in the house and that it was the appellant who led them to his house where they recovered the cheque in a black suit case in the bedroom and the mask was in the sitting room. PW5 further stated that the appellant's wife was present when they recovered the stolen items while PW6 stated that the appellant's wife was outside the house and did not witness the recovery.

10. Counsel argued therefore, that two people who conducted search and arrest and made a recovery together could not give different versions of the events. Counsel relied on *Philip Nzaka Watu v Republic* 2016 CR App. 29 of 2015. She further argued that there was no evidence to support the fact that police officers spoke to the landlord or neighbours to ascertain that the house they were in belonged to the appellant, and there was no witness present when they purportedly recovered the items from the house said to belong to the appellant.

11. With regard to identification of the appellant at the scene of crime, counsel submitted that the evidence of PW1 and W2 was that they did not identify the attacker since it was dark; he was wearing a mask over his head, and they could not ascertain his voice as he was speaking in low hushed tone. In addition, they could not positively confirm if the attacker had a gun.

12. It was argued that to determine whether identification is truthful, the court must evaluate the believability of the witness. Counsel relied on Francis *Kariuki Njiru & 7 Others v Republic* [2001] eKLR for the submission that evidence relating to identification must be scrutinized and only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error.

13. Counsel asserted that for the charge of robbery with violence to stand, the accused has to be present at the scene of crime. From the prosecution evidence, there was nothing to place the accused at the scene of the crime, nor was there any evidence that the attacker had a dangerous weapon, was in the company of others or that any violence was used on the victims.

14. Counsel faulted the trial court for failing to conduct a trial within a trial to establish how the alleged statement from the appellant was obtained given that the appellant stated that he neither wrote nor read the statement that was presented before him for signing. He was merely instructed to sign it. Counsel argued, therefore, that the prosecution did not prove the case beyond reasonable doubt.

### **Respondent's submissions**

15. Miss Ireri learned Prosecution counsel opposed the appeal orally. She submitted that the prosecution proved its case beyond reasonable doubt; that the appellant was armed with a dangerous weapon, which was supported by the evidence of PW1 and PW21 that he pointed a gun and threatened to shoot them.

16. On identification, she submitted that the appellant was holding a lantern which enabled the PW1 and PW2 to see him and the weapon. According to Miss Ireri, the appellant was identified after he was tracked down by police officers and data from the mobile phone provider. She also submitted that the evidence of PW5 was that they tracked down the appellant, searched his house, and recovered a cheque and a black mask. He urged the court to dismiss the appeal.

### **Determination**

17. I have considered this appeal; submissions by parties and the decisions relied on. I have also perused the trial court's record and considered the impugned judgment. This being a first appeal, it is the duty of this court, as the first appellate court, to re-evaluate, reanalyze and reconsider the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see witnesses testify and give due allowance for that. (See *Okeno v Republic* [1972] EA 32).

18. In *Pandya v Republic* [1957] EA 336, the court outlined the duty of the first appellate court stating:

*“On a first appeal from a conviction by a Judge or magistrate sitting without a jury, the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen.”*

19. In Kiilu & Another v Republic [2005]1 KLR 174, the Court of Appeal held that:

***“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and 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.”***

20. And in victor Owich Mbogo v Republic, criminal appeal No. 152 of 2015 [2020] eKLR, the same court stated:

***“It is the duty of the first appellate court to reevaluate the evidence afresh and reach its own conclusion bearing in mind that unlike the trial court, the appellate court did not have the benefit of hearing or seeing the witnesses testify.”***

21. PW1 Dr. Chavasse Desmond, the complainant, testified that on the night of 9<sup>th</sup> September, 2017 he was in bed with his wife, (PW2) when they were woken up by a barking dog. They saw a person coming in their cottage which had a short wall which enabled one to see outside. There was moonlight, but electric lighting was off. The man carried a kerosene lamp which he placed outside. They usually kept the lamp outside to keep away animals. The man wore a mask with holes at the mouth and eyes. He was a tall slim man, had a dark cloth, a brown jacket, and trouser, dark green coloured shoes and carried a knapsack.

22. He pointed a gun at them and demanded Kshs. 100,000/= but he told him that he only had Kshs. 19,000/- in the M-PESA. The man insisted demanding Kshs. 100,000/= or he would kill them. PW2 offered to write a cheque for him which calmed him down. PW2 picked a cheque book and asked the man how much he wanted. He demanded Kshs. 500,000/=. She drew a cheque for that amount. He also demanded their phones but PW2 told him her phone was in the kitchen. PW1 gave him his phone, a Samsung S7. He identified the phone in court and produced a purchase receipt. The cheque No. 101529030732 dated 6<sup>th</sup> September, 2012, for Kshs. 5.00,000/= for A/C No. 0732550399 was also produced as an exhibit.

23. After the attacker left, PW1 and the farm manager, Daniel Mwangi, went to report the incident at Bisil Police Post. The following day, police officers recorded their statements and commenced investigations. He was later called to identify the mask, the phone, and the cheque which he did. They had given out names of possible suspects. The phone was tracked and found in Gilgil where the appellant lived. They had suspected the appellant as the attacker because he had sued them after he left their employment.

24. He identified the appellant as the person who had worked for them for two years looking after horses but injured his leg in 2015. They paid for his treatment and the insurance also paid him compensation. That notwithstanding, the appellant sued them for unlawful dismissal. He denied that they owed the appellant money.

25. In cross examination, the witness admitted that he never mentioned in his statement that it was the appellant who had robbed them. He also admitted that no identification parade was conducted.

26. PW2, Yolanda Coombs Jane, wife to PW1, testified that on the material night they were sleeping when they heard the dog barking. She saw a man walk in. She thought it was the night watchman. She asked what he was doing there but he did not respond. It was dark but there was moonlight outside. The person picked up the kerosene lamp which was outside the verandah meant to keep away animals. He entered the room and that was when she realized he was a robber because he had a gun. She could see the shadow on the wall. He told them he had a gun and threatened to kill her. The man had opened the door halfway and seemed to know how to do it. He had a dark mask and therefore she could not see his face, had a dark jacket; trousers were a little bit lighter and Brown shoes.

27. He put the kerosene lamp on the floor then put the gun against her head and demanded Kshs. 100,000. He was speaking in English. She told him there was some money in her pocket and handbag. She told PW1 where it was. He took it and put it on the table and came back to bed. The man told them the money was not enough. There were Euros and Dollars in the purse but he did not take them. The man demanded Kshs. 100,000 from MPESA accounts which she did not have but PW1 had some. PW1 told him that he had only Kshs. 19,000. He gave PW1 a number to send the money to. The number looked like a bank account number not a phone number. PW1 told him he could not transfer money from MPESA account to a bank account number. The man got angry and came closer to her. She got scared and told him that she could write a cheque to him. She wrote the cheque for their joint account No. 250399, Barclays Bank, dated 6<sup>th</sup> September 2012, for Kshs. 500,000/-, although she knew there was no such money in the account. She did not sign her usual signature. When he asked her name she gave only her first name “Jane.” He got angry and demanded her second name. She suspected he knew her.

28. The man took the cheque and demanded their phones. She told him her phone was charging in the kitchen. He said the watchman would see him. He asked where their son was and she said he was not with around. She was by now convinced the person knew them well. The man took PW’s phone but she requested him to give them the sim card which he did. He also allowed them to switch on a bedside lamp to be able to see how to remove the sim card. They switched off light and gave him the phone. She identified the phone and its cover. She also identified the mask in court

29. When he was leaving, she informed him that there was a buffalo around but he replied that he knew about it as he had been watching. The man seemed to know how to get through the woods very fast. As he left, he threatened them that if they called the police or followed him he would kill the boy as he knew where we lived in Nairobi. They waited for a while and switched on lights, raised an alarm. PW1 went to Bisil Police Post to report the incident. Police came the following day and recorded their statements. She was asked whether she had seen the gun well but she told them that she had not seen what the robber was holding well as what she saw looked like a barrel.

30. She testified that the appellant used to look after horses when he fell and broke his leg. They paid for his treatment but he later sued them

for dismissal. In cross examination, she told the court that she had no grudge with the appellant for suing them.

31. PW3 Daniel Gichuka Maingi, the complainant's farm manager, testified that on 10<sup>th</sup> September, 2017 between 1 and 3am, he received a call from PW1 informing him that they had been robbed by an armed man who had taken his phone and cash Kshs. 20,000. He accompanied PW1 and other workers Bisil Police post to report the matter. The following day Police visited the farm and recorded statements. PW1 later rang and informed him that his phone a Samsung had been found which he identified in court. He said the appellant was person who had worked with him in the farm for a year. He gave his name as Victor.

32. PW4 Odhiambo Felix Ouma, previously a teacher at Teresia's Academy in Gilgil, testified that on 14<sup>th</sup> September, 2017 the appellant who worked as a watchman at the school sold to him a phone Samsung S7 for Kshs. 17,500/- and also give his Huawei phone. The appellant removed his line from the Samsung phone, and he also removed his line 0714354663 from the Huawei phone. The appellant promised to bring the phone charger and the purchase receipt but he did not and did not report to work. He tried to call him on his Safaricom line but it did not go through.

33. On 21<sup>st</sup> September, 2017, at 10 pm a strange number called him, and identified himself as Victor. He told him that he could now transfer his contacts. A police officer called and informed him that they were outside his door. He went out to see them. They asked him if he knew the appellant and he told them that he did. They asked him about the phone which he showed them. They went with him to Gilgil police station where he was told had been stolen from Kajiado.

34. The following day, 22<sup>nd</sup> September, 2017, police officers from Kajiado police station went, picked him and brought him to Kajiado where he recorded a statement He identified the appellant in court as Victor Onyango. He further stated that he used to see him at the school gate but he did not know his residence.

35. PW5 No. 99787 PC Geoffrey Lagat of DCI Gilgil testified that on 21<sup>st</sup> September, 2017 officers from DCI Kajiado went to Gilgil and informed the DCI that they were tracking down a robbery suspect. They gave his name as Victor Onyango. The DCIO called him, CPL Mulasi and PC Boniface Otieno and introduced them to the officers from Kajiado led by CPL Ng'eno. They used the phone they were tracking which had been traced to Gilgil. The person kept switching it on and off. They did not succeed to get the person. The officers from Kajiado left and asked them to continue tracking the phone.

36. At 11pm they laid an ambush after tracking the appellant's number in a Huawei phone which the appellant had in his possession. They entered the appellants house and found two men and two women in the house. they searched the house and recovered the cheque dated 6<sup>th</sup> September, 2012, for Barclays Bank, the appellant's identification card, which confirmed that he was Victor Onyango; a mask, an Airtel line No. 0753181674, and a Huawei phone which had a safaricom line 0714 046814.

37. They confirmed that the appellant's details matched those in the communication data. They asked him where the Samsung phone was and he said it was with PW4. He took them to PW4's house where they recovered the phone from PW4. They confirmed the **IMEI 358430078004648** they were tracing was for the phone. They made an inventory of the things recovered dated 22<sup>nd</sup> September, 2017, which was signed by the appellant, himself and the other officers. The inventory contained; Barclays Bank Cheque No. 101529 for Kshs. 500,000, Airtel line 0753181674, Safaricom line 0714046814, Mobile phone, Huawei Serial No. 866838023066307, identification card No. 26305864 belonging to the appellant, and a black mask. They arrested the appellant and PW4 and took them to the police station.

38. PW6 No. 88255 CPL Alice Mulasi, also attached to DCI Gilgil, testified that on 21<sup>st</sup> September, 2017, police officers from DCI Kajiado led by CPL Ng'eno visited their station. They were investigating a case of robbery with violence. They were tracking a person who was using a Samsung S7 phone that had been stolen in a robbery in Kajiado County. The person was sing phone No. 0753181674.

39. At around mid-night, they got information from an informer that the suspect was in a house in Gilgil. They went to the house and found about four men. They called out the appellant's name and he owned up. She identified the appellant in court. They searched the house and recovered a Huawei mobile phone from his body, two sim cards from the phone, an Airtel line and a safaricom line Nos. 0753181674 and 0714046814 respectively. They also recovered an identification card No. 26305864, for Victor Onyango Otieno. The appellant led them in doing the search. They recovered the cheque from a suitcase side pocket. They also recovered a Barclays bank cheque for Kshs. 500,000 dated 6<sup>th</sup> September, 2012 and a mask. They made an inventory of the recoveries which the appellant signed. They also signed it. The inventory was produced as exhibit.

40. They asked the appellant about the Samsung phone and he told them that he had sold it. He gave them PW4's phone number but they could not get him on phone. He led them to PW4's house where they recovered the phone from PW4. PW4 told them that he purchased it from the appellant and he also gave the appellant his Huawei phone. They made an inventory dated 22<sup>nd</sup> September, 2017 at PW4's house for Phone Samsung S7 Serial No 35843007800404 and Safaricom line 0714354663 which they signed. They arrested the appellant and PW4 and took them to the station. She handed over the items, the inventories and the suspects to officers from Kajiado. She identified the appellant as the person they arrested.

41. In cross examination, she testified that there were 4 people in the appellant's house; three men and one woman. The appellant led them to his house where they recovered the items. She was with another officer. The appellant's wife was outside. The wife did not witness recovery of the items. She said she did not investigate the case and did not know why PW4 was released. She denied that they planted the items on the appellant.

42. PW7 Vincent Magu, from Airtel mobile provider, whose work is investigations in internal security matters and fraud, testified that on 15<sup>th</sup> September, 2017 he received a letter dated 14<sup>th</sup> September, 2017 from the police and an order from the Chief Magistrate Court, Kajiado in *Misc. Application No. 131 of 2017*, to provide mobile data on lines used on phone **IMEI No. 358430078004040** for the period, 1<sup>st</sup> September 2017 to 14<sup>th</sup> September 2017. There was also a request for call data records for mobile numbers 0753181674 and 0780909895 for

the same period and registered holders of those mobile numbers.

43. He searched in their data base for the IMEI. The user from 1<sup>st</sup> September 2017 to 14<sup>th</sup> September 2017 was mobile number 0753181674. The mobile number had been inserted into the handset on 10<sup>th</sup> September 2017 at 10.01 am. He got the call data record of the mobile number, which he produced as exhibit 14. The 1<sup>st</sup> column is the caller number. It has the number where the call originates from which is either outgoing or incoming. The 2<sup>nd</sup> column is the recipient number. The 3<sup>rd</sup> column is the record type. It gives direction as to whether the call is incoming or outgoing. It might also be a SMS. The 4<sup>th</sup> column is the service type. It specifies whether it was a voice call or a short message. The 5<sup>th</sup> column is the duration. It is normally counted in seconds. The 6<sup>th</sup> column is the timer stamp indicating the date the call was terminated or made. The next column is the IMSI, an international mobile serial which identifies the network. In this case it is Airtel. The next column is the equipment ID which gives the serial number of the hand set. The next is the distribution code that indicates whether it is a 39, 29 or 49. The last column is the geographical position of the location of the Base Transceivers, normally called boosters. It will indicate the name of the location. The document shows that the location of the number of the caller on 10<sup>th</sup> September, 2017 was at Gilgil. According to the witness, from 10<sup>th</sup> to 14<sup>th</sup> September 2014, the mobile number was at Gilgil. The other number that was used in the handset was 0780909895 which had been used prior to the dates in the call data request. There was no record of that number from 1<sup>st</sup> September, 2017 to 14<sup>th</sup> September, 2017.

44. The witness further testified that there was another request to provide the registered owners of mobile numbers 0753181674 and 0780909895. Line 0753181674 was registered in the name of Victor Onyango, national identity card number 26305864 on 10<sup>th</sup> September, 2017. Line No. 0780909896 was registered in the name of Patrick Wagemah Karanja on 25<sup>th</sup> June, 2016, national identity card number 24650760. He produced computer generated registration details as exhibit 15. He also produced a certificate of electronic evidence; a certificate for the call data records for mobile No. 0753181674 from 1<sup>st</sup> September 2017 to 14<sup>th</sup> September 2017 as exhibit 16. He also produced the court order as exhibits. In cross examination, he stated that the phone was used by two people, Patrick Wagama Karanja who used it before 1<sup>st</sup> September, 2017 and Victor Onyango from 10<sup>th</sup> September, 2017.

45. PW8 No. 51918 CPL Rotich Ng'eno of DCI Kajiado Central and the investigating officer, testifies that on 10<sup>th</sup> September, 2017 at about 11am he was within the station area when the DCIO Mr. Musangi called and informed him of a robbery at the PW1's home. The DCIO instructed him to team up with the OCS Kajiado and visit the scene. He met the OCS and they went to the scene, though the scene had already been visited by officers from Ilbisil Police Patrol Base.

46. At the scene, they met PW1 and PW2 who explained what had happened the previous night, 10<sup>th</sup> September, 2017. The attacker entered their bedroom armed with a pistol. He wore a mask and spoke fluent English. He demanded money while threatening to kill the couple. They gave him Kshs. 20,000 which was the only cash they had. He demanded more money and they wrote a cheque for dated 6<sup>th</sup> September, 2012 for Kshs. 500,000 drawn on Barclays Bank (K) Ltd, Westlands Branch. The robber took PW1's Samsung S7 phone. They were not injured.

47. On 14<sup>th</sup> September, 2017, he applied for an order from court directing to Safaricom and Airtel Kenya to give the IMEI for the stolen phone and call data. He got data from Airtel Kenya which showed that after the robbery, the phone was used on 10<sup>th</sup> September, 2017 at about 11am in Gilgil Township on phone No. 0753181674, registered in the name of Victor Onyango. On 21<sup>st</sup> September, 2017 together with other officers from DCI Kajiado, they went to Gilgil, and met officers from that station, PW5 and PW6. They teamed up in the search but did not succeed. They gave officers from Gilgil the physical appearance of the suspect as described by the complainants.

48. He later received a call from CPL PW6 informing him that they had arrested two suspects, the appellant PW4 and made recoveries of the phone and other items. On 22<sup>nd</sup> September, 2017 they went back to Gilgil, and picked the two suspects together with the recovered items, Samsung phone, Cheque for Kshs. 500,000, a Mask, appellant's identification card, one safaricom sim card and one Airtel sim card. He produced the inventories as exhibits. They interrogated the appellant on the where about of the pistol he had on that day. He denied that he had pistol but claimed it was a home-made gun, which he dropped within Ilbisil area before going back to Gilgil. They went to search for the gun but did not recover it. The appellant was charged with the offence. PW4 was treated as a witness. He produced the recovered items as exhibits. He identified the appellant as the person who was arrested.

49. In cross examination he stated that the complainants gave physical appearance of the robber but wore a mask; that they were not relying on physical appearance but were tracking the stolen phone and that it was the appellant and PW4 who had the phone. He also stated that it was the appellant who was the first to use the phone after it was stolen; that the appellant was arrested based on the robbery report which he investigated and that the complainant never gave the name of the robber. PW4 had the complainant's phone. He also stated that he did not record the appellant saying he had a gun and that the appellant did not record a statement. They wrote the statement which the appellant signed.

50. PW9 No. 65552 CPL Mbwana Riko of Ilbisil Patrol Base, testified that on 10<sup>th</sup> September, 2018 PW1 reported a robbery incident at his home. He reported that one person armed with a pistol entered their farm at night as they slept. The person wore a mask on his face. He threatened them and demanded money from them. He gave the man Kshs. 20,000/=. PW2 wrote for him a cheque for Kshs. 500,000. He also reported that the attacker also took his phone, a Samsung S7.

51. After booking the report, they asked the complainant to pick them in the morning to visit the scene. In the morning they visited the scene and established how the attacker entered the compound and left. He recorded the complainant's statement and that of his wife. They later informed the OCS (Njeru) who also visited the scene with CID Officers. He later learnt that the appellant had been arrested and charged.

52. In his sworn defence, the appellant testified that on 21<sup>st</sup> September, 2017, he went to work as usual and returned at 8.30 pm. His wife had gone to her brother's place and he decided to go and pick house keys from her. He arrived there at 9pm and found them preparing supper. After 15 minutes there was a knock on the door. People entered and ordered them to lie down. They were ordered to produce their Identity cards. He was arrested and taken to a vehicle where he was asked if he had a broken leg to which he responded in the affirmative. They

threatened to break it again. He was asked if he had the Samsung phone. He told them that he did not have phone but had a line.

53. He was put him in the boot of the car. The police made several calls and traced the phone to PW4. They drove there knocked at the gate and entered. PW4 was arrested with the phone. He had known PW4 four days back since he worked as a night guard at the school where PW4 taught. They were taken to his house. a search was conducted his house but nothing was recovered. They were taken to Gilgil police station. The following day a statement was written and he was asked to sign it although he had not read it. They were later taken to Kajiado Police Station. He was later charged with the offence without any identification parade being conducted. He maintained that the complainant had a grudge against him and that was why he wanted him jailed so that the suit he had filed against the complainant could fail. He denied ever having the phone and said that it probably occurred during the period when he borrowed the phone.

54. The trial court considered the evidence and was satisfied that the prosecution had proved its case beyond reasonable doubt convicted him as charged. the trial court stated;

***“There is evidence that through phone tracking police managed to track the complainant’s phone being used in Gilgil. The first sim card to use it from 10<sup>th</sup> September, 2017 was registered in accused’s names. The police recovered from him the national identity card which he had used to register the number. He did not give explanation except that he may have borrowed the phone and used his line.”***

55. The court further stated that police from Gilgil police station managed to track accused and a search in his house recovered the cheque that PW2 gave the robber and the mask the robber wore. According to the trial court, the appellant never gave a satisfactory explanation on how he came to have those items.

56. The appellant faulted the trial court for convicting him on the basis of recent possession when the prosecution did not discharge its burden. I have reevaluated the evidence and reanalyzed it myself. I have also considered the appellant’s amended grounds of appeal, and submissions. The issues that arise for determination are whether the prosecution proved the offence of robbery with violence and whether the trial court was in error in convicting the appellant on the basis of recent possession.

#### **Whether the prosecution proved robbery with violence**

57. The appellant argued that the prosecution did not prove robbery with violence. He argued that to prove a charge of robbery with violence, the attacker must have been present at the scene of crime, armed with a dangerous weapon, or in company of other people or used violence. According to the appellant, there was no evidence to place him at the scene of crime; no evidence of a dangerous weapon; no evidence that attackers were more than one or that there was use of violence. The respondent argued that the prosecution proved the ingredients of the offence.

58. The appellant was charged with robbery with violence contrary to section 296(2). The ingredients of the offence are clear under section 296(2). The section provides that;

***“If the offender is armed with any dangerous weapon or instrument or is in company with one or more other person(s) or if immediately before or after time of the robbery, he wounds, beats, strikes, or uses any other personal violence to any person, he shall be sentenced to death.”***

59. Both Pw1 and Pw2 testified that the attacker was alone. They reported to the police that the person had a gun or what they thought was a gun. No gun was recovered from the appellant though. The two witnesses also confirmed through their testimonies that no one was injured and no personal violence was used against them PW1 and PW2 were clear in their testimonies that they were not sure whether the person had a gun since it was dark and they could not clearly see the gun.

60. Given the facts as stated by the victims of the offence, it is clear to me that the prosecution did not satisfy any of the ingredients of the offence of robbery with violence to warrant a conviction under section 296(2). The facts disclosed simple robbery and for that reason, the trial court fell into error in not concluding that the circumstances proved robbery with violence. It was therefore wrong for the trial court to convict the appellant for robbery with violence when the prosecution did not prove the offence beyond reasonable doubt.

#### **Whether there was proof of recent possession**

61. The appellant argued that PW1 and PW2 were clear in their evidence that they could not identify the attacker during the robbery because it was not only dark, but the person was wearing a mask over his head and spoke in low tone. They only gave general descriptions of the assailant which could not help identify him as the attacker. They also merely suspected that the person was not a stranger since he seemed to know the compound well.

62. From the evidence on record, it is clear that the complainants could not identify the person who attacked them. The prosecution case was built more on suspicion that the person who attacked them knew the place and therefore suspected the appellant their former employee. The law is clear that suspicion, however strong cannot be the basis of a conviction unless there is other corroborative evidence, (see ***Sawe v Republic*** [2003] Eklr)

63. The complainants were also clear that the person spoke in a low tone. That means they could not recognize the person through his voice. In ***Choge v Republic*** [1985]eKLR, it was held that evidence of voice identification is receivable and admissible in evidence and can, depending on the circumstances carry as much weight as visual identification. However, care is necessary to ensure that it was accused person’s voice and that the witness was familiar with it and recognized it.

64. In the premises, there was no clear evidence of identification to connect the appellant with the offence. The trial court did not make a finding that the appellant was identified or recognized as the person who attacked PW1 and PW2 to call on this court to reverse such a finding.

65. The trial court's finding of guilt was based on the doctrine of recent possession which the appellant has criticized. PW4, a teacher and resident of Gilgil, was found in possession of the stolen phone. He told the court it was the appellant who sold the phone to him on 14<sup>th</sup> September, 2017. He taught at the school where the appellant worked as a watchman which means they knew each other. He bought the phone at Kshs. 17,500/- and also gave the appellant his Huawei phone. It was after he was arrested that he learnt that the phone had been stolen.

66. PW5 confirmed that they tracked the phone **IMEI number No. 358430078004648** and recovered it from PW4 who told them that he bought it from the appellant. He also told the court that according to the call data, the appellant was the first to use the phone after it was stolen. The record from Airtel mobile provider, the number 0753181674, used in the phone immediately after it had been stolen was registered in the appellant's name Victor Onyango. The calls were traced to Gilgil where the appellant was arrested. The Huawei phone which PW4 had given him was found in his possession. His evidence was corroborated by that of PW6 and PW8.

67. PW7 confirmed that he retrieved calls data for the phone from 1<sup>st</sup> September 2017 to 14<sup>th</sup> September 2017. And records for mobile numbers 0753181674 and 0780909895 for the same period and the registered holders of those mobile numbers. The appellant's number was first used in the handset on 10<sup>th</sup> September 2017 at 10.01 am. The call data record of the number showed that the location of the caller on 10<sup>th</sup> to 14<sup>th</sup> September, 2017 was Gilgil. The other number used in the handset was 0780909895 but it had been used prior to 1<sup>st</sup> and 14<sup>th</sup> September 2017. He confirmed that the registered owner of mobile number was Victor Onyango, (the appellant), of identity card number 26305864 on 10<sup>th</sup> September, 2017.

68. There was no doubt therefore, that the appellant had indeed used the phone and later sold it to PW4. The line used in the phone was also registered in the appellant's name and his identity card.

69. PW5 and PW6 also confirmed that they searched the appellant's house and recovered the Barclays cheque dated 6<sup>th</sup> September, 2012 that PW2 had issued to the assailant. They also recovered appellant's identification card; a mask, Airtel line No. 0753181674, and the Huawei phone which had a safaricom line 0714 046814. The phone number and identity card corresponded with the details they had from the call data.

70. The appellant denied that the phone was found in his possession. He argued that the phone was recovered from PW4 and arrested him but later released him. He admitted that he knew PW4 who taught at the school where he (appellant) worked as a guard. He admitted that his house was searched but nothing was recovered therein.

71. He contended that he was framed up by the complainant because he had a civil case against PW1 for wrongful dismissal. He denied being in possession of the phone and explained that he probably used the phone when he borrowed phone. He admitted having Airtel and Safaricom lines but could not remember the numbers. He also denied selling the phone to PW4.

72. The appellant's argument is that the trial court erroneously relied on the doctrine of recent possession given that nothing was recovered from him; that there was no sale agreement between him and PW4 for sale of the phone that was recovered from PW4 and therefore, there was no cogent evidence to connect him with the phone, thus the offence.

73. Possession may be either actual or constructive. Section 4 of the Penal Code defines possession thus:

***“(a) Be in possession or have in possession, includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or any other person;***

***(b) If there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession it shall be deemed and taken to be in the custody and possession of each and all of them.”***

74. The doctrine of recent possession has been the subject of various court decisions. In *Nganga Kahiga alias Peter Nganga Kahiga v Republic* Criminal Appeal 272 of 2005, the Court of Appeal held that before a court can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. That is, there must positive proof that the property was found with the suspect; that the property was positively identified as the property of the complainant; that the property was stolen from the complainant and that the property was recently stolen from the complainant.

75. In *Eric Otieno Arum v Republic* Criminal Appeal No. 85 of 2005 [2006] eKLR, it was again held that;

***“...before a court of law can rely on the doctrine of recent possession as basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be a positive proof, first, that the property was found with the suspect, secondly that the property is positively the property of the complainant thirdly, that the property was stolen from the complainant.”***

76. The court emphasized that proof as to time the person was found in possession of the will depend on the easiness with which the stolen property can move from one person to the other.

77. It must be clear that the prosecution bears the legal burden of establishing the primary facts to prove the doctrine of recent possession. Once the prosecution discharges this burden, the accused has to offer an acceptable explanation on the circumstances under which he was found in possession of the stolen property. To establish possession, the prosecution should also prove that custody and control of the stolen property was in the hands of the accused person.

78. In the present appeal, the prosecution's case was that Pw1's phone, a Samsung S7 was stolen from him on the night of 10<sup>th</sup> September 2017. The phone was later traced to PW4 who explained that it was the appellant who had sold it to him. The phone was recovered on 21<sup>st</sup> September 2017, less than two weeks after it had been stolen. PW1 identified the phone as his and produced a receipt dated 8<sup>th</sup> November, 2016 as proof of purchase of the phone. PW4 identified the appellant as the person who sold the phone to him as they worked in the same school, though in different capacities. He had paid for the phone and also gave the appellant his Huawei phone in exchange.

79. PW5 confirmed that the stolen phone was traced to Gilgil and found in PW4's possession. He testified that the Huawei phone was also found in the appellant's possession. His evidence was corroborated by that of PW6 and PW8. They said the appellant had told them that he sold the phone to PW4 and led them to PW4's house where they recovered the phone.

80. PW7 confirmed that from the calls data for the phone, IMEI No. 358430078004040 was used by the appellant between 10<sup>th</sup> and 14<sup>th</sup> September 2017. Mobile number 0753181674 used in the handset for that period was registered in the appellant's name with his identity card number. The location of the calls was Gilgil from 10<sup>th</sup> to 14<sup>th</sup> September, 2017.

81. The prosecution evidence was clear that the phone had been stolen from PW1; that it had been stolen on 10<sup>th</sup> September 2017; that it was first used by the appellant between 10<sup>th</sup> and 14<sup>th</sup> September 17 and that the phone was recovered from PW4 who explained that he bought it from the appellant. PW1 identified the phone as his and produced a receipt for its purchase. The prosecution case properly fell within the doctrine of recent possession and having done so, the burden shifted to the appellant to explain how he came into possession of the stolen phone.

82. In ***Paul Mwita Robi v Republic*** Criminal Appeal No. 20 of 2008, the Court of Appeal held that:

***“Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act cap 8-, the accused has to discharge that burden.”***

83. Although the phone was not recovered from the appellant, there was evidence that he was the first to use it on being stolen. He was therefore required to explain how he came into possession of that phone.

84. In his defence, the appellant argued that nothing was recovered from him or his house. On how he may have used the phone, he stated that this may have happened when he borrowed a phone without saying from whom. There was also evidence that a cheque was recovered from him. That was the cheque PW2 issued to the person who attacked them. Although the appellant maintained that nothing was found on him, the prosecution evidence clearly pointed to the fact that the cheque was recovered from his house, so was the mask.

85. The cheque was issued in Kajiado County but was recovered in Gilgil, Nakuru County. Recovery of the cheque came at the same time with that of the stolen phone. That implied that the two items were most likely moved from Kajiado to Gilgil by the same person. As the trial court held, the appellant failed to satisfactorily explain why his line was used in the stolen phone soon after the phone had been stolen.

86. In the Malawian case ***of Mpopa Nyirenda v the state*** (MZ/CR APP 6 OF 2011, MWHC4 08 Nov. 2011), it was stated that:

***“Doctrine of recent possession operates on the premises that an accused's handling of the goods is disproved, thus he offers no reasonable explanation for his being found with the goods shortly after they were reported stolen. Where the accused is in possession of stolen goods so recently, the inevitable inference is that he is the thief. However, if the accused gives an explanation he must be acquitted. The doctrine of recent possession raises a presumption which calls upon the accused to give an explanation to the satisfaction of the court and on a balance of probabilities (reversal burden of proof) as to how he came by the same.”*** (emphasis)

87. The trial court correctly invoked the doctrine of recent possession to draw an inference of guilt on the part of the appellant. Although the phone was not found in the appellant's possession, the appellant used it before it moved to PW4 who explained that it was the appellant who sold it to him. This was shortly after the appellant had used the phone on being stolen from PW1.

88. The prosecution discharged its burden of proving that the appellant was the first to be in custody and control of the phone and used it between 10<sup>th</sup> and 14<sup>th</sup> September 2017 before it passed to PW4. The appellant had constructive trust once he sold it to PW4, with knowledge that it was a stolen property. The phone was positively identified as the property of PW1 and that it had been stolen from him. It was stolen on 10<sup>th</sup> September, 2017 and recovered on 21<sup>st</sup> September, 2017, when the appellant was also arrested, proof that the phone had been recently stolen.

89. A phone is a portable and moves with ease from one person to another. In this case, the phone was sold by the appellant to PW4 who satisfactorily explained how it came into his possession. I am satisfied as the trial court was that PW4 told the truth on how the phone came into his possession.

90. In the premises, I am satisfied that the prosecution discharged its burden of proof that the appellant was in possession of the phone and the cheque, and that he had failed to give a plausible explanation on how the phone and cheque came into his possession. I am unable to fault

the trial court's finding of fact in this regard. The appeal on conviction for robbery with violence is quashed and replaced with a conviction for simple robbery under section 296(1) of the Penal Code.

91. Regarding sentence, the appellant was sentenced to twenty years imprisonment for robbery with violence. The sentence for simple robbery under section 296(1) imprisonment for fourteen years. From the record, the appellant was arrested on 21<sup>st</sup> September 2017 and was in remand during trial. Section 333(2) of the Criminal procedure Code requires courts to consider such period when imposing sentence.

92. Having considered the appeal, submissions and the law, I see no merit for allowing the appeal in its entirety. However the conviction for robbery with violence under section 296(2) is quashed. The appellant is convicted for the offence of robbery under section 296(1) of the Penal Code.

93. The sentence of twenty years is set also aside and in place therefor, the appellant is sentenced to 8 years imprisonment. The sentence shall run from 21<sup>st</sup> September 2017 when he was arrested.

**Orders accordingly.**

**Dated, signed and delivered at Kajiado this 22<sup>nd</sup> day of January, 2021.**

**E.C. MWITA**

**JUDGE**