



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 240 OF 2018

BETWEEN

JOHN KIMURU NGWIRI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An Appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No.3089 of 2012 delivered by Hon. F. Mutuku (SRM) on 21st September, 2018).

JUDGMENT

1. The Appellant, **John Kimuru Ngwiri** was charged alongside another with three counts of robbery with violence contrary to **Section 295** as read with **Section 296 (2)** of the **Penal Code**. The particulars in count 1 were that on the 2nd day of May, 2012 at Dam II Estate in Langata within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely pistols they robbed **Peter Ochieng Okong'o** of one TV set make LCD 40' inches valued at Kshs. 119,000/=, one TV set make LG valued at Kshs. 7,000/=, one radio DVD player valued at Kshs. 12,000/=, a mobile phone make Nokia E72 valued at Kshs. 30,000/=, a Black Berry phone valued at Kshs. 30,000/= and a motor vehicle registration no. KBL 845F Toyota Wish valued at Kshs. 1.2 Million all valued at a total of Kshs. 1,344,000/= and immediately before the time of such robbery, threatened to use actual violence against the said **Peter Ochieng Okongo**.

2. In count II, the particulars were that on the 2nd day of May, 2012 at Dam II Estate in Langata within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely pistols they robbed **Nancy Laura Khisa** of a blackberry phone serial no. 352480040866418 valued at Kshs. 42,000/=, one mobile phone make Nokia Asha 200 valued at Kshs. 6,500/=, two gold necklaces valued at Kshs. 50,000/=, a wedding ring valued at Kshs. 14,000/=, earrings valued at Kshs. 2,500/=, three flash discs valued at Kshs. 4,000/= and cash Kshs. 30,000/= all valued at a total of Kshs. 148,300/= and immediately before the time of such robbery, threatened to use actual violence against the said **Nancy Laura Khisa**.

3. In count III, the particulars were that on the 2nd day of May, 2012 at Dam II Estate in Langata within Nairobi County, jointly with others not before court, while armed with dangerous weapons namely pistols they robbed **Charlene Becky Khisa** of a Samsung phone serial no. 35653041619695 valued at Kshs. 2,000/= and immediately before the time of such robbery, threatened to use actual violence against the said **Charlene Becky Khisa**.

4. The Appellant pleaded not guilty to all the three counts. Upon trial he was found guilty accordingly and sentenced to serve twenty (20) years imprisonment on each count. The sentences were ordered to run concurrently. Aggrieved by both his conviction and sentence, he preferred the present appeal to this Court.

5. The Appellant raised five grounds of appeal in his Amended Petition of Appeal filed on 14th October, 2019 by M.M. Wangila & Co. Advocates. The said grounds have been reproduced hereunder as follows:

a. THAT the learned trial magistrate erred in law and fact by relying on dock identification evidence by PW3 in convicting the Appellant thereby occasioning a miscarriage of justice.

b. THAT the learned trial magistrate erred in law and fact by observing that the prosecution established its case on the strength of the ID Parade evidence notwithstanding the fact that the ID parade was biased and unscrupulous thus occasioning prejudice and injustice to the Appellant.

c. THAT the learned trial magistrate erred in law and fact by invoking the doctrine of recent possession by drawing an adverse

inference on the basis of recent possession alone while disregarding the Appellant's reasonable and plausible explanation.

d. THAT the learned trial magistrate erred in law and fact by failing to address the overt contradictions between the initial statement given to the police and the evidence in chief of all prosecution witnesses.

e. THAT the learned trial magistrate erred in law and fact by shifting the burden of proof to the Appellant and rejecting his plausible defence without cogent reasons or due consideration.

Summary of Evidence

6. I am minded that this is the appellate court whose duty is to reevaluate the evidence and make independent conclusions. See: **Okeno v Republic (1972) EA,32** and **Kiilu & Another v Republic (2005)1 KLR, 174**. I thus summarize the evidence adduced as follows.

7. On 2nd May, 2012 at about 2.00 pm, the complainant **PW1, Peter Ochieng Okeno** returned home to take medicine for his two month old child who was unwell. He parked his car outside the gate and went into the house where he found his wife **PW2, Nancy Lora Nekesa Khisa** who was on maternity leave, with a friend. He proceeded to the kitchen to store the medicine in the refrigerator while PW2 left the house to escort her friend. As he was coming out of the kitchen, the front door burst open and a group of about eight men walked in brandishing at least two pistols. They ordered him to lie down and demanded to know who else was in the house. PW1 told them that it was just him, his child and the maid but his wife who had escorted a friend would be back soon.

8. They ordered him to lie down facing the floor. They held a pistol to his face and threatened to shoot him and demanded to know where the keys were. They kept saying that they had been sent to kill him but he would survive if he cooperated with them. One of them took out his wallet and a Nokia E72 phone valued at Kshs. 19,000/= from the back pocket of his trouser. They demanded for money and he told them that he had Kshs. 50,000/= which he had just withdrawn from the bank. They asked for his MPesa Pin Number and bank ATM cards which he gave them. One of them pulled out his wedding ring from his finger. They then called the maid and told her to lie down next to him. Thereafter, the robbers tied them up and blindfolded them.

9. When PW2 returned after escorting her friend, she found their gate open yet she had instructed the house girl to close it. She pushed it in walked in and found the burglar proof door open as well. She opened the front door and found a man standing by. She had seen the man in the company of another about twenty meters away from their house as she was leaving her home to escort her friend. Another man emerged from the kitchen armed with a pistol and ordered her to lie down. A third man, the Appellant herein, who was one of the two men she had seen outside, asked her what she was wearing then proceeded to take off her gold chain, earrings, watch and wedding ring. They then tied up her hands and ordered her to lie down next to PW1 and the maid. PW2 could see them well. Thereafter, one of them raised the volume of the television. Another one demanded for the key for PW1's car, a black Toyota Wish registration Number KBL 845F which was parked outside the gate.

10. Other men were busy ransacking the house and picking whatever they could. The robbers demanded for the gate keys but they told them that their niece **PW3, Becky Shirleen Khisa** had gone with them so they could only use the small gate. PW3 returned home at about 3.00-3.30 pm and found the door open but did not suspect anything. She entered the house and about three men grabbed her as another grabbed her bag. They told her to lie down next to PW1 and PW2 then tied her hands too. PW3 saw about six robbers. The robbers said PW3 did not have the gate keys. PW1 told them that he had another set of keys which they took and used to open the main gate then drove the car into the compound.

11. They started loading the car with assorted household goods which included a 42" flat screen TV make Samsung, a 17" inch TV, two gas cylinders, cutlery, sufurias, wine glasses, carpet, laptop, two DVD players, a desktop computer and four flash discs. The robbers also took PW2's mobiles phones being a blackberry and a Nokia as well as PW3's Samsung phone. The armed man asked other men to go to Langata Shopping Center with the ATM Cards. They could hear them communicating on the phone asking whether the others had confirmed if the PIN numbers were correct. As this was going on, their two months old son who was sleeping in the sitting room woke up and started crying. One man asked PW2 to sit up and breastfeed the baby so as not to alert the neighbours. After they had finished loading the car, they asked PW2 to go and switch off the TV which she did then they took it away too. They then drove away in PW1's car and left two men guarding them.

12. After a while, the two robbers also left but warned them not to raise any alarm. As soon as PW2 saw the two men walk out of the gate, she took a kitchen knife which they had been using to guard them and unbound her legs. She went and locked the gate then came back and untied the others. Thereafter, PW1 and PW2 went to their daughter's school just across the road and sought for assistance. The school director asked the driver to drop PW1 at Langata Police Station where he reported the matter.

13. On 3rd May, 2012, **PW4, Corporal Gabriel Ndung'u Wainaina** of CID office Langata investigated the case. He recorded the statements from the witnesses and also visited the scene of crime. On the night of 5th May, 2012, PW2 started receiving messages from the Samsung mobile phone which was being traced with an anti-theft device. It would relay to her messages with details of any unrecognized sim card inserted therein. This happened for about three days during which she would forward the messages to the investigating officer.

14. On 15th May, 2012 at around 8.30 pm, the Appellant was arrested and PW3's Samsung phone recovered from him. PW4 was assisted by Safaricom personnel to track the Appellant leading to his arrest by flying squad officers namely Sergeant Singira and PC Aundry Kausi. He was taken to CID headquarters and picked by PW4's colleagues PC Stephen Njagi and PC Ali who took him to CID office Langata. Thereafter, PW2 was called to Langata Police Station to identify a recovered mobile phone. PW2 was able to identify PW3's Samsung phone by checking the IMEI number 356853041619695 which was similar to the one she had been receiving messages from. PW3 was also able to identify her phone by the scratch marks on the front lower part. PW4 recalled that the phone number that used the phone last was 0715151094.

15. On 17th May, 2012, PW4 requested **PW5, CI Margaret Abayi** formerly of CID Langata to conduct an identification (ID) parade for the Appellant. The Appellant did not object to the parade as well did not wish to have a representative during the parade. The Appellant did not also have an objection to the parade members selected by PW5 from the cells. PW1 did not identify anyone as he had been blindfolded throughout the ordeal. PW2 identified the Appellant by touching him on the shoulder. The Appellant did not raise any complaint but confirmed that the parade was fair and indicated as such on the Identification parade form. He signed the form and PW5 countersigned. PW5 produced the ID parade form dated 17th May, 2012 in evidence.

16. PW2 recalled that on the date of the incident, the Appellant was wearing a light green T-shirt, brown trousers and brown shoes. His friend was wearing a white T-shirt, black trouser and white sneakers. The one in white T-shirt is the one who ushered her into the house while the Appellant who was in light green T-shirt took her jewellery and wedding ring. The Appellant was light skinned, had a clean shaven head and was of medium height and medium built.

17. On 30th June, 2012, PW4 arrested a person by the name Jacob Nabongo within Nairobi City Centre whom they had located with the help of Safaricom personnel. The said Jacob was found in possession of PW2's blackberry phone. They interrogated him regarding where he had gotten the phone and he led them to a shop called FYIN Communications Shop along Tom Mboya Street. He showed them the Appellant's co-accused one Godfrey Otieno as the person who had sold him the phone. They arrested the said Godfrey and escorted him to Langata Police Station. They then summoned PW2 who identified the phone as the one robbed from her by producing the IMEI number which was on a cut out of the box in which the phone was bought. The IMEI number tallied with the one on the recovered phone. The 2nd Accused admitted that he was the one who sold the phone to the said Jacob but said that he had bought it from a person called Njoki.

18. PW4 charged the Appellant and his co-accused with the offences in question. During trial, PW3 identified the Appellant in court as the one who grabbed her hands when she entered the house. She said she could remember him because of his brown complexion. The two recovered phones were produced in evidence by PW4. He also produced the court the box in which the PW2's blackberry phone was bought.

19. In defence the Appellant gave a sworn testimony in which he denied stealing committing the robberies. He called two witnesses in support of his defence. He stated that on 2nd May, 2012, he had been employed by his uncle as a turn boy of a lorry. As he was heading to Nairobi using a Githurai bus, he picked the Samsung phone under a chair, took it and went on with his business. On the evening of 15th May, 2012, his mother called him and asked him to meet her at Ruiri town. He went and met her at Ranga Hotel. She came with three men and his two aunts. An officer asked him to show them the phone he was using. He showed him two phones being a Nokia 3310 and the Samsung which he had picked. The officer checked the serial number of the Samsung Phone and asked him where he had gotten it from. He told them that he collected it in a bus. They asked him to accompany them to Githurai as there was another person who was using the phone. He was taken to Pangani Police Station and later transferred to Nairobi Area then Langata Police Station. The following day, he went with the officers to his house where a search was conducted but nothing else was recovered. He was then taken back to the police station and charged because he was found with the phone.

20. **DW2, Godfrey Otieno Onyango** was the 2nd Accused. He stated that one Saturday in June 2012, he received a call from an unknown number. Three men went to his shop and asked him whether he knew the person who had called him. He told them he did not know and they told him that he had a case and took him to Nairobi Area Police Station. He was told that the person who had directed the police to him was not around so he was transferred to Langata Police Station where he spent a night in custody. The following morning, one officer went and explained to him that there was a person who had been arrested with a phone which he said he had bought from DW2's shop. He told the police that he could not know since he had several phones. An identification parade was conducted but the witness, a lady, said she did not know anyone. As such, he was told to go back to the cell. He was taken to court the following morning.

21. The Appellant's aunt **DW3, Ruth Wanjiku** stated that the Appellant used to go to her home in Ruiru every day. On 15th May, 2012, the CID called her alleging that she was colluding with robbers. The police officers took her phone and asked for the Appellant's phone number. The police asked her to take them to the Appellant's home. She called the Appellant's mother who said she would call him. The Appellant's mother identified him to the police. They said he had a nice phone and asked him where he had gotten it from. The Appellant said he got the phone from a Githurai matatu but threw the sim card at Ruiru town. They later got information that the Appellant had been charged with robbery with violence.

22. The Appellant's mother **DW4, Lucy Wacheke** stated that on the date he was arrested, she received a call from her sister in law DW3 who told her not to close her place of work as she was going there. DW3 went with police officers who asked her if she knew the Appellant. He told them that the Appellant was his son. They said the Appellant had a phone which had been stolen. She showed them the Appellant and he was arrested while in possession of the said phone. She was staying with the Appellant in her house since his wife had just delivered. In cross examination, she stated that the Appellant had been employed by her brother as a conductor for sand trailers.

Analysis and Determination

23. This appeal was canvassed by both written and oral submissions. The Appellant's written submissions were filed on 11th December, 2019 whilst the Respondent's written submissions were filed on 18th December, 2019. The Appellant was represented by learned counsel, Mr. Wangila whereas the learned State Counsel, Ms. Nyameto represented the Respondent. Upon a careful reevaluation of the evidence on record and consideration of the parties respective submissions, I have deduced that the issues arising for determination are whether the offence of robbery with violence was established, whether the Appellant was positively identified, whether the doctrine of recent possession was properly invoked by the trial court and whether the sentence imposed was proper.

Whether the offence of robbery with violence was established

24. The ingredients constituting the offence of robbery with violence are set out in **Section 296 (2) of the Penal Code**. These are that:

a) *The offender is armed with a dangerous or offensive weapon or instrument; or*

b) *The offender is in the company of one or more person or persons; or*

c) *If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any personal violence to any person.*

25. No doubt the gang of eight robbers that entered into PW1's house was armed with at least two pistols. The robbers ordered PW1, PW2 and PW3 to lie down then tied them up. They also threatened the victims with dire consequences including death if they did not comply with their orders. PW1 was also blindfolded him together with the maid. The robbers stole several items from the house belonging to the three witnesses. In the premises, I find that the evidence on record established the offence of robbery with violence.

Whether the Appellant was positively identified.

26. This issue calls for an interrogation of the prevailing circumstances at the time when the incident occurred. The Appellant submitted that the assailants were strangers to the complainants and as such, there was need for exercise of special care.

27. The only evidence regarding the identification of the Appellant was that of PW2 who testified that she clearly saw the Appellant and subsequently identified in the ID parade. In **Maitanyi vs. Republic [1986] eKLR**, it was held, with respect to the reliability of the evidence of a single identifying witness as follows:

“Although it is trite law that a fact may be proved by the testimony of a single witness, this does not lessen the need for testing with greatest care the evidence of a single witness respecting identification...The court must warn itself of the danger of relying on the evidence of a single identifying witness. It is not enough for the court to warn itself after making the decision, it must do so when the evidence is being considered and before the decision is made.”

28. In the English case of **R vs. Turnbull and others (1976) 3 All ER 549**, Lord Widgery C.J. said the following the circumstances for identification of a perpetrator:-

“....the Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and the actual appearance?”

29. It is indisputable that the robbery took place between 2.00 pm and 4.00 pm when there was sufficient light. PW2 had ample time and opportunity to identify the Appellant. She saw him in the company of another about twenty meters away from their house as she was leaving their home to escort her friend. She also saw him at close range as he was taking off her jewellery when she returned in the house. She was categorical that she was able to see the robbers very well as they were ransacking the house and picking whatever they could. When their son woke up and started crying during the robbery, the Appellant asked her to sit up and breastfeed him. Finally, when the robbers finished loading the car, they asked her to go and switch off the television which she did then they took it away as well. In any event, the Appellant had not concealed his identity in any way whatsoever. Thus, I find that the circumstances prevailing at the time of the robbery negated any possibility of a mistaken identity of the Appellant by PW2.

30. This takes us to the issue of the identification parade. It is trite that Identification parades are meant to test the correctness of a witness's identification of a suspect. (See **John Kamau Wamatu & another v Republic [2010] eKLR**).

31. The Appellant faulted PW2 for failing to give any prior description of the assailants and submitted that in that case, the identification parade was just a mock exercise conducted for formality purposes. In support of this, counsel cited the case of **Maitanyi v Republic [1986] KLR 198**. He argued that the absence of such first report by PW2 dented her credibility since without a first report there can be no proper identification parade. Further, he stated that the ID parade was not independent since the witness was influenced on whom to select. He faulted the trial court for basing the Appellant's conviction on the evidence of an identification parade which was not conducted fairly. He also questioned why the parade form produced in evidence did not explicitly indicate that the Appellant was identified by PW2 and the circumstances of such identification. Mr. Wangila further submitted that the identification parade was biased because PW2 knew the Appellant by the name John. It was argued that there was no first report by PW2 in which she identified the Appellant by the said name.

32. In addition, the Appellant questioned how PW3 was able to identify him in the dock as the person who grabbed her whereas she had told the police that she could not identify any of the robbers. He submitted that since PW3 did not participate in an identification parade, her dock identification was worthless.

33. In rebuttal, the learned state counsel Ms. Nyameto submitted that there was no evidence that PW2 saw the Appellant before the parade.

34. Ideally, a witness ought to give a description of her assailant in the first report for purposes of organizing an identification parade to test the accuracy of her identification evidence. However, in the case of **Nathan Kamau Mugwe vs. Republic [2009] eKLR**, the Court of Appeal observed as follows:

“As to the complaint in ground six that the witnesses had not given to the police the description of the appellant before the

parade, we do not think that failure to describe the person to be identified necessarily renders an otherwise valid parade worthless. Even in GABRIEL's case, supra, the Court did not go so far as to say that a witness must be asked to give a description of the person to be put on the parade for identification. All the Court said was that the witness 'SHOULD' be asked. That is obviously a sensible approach. It is not impossible to have a situation in which a witness can tell the police that though he cannot give a description of the person he had seen during the commission of an offence, yet if he (witness) saw that person again, he would be able to identify him. It would be wrong to deprive such a witness of an opportunity of a properly conducted parade to see if he can identify the person. Again, the police themselves may, through their own investigations, come to know that a particular suspect may have been involved in a particular crime though the witness or witnesses to that crime have not given a description of the suspect. Once again it would be wrong to deny the police the opportunity to put such a suspect on a parade to see if the witnesses can identify him.

In either of the two cases, the parade cannot be held to have been invalid merely because the witnesses had not previously given a description of the suspect. The relevant consideration would be the weight to put on the evidence regarding the identification parade. We reject the contention that because James had not given to the police a description of the appellant, his evidence with regard to the identification parade ought to have been rejected."

35. In the instant case, PW4 stated that with the help of Safaricom personnel, he managed to track the PW3's Samsung mobile phone in the Appellant's possession thus leading to his arrest. Thereafter, PW2 called upon to identify the phone and participate in an identification parade to see whether she could identify the suspect. Accordingly, I find that the failure to give a description of the assailants before the parade did not vitiate the parade. It is a parade that was conducted for purposes of taking extra caution that, just as PW2 has said she had been able to identify the Appellant, the person who was arrested was indeed the person she said she saw in the robbery. Furthermore, the parade was conducted in accordance with the law and the **Forces Standing Orders** on Identification Parades. No Rule of conducting a parade was flouted. Furthermore, the Appellant conceded in the parade form and as testified by the parade officer, PW5, that he had no objection with the manner the parade was conducted,

36. I accordingly differ with Mr. Wangila's submission that the parade was a cosmetic exercise. In contrast, it was undertaken to fill in gaps as regards the clarity of the Appellant's identification and, in a professional manner. It was not undertaken in futility despite the fact that the conditions for a positive identification prevailed. I find no basis for faulting the identification parade. I am also satisfied that the Appellant was positively identified as having taken part in the robbery.

37. I add that, I concur with the Appellant's counsel that the identification of the Appellant by PW3 was dock identification which in my view was worthless in the circumstances. However, the fact that the Appellant was positively identified by PW2 squarely placed the Appellant at the scene of the robbery in which both PW2 and PW3 were victims.

Whether the doctrine of recent possession was properly invoked by the trial court.

38. On this issue, the Appellant submitted that the trial court wrongfully invoked the doctrine of recent possession and disregarded the Appellant's reasonable and plausible explanation of how he came into possession of the recovered mobile phone. He argued that the trial court analyzed the evidence casually rather than critically. The case and relied on the case of **Eric Otieno Arum v Republic [2006] eKLR** was cited where the Court of Appeal summarized the essential elements of the doctrine of recent possession. Mr. Wangila argued that the Appellant's possession of the phone was not recent enough since the phone was recovered on 15th May, 2012 whereas the robbery took place on 2nd May, 2012. He submitted that the prosecution needed to establish constructive and/or exclusive possession of the stolen phone by the Appellant. He argued that it was possible that the mobile phone may have changed hands during the two weeks period before the Appellant was arrested.

39. He also faulted the investigating officer for failing to produce evidence of the numerous numbers that PW2 claimed used the phone when it was being tracked or any data from Safaricom. Further, the Appellant argued that the threshold required for the explanation is for the same to be reasonably true. In his view, the explanation that he picked the phone in a bus was reasonable.

40. In response, Ms. Nyameto submitted that the Appellant did not give a reasonable explanation as to why he was in possession of the stolen phone. She stated that his explanation that he picked the phone in a bus was doubtful and not plausible.

41. The applicability of the doctrine of recent possession was set out by the Court of Appeal Case in **Isaac Nganga Kahinga alias Peter Nganga Kahinga v Republic [2006] eKLR** as follows:-

"It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved. In other words there must be positive proof, 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 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. In **Malingi v Republic [1989] KLR 225** Bosire, J (as he then was) at Page 227 held thus:

"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."

43. There is no doubt that a Samsung mobile phone was stolen from PW3 during the robbery. It was positively identified to belong to PW3 by checking its IMEI number 356853041619695 which was similar to the one PW2 had been receiving alerts from. It is indisputable that it was found in the exclusive possession of the Appellant upon his arrest about two weeks after the robbery incident. It trite a mobile phone is a fluid object; that is to say that it can quickly change hands from one person to another. However, in this case, the Appellant was positively identified in the ID parade as one of the robbers, having earlier been found with the stole phone. Hence, my candid view is that, applying the rebuttable presumption of the doctrine of recent possession, it was required of him to explain how he came into possession of the phone in rebuttal. Failure to do so would draw an inference that he either stole it or was a guilty receiver. (See *Maingi v R [1989] KLR 221*).

44. In defence, the Appellant stated that he found the mobile phone under a chair in a Githurai bus on 2nd May, 2012 while heading to Nairobi. He stated that a co-passenger who boarded the bus at Alsops area and alighted at Ngara dropped it but he only saw it after the co-passenger had alighted. However, he couldn't call him because the vehicle left so he decided to keep it.

45. This explanation was plainly unbelievable. 2nd May, 2012 is the day when the Appellant alleges that he picked the phone in a matatu was date of the robbery. Furthermore, PW2's testimony was that she started receiving messages from the Samsung mobile phone on the night of 5th May, 2012 which was three days after the Appellant had picked the phone as he alleged. This means that the Appellant had exclusive and continuous possession of the stolen phone from the day it was stolen to the time when he was arrested two weeks after the robbery incident.

46. Therefore, even in the absence of Safaricom data, that he was the one using the numerous sim cards inserted in the phone which would in turn relay the details to PW2. His explanation as to how he came to be in possession was unbelievable and an afterthought meaning therefore that he stole the mobile phone in the robbery or received it knowing it to have been stolen.

47. The trial court thus, correctly invoked the doctrine of recent possession. The totality of my conclusion is that the doctrine recent possession was merely corroborative of the positive identification of the Appellant.

48. Further, the Appellant contended that the trial magistrate shifted the burden of proof to him by rejecting his defence without due consideration and calling upon him to offer an explanation on his possession of the stolen phone. He cited the case of *Thomas Patrick Gilbert Cholmondeley v Republic [2008] eKLR* where it was held that the burden of proof in criminal cases always rests on the prosecution.

49. I differ with this selected interpretation of the law. This is so because I have candidly explained that the burden of explaining how the Appellant came into possession of the stolen mobile phone obtained because of the application of the doctrine of recent possession. I need not further pronounce myself on this. There was no error occasioned by the learned trial magistrate in holding that the Appellant did not give a plausible explanation of how he came into possession of the stolen mobile phone.

50. Further, under **Section 109** of the **Evidence Act** a rebuttable presumption of law is created under which the burden of proving the facts within the knowledge of a person who wants the court to believe in the fact rests on him.

Whether the sentence was proper

51. On this issue, learned state counsel submitted that the Appellant was armed with a pistol and was in the company of others who threatened to kill PW1. Further, that the stolen goods were not recovered save for the mobile phones. She also submitted that the complainants were terrorized by the ordeal and PW2 had a breast-feeding child. As such, she urged the court not to disturb the sentence.

52. The trial magistrate accordingly considered the Appellant's mitigation, the presentencing report as well as the circumstances of the case in sentencing him. The trial court particularly took note of the seriousness of the offence which calls for a deterrent sentence. I cannot add more than the learned magistrate considered. She did not misdirect herself in arriving at the sentence. I therefore, find no reason to interfere with the sentence.

53. In the result, I find that this appeal lacks merit and is hereby dismissed in its entirety. It is so ordered.

Dated and Delivered in Nairobi This 29th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Wangila for the Appellant.

2. Miss Nyauncho for the Respondent.