



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CRIMINAL APPEAL NO. 58 OF 2019**

**BENEDICT OGINGA PANYAKO.....APPELLANT**

**-versus-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the judgment, conviction and sentence of Hon. M. Obiero***

***Principal Magistrate in Migori Chief Magistrate's Criminal Case No. 69 of 2016***

***delivered on 08/07/2019)***

**JUDGMENT**

1. The Appellant herein, *Benedict Oginga Panyako*, was jointly charged in *Migori Chief Magistrates Court Criminal Case No. 69 of 2016* (hereinafter referred to as '**the criminal case**') with his brother one *Dominic Achila Panyako* (hereinafter referred to as '**Dominic**').
2. The accused persons were jointly charged with robbery with violence. Dominic faced an alternative count of handling stolen goods.
3. The accused persons were fully tried. They were then placed on their defences. They variously defended themselves.
4. The trial began before **Hon. E. M. Nyagah, PM** on 16/05/2016. The judicial officer was transferred and the case was taken over by **Hon. M. Obiero, PM. Section 200 CPC** was duly complied with and the case ordered to proceed from where it had reached.
5. By a judgment delivered on 08/07/2019 Dominic was acquitted of the charge of robbery with violence charge as well as the offence of handling stolen goods. The Appellant was found guilty of the offence of robbery with violence, convicted and sentenced to 30 years' imprisonment.
6. The Appellant was dissatisfied with the conviction and sentence. He preferred an appeal. He filed a Petition of Appeal on 24/07/2019. The Appellant mainly challenged his identification as the assailant and that the offence was not proved as required in law. The appellant prayed that the appeal be allowed, conviction be quashed and sentences be set-aside.
7. Counsel for the prosecution opposed the appeal. He submitted that the offence was duly proved and that the appellant was properly placed as one of the robbers. It was further submitted that the defence was considered. Counsel urged this Court to dismiss the appeal by the appellant.
8. Directions were taken and the appeal was disposed of by way of written submissions. The appellant duly complied. The Appellant expounded on the grounds of appeal.
9. As this is the appellant's first appeal, the role of this Court is well settled. It was held in the case of **Okeno vs. Republic (1977) EALR 32** and further in the Court of Appeal case of **Mark Oiruri Mose vs. Republic (2013) eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.
10. For ease of consideration of this appeal, I will reproduce the particulars of the offence of robbery with violence subject of the appeal. The particulars were as follows: -

**On the 20<sup>th</sup> day of December 2015 at total area in Migori sub-county within Migori County of the Republic of Kenya, jointly with others not before court, robbed JARED OOKO OKETCH of motor cycle Reg. No. KMDN 832M make Boxer red in colour valued at Kshs. 95,000/= and a mobile phone make Motorola C155 valued at Kshs. 3,000/= and immediately after the time of such robbery killed the said JARED OOKO OKETCH.**

11. Five witnesses testified in support of the prosecution's case. **PW1** was one *Peter Otieno Odundo* (hereinafter referred to as '**Peter**'). He was a *boda boda* rider. **PW2** was one *Dickson Okinyi Okoth* (hereinafter referred to as '**Dickson**') who was the owner of the motor cycle registration number KMDN 832M make Boxer red in colour (hereinafter referred to as '**the motor cycle**'). *George Odhiambo Odingo* (hereinafter referred to as '**George**') testified as **PW3**. The investigating officer was **No. 73671 Corporal Walter Chepkwony** (hereinafter referred to as '**Corporal Walter**') attached at the DCI Migori who testified as **PW4**. **PW5** was *Dr. Victor Awinda Omolo*, (hereinafter referred to as '**Dr. Omollo**'), a Medical Officer attached at the Migori County Referral and Teaching Hospital.

12. When the accused persons were placed on their defences, Dominic gave a sworn testimony. Dominic called his mother, *Marcella Panyako* (**DW2**) as a witness. The Appellant also gave a sworn defence, but he did not call any witness. The accused persons were partly represented by Counsel at the trial.

13. For ease of the discussion herein, I must revisit the prosecution's case. On 20/12/2015 at around 8:30pm, George was on his way home from Awendo. When he alighted at Migori stage he boarded a *boda boda* to take him home. He stayed near Total area in Migori town. As he approached his home (which was about 5 metres away) he came across another *boda boda* rider who had stopped and was in the company of two other people.

14. George asked the rider of the motor cycle to stop, which he obliged. George asked the three people whether there was any problem. He noted that the two people were armed. The one at the front of the motor cycle had a *panga* whereas the one at the rear was armed with a knife. The two people demanded the rider to give them the motor cycle. The rider refused and said it was better they instead killed him. The two people who were armed then threatened George with death and George ran off. George entered into his compound and watched what happened at the scene. The rider who had carried George also sped off leaving the two attackers and the rider at the scene.

15. Shortly, Peter who had also carried a pillion passenger arrived at the scene. Seeing some confrontation, Peter stopped and enquired whether there was any problem. Peter sensed danger and sped off with his client. They instead returned to the main stage. Peter was sure the rider at the scene must have been injured. The pillion passenger whom Peter carried also vouched the Peter's concern.

16. It was George who witnessed what happened at the scene. The rider was attacked. He was stabbed on the neck with the knife and was also struck on the head with the *panga*. The rider fell unconscious as the attackers sped off with the motor cycle.

17. Peter decided to return to the scene to see if he could assist his fellow rider. Peter returned to the scene with his passenger. As they approached the scene, Dickson appeared and picked the rider who was laying down. He rushed the rider to hospital. Peter and his passenger followed Dickson and the rider to hospital. They learnt that the rider died as he underwent treatment.

18. George then went to Migori Police station and reported the incident.

19. The police commenced investigations and called George to attend an identification parade. George identified the appellant and another person at the parade. George however stated that although the Appellant and Dominic were at the parade he had not seen them at the scene of crime.

20. Corporal William traced a phone which allegedly belonged to the rider who had died. The rider was one *Jared Ooko Oketch* (hereinafter referred to as '**the rider**'). The phone was eventually recovered with Dominic. It was Dominic who stated that he had been given the phone by his brother, the Appellant herein. Dominic led the police to arresting the Appellant. The Appellant and Dominic were then jointly charged. Dr. Omollo confirmed that the rider had died out of bleeding from cuts on the head and neck.

21. With such a background, I will now deal with the aspect of the identification of the assailants. The trial court found that the assailants were not able to be identified at the scene by any of the witnesses. The court however connected the Appellant with the commission of the crime *vide* the doctrine of recent possession. As a result of the centrality of the doctrine in this decision, I deem it fit to revisit the same.

22. The doctrine of recent possession was discussed at length in Court of Appeal at **Nyeri Criminal Appeal No. 4 of 2014 David Mugo Kimunge vs. Republic (2015) eKLR**. The learned Judges greatly rendered themselves as follows: -

**16. The doctrine of recent possession has been applied in numerous decisions of this court and the High Court properly cited the Kahiga case (supra) as one for the elements necessary for proof. We may reproduce the elements from that case:**

*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*

*i) that the property was found with the suspect;*

*ii) that the property is positively the property of the complainant;*

iii) that the property was stolen from the complainant;

iv) 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.”*

17. Has the doctrine been properly summarized in that case, or to ask a more fundamental question, is it a doctrine at all? That question was explored at length in the case of *Kowlyk (supra)*, which involved the offence of ‘break, enter and theft’ under Canadian law, and the only issue was possession of recently stolen items. The items were found in a house the appellant shared with his brother, some in his bedroom. On entering the house with the police, his brother shouted “They got us” and the appellant tried to leave through the window but was restrained. Delivering the judgment for the majority, *McIntyre J.* explored at length the history of the doctrine in various decisions from its roots in the nineteenth century in England and Canada and said in part:

*“Before going further, it will be worthwhile to recognize what is involved in the so called doctrine of recent possession. It is difficult, indeed, to call it a doctrine for nothing is taught, nor can it properly be said to refer to a presumption arising from the unexplained possession of stolen property, since no necessary conclusion arises from it. Laskin J. (as he then was) )Hall J. concurring) in a concurring judgment in *R. v. Graham, supra*, said at p. 215:*

*“The use of the term ‘presumption’, which has been associated with the doctrine, is too broad, and the word which properly ought to be substituted is ‘inference’. In brief, where unexplained recent possession and that the goods were stolen are established by the Crown in a prosecution for possession stolen goods, it is proper to instruct the jury or, if none, it is proper for the trial judge to proceed on the footing that an inference of guilty knowledge, upon which, failing other evidence to the contrary, a conviction can rest, may (but, not must) be drawn against the accused.”*

He went on to point out that two questions, that of recency of possession and that of the contemporaneity of any explanation, must be disposed of before the inference may properly be drawn. He made it clear that no adverse inference could be drawn against an accused from the fact of possession alone unless it were recent, and that if a pre-trial explanation of such possession were given by the accused and if it possessed that degree of contemporaneity making evidence of it admissible, no adverse inference could be drawn on the basis of recent possession alone if the explanation were one which could reasonably be true. Implicit in *Laskin J.’s* words that recent possession alone will not justify an inference of guilt, where a contemporaneous explanation has been offered, is the proposition that in the absence of such explanation recent possession alone is quite sufficient to raise a factual inference of theft.”

18. In the end, the majority of that Supreme Court accepted the following summary of the doctrine:-

*“Upon proof of the unexplained possession of recently stolen property, the trier of fact may - but not must- draw an inference of guilt of theft or of offences incidental thereto. Where the circumstances are such that a question could arise as to whether the accused was a thief or merely a possessor, it will be for the trier of fact upon a consideration of all the circumstances to decide which, if either, inference should be drawn. In all recent possession cases the inference of guilt is permissive, not mandatorily, and when an explanation is offered which might reasonably be true, even though the trier of fact is not satisfied of its truth, the doctrine will not apply.”*

19. There is no significant disparity between the English / Canadian position and what has been accepted as the applicable doctrine in our courts. Applying that learning to the case before us, we are of the view that the inference arising from the unexplained possession of stolen goods is one of fact. The trier of fact in this case was the Principal Magistrate’s court which had the advantage of seeing and hearing the witnesses testify before it. As always, the first appellate and the second appellate courts must of necessity give allowance for this advantage and be slow to interfere unless there was no evidence to support the findings or the findings were perverse. It is also clear from the decisions that the truth of the explanation alluded to in the doctrine is not the standard applicable. Nor is it acceptable that any fanciful or concocted explanation will suffice. The explanation must pass the muster of reasonableness and plausibility. Did it do so in the case before us?

20. Firstly, the trier of fact was positive that the property was in possession of the appellant. That included the property actually recovered from his house and the property he had admittedly given to Ann (PW7). Under the Penal Code, ‘possession’ is defined as either actual or constructive, thus:

(a) “be in possession of” 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 of 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;

21. Secondly, the trial court was positive, upon evaluation of the evidence and credibility of the witnesses, as well as physically checking the clothing items in issue, that they belonged to Igoki. So too the two items claimed and identified by Ileri. The reasoning, which the first appellate court accepted has been reproduced above. Being so satisfied, it would have been unreasonable, indeed non-sensical, for the same court to accept that the same items belonged to another person. The

argument was that the two courts below were seeking a truthful explanation from the appellant. We take a different view. There was no finding that the explanation given by the appellant was untruthful. On the contrary, the two courts weighed the explanation and found it devoid of reasonableness and plausibility. There was no logic in the appellant having in his possession stolen items which were also his!

22. Thirdly, the property was stolen from Igoki and Ileri during a violent robbery. And finally, the time taken, the nature of the items in issue and the time taken to investigate, do not negate the doctrine in this case. The findings on these elements were factual and there was evidential material upon which the findings could reasonable be made.

23. We are satisfied, on the basis of the applicable law, that the two courts below were entitled to arrive at the conclusions they did and we have no reason to disturb them. This appeal is therefore lacking in merit and we order that it be and is hereby dismissed.

23. I will now apply the above four principles in this matter. As to *whether the property was found with the suspect*, I must acknowledge that the property allegedly recovered was a phone. Corporal William described the phone as a Motorola C155S (hereinafter referred to as '**the phone**'). The phone was found with Dominic. The suspect in the context of this case and in relation to the doctrine of recent possession was the Appellant. I therefore answer the first issue in the negative.

24. On whether the phone was positively identified to belong to the rider, Corporal William seemed to answer the issue. Whereas the rider unfortunately died, no one was called to connect the phone with the rider. Not even PW2 whose motor cycle was with the rider. Corporal William stated in cross-examination that he had evidence to confirm that the phone belonged to the rider since the name of the rider was in the data he had collected from Safaricom Limited. The said data was not produced in evidence. It is surprising that the rider did not have closer people who would have settled the issue. Therefore, from the record, I find it hard to hold that the phone belonged to the rider.

25. Given the foregone finding, I likewise settle the issue as to whether the phone was stolen from the rider in the negative. That aside, the time within which the phone was allegedly stolen and when it was recovered is worth a mention. According to Dickson, when he found the rider at the scene he had the phone but not the motor cycle. The rider also had Kshs. 700/=. Dickson however did not state what happened to the phone.

26. The incident occurred on 20/12/2015. The phone was recovered with Dominic on 12/01/2016. That was a period of about 23 days. As stated by the Court in **David Mugo Kimunge vs. Republic** (supra) '*the proof as to time, ..... will depend on the easiness with which the stolen property can move from one person to the other.*'

27. The phone in this case was a common one. It was also not an expensive one. It was valued at Kshs. 3,000/=. It is one such phone that can be easily passed from one person to another. It is possible that in a period of 23 days the phone could have severally changed possession. It may not be easily settled that the one who was found with the phone after such a period was the thief.

28. The foregone analysis does not support the applicability of the doctrine of recent possession in this case. None of the four legal principles was proved by the prosecution. The evidential burden of proof did not therefore shift to Dominic to give an explanation over his possession of the phone. The doctrine could not therefore be a basis for finding a conviction in this matter. As a result, the provisions of **Section 141** of the **Evidence Act, Cap. 80** of the Laws of Kenya were not applicable to connect the Appellant with the commission of the offence.

29. Apart from the doctrine of recent possession, I am satisfied that the Appellant had a valid defence. He denied taking part in the robbery. He stated that he had picked up the phone on the day of the robbery as he went home. He kept the phone and readily assisted Dominic who had lost his phone. The defence by the Appellant illuminates what Dickson stated. It was Dickson who confirmed that the rider had the phone and Kshs. 700/= when he collected and rushed him to hospital. By then the motor cycle was long gone. It is therefore reasonably possible that the phone dropped at the scene as Dickson rushed the rider to hospital and the Appellant truly picked it up. That is a reasonable and plausible explanation.

30. The prosecution did not hence connect the Appellant with the commission of the offence. The conviction cannot legally stand and must be quashed.

31. Apart from the issue of the doctrine of recent possession I am obliged to state that there was a serious miscarriage of justice in the manner in which the Appellant conducted his defence. The criminal case came up for defence hearing on 01/04/2019. The Appellant was absent. The hearing however proceeded. Dominic tendered his defence and implicated the Appellant.

32. The Appellant explained his absence on 31/05/2019 which the court accepted. The Appellant had been involved in an accident. The court allowed the Appellant to tender his defence. He gave a sworn statement. He was however not offered for any cross-examination to the prosecution or Dominic. Of much essence however was the fact that the Appellant was not accorded an opportunity to cross-examine Dominic who then was before Court. It was Dominic who implicated the Appellant. Dominic was hence to be recalled for cross-examination to accord the Appellant an opportunity to challenge the adverse evidence against him. Failure to observe such a cardinal principle of fair trial under **Article 50** of the **Constitution** rendered the trial subject to setting aside. Having said so, I must confirm that the appeal did not succeed on this issue. I just found it prudent to raise the issue as a guide to the need to ensure that trials conform to the wider dictates of the **Constitution** and the law.

33. Coming to the end of this decision, I hereby allow the appeal, quash the conviction and set-aside the sentence. The Appellant shall forthwith be set at liberty unless otherwise lawfully held.

It is so ordered.

**DELIVERED, DATED and SIGNED at MIGORI this 22<sup>nd</sup> day of May,2020.**

**A.C. MRIMA**

**JUDGE**

**Judgment delivered in open Court and in the presence of: -**

**Benedict Oginga Panyako** the Appellant in person.

**Mr. Kimanthi** Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

**Evelyne Nyauke** – Court Assistant