REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CRIMINAL APPEAL NO. 59 OF 2019

(Consolidated with Criminal Appeal No. 60 of 2019)

MARK AYONGA OYOMO *alias* TABU.....1ST APPELLANT

MOSES ONYANGO.....2ND 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. 78 of 2017 delivered on 8/07/2019)

JUDGMENT

Background:

1. The Appellants herein were part of four accused persons who were jointly charged in *Migori Chief Magistrates Court Criminal Case No. 78 of 2017* (hereinafter referred to as '**the criminal case'**). The accused persons were *Alfred Odhiambo Onyango, Moses Onyango, Zadock Odanga Okumu* and *Mark Ayongo Oyombo alias Tabu* respectively.

2. All the accused persons faced five counts of robbery with violence. *Alfred Odhiambo Onyango, Moses Onyango* and *Zadock Odanga Okumu* faced a sixth count of handling stolen goods.

3. Zadock Odanga Okumu died during the trial. The rest of the accused persons were fully tried. They were then placed on their defences. They variously defended themselves.

4. It is imperative to note that the trial began before **Hon. E. M. Nyagah, PM** on 21/02/2018. 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 start afresh. At the start of the fresh hearing, the prosecution made an application for review of the order that the case starts afresh since the witnesses who had earlier on testified were Tanzanians and had left the jurisdiction of the court. It was hence not possible to avail them before court. The application was not opposed by any of the then accused persons. The court reviewed the orders accordingly and ordered the case to proceed from where it had reached.

5. By a judgment delivered on 08/07/2019 *Alfred Odhiambo Onyango* was acquitted of all the robbery of violence charges. He was however found guilty of the offence of handling stolen goods, convicted and sentenced to 2 years' probation. *Moses Onyango* and *Mark Ayongo Oyombo alias Taabu* were found guilty of counts 1, 2, 3 and 4 and duly convicted. They were sentenced to serve 30 years in prison on each count. The sentences were to run concurrently.

6. Moses Onyango and *Mark Ayongo Oyombo alias Tabu* were dissatisfied with the conviction and sentences. They preferred **Criminal Appeal No. 60 of 2019** and **Criminal Appeal No. 59 of 2019** respectively.

7. The appeals were consolidated by an order of this Court and **Criminal Appeal No. 59 of 2019** became the lead appeal. *Mark Ayongo Oyombo alias Tabu* became the first appellant herein and *Moses Onyango* appeared as the second appellant herein. I will henceforth refer to *Mark Ayongo Oyombo alias Tabu* as '**the first appellant**' and to *Moses Onyango* as '**the second appellant**'.

The Appeal:

8. The first appellant filed his Petition of Appeal on 24/07/2019. He contended that the charges were not proved as required in law, that the evidence relied upon by the trial court to convict him was by a co-accused, that his defence was not considered and the language used during the trial was foreign to him.

9. The second appellant also filed his Petition of Appeal on 24/07/2019. He contended that he was not properly identified as one of the robbers, that the investigations were incomplete, that the language used during the trial was foreign to him, that the case did not start *de novo* despite his request and that he was kept in police custody for more than 24 hours from arrest.

10. The appellants prayed that the appeals be allowed, convictions be quashed and sentences be set-aside.

11. Directions were taken and the appeals were disposed of by way of written submissions. The appellants duly complied. They variously expounded on their grounds of appeal.

12. The Counsel for the prosecution supported the appeal by the first appellant. He however opposed the appeal by the second appellant. He submitted that the offences were duly proved and the second appellant 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 second appellant.

Analysis and Determinations:

13. 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.

14. For ease of consideration of this appeal, I will reproduce the particulars of the five counts subject of the appeal. They were as follows: -

Count I:

On the 29th day of Jnauary, 2017 at 2:00 a.m at VAT GOLD Liching Plant, Masara sub-location in Suna West sub-county within Migori County jointly with others not before the court while armed with offensive weapons namely pangas, iron bars and rungus robbed Dickson Julius Nyameka Kshs. 206,000/=, Tsh 30,000/= equivalent to Kshs. 1,500/= and immediately before the time of the robbery wounded the said Dickson Julius Nyameka

Count II:

On On the 29th day of Jnauary, 2017 at 2:00 a.m at VAT GOLD Liching Plant, Masara sub-location in Suna West sub-county within Migori County jointly with others not before the court while armed with offensive weapons namely pangas, iron bars and rungus robbed Okumu Kelvin Michael two mobile phones, one Tecno serial no. 359975078265915 valued at Kshs. 5,000/= and Samsung mobile phone serial number 359085062757461 valued at Kshs. 8,000/= plus cash Kshs. 15,800/=, identification card, Voter's Card, NSSF Card all valued at Kshs. 28,800/= and immediately before the time of such robbery wounded the said OKUMU KELVIN MICHAEL

Count III:

On On the 29th day of Jnauary, 2017 at 2:00 a.m at VAT GOLD Liching Plant, Masara sub-location in Suna West sub-county within Migori County jointly with others not before the court while armed with offensive weapons namely pangas, iron bars and rungus robbed MOHAMED MFLAME KAVEMBE cash Kshs. 25,000/= and a pair of black leather shoes all valued at Kshs. 27,000/= and immediately before the time of such robbery wounded the said MOHAMED MFLAME KAVEMBE.

Count IV:

On On the 29th day of Jnauary, 2017 at 2:00 a.m at VAT GOLD Liching Plant, Masara sub-location in Suna West sub-county within Migori County jointly with others not before the court while armed with offensive weapons namely pangas, iron bars and rungus robbed ELISHA PETER one Samsung power bank, one mobile phone make FERO Serial no. 352128081152366 valued at Kshs. 4,000/=, and a small radio all valued at Kshs. 6,000/= and immediately before the time of such robbery wounded the said ELISHA PETER.

Count V:

On On the 29th day of Jnauary, 2017 at 2:00 a.m at VAT GOLD Liching Plant, Masara sub-location in Suna West sub-county within Migori County jointly with others not before the court while armed with offensive weapons namely pangas, iron bars and rungus robbed Masoud Mohamed 20 litres of sulphuric acid, one mortar, one heater, cash Tsh 100,000 equivalent to Kshs 5,000/=, cash Kshs 8,000/=, one mobile Huawei serial no. 869826026101376/ 869826026116382 valued at Ksh 4,500/=, all valued at Kshs 17,500/= and immediately before the time of such robbery wounded the said MASOUD MOHAMED.

15. Eleven witnesses testified in support of the prosecution's case. **PW1** was one **Daniel Ochieng**. He owned a gold site at Masara sub-county within Migori County. **PW2** was **Elisha Peter**. He was the complainant in count IV. **Eveline Atieno** testified as **PW3.** She was a

Watch lady at the gold site. **PW4** was the complainant in count I. He was **Dickson Julius Nyameka**. **Raphael Onyango** was the owner of motor vehicle registration number KBQ 778V which was driven by Alfred Odhiambo Onyango**,** the first accused person. He testified as **PW5.** A Clinical Officer from Migori County Teaching and Referral Hospital testified as **PW6.** The investigating officer was **No. 60902 Cpl. John Ndungu** attached at DCI Migori. He was **PW7. PW8** was the complainant in count II. He was **Okumu Kelvin Michael.** One of the arresting officers testified as **PW9**. He was **No. 225468 Cpl. Vincent Ambrose Agundei.** Another arresting officers testified as **PW10**. He was **No. 218863 IP Joseph Tongik** and **No. 236200 IP Maurice Amwayi** who was then stationed at DCI Migori conducted an identification parade for Moses Onyango. He testified as **PW11**.

16. When the accused persons were placed on their defences, Alfred Odhiambo Onyango gave a sworn testimony. The first appellant gave an unsworn defence. The first appellant called his wife as a witness. She testified as **DW3**. The second appellant gave a sworn defence. He did not call any witness.

17. The accused persons were all unrepresented at the trial. For the purposes of this judgment I will refer to the witnesses according to the sequence in numbers in which they testified before the trial court.

18. I will now, *albeit* briefly, revisit the prosecution's case. In the early hours of 29/01/2017 a gold site at Masara was invaded by armed robbers. PW2, PW4, PW8 and others were accosted by the robbers. They were variously assaulted and several items including money stolen. They were eventually locked inside the store.

19. Awino (not a witness) called PW1 as the ordeal was on-going. PW1 immediately called and informed the police. PW10 was called by *Sergeant Oguta* (not a witness) at around 04:00am and informed of the robbery. PW10 mobilized his colleagues including PW9 and rushed towards the scene. While on the way PW10 received another call from one *Nixon Odhiambo* (not a witness) who was at Masara that the assailants left the scene in a vehicle and were heading towards Migori direction. PW10 and his team managed to intercept the vehicle at Mokuro. It was vehicle registration number KBQ 778V owned by PW5. Some police officers from Masara were also pursuing the assailants. They joined their colleagues at Mokuro and conducted a joint search on the vehicle.

20. The vehicle had three occupants who were Alfred Odhiambo Onyango, the second appellant and Zadock Odanga Okumu. Zadock Odanga Okumu attempted to escape but was apprehended. Several items were found in the car. An inventory was taken of all the items found in the moto vehicle. Some of the items were later identified by the complainants as those stolen from the scene of robbery.

21. The occupants of the motor vehicle were interrogated by the police on their whereabouts. They all revealed that they hailed from Awendo town. When asked how they came to know of the gold site at Masara, Zadock Odanga Okumu (now dead) disclosed that they had been led by the first appellant who was a resident of the area and that the first appellant had fled the scene using a motor cycle. The police were led by the said Zadock Odanga Okumu to the home of the first appellant. They found the first appellant asleep in his house. He was woken up and arrested. The suspects were led to Migori Police Station where they were booked into police cells.

22. The complainants were taken to hospital and later issued with P3 Forms. PW6 produced the treatment notes and the P3 Forms for PW2, PW4, PW8 and Mohammed Mfalme. Mohammed Mfalme did not testify. He was the complainant in respect of count III.

23. PW7 investigated the case. He visited the scene and recorded statements from various potential witnesses. He requested PW11 who conducted an identification parade for the second appellant. PW11 conducted the parade on the very day, that is on 29/01/2017. The second appellant was positively identified by touching by PW2, PW8 and Mohammed Mfalme. The accused persons were then formally charged.

24. I will first deal with the appeal by the first appellant.

25. The main contention by the first appellant was that he was convicted on allegations that his co-accused, Zadock Odanga Okumu, told the police that he was the one who led the rest of the robbers to the gold site.

26. The said Zadock Odanga Okumu did not live to testify as much. He died before he tendered his evidence. It was therefore PW9 and PW10 who told the court what Zadock Odanga Okumu had told them. No written statement of Zadock Odanga Okumu was produced in evidence.

27. Zadock Odanga Okumu was hence an accomplice pursuant to **Section 141** of the **Evidence Act, Cap. 80** of the Laws of Kenya. The provision states as follows: -

> **An accomplice shall be a competent witness against an accused person; and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice.**

28. Since Zadock Odanga Okumu died before he testified, the prosecution still had refuge in **Section 33(c)** of the **Evidence Act**. The section states as under: -

> **33. Statements, written or oral or electronically recorded, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured, without an amount of delay or expenses which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases -**
>
> (c) against the interest of the maker
>
> When the statement is against the pecuniary or proprietary interest of the person making it, or when if true, it would expose him or

would have exposed him to a criminal prosecution or to a suit for damages;

29. The oral statement by Zadock Odanga Okumu which led to the arrest of the first appellant was therefore admissible in evidence.

30. Having so said, the issue of evidence of an accomplice has been subject of several appeals before the Court of Appeal. The Court of Appeal, ever since, firmly laid the applicable principles in such instances. In **Kinyua vs. Republic (2002) 1 KLR 256** the Court held as follows: -

> **i. The firm rule of practice is that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if it is satisfied that the accomplice witness if telling the truth upon the aid assessors, on the damages of doing so.**
>
> **ii. Before corroboration can be considered, a court of law dealing with an accomplice witness must first make a finding as to the credibility of the witness. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence and unless there is some other evidence, the prosecution must fail. If the court decides that the witness though an accomplice witness, is credible then the court goes further to decide whether it is prepared to base a conviction on his evidence without corroboration. The court must direct and warn itself accordingly.**
>
> **iii. If the Court decides that the accomplice witness' evidence, though credible, requires corroboration, the court must look for, find and identify the corroborative evidence.**
>
> **iv. The trial judge did not explicitly direct himself and the assessors on the nature of accomplice evidence and the weight to be given to it as required by law. However, this omission would not invalidate the trial and the conviction in the circumstances of this case.**

31. On the nature of the corroboration, the Court of Appeal in **Karanja & Another vs. Republic (1990) KLR 589** held as follows: -

> **… the corroboration which is required of an accomplice's evidence is in the nature of some independent additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon.**

32. Applying the foregone principles to this case, there is no doubt that the accomplice did not testify. The oral statement of the accomplice was admitted in evidence under **Section 33(c)** of the **Evidence Act**. Such circumstances definitely called for corroboration.

33. There is no any other evidence connecting the first appellant with the commission of the offences. No recoveries of any of the stolen items were made on him. The first appellant was also not identified by any of the witnesses. The evidence of PW9 and PW10 was hence not corroborated as required in law. As such, no sound conviction would arise from the uncorroborated evidence of PW9 and PW10. I hereby agree with the prosecution in supporting the appeal.

34. Respectfully, the finding by the learned trial court that '*I am of the finding that the fact that the accused person did not testify against the 4th accused person [the first appellant] is not fatal to the prosecution's case as against the 4th accused person'* can only be erroneous in law. The conviction against the first appellant cannot stand and is hereby quashed. The sentences are hereby set-aside.

35. Turning to the appeal by the second appellant, the first stop is the evidence of PW11. It was the evidence of PW11 that he conducted an identification parade for the second appellant. The second appellant was positively identified by PW2, PW4, PW8 and Mohammed Mfalme.

36. As said, Mohammed Mfalme did not testify. PW8 testified that when he was accosted by the assailants he was not able to identify any of them. He however further testified that he took part in an identification parade at the police station where he was *'only able to identify Atonga, that is the 3rd accused.'*

37. I note that by the time PW8 testified, the original third accused person, Zadock Odanga Okumu, had died and the fourth accused person (now the first appellant) must have appeared as the third accused person. In any event PW11 did not conduct any parade for either Zadock Odanga Okumu or the first appellant. The evidence of PW8 on the identification parade did not therefore aid the prosecution in any way.

38. PW2 also testified on the identification of the assailants. He was woken up by people who were armed. He was sleeping with a workmate one Mohammed. They were assaulted and asked to produce the keys to the store. Since they did not have the keys they were locked up in the store together with one of their other workmates. PW2 stated that he had not seen the assailants before. He did not testify to have attended any identification parade. However, he insisted that he was sure that he saw the second appellant and Zadock Odanga Okumu being part of the assailants.

39. PW4 also testified that he was asleep when he was woken up by screams by PW2 and Mohammed as they were assaulted. He had slept with his colleagues. The assailants then cane to where they were and they were also assaulted. PW4 managed to identify the second appellant and Zadock Odanga Okumu.

40. I will now subject the foregone to the settled legal principles guiding identification. The Court of Appeal in **Wamunga vs Republic (1989) KLR 426** stated as follows: -

It is trite law that where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of conviction.

41. It was also held in **Nzaro vs Republic (1991) KAR 212** and **Kiarie vs Republic (1984) KLR 739** by the Court of Appeal that evidence of identification/recognition at night must be absolutely watertight to justify conviction. In **R –vs- Turnbull & Others (1973) 3 ALL ER 549**, which decision has been generally accepted and greatly used in our judicial system, the Court considered the factors that ought to be considered when the only evidence turns on identification. The Court said:

…..... 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 with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? 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 the 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 his actual appearance?.... Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

42. The foregone does not mean that there cannot be safe recognition even at night. The Court of Appeal in **Douglas Muthanwa Ntoribi vs Republic (2014) eKLR** in upholding the evidence of recognition at night held as follows: -

On the issue of recognition, the learned Judge evaluated the evidence on record and emphasized that PW1 testified: -

I flashed my torch and I saw the accused he was 2 meters away from me. That the appellant was not only seen, but was positively and correctly identified or recognized by PW1, the complainant.

The Learned Judge further noted that the complainant testified he used to see the appellant in town. It is our considered view that from the evidence on record, the identification of the appellant based on recognition was free from error...

43. Again, the Court of Appeal in **Criminal Appeal No. 274 and 275 of 2009 at Eldoret in Peter Okee Omukaga & Another vs Republic (unreported)** had this to say on the evidence of recognition at night: -

We have re-examined the evidence upon which that conclusion was made, and we find that it was well founded. We have no doubt whatsoever that Francis, John and Rose were familiar with the appellants; that Francis and John had known them by appearance as 'neighbours from the village', that they had played football with them long time ago, and that their voices were so familiar to them. Accordingly, we have no reason to disturb that finding and we dismiss that ground of Appeal. We also reject the argument that failure to hold an identification parade, and the non- recovery of the stolen articles made conviction unsafe. As this was a case of identification by recognition, an identification parade was unnecessary. The non-recovery of the stolen items did not in any way point to the innocence of the appellants.

44. The trial court was not persuaded by the evidence of PW2, PW4 and PW8 that they identified the second appellant at the scene of robbery. None of the witnesses knew any of the attackers before the incident. Some of the attackers were hooded. In view of the foregone guidance, I concur with the trial court on its finding that '*there is no evidence sufficient to demonstrate that any of the accused persons was identified at the scene.'*

45. The trial court however found that the second appellant was in possession of recently stolen goods. The court was guided by the decision by **Bosire, J** (as he then was) in **Malingi vs. Republic (1989) KLR 225** in arriving at the finding that the second appellant was one of the robbers. I will briefly re-look at the said doctrine.

46. 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 roperty of the complainant;

iii) that the property was stolen from the complainant;

v) 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, Mclntyre 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 put that two questioned, that of recencyof 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 decided 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 / Candaian 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 thedecisions 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 either 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 Ireri. 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 Ireri 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.

47. The trial court considered the fact that the robbery was at around 3:00am and the goods were recovered by 5:00am. That was a period of about two hours. The court was also satisfied that the goods which were recovered from the motor vehicle were among those stolen from PW2, PW4 and PW8 and they were found in possession of the second appellant. The court also considered the defence by the second appellant.

48. Applying the foregone in this case, I find that the tier of fact was the trial court. The court was satisfied that the goods were in possession of the second appellant. There was no doubt that some of the goods which were recovered from the motor vehicle had been stolen from PW2, PW4, PW8 and others. The goods were positively identified and that was not disputed. The second appellant was with Zadock Odanga Okumu when Zadock Odanga Okumu ordered the driver of the motor vehicle to open the car boot so as to load the goods. The second appellant not only witnessed the loading of the goods, but he was well aware of what they had carried in the motor vehicle with his companion. Infact, it was the second appellant who returned to the motor vehicle with Zadock Odanga Okumu.

49. Coupled with the definition of '*possession*' under the **Penal Code**, I find that the second appellant was in possession of the recently stolen goods. The facts therefore attained the legal bar for the presumption of the rebuttable doctrine of recent possession. As such, the evidential burden of proof shifted to the second appellant.

50. The standard of proof in discharging that burden of proof on the part o the second appellant must be on balance of probability. As the Court in **David Mugo Kimunge** (supra) stated *'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.'*

51. What explanation did the second appellant give? The second appellant distanced himself from the recovered items. He contended that he was transporting two sacks of '*omena*' from Muhuru to Awendo and that when the motor vehicle was intercepted by the police he was not allowed to collect his luggage. Instead, he was arrested and taken to the police station.

52. The police prepared an inventory of the goods which were in the motor vehicle at the interception. The inventory was produced as Exhibit 28. I have carefully gone through it. It was signed by among others the second appellant herein. The inventory did not include any sacks of *omena*. Further, the production of the inventory in evidence was not challenged in any way. Therefore, the explanation by the second appellant was devoid of reason and was not persuasive. It was improbable that the second appellant carried sacks of *omena* in the motor vehicle. The explanation did not pass '*the muster of reasonableness and plausibility*.'

53. Having so found and in view of the period within which the second appellant was found with the stolen goods the presumption that the second appellant was among the robbers must apply.

Were the charges proved in law?

54. The starting point on this discourse is what the law provides on the offence of robbery with violence. The offence of robbery with violence is a creation of **Sections 295 and 296(2)** of the **Penal Code**. For clarity, I shall reproduce the said sections as tailored: -

295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

55. From the foregone provisions, the offence of robbery with violence is made up of two parts. The first part is the '**robbery'** and the other part is the '**violence'**.

56. Robbery is committed when a person steals anything capable of being stolen and immediately before or after the theft the person uses actual violence or threatens to use actual violence on the holder of the thing or the property so as to either obtain or retain the stolen thing or so as to prevent or overcome any resistance thereto. Two things must therefore be proved for the offence of robbery to be established: **Theft** and **the use of or threat to use actual violence.**

57. On the other hand, the offence of **robbery with violence** is committed when robbery is proved and further if any one of the following three ingredients are established: -

(a) The offender is armed with any dangerous or offensive weapon or instrument, or

(b) The offender is in the company of one or more other person or persons, or

(c) The offender at or immediately before or immediately after the time of the robbery, wounds, beats, strikes or uses any other personal violence to any person.

58. The second appellant was found guilty of counts 1, 2, 3 and 4. He was accordingly convicted. The complainant in count III was one *Mohammed Mfalme Kavembe*. That complainant did not testify. The second appellant could not therefore be convicted on the count III.

59. PW2, PW4 and PW8 testified on how they were ambushed, assaulted and injured. They also lost their goods including money and other valuables. They did not consent to the taking away of their goods and money which some were found in possession of the second appellant and his accomplices. Those acts on the part of the appellants constituted theft.

60. The aspect of use of actual violence on the complainants was equally demonstrated. The record is clear that the attackers pounced on the complainants and injured them. The complainants were overpowered by the robbers. The complainants' evidence on that aspect was corroborated by PW6, a Clinical Officer who produced the P3 Form and treatments from the Migori County Teaching and Referral Hospital for the complainants. The complainants were variously injured.

61. There is no doubt from the record that the attackers were more than one, were armed and they struck, beat and used personal violence on the complainants. That settles the requirements under **Section 296(2)** of the **Penal Code**.

62. Before I come to the end of this discussion, I must consider some three other grounds raised by the second appellant. The first one was the language. The second appellant contended that he did not understand the language used during the trial. The charge sheet indicated that the second appellant was a Luo. The proceedings were conducted in English/Kiswahili and Dholuo languages. The second appellant did not raise the issue of the language throughout the trial. I find that the ground is an afterthought and is hereby dismissed.

63. The second issue was that that the criminal case did not start *de novo* despite the second appellant so requesting. I have stated elsewhere above that the trial court allowed the case to start *de novo* in the first instance. However, an application for review of that order was made by the prosecution due to the unavailability of witnesses who had left the jurisdiction of the court. The second appellant did not oppose the application. Given such background, the second appellant cannot now turn around and challenge what he admitted at trial. The last issue was that the second appellant was held for more than 24 hours at the police station. I have severally held the position that such a ground cannot upset a conviction unless it can be demonstrated that the impugned holding of an accused person vitiated the trial. Generally, the right province for redress is damages. In this case the second appellant only stated that he was held by the police for more than 24 hours. That was all. The second appellant did not demonstrate how the trial was vitiated. The ground also fails.

64. This Court hence comes to the finding that the offence of robbery with violence was proved as against the second appellant in respect to counts 1, 2 and 4. The second appellant was properly found guilty and convicted. The appeal on conviction in respect to counts 1. 2 and 4 is hereby disallowed.

Sentence:

65. The second appellant also appealed against the sentence. The High Court in **Wanjema v. Republic (1971) EA 493,** rightly so, laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

66. The second appellant contended that the sentence was very harsh and excessive. I have looked at the sentencing proceedings. The court received the mitigations by the second appellant and considered them in sentencing. The court settled for a custodial sentence of 30 years' imprisonment in respect of counts 1, 2, 3, 4 and 5.

67. Conviction is always precedent to sentencing. No one can be sentenced if in the first instance he/she/it not found guilty of an offence known in law and convicted. In this case the trial court found the second appellant guilty and convicted him in respect to counts 1, 2 and 4. The court however sentenced him in respect to counts 1, 2, 3, 4 and 5. The sentences on counts 3 and 5 have no legal leg to stand on and are hereby set-aside.

68. As to whether the sentence of 30 years' imprisonment in respect to counts 1, 2 and 4 ought to be interfered with, I have considered all the issues in this matter including the circumstances within which the offences were committed. The sentencing court took into account the relevant issues and I do not see how the court erred. The court further rightly ordered the sentences to run concurrently.

Conclusion:

69. On the basis of the foregone analysis this Court makes the following final orders: -

a. The appeal by the first appellant herein, *Mark Ayongo Oyomo alias Tabu*, is hereby allowed. The convictions are quashed and the respectively sentences set-aside. The first appellant shall forthwith be set at liberty unless otherwise lawfully held.

b. The appeal by the second appellant herein, *Moses Onyango*, is partly allowed. The convictions in respect to counts 1, 2 and 4 are hereby affirmed. The conviction in respect to count 3 is quashed. On sentence, the sentences in respect to counts 3 and 5 are hereby set-aside and the concurrent sentences of 30 years' imprisonment in respect to counts 1, 2 and 4 are affirmed.

It is so ordered.

DELIVERED, DATED and SIGNED at MIGORI this 22nd day of May, 2020.

A.C. MRIMA

JUDGE

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

Mark Ayongo Oyomo *alias* **Tabu** and **Moses Onyango** the Appellants 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