



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NO. 65 OF 2017**  
*(An Appeal arising out of the conviction and sentence of*  
*Hon. E.S. Olwande – SPM delivered on 21<sup>st</sup> April 2017*  
*in Makadara CMC. CR. Case No.239 of 2014)*  
**EDWIN MUCHIRI WAMBUI.....APPELLANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Edwin Muchiri Wambui was charged with **robbery with violence** contrary to **Section 296(2)** of the **Penal Code**. The particulars of the offence were that on 7<sup>th</sup> January 2014 at Ngara Railway Quarters, Starehe in Nairobi County, the Appellant jointly with others not before court, while armed with dangerous weapons namely a pistol robbed Stanley Kipruto of a laptop make Toshiba, a cellphone make Samsung, holy bible, identity card No.[Particulars withheld, Sacco Link Card No. [Particulars withheld], NHIF Card No.[Particulars withheld], voters card No.[Particulars withheld], KPLC Human Resource card, Uchumi Card No.[Particulars withheld], a wallet and a Laptop Charger all valued at Kshs.100,000/-, the property of Stanley Kipruto and immediately after the time of such robbery killed the said Stanley Kipruto (the deceased). When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to death. The Appellant was aggrieved by his conviction and sentence. He has filed an appeal to this court.

In his petition of appeal, the Appellant raised several grounds of appeal challenging his conviction and sentence. He was aggrieved that he had been convicted on the basis of evidence that did not establish his guilt to the required standard of proof beyond any reasonable doubt. He was aggrieved that he had been convicted on the basis of evidence that was as a result of shoddy investigations that did not take into consideration the fact that vital and crucial witnesses were not called to testify in the case. The Appellant faulted the trial magistrate for convicting him on the basis of a defective charge that did not support the evidence that was adduced by the prosecution witnesses. The Appellant took issue with the fact that he had been convicted on the basis of the evidence of recovery of the stolen items yet no evidence had been adduced to connect him with the said recovered items. He was finally aggrieved that he had been

convicted on the basis of evidence that was wrongly admitted and further on account of the failure by the trial court to take into consideration that no one had adduced evidence to place him at the scene of crime. In the premises therefore, the Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence that was imposed upon him.

During the hearing of the appeal, the Appellant presented to court written submission in support of his appeal. He urged the court to allow his appeal. Ms. Akunja for the State made oral submission opposing the appeal. She submitted that the prosecution had adduced sufficient culpatory evidence to connect the Appellant to the crime. In particular, she submitted that the prosecution had adduced evidence that triggered the application of the doctrine of recent possession to connect the Appellant to the crime. She urged the court to dismiss the appeal as it lacked merit. This court shall revert to the arguments made on this appeal after briefly setting out the facts of the case.

The deceased was at the material time an employee of Kenya Power and Lighting Company Limited. He resided at Ngara Railway Quarters. His neighbour and landlord was PW1 John Ndunde Masaku. PW1 was also the deceased friend. PW1 testified that prior to the fateful date of 6<sup>th</sup> January 2014, the deceased had introduced the Appellant to him as his friend. The deceased told PW1 that he would host the Appellant on Wednesdays and Fridays, because on those days, they attended church functions. PW1 recalled that on 6<sup>th</sup> January 2014 at about 5.00 p.m., the deceased arrived home and took a bath. On his way to the bathroom, he told PW1 that he would be passing by his house to take a cup of tea. The deceased then went to his house. At about 1.00 a.m. on 7<sup>th</sup> January 2014 he heard some commotion emanating from the deceased's house. The deceased's house and that of PW1 was separated by plywood partition.

According to PW1, it was as if there was a struggle in the house. He did not hear any voices. He then heard a sound as if someone was being strangled. He rushed out of his house and raised alarm. He was able to wake up his neighbours. They accessed the deceased's house but did not see anything because it was dark. PW1 used his phone's flashlight to illuminate the house. He saw the deceased lying on a mattress on the floor. There was blood near his body. PW1 reported the incident to the police at Pangani Police Station. The police arrived at the scene with PW1. PW1 saw the police turn over the body of the deceased. That was the time he saw that the deceased had a necktie tightly wound around his neck. It was a black necktie. The deceased was dead. The body of the deceased was taken to the City Mortuary for postmortem.

The police immediately commenced investigations. PW3 Corporal Richard Wesonga, then attached to the Directorate of Criminal Investigations Starehe Division, Nairobi was assigned to investigate the case. He testified that he went to the City Mortuary to view the body of the deceased. He noted that the deceased had a black necktie tied around his neck. He recorded the statements of the witnesses. He was able to establish that the deceased's mobile phone and other property had been stolen by those who had killed him. He sent the particulars of the mobile phone to Safaricom, the mobile provider so that the whereabouts of the phone could be traced. He also sought the assistance of Criminal Intelligence Services to track the phone. He was informed that the mobile phone had been traced to Dandora area. The mobile phone had been used to pay the Kenya Power bills for a house No.A54 in Dandora area.

On 8<sup>th</sup> January 2014 at 7.00 a.m., PW3 accompanied by his fellow police officers went to the house. They found the Appellant with his girlfriend. They conducted a search in the house. They were able to recover the following: A NHIF card No.[Particulars withheld] in the name of the deceased, a Samsung phone Black in colour belonging to the deceased, A Sacco Link card in the name of the deceased, the deceased's National Identity Card, the deceased's staff identity card, the deceased's voter's card, a loyalty card issued by Uchumi Supermarket in the name of the deceased, a black bound bible with the name of the deceased inscribed in it, a black wallet which belonged to the deceased, a Toshiba laptop red in colour belonging to the deceased, a laptop charger, a DVD machine make Philips which belonged to the Appellant, Nokia and LG cellphones which belonged to the Appellant.

All these items were inventoried and were signed by the Appellant, his girlfriend and the police who were present. These items were produced as exhibits during trial. PW3 testified that his investigations revealed

that the Appellant was a friend of the deceased. They have been attending church together. The Appellant did not give an explanation how he came to be in possession of the deceased's belongings. His investigations also revealed that the Appellant had visited the deceased severally in his residence prior to his death. According to PW3, it was the Appellant who robbed and then killed the deceased.

Postmortem was conducted on the body of the deceased at City Mortuary by Dr. Ndegwa. His report was produced on his behalf by Dr. Oduor Johansen. The postmortem examination established the deceased's cause of death to be asphyxia due strangulation. The body of the deceased was identified by PW2 Rachel Koech, the mother of the deceased. The postmortem report was produced as an exhibit in the case.

When the Appellant was put on his defence, he denied committing the offence. He testified that his arrest and subsequent charge for the offence was as a result of his refusal to succumb to extortion by the police. He testified that he was arrested on 11<sup>th</sup> January 2014 while he was walking home with his friends. The police stopped them, then demanded to be bribed. He refused to bribe the police. He was taken to Pangani Police Station where he was detained. The others who were with him were released after they had bribed the police. He was surprised when he was charged with the present offence which he had nothing to do with or had any knowledge of.

This being a first appeal, it is the duty of this court to reconsider and to re-evaluate the evidence adduced during trial so as to reach its own independent determination whether or not to uphold the conviction of the Appellant. As was held by the Court of Appeal in **Njoroge –Vs- Republic [1987] KLR 19 at P.22:**

***“As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well as on the questions of facts as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen or heard the witnesses and to make due allowance in this respect (see Pandya v R [1957] EA 336, Ruwala v R [1957] EA 570)”.***

The issue for determination by this court is whether the prosecution established to the required standard of proof beyond any reasonable doubt the charge of robbery with violence contrary to **Section 296(2)** of the **Penal Code** that was brought against the Appellant.

On re-evaluation of the evidence adduced before the trial court, the decision of the trial court and the submission made on this appeal, it was clear to this court that the trial magistrate convicted the Appellant on application of the doctrine of recent possession. As correctly observed by the Appellant, no one saw the Appellant at the scene of the robbery. Indeed, it was PW1's testimony that he only heard commotion in the house of the deceased, and when he responded, he saw no one else other than the deceased in the house. At that time, the deceased had already been strangled and met his death. It was the prosecution's case that the deceased's property which was robbed from him on the material night that he was killed were found in the Appellant's possession after the police had sought the assistance of Safaricom, a mobile phone provider to track and trace the whereabouts of the deceased's mobile phone which had been robbed from him when he was killed. The issue for determination by this court is whether the trial court properly applied the doctrine of recent possession to reach the finding that it was the Appellant who robbed and killed the deceased.

The principle to be considered by the court in determining under what circumstances the doctrine of recent possession may be applied is settled. In the case of **Malingi –Vs- Republic [1989] KLR 225** at Page 227, Bosire J (as he then was) 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.”*

The Court of Appeal in Athuman Salim Athuman –vs- Republic [2016] eKLR held thus:

***“The circumstances under which the doctrine will apply were considered in ISAAC NGANG’A KAHIGA ALIAS PETER NGANG’A KAHIGA V REPUBLIC CR. APP. NO. 272 OF 2005, where this court stated:***

***“It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, they must 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 to the other.”***

In the present appeal, the prosecution established to the required standard of proof that the items found in the Appellant’s possession were indeed robbed from the deceased’s house on the night he was strangled to death. Some of the robbed items were of a personal nature. They included the deceased’s identity card, his staff identity card, his bank access card, his NHIF card and his voter’s card. These are items which are ordinarily found in possession of the owner. The other items including the deceased’s laptop and its charger and the deceased’s wallet were also found in the Appellant’s possession. The police traced these items in the Appellant’s possession after they had tracked the deceased’s stolen mobile phone by the assistance of Safaricom, the mobile services provider.

The deceased was robbed and fatally injured on the nights of 6<sup>th</sup> and 7<sup>th</sup> January 2014. The Appellant was found in possession of the stolen items on 8<sup>th</sup> January 2014 at 7.00 a.m. An inventory of the items recovered in the Appellant’s house was taken. The Appellant signed the inventory. From the nature of the items stolen, it was clear to this court that the recovery of the said items in the Appellant’s possession was recent. The Appellant did not give an explanation, at all, of how the said items that were robbed from the deceased were found in his possession. The Appellant’s defence did not illuminate how the said items were found in his possession. This court cannot therefore fault the trial magistrate for applying the doctrine of recent possession in finding that it was the Appellant who robbed and killed the deceased.

The prosecution was able to established to the required standard of proof beyond any reasonable doubt that the Appellant robbed the deceased, and in the course of the robbery strangled him to death. The stolen items were found in the Appellant’s possession in circumstances that irresistibly pointed to the fact that he was the perpetrator of the offence. This court finds no merit with the grounds put forward by the Appellant seeking to impeach the said finding of guilt by the trial magistrate. The submission the Appellant made on this appeal does not dent the cogent, consistent and strong culpatory evidence that was adduced by the prosecution.

The appeal lacks merit and is hereby dismissed. The conviction and sentence of the trial court is upheld. It is so ordered.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF APRIL 2018**

**L. KIMARU**

**JUDGE**