



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**CRIMINAL APPEAL NO. 151 OF 2012**

**SAMMY KIPKOGEI..... APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

***(An Appeal from the Judgment of the Honourable E.A OBINA Senior Principal Magistrate in Eldoret Criminal Case No. 1725 of 2011, dated 29<sup>th</sup> August, 2012)***

**JUDGMENT**

1. The appellant *Sammy Kipkosgei* was tried and convicted of the offence of robbery with violence contrary to *Section 296(2)* of the *Penal code*.

2. The particulars thereof alleged that on the 20<sup>th</sup> day of April 2011 at West Indies Estate in Uasin Gishu District within Rift Valley Province, jointly with others not before court, while armed with a panga and an axe, the appellant robbed *Allan Kipruto Sigilai* of two LG Tv's 14 inch and 21 inch, three mobile phones Nokia X3, Nokia C1 and Nokia 660, LG DVD Model DV 350, cash Ksh 2,000/= and a Sony home theatre all valued at Ksh 120,000/= and at the time of such robbery threatened to use actual violence to the said *Allan Kipruto Sigilai*.

3. Upon his conviction, the appellant was sentenced to life imprisonment. He was dissatisfied with his conviction. He lodged an appeal to this court vide a petition of appeal filed on 11<sup>th</sup> September 2012.

In the grounds encompassed in his petition of appeal, the appellant basically complained that he was wrongly convicted because he was not positively identified at the scene of crime; that the evidence by the prosecution witnesses was contradictory and did not prove the offence beyond reasonable doubt.

He also averred that the trial magistrate erred in failing to consider his defence.

4. At the hearing, the appellant was not represented. He prosecuted the appeal in person. He entirely relied on his home made written submissions which he filed on 16<sup>th</sup> March 2017.

5. The state contests the appeal. *Ms Odour* in opposing the appeal submitted that the appellant was properly convicted as the prosecution had called credible witnesses who proved his guilt as charged beyond any reasonable doubt; that the appellant was linked to the offence by the doctrine of recent possession. She urged the court to uphold the conviction and revise the sentence imposed on the appellant by the trial court. She submitted that the sentence was illegal and ought to be substituted with a death sentence as prescribed by *Section 296(2)* of the *Penal Code*.

6. I have carefully analysed the evidence on record, the judgement of the learned trial magistrate and the submissions made by the appellant and the state. I have also considered the grounds of appeal.

7. I wish to deal first with the appellants claim that the learned trial magistrate did not consider his defence. The trial courts judgment shows clearly that the learned trial magistrate actually considered his defence but when compared with the evidence adduced by the prosecution, it was found to be unworthy of belief. I therefore fail to find merit in that ground of appeal.

8. The gravamen of this appeal is the appellant's complaint that he was convicted on evidence which did not prove the charges preferred against him beyond any reasonable doubt.

I wish to start my determination on this claim by observing that from the evidence on record, there is no doubt that the prosecution managed to prove beyond doubt that the complainant (PWI) was actually robbed of some properties on the night of 20<sup>th</sup> April 2011 by about three men who were armed with an axe and a panga.

9. Section 296 (2) of the *Penal Code* enumerates the circumstances in which the offence of robbery with violence is committed. One of those circumstances is when a theft is committed by more than one person or where the robber is armed with a dangerous weapon. It is common knowledge that an axe and a panga are dangerous weapons.

I therefore agree with the learned trial magistrate that the prosecution proved beyond doubt that the offence of robbery with violence was committed against the complainant herein.

10. The question that arises for my determination is whether the trial magistrate's finding that the appellant was one of the culprits who committed the offence was properly grounded in law.

Put another way, was the appellant's guilt as charged proved beyond reasonable doubt?

11. The learned trial magistrate in his judgment correctly found that the appellant was not identified at the scene of crime as one of the persons who had committed the offence. He based his conviction on the doctrine of recent possession having found that the appellant was found in possession of a mobile phone stolen during the robbery and led the police to the recovery of several other items allegedly stolen during the robbery. This was about three to four weeks after the robbery.

12. On my re-appraisal of the evidence, I find that the findings of the learned trial magistrate are not supported by the evidence on record. The evidence of PW5 confirms the appellant's claim that the mobile phone produced as EXbt-I was not recovered in his possession. It was recovered in the possession of one *Bernard Mutuku* who alleged that it is the appellant who had sold the phone to him.

The said *Bernard Mutuku* was not availed as a witness to verify the allegation. PW5's testimony on that point amounted to hearsay which was not admissible in evidence.

13. In any event, the recovery of the said mobile phone was not relevant or useful to the prosecution's case since from the particulars supporting the charges, the recovered phone was not among the items stolen during the robbery. Its make was Nokia 1101 while as the three mobile phones stolen during the robbery were Nokia C3, Nokia C1, and Nokia 660.

14. Regarding the recovery of the TV set and home theater, though there is evidence that the appellant was one of the people who had left them in the house in which they were recovered, the prosecution failed to adduce evidence to prove that the items were actually owned by PWI and that they were stolen during the robbery.

PWI in his evidence did not produce any documentary evidence to prove ownership of the said items or point to any identification mark to eliminate the possibility that the items could have belonged to somebody else. In criminal cases, the burden of proof always lies on the prosecution to prove the charges

against an accused person beyond any reasonable doubt. The burden never shifts to an accused person.

See: **Rhamanlal Trambaklal Bhatt Vs Republic (1957) EA 332; Abdalla Bin Wendo and another V Republic (1953) EACA 166.**

15. The law is that for the doctrine of recent possession to apply, three conditions must be present. First, the property must be found in possession of the suspect. Secondly, the recovered property must be identified by the complainant. Lastly, the property must have been recently stolen from the complainant.

16. As demonstrated above, the evidence in this case disclosed that the mobile phone was not recovered from the appellant and that it was not among the properties stolen during the robbery. The recovered TV set and home theatre were not positively identified by the complainant as his property stolen during the robbery. I am thus satisfied that the learned trial magistrate erred in his finding that the doctrine of recent possession was applicable in this case.

17. Like I said earlier, the appellant was convicted on the strength of the doctrine of recent possession. Having found that the doctrine was not applicable in this case, I find that the appellant was wrongly convicted. I thus find merit in the appeal.

It is accordingly allowed.

The appellant's conviction is consequently quashed and the sentence set aside. He shall be set free forthwith unless otherwise lawfully held.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 31<sup>st</sup> day of May, 2017**

In the presence of:

Appellant

Mr. Muiruri for the state

Lobolia court clerk