REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL NO. 116 OF 2016

BETWEEN

ABISAI ABWONZA CHOGO ……...……..……..……. APPELLANT

AND

REPUBLIC …..…….……. RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. E. W. Muleka, SRM dated on 23rd November 2016 in Criminal Case No. 116 of 2016 at Senior Principal Magistrate's Court at Hamisi)

JUDGMENT

1. Before the subordinate court, the appellant, **ABISAI ABWONZA CHOGO**, was charged with one count of robbery with violence contrary to **section 296(2)** of the ***Penal Code (Chapter 63 of the Laws of Kenya)***. The particulars of the offence were that on 24th November 2015 at Chavakali Location within Vihiga County, the appellant robbed **ISAAC NYAPOLA** of Kshs. 12,060/-, one phone male oling valued at Kshs. 2,100/- and one camera make Kodak valued at Kshs. 16,000/- and immediately before such robbery he threatened to shoot the said **ISAAC NYAPOLA** with a pistol. The appellant denied the charges but after a full trial, he was convicted and sentenced to death.

2. The appellant now appeals against conviction and sentence on the grounds set out in the petition of appeal filed on 28th November 2016. In addition, he filed written submissions to support his case. The thrust of the appeal is that the prosecution did not prove the elements of the offence of robbery with violence beyond reasonable doubt. The appellant attacked the judgment on the ground that the trial magistrate did not consider the fact that the he was framed as a result of a grudge between him and the complainant. He submitted that the first report made to the police did not identify him as the attacker and that crucial evidence concerning communication between him and the complainant was not proved.

3. The respondent, in its written submissions, submitted that the prosecution proved all the elements of the offence of robbery with violence. Further, it submitted that the appellant was identified in circumstances that were favourable to positive identification. It also submitted that there was sufficient evidence of recent possession of stolen goods implicating the accused in the robbery.

4. As this is a first appeal, the duty of the appellate court is to review all the evidence and reach an independent conclusion as to whether to uphold the conviction and sentence. In doing so, the court must make an allowance for the fact that it did not have or see the witnesses testify to assess their demeanour (see ***Okeno v Republic*** **[1972) EA 32**).

5. The complainant, Isaac Nyapola (PW 1), was a photographer. He recalled that on 24th November 2015 at about 8.30am, he was called by the appellant to go Ambwere Complex for an assignment. PW 1

proceeded there with his friend, Billy Amos (PW 2). They met the appellant who told them that he only needed one of them for the assignment. As they went to Majengo, the appellant removed a pistol and ordered him to give up the Kodak camera, the Kshs. 12,060/- he had and his smartphone. PW 2 testified that on that evening, PW 1 came to inform him that the appellant had stolen from him. He advised him to report he matter to the police. Nothing became of the matter until 28th February 2016 when PW 1 saw the appellant when he was at a photostudio at Kakamega. He immediately went to report to Kakamega Police Station who referred the matter to Kilingili Police Station.

6. Corporal Paul Mutua (PW 4) testified that on 2nd March 2016, the appellant was brought to the Kilingili Police Station from Kakamega. From there they proceeded to the appellant's home at Lumakanda. After conducting a search in the house, they found some photos which were identified as belonging to PW 1. A lady who was said to be the appellant's wife was in possession of a jungle green bag which the appellant identified as his.

7. In his sworn defence, the appellant told the court he was a photographer and on 28th February 2016, he was called to for an assignment at Kakamega. He went to Ambwere Plaza where he met his boss, PW 1. PW 1 demanded his phone and camera which he did not have. They decided to go the Police Station where he was asked for a gun which he did not have. He was arrested thereafter. In cross-examination, he stated that on 24th November 2015, he was teaching in Eldoret.

8. The elements of the offence of robbery with violence **under Section 295 as read with 296 (2) of the *Penal Code*** were elaborated by the Court of Appeal in ***Ganzi & 2 Others v Republic*** **[2005] 1 KLR 52** as follows:

> *The offence of robbery with violence under section 296(2) of the Penal Code is committed in any of the following circumstances namely:-*
>
> *(a) The offender is armed with any dangerous or offensive weapon or instrument; or*
>
> *(b) The offender is in company with one or more other person or persons or*
>
> *(c) At or immediately before or immediately after the time of the robbery, the offender wounds, beats, strikes or uses other personal violence to any person.*

9. For the offence to be established, the prosecution need only prove any of the elements set out as *"or"* in the **section 296(2)** of the ***Penal Code*** is to be read disjunctively (see ***Oluoch v Republic*** **[1985]eKLR**). In this case, PW 1 testified that he was threatened by the appellant who pulled out a gun, which is a dangerous weapon, threatened and his camera, phone and money stolen.

10. The main issue for consideration in this appeal is whether the appellant was the assailant. The prosecution case was grounded on direct evidence of identification and on the doctrine of recent possession. On the issue of identification, the respondent cited the case of ***Peter Musau Mwanzia v Republic*** **[2008] eKLR** where the Court of Appeal held:

> *We do agree that for evidence of recognition to be relied upon, the witness claiming to recognize a suspect must establish circumstances that would prove that the suspect is not a stranger to him and thus to put a difference between recognition and identification by a stranger. He must show, for example, that the suspect was known him for sometime, is a relative, a friend or somebody within the vicinity as himself and so he had been in contact with the suspect before the incident in question. Such knowledge need not be for a long time but must be for such time that the witness, in seeing the suspect at the time of the offence, can recall very well having seen him earlier on before the incident.*

11. In this case, the incident took place in broad daylight. The appellant is the one who called the PW 1 and invited him for the business opportunity. They interacted before they proceeded on the fateful

journey. This interaction was witnessed by PW 2 who was later informed by PW 1 that he had been robbed by the appellant. The appellant's defence implied that he knew PW 1 as his boss. The totality of the evidence is that this was not a case of identification of a stranger but recognition of someone he knew well in circumstances that negative any notion of mistaken identity.

12. The prosecution case was also grounded on the doctrine of recent possession as a photograph belonging to PW 1 was found in his possession. In ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v Republic*, Nyeri Criminal Appeal No. 272 of 2005 [2006] eKLR** the Court of Appeal stated that:

> ***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, there must be positive proof, first; that the property was found with the suspect, secondly that; that 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.***

13. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. While the law is that in a criminal trial, the prosecution bears the burden of proving the case against the accused throughout the case, in a case where one is found in possession of recently stolen property like this case, the evidential burden shifts to him to explain his possession. That explanation need only be a plausible one but he needs to put it forward for the court's consideration (see ***Malingi v Republic* [1988] KLR** 225). In ***Paul Mwita Robi v Republic* KSM Criminal Appeal No. 200 of 2008 [2010]eKLR**, the Court of Appeal observed that;

> *Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden.*

14. In this case the photograph identified as that of the complainant was found at the appellant's home. PW 3, a carpenter, confirmed that PW 1 is the one who took the photograph of his bed and had told him that he had been robbed. The appellant did not provide a reasonable explanation as to how he received the photograph or lay a claim to it. In the absence of such an explanation, the inescapable conclusion is that the appellant is the one who robbed PW 1.

15. The evidence of identification and recent possession all pointed to the appellant. The case against him was watertight. His defence was a sham. For reasons I have set out, I affirm the appellants' conviction and sentence.

16. The appeal is dismissed.

DATED and DELIVERED at KAKAMEGA this 31st day of August 2017.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Ng'etich, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.