



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT KAKAMEGA**

**CRIMINAL APPEAL NO. 76 OF 2016**

**CONSOLIDATED WITH**

**CRIMINAL APEALS NOS. 68 & 69 OF 2016**

**BETWEEN**

**KELVIN NYONGESA ..... 1<sup>ST</sup> APPELLANT**

**BONIFACE AKANGA ..... 2<sup>ND</sup> APPELLANT**

**HILLARY LITIOLO ..... 3<sup>RD</sup> APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal from the original conviction and sentence of Hon. E. Muleka dated 9<sup>th</sup> June 2015 at the Senior Principal Magistrates Court at Hamisi in Criminal Case No. 238 of 2014)***

**JUDGMENT**

1. The appellants, **KELVIN NYONGESA**, **BONIFACE AKANGA** and **HILLARY LITIOLO** together with another co-accused, were charged and convicted for the offence of robbery with violence contrary to **section 295** as read with **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. At the trial court they faced four counts of robbery with violence, one count of breaking in a building and committing a felony contrary to **section 306(a)** of the *Penal Code* and two alternative counts of handling stolen goods contrary to **section 322(1)** and **(2)** of the *Penal Code*.

2. The particulars of **Count I** were that on the night of 30<sup>th</sup> March 2014 at Serem Market, Serem Sub-location, Shamakhokho Location of Hamisi District within Vihiga County, the appellants, jointly with others not before the court, while armed with pangas and iron bars robbed **DANIEL KIPKOSHO MASISA** of his mobile phone Nokia 1200, a torch and two whistles all valued at Kshs. 2,200/- and immediately before the time of such robbery used actual violence on the said **DANIEL KIPKOSHO MASISA** by cutting his long trousers with a panga.

3. The particulars of **Count II** were on the night of 30<sup>th</sup> March 2014 at Serem Market, Serem Sub-location, Shamakhokho Location of Hamisi District within Vihiga County, the appellants jointly with others not before the court, while armed with pangas and iron bars robbed **HABIBA HUSSEIN** of a Samsung mobile phone valued at Kshs. 4,000/- and during the time of such robbery struck **HABIBA HUSSEIN** with the side of a panga.

4. The particulars of **Count III** were that on the night of 30<sup>th</sup> March 2014 at Serem Market, Serem Sub-location, Shamakhokho Location of Hamisi District within Vihiga County, the appellants jointly with others not before the court, while armed with pangas and iron bars robbed **NASRA HUSSEIN** cash Kshs. 200,000/- and mobile phone Ideos valued at Kshs. 8,000/- all valued at Kshs. 208,000/- and during the time of such robbery threaten to use actual violence to the said **NASRA HUSSEIN** by putting a panga on her neck.

5. **Count IV** charged the appellant with attempted robbery contrary to **section 297** of the *Penal Code*. The particulars were that on night of 30<sup>th</sup> March 2014 at Serem Market, Serem Sub-location, Shamakhokho Location of Hamisi District within Vihiga County the appellants, jointly with others not before the court, while armed with pangas and iron bars attempted to rob **NIMO AHMED** cash and mobile phone and during the attempted robbery wounded the said **NIMO AHMED** on her left leg by cutting her with a panga.

6. **Count V** on breaking into a building and committing a felony and the alternative count of handling stolen goods related to the breaking into the shop of Harrison Mwavali who did not testify.

7. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced so as to reach its own independent conclusion as to whether or not to uphold the appellant's conviction bearing in mind that it neither heard nor saw the witnesses testify (see *Njoroge v Republic [1987] KLR 19*). In order to proceed with this task, it is necessary to set out the material evidence emerging before the trial court.

9. According to the evidence before the trial court, the fact that a robbery took place on the night of 30<sup>th</sup> March 2014 is not disputed. Habiba Hussein (PW 2), a petroleum dealer at Serem, testified that on that night she was at home with her children and grandchildren. At about 1.30am, while asleep, she was shocked to be woken up by 4 people, armed with pangas, threatening her and demanding money. Nasa Hussein (PW 1), Nimo Ahmed (PW 5) and Amran Sala (PW 6), who were also in the house, all testified that several assailants, armed with pangas and iron bars, broke into the house and started demanding money and phones while ransacking the house. PW 1 testified that she gave the assailants Kshs. 200,000/- while PW 2 recalled that one of the assailants took her phone, a Samsung Duo. PW 5 testified that one of the assailants attacked her and cut her leg. The injury was confirmed by PW 4, a clinical officer at Serem Health Centre, who produced the P3 form. The watchman, Daniel Kipkosho (PW 3), also testified that when he was attacked by the assailants, they took his Nokia mobile phone. He told the court that he identified his phone and whistles at the police station. None of the witnesses identified any of the assailants.

9. After the assailants left, the incident was reported to Serem Police Station. The Deputy Commanding Officer, who was also the investigating officer of this case, Inspector John Oyugi Ogutu (PW 8), sent PC Francis Shisashani (PW 7) and other officers to the scene of the incident. After viewing the scene, the officers proceeded to lay ambush for the assailants. At Musasa, they saw a saloon car which they stopped. One of the people came out and started running away. The officers ordered the 6 passengers out of the vehicle and after searching the vehicle they found assorted items including mobile phones and a whistle. PW 8 was also present at the search and he confirmed that among the items recovered from the vehicle were PW 2's Samsung Duo Phone, PW 3's Nokia phone and two whistles.

10. When put on their defence, the appellants elected to give sworn testimony. All of them denied involvement in the robbery. The 1<sup>st</sup> appellant told that court that he was arrested after taking a lift in a vehicle and when the vehicle was stopped by the police, the police took his items. In cross-examination he told the court that the police took his Samsung and Ideos phone. The 2<sup>nd</sup> appellant testified that he had boarded a vehicle which was stopped by the police who took Kshs. 14,000/- from him. He did not know why he was charged. The 3<sup>rd</sup> appellant denied the offence and confirmed that he was travelling in a vehicle that was stopped by the police who took his money and phone without any reason.

11. The trial magistrate held that while the robbery took place, none of the witnesses identified the assailants hence their complicity in the robbery was established by application of the doctrine of recent

possession. The thrust of the appellants' case before this court was that there was no evidence connecting them to the offence. The respondent contended that the doctrine of recent possession was properly applied in the circumstances hence they were properly convicted.

12. The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarised the essential elements of the doctrine of recent possession in ***Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006]eKLR***, where the court stated as follows:

In our view, 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 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 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. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be a plausible (see ***Malingi v Republic [1988] KLR 225***. In ***Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008***, 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. I now turn to consider the evidence in light of the principles I have outlined above. Count I was in relation to PW 3's Nokia 1200, torch and two whistles. PW 3 testified that when the phone and whistles were recovered, he saw them at the police station. The recovered items were never put to or identified by him while he was giving his evidence in chief. Likewise, in Count III which concerned PW 1, the prosecution did not put to her nor did she identify the Ideos mobile phone that was stolen from her by the assailants and later recovered by PW 8.

15. Without the witnesses identifying the exhibit and affirmatively confirming that the items recovered were theirs, the court is denied the chance to assess the evidence and make a finding that the items belonged to them. Furthermore, the appellants are denied the opportunity to cross-examine the witness on the identity and ownership of the items recovered. I therefore find and hold that the key element which the prosecution must prove; *that the property is positively the property of the complainant*, was not proved. I therefore find and hold that Count I and III were not proved.

16. Count IV was in respect of attempted robbery of PW 3. Since nothing was stolen from her, the doctrine of recent possession could not be applied in the circumstances and that charge was therefore not proved.

17. Count II was in relation to the Samsung Duo mobile phone belonging to PW 2. She identified the phone as belonging to her. PW 8 recovered the phone from the 2<sup>nd</sup> appellant when he searched him. The 2<sup>nd</sup> appellant did not explain how he came into possession of PW 2's phone or lay claim to it. The phone was recovered within a period of 5 hours after the robbery had taken place hence the irresistible evidence is that he was involved in the robbery.

18. Whether the other accused are implicated depends on whether the 1<sup>st</sup> and 3<sup>rd</sup> appellants can be said to be in possession of PW 2's mobile phone which was found in actual possession of the 2<sup>nd</sup> appellant. Under **section 4(a)** of the **Penal Code**, "*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.”*

19. The meaning of possession was elucidated in ***Kinyatti v R [1984]eKLR*** where the Court of Appeal held that in defining “*being in possession*”, full control of the object or article in possession of the accused is not necessary nor is it a requirement of that definition. It further held that in order to prove possession, it is enough to prove either that the accused was in actual possession of the item or that he knew that the item was in the actual possession or custody of another person or that he had the item in any place (regardless of whether the place belongs or is occupied by him or not) for his use or benefit or another person. The Court further explained that knowledge that the item is in actual possession or in one’s custody or of another person may be inferred from the circumstances or proved facts of the particular case.

20. The testimony of PW 7 and PW 8 is that the appellants were found in a car that was intercepted a few hours after the robbery. In their respective defences, the appellants stated that they had boarded the vehicle on their own and although they were found with assorted goods, including mobile phones, the prosecution did not prove that these items belonged to the witnesses. The prosecution did not also prove that the appellants knew each other independently of being found in the same car. I give the 1<sup>st</sup> and 3<sup>rd</sup> appellants the benefit of doubt and hold that they were not in possession of PW 2’s mobile phone.

21. The totality of the prosecution evidence is that the 2<sup>nd</sup> appellant was found with the 2<sup>nd</sup> appellant’s Samsung Duo phone a few hours after the robbery. He did not explain how it came into his possession or claim it as his own. The irresistible inference is that he was involved which took place on that morning at the home of PW 2.

22. As I stated at the start of this judgment, the appellants were charged with several counts of robbery with violence and a count of attempted robbery. A look at the judgment reveals that the trial magistrate did not comply with the requirements of **section 169 particularly subsections (2) and (3) of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya)** as he did not state or specify the counts on which the appellant and his co-accused were either convicted or acquitted. The section provides as follows:

169(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, shall contain the point or points for determination, the decision thereon and the reasons, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.

(2) In the case of a conviction, the judgment shall specify the offence of which, and the section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced.

(3) In the case of an acquittal, the judgment shall state the offence of which the accused person is acquitted, and shall direct that he be set at liberty.

23. In ***James Nyanamba v Republic [1982 – 88] 1 KAR 1165 [1983]eKLR*** the Court of Appeal expressed the following view on compliance with the provisions of **section 169** of the ***Criminal Procedure Code***;

Again the magistrate transgressed subsection (2) of section 169 of the Criminal Procedure Code which requires that in the case of a conviction, the judgment must specify the offence of which and the section of the Penal Code or other law under which the accused person is convicted. Since in his opening statement of the judgment, the magistrate did not state which accused was charged alone in which count of the counts 3 and 4 it cannot be said that the omission to comply with section 169(2) (ibid) did not occasion the appellant injustice. In the circumstances of this case that omission is not cured by section 382 of the Criminal Procedure Code.

24. Although the trial magistrate did not state which count the appellants were convicted on and in the sentencing order, the appellants were sentenced to death for the robbery of Habiba Hussein (PW 2) on Count II. I therefore find that the failure to comply with **section 162** of the ***Criminal Procedure Code*** was not fatal to the prosecution case and did not occasion any injustice.

25. I affirm the conviction and sentence of the 2<sup>nd</sup> appellant on Count II and his appeal is dismissed.

26. The 1<sup>st</sup> and 3<sup>rd</sup> appellants' appeals are allowed and the conviction and sentence against them are set aside. They are set free unless otherwise lawfully held.

**SIGNED AND DATED AT KISUMU**

**D.S. MAJANJA**

**JUDGE**

**DATED and DELIVERED at KAKAMEGA this 15<sup>th</sup> day of November 2017.**

**R. N. SITATI**

**JUDGE**

Appellants in person.

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