



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL APPEAL NUMBER 84 of 2015.**

**STEPHEN MAKAU KAREGA.....APPELLANT.**

**VERSUS**

**REPUBLIC .....RESPONDENT.**

*(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 891 of 2013 delivered by Hon. Onyina, SPM on 18<sup>th</sup> May, 2015).*

**JUDGMENT**

**BACKGROUND**

The Appellant was charged in four counts of committing robbery with violence contrary to section 295 as read with Section 296(2) of the Penal Code. The particulars of the first count were that on the night of 11<sup>th</sup> March, 2013, at Gategi village in Kiserian area within Kajiado county, jointly with others not before the court, while armed with crude weapons namely; pangas, iron bars and rungus robbed Abdalla Nakwekwe of his Samsung mobile phone valued at Kshs. 4,000/= and at the same time of the robbery killed the said Abdalla Nakwekwe. In the second count the particulars were that on the same night he robbed Patrick Gathigi Gachoka of his Tecno mobile phone and Kshs. 2,400/= in cash and at the same time assaulted the aforementioned complainant. The particulars in the third count were that on the same night he robbed David Mwangi Wanderi of his Nokia mobile phone and Kshs. 1,400/= in cash and at the time of the robbery assaulted the complainant. In the fourth count the particulars were that on the same night, similarly, robbed Genes Julius Kimario of his cash Kshs. 500/= and a Tecno and Forme mobile phone and at the same time robbed the complainant.

The Appellant was charged in the alternative with three counts of handling stolen goods. The particulars of the first count were that on 16<sup>th</sup> March 2013 at Gategi village in Kiserian area within Kajiado county, otherwise than in the course of stealing, dishonestly retained a mobile phone make Nokia 1200 IMEI No. 3568041071368281/3 knowing and having reason to believe it to be stolen goods.

The particulars of the second count were that on 16<sup>th</sup> March 2013 at Gategi village in Kiserian area within Kajiado county, the Appellant, other than in the course of stealing, dishonestly retained a mobile phone make Tecno T20 IMEI No. 861664019353078 knowing or having reasons to believe it to be stolen goods.

The particulars of the third count were that on 16<sup>th</sup> March 2013 at Gategi village in Kiserian area within

Kajiado county, the Appellant, other than in the cause of stealing, dishonestly retained a mobile phone make Forme IMEI No. 353031056225004 knowing or having reasons to believe it to be stolen goods,

After the trial he was convicted in Counts 2 and 3 and in lieu of the 4<sup>th</sup> count for the cognate offence of causing grievous harm contrary to Section 234 of the Penal Code. He was sentenced to death in count 2 with the rest of the sentences held in abeyance. He was dissatisfied with the decision of the trial court and he lodged this appeal. The grounds of appeal are as follows;

**I. That the entire case for the prosecution was not proved beyond reasonable doubt.**

**II. That the evidence relied upon by the trial magistrate as a basis of his conviction was not enough to sustain a conviction.**

**III. That the evidence adduced did not meet the standard required for capital charges.**

**IV. That the provisions of section 169(1) of the Criminal Procedure Code was not complied with in relation to his defence statement.**

However, in his submissions he raised additional grounds appeal as follows:

**I. That his fundamental right to a fair trial under Articles 50(2)(b) & (J) was infringed and that the entire trial thus remained null and void.**

**II. That section 214 of the Criminal Procedure Code was violated and as such the entire trial was null and void.**

**III. That the conviction as it stands is wrong in law as it is based on evidence that was not proved beyond reasonable doubt.**

**IV. That the learned trial magistrate erred in rejecting his alibi defence and in failing to find that the inconsistent and contradictory evidence in trial created sufficient doubt to secure his acquittal.**

### **SUBMISSIONS.**

The Appellant chose to file written submissions. He decried that his right to a fair trial was infringed and particularly Articles 10(2), 21(1), 25(c), 50(2)(b) and 50(2)(j). He submitted that he had initially pleaded to counts 1, 2, 3 and the alternative charges 1 and 2 and consequently the charge sheet was amended to his detriment introducing count 4 and alternative count 3. He submitted that the fact that serial numbers to the phones allegedly stolen in count 2 and 3 were not disclosed in the particulars of the offence gave the prosecution the leeway to produce any phone as evidence. This, he further submitted, meant that proof of ownership of the phones could not be established. He submitted that even though the mobile phone IMEI numbers were given in the particulars of the alternative charges, there was no corroborative evidence by the witnesses as to ownership of the phones in question. He therefore submitted that the identification of the exhibits was not proper and as such could not support a conviction.

He submitted that there was no proof of the gazzement of SP Muyeji as a prosecutor which meant that he was unqualified to prosecute the case. He then submitted that the offences convicted for were not proven beyond a reasonable doubt in that; that essential evidence was not adduced by PW1 in his evidence and that a crucial witness was not called by the prosecution.

He also submitted that the trial magistrate misapplied the doctrine of recent possession given that the ownership of the stolen items was not proved. He concluded by submitting that his alibi defence was not considered and in any event, the same was not dislodged by the prosecution. He urged the court to uphold the appeal.

Ms. Sigei, for the Respondent submitted that the offences were proved beyond a reasonable doubt. It was her view that the conviction was based on the doctrine of recent possession based on the Appellant's possession of the mobile phones stolen from the complainants. She relied on **Michael Davis Munyui v Republic [2015] eKLR** to support this submission. She submitted that PW2 had offered a clear role of each of the assailants in the theft including the Appellant and that supported the evidence of PW3 that his arrest in the nearby quarry in possession of the phones pointed to him as one of the robbers. She further submitted that the Appellant's defence that he had been thrown in the quarry after being robbed was fictitious and amounted to a mere denial given the manner in which he was dressed and the fact that he had not sought help either by screaming or alerting members of the public. She concluded by stating that the evidence of the witnesses was not shaken in cross examination. She urged that the appeal be dismissed.

## **EVIDENCE.**

This being the first appellate court its duty is to reevaluate the evidence and come up with its own conclusions but bear in mind that it has neither heard nor seen the witnesses. See **Okeno v Republic(1972)EA, 72.**

The prosecution's case was that the Appellant was part of an armed gang. They attacked the village of Gategi in Kiserian on the night of 16<sup>th</sup> March, 2013. The attack affected various establishments in the village and unfortunately in their rampage and in the course of perpetuating robberies killed a watchman and injured three other local businessmen. The injured men all had to seek medical help. On the following morning as the people were mourning the death of the watchman they found the Appellant at the bottom of a nearby quarry where he had fallen the previous night due to his unfamiliarity with the geography of the area. The members of public bayed for his blood and they beat him up. Fortunately, he was rescued by the police who arrived at the scene on time.

**PW1, PATRICK GATHIGI GACHOKA** lived in Kiserian, Gategi where he owned a butchery. He recalled that on 16<sup>th</sup> March, 2013 at around 1:30 am they were taking stock at their shop with the co-owner, David Mwangi (PW2), when four people appeared at the premises. One of them, in a reflective jacket, stood at the door while the rest went in. The men were referring to each other as "Afande Afande". The man at the door was holding a burdizzo and the ones who came in had a panga, 'metal' and rungu respectively. He could clearly see them as the lights were on. He asked them what was wrong and the reply was that he should give up his phone and money. As he tried to get the items out of his pocket he was hit on the forehead and lights went out. He was inside the counter and one of them jumped in and started ransacking his pockets. They took his phone, Tecno T120, and Kshs. 2,400/= in cash. They then left.

About a minute later while still lying on the ground he heard a person screaming outside. When he heard the scream he left the building through the rear door in the company of his colleague. He went home and was taken to hospital where he was treated before proceeding to Kiserian Police Station where he recorded a statement. He found out that a watchman had been killed and that one of the robbers had been arrested. He identified the Appellant on the dock as one of their assailants. He testified that when the Appellant was brought to the station he had phones in his possession one of which the witness identified as his. He also identified his colleague's phone that was among those found on the Appellant. He also produced a hospital card and P3 form with regard to treatment sought and injuries suffered that night. He testified he did not have a receipt for the phone. He had not seen the Appellant prior to the incident.

**PW2, DAVID BENSON MWANGI** was a business companion of PW1. He corroborated the evidence of PW1. In addition, he testified that after the robbers asked for money, he was hit on the head and he fell down unconscious after being thrown into the butchery kitchen. When he woke up, he was bleeding and his colleague (PW1) had cuts on the forehead. He had been hit twice on the front side of the head and had stitches. When he went home to alert his neighbours, he was taken to hospital where again he lost consciousness and came to after two weeks and three days. After discharge from the hospital he reported to the Police Station where he identified his mobile phone that had been recovered from the Appellant. He also learnt that the Appellant had been arrested from a quarry where he was rescued from a mob justice.

He recalled that during the robbery, he was referring himself as 'corporal' and that he is the one who took away his phone and that of PW1. He also later learnt that PW3's watchman one, Abdalla had been killed.

**PW3, EDDY CHEGE KOMO** ran a bar and butchery known as 'Sizes'. He recalled that on 16<sup>th</sup> March, 2013 he closed the premises at 11.00 pm and left Abdalla, the watchman, guarding the premises. He later was informed by a neighbour that his watchman had been killed and the owners of the butchery assaulted. He proceeded to his place of work and found Abdalla's body lying on the road. There were police officers at the scene. At 6.00 a.m, the scene of crime personnel arrived.

He recalled that there was a quarry about 20 meters from his plot and some people informed them they had seen someone at the bottom of the said quarry. They therefore ran to the quarry to see whether he had been killed. They found the person alive and when they asked him what he was doing there he informed them that he was from Nairobi when thugs attacked him and threw him there. Officers also arrived on the scene. PW3 noticed that the Appellant was wearing an inordinate number of clothings namely; two trousers, two pairs of socks, two T-shirts, a new pair of safari boots and a green jeans jacket. Together with members of public asked him to give an explanation of the nature of his dressing. When he could not account for them, members of the public set on him but the police arrived on time to save him. He was also found in possession of three mobile phones that were stolen from the victims. He later went and recorded a statement. He also learnt that PW1 and PW2, who owned a butchery at the shopping center had been robbed and injured. The robbers had tried to break the padlock to his premises but had failed

**PW4, GENES JULIUS KIMARIO** was a shopkeeper in Gitegi. He recalled that on 16<sup>th</sup> March, 2013 at around 00:30 am he heard his door being hit. He got out and when he peeped outside he saw people. They broke through and came in saying they were police officers. He switched on his lights. They informed him that he was a criminal. He raised his hands in surrender. He was then hit twice on the head before losing consciousness. He regained consciousness in Kenyatta National Hospital two weeks later. He enquired on what had transpired and on the second day he was told that he'd been hit on the head. His testimony was that despite the treatment, he continued to suffer poor eyesight and hypersensitivity to noises. At home, he realized that the robbers had stolen cash in coins amounting to Kshs. 500/=. He testified he could recall the men if he saw them and identified the Appellant on the dock as one of them. He concluded by testifying that the money was never recovered.

**PW5, Dr. JOSEPH MAUNDU** of Nairobi Area surgery recalled that on 22<sup>nd</sup> April, 2014 he examined Patrick Gathigi(PW1) with a history of being attacked by a group of men. The victim had an injury on the head which had healed but a scar was left. The injury appeared to be a year old and caused by a sharp object. The patient gave him documents from Exodus Medical Center in Kiserian where he had received treatment. He produced the P3 Form he had filled.

He also recalled examining David Mwangi Benson(PW2) on the same day. He also had an injury on his head on the left side. There was also an X- Ray which showed a blood clot in the head which was removed at Kenyatta National Hospital. From the documents in the patient's possession he had been injured a year ago with a blunt object. He classified the injury as grievous harm. He filled a P3 form to the effect and produced it in court.

**PW6, Dr. KIZIE SHAKO** also of police surgery examined Julius Kimario (PW4). A CT scan showed that he had multiple fractures on the left hand side of his head. On the front side was a scar. He also had bleeding in the brain which was swollen and there was also air in the skull. He had multiple lacerations on the skull and he concluded that the possible cause of the trauma was blunt force trauma. The patient was treated at Kenyatta National Hospital. The witness assessed the degree of injury as grievous harm. He produced the P3 Form which he had filled.

**PW7, No. 69298 CPL WILLIAM KAMAU** then stationed at Kiserian Police Station recalled that on 16<sup>th</sup> March, 2013 he was at work when around 4:00am he received a report that a person had been killed on the Isinya-Kiserian road. Together with PC Wameyo they proceeded to the location where they found the body lying on the tarmac with injuries to the head. There was blood indicating he had been killed at

that location. He found Eddy Chege, PW3, who identified the body as one of Abdalla Nakwekwe who was his employee at Sizes Bar. In the course of his investigation he found Patrick Gathigi and David Wanderi who were also attacked at their butchery that night. They were also informed of an incident that occurred about three kilometers from the sight of the body where one Genes Kimario had also been attacked.

In the morning, at around 6 am, while still on location they were informed of a person who had fallen in a nearby quarry. He had injured his leg and could not walk. They proceeded to the quarry where they found the man with 4 phones on his person. He produced the phones and testified that they were; a Tecno T 20 that belonged to Patrick Gathigi, a Nokia 1200 that belonged to David Wanderi and a Forme which he later learnt belonged to Genes Kimario. The fourth phone belonged to the Appellant, Stephen Karega Makau.

They took the deceased's body to City mortuary and the accused person to Kiserian Police Station. He went back to the scene and found that there had been an attempt to break into Sizes Bar. He later on talked to the witnesses who gave them information that conformed to their respective testimonies. He interrogated the Appellant and found out that he was from Ngara in Nairobi. He was later charged accordingly.

The prosecution then closed their case and the magistrate made a ruling that a prima facie case had been established and put the Appellant on his defence. He chose to give a sworn statement of defence but called no witnesses. He testified that he lived in Kiserian at a place called Dam and he worked as a second clothes salesman. He recalled that on 15<sup>th</sup> March, 2013 he woke up at 5:30 am and headed to Gikomba to collect his wares. He went out and sold them. That day at around noon he received a phone call from one Jane Omondi who informed him that her husband had passed on after being run over by a car and that funeral arrangements were ongoing. He informed her he would go and visit her that evening. After selling his stock of clothes he went to Isinya where he arrived at around 8pm. He went to the funeral where he remained until 11:30 pm when he left for home. At the stage he found there were no vehicles and he therefore took a motor bike. When they reached Gatagi the cyclist informed him that he could not go any further. He therefore alighted and started walking home. He walked for about 50 meters before encountering 4 men who stopped him and informed him they were police officers. They asked him to identify himself and state where he was from and going. He was cut with a panga on his head and this prompted him to make his escape. As he ran off he was cut on the back of his head and he lost consciousness. In the morning he found himself in a quarry with his phone and money missing.

He saw two Maasai men passing and he called them for help. The men agreed to call for help. They came back with good samaritans and police officers. He was then taken to the police station and later to a hospital. He was thereafter booked in a cell before being charged in court.

## **DETERMINATION**

After reevaluating the evidence, I narrow down the issues for determination to be; whether the Appellant's right to a fair trial was infringed, whether the doctrine of recent possession was properly applied and whether the case was proved beyond a reasonable doubt.

Under the first issue for determination, the Appellant submitted that the particulars of the main charges did not disclose sufficient details of the mobile phones that were stolen from the victims. That is to say, neither their serial nor the IMEI numbers were stated. As such, the proof of ownership could not be sufficiently established. In addition, even if the IMEI and serial numbers were not disclosed, ownership was not proved by failure to adduce the purchase receipts. The Appellant's submission is correct in that the IMEI numbers of the mobile phones was only disclosed in the alternative charges. The onus then lay on the prosecution to prove that the Appellant was found in possession of the respective mobile phones that were believed to be stolen goods. But in the respect of the main charges, if the doctrine of recent possession were to apply, then the ownership must be established.

Under Section 116 of the Evidence Act;

***“When the question is whether any person is owner of anything, of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. “***

The Appellant did not disprove the ownership of the mobile phones by the complainant. Surprisingly, he even denied owning the phone that the police said belonged to him. But again, it was the duty of the prosecution to discharge their burden as the law requires. There was no doubt of the existence of the robberies. There was also no doubt that the victims lost amongst other things their mobile phones. Therefore, even if the police did not state the serial and IMEI numbers in the particulars of the main charges, the tests of whether that prejudiced the Appellant was whether the prosecution proved the charges to the required standard. As such, the submission has no merit and I dismiss it.

It was his further submission that his right to a fair trial was infringed by failure by the prosecution to furnish him with witness statement of the prosecution witnesses. Record does however attest that on 4<sup>th</sup> October, 2013, an order was made by the trial court that the Appellant be furnished with prosecution witness statements and the investigation diary. There is no further evidence that he was not furnished with them. He also neither thereafter complained that he did not have documents. As such, his contention that he was not accorded a fair trial is unmeritorious and baseless.

Another submission by the Appellant was that a crucial witness was not availed by the prosecution to buttress their case. He however did not disclose who this witness was or what evidence was not adduced. The submission is unsubstantiated and I dismiss it accordingly.

The Appellant did also submit that the then prosecutor SP Muyeji was not a gazetted prosecutor. I am unaware of any law prohibiting police to work as prosecutors as long as they are of the rank of an Inspector and above. The prosecutor was a Supritendant of Police thus according him the mandate to prosecute in criminal cases.

I also point out that under Section 214 of the Criminal Procedure Code, the prosecution have a right, before the close of their case, to amend the charges. The amendments to include count IV and the third alternative charge were done in accordance with the law and so no prejudice was occasioned to the Appellant.

On the second issue for determination, the Appellant submitted that the learned trial magistrate failed to properly apply the doctrine of recent possession. It is trite from the record of evidence that he was convicted based on the evidence of his arrest in possession of stolen goods, specifically mobile phones. Indeed, from the evidence of the victims, they were able to positively identify the said mobile phones. The Appellant on the other hand denied having been in possession of the said mobile phones. That said, it is important to note that although PW1, 2 and 4 all of whom were victims of the robbery testified that they had identified the Appellant and pointed at him in court, the visual identification was not full proof. First, it was at night when conditions of identification were not favourable. Second, each of them was hit on the head as a result of which they lost consciousness. They were therefore not able to explain the entire process of the robbery save to state that the robbers were referring themselves as Police Officers. Indeed, the bare minimum evidence of identification was when the robbers approached each of them demanding for money and introducing themselves as Police Officers. Thereafter, each of them was hit on the head and lost consciousness. Therefore, had there been good identification, the same ought to have been corroborated by identification parades so as to erase any doubts that the victims had identified their assailants at the scene. In the absence of this sequence of events, I conclude that the witnesses identified the Appellant by way of dock identification which was not good evidence in the circumstances.

I now revert to the doctrine of recent possession. The principles that guide the court in upholding the doctrine of recent were laid down in the famous case of **Malingi vs Republic [1989] KLR 225** as follows:

***“He can only be asked to explain his possession after the prosecution has proven 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 were 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 rebuttable. 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.”***

In the present case, I have already held that the evidence that the robbery occurred is not doubtful. There is also no doubt that the Appellant was arrested only a few hours after the robbery. He was in possession of four mobile phones, three of which were said to belong to the victims. One of the conditions that the prosecution needed to satisfy was prove of ownership of the phones. Both PW1 and 2 were business partners and were therefore an acquaintance to each other. While testifying in court PW1 stated that although he had a receipt for his lost phone, he had not carried it to court. He therefore identified his phone by a cracked screen. This piece of evidence was corroborated by PW2 who also stated that PW1's mobile phone had a cracked screen and he singled it out in court. My view is that although the receipt for the phone was not adduced, its physical identification was good evidence, particularly bearing in mind that the witness had reported that it was stolen. More importantly is the fact that the phone was in the person of the Appellant as it was removed from his pocket. Given that he was arrested at 6.00 am after the robberies at about 1.00 a.m gives the inference that he must have stolen it.

I discount a likelihood assumption that he was an innocent receiver given the circumstances of the case. He did not hail from the area where the robbery took place which rendered him prone to what befell him. He was not aware that there existed the quarry and with the difficulty of the knowledge of the topography of the area, he found himself in the quarry as a result of which he broke the leg. His explanation that he was beaten by thieves as a result of which he sustained the injury is farfetched and I dismiss it.

In the case of **Rex vs Hassan S/O Mohamed Alias Kinyonyoke [1948] EACA**, it was held that:

***“Whenever the circumstances are such as to render it more likely that the party found in possession did not steal it, the presumption is that he received it. Everything must depend on the circumstances of each case.”***

I have already elucidated the circumstances of this case. The doctrine of recent possession being a rebuttable presumption gives the accused person an opportunity to explain how he came by any stolen property. The Appellant merely gave a mere denial that he was not in possession of the phones. He did not give an account of how he came by the phones which were recovered from him. One having been properly identified by two of the witnesses makes me conclude he participated in the robbery. As such, I uphold the learned magistrate's application of the doctrine of recent possession.

Finally, is the question of whether the elements of the offence of robbery with violence were proved. The robbers were more than one in number. They were armed with crude weapons namely pangas and metal bars. They inflicted bodily harm on PW1, 2 and 4 whose medical reports were adduced by PW 5 and 6, thus evidencing the use of violence. The victims also lost various items during the robbery. No doubt then that the prosecution established the elements of the offence of robbery with violence beyond a reasonable doubt.

In the result, this appeal fails and I dismiss it in its entirety. I uphold the conviction and death sentence. It is so ordered.

**DATED AND DELIVERED THIS 28<sup>th</sup> DAY OF SEPTEMBER, 2016.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

**1. Appellant in person.**

**2. Miss Nyauncho for the Respondent.**