



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CRIMINAL APPEAL NO. 2 OF 2014

(Being an appeal from original Conviction and Sentence in the Chief Magistrate's Court at Naivasha Criminal Case No. 1099 of 2011 - S. Githinji, CM)

DAVID LETIRA LEKAI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

J U D G M E N T

1. The Appellant, David Letira Lekai, was arraigned before the Chief Magistrate's Court at Naivasha for the offence of Robbery with violence Contrary to Section 296 (2) of the Penal Code. He had been jointly charged with four others on nine counts of Robbery with violence. In the count alternative to the first count of Robbery with violence, he was charged with Handling stolen goods Contrary to Section 322 (2) of the Penal Code.

2. During the trial conducted before **Githinji CM** (as he then was) the prosecution called sixteen witnesses. By the close of the trial, the case had been withdrawn against the 2nd and 5th Accused (both deceased) and the 4th Accused who absconded. Two Accused persons namely the Appellant herein and the 3rd Accused remained to the end of the trial. The 3rd Accused was acquitted at the judgment stage while the Appellant was convicted on all the nine counts being Robbery with violence Contrary to Section 296 (2) of the Penal Code. The particulars are stated in the charge sheet.

3. As against the Appellant herein, the prosecution case was as follows. **Dr. Ian Douglas Hamilton** (PW3) and his wife **Oria Douglas Hamilton** (PW12) reside on their farm house (the house) at Naivasha, where they also operate a lodge known as **Olerai Lodge** (the lodge). On 13/3/2011 there were several guests at the lodge, including **William Nigel Adams** (PW4), **Sveva Gallman** (PW8). The couples daughters **Saba Douglas Hamilton** (PW1) and one **Mara Douglas Hamilton** (Mara) were also visiting the farm. After spending some time with the guests **PW3** and **PW12** drove to the house, which is about 1 kilometre away from the lodge.

4. At about 8.00pm the lodge guests settled down for dinner in the company of **Mara**. Suddenly, a gang of not less than seven men armed with firearms, and clubs burst into the lodge kitchen and ordered the lodge workers among them **Joyce Wanjiru Karanja** (PW2), **Amina Hassan Bobo** (PW5) to lie down. They assaulted and injured them. They demanded for money and took their phones. The guests were not spared. They were assaulted and held in the dining area as the robbers demanded money and valuables from them on pain of death. The robbers entered their rooms which they ransacked, taking money and

valuables. The gangsters shot in the air and eventually left in **PW8's** vehicle.

5. The guests ran into the bushes for cover. The robbers proceeded to the farm house. They broke in and ransacked the house, taking away with them a hunter rifle licenced to **PW12**, phones, assorted electronic goods and jewellery. **PW12** and her daughters were not harmed as they hid themselves in the house, while **PW3** had left for the lodge upon hearing gunshots. The gangsters left the farm after midnight.

6. A report of the robbery was received by **IP Paul Munyao** (PW14) of Kongoni Police Station while on patrol with other officers including **PC Ruge** (PW15). They headed to the farm and confirmed the report. Thereafter, the officers left in three separate groups in pursuit of the robbers. At about 2.30am information was received from an informer that two suspects were being held at Malewa by members of the public, including security guards. On arrival they found one suspect by the name **Peter Ekiru Augustino** had succumbed to injuries but the Appellant was alive though injured.

7. The Appellant was rescued. In his possession were a **Sony video camera** and its bag Exhibit 10, and **jewellery** Exhibit 4A, B, C and other goods suspected stolen. The video camera and jewellery were identified as the property stolen from the home of **PW3** and **12**. Also recovered was the Appellant's **Nokia phone** (Exhibit 46), **several papers**, a **sim card** (Exhibit 47), and a sum of **Shs. 2,250/=** (Exhibit 43).

8. Investigations carried out subsequently led to the arrest of the other suspects who were charged alongside the Appellant. Some of these investigations related to phone calls made between the Appellant, the deceased and another Accused person in the trial known as **Paul Emuria Edome** (5th Accused). The said Accused person allegedly surrendered to **SSP Johnston Ipara** (PW11) an **AK 47 firearm** with a **magazine** (Exhibit 28) and the **sporting rifle** (Exhibit 29) stolen from **PW3's** home, on 26/5/2011. Phones stolen from **PW3** and **PW8** were traced with inmates at G. K. Prison Nakuru in May 2011. They were recovered and produced as Exhibit 13 and 18, respectively.

9. In his defence, the Appellant gave an unsworn statement. To the effect that he was a fish trader at Kasarani, Naivassha. That on 13/3/2011 he was at his quarters at Olsuswa farm, Kasarani. Police came and arrested him for possession of chang'aa. He was assaulted when he demanded the return of his Shs 3,530/=, identity card, wallet and personal documents the arresting officers had taken from his person.

10. On the next day at 7.00am police drove him to the scene where a man had been killed. The head of the deceased was deformed and he could not identify it. Several items that lay close to the body were collected. He was driven, along with the body to the lodge at Olerai and then to the Kongoni Police Station. He was taken to court on 15/5/2013. He denied that he committed the offences charged.

11. At the close of the trial the Appellant was convicted on all the nine counts of Robbery with violence and sentenced to life imprisonment. He now appeals this court raising four amended grounds of appeals as follows:-

“1. THAT the trial magistrate erred both in law and fact when he convicted me in the present case yet failed to find that the alleged possession of exhibits were not proved.

2. THAT the learned trial magistrate erred both in law and fact when he convicted in the present case yet failed to find that the investigations carried out were shoddy.

3. THAT the trial magistrate erred in law and fact when he convicted me in the present case yet failed to find that the trial amounts to a mis-trial.

4. THAT the learned trial magistrate erred both in law and fact yet failed to find that my plausible defence was capable of dislodging the prosecution case.” (sic)

12. The duty of the first appellate court was settled in the case of **Okeno -Vs- Republic [1973] EA 32**, where the Court stated as follows:-

“An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –Vs- R [1957] EA 336) and to the Appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala –Vs- R [1957] EA 570. It is not the function of the first appellate court merely to scrutinize the evidence to see there was some evidence to support the lower court’s findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters –Vs- Sunday Post [1958] EA 424.”

13. In his written submissions in the support the appeal the Appellant stated that:

“Your Lordship I am not disputing the prosecutions allegations that the ill feted victims were attacked on the fateful night and valuables stolen and that some were recovered and produced in evidence as exhibits. The only dispute is my involvement in the perpetration of the crime and the allegations that I was arrested possessing part of the stolen items. The evidence the learned trial magistrate relied upon to convict and pass a sentence.” (sic)

14. In this connection, the Appellant took issue with the evidence by **PW14** concerning his failure to record the recoveries in his statement, the narration contained in the Kongoni Police Station occurrence book regarding the Appellant’s arrest, the failure by **PW14** to produce the inventory in connection with the recovery and the deliberate exposure of the Appellant to the prosecution witnesses prior to the identification parade.

15. He submitted that the doctrine of recent possession was not properly applied in this case. He further highlighted what he described as contradictions in the evidence by **PW14** and **15** regarding the particulars of items recovered and the circumstances thereof. He reiterates his **“strong and truthful defence”** at the trial and complains that the same did not receive adequate consideration at the trial.

16. As regards the telephone conversation between Appellant’s phone with the deceased suspect’s phone, he submitted that it had no probative value as **“communication is not a crime”**, and that such evidence only raised suspicion.

17. Through Mr. Koima, the Director of Public Prosecutions opposed the appeal. He reiterated the prosecution evidence at the trial, and in support of the trial court’s application of the doctrine of recent possession, cited the case of **David Mutune Nzongo –Vs- Republic [2014] eKLR**.

18. He stated that the Appellant was properly convicted as by his denial of possession he had failed to offer a reasonable explanation as required under Section 119 of the Evidence Act. The Director of Public Prosecutions submitted that all the ingredients of the offence of Robbery with violence Contrary to Section 296 (2) had been proved.

19. I have considered the trial evidence, the submissions by the Appellant and the Director of Public Prosecutions. Clearly, there is no dispute that indeed a violent robbery was staged at the farm owned by **PW3**. And that, the robbers made away with money and valuables taken violently from workers and guests in the lodge on the farm and also from the family house of **PW3**. Some of the victims were injured in the robbery. There is no dispute further that some of these stolen items were recovered subsequently on the same night. Equally, there is no dispute that the Appellant was arrested by police on or around 13/3/2011.

20. Unsurprisingly the Appellant’s grounds of appeal and submissions are directed at the evidence of his arrest and recovery of the stolen items. This evidence, being the basis of the application of the doctrine of recent possession in the lower court’s judgment, requires some examination. Several police officers were part of the team that responded to the robbery report at **PW3’s** on the material night, under the leadership of **PW14**.

21. One of them, **PW16** remained at the scene to guard the robbery victims as the team broke up into three groups according to **PW14**. **PW15** was among those who went out with **PW14** towards Malewa area in pursuit of the robbers. It is the evidence of **PW14** and **PW15** that at about 2.30am they received information that some suspects were being held at Malewa, close to Marula farm, by members of the public. On arrival at the scene, the two officers found the Appellant and the deceased **Peter Ekiru Augustino**. The crowd was intent on lynching the Appellant who also had injuries, but the officers rescued him.

22. On the Appellant's person they recovered the black bag containing a **Sony Video Camera** (Exhibit 1 and 10). According to **PW15**, also, recovered were the Appellant's personal items such as voter's card, MPESA registration and others (**Exhibit 12 A, B, C**). Other items suspected stolen were a wallet (**Exhibit 11**) found in the Appellant's pocket which contained an elector's card for Victor Maina Mwangi (**Exhibit 3A, B**). The Appellant's Nokia phone and sim for line number **0700619725** (Exhibit 46 and 47) card, Shs 2,250/= (**Exhibit 43**) were also recovered. Other recovered items included a video head cleaner and disc for the Sony video camera (**Exhibit 40**), a tape (**Exhibit 41**), remote control switch (**Exhibit 14**), 5 compact discs (**Exhibit 42 A – E**); video camera manuals (**Exhibit 1B**). Foreign currencies including 10 Australian dollars (**Exhibit 44**), 10 Zimbabwe dollars (**Exhibit 45**) and a set of jewellery (**Exhibit 4A, B, C,**) were also recovered.

23. During cross-examination, **PW15** reiterated that these listed items were recovered from the Appellant and denied that having collected them elsewhere, he planted them on the Appellant. He confirmed that the said items were listed in the occurrence book of the day, explaining that despite the use of the word "later" in connection with the arrest of the Appellant, the recovered goods, particularly the Sony video camera and bag were found on the Appellant. Also that that the Appellant had his Nokia phone and sim card.

24. Like **PW15**, **PW14** said the "Malewa Security Guards" who had caught the suspects before the arrival of police were not called as witnesses. Further that no inventory was prepared in connection with the Appellant. In connection with the Appellant's arrest, **PW14** stated in his evidence:

"It was at about 4.00am, when I received a call from an informer. I was told two suspects were seen going towards Malewa. We rushed there. On arrival we found a group of people and two suspects. One had been lynched. I saved the other David Lekai, who is the first accused at the dock. The crowd was baying for his blood. I stood firm and took the dead body and the live one. The crowd wanted to set the body on fire and I could not wait for scene of crime personnel. I did a quick search and recovered a video camera. They also had many documents. The first accused (Appellant) had the bag which had the video camera and some documents. This is the video camera.....

I took a quick inventory of the items I recovered. Some were necklaces and earrings. They are the onesExhibits 4A, 4B and 4C.

There was a remote switch also in the bag (Exhibit 14).....papers which had different mobile numbers – Exhibit 12A, B, C, D..... There was a knife. I heard it was for Ian Douglas. It's this one – part of Exhibit 4BMFI 8 - It's a belt with something like a knife. First accused (Appellant) had used it along his waist. Complainant said it was his (Exhibit 8)..... We took the two to the homestead of Mr. Ian Douglas. Complainant identified Exhibit 1, 4A B and C, 8, 10 and 14. I then took the body and the suspect to police station.....I also recovered a wallet of Maina who was an employee of Ian Douglas in the pocket of first accused.Exhibit 11.

25. During cross-examination **PW14** stated:-

"I did not state about recovery of the items as those I was with did. There is a statement I recorded which does not touch on you. I am not the investigating officer. [He] was there during recovery.

The OB shows I was leading the group during the recovery. I wrote no statement in relation to recovery. This is an inventory. The inventory..... shows some items were in possession of the deceased suspect..... Those who arrested you, members of the public are not witnesses in this case. We could not call them as witnesses. They had killed, and disappeared when we arrived. It is not true that I did not arrest you at the alleged place with the items. I rearrested you and did a search.....This is OB 2, dated 14/3/2011. Page 2 states the items recovered and that David Letira Lekai was arrested with the above items.....but has an error in indication that you were arrested later..... The OB was written at 5.00am.....I signed the inventory. You did not sign it. You were required to sign.”

26. The witnesses proceeded to assert that the police took items from the Appellant including personal documents but said that cash Shs 2,500/-, the Nokia phone and foreign currency were found on the deceased. Clearly, there in was a discrepancy concerning part of the items, whether recovered from the Appellant or the deceased. I think such discrepancies are expected where proper inventories are not prepared contemporaneously with recovery. However, there can be no doubt that all the concerned items produced in court were recovered by police at dawn on 14/3/2011.

27. The Appellant has made much of the police failure to prepare an inventory. In the case of **Leonard Odhiambo Ouma and Another -Vs- Republic [2011] eKLR** the Court of Appeal discussed the effect of failure to prepare an inventory on recovery and observed as follows:-

“Failure to compile an inventory as contended in ground 5, is in our view a procedural step which in the circumstances, did not prejudice the Appellants in any way and for this reason, the omission did not vitiate the trial. We find no substance in this ground as well.”

28. Later, the High Court observed in **Stephen Kimani Robe and Others -Vs- Republic [2013] eKLR** that such failure:

“The purpose of an inventory is to keep a record of exhibits recovered during the investigation. Failure to prepare an inventory cannot override the physical existence of the exhibits especially where other witnesses apart from the officer who made the recovery confirms their existence.”

29. The failure to record an inventory or a complete inventory duly signed by a suspect cannot in this case discredit oral evidence, largely consistent by **PW14** and **15** on the recovery. Secondly, read as a whole the occurrence book report of the recovery clearly vindicates **PW14** and **PW15** on the recovery.

30. Thirdly the Appellant did not dispute the physical existence and recovery of the stolen goods. It seemed that all he disputed is any relationship with the goods in question. It is telling that while the Appellant in cross-examination of **PW14** and **15** alleged to have been arrested elsewhere, he never suggested to the witnesses that he was arrested at his home for possession of 1.5 litres of chang’aa. That would require an explanation too as to why the Appellant was singled out for ‘framing’ by police. However, it was a grave error for **PW14** to drive the Appellant to the home of **PW3** soon after arrest rather than organize an identification parade. As a result, identification evidence by workers of the Olerai lodge such as **PW2** and **PW5** was rendered worthless. It is not clear to me why, except perhaps to confirm the recovered goods with victims, that **PW14** thought it is necessary to take the suspects to Olerai on the morning of 14/3/2011.

31. **PW3** said that at 3.00am he was called by police who informed him they had two suspects. He stated:

“One was dead and one alive. They were brought to our house.....they had recovered a Sony video camera – MFI 1. This is the camera. I used it for 3 years. The camera was in the bag (MFI 10). There were some jewellery – MFI 4 (a), 4 (b) and 4 (c). There were some papers with phone numbers and Identity card for Victor Maina. It is this one MFI 3 (a), coloured wallet, red yellow and green MFI 11. It has a card of opening National Bank account for David Letira.....voter’s card for same person, Mpesa opening receipt too same

person showing his phone number 0700619725 (MFI 12 (a), (b), (c). We went to the other home (lodge) with police They dusted some bottles.”

PW3 stated that the Appellant was brought to the home between 7.00am and 8.30am. **PW1**'s testimony is consistent with **PW3**'s and **PW5**'s on the time when the Appellant and deceased were driven back to Olerai.

32. Although the Appellant's statement in defence does not identify the police who arrested him on chang'aa possession on 13/3/2011 or the time of arrest, I do not think it plausible that his arrestors quickly contrived to put him in a vehicle with the body of a stranger because he quarreled them for taking his Shs 3,530/= upon arresting him. Besides, as the trial magistrate correctly noted, the deceased **Peter Ekiru Augustino** was no stranger to the Appellant.

33. The Appellant's telephone number indicated on the sim card and **Mpesa** card recovered from him, and not denied was **0700619725**. Safaricom data generated by **PC Sylvester Muika Kariuki** (PW13) on request by Kongoni Police Station in respect of **Mpesa** line number **0700619725** was produced as Exhibit 33 and call records Exhibit 35. Also produced was data in connection with phone line number **0719311334** and **0704289572** in respect of Paul Emuria – the 5th co-accused at the trial (Exhibit 34 and 36).

34. Concerning the mobile phone data and communication (**PW16**) produced a **Motorolla** handset (**Exhibit 2**), correcting the details of the handset IMEI (handset identification number earlier misread by **PW15**. The former identified the IMEI number of the **Motorolla** phone as No. **44924929594410** and identified 3 days and times on **Exhibit 35** (Safaricom data) when the handset was using the sim card for line number **0700619725** (**Exhibit 12c**). These dates are 19/1/2011 at 11.37am, 26/11/2010 at 10.58am and 11/11 at 11.30am. Further he demonstrated by the call data that the **Exhibit 2** handset was used on 13/3/2011 to communicate with line number **0700619725** (Appellant's line) from Ekiru's line number **0711868145**. He stated:-

“At 10.20am the deceased called the 1st Accused (Appellant). At 11.41 first accused called the deceased. At 2.10pm the Accused (Appellant) called the deceased. From 2.12pm they communicated 17 times until 6.07pm. Exhibit 2 was used by deceased to communicate with 1st Accused. The first Accused used Exhibit 4 b (Nokia) phone.”

35. When questioned regarding his evidence by the Appellant, **PW16** had this to say:-

“On 19/3/2011 I was brought the Motorolla handset which was found at the scene. I took the list of numbers to a police officer attached to Safaricom. I was told the phone (Motorolla) was using sim card of Peter Ekilu Augustino deceased - owner of 0711868145 is you. No its for Peter Augustino.”

Thus, **PW16** relying on records was marked **Exhibit 33 – 36** was able to answer questions on the different phone numbers which **PW16** before him was had been evidently unable to do without records when he testified, explaining however, that he was one only of 3 police investigators in the case.

36. For my part, I have reviewed the Safaricom data. The print out date-stamped 5/4/2011 and marked **Motorolla** phone indicates the following history, in part, in relation to the usage of the phone with line number **0700 619725**

“IMEI 44924020504410.....

700619725 19th January 2011 11.37....

700619725 26th November 2010 10.58....

700619725 11th November 2010 11.08”

A copy of a search from the Safaricom computer indicates that **David Likai Letira** of Identity card number 24515208 is the person to whom

the said line account was registered. Ditto the **Safaricom Mpesa** account opening details marked Exhibit 33.

37. The Mpesa account opening details regarding account number **0711868145** also in Exhibit 33 indicate the holder of the line to be Peter Ekiru Augustino (the deceased), his identity card number being 20747704. Mpesa records (in Exhibit 33) in respect of line number **0704289572** is shown to be held by Paul Emuria Edome (5th Accused at the trial), of identity card number 23672606.

38. The call data Exhibit 35 reflects many calls made between the Appellant's phone line and the deceased (Ekiru), particularly on the 13th March 2011 between 10.20am and 7.00pm. The equipment used on the deceased's phone has an IMEI number corresponding with the **Motorolla** phone Exhibit 2. Thus it is believable that the phone was being used by the deceased on the material date to make calls, including to the Appellant.

39. **Safaricom** data retrieved in respect of the subscriber of line number **0719311334**, who was identified as the 5th Accused at the trial (**See Exhibit 36**) was tendered. This data reveals several calls between the above number and the Appellant's on several occasions: on the morning 1st March 2011, twelve calls between 8th and 9th March, seven calls on 10th March 2011, two on 11th March, six calls on 12th March, 13 calls on 13th March 2011, ending at 12.36am. On the same data are also recorded calls between the 5th Accused's line number **0719311334** and Ekiru's line number **0711866145** which have more or less the same frequency, and intensifying on 13th March 2011. At the time of the Appellant's arrest, this data had obviously not been procured by the police from the telephone providers. Nor had the **Motorolla** phone been found. Indeed, the identities of the holders of the lines in question were saved in disguised names, only revealed by data per **PW16**.

40. Looking at the pattern of calls and identities of the callers in light of the evidence regarding the robbery incident, the arrest of the Appellant and killing of the suspect Peter Ekiru, solid corroboration emerges concerning the Appellant's actual role in the offences charged. He was not a stranger to the deceased man, having spoken to him only hours prior to arrest.

41. It is true that the finder of the **Motorolla** phone (**Exhibit 2**) should have been called as witness. However, the fact that the said equipment using the deceased's line was in constant communication with the Appellant, particularly on the material day and night, it would be nothing short of a miracle that the Appellant was randomly associated with a stranger by police, and that later it turned out that the Appellant had phone links with the stranger. The Appellant confirmed arrest on 13/3/2011 at Kasarani, Naivasha, and not later, when the **Safaricom data** would have been obtained. The Appellant's brusque but correct assertion that making a call to another person is not a crime does not in the circumstances of this case diminish the value of the mobile data records in giving strong corroboration to other prosecution evidence.

42. The trial magistrate in the course of his judgment observed correctly regarding this data that:

“The other bits of evidence which connects him (Appellant) to the robbery is that a cell phone, Motorola was got on 19/3/2011 from Olerai Farm. Investigations established it belonged to one Peter Ekiru who was arrested together with the Accused and killed by members of the public. Investigations as to the use of that phone established the 1st Accused had used it; using his sim card, on 19/1/2011. The fact shows he had a relationship with the deceased and they were at Olerai Farm where the phone was collected..... Connection with other suspects in this case and other cases through his phone only raises strong suspicion against him but are not firm enough to warrant his conviction.....However, when

considered with the rest of evidence it leaves no doubt that the 1st Accused person took part as the commission of the robberies covered in the nine counts on the charge sheet. His defence is not true. He could not have been arrested in possession of chang'aa and fixed by police with strange offences out of no clear cause.”

43. Although I believe the learned trial magistrate should have carefully set out his analysis of the call data evidence, before making conclusions, having done so myself I cannot fault his conclusions. There is believable evidence that the Appellant, contrary to his assertions was arrested, after the robbery while in the company of a man known to him, while both of them were in possession of goods stolen at Olerai Farm. This was less than four hours since the robbery incident which appears to have started at 8.30pm and ended just past midnight.

44. Thus it is not surprising that in the flux of things **PW14** and **PW15** appeared a little mixed up regarding the exact items recovered from each of the two suspects. In the worst case both witnesses were clear that the Appellant had **PW3's** stolen Sony video camera and bag on arrest. The evidence tendered strongly indicates that the two suspects were members of the gang that robbed the guests and family of **PW3** on the material night while armed with firearms and other weapons.

45. The submission by the Appellant that the doctrine of recent possession was wrongly applied, holds no water. The facts in the case of **David Mutune Nzongo** (Supra) relied on by the Director of Public Prosecutions is almost on all fours with the instant case. The Appellant therein had been arrested, within hours after a robbery incident involving three complainants. On arrest he was found in possession of stolen items identified by the Complainants.

46. The Court of Appeal cited its decision in **Ogembo -Versus- Republic, [2003]1 EA**, to the effect that:

“For the doctrine of possession of recently stolen property to apply, possession by the appellant of the stolen goods must be proved and that the appellant knew the property was stolen.”

Recently, this Court in **Moses Maiku Wepukhulu & PAUL NAMBUYE NABWERA -Versus- Republic CR.A NO. 278 OF 2005** (Koome, Mwera & Otieno-Odek, JJ.A.) quoted with the approval what constitutes the doctrine of recent possession in the case of **Malingi -Versus- Republic, [1989] KLR 225**:

“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 has proved certain basic facts. That the item he has in his possession has been stolen; it has been stolen a short period prior to their 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 the 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 items.”
[Emphasis added]

The doctrine is a rebuttable presumption of fact. Accordingly, 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 or was a guilty receiver.

As was aptly stated in the case of **Hassan -Versus- Republic, (2005) 2 KLR 151**:

“Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or a receiver.”

In this case, Appellant denied possession of the stolen goods hence offered no reasonable explanation.

47. P3 forms and medical records tendered in respect of victims of the robbery namely **PW2, PW4, PW5**

and **8** indicate that the robbers severely injured the victims in the course of the robbery. The robbers were armed with an **AK 47** and **rungus**. Not only did they shoot wildly during the robbery they also beat up their victims viciously. It is my considered view having considered the evidence, that the Appellant was properly convicted for the offence of Robbery with violence contrary to Section 296 (2) in respect of counts one (1), three (3), five (5) and six (6).

48. The complainants in counts two, four, seven, eight and nine, though mentioned in the charge sheet and evidence did not come forward to testify. It was necessary to call the said complainants to give an account of what they lost in the robbery and to identify any of the goods that were recovered. There was no explanation for this omission. I will therefore allow the appeal in respect of counts two (2), four (4), seven (7), eight (8) and nine (9). The convictions in respect of the said above counts are quashed and sentences set aside.

49. However, regarding counts one, three, five and six, I am satisfied that the convictions were properly arrived at and I do dismiss the appeal therefrom. Regarding sentencing, two errors were made by the lower court. Firstly, a conviction for an offence of Robbery with violence Contrary to Section 296 (2) as proved in the circumstances of this case attracts a mandatory death sentence. That is the law and the trial court erred by imposing a life sentence, which is illegal.

50. Secondly where an accused person has been convicted on several counts of Robbery with violence Contrary to Section 296 (2) of the Penal Code, only one sentence of death can be imposed while other sentences are held in abeyance.

51. In the circumstances of this case, I will set aside the life sentence imposed in respect of counts one, three, five and six and substitute in respect of count one, the death sentence, while at the same time ordering that sentencing in respect of counts three, five and six be held in abeyance. It is so ordered.

Delivered and signed at Naivasha, this 17th day of November, 2016.

In the presence of:-

For the DPP : Mr. Koima

C/C : Barasa

Appellant : Present

C. MEOLI

JUDGE