



**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY**

CRIMINAL APPEAL NO. 9 OF 2014

CONSOLIDATED WITH

CRIMINAL APPEAL NO. 10 OF 2014

BETWEEN

COLLINS EVANS OMONDI 1ST APPELLANT

SAMUEL ISINYA NYAKUNDI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 1004 of 2012 at Chief Magistrate's Court at Homa Bay, Hon. S. Onger, SRM dated on 25th March 2014)

JUDGMENT

1. Shivling Supermarket is located within Homa Bay Township within Homa Bay County. On the night of 29th and 30th July 2012, a robbery took place resulting in the death of four people who, it was alleged, were watchmen at the supermarket. They were Samuel Ogolla Ooko, Dickson Andata, Samuel Anguko and Odiwuor Awala Ogenya. The appellants, **COLLINS EVANS OMONDI** and **SAMUEL ISINYA NYAKUNDI** were charged with four other co-accused were charged with four counts of robbery with violence contrary to **section 296(2)** of the **Penal Code (Chapter 63 of the Laws of Kenya)** in respect of each deceased person. The particulars of the four counts were that on the material night they, jointly with others not before the court, while being armed with dangerous weapons namely pangas and rungus, they robbed the deceased persons of cash amounting to Kshs. 1.4 million, assorted mobile phones, TV set, DVD's all valued at Kshs. 2.2 million and immediately before the time of such robbery unlawfully caused the death of the deceased.
2. Each appellant faced an alternative charge of handling stolen goods contrary to **section 322(2)** of the **Penal Code**. As against the 1st appellant, it was alleged that on the 17th August 2012 at Riat Village in Kisumu East District, Kisumu County, otherwise than in the course of stealing, he dishonestly received or retained 5 mobile phones, two alcatels, one Nokia 100, 2 Samsung GTE2232 and Samsung Galaxy 2222 all valued at Kshs. 32,800/- knowing or having reason to believe them to be stolen goods. It was alleged the against the 2nd appellant that on 21st August 2012 at Nyangusu Market, Gucha District, Kisii County, he otherwise than in the course of stealing dishonestly received or retained 1 mobile phone make Samsung Galaxy 2222, 1 DVD make LG, one flat screen make AUCMA, two Benq digital cameras, 1 LG remote, Astra four

ways extension and one roller panel charger all valued at Kshs. 21,350/- knowing or having reason to believe them to be stolen.

3. The 1st appellant also faced a charge of being in possession of bhang, a narcotic drug, contrary to **section 3(1)** as read with **section 3(2)** of the *Narcotic Drugs and Psychotropic Substances Act, 1994*. The particulars of the charge were that on 17th August 2012 at Riat Village in Kisumu East District, Kisumu County, he was found in possession of 4 rolls of bhang with a street value of Kshs. 200/- which was not in its medicinal form in contravention of the *Act*.
4. The appellants pleaded not guilty and after a trial, in which the prosecution called 20 witnesses, the appellants were found guilty of the first three counts of robbery with violence and acquitted on the fourth one. The 1st appellant was convicted on the additional charge of possession of bhang. They were sentenced to death on the first count and the sentences in respect of the 2nd and 3rd counts were held in abeyance. The appellants now appeal against conviction and sentence. The appellants filed separate appeals which were consolidated.
5. The 1st appellant lodged his petition of appeal on 4th April 2014. He contests the conviction and sentence on several grounds; that the date and time of the commission of the offence was not established as PW 1 testified that he reported the incident at 8.30am on 29th July 2012 while the PW 2 found the watchmen dead at 4.44am. That PW 7 testified that the 1st appellant gave her some phones as security yet she did not produce any documents. That the prosecution alleged that the phones were tracked yet the phone company records were not produced to prove such an allegation. That the confession was not recorded in accordance with the law. That the prosecution did not establish where the 1st appellant's fingerprint was found. The 1st appellant also filed handwritten supplementary grounds of appeal which he relied upon in his submissions.
6. The 2nd appellant contested his conviction and sentence on the ground that the trial magistrate erred in relying on the doctrine of recent possession as he was arrested 24 days after the offence was committed. That the records from the mobile phone company were not produced to show that the phones were stolen. That there was no evidence to show he was implicated by his co-accused and that his sworn testimony was disregarded. The 2nd appellant filed handwritten submissions which he relied upon.
7. Mr Oluoch, learned counsel for the respondent, opposed the appeal. As regards the 1st appellant he submitted that his involvement in the robbery was proved on the basis of the doctrine of recent possession when he was found with assorted mobile phones belonging to the complainant on 17th August 2012, 17 days after the robbery. He stated that the 1st appellant did not lay claim to the items nor furnish a reasonable explanation for having them. He submitted that there was sufficient fingerprint evidence to implicate the appellant and the extra judicial statement recorded was admitted without objection and was too detailed to disregard and was in fact corroborated by material evidence. He further submitted that the conduct of the 1st appellant when he was arrested was inconsistent with innocence.
8. As regards the 2nd appellant, Mr Oluoch submitted that the prosecution proved that he was found in possession of recently stolen property on 21st August 2013, 21 days after the robbery. That his conduct upon arrest was also inconsistent with innocence. Counsel contended that the 2nd appellant did not challenge the admission of the extra-judicial statement which implicated him and in any case, the same was corroborated by discovery of the stolen property.
9. As this is the first appeal, we are enjoined to consider the entire evidence, evaluate it and reach an independent conclusion as to whether we should uphold the conviction bearing in mind that we neither heard nor saw the witnesses testify (see *Okeno v Republic [1972] EA 32*).
10. Before we consider the essence of the appeal before us we wish to point out that in a prosecution

for robbery with violence **under section 295 as read with 296 (2) of the Penal Code** the prosecution must be prove theft as **a central element of the offence** (see *John Mwikya Musyoka v Republic Mombasa CRA No.38/99 (UR)*). The other elements of the offence of robbery with violence 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.

11. On the night of 29th and 30th July 2012, a robbery took place at Shivling Supermarket. Security guards were killed and the supermarket broken into and assorted items and money stolen. PW 3, Maurice Otieno Amollo, a security guard supervisor employed by Loure Security assigned 3 guards to guard the premises; Samuel Ogolla Ooko, Dickson Andata and Samuel Anguko. They reported to work at 6.00am and were to leave at 6.00pm on the next day. He visited them at 7.10 pm and at 9.20pm and confirmed that they were present. When he went there at 4.44pm, he did not find them and when he looked around and found them dead. Their bodies were cut and strangled with ropes. He called his supervisor, Samuel Odira Odongo (PW 2) who instructed him to call Homa Bay Police Station. PW 2 called the police and the director of the supermarket. He proceeded to the scene and found the guards had been tied with ropes on their legs and that they had several injuries. He also noted that the window of the supermarket had been broken.
12. Ashwin Patel (PW 1), a Director of Shivling Supermarket and the manager of the Homa Bay branch, confirmed that on the evening of 29th July 2012, he locked the supermarket and left three guards at the premises. PW 2 called him in the morning and informed him that the supermarket had been broken into. He informed the police and when to the premises when he found that the guards had been killed. He entered the shop and found mobile phones, a flat screen TV, 5 DVD players and assorted electronic goods and Kshs. 2.2 million shilling in cash missing.
13. Duncan Ocholla Asinya (PW 4), a supervisor at Shivling Supermarket, was also informed that the supermarket had been broken into. He confirmed on the previous day he closed the supermarket and left 3 guards. When he arrived in the morning, he found the 3 bodies of security guards and the door of the supermarket had been broken into through a window. When he went inside the premises he confirmed that he found that mobile phones, televisions sets, cameras and money had been stolen.
14. The bodies at the premises were taken to the Homa Bay District Hospital mortuary. Lorna Adhiambo Ogolla (PW 5), Margaret Achieng Andeta (PW 6), Monica Akinyi (PW 7) and Edwin Oloo Ooro (PW 13) identified the bodies of Samuel Ogola Ouko, Dickson Andera, Samuel Aguko and George Oduor Odero respectively. Dr Ayoma Ojwang' (PW 16) conducted autopsies on the bodies. He noted that Dickson Andeta Agutha had external injuries to the neck and his skull was crushed at the base causing bleeding into the brain and neck which resulted in his death. As regards Samuel Aguko Pima, he observed a depressed skull fracture at the right temporal bone with bleeding in the brain. He concluded that the skull fracture led to his death. George Oduor Odero died as a result of a depressed skull fracture which led to the bleeding of the brain. Samuel Ogolla Ouko had tight ligature marks around the eyes and a severe fracture at the base of the skull which led to his death.
15. From the evidence presented by the prosecution it is clear that Shivling Supermarket was broken into and various items stolen therefrom and in the course of stealing violence was inflicted on the

security guards who died as a result. The issue then is whether the appellants were the assailants who, in the course of stealing from Shivling Supermarket, inflicted such violence on the security guard thereby causing their death. The material evidence relied upon by the prosecution to implicate the appellants was as follows.

16. Pauline Khamete Babu (PW 8) recalled that the 1st appellant was a tenant in the rental house she owned with her husband at Riat in Kisumu. He was paying Kshs. 1,500/- for a single room which he occupied with his wife, Maximilla Musembi Achilu (PW 13) and child. On 6th August 2012, the 1st appellant came to see her as he had not paid rent. He requested her to take 4 phones as security until he paid the rent. These phones were; 2 Samsung phones, 1 Nokia and an Alcatel phone (Exhibits No. 3, 4, 5 and 29). On 16th August 2012, the 1st appellant came to see her and informed her that his wife and father in law had been arrested and that he was running away. When the police came to see her, she handed over the phones given to her by the 1st appellant. On 17th August 2012 at about 2.00pm, while she was at Kisumu Central Police Station to see her husband who had been arrested, her daughter Bilha called her and told her the 1st appellant was in the house. She instructed her to lock the house from outside and call the police from Riat to come and arrest him.
17. Maximilla Musembo Achilu (PW 13) testified that she was staying with the 1st appellant at Riat and they had a son. She recalled that in July 2012, the 1st appellant gave her phone which he told her he had bought. She went with the phone to Kakamega for a funeral where her father Thomas Adogi Ikaro (PW 12) used to make a call. PW 12 testified that he called his son using PW 13's phone. The police traced PW 12 who testified that he was arrested and taken to Kisumu.
18. Chief Inspector Bernard Muriuki (PW 14), the Commanding Officer of Kondole Police Station, he recalled that on 16th August 2012 at about 7.30pm he received information about the robbery incident in Homa Bay and that 2 suspects who were traced using the stolen phones, PW 12 and PW 13, had been brought to the police station. PW 13 took them to the 1st appellant's home and where they found PW 8 who handed over 2 phones an Alcatel T222 and Alcatel wifi he had received from the 1st appellant.
19. On 17th August 2012, PW 14 and his officer received information that the 1st appellant was in his house packing. They mobilized officers who went to the house and found him locked inside his house. The 1st appellant broke the door and was caught as he tried to jump over the fence. PW 11 further testified that when he was searched the appellant he recovered 2 mobile phones, a Nokia 100 and Alcatel 506 (Exhibits 34 and 36) and rolls of bhang.
20. PC Charles Keter (PW 10), a Scenes of Crime officer from Kisii, authorised vide Gazette No. 407 dated 18th January 2010 testified that he arrived at the scene of the robbery at about 9.00am on 30th July 2012. He noted that the night guards had been killed and the robbers gained entry by opening a window of the supermarket and had stolen assorted electronic goods and money. He did dusting and was able to lift 17 fingerprints. He also took photographs of the scene which he developed and produced in evidence.
21. Chief Inspector Paul Ndirangu Mburu (PW 11), a gazetted finger print expert, recalled that he took possession of the crime scene marks and CID forms C46 from the Homa Bay Scene of Crime Support Services. He mounted the crime scene marks and the 1st appellant's fingerprints in Form P20 he found them to be identical.
22. Richard Kimutai Langat (PW 18), a duly gazetted Government Analyst based at Kisumu, testified that he received an Exhibit Memo from PC Patrick Kibowen with instructions to confirm that the 4 rolls recovered from the 1st appellant were bhang. He conducted the requisite tests and confirmed that the rolls were *cannabis sativa* which is a psychotropic substance. He prepared a report and which was produced as an exhibit.

23. PC Sammy Kure Gitwanya (PW 18) and PC Peter Sugut (PW 19) were working at Nyangusu Police Station at the time. They both testified that on 21st August 2012, they were called by their superiors and informed about the robbery that had taken place in Homa Bay and that the 2nd appellant was a suspect. An informer assisted them trace him at Nyangusu market where he was pointed out. He ran and entered Akemo Valley Hospital. With the assistance of the public, the 2nd appellant was arrested and he was found with a mobile phone and 2 cameras (Exhibit 42a and 42b). After his arrest, he led the police to his home where they conducted a search and recovered a DVD Player (Exhibit 40), Solar Panel (Exhibit 43), flat screen TV (Exhibit 2), LG TV Remote (Exhibit 18), extension cable (Exhibit 19) and other items.
24. Chief Inspector Francis Cheboiywo (PW 12), the Deputy DCIO of Homa Bay Police Division and the investigating officer in the matter, received a call on the morning of 30th July 2012 informing him of the robbery at Shivling Supermarket. He proceeded to the scene with other officers and observed 4 dead bodies which had cut injuries opposite the entrance of the supermarket. The padlocks on the doors had been cut and the glass window, which was used to gain access broken. He organised Scene of Crime Officers to come. PW 9 came and took photographs and dusted the scene for fingerprints. He organised for the bodies to be taken to the mortuary. When PW 1 came he was asked to take an inventory of the items that were missing. He also called Safaricom to request them to track the stolen phones in the event they were activated.
25. On 16th August 2012, one of the phones was activated which led to the arrest of PW 12 and PW 13. PW 13 led to the arrest the landlord of the 1st appellant and subsequently to the arrest of the 1st appellant on 17th August 2012. On 21st August 2012, a mobile phone at Nyangusu was activated which led to the arrest of the 2nd appellant and recovery of some stolen items. The 1st appellant recorded a statement to Chief Inspector Mulatya (PW 20) under caution in which the 1st appellant outlined how they organised for the robbery with the 2nd appellant.
26. Chief Inspector Joseph Mulatya (PW 20), the Commanding officer of Homa Bay Police Station testified that he was called by PW 3 at about 4.00 am on 30th July 2012 that Shivling Supermarket had been broken into. He proceeded there and found 4 bodies. He secured the scene for the DCIO to commence investigations. On 18th August 2012, he was summoned by the DCIO to record a statement under inquiry by the 1st appellant. The 1st appellant was brought to his office and cautioned and thereafter recorded a statement which was produced in evidence.
27. The appellants were put on their defence. In his sworn testimony the 1st appellant denied that he knew anything about the charges facing him. He testified that he was a businessman selling clothes at Kibuye in Kisumu. He stated that he could not remember where he was on the night of 29th and 30th July 2012. He recalled that on 16th August 2012, he was at Kibuye market when some customers called him to take some clothes. One of the customers who called him was the nephew of his landlord. He took some trousers to him but before he could be paid for the trousers the customer had selected, police officers came into his compound and arrested him. His mobile phone was taken.
28. In his sworn testimony, the 2nd appellant denied that he was involved in the robbery. He stated that he was a form 2 student and that on the night of 29th and 30th July 2012, he was at home sleeping. He recalled that on the 21st August 2012 at about 3.30pm, his mother had sent him to take Kshs. 8,350 to an organisation in which she was a member. On his way he was stopped by three men but he hit one of them with his bicycle because of a mechanical problem. The two others chased him and because he feared, he ran into the hospital. When the two men caught up with him, they informed him they wanted his brother Hesbon. He took them to Hesbon's place at Nyangusu market where they found Hesbon's wife. They searched the house and found 2 TV sets, Gas cooker, 2 cameras and other items he could not recall. Hesbon's wife also gave them a phone which the officers told him they were looking for. He was taken to the police station and charged.

29. From the evidence, the learned magistrate found that the prosecution had proved its case against the appellant. The appellants were duly convicted while the co-accused were acquitted. The learned magistrate grounded the appellants' conviction primarily on the doctrine of recent possession.

30. It is well established that the doctrine of recent possession can be relied upon to support a conviction of a charge of robbery with violence contrary to **section 296(2)** of the *Penal Code* (see *Samuel Gichuru Matu v Republic CA NRB Criminal Appeal No. 88 of 2000 (UR)*). In *R v Bakari s/o Abdulla [1949] 16 EACA 84*, the Court of Appeal for Eastern Africa stated that;

That cases often arise in which possession by an accused person of property proved to have been very recently stolen has been held not only to support a presumption of burglary or of breaking and entering but of murder as well and if all circumstances of a case point to no other reasonable conclusion the presumption can extend to any charge however penal.

31. In order to secure a conviction, the prosecution relied on the evidence of recent possession to establish that phones and other items belonging to Shivling Supermarkets were recovered from the appellants so soon after the robbery. In *Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga -vs- R NYR CA Criminal Appeal No. 272 of 2005*, the Court of Appeal summarised the application of the doctrine of recent possession thus;

It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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.

32. We have evaluated the evidence and considered the submissions and we now find as follows. As regards the 1st appellant, he was traced through PW 12 and PW 13. PW 7, his landlord, testified that she was given 2 Samsung phones, alcatel and a nokia as security for his rent. These phones were identified by PW 1. It was not necessary, as the 1st appellant argues, that the prosecution ought to have produced a document to establish such an agreement as such an agreement between the 1st appellant and his landlord need not have been in writing. In any case it is the 1st appellant who went to her and made the proposal to secure the rent with the mobile phones. The phones remained with the landlord for his benefit and were intended to be recovered later once rent was paid. As the phones were to be used as security they remained in his possession in terms of **section 4(a)** of the *Penal Code* which states as follows;

“be in possession’ or ‘ have in possession ‘ includes not only having one’s 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.

33. When he was arrested by PW 1, the 1st appellant was found with 2 mobile phones. These phones were identified by PW 1 as having been stolen from the supermarket. The phones were recovered 17 days after the robbery. Taking into account the nature of the investigation, we do not consider the time taken for recovery unreasonable or such as to negate the application of the doctrine of recent possession. When called upon to make his defence, the 1st appellant did not lay claim to the phones or provide a reasonable explanation why he possessed them. Given the nature of his business, which he said was selling clothes at Kibuye, there was no reasonable basis for this court to conclude that the phones were part of his business. We also agree with counsel for the respondent that his conduct when he was being arrested was inconsistent with his innocence.

34. The 2nd appellant was arrested by PW 18 and PW 19 at Nyangusu market. The fact and circumstances of his arrest were confirmed by the 2nd appellant in his own sworn statement. He led them to his house where the stolen property was recovered. In his testimony he attempted to suggest that the property belonged to his brother Hesbon but we find this to be an afterthought as he did not put this issue to PW 18 or PW 19 when he cross-examined them. In his defence he admitted that the flat screen TV (Exhibit 2) was found in the house. This flatscreen TV was identified by PW 1. His defence was therefore a sham. As the property was found in his house, he was in possession of the same. The 21 days taken to recover the items was not unreasonable in view of the nature of the investigation.
35. Both appellants submitted that the prosecution ought to have called or produced records from Safaricom to show how they were tracked. We do not think that such evidence was necessary in light of the clear evidence that the appellants were actually found with the stolen property. Further, the manner in which the appellants were traced was not an essential element of proof of the offence as opposed to the fact that the appellants were found in possession with stolen property.
36. We therefore find and hold that the prosecution established the elements of the doctrine of recent possession and the appellants were properly convicted on such evidence. This evidence, without more, was sufficient to sustain their conviction.
37. However for completion of the record, we note that the appellants were further implicated in the robbery by other material evidence. The 1st appellant's fingerprint was found at the scene as testified by PW 9 and PW 10. We have examined the chain of evidence and are satisfied that the 1st appellant's fingerprint was found at the scene of the robbery and processed in accordance with established procedures. Other than state that he could not remember where he was on 29th and 30th July 2012, he could not provide a reasonable explanation as to why his fingerprint, which is a very unique form of identification, was at the scene of a robbery yet he was a businessman in Kisumu. This was sufficient evidence to put him at the scene of the incident.
38. The other piece of evidence that implicated the appellants is the extra-judicial statement made by the 1st appellant under caution. This statement was made before PW 20. Although the appellants did not object to its production we find that the statement admitted contrary to the law. The law regarding confessions is found in **section 25A** of the *Evidence Act (Chapter 80 of the Laws of Kenya)* which provides at the material part:
- 25A(1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police and a third party of the persons choice.*
(Emphasis mine)
39. We have considered the evidence of PW 20 and find that though the statement was made before an officer above the rank of inspector, it was not made before a third party of the accused's choice. There is no evidence that the 1st appellant was informed of his right to have a third party present while the statement was being taken. In the circumstances, the confession could not pass the hurdle erected by the mandatory provisions of **section 25A(1)** of the *Evidence Act* and it was inadmissible to prove the guilt of the appellants.
40. Before we conclude the judgment, we would like to deal with a few issues raised by the appellants in their submissions. The 1st appellant contended that the charge was defective in that it did not set out the precise items that were stolen and recovered. In our view the charges as framed laid out the essential elements of the offence of robbery with violence. No objection was raised at the trial and the prosecution, as we have demonstrated, proved the case against the appellants. We find that there was no prejudice occasioned to the appellants by the manner the charges were framed. In any event, any defect in the charge is covered by **section 382** of the *Criminal Procedure Code*

(Chapter 75 of the laws of Kenya) which provides that;

382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

41. We have evaluated the evidence and considered the parties submissions and we find that there was sufficient evidence based on the doctrine of recent possession to convict the appellants. The case against the 1st appellant was buttressed by the finding of his fingerprint at the scene of the crime.

42. We affirm the appellants' conviction and sentence for the offence of robbery with violence on the 1st, 2nd and 3rd counts. We note from the petition of appeal that the 1st appellant did not contest his conviction and sentence for possession of psychotropic substance.

43. The appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 27th day of July 2015.

D.S. MAJANJA

E. C. MWITA

JUDGE

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.