REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL APPEAL NO. 185 OF 2008

DAVID OLEGUMO KIMAYIAN …… APPELLANT

-VERSUS-

REPUBLIC ……..…….. RESPONDENT

JUDGMENT

(Being an appeal from the Original sentence and conviction of Hon. R. Oganyo (Mrs) Senior Resident Magistrate's Court at Kilgoris Criminal Case No. 461 of 2007, delivered on 17th September, 2007.)

The appellant was with one, **David Kipkemoi Ngeno** on 16th July, 2007 arraigned before the Senior Resident Magistrate's court at Kilgoris on three counts. Count 1 was for robbery with violence contrary to section 296 (2) of the **Penal Code**. It was alleged that on the night of 27th June, 2007 at Siteti trading centre in Transmara District of the Rift Valley Province, jointly with others not before court while armed with dangerous weapons namely spears and Maasai swords robbed **Leonard Maina**, two mobile phones make Nokia 1600 and 2610, one solar battery, a torch, an umbrella and one black porch all valued at Kshs. 26,050/= and at or immediately before or immediately after the time of such robbery wounded the said **Leonard Maina**.

The 2nd count was with regard to Assault causing actual bodily harm contrary to section 251 of the **Penal Code**, particulars being that on the same day and place, the appellant, again with **David Kipkemoi Ngeno** jointly and unlawfully assaulted **Teresia Maina** thereby occasioning her actual bodily harm.

Finally, the appellants faced the third count of Grievous harm contrary to section 234 of the Penal Code. Particulars given were that on the same day and place, they jointly and unlawfully did grievous harm to **George Maina**.

The appellant entered a plea of not guilty on each count and was subsequently tried together with his co-accused.

In brief, the prosecution case against the appellant was that on the night of 27th and 28th June, 2007 at about 1.00a.m. **Leonard Maina (PW1),** the complainant in respect of count 1 was asleep in his house at Siteti area of Lolgorian Division with his wife, **Teresia Maina** (PW3), the complainant in count II. They suddenly heard a bang on the door. They woke up and PW1 lit a torch. The door caved in on the third strike and a person walked in and went straight to the bedroom as PW1 prepared to arm himself. That person had a torch with three bulbs and it emitted bright light. The person ordered PW1 to sit down as he held something which looked like a gun. PW1 had directed his torchlight at him when he walked in. However he was unable to see him well to be able to identify him. That person was also armed with a Somali sword and immediately cut him on the back whilst demanding money in Kiswahili. PW1 screamed and his wife joined in too. At this point the other robbers who had been bidding their time outside stormed the house. One of them came and sat on the long sofa set. When he told the first robber who entered the house first, that he has no money, he left him and went to his wife. The one on the sofa set stood up and came to where PW1 was. His wife continued screaming and asked the 1st robber why they wanted to kill her husband. He decided to look at the 2nd robber standing next to him. That robber immediately cut him on the right forehead. PW1 then dragged himself on his knees to the kitchen. It was then that he was able to see the 2nd robber properly. He was physically taller than him and was wearing half sweater inside a long black coat over it and a scarf on the head. The robbers searched the house for mobile phones. The 1st robber found two mobile phones from the head board drawers. They were Nokia 2610 and 1600 respectively. The robbers then took the black solar battery, Great wall T.V and a torch. However they abandoned the T.V outside. After they left PW3, who had accompanied them outside screamed for help. She had been cut on the right leg and

wrist twice by the 1st robber. He did so after she had asked him why he was doing so yet she knew him. She was cut continuously as she was dragged around the house as the robbers looked for money. In fact she was cut seven times. Their son, **George Mwangi** (PW4), the complainant in count III then aged 4 years in the meantime was kneeling on the bed and screamed when he saw his mother being cut. The same robber then cut the boys left hand. PW3 again talked to him in Kalenjin dialect asking him not to kill her child since he also had children. He then pointed some cold barrel on her cheek and asked her if she knew what that was. When she said it was a gun, he demanded for her mobile phone. The 1st robber managed to get the two mobile phones Nokia 1600 and 2610 which belonged to her and her husband respectively. As they were leaving the 1st robber told PW1 not to look at them and he then cut him on the back and left. PW3 accompanied them to the outside of the house. Once out there, they gave her back the T.V and they left with the solar battery. One of them actually thanked her and in response she told them that God alone will judge their actions. She immediately screamed and neighbours came and helped them to a hospital at Lolgorian. On the way, neigbours asked them if they had recognized any of the robbers. PW3 confirmed that she knew one of them and had even spoken to him in Kalenjin dialect. At the Lolgorian police station, she repeated the same message. As for PW1, he stated that he had identified one of them who had shoes with a white sole. He was the 1st robber. The shoes were open like Oginga-Odinga shoes. He was wearing a trouser that was torn at the knees. He was tall. He used to see the white soled open shoes with somebody. He confirmed to the neighbours that if he saw the shoes again he would recall them.

At the hospital, PW1 and PW3 were stitched. However the injuries sustained by their child (PW4) were so severe as the tendons had been cut and they could not be stitched. They referred them to Kilgoris District Hospital where again the condition of PW4 could not be managed. They were then referred to Kisii Hospital. However PW4 could not be attended to at the said hospital as the doctor was absent. They therefore opted to take PW4 to Tenwek hospital instead where he was admitted and treated for five to six days before he was discharged.

The report of the incident at Lolgorian police station was received by **CPL John Olima** (PW7). He proceeded to the scene with his colleagues, **P.C's Onger, Ndoli** and **Ochieng** where they recovered the stone used to break the door. They also recovered the solar battery in the maize plantation next to PW1 neighbour's house. Subsequently P3 forms were issued to both PW1, PW3 and PW4. They were all examined by **Richard Lemiso Kangaro** (PW2), a clinical officer at Lolgorian Health Centre. With regard to PW1 he noted a transverse deep cut wound on the forehead and cut wound on the left posterior upper scapula. The type of weapon used to inflict the injuries was sharp. He assessed the degree of injury as grievious harm.

As for PW2, he observed that the right upper chest was deeply cut, superficial cut on the right wrist and deep cut on the right leg. Probable weapon used was sharp and degree of injury, grievious harm,

Finally, with regard to PW4 he noted that he was a boy of 4 years. He had sustained a deep cut wound on the left wrist which was severe. Probable weapon used was a sharp and type of injury was harm.

On the date when PW1 was to take PW4 back to hospital for a review, police came to see him so that he could confirm whether the person they had arrested following his description was among the robbers. He was in the police land rover then. PW1 asked the person where the shoes he was wearing were. Then the police officers removed the shoes and on seeing them he confirmed that he had seen them with the suspect on the night of the robbery. PW3 too who was present also recognized the suspect. He was the one she had talked to in Kalenjin dialect during the robbery. He is the appellant. PW3 also knew the appellant as she used to see him in the market. During the robbery he is the one who cut her on the leg, hand and chest. He was wearing a black jeans trouser with a hole on the knee cap area. He was also wearing a long black jacket and had covered his head with a red sheet. As he continued with his actions the sheet loosened and fell on his shoulder then his face was exposed and remained bear. She then saw him clearly as he led her towards the suit case to look for money. She even called him by the names **Kimayian** and talked to him in Kalenjin dialect. He had white soled pair of open shoes.

In the meantime **PC James Sairei** of Lolgorian police station (PW8), on 12th July, 2007 in the morning was tipped by an informer that a cell phone was being charged at a school known as Olopikindongoi Primary School. It was suspected to be stolen property. He flagged down a motor cycle and rode to the school. On the way he met the informer who described to him where the phone was and how the one who had it looked like. When he got to the school gate he found two young men seated in a shade. He asked the duo who among them had a cell phone and one, **Jackson Konojoni Parkeni** (PW6) answered in the affirmative. It was a Nokia 2610. He took the phone and checked the serial number and found it to be 359771001216095. This is the same serial number given to them by the owner of the phone PW1. He arrested him and took him to the police station. On the way he interrogated him and he said that he had been sold the phone by one, **Kimayian** and he was to pay him the balance of the purchase price on 2nd August, 2007. He proceeded to lock him up in the cells.

In his own words, PW6 testified that on 28th June, 2007 at about 5.00p.m. he went to shelter from rain. He was coming from Olopikodongoi. In the shelter he found himself in the company of the appellant, and one, **Julius Ole Ntaiyo**. The appellant removed a cell phone and told them he was selling it for Kshs. 5,000/=. **Julius Ole Ntayo** (PW5) got interested in the phone and offered to buy it at Kshs. 3,000/=. They agreed. However PW5 did not have the money there and then. Instead he offered to pay him the following Saturday. The appellant did not agree and PW5 walked away leaving behind the appellant with PW6. PW6 too developed interest in the phone. He offered to buy it at the same price as offered to PW5. However the appellant upped the price by Kshs. 500/=. He agreed and paid him immediately Kshs. 2000/= and was to pay the balance on 6th July, 2007. He was then handed the phone by the appellant. He used the phone and subsequently took it for charging to a

teacher known as **Caleb Sikey** at Olopikidongoi. The following day when he went to collect the same, some police officers came and asked him for the phone which he gave. There and then he hand cuffed and took him to Lolgorian Police Station where he found the appellant already under arrest. In the cells the appellant asked him why he had been arrested and he responded that it was because of the phone. The appellant asked him whether he had disclosed that he was the one who had sold him the phone and when responded in the affirmative he cautioned him not to say so anymore as he was dead. Subsequently, he recorded his statement and he was released. He knew the appellant very well by name as he used to meet him frequently in Lolgorian and Olopikidongoi shopping centres.

How was the appellant arrested? PW3 gave his name to the police and in particular to PW7. They traced him using the name. on 8th July, 2007 at about 4.00 a.m. they traced him to his house and laid an ambush for him upto about 1.00p.m, when they arrested him. They conducted a search in his house but recovered nothing. Whilst at his house, the OCS came and interrogated him about the phone. He stated that his phone was at Oldonyo Orok trading centre. They proceeded there and he showed them a phone charging. It was a Motorolla make C113. They then returned to the police station. On 12th July, 2007 the same witness was informed by PW8 that he had received information that a phone which had been stolen from PW1 had been seen at Olopikidongoi Primary School. He advised PW8 to proceed there. He went and returned with the phone plus the suspect. The suspect owned up that he had been sold the phone by the appellant. The appellant with the co-accused were then charged with the offences.

Put on his defence, the appellant in unsworn statement testified that on 7th July, 2007 at about 1.00p.m. he saw policemen come to his home. They arrested him and demanded his cell phone. He told them that it was at Oldonyo Orok centre charging. They ransacked his house for a gun. Shortly after the OCs Lolgorian Police Station arrived. They conducted a search even in his farm for things he did not know. However nothing was found. They drove away with him. On reaching Siteti trading centre they stopped and asked him whether he was one of those who had attacked the lady whose home was just by the road side. He denied and claimed that he was seeing her for the first time. They then proceeded to Oldonyo Orok where he picked his phone, Motorolla C115 and thence to Lolgorian Police Station. He was then locked up in the cells. His co-accused was already in the cells and he was asked if he knew him and he denied. He was later charged for the offences he had not committed.

The learned magistrate duly evaluated the evidence on record and reached the verdict that the appellant was guilty as charged. Accordingly she convicted him and sentenced him to death in respect of the first count and two years imprisonment on counts II and III respectively. The latter sentences were ordered to run consecutively before the sentence in count I could be executed. She however acquitted the appellant's co-accused on all the three counts for want of proper identification.

The conviction and sentence of the appellant as aforesaid triggered this appeal through **Messrs Oguttu-Mboya & Company Advocates**. Six grounds of appeal were advanced in the petition of appeal dated 24th September, 2008 and filed in court the following day. These were:

"1. The learned trial magistrate erred in law, in finding and holding that the case against the appellant was proven beyond reasonable doubt, notwithstanding the material discrepancies and/or contradictions, apparent in the evidence of the prosecution's witness.

2. The learned trial magistrate erred in law in relying and applying the doctrine of recent possession, against the appellant, when the said doctrine, was clearly inapplicable, in the obtaining circumstances. In a nutshell, the learned trial magistrate misconceived and misapprehended the doctrine of recent possession.

3. The learned trial magistrate erred in law in disregarding, ignoring and/or failing to consider the evidence adduced by the appellant, in his defence, without assigning any credible reasons and/or basis, for such disregard.

4. The learned trial magistrate failed to properly or at all, analyze the evidence on record, either simultaneously or otherwise and consequently, arrived at a finding and/or conclusion, contrary to the weight of evidence on record.

5. The learned trial magistrate having found the appellant guilty of the offence of robbery with violence, contrary to section 296 (2) of the Penal Code, in terms of count (1), erred in law, in entering sentence(s) against the appellant in respect of counts (II) and (III). In a nutshell, the sentence(s) so entered, are bad in law and thus a nullity.

6. Alternatively, the sentence(s) by the learned trial magistrate, in terms of counts (II) and (III) of the charge, were manifestly excessive and thus legally untenable".

When the appeal came before us for hearing, **Mr. Oguttu**, learned counsel for the appellant submitted that the appellant was not found in possession of the phone allegedly stolen from PW1.Instead it was found in physical and actual possession of PW6.The doctrine of recent possession was thus not properly invoked. PW6 was the most culpable person yet he was discharged by the police. The appellant denied having had any dealings with PW 6.The defence of the appellant raised salient and pertinent issues that created reasonable doubt. That defence of ***alibi*** was not rebutted.

In response, **Mr. Mutuku**, learned senior principal state counsel submitted that it was not true that the most culpable person was released by the police. The evidence of PW6 was corroborated by PW5.The court observed that the only link to the robbery by the appellant was the phone. The complainant also positively identified the phone as his.The appellant never claimed ownership of the same. Though the appellant was not in actual possession of the phone nonetheless he was in constructive possession pending receipt of the balance of the purchase price. The doctrine of recent possession was therefore properly applied.

Re-evaluation of evidence tendered in the trial court as we must is indeed a matter of law since it is a duty imposed on the first appellate court, as we are, to do so and draw our own conclusions in deciding whether the judgment of the trial court should be upheld. This duty has been spelt out in many cases by the court of appeal including **Okeno –vs- Republic (1972) E.A 32**.

The conviction of the appellant by the trial court turned on the application of the doctrine of recent possession. The trial court discounted the evidence of identification and recognition by holding thus: ***"…An identification parade was necessary however none (sic) was done. The first reports by the complainants also did not give descriptive features of the accused persons. The only available link is a cell phone which was recovered by PW8 P.C James Saurei from PW6 one, Jackson Konojoni Parkeni. Otherwise the circumstances surrounding the incident were shaky for a precise recognition of the attackers to have been possible".***

With tremendous respect to the learned magistrate we disagree with her evaluation and or assessment of evidence of identification, nay, recognition as aforesaid. She must have misapprehended the evidence tendered by both PW1 and PW3 on the identification, recognition of the appellant at the scene of crime. PW1 had described the appellant as having worn during the incident, white soled open like Oginga-Odinga shoes and the stripes were black. He was also wearing a trouser that was torn at the knee. He further told the neighbours who came to his aid following the robbery that he had seen the white soled open shoes with somebody and that if he saw the shoes again, he would recall them. Under cross-examination by the appellant, PW1 reiterated that he had recognized him because of the shoes he was wearing that night and which he was found wearing upon arrest.

As for PW3, she knew the appellant. He was a Kalenjin like she was. She knew his name as **Kimayian**. He is the one who accessed where she was by cutting the curtain partitioning the house into two. He is the one who cut her legs twice and when she asked him why he was cutting her yet she knew him, he became more furious and cut her severally. When PW4 screamed, the appellant went for him and cut him as well. This time around PW3 talked to him in Kalenjin beseeching him to spare her son. On the way to hospital, she told the neighbours that he had recognized the appellant among the robbers. She reiterated the same to the police at Lolgorian police and gave out the name of the appellant. Infact it was as a result of this information that the police led by PW7 traced the appellant's home and arrested him. The appellant did not deny that he was Kalenjin and that his name was **Kimayian**. Indeed from the charge sheet his last name is **Kimayian**. Again when he testified in his defence he gave **Kimayian** as one of his names. He was armed with a bright torch which had three bulbs and which emitted bright light. This enabled her to see the appellant sufficiently as to be able to recognize him.

From the foregoing it is quite clear that the learned magistrate erred when she asserted that the first reports by complainants were lacking in the description of the appellant. The appellant was known to both the witnesses and we do not see therefore the relevance of the police identification parade. In cases of recognition, identification parade is unnecessary.

The learned magistrate held that the circumstances at the scene of crime were shaky for a precise recognition of the attackers to have been possible. Is that so? We entertain our doubts. We are aware that the evidence of identification and or recognition in difficult circumstances must be tested with greatest caution and can only form a basis for conviction, if it is absolutely watertight. But again this was, however, a case of recognition and not identification of the robbers. The court of appeal in the case of **Anjononi –vs- Republic (1980) KLR 59** did say that: ***"…recognition of assailant is more satisfactory, more assuring and more reliable than identification of a stranger because it depends upon personal knowledge of the assailant in some form or another…"***. The foregoing notwithstanding there is still need for the trial court to be wary of the dangers of conviction on the basis of such evidence. For in the case of **Karanja & Another –vs- Republic (2004) 2 KLR 140**, the Court of Appeal said:-

"The law as regards identification under difficult conditions is now well settled". In the case of Cleophas Otieno Wamunga –vs- Republic Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu this court stated as follows:-

"…We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lillian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them … what we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extend on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well known case of Republic –vs- Turnbull (1976) 3 ALL E 549 at page 552 where he said:-

"Recognition may be more reliable than identification of a stranger but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made".

No doubt the robbers were extremely vicious in the execution of the crimes. Those crimes were committed at night, at about 1.00a.m. It was dark. The house of PW1 and PW3 was not lit at all. The only source of light was from the torches that the robbers carried. According to both PW1 and PW3, they were very bright. Listen to PW1 ***"...The person had a torch with three (3) bulbs so its light emitted was so bright .."*** As for PW3 she stated ***"…He had a big torch with four globes …. The torch's light was very bright…"*** It is therefore common ground that the robbers were armed with very powerful torches which they used in the house as they went about their business. From the record it appears that the robbers were in the house for a considerable period of time and were in close proximity with both PW1 and PW3. For a person well known to them as the appellant it could not have been difficult to be recognized. Much as robbers were vicious in the execution of the plot, the time they took in the house and with bright torches on, the two witnesses, and in particular PW3 could not have failed to recognize the appellant. He spent a considerable period of time with her first, when she lamented that he was assaulting her yet she knew him. This seems to have infuriated the appellant the more, who proceeded to unleash more violence on her. That reaction of the appellant to our mind can only mean one thing, that indeed the appellant realized that he had been recognized by PW3. From there they spent some time looking for money in the suit case next to her bed. They could not have been searching the suit case when the torch was off. If it was on and powerful as we are told by PW1 and PW3 the light must have illuminated sufficiently for PW3 to have seen the appellant again. The appellant then moved with her through a small passage between the beds so that she could go and show him the money. It is at this time that PW4 screamed and the appellant turned his fury on him and cut him. PW3 then talked to him in Kalenjin and told him not to kill her as he too had children. This witness could not have been able to say so unless she was certain about the person she was talking to. She knew him. He was a Kalenjin and his name was **Kimayian**. As already stated elsewhere in this judgment there is no denial that the appellant is **Kimayian** and a Kalenjin at that. Indeed when the witness talked to him in the dialect he responded as much.

There is no suggestion anywhere in the record that there was any misunderstanding or grudge between the appellant and any of these witnesses as would have been the reason for them to frame him up with the case. Initially when the appellant entered where PW3 was he had covered his face with a red sheet. As he continued with his activities, the sheet loosened and fell on his shoulder thereby exposing his face. PW3 in those circumstances could not have failed to see him properly. From the detailed nature of her evidence regarding the activities of the appellant on that night, we have no doubt at all that despite the violence visited on her by the appellant, she still had presence of mind to be able to see the appellant sufficiently to be able to recognize him. She gave his name to the police immediately which led to his arrest. She even described the trouser he was wearing and where it was torn just like her husband. She also confirmed that on that occasion the appellant ***"…had a white soled pair of open shoes…"*** just like her husband. On the basis of the evidence of PW3 on record, we are satisfied that her recognition of the appellant cannot be mistaken.

As for PW1, he only recognized the appellant by the shoes he had worn during the episode. They were white soled open Oginga-Odinga shoes. The shoes were unique and he had described them in the first report. These are same shoes that his wife, PW3 also referred to. Indeed when PW7 went to arrest the appellant they were also looking for those kind of shoes. When they arrested him, he was wearing such shoes. The appellant did not deny nor dispute the fact that when arrested he was wearing such shoes. Infact when he cross-examined the witness on the issue all he could ask was whether any other person could have had similar shoes. PW7's response was telling. He stated ***"I do not think any other person has such shoes because they are man-made"***. This answer does not however preclude other people from having had such shoes. However was it a mere coincidence that one of the robbers who turned out to be the appellant was seen at the scene of crime wearing the shoes and upon arrest he is found wearing similar shoes? We do not think so.

The upshot of all the foregoing is that contrary to the view held by the learned magistrate regarding the identification and or recognition of the appellant, we are satisfied that the appellant was positively identified or recognized at the scene of crime. The obtaining circumstances were conducive and enabled PW1 and PW3 to recognize the appellant.

Even if we are wrong in our assessment of the evidence of identification/recognition, there is yet other evidence that connects the appellant to the crime. On 28th June, 2007 at about 5.00p.m. less than 24 hours after the robbery on PW1, his Nokia 2610 phone was offered for sale allegedly by the appellant initially to PW5 and later to PW6. PW5 could not immediately raise the sum of Kshs. 3,000/= agreed. He therefore abandoned the transaction. PW6 who all along was with the appellant and PW5 in the shelter and observed the negotiations also developed an interest in the phone. After PW5 abandoned the transaction, he took over and eventually agreed to buy it from the appellant at Kshs. 3,500/=. He paid Kshs. 2,000/= immediately and took possession of the phone. He was to pay the balance of Kshs. 1,500/= later. However this was not to be as he was arrested about two weeks when he had gone to collect the phone where he had left it to charge the previous day. PW1 positively identified the phone as his through unique features he had inserted therein. PW6 told the police that he had been sold the phone by the appellant. The appellant never claimed ownership of the phone nor did he offer any explanation as to how he had come by it. Both these witnesses (PW5 and PW6) confirmed that they knew the appellant. They had no grudge against him as would have caused them to falsely testify against him. All that the appellant could say was that he was not found in physical possession of the same and that the police took upon themselves to release the most culpable person meaning PW6 and vent criminal proceedings on him.

We agree that the appellant was not found in physical or actual possession of the phone and which informed the judgment of

the trial court. However, for the doctrine of recent possession to apply, the accused need not necessarily be found in physical and actual possession of the item recently stolen. As correctly observed by **Mr. Mutuku**, though the appellant was not in actual possession of the phone at the time of his arrest, nonetheless he was in constructive possession thereof, pending receipt of the balance of the purchase price. Thus though he had parted with the phone to PW6, he still retained it in legal terms ownership as he was yet to be fully paid the purchase price. The police having conducted their investigations released PW6 and turned him into prosecution witness and rightly so in our view. It is not therefore correct as submitted by the appellant that PW6 was the most culpable. PW5 and PW6 who had no bone to grind with the appellant were categorical that the appellant offered to sell them the phone. Initially he offered it to PW5 and when he was unable to raise the agreed purchase price, it fell upon PW6 to purchase it. The court believed the evidence of those two witnesses. Our attention has not been drawn to anything in the proceedings as will make us believe that the said witnesses were unworthy of believe.

In our view, the learned magistrate was right in invoking the doctrine of recent possession to find a conviction in this case. In the case of **Andrea Obonyo & Others –vs- Republic (1962) E. A 542**, the Court of Appeal observed ***"… It is settled in law, that evidence of recent possession, is circumstantial evidence, which depending on the facts of each case, may support any charge, however penal …"***.

To our mind however, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first, that the property was found with the suspect, secondly, that, that property was 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. See the case of **Erick Otieno Arum –vs- Republic Criminal Appeal Number 85 of 2005 (UR)** and **Andrea Obonyo – vs- Republic (1962) E. A 542**.

In this case, the appellant was found in constructive possession of the phone belonging to the complainant (PW1). This was within hours of the robbery. The phone was positively identified by PW1 as his. The same had been stolen from PW1 in a matter of hours and was being offered for sale to PW5 and PW6. The period taken was so short that it was not possible for the appellant to have come across the phone from somebody else. In any event he had been recognized during the robbery. Since the appellant did not claim ownership of the same, the burden was upon him to explain how he had come by it. It is a duty cast upon him by section III(1) of the **Evidence Act**. However, his duty to explain his possession of the phone was not displaced by the alibi defence he advanced. To the contrary his constructive possession of the phone and his failure to offer reasonable explanation as to how he came by it coupled with his identification/recognition at the scene of crime completely dislodged his alibi defence.

The appellant was convicted on three counts. He was thereafter sentenced to death as well as imprisonment. The appellant having been sentenced to death in respect of count 1 there was no need to impose the prison sentence as well. However the trial court imposed it. What the learned magistrate should have done was to order that the other sentences be held in a beyance. Thus the sentence imposed as aforesaid was irregular. This court in its appellate jurisdiction can however correct the anomaly as we intend to do.

The appeal lacks merit and is accordingly dismissed save that the sentences in respect of counts II and III shall be held in abeyance pending the execution of the sentence in count 1.

Judgment dated, signed and **delivered** at Kisii this 15th day of March, 2011.

ASIKE-MAKHANDIA **RUTH NEKOYE SITATI**
JUDGE **JUDGE**