



**Mwambuchi v Republic (Criminal Appeal E040 of 2024)
[2025] KEHC 1828 (KLR) (19 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1828 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL E040 OF 2024
RE ABURILI, J
FEBRUARY 19, 2025**

BETWEEN

HUMPREY MWAMBUCHI APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the judgment and sentence passed by Hon. R. Mobisa Oanda-SPM in Winam SPM Criminal Case No. E460 of 2023 on 15th April 2024)

JUDGMENT

1. The appellant Humprey Mwambuchi was granted leave to file his appeal out of time by this court on 21st May 2024. A brief background of the events leading up to the appeal before this court is given in the succeeding paragraphs.
2. The appellant Humprey Mwambuchi together with 3 others were jointly charged with the offence of robbery with violence contrary to section 295 as read together with section 296(2) of the [Penal Code](#). The particulars thereof were that on 14th December 2023 at around 11.40 pm at Kibuye Area in Kisumu the accused persons jointly with others who were not before the court robbed one Willis Owuor Ogutu of his Techno Pop 7 mobile phone. The phone was said to be worth Kshs.13,499/= . Mr. Ogutu was also wounded during the robbery.
3. The appellant also faced the alternative charge of handling stolen property contrary to Section 322(1) (2) of the [Penal Code](#).
4. The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded for hearing.
5. The trial magistrate, Hon. R.M. Oanda, SPM, after hearing the five prosecution witnesses and the testimony of the accused persons in defence found the appellant together with the other accused



persons guilty of the offence of robbery with violence contrary to section 296(2) of the Penal Code. The appellant before this court was sentenced to serve 15 years imprisonment.

6. Aggrieved by the said conviction and sentence the appellant initially filed grounds of appeal both against conviction and sentence and subsequently filed supplementary grounds of appeal. The grounds of appeal raised by the appellant are as follows;
 1. That, the learned trial magistrate erred in both law and in facts in admitting the investigating officer's evidence which was marred with discrepancies and inconsistencies.
 2. That, the learned trial magistrate erred in both law and facts in failing to appreciate that there was need of trial within trial that would have led to rejection of the shoddy investigations of the prosecution.
 3. That, the learned magistrate erred in both law and in facts by convicting the appellant herein on the present case without considering that the ingredients of robbery with violence were not proved beyond reasonable doubt.
 4. That, the trial magistrate erred in both law and in facts by shifting the burden of proof to the appellant, hence prejudice.
 5. That, the learned magistrate erred in law and in facts in not according the appellant with fair hearing hence violating Article 50(2)(j) of the constitution.
 6. That, the learned trial magistrate erred in law and facts when he proceeded with the hearing without considering that the prosecution has not availed crucial witnesses to testify.
 7. That, the learned trial magistrate erred in both law and fact in failing to find that the evidence of the prosecution witnesses was contradictory.
 8. That, the learned magistrate erred in law and fact by not finding that the prosecution had failed to prove its case beyond reasonable doubt.
 9. That, the learned trial magistrate erred in law and fact when convicting the appellant after relying on identification of a prosecution's single witness.
10. That, the trial court erred in law and in fact in relying on evidence of the prosecution witnesses that did not prove the charges that the 1st accused robbed and handled a mobile phone make Techno pop 7 grey in colour of IMEI 355968XXXXXXXX86/94 valued at Ksh. 13499. Hence theft not proved and the case of Robbery with violence c/s 296(2) must fail.
11. That, the trial court erred in law and in fact in convicting the appellant relying on a duplex charge sheet.
12. The, trial court erred in law and in fact in not appreciating the appellant's defence that overwhelmed the prosecution case.
7. The Appellant filed written submissions which he highlighted orally while the respondent only made oral submissions.

The Appellant's submissions

8. In both his written and oral submissions, the appellant asserted that he would proceed with his appeal as only against conviction and not sentencing.
9. It was submitted that the evidence before the court did not prove the charges as the mobile phone provided by the prosecution as seen in the receipt 'MFIP2' and the inventory 'MFIP4' was not the



- same one that the appellant was charged with. He submitted that PW1 testified that his Techno pop 7 phone was bought at Kshs.14,499/= which did not tally with the price of the Techno phone that was before the court and which was valued at Kshs.13,499/=.
10. The appellant placed reliance on the case of Samuel Kariuki Wanjiku vs. Republic [2019] eKLR where the court is said to have acquitted the appellant because the substratum offence of stealing had not been established.
 11. It was further submitted that the trial court erred in law and in fact in convicting the appellant relying on a duplex charge sheet. Reliance was placed in the case of Mary Waithera Kamau vs. Republic [2016] eKLR where the court observed that as the main charge the appellant was convicted of was framed as a charge for Robbery with Violence contrary to section 295 as read together with 296(2) of the [Penal Code](#) the same was considered duplex as was held by the court in the case of Mwaura vs. Republic [2013] eKLR as the two offences under the two sections are different.
 12. The appellant further submitted that the court ought to acquit him and as for re-trial the same ought not to be ordered due to the insufficiency of evidence. In support of this submission he relied on the case of Koome vs. Republic[2005] eKLR 575.
 13. It was also submitted that even though PW1 was attacked by many people whom he testified he did not know and who were strangling him as others robbed, no identification parade was conducted.
 14. According to the appellant PW1's report was that he did not know his attackers. It was also submitted that in the P3 form, PW1 did not describe his attackers nor tell the police that he could identify them if he sees them. Further, that the police officers who arrested them were not at the scene of crime during the incident but that they only received information while at the police station.
 15. The appellant also submitted that dock identification is worthless if not preceded with a properly conducted identification parade. He also submitted that PW1 only came to identify the police suspects after arrest which was unfair to the appellant.
 16. It was also his submission that the trial court erred in law and fact in not appreciating the appellant's defence that overwhelmed the prosecution's case. He submitted that he had explained that he had gone to Kisumu Kibuye Market to play cards when he was arrested.

The Respondent's Submissions

17. Mr. Marete Principal Prosecution Counsel in his oral address to Court opposed the appeal and submitted that that he had intended to issue a notice of enhancement of sentence to life imprisonment because the appellant had been given 15 years imprisonment only.
18. He further submitted that the conviction of the appellant for the offence of robbery with violence was sound as the complainant had testified how he was attacked, assaulted and his phone taken away. It was also Mr. Marete's submission that the appellant called three of his accomplices and further that he was arrested at the scene where the crime had taken place.
19. Mr. Marete also submitted that the appellant's defence was considered and rightly dismissed and further that there was overwhelming evidence supporting the appellant's conviction.
20. It his further submitted that the complainant was injured during the robbery and that he was treated at the hospital. He submitted that robbery with violence carries a death sentence and that the 15 years imprisonment was too lenient and the same should be enhanced.



Analysis

21. The role of this first appellate Court is now well settled. As was held in the case of *Okeno v R* (1977) EALR 32 and in other many cases including Court of Appeal case of *Mark Oiruri Mose v R* [2013] eKLR, this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyse it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

Evidence before the trial Court

22. PW1, the complainant Willis Owuor testified that on the material day of 14th December 2024 at 10.30 a.m., he was headed to Kisumu Stage when on his way to Kibuye Market, a person asked him to help him pick up a box after which the said person grabbed his phone. During his testimony, the complainant confirmed that the 1st accused was the said person and further that his phone was a Tecno Pop-7 phone and that the same was before the court and marked as 'MFIP1'. He also confirmed that the receipt evidencing purchase was marked as 'MFIP2'.
23. He also testified that he first tried to struggle with the 1st accused for his phone but the accused person threatened to call security after which some of them arrived and there was a struggle. PW1 also stated that immediately the struggle began, a civilian police officer arrived and the attacker and his accomplices were all arrested. The 1st accused person it was testified had removed PW1's sim card from the phone.
24. It was PW1's testimony that upon arrest, he informed the police that the 1st accused person had his phone. He also testified that he had injuries and that he was treated at Russia Hospital. He later recorded a statement.
25. PW1 also testified that the 1st accused and his security were all in court and that they were all arrested at the scene.
26. Upon cross examination by the 1st accused, PW1 testified that he knew the accused person physically, and that he was there when the accused was arrested. He also testified that the 1st accused had asked him to pick a customer's box which he did and that he had not met the 1st accused before.
27. In cross-examination by the 2nd accused person, PW1 testified that the 2nd accused was part of the gang he was struggling with and that during the struggle, one hand had long nails. Further that the 2nd accused had punched him to the ground and he got bruised. It was also his testimony that he could remember the 2nd accused's clothes and face.
28. PW1 when crossed examined by the 3rd accused person confirmed that when the 1st accused person shouted security!, the 3rd accused person appeared and got hold of PW1. He also stated on being cross examined by the 4th accused person that he could identify those who got hold of him and that the 4th accused was among them.
29. PW2 Philip Kilimo, an officer at Kisumu County Hospital testified that he examined and filled a P3 form for PW1 who was assaulted on 14th December 2023 at 10 a.m. at the Kibuye area. It was also PW2's testimony that PW1 had sustained soft tissue injuries and was treated at JOOTRH. Further, that PW1 was in fair general condition with injuries on the right hand, a cut wound on the right wrist and multiple bruises on the left hand. He also his testimony that PW1 had a swelling on the left knee joint. Mr. Kilimo also testified that a blunt object had been used and that the patient had been treated at Russia hospital.



30. In cross examination by the 1st accused person, PW2 testified that PW1 had said that he had been injured by people he didn't know.
31. PW3, SGT Christopher Ochieng, testified that on the fateful date, he was at Kondole Police station when his fellow police officers received a complaint from members of the public that there were young men robbing people at Kibuye market. He organised a team to patrol the area and upon arrival at the scene, there was a group of around 10 young men. He further testified that the police officers were in civilian clothes.
32. It was also his testimony that when two police officers ordered and attempted to arrest the young men, they started fleeing but the area had already been surrounded. PW3 further testified that a mobile phone that had been robbed off the complainant was recovered and that at the time PW1 was bleeding and had reported that his phone had been robbed. It was PW3's testimony that they arrested the 4 accused persons and escorted them to the police station.
33. In cross examination by the accused persons, PW3 testified that the report by the member of public was made between 10 and 11.30 a.m. Further that he had seen a young man being robbed in broad daylight and that the complainant together with the accused persons had all been arrested. PW3 also testified that the 4 accused persons had surrounded the complainant and that they were struggling over the phone.
34. It was also his testimony that he had not seen any blood stains on the 2nd accused nor did they take any photos. He also testified that he had not seen who had beaten up PW1 but that PW1 had identified the 4th accused on the spot, immediately after the arrest.
35. PW4 PC Wilson Lawi also stationed at Kondole Police Station testified that on 14th December 2023, he received a call from the OCS and was asked to attend to a robbery incident at Kibuye. It was his testimony that they cordoned the area and arrested five suspects and one of them informed the police that he had been robbed. That upon doing a quick search, they recovered a Techno pop 7 phone from one of the suspects Humphrey.
36. It was PW4's testimony that the complainant was bleeding and they told him to seek medical attention and the suspected robbers were placed in custody.
37. On being cross-examined by the accused persons, PW4 testified that the 1st accused did not have any weapon in his possession and also that he did not see any of the accused persons rob the complainant. He also testified that an identification parade had not been carried out.
38. The final prosecution witness was PW5 PC Sam Abok also attached to Kondole Police Station. In his testimony, PW5 testified that upon arresting the 1st accused, they found him in possession of a Techno Mobile phone and that the 2nd accused had been arrested at Highway Primary School while the 3rd accused was arrested at Heart Centre.
39. PW5 also testified that PW1 was crying and bleeding and that they realised that he was the one being robbed when they took a glance at the phone screen and saw a photo. It was also his testimony that they released the complainant to go to the hospital and further that he provided them with a receipt to the techno phone.
40. In cross examination by the accused persons, PW5 testified that he had found the 1st accused in possession of the phone and that all the accused persons signed the inventory. It was also his testimony that the complainant had already identified the 1st accused person as the complainant was already at the scene. He also testified that the 2nd accused was arrested by a fellow officer inside Highway Primary



School as he attempted to run away after noticing the presence of police officers. PW5 confirmed that he had seen the 2nd accused person at the scene. PW5 also testified that during the 4th accused person's arrest, he did not have any weapon in his possession.

41. Placed on their defence, the 1st accused person testified as DW1 and stated that on the day of his arrest, he was playing cards at the said market and that there was a raid and people started running but he was arrested and asked to carry his box of cards and placed in a land cruiser. He testified that the police were saying that he should pay Kshs.5000/= but he did not have the money. He also testified that he was charged the next day and also that he did not know anything about the charges.
42. When he was cross examined, DW1 testified that he was playing cards alone and that he did not know the complainant. Further, that he knew nothing about the phone and neither did he know his co-accused. He did not call any witnesses.
43. The second accused testified as DW2 and stated that he worked at a construction site and that on the day of his arrest, he had gone to the market to buy food stuffs after he had received his pay for work done three days prior. It was his testimony that on the said date, he had gone to his workplace and found that there was delay in getting materials and that is why he decided to head to the market.
44. He also testified that before reaching the market, he met with people running away and he also saw a youth being arrested by police officers and because of fear, he ran away but was arrested and taken to the police station and his finger prints were taken. He also testified that the police officers wanted Kshs.7000.
45. In cross examination, he stated that he did not know his co-accused and that he did not know how to play cards. Also, that he was the only person who had been arrested at the gate. He did not call any witnesses.
46. The 3rd accused testified as DW3 and stated that he was a boda boda rider and that on the day he was arrested, he had taken two ladies to Heart Centre. He also testified that on the highway, he had met a customer who claimed that he had been robbed off his phone and that on his way to pick a customer, he was arrested.
47. In cross-examination, he claimed that he had not received any change from the customer and that he had left the customer at the hospital and he was arrested at the hospital gate. Also, that he was not with the co-accused and that his motor cycle had also been impounded. He also did not call any witnesses.
48. The 4th accused person testified as DW4 and stated that he sold eggs for a living and that on the date of his arrest, he was selling eggs at the Ofafa area when he met six people who were coming from the opposite direction and they asked him about the people who were running away and they arrested him and the next day he was arraigned in court.
49. In cross examination, he testified that during his arrest, he had in his possession the eggs that he was selling and that his brother took the eggs. He also testified that he was not playing cards and that many people had been arrested. He did not call any witnesses.

Determination of the issues

50. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions by both the appellant and oral submissions by the respondent's counsel. I find the following issues arising for determination:
 - a. Whether the prosecution's case was proven beyond reasonable doubt and;



- b. Whether the conviction of the appellant ought to be quashed and sentence set aside.

Whether the prosecution proved its case beyond reasonable doubt

51. The offence of robbery with violence is provided for under sections 295 and 296(2) of the [Penal Code](#) as follows:

“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.

296(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately after the time of robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.”

52. The Court of Appeal in the case of *Oluoch & another v Republic* (Criminal Appeal 98 of 2016) [2022] KECA 1260 (KLR) (18 November 2022) (Judgment) held as follows on the offence of robbery with violence:

“For the prosecution to sustain a conviction for the offence of robbery with violence, it needs to establish and prove three essential ingredients as provided for under Section 296(2) of the [Penal Code](#), stated in the case of *Oluoch v. Republic* (supra) as follows:

“The offender is armed with any dangerous or offensive weapon or instrument; the offender is in the company of one or more person or persons; or 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.” [Emphasis added].

53. In the case of *Dima Denge Dima & others v Republic, Criminal Appeal No. 300 of 2007*, the Court stated that the elements of the offence under section 296 (2) are three in number and they are to be read not conjunctively, but disjunctively. One element is sufficient to be found an offence of robbery with violence.

54. The appellant in his submissions has challenged the prosecution’s evidence as being inconsistent and full of discrepancies. He argues that the phone he was charged with is not the one that was produced in court. He further buttresses this argument by referring to PW1’s statement where he testified that he had bought his phone at Kshs.14,499/= while the phone produced before the court was valued at Kshs.13,499/=

55. The Court of Appeal in the case of *Philip Nzaka Watu v Republic* [2016] eKLR had the following to say on inconsistencies and discrepancies:

“However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing in the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether



discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.

In *Dickson Elai Nsamba Shapwata & Another v The Republic*, CR APP. NO. 92 OF 2007 the Court of Appeal of Tanzania addressed the issue of discrepancies in evidence and concluded as follows, a view we respectfully adopt:

“In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The Court has to decide whether inconsistencies and contradictions are minor, or whether they go to the root of the matter.”

56. My assessment of the prosecution's evidence presented in the trial court is firstly that I do not see any material contradictions and inconsistencies in the evidence of the prosecution witnesses and secondly, if any, the same are not sufficient to warrant the overturning of the trial court's judgement.
57. The issue of whether the phone the appellant was charged with is what was brought before the court does not hold any water as PW1, PW4 and PW5 all agree on the make and model of the phone that was found in the appellant's possession. The difference in pricing and the writing of 9 instead of 0 in the IMEI number in the charge sheet is not substantial enough for the court to overturn the trial court's judgment.
58. The cash receipt dated 01/07/2023 on which the IMEI number was written tallies with the IMEI number on the inventory while in the charge sheet, the number after 355 is written as 9 instead of 0. This in my humble view, is not fatal to the trial of the appellant.
59. The fact of the matter is that the appellant was arrested at the scene in possession of the phone which was positively identified to be that of the complainant and which phone had the complainant's photo on the screen evidencing that the same belonged to PW1. The appellant never laid claim of ownership to the said phone.
60. The Court of Appeal in the case of *Richard Munene v Republic* [2018] eKLR observed as follows;

“It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.)
61. As a result, I find that the contradictions and inconsistencies identified by the appellant were not sufficient to cause the trial court to question the appellant's guilt. Consequently, this ground fails.
62. The appellant also raises the issue of a duplex charge sheet. It is his case that the charge was duplicitous for citing Section 295 and 296 (2) of the Penal code. However, it must be noted that Section 295 is a definition section; it contains the ingredients of robbery with violence.
63. The Court of Appeal in *Johana Ndungu v Republic* [1996] eKLR set out the issues of section 295 and 296 as herein;

“In order to appreciate properly as to what acts, constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the *Penal Code*. The essential ingredient of robbery under section 295 is the use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in



any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery is pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument, or
2. If he is in company with one or more other person or persons, or
3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes, or uses any other violence to any person.”

64. Further, in the case of Joseph Onyango Owuor & Cliff Ochieng Oduor v Republic [2010] KECA 313 (KLR) The Court stated as follows:-

“Mr. Musomba submitted that unless the afore quoted sub-section (section 296) is read with section 295 of the *Penal Code*, then reliance on section 296(2), above, without more will not disclose the commission of an offence. Section 295 of the *Penal Code* defines the offence of robbery. Section 296(1) and 296(2) of the *Penal Code*, have a common marginal note, namely “punishment of robbery. ..”

65. Section 296 (2) of the *Penal Code* deals with the specific degrees of the offence of robbery and it has been framed as such.

66. The charge sheet herein read as follows;

1. Humphrey Mwambuchi 2.oniango Jackson 3daniel Odero 4.ian Omondi: On the 14th day if December 2023,at around 1140hrs at Kibuye Area, Kisumu Central Sub County, within Kisumu County jointly with others not before court, Robbed Willis Owuor Ogotu of his mobile phone make tecno pop 7 grey in colour IMEI No.35596XXXXXXXX86/94 valued at Kshs.13,499 and immediately after such wounded the said Willis Owuor Ogotu.

Alternative Charge:

1. Humphrey Mwambuchi: On the 14th day of December 2023,at around 1140hrs at Kibuye Area in Kisumu Central Sub County, Within Kisumu County otherwise than in the cause of stealing dishonestly retained one mobile phone make techno pop 7 grey in colour of IMEI NO.35596XXXXXXXX86/9X valued at ksh.13,499 the property of Willis Owuor Ogotu knowing or having reason to believe to have been stolen.

67. In the case of Paul Katana Njuguna vs Republic [2016] eKLR the court observed as follows: -

“3. In arguing the appeal, Mr. Nyaga submitted that the charge against the appellant was duplex as he was charged under both Sections 295 and 296 (2) of the *Penal Code*. Referring to Simon Materu Munyaru -v- Republic, [2007] eKLR, quoted in Joseph Njuguna Mwaura & 2 Others -v- Republic, [2013], eKLR, counsel submitted that it was wrong to charge the appellant with the offence of robbery under Section 295 as read with Section 296 (2), as that rendered the charge duplex and created a confusion. ...

5.In regard to the alleged defect in the charge, Mr. Omirera submitted that Section 295 of the *Penal Code* was simply a definition section, and although



charging an accused under both Sections 295 and 296 (2) was undesirable, doing so did not amount to a fatal defect in the prosecution's case, as the same could easily be cured by invoking Section 382 of the Penal Code.”

68. In the appeal before this court, the robbery involved the use of a blunt object. I find that quoting section 296 in the charge sheet would not occasion an injustice. The appellant was aware of the charges facing him during the trial process and he did not raise the issue of a defective charge sheet at the trial, and he cross examined witnesses on the same, a clear indication that there was no confusion during the trial, of the charge that he was facing and thus I find no fatal defect in the charge sheet to warrant rendering the trial fatally defective.
69. It was also submitted that even though PW1 was attacked by many people whom he testified he did not know and who were strangling him as others robbed him, no identification parade was conducted.
70. Further that PW1's report indicated that he did not know his attackers. It was also submitted that in the P3 form Pw1 did not describe his attackers nor tell the police that he could identify them if he sees them. Further the appellant also submitted that the police officers who arrested them were not at the scene of crime during the incident, they only received information while at the police station.
71. I have considered the above submissions. From the testimony of PW1, there was no need for an identification parade as he was able to recognise the appellant as they were together at the crime scene. The court also notes that PW1 in his testimony stated that the offence took place in broad daylight at at 10.30 am and that it was the appellant who had stopped him and requested him to help collect a box and it was then that the appellant snatched PW1's phone and when the complainant tried to recover his phone, the appellant called for 'security' who were the other accused persons .PW5 in his testimony also confirms that PW1 had already identified the 1st accused person as the complainant, PW1 was already at the scene.
72. The court in the case of *George Kamau Muhia v Republic* [2014] KECA 533 (KLR) observed as follows:

“In *Anjononi & Others vs. Republic* (1976-80) 1 KLR, 1566, 1568, this Court distinguished recognition from identification in the following terms:

“This was, however, a case of recognition, not identification, of the assailants; recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other.”

In the circumstances of this appeal, we do not think that there is any substance in the complaint that an identification parade was not held. It would have served no purpose to conduct an identification parade since PW3 had already recognised the appellant as a person he had known for at least 6 months. In *Githinjvs Republic* (1970) EA 231, the High Court held that:

“Once a witness knows who the suspect is, an identification parade is valueless.”

In *Ajode Vs Republic* (2004) 2 KLR 81, this Court approved the same reasoning in the following words:

“Once a witness has been able to see the suspect before the parade is held, then he will be doing no more than demonstrating his recognition of the suspect and not



identifying the suspect. That indeed is the reason why no identification parade is required in cases of recognition.” (Emphasis added).”

73. In this appeal, PW1 was able to recognize the appellant at the scene as one of the persons who had robbed him off his phone when questioned by the police and this was corroborated by PW5’s testimony. This evidence was also corroborated by the fact that the appellant was found in possession of PW1’s phone and this is further corroborated by PW4 and PW5’s testimony where they confirmed that after undertaking a quick search, they found the appellant in possession of a Techno mobile phone and upon a glance at the phone’s screen they saw photos which showed that it was PW1 who was being robbed.
74. The offence also took place during the day and as such, it cannot be said that there was anything hindering the complainant from seeing the appellant. If anything, before the other co-accused persons attacked PW1, it was the appellant who had spoken to the complainant and requested him to help carry a box, in disguise, before snatching the complainant’s phone and as such, the issue of there being a struggle between several persons therefore hindering the complainant’s ability to identify whether the appellant was involved does not arise.
75. Having established as much, I find that the ground that there was need for an identification parade fails.
76. The appellant also submitted that as there was contradictory information on how the mobile phone was stolen and handled and therefore the same renders the doctrine of recent possession null and void.
77. The issue of possession was proved by the evidence adduced by PW1, PW4 and PW5 which evidence was corroborative of each other.
78. The doctrine of recent possession allows the court to infer guilt when the accused is found with recently stolen property under unexplained circumstances. The Court of Appeal summarised the essential elements of the doctrine of recent possession in *Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR*, where the court stated as follows:
- “In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”
79. That explanation need only be plausible after the primary facts are established, the accused has the evidential burden to offer a reasonable explanation for the possession. This burden is solely evidential and does not absolve the prosecution from proving its case to the required standard. The explanation provided must only be plausible.(see *Malingi v Republic [1988] KLR 225*).
80. In *Paul Mwita Robi vs. Republic KSM Criminal Appeal No. 200 of 2008*, the Court of Appeal observed that:
- “Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.”



81. In the instant case, the appellant never discharged the burden placed on him upon being found in possession of the complainant's phone, the testimonies of PW4 and PW5 corroborated the fact that the appellant was found in possession of a phone that had a photo of PW1 on the screen at the time, place and date of the robbery. I therefore find that the doctrine of recent possession was proved beyond reasonable doubt.
82. In the end, I am satisfied that all the elements of the offence of robbery with violence were proved beyond reasonable doubt and that the conviction of the appellant was sound and safe.
83. The appellant in his petition of appeal and his supplementary grounds of appeal argues that the trial court violated his right to a fair hearing as envisioned under Article 50(2) of *the Constitution*. However, he does not state with precision or give circumstances during which this right was violated by the court. The court in the case of *Annarita Karimi Njeru v Rep* [1979] KLR 154 held that the person alleging an abuse or infringement of a right must set out the acts or omissions constituting violations. A mere statement that a right has been infringed cannot suffice.
84. Having said as much, this court is satisfied that the prosecution proved the elements of robbery with violence as the offenders were armed with a dangerous weapon going by PW1's demeanor when they were arrested and also by PW2's testimony and the P3 form which stated that the injuries sustained by PW1 were inflicted using a blunt object.
85. The convicting evidence was also corroborated by PW3, PW4 and PW5 that immediately after the time of the robbery, the offenders wounded PW1 to the extent that he was bleeding and he had to receive treatment.
86. On whether the appellant was in the company of other offenders. PW1 testified that the appellant had summoned what he called 'security' to assist with the robbery. This has been corroborated by PW3's testimony when he testified that members of the public had informed them that there were young men robbing people at Kibuye market. He also confirmed arrest of four accused person. This position was also corroborated by PW4 and PW5.
87. In the end, I find and hold that the prosecution proved their case against the appellant herein beyond reasonable doubt. I find no merit in the appeal against conviction and dismiss it.
88. Counsel for the respondent submitted that as provided under the law the court ought to have been given a life imprisonment sentence this being a crime of robbery with violence and further that the term of 15 years was very lenient.
89. Regarding the enhancement of sentence as prayed by the applicant, the law relating to enhancement of sentence on appeal is section 354 of the *Criminal Procedure Code* which stipulates that:

354. Powers of High Court

- (1) At the hearing of the appeal the appellant or his advocate may address the court in support of the particulars set out in the petition of appeal and the respondent or his advocate may then address the court.
- (2) The court may invite the appellant or his advocate to reply upon any matters of law or fact raised by the respondent or his advocate in his address.



- (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—
 - (a) in an appeal from a conviction—
 - (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or
 - (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; Or
 - (iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;
 - (b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

90. This Court is alive to the decision of the Court of Appeal in the case of *J.J.W. v Republic* [2013] eKLR where it was held as follows on enhancement of a sentence by the High Court:

“It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.” See my decision in *State v Charles Zadok Oriwa Oruko* [2021] eKLR.

91. However, in this case, no notice of enhancement of sentence was filed. The respondent’s counsel only informed the court that he had intended to file notice of enhancement of sentence, upon which the appellant responded that he was not appealing against sentence. The court too did not record any warning to the appellant that it could enhance sentence.

92. The appellant was sentenced to 15 years in prison. Robbery with violence is not a crime committed by chance; it is premeditated and carried out with intent. In most instances, it results in the loss of life or serious injury. The perpetrators show no mercy to their victims and are indifferent to where they strike.

93. I find no reason to interfere with the discretion of the trial court in imposing fifteen years imprisonment for robbery with violence considering the victim of the robbery was not seriously injured, with the P3



classifying the degree of injury to be harm, albeit the maximum mandatory sentence is death penalty provided for in the statute. I dismiss the appeal against sentence too.

94. On the whole, this appeal against conviction is dismissed and the sentence imposed is upheld. The appellant to serve full sentence to take into account the period he was in remand custody from 14/12/2023 date of arrest to 15/4/2024 date of sentencing as there is no evidence that he was released on bond pending trial.

95. This file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2025.

R.E. ABURILI

JUDGE

