



**Osiago v Republic (Criminal Appeal E054 of 2023)
[2025] KEHC 12805 (KLR) (19 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12805 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL APPEAL E054 OF 2023
DK KEMEL, J
SEPTEMBER 19, 2025**

BETWEEN

RICARDO OBWAYA OSIAGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Arising from the judgment of Hon. L.Simiyu (S.P.M) delivered on 30th
October 2023 in Siaya Chief Magistrates Court Criminal cases No.870 of 2021)*

JUDGMENT

1. Ricardo Obwaya Osiago, the Appellant herein was charged with two counts. The first count related to an offence of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code. The particulars were that on unknown date between 9th and 11th day of January 2021 at Nyadhi village, Kakum –Kombewa sub location in Siaya Sub- County within Siaya County, jointly with others not before the court, robbed Beatrice Adhiambo Omamo of her three mobile phones make Nokia valued at Ksh 4000/=, X-tigi valued at kshs 4000/- and UMAX HUFURY valued at Ksh 10,000/= all valued at 18000/=, and unknown amount of money and that during the time of such robbery killed the said Beatrice Adhiambo Omamo.
2. The second county was that of handling stolen goods contrary to section 322(1)(2) of the Penal Code. The particulars were that on unknown date in the month of April 2021 at Kakamega Township in Kakamega County, otherwise than in the course of stealing, retained one mobile phone make Umax Hufury IMEI No. 865200030178487/8655200030178486, or having reason to believe it to be stolen goods.
3. Upon a full trial, the Appellant was convicted on the first count and sentenced to serve 20 years' imprisonment.



4. Aggrieved by the conviction and sentence, the Appellant has since appealed to this Court on the following grounds of appeal:
 - i. The trial magistrate erred in law and in fact in holding that the prosecution had proved its case beyond reasonable doubt.
 - ii. The trial magistrate did not consider the alibi defence presented by the Appellant, which was not in any way controverted by the prosecution.
 - iii. The prosecution relied on circumstantial evidence which did not point to the accused person irrevocably.
 - iv. The trial magistrate erred in law and in fact by shifting the burden of proof to the Appellant.
 - v. The trial magistrate erred in law and in fact by not appreciating that all the ingredients of the charge were not proved to the required standards.
 - vi. The prosecution failed to adduce important evidence, which was to the detriment of a fair trial of the case before her.
5. The prosecution called eight witnesses in support of its case whose evidence is summarized as hereunder.
6. Victor Ouma Oduwa (PW1) testified that he is a boda boda rider and resident of Kobare. He stated that on 11/1/2021, Joyce Omamo called him and reported that she could not contact her mother on the phone and thus she sent him to her mother's house to check on her. He did not go immediately, but later in the evening. He stated that upon reaching the house, he went through the small gate, and immediately, the cows started mooing and that he thought they were hungry. He called out loudly and went around the house, but there was no response. He found a window open but the curtains were not drawn. He peeped only to see Nyarsakwa lying down and covered in a lessso. He informed the villagers and contacted the police who came and broke the window and door to gain access to the house. The police took pictures and then took the body to Siaya County Referral Hospital Mortuary.

He testified further that Joyce had called him between 4.00 -5.00 pm, but that he did not go immediately. That he had known Nyarsakwa for a long time. That he knows that she used to have a male worker. He identified the photos shown to him as follows: PMFI- 1 was the house, PMFI- 2 was the front door, PMFI- 3 was the window that he peeped through, and PMFI- 4 was the body of Nyarsakwa as he saw it.
7. No. 66783 Corporal Simon Likonyi (PW2) testified that he is attached to DCI Siaya performing crime scene duties. That he is gazetted vide No. 10284/15/12/2006. He testified that on 11/01/2021 at 7.00 PM, he was requested to accompany Sergeant Nzine to Sirendo village in Kaugagi Odenda in South West Alego where there was an alleged murder scene. That the door was locked from inside and hence he peeped and saw a female lying dead. That they had to cut a window lever to gain access. He stated that the room was ransacked and that a decomposing body lay face down with maggots all over. That on turning the body, he saw that the face was swollen. That there was a manila rope tied around her neck. That the deceased wore a black skirt and a blood-stained blouse. That he took the following photos: 1-general view of the house, 2- front door, 3- photo of window, 4- photo showing body, 5- photo showing body, 6- close upper view of the deceased showing a rope tied around her neck, 7 – full length view without a shawl, 8- closer view of body after turning showing swelling, 9 is view of the body for identification purposes. That the photos were produced under his supervision. He did the report and signed it. All photos were produced as P exhibit 1-9 while the report was produced as P exhibit 10.



8. Maureen Omamo (PW3) testified that she works and resides in Nairobi. That on 11/1/2021, her brother Peter called and informed her of her mother's death. That she travelled home to Siaya the following day. That she does not know how her mother died. That post mortem indicated that she had been strangled. That the last time she saw her was in December but that they had talked around 5th January 2021 and informed her that Charles, a worker who used to stay with her had left in January. That a new worker had come but that she did not get to meet him. That her sister had informed her that their mother was not picking calls. That upon arrival, her mother's bedroom had been ransacked and that her ATM was missing. That her mother had two usable phones which were missing. That she was later informed that one of the phones had been tracked in Kakamega.

On cross- examination, she stated that her mother used to live with Charles but did not have issues with him. That prior to Charles, there was another worker who stole things and vanished.

9. Joyce Onyango Omamo (PW4) testified that she resides in Langata area in Nairobi. That she contacted her mother on 9/1/2021 and learnt that she was unwell. That on 10/01/2021 she called her mother to no avail. That she called her the whole of that day but her phone was off. That on 11th January 2021 her phone was still off, so she sent Victor a rider whom she used regularly to go check on her mother. That Victor informed her that he was far. That she booked a flight to go home and check on her mother and that at 6.00 pm, her uncle called her. That she reached home only to find the police taking her mother's body away. She stated that she was with her mother from 24th to 30th December. That her mother had sent her gardener away. That in January 2021, her mother informed her that a person from her church had sent her another gardener but she never got to know him. It was her testimony that all her mother's phones and ATM card were missing.

On cross- examination, she confirmed that she last spoke to her mother on 9th January 2021 and that on 10th her phone was off. She reiterated her averment in chief.

10. Lenah Anaisi Oluchirit (PW5) she testified that in April 2021 her friend Kevin called and informed her that he was at her house. She went to her house only to find the said Kevin with police officers. That she welcomed them and that the police informed her that they were looking for a certain phone that was in her house. That the phone was a Hufury make. That she explained to them that one Kamari had sold to her a Tecno phone that was not working well and so she had called him to exchange it. That Kamari went with a rider and Obwayo. That Kamari had informed him that the phone belonged to Ricardo and so the two agreed on the price and that she paid them. That she then went with the officers to Maisha Mart stage in Kakamega town where she pointed out Ricardo and who was arrested. That they were taken to the police station and an hour later, Kamari was brought and that they had a discussion after which Ricardo claimed that he had picked the phone in a club. That the phone make was Hufury and that she identified it in court and she produced it as Exhibit 11.

On cross examination, she stated that Ricardo had reported having picked the phone at Metameta club.

11. No. 58242 Sergeant John Nzine (PW6) testified that he was initially at DCI Siaya. It was his testimony that on 11/1/2021 at 5.30 pm he was instructed to attend to a scene of crime together with the duty officer at Nyadhi area where there was a report of sudden death. That they reached at 6.00pm. That security lights were on in a stone building but all doors were locked from inside. That it was the home of the late Beatrice Omamo. That there was a window near the back door which was partially open, and upon peeping through, he saw a body lying on the floor of the sitting room and that maize were spilled on the floor. That there was a bad smell and that they suspected murder. That they called corporal Likonyi from crime scene department. That they opened the door through the window and gained access. That the body lay face down and was decomposing. That they did not see injuries but a nylon rope around her neck with a visible scar. That all rooms were ransacked and clothes spread all over.



That the scene was processed, and photos taken then the body was taken to Siaya County Hospital. That one Omamo who worked for the deceased was not present.

That the postmortem was done on 19/1/2021 and that it was established that the cause of death was strangulation.

That the deceased's daughters gave the officers two mobile phone cartons as they believed the two phones were stolen during the incident. That the phones were a Nokia and Hufury phones which contained IMEI No. 86500030178457 and 865200031178486. That he produced the Phone carton as P Exhibit 12 for Hufury phone. That they wrote to Safaricom to confirm if the IMEI numbers were in use with sim cards. That they received a report that the Hufury phone was in use by one Lenna Andia. That on 17/6/2021 he together with Pc Bett went to Kakamega and traced the suspect and arrested her. That upon her arrest she claimed that she had bought the phone from Ricardo Obwayo who was accompanied by one Mr. Kamari a broker who sells phones. That she added that she had known Kamari. That she then contacted Ricardo and that they went to tuktuk stage and arrested him. That Lenna had the Hufury phone which was produced as P exhibit 13. That after questioning Ricardo, he claimed that he had collected the phone from a club in Kakamega and sold it to Lenna through Kamari. That Ricardo was unable to disclose where the sim card was or whether he has ever used the phone.

Safaricom disclosed that Lenna had started using the phone in April and that the call log was produced as P Exhibit 14. That the nylon rope that was around the neck of the deceased and which was pink and blue and green with black hair on it was produced as P Exhibit 15. That there was also a pink and cream scarf with yellow flowers tied on the neck of the deceased. That the scarf was produced as P Exhibit 16. That they charged the Appellant with an offence of armed robbery as the first charge.

On cross-examination, he stated inter alia; that the death was by strangulation; that the scene was not dusted or DNA collected on the recovered rope and scarf; that one of the phones make Nokia that had been stolen was still in use in Kakamega but he was yet to recover it; that the house of the deceased was ransacked; that one of the killers knew the deceased.

12. Dr. Juma Gabriel (PW7) testified that he is a medical officer at Siaya County Referral Hospital, with a Bachelor's Degree in Medicine and Surgery from Moi University. He stated that he had a post mortem report of Beatrice Omamo which was done on 13/1/2021 at 2.00pm at Siaya County Referral Hospital. After examination he concluded that the cause of death was asphyxiation secondary to strangulation with a blunt chest trauma. He issued a death certificate No. 1557418. Due to decomposition, he opined that the body may have been dead for about seven days. The post mortem report was produced as P Exhibit 17.
13. Jerosa Awona Abwanda (PW8) testified that on 13/1/2021 she was called and informed that her sister Beatrice Omamo (deceased) had been killed. That she does not know how she died. That she went to the house and found the body. That the police collected the body and took it to the mortuary. That she witnessed the postmortem examination.
There was no cross-examination and that marked the close of the prosecution's case.
14. The trial court later established that the prosecution had made out a prima facie case against the Appellant who was subsequently placed on his defence. He opted to tender a sworn testimony and call one witness.
15. In his defense Ricardo Obwaya Osiago (DW1) testified that he is a resident of Kakamega, a vegetable sales person and a casual labourer. It was his testimony that the charges against him are false. That he had never been in Siaya County prior to his arrest. That between 9th and 11th of January 2021 he was in Kakamega town engaging in the 'Kazi Mtaani' government project. It was a two weeks project which



he did as from Monday 4th January 2021 to Friday 8th January 2021 running from 8.00 AM to 4.30 PM every day. It was his testimony that 9th January 2021 being a Saturday, he went and prepared fodder for his livestock then proceeded to church returning at 1300 hours. That on 9th he spent the day in Kakamega town and the night at Maraba. That on 10th January 2021, he spent the day and night at his home. That on Monday 11th January 2021, he woke up and proceeded to work. It was his testimony that between 9th and 11th January 2021, he was not in Siaya, that he never stole nor killed Beatrice Omamo. On how he came into contact with the alleged Hufury phone; he stated that in April 2021 on a Sunday he had been at his home tending to his livestock when he decided to go to Metameta Busaa Club. As he drunk his alcohol, he saw an abandoned phone. That he took it to the club owner but the waiter told him to keep it until the owner shows up. As he left, he met Eugene who introduced him to Kamari, a phone dealer who introduced him to Lenna who bought the phone through Kamari.

On cross examination, he stated that he goes to SDA church and that he has a witness to confirm that. That he did not open the phone to see whether it had a simcard on.

16. Risper Nyaboke Osodo (DW 2) testified that she was the biological mother of the Appellant and that she lived with the Appellant in Maraba –Kakamega County. She stated that on 9th January 2021 they went to SDA Church in Maraba and returned at 1400hours. That the Appellant was working for the government project dubbed ‘Kazi kwa vijana’. That on 10th January 2021 he was at home and spent the night at home. That on 11th January 2021 he was at home then went to his work. That from 9th to 11th January 2021 the Appellant was at home with her and not in Siaya.

On cross examination, she stated that the Appellant was born in 1997. That she did not know whether his son took alcohol. That she did not know about the sale of the mobile phone.

17. That marked the close of the Appellant’s case.
18. The appeal was canvassed by way of written submissions. However, it is only the Appellant who complied.
19. The Appellant submitted that the main charge was not proved as the elements to be proved in the charge of robbery with violence were not proved. That there was no direct evidence connecting the Appellant to the main charge. That even circumstantial evidence does not hold or connect him to the offence. It was submitted that even the circumstantial evidence presented did not point to the guilt of the Appellant.
20. In conclusion, the Appellant prayed that the appeal be allowed, the conviction be quashed and sentence set aside.
21. I have considered the evidence on record, the submissions and authorities relied upon by the parties herein and find that the issue for determination is whether the Respondent proved its case against the Appellant beyond reasonable doubt.
22. It is noted that the Respondent preferred against the Appellant a main charge of robbery with violence contrary to Section 295 as read with Section 296 of the Penal Code. However, the Respondent was expected to prefer an alternative charge of handling stolen goods contrary to Section 322 (2) of the Penal Code but it has instead deemed the said alternative charge as one of the main counts and has described it as count two.



23. As regards the offence in count one, Section 295 and 296(2) of the Penal Code Cap 63 of the Laws of Kenya provides 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. Punishment of robbery

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(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 before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

24. In Criminal Appeal No. 116 of 2005 (UR), Johana Ndungu v Republic the Court of Appeal listed the ingredients of the offence of robbery with violence as follows;

i. If the offender is armed with any dangerous weapon or instrument; or

ii. If he is in the company of one or more other person or persons, or;

iii. If at or immediately after the time of the robbery, he wounds, beats, strikes or uses violence to any person.

25. In Criminal Appeal No. 300 of 2007, Dima Denge Dima & Others vs Republic, the Court stated that the ingredients of the offence of robbery with violence are appreciated disjunctively. It is, therefore, proper to convict an offender in instances where only one of the ingredients is proved. The Court observed: -

“.....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 found an offence of robbery with violence....”

26. In the case of Oluoch -vs- Republic [1985] KLR 549, the Court observed that proof of any one of the above ingredients is enough to sustain a conviction under Section 296(2) of the Penal Code.

27. Flowing from the foregoing, the offence of robbery with violence is made up of two parts. The first part is the robbery and the other part is the aspect of violence.

28. Returning to the case at hand, although the charge sheet indicated that the attacker was in the company of others not before court, no such evidence was tendered at trial. It transpired from the evidence that the deceased lived alone at the time and that she used to hire and fire her workers and that she had fired her worker and hired a new one after recommendation by one of her church members. It is instructive that the investigating officer did not bother to interview any of the church members so as to get the particular member who had recommended the alleged worker who had disappeared after the incident. It also transpired that none of the deceased's children knew about the identity of the said worker. That being the position, it is only circumstantial evidence to be considered as to whether the Appellant



having been found in possession of the deceased's stolen mobile phone was placed at the scene of crime as the perpetrator.

29. From the record, it was the testimony of PW2 and PW6 that a body of an adult African female was found lying on the floor of a house that was locked from inside. Upon the said house being broken into by the police officers to gain access, they found that the body had a nylon rope of about 200 cm (P Exhibit 6(a) photo of the rope on the body and the rope tied around the neck of the deceased (P Exhibit 15). It was the testimony of the pathologist (PW7) that the cause of death was strangulation. Therefore, the rope was the weapon used to cause the death of the deceased. PW3 and PW6 testified that all the rooms were ransacked. It was PW3 and PW4's testimony that their mother's mobile phones and ATM card were missing. This therefore shows that during the robbery, force was used which is tantamount to robbery with violence.
30. The questions that is critical is who then was the perpetrator of the crime? The question of the identity of the assailant comes into play.
31. The Appellant in his defence evidence vehemently contested that he was not identified as the one who committed the offence. He also maintained that he never visited Siaya County and that all this time he was either at home or working under Kazi Mtaani or SDA Church or at Kakamega Club. He also called his mother (DW2) to back up his alibi defence. This then brings up the issue of whether the recovery of the deceased's stolen mobile phone from the Appellant placed him at the scene of crime as the perpetrator. The Respondent was under duty to present watertight evidence which could lead to two outcomes namely, whether the Appellant was among the robbers or that he dishonestly retained or handled the stolen mobile phones in circumstances showing that he had knowledge that the same had been stolen or unlawfully obtained.
32. The importance of a flawless identification of an accused person cannot be gainsaid. It forms the basis upon which a court of law can convict authoritatively.
33. In Crim App 140 of 00[1], Peter Mwangi Mungai -vs- Republic [2002] eKLR, the Court of Appeal referred to its own decision where the following was stated;

“ In Owen Kimotho Kiarie v. R. Criminal Appeal No.93 of 1983, (unreported) this Court held that dock identification of a suspect is worthless unless it is preceded by a properly conducted identification parade. The principle was re-echoed in the case of Charles O. Maitanyi v. Republic [1985] 2 KAR 75. In that case it was also held that even where the dock identification is preceded by a properly conducted identification parade the evidence of a single identifying witness must be tested with the greatest care before a conviction is entered. The court there said: That cannot be done unless the identifying witness had made a report as to whether he could identify the accused and given a description. His ability to identify the accused is then to be tested on an identification parade ... If one is to test the evidence with the greatest care this was the way that the Court of Appeal in England in R.v. Turnbull [1976] 3 All ER 549 saw the examination. The Judge ...examines closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, e.g. by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, did he have any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the



description of the accused given to the police by the witness when first seen by him and the accused's actual appearance..."

34. Having carefully appreciated the circumstances of this case, it is apparent that the principles applicable in testing the propriety of an identification parade in so far as the prosecution witnesses are concerned, are not applicable. This is simply because, no evidence at the trial court, placed the assailant at the scene of the crime or gave a description of him to the police. It is instructive that the police did not dust the scene of crime so as to see if they could lift some finger prints and which could be used to compare with the prints obtained from suspects arrested. The investigations conducted herein only related to mobile phones which were allegedly stolen from the deceased during the alleged robbery. Indeed, the investigations led police officers to Kakamega where one Lennah Anaisi Oluchirit was arrested as she was in possession of one of the stolen mobile phones. The said lady claimed that she had bought the phone from one Ricardo who approached her while in company of a mobile phone dealer named Kamadi. The police managed to arrest the said Ricardo (Appellant herein) and the said Kamati and after investigations, charges were preferred against Ricardo (Appellant). Hence, the proof of the offence of robbery with violence would have to rely heavily on circumstantial evidence. The question that arises is whether the Appellant who was in possession of the stolen mobile phone and who sold it to one Lennah Anaisa Oluchirit could be one of the robbers. It is trite that if a case is entirely based on circumstantial evidence, the test to be considered is the one laid down in the case of *Sawe Vs Republic* [2003] KLR 364 where the Court of Appeal held as follows:

“In order to justify on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. There must be no other co-existing circumstances weakening the chain of circumstances relied upon. The burden of proving facts that justify the drawing of this inference from the facts to the exclusion of any other reasonable hypothesis of innocence remain with the prosecution. It is a burden which never shifts to the party accused.”

35. The Court now turns the evidence of Lennah Anaisi Oluchirit who testified as PW5. She is the person who was eventually caught with the deceased's stolen phone. It was PW5's testimony that Kamadi, a phone broker and seller sold to her a Techno phone that was not working. She then called him and requested him to bring her another phone. While Kamadi came to give her another phone, he happened to be in company of Obwayo and a rider and that Kamadi informed her that the phone belonged to one Ricardo. They agreed on the price and that she paid them.

On cross examination, she testified that she bought the phone (Exhibit 11) in April 2021. That Ricardo had told the police that he had picked the phone from Metameta club.

36. It was the Appellant's testimony that between 9th January 2021 to 11th January 2021, he was in Kakamega and not in Siaya where the incident happened. His testimony was corroborated by that of his mother (DW2) who confirmed that he was with him in Kakamega during the said period. The Appellant however testified that he picked the phone at Metameta club in Kakamega but never opened it to see whether it had a simcard.

37. The Appellant raised a ground of appeal that the trial magistrate shifted the burden of proof to him. On this issue I find that this was an error on the part of the trial magistrate. It is trite that the burden of proof is always on the prosecution, it never shifts to the accused. It is the duty of the prosecution to prove its case against an accused person beyond reasonable doubt, and if there is a doubt it must be resolved in favour of the accused. This was the holding by the House of Lords in the leading Judgment in that area in the case of *Woolmington v Director of Public Prosecutions* [1935] AC 462 where the Court



held that the burden of proof in criminal cases is always on the prosecution to prove the defendant's guilt beyond a reasonable doubt. Hence, the Respondent was still under obligation to disprove the Appellant's alibi as its burden never shifted to the Appellant in any way, for instance if he opted to remain silent in defence.

38. The Appellant raised a ground that the prosecution failed to call key witnesses which failure occasioned him injustice. The Appellant's argument could be right but then there is no obligation on the prosecution to call myriads of witnesses in a bid to prove its case. However, the decision to call or not to call a witness by the prosecution has been settled by the superior courts whose decisions are binding on this Court. For instance, in Criminal Appeal No. 31 of 2005, Julius Kalewa Mutunga -vs- Republic, the Court of Appeal discussed the failure by the prosecution to call a witness as follows: -

“...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal Court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive.”

44. Further in *Bukenya & Others -vs- Uganda* {1972} E.A.549, the East African Court of Appeal held as follows: -

- i. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.
- ii. The Court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.
- iii. Where the evidence called barely is adequate the Court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

39. In the case of *Abanga Alias Onyango -Vs- R*, Criminal Appeal No. 32/1990, the court stated that circumstantial evidence should be such that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused.

40. In light of the foregoing, I find that no direct or circumstantial evidence placed the Appellant at the scene of the robbery. The evidence on record does not support the charge of robbery with violence in count one. In that regard, the finding on conviction by the trial court on the said charge was in error and must be interfered with. There is doubt as to whether the Appellant was among the robbers and thus the benefit thereof must be ruled in his favour. However, the evidence tendered clearly supports a charge of handling stolen goods as captured in count two. The recovery of the stolen mobile phone was made after about five months from the date of the incident. The Appellant's explanation of how he came by the same must be seen within the prism of section 322(2) of the Penal Code. The Appellant claimed that he had picked up the stolen mobile phone in a Kakamega club and that he had informed the bar attendant who advised him to look for the owner. The Appellant stated in his defence evidence that he met one Eugene who led him to Kamadi who was a phone dealer and who introduced him to Lenah Anaisi Oluchirit (PW5) who eventually purchased the mobile phone from him and who later led police officers to Maisha Mart bus stage in Kakamega where he was arrested. The conduct of the Appellant in going about looking for a buyer and eventually finding one and later selling off the stolen mobile phones gave him away. The Appellant's claim of innocence must therefore be rejected. I am satisfied that the Appellant had knowledge that the mobile phone had been stolen or unlawfully obtained. He did not seek to look for the owner but instead went about looking for a buyer. I find the evidence on record satisfactorily supports the charge on count two against the Appellant.



41. Section 322(1)(2) of the Penal Code provides thus:

- (1) A person handles stolen goods if (otherwise than in the course of the stealing) knowing or having reason to believe them to be stolen goods he dishonestly receives or retains the goods, or dishonestly undertakes, or assists in, their retention, removal, disposal or realization by or for the benefit of another person, or if he arranges to do so.
- (2) A person who handles stolen goods is guilty of a felony and is liable to imprisonment with hard labour for a term not exceeding fourteen years.

The conduct of the Appellant left no doubt that he did receive and retained the stolen mobile phone and later disposed it off while having knowledge that the same had been stolen or unlawfully obtained. I am unable to believe his claim of innocence regarding the offence of handling stolen goods in count two. I find the circumstances taken cumulatively form a chain so complete that there is no escape from the conclusion that within all human probability the offence of handling stolen goods in count two was committed by the Appellant herein.

42. As regards the sentence, section 322(2) provides for a sentence of imprisonment for a term not exceeding fourteen years. It is noted that the circumstances of the offence were tragic in that the owner of the stolen and recovered mobile phone was killed during the robbery incident. I find that the Appellant deserves a deterrent sentence in the circumstances. I find that a sentence of fourteen (14) years' imprisonment is appropriate in the circumstances.

43. In view of the foregoing observations, it is my finding that the Appellant's appeal partially succeeds. The same is allowed in the following terms:

- a. The conviction on the offence of robbery with violence on count one is hereby quashed.
- b. The Appellant is hereby convicted for the offence of handling stolen goods contrary to Section 322(1) as read with Section 322(2) of the Penal Code.
- c. The sentence of twenty years (20) imprisonment is hereby set aside and substituted with a sentence of fourteen (14) years' imprisonment which shall run from the date of arrest namely 17/6/2021.

It is so ordered.

DATED AND DELIVERED AT SIAYA THIS 19TH DAY OF SEPTEMBER 2025.

D. KEMEI

JUDGE

In the presence of:

Ricardo Obwaya Osiago.....Appellant

N/A.....for Appellant

M/s Mumu.....for Respondent

.....Court Assistant

