



**Ongeko & 2 others v Republic (Criminal Appeal E034, E033 & E035 of 2021
(Consolidated)) [2023] KEHC 95 (KLR) (18 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 95 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E034, E033 & E035 OF 2021 (CONSOLIDATED)
FA OCHIENG, J
JANUARY 18, 2023**

BETWEEN

JUSTIN MAGETO ONGEKO 1ST APPELLANT

JARED MOCHENGO OKIBO 2ND APPELLANT

EDWIN MOKAYA MOMANYI 3RD APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of Principal Magistrates Court at Keroka
(B M Kimtai) dated November 1, 2021 in Criminal Case no 399 of 2020)*

JUDGMENT

1. The appellants, Justine Mageto Ongeko, Edwin Mokaya Momanyi And Jared Mochengo Okibo were convicted for the offences of robbery with violence contrary to section 295 as read with section 296(2) of the *Penal Code*; and shop breaking and stealing contrary to section 279(b) of the *Penal Code*.
2. For the offence of robbery with violence, each of the appellants was sentenced to imprisonment for a period of 25 years. Meanwhile, for the offence of shop breaking and stealing, each of the appellants was sentenced to 3 years' imprisonment.
3. However, the learned trial Magistrate directed that the 2 sentences would run concurrently.
4. Each of the appellants filed their respective appeals to challenge both convictions and sentences. However, as the appeals arose from the same judgment, this court had them consolidated. The appellants submitted joint submissions.
5. They urged this court to evaluate the evidence afresh. Being a first appellate court, I am obliged to re-evaluate all the evidence tendered.



6. If, as the appellants said, there are shortcomings and doubts about the evidence which the prosecution adduced, the court would set aside the conviction.
7. The first point that was raised by the appellants was that the trial court failed to inquire about the exact words spoken to PW1. The appellants were of the view that in the absence of information concerning the exact words, the evidence of the alleged voice recognition was flimsy.
8. The appellants cited the case of *Wamunga vs Republic* [1989] eKLR, to support their case.
9. I have carefully read the judgment of the Court of Appeal, in that case. However, there is no holding in the said case, which supports the appellants' contention on voice recognition.
10. In any event, PW1 testified that the 1st appellant told her to "shut up". Secondly, when PW1 inquired from the 1st appellant about what she had done;

... he told me to keep quiet since he had been sent to me to get the money I sold at the boutique."
11. The point I am making is that even if it were assumed that the complainant ought to have told the court what the appellant had said, so as to enable her to recognise him by his voice, the evidence of PW1 was sufficient in that regard.
12. On his part, the 2nd appellant submitted that there was no evidence which linked him to the crimes for which he was convicted.
13. When PW1 testified, she said that she saw the 3 men who robbed her, and she was able to recognise the 2nd appellant. PW1 said that the security light was on, and that enabled her to see the robbers.
14. In respect to the 2nd appellant, PW1 said:

You are a business person. I know you as Momanyi, and you have even sold me some coffee."
15. Meanwhile, as regards the 3rd appellant, PW1 said that he was the person who was transporting the stolen items from her shop. PW1 told the court that she identified the 3rd appellant, as the security lights were on.
16. PW2 is the daughter of PW1. On the material night both of them were asleep inside their house, when the robbers struck. PW2 testified that she identified the 1st and the 3rd appellants, during the robbery incident.
17. PW3 was the owner of the boutique located next to the shop of PW1. She testified that when the 1st and the 3rd appellants were arrested, each of them was wearing some items of clothing which had been stolen from her boutique.
18. PW4, PC Sosiah Mokenye visited the scene of crime after the complainants had lodged a report about the robbery. PW4 testified that PW1 informed the police that she had identified the 1st appellant.
19. The police provided the said information to the chief (PW5). It was for that reason that the chief went to the home of the 1st appellant.
20. When the chief got to the house of the 1st appellant, he found the said appellant together with the 3rd appellant. Both of them were asleep when the chief got to the house.
21. PW5 testified that he recovered many of the stolen items from the house of the 1st appellant.



22. PW4 got to the said house after PW5. When he reached there, the chief had already effected the arrest of the 1st and the 3rd appellants. The chief had arrested them with the support of the community policing Team.
23. When the police arrived at the house, the chief handed over to them, the 2 suspects together with the stolen items which had been recovered.
24. PW4 testified that it was the 3rd appellant who then led the police to the house of the 2nd appellant.
25. When they searched the house of the 2nd appellant, the police recovered some of the items which had been stolen.
26. PW6, SNR SGT Maurice Kawa largely corroborated the evidence of PW4. He went to the house of the 1st appellant after PW5 informed the police that he had already made the arrest of the 1st and the 3rd appellants.
27. According to PW6, it was the 2 appellants who, after being arrested, mentioned the 2nd appellant.
28. When canvassing their defences, the appellants said that they found the stolen items at the crime office, at Keroka Police Station.
29. However, I have noted that when the appellants were cross-examining PW4, PW5 and PW6, they never raised any questions concerning the evidence which those 3 witnesses had given, about the recoveries being made from the appellants.
30. In the circumstances, it does appear that the line of the defences was nothing more than an afterthought.
31. The appellants also pointed out that there was no actual violence during the robberies.
32. I suppose that that submission is premised upon the literal meaning of the name of the offence for which the appellants were convicted.
33. I appreciate that the title of the offence may be a misnomer. But in order to appreciate the ingredients of the offence of robbery with violence, we have to read the provisions of section 296(2) of the [Penal Code](#).
34. If a person steals anything, and;

If the offender is armed with any dangerous or offensive weapon or instrument, or is in company of 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.”
35. It is well settled that provided the prosecution proves any one of the 3 disjunctive ingredients, the accused person is liable to conviction.
36. It is not a requirement of the statutory provision, that an accused must have struck, beaten or wounded another person during the robbery.
37. If an offender is armed with a dangerous or offensive weapon or instrument, during the robbery, the court will convict him, even if he did not harm the complainant or any other person.
38. If the offender is in the company of one or more other person or persons, it would not matter that they were neither armed with dangerous or offensive weapons or instruments, during the robbery. The fact



that the offence was committed by more than one person, renders the offenders liable to conviction, even if nobody was harmed by the offenders.

39. In this case, the 1st appellant was armed with a *panga*. Secondly, the offenders were 3. Therefore, the trial court was right to have convicted them, even though the appellants did not injure any of the complainants or any other person.

40. A close reading of the judgement rendered by the trial court reveals that the appellants were convicted based upon the doctrine of recent possession. As the learned trial magistrate said:

There are also some recoveries that were made the following day, after the offence had occurred. I'm therefore inclined to conclude that the doctrine of recent possession would apply in this case; in that the accused persons have not sufficiently explained how those items that were recovered came into their possession."

41. Each of the appellants confirmed that the items in issue did not belong to them.

42. The learned trial magistrate had observed as follows, earlier in the judgment:

... the recovery of some items that were recovered from the possession of accused 1 herein, belonging to PW1; were inculpatory to say the least. This also applies to both accused 2 and 3, in that there were items found in their possession, that were stolen from PW1: And even in their defence they have cunningly evaded the issue of items found in their possession."

43. When items which were recently stolen, were recovered in the possession of an accused person, that gives rise to a legal presumption that the accused was the thief. It then becomes the duty of the accused to provide an explanation about how the stolen items came to be in his possession.

44. If the accused failed to give an adequate reasonable explanation, which was plausible in the prevailing circumstances, the court would be right to convict him, based upon the doctrine of recent possession.

45. In this case the appellants did not give any explanation about how they came to be in possession of the items which had been stolen from the complainants', on the previous night. In the said circumstances, I find that the trial court was right to have convicted the appellants, based upon the doctrine of recent possession.

46. In the final analysis, I find no merit in the appeal: it is therefore dismissed. I uphold the convictions and the sentences in respect to each of the 3 appellants.

DATED, SIGNED AND DELIVERED THIS 18TH DAY OF JANUARY, 2023.

FRED A OCHIENG

JUDGE

I certify that this is a true copy of the original

DEPUTY REGISTRAR

