



**Magero v Republic (Criminal Appeal E022 of 2021)  
[2023] KEHC 2547 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2547 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAMIRA  
CRIMINAL APPEAL E022 OF 2021  
WA OKWANY, J  
MARCH 23, 2023**

**BETWEEN**

**DENIS ONYANGO MAGERO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an Appeal against the Judgment of Hon. M. O. Wambani  
(Mrs.) – CM Nyamira dated and delivered at Nyamira in the original  
Nyamira Chief Magistrate’s Court Criminal Case No. 339 of 2015)*

**JUDGMENT**

1. The Appellant herein, Denis Onyango Magero and one Gilbert Nyambane Sogota were jointly charged before the Lower Court with the offence of Robbery with violence contrary to Section 296 (2) of the [Penal Code](#). The Appellant was the 2<sup>nd</sup> accused before the trial court while his said co-accused was the 1<sup>st</sup> accused.
2. The particulars of the charge were that on the April 6, 2015, at Mokomoni Sub-location in Nyamira North Sub-county within Nyamira County, jointly with others not before court, while armed with dangerous weapons namely pangas robbed Joseph Nyaisa Maosa of Kshs 5,800/= and a mobile phone Nokia valued at Kshs 1,500/= and at the time of such robbery killed the said Joseph Nyaisa Maosa.
3. The prosecution called a total of 8 witnesses in support of its case and at the close of the trial, the Learned trial Magistrate found both the accused persons guilty of the offence of robbery with violence and sentenced them to life imprisonment thus triggering the instant appeal in which the Appellant listed the following Grounds of Appeal in his amended Petition of Appeal: -



1. THAT the Learned Magistrate erred in fact and in law by applying the doctrine of recent possession as a basis to convict the appellant on the offence of robbery with violence when it was apparently not applicable in the circumstances and prosecution evidence adduced.
- 1 (a) THAT the Learned Magistrate erred in fact and in law by making finding that the appellant was using the deceased's recently stolen phone make Nokia without sufficient evidence to back up the finding.
- 1(b) THAT the Learned Magistrate erred in fact and law by making a finding that there is a strong presumption that the appellant was among the robbers who allegedly committed the offence in relation to the impugned conviction and sentence.
- 1(c) THAT the Learned Magistrate erred in fact and law by finding that the appellant sold the phone make Nokia to P3 yet the same was not proofed beyond reasonable doubt.
- 1(d) THAT the Learned Magistrate erred in fact and law by making a finding that the appellant used the deceased's phone Nokia shortly after the alleged robbery yet the same was not proofed beyond reasonable doubt.
- 1(e) THAT the Learned Magistrate erred in law and fact by convicting the appellant of the alleged offence of robbery with violence when there was insufficient evidence to link him to the alleged deceased's phone that was alleged robber(s) took during the robbery.
2. THAT the Learned Magistrate erred in fact and in law by not according the appellant the opportunity to be heard before convicting and sentencing him.
3. THAT the Learned Magistrate erred in fact and in law by not considering that the prosecution failed to proof the offence in question against the appellant beyond any reasonable doubt.
4. The Appellant's co-accused is not a party to this appeal.
5. A summary of the prosecution's case was as follows: -

PW1 David Okero Nyanumba was on April 6, 2015 at about 10.00pm at his home in Mokomoni area when he heard screams emanating from the home of Joseph Maosa Nyaisa (the deceased). He rushed out to home of the deceased and met the deceased's wife one Joyce Maosa, who informed him that the deceased had been attacked and killed by robbers. He went to the deceased's home and found his dead body lying on the floor. Pw1 testified that the accused persons were not known to him.
6. PW2, John Okero Maosa, the deceased's brother, also heard the screams on the material day. He rushed to the deceased's house and found him lying dead. He stated that the deceased lay in a pool of blood and had several cut wounds all over his body. He testified that he was able to identify a black Nokia 1110 phone belonging to the deceased when the said phone was recovered by the police three months after the robbery incident.
7. PW3, Moses Moseki Makori testified that he purchased the said Nokia mobile phone at Kshs 800/= from the Appellant who did not issue him with a receipt. He added that police officers recovered the phone from his sister (PW4) while she was using it to register sim cards in their mobile phone shop.
8. PW4, Emily Kwamboka Makori was the sister of Pw3 in whose custody the police found the Nokia mobile phone. She testified that PW3 bought the phone in May 2015 for her use in the mobile phone shop. She stated that she used the phone until September 2015 when the police officers traced and recovered it over allegations that it belonged to the deceased.



9. PW5, Wilson Matunda Orechi a guard at a medical clinic testified that the Appellant's co-accused was treated for a cut wound on the palm on 6<sup>th</sup> April 2015.
10. PW6, Dr Samuel Ombati Atandi, performed the post mortem examination on the body of the deceased and established the cause of death to be massive hemorrhage due to cut wounds.
11. PW7 PC Steven Muovi, a police officer stationed at CID Ekerenyo, Nyamira North, investigated the robbery in question. His testimony was that the deceased's wife, one Joyce Kerubo reported the robbery and the deceased's death. He visited the crime scene in the company of his colleagues and observed that there were blood stains on the floor and beddings. He took blood samples from the scene before proceeding to the home of the Appellant's co-accused where he also obtained more blood samples. The samples were later sent to government chemist for analysis.
12. PW7 testified that he obtained the serial number of the deceased's mobile phone from the deceased's wife and traced the phone with the assistance from Safaricom service provider. He noted that the said phone was in use in Mokomoni area. He stated that the deceased's phone was Nokia 1280 and that it had the Appellant's Safaricom number xxxx. He added that the Appellant was the one using the mobile Nokia handset and that he arrested and charged him with the offence of robbery with violence. He further testified that PW3 was in actual possession of the mobile phone having purchased it from the Appellant. Pw7 maintained that he recovered the phone from PW3 who then led them to the Appellant. PW7 produced exhibits in court which included the blood samples recovered from the scene, blood stained clothes and items; and the mobile phone.
13. PW7 testified that he recorded the statement of the deceased's wife but was unable to secure her attendance in court as she had allegedly disappeared without trace. He stated that the deceased's wife informed him that the deceased's phone had a damaged charging system. He further stated that the Appellant informed him that he had registered a phone number xxxx in the name of his uncle one John Oyoo.
14. PW8, Richard Kimutai Langat, the Government Analyst, received the blood samples and the blood stained items collected at the scene of crime for analysis. He concluded that the DNA profiles generated from the blood samples from the scene matched the blood stains on the clothes of the Appellant's co-accused.
15. The appeal was canvassed by way of written submissions which I have considered.
16. As the first appellate court, the duty of this court is to re-evaluate and re-analyze the evidence tendered before the trial court with a view to arriving at its own verdict while bearing in mind the fact that it neither heard nor saw the witnesses testify. (See *Okeno vs Republic (1972) EA 32*).
17. The main issue for determination by this court is whether the trial court arrived at the correct decision in convicting the Appellant herein.
18. After considering the totality of the evidence tendered before the trial court, I note that it was not disputed that the only nexus between the Appellant and the crime in question was a Nokia mobile phone allegedly belonging to the deceased. There was no eye witness to the robbery as the only other person who was allegedly present during the attack was the deceased's wife, Joyce, who did not testify at the trial. The prosecution claimed that the phone was one of the items stolen on the night of the robbery and that the said phone was found in the Appellant's possession.



19. The trial court held as follows over the subject of the mobile phone:-

' As regards, accused 2, this court has found out from the prosecution's evidence that he used the deceased's mobile phone make Nokia shortly after the robbery incident. He even sold the said deceased's phone to Pw3 herein, a fact which was confirmed by Pw4 herein.'

20. The Appellant submitted that the circumstantial evidence adduced against him cannot sustain a conviction as the prosecution did not establish any link between him and the alleged Nokia phone. For this argument, the Appellant cited the decision in *Rex v Kipkering Arap Koskei & 2 others [1949] EACA 135* cited in [PON v Republic \[2019\] eKLR](#) wherein the Court of Appeal stated that: -

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

21. The Appellant submitted that the claim that he stole the Nokia phone was based on hearsay as there was no evidence whatsoever to link him to the said phone. It was further the Appellant's case that the doctrine of recent possession was not proved.

22. The Respondent/State on the other hand, submitted that the prosecution had proved its case to the required standards.

23. The issue that the court has to deal with is whether there was evidence, to the required standards, to show that the Appellant robbed the deceased. I note that the trial court held that the evidence against the Appellant was circumstantial evidence.

24. It is noteworthy that there was no direct evidence linking the Appellant to the Nokia phone. I find that even though the trial court held that there was evidence to show that the Appellant used the deceased's mobile phone shortly after the robbery incident, and even sold the phone to PW3, there no material was placed before the court to show that the Appellant used the phone or that he sold it to Pw3. My finding is that if indeed the Appellant used and sold the stolen phone as alleged, nothing would have been easier than for the prosecution to tender documentary evidence from the mobile telephone service provider or a sale agreement to prove the claims.

25. I further find that even though it was alleged that the deceased owned the Nokia mobile phone in question, no evidence was tendered to show that the phone belonged to the deceased.

26. PW7 testified as follows on the issue of the ownership of the phone:-

' I charged accused 1 with the present offence. We acquired the serial number of the deceased mobile phone from his wife. We found the same from Safaricom service providers. We received a response from Safaricom. We found that the phone of the deceased person was in use. We found that the phone is being used in Omonono within Mokomoni sub location. It was being used by Safaricom the number xxxx. The number was being used on the deceased mobile phone handset make Nokia 1280. We found the owner of the said mobile phone number to be a young man by the name Dennis Onyango Magera. He was the one who using the mobile Nokia handset. We arrested him and charged him with the present offence.



When the deceased was killed, he has been using an Airtel line on his mobile phone. The Airtel line is xxxx. The serial number of the mobile phone make Nokia is xxxx. It is accused 2 that we found using the mobile handset. We arrested a suspect who had been found in actual possession of the mobile phone. His name is Moses Makori. Moses Makori had purchased the phone from accused 2 he has been using it at the shop to carry out M-pesa transactions. Moses Makori was using line xxxx. That line belongs to Moses Makori's shop attendant by the name Emily Makori.'

27. I note that even though the deceased's wife, one Joyce, who was an alleged eye witness to the offence is reported to have recorded a statement with the police following the robbery witnesses, she did not testify at the trial. No reasonable explanation was given for her failure to attend court as all that the investigating officer stated is that she had disappeared without trace. It is instructive to note that no evidence was presented to show that the said witness had disappeared or a police report showing that she is a missing person.
28. My finding is that the failure, by the prosecution, to call the crucial witness without any justifiable cause, raises doubts on the prosecution case and can only be interpreted to mean that her evidence would not have favoured the prosecution's case.
29. I further find that there was a glaring contradiction on the make or description of the deceased's alleged phone as while PW7 testified that the phone handset make was Nokia 1280, PW2 testified that the phone make was Nokia 1110.
30. Turning to the doctrine of recent possession, I find that the circumstances under which the deceased's alleged phone was recovered does not meet the test of the said doctrine. The doctrine was discussed in *Erick Otieno Arum v Republic [2006] eKLR* where the Court of Appeal held that: -  
  
' 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; that 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.'
31. In the present case, it was not disputed that the phone was not recovered in the Appellant's possession. Indeed, the phone was in the possession of PW3 and PW4 who were using it in their mobile phone business. Secondly, the phone was recovered almost five months after the alleged robbery. Thirdly, and as I have already noted in this judgment, no evidence was led to show that the deceased owned the phone in question. Most importantly, the phone was not positively identified as belonging to the deceased.
32. Since the case against the Appellant was founded on circumstantial evidence, the missing links and contradictions that I have highlighted in this judgment create sufficient doubt on the prosecution's case; thus leading to the conclusion that the case against the Appellant was not proved to the required standard.
33. For the reasons that I have stated in this judgment, I hold that the Appellant's conviction was unsafe and cannot be sustained. I therefore give him the benefit of doubt.
34. Consequently, I allow the appeal, the conviction is quashed and sentence set aside. The Appellant shall be released forthwith unless he is otherwise lawfully held.



**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23<sup>RD</sup> DAY  
OF MARCH 2023.**

**W. A. OKWANY**

**JUDGE**

