



**Mukoya v Republic (Criminal Appeal E040 of 2021)
[2023] KEHC 21582 (KLR) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21582 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CRIMINAL APPEAL E040 OF 2021
SN MUTUKU, J
JULY 5, 2023**

BETWEEN

ALLAN MABWA MUKOYA APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal against conviction and sentence, judgement delivered on 9/6/2021
by Hon.Kasera SPM of Kajiado Law Court to serve 30 years imprisonment over
charges of Robbery with Violence contrary to section 296(2) of the Penal code)*

JUDGMENT

Background

1. Allan Mabwa Mukoya, the Appellant herein, was jointly charged alongside Justus Muruli Arung'a with the offence of Robbery with Violence contrary to section 296(2) of the [Penal Code](#). The particulars of the offence are that on 26th April, 2016 in Kisaju Town in Isinya sub-county within Kajiado County jointly robbed James Wangui Ndung'u off motor cycle registration number KMDT 183R black in colour valued at Kshs. 111,000/- and immediately before such robbery threatened to use actual violence to the said James Wangui Ndung'u.
2. The Appellant was tried and found guilty. He was convicted of robbery with violence and sentenced to 30 years imprisonment. He is aggrieved by the conviction and the sentence and has filed this instant appeal challenging that decision.

Memorandum of Appeal

3. In his amended Memorandum of Appeal which forms part of his submissions, the Appellant has raised the following grounds of appeal:



- i. That the learned trial court magistrate erred in both law and facts while basing the appellant's conviction in reliance he was positively identified by the complainant herein at the locus in quo and failed to observe that, the sane was being left in doubt particularly no description was given to the actual arresters (sic).
- ii. That the learned trial court magistrate erred in both law and facts while relying on the alleged doctrine of recent possession which was not proved by the prosecution since there is no evidence in record of inventory that was ever adduced into record by the police who removed the said motorcycle (sic).
- iii. That the learned trial court magistrate lost direction while convicting the appellant in absentia that the warrant of arrest remains in force while the record does not indicate how he came to his mitigation thus Articles 50(2), 24(1), 29(a)(b) and 259(3) of the Constitution while further section 212 of the Criminal Procedure Code was not met as required in law (sic).

Submissions

4. The appeal was canvassed by way of written submissions. The Appellant filed his submissions on 15th December 2021. He has submitted that the trial court only relied on the testimony of PW1 on the issue of identification; that the complainant had not known the Appellant prior to the robbery and that this was a case of identification of a stranger and that the identification evidence was not properly tested to ensure that it was watertight. He *Republic-vs- Turn Bull and Others* 1976 3 ALLER 549 and *Roria -vs- Republic*.
5. On the second ground of appeal, he submitted that the doctrine of recent possession of motorcycle was not proved beyond reasonable doubt; that the evidence reveals that PW3 did not make any effort of preparing an inventory to prove who was the actual person who was in possession of the motorcycle when it was recovered and that the same was left to speculation.
6. The Appellant cited *Isaac Ng'ang'a Kabiga alias Peter Ng'ang'a Kabiga -vs- R* CR.APP. NO 272 of 2005, where it was held that:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for 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...”
7. The Appellant submitted, further, that the charge sheet is defective; that while the charge sheet specified the colour of the motorcycle as black KMDT 183R, PW1 described it as KMDT 183R Boxer Bajaj 150 and did not state the colour. PW3 stated that it was KMDT 183R Bajaj Asack without giving the color; that these were different motorcycles and that he was being convicted on a defective charge sheet which could not be cured by section 382 of the Criminal Procedure Code.
8. The Respondent's submissions were filed on 23rd January 2023. The Respondent has raised two issues for determination:
 - i. Whether the offence of robbery with violence was proved beyond reasonable doubt.
 - ii. Whether the accused persons were properly identified.



9. On the 1st issue, the Respondent relied on *Johana Ndungu -vs Republic* CRA 116/1995[1996] eKLR where ingredients of robbery with violence were discussed. It was submitted that the testimony of the complainant demonstrated that the Appellant together with his co-accused assaulted, beat and ties the complainant to a tree with the intention of stealing his motorcycle. That the offence was proved to the required legal standard.
10. On the second issue, the Appellant submitted that though the Appellant claims that the evidence of identification was by a single witness that the same does not render the evidence unreliable. They relied on *Maitianyi -vs- Republic* [1986] KLR where the Court of Appeal held that:

“Subject to well-known exceptions it is trite law that a fact maybe proved by the testimony of a single witness, but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification.”
11. It was argued that the testimony of PW1 was cogent and concise and did not waver even under cross-examination; that further, the circumstances were optimal for a positive identification as it was during the day and the complainant had ferried the robbers from Kisaju to Isinya; that the complainant knew the Appellant and the other accused person by appearance since they were his customers; that the evidence as adduced was weighty and that the Respondent has proved this case against the Appellant and his co-accused to the required degree of the law.

Analysis and Determination

12. I have carefully examined and analysed, afresh, all the evidence on record with a view to arriving at my own independent conclusion. I did not have the opportunity of observing the witnesses and I will give allowance to that.
13. For the offence of robbery with violence under section 296 (2) of the *Penal Code* to be complete, any of the following circumstances must be proved:
 - i. The offender is armed with any dangerous and offensive weapon or instrument; or
 - ii. The offender is in company with one or more person or persons; or
 - iii. 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.
14. According to the evidence adduced in the lower court, the complainant, PW1, testified that on 26/4/2016 he carried 2 men from Kisaju stage to Isinya road block; that he took the two men to Kenchik to see a plot; that at the plot the 2 men argued about a slab; that while he was facing the other side, the 2nd accused person held him by the neck from the back and choked him while the 1st accused switched off the motorcycle as PW1 attempted to accelerate. He testified that the two accused persons took him to a tree; that 2nd accused told the 1st accused that they should kill PW1, but the 1st accused advised against it. It is his evidence that they took his jacket straps, tied his hands between his thighs and left him and took the motorcycle with them. He testified that the time was around 1:00pm.
15. PW1 testified, further, that he managed to untie his leg and stopped a Nissan matatu that came along and told the crew that his motorcycle had been stolen; that together with other motorcycle riders, they chased the robbers; that at National Oil, the two accused dropped the motorcycle and entered a bush; that PW1 jumped out of the motor vehicle and hit the 2nd accused person and knocked him down. The stated that police went to the scene later and arrested the two robbers. On cross-examination he stated that he knew the 2 accused as they were his customers.



16. The second witness to testify was Jackson Kutatoi, PW2. He told the court that on 26th April 2016 at about 10.00am, he rode his motor vehicle and followed a matatu and motorcycle riders who were chasing robbers riding a motorcycle; that the two robbers were arrested by members of the public who started beating them; that he called police to go to the scene of arrest; that police rescued the two robbers from the members of public. PW2 did not identify who the robbers were.
17. PW3, IP Paskal Mwanyeti testified that on 26th April 2016 while he was in the office, two robbers were brought to Isinya Police Station by IP Obegi, CPL Agongo and PC Musomi; that the three police officers had responded to a distress call from members of public that two thieves had been arrested along Isinya/Kiserian road; that the two were Allan Mabwa and Justus Muruli; that the two had been assaulted and were taken to hospital.
18. PW3 testified further that he investigated the case and learned that the two accused had stolen the motorcycle No. KMDT 183R Basaj Assack from PW1 after PW1 picked them from Kisaju stage to Kenchick where they attacked and stole the motorcycle from PW1 and left him tied up. He testified that the appellant was found with identity cards of 3 people, Amos Saigwa (ID No. 33xxxxxx), Denis Onyango Okato (ID No. 29xxxxxx) and Simon Muthoka (ID No. 12xxxxxx), a DL card and an ATM card for Joel Sunde Lelian.
19. I have considered this appeal. In respect to the issue of identification by a single witness, I have considered *Abdala bin Wendo & Another versus Republic* (1953), 20 EACA 166 where it was held that:
- “Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the conditions favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to the guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of error.”
20. In this case, in establishing that the identification was free from possibility of error, I have considered the evidence of PW1 that he was robbed of the motorcycle during the day and that he knew the two accused persons as his customers. I have considered the evidence that the robbers were chased and arrested immediately, they abandoned the motorcycle and ran into the bush. I find the evidence clear that the robbers, including the Appellant, were positively identified and there is no error. There is no evidence to show that the identification of the appellant could have been hampered by anything.
21. I have considered the arguments by the Appellan that the doctrine of recent possession in this case was not proved. The doctrine of recent possession entitles the court to draw an inference of guilt where the accused is found in possession of recently stolen property in unexplained circumstances. The Court of Appeal summarized 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, 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.”

22. The evidence before the court shows that the Appellant and his co-accused were found in possession of a motorcycle that had been stolen a short while before their arrest on the same day. The Appellant did not adduce evidence in rebuttal as to how he came by the motorcycle. The court of appeal when analyzing this issue in *Augusti Erasmi v Republic* [2016] eKLR placed reliance on *Malingi v R*, [1989] 225 where it was stated that:

“By the application of the doctrine the burden shifts from the prosecution to the accused to explain his possession of the item complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts; that the item he had in his possession has been stolen, it has been stolen a short period prior to their possession; that the lapse of time from the time of its loss to the time the accused was found with it was (from the nature of the item and the circumstances of the case) recent; that there are no co-existing circumstances which point to any other person as having been in possession of the items.”

The doctrine of recent possession is a rebuttable presumption of fact. Accordingly, the appellant is called upon to offer an explanation in rebuttal, which if he fails to do, an inference is drawn, that he either stole or was a guilty receiver. As was aptly stated in the case of *Hassan V R*, (2005) 2 KLR

Where an accused person is found in possession of recently stolen property, in the absence of any reasonable explanation to account for this possession, a presumption of fact arises that he is either the thief or the receiver”.

23. From the evidence adduced and the authorities herein it is clear that the doctrine of recent possession was properly applied by the trial court. No explanation or rebuttal was given by the appellant as to why he was in possession of the motorcycle.
24. The Appellant herein has also claimed that the charge sheet was defective as the particulars of the motorcycle varied. He alleged that the motorcycle as described by PW1 and PW3 did not match what was in the charge sheet as they did not specify the colour. What constitutes a defective charge sheet was spelt out in the case of *Sigliani v R*, (2004) 2 KLR 480, where it was held that:

“The principle of the law governing charge sheets is that an accused should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.”

25. From the evidence on record, the appellant knew from the onset that the charge facing him was robbery with violence. Its particulars were clearly spelt out, which included the date of the offence, the place of the offence, the act constituting the offence, the motorcycle registration and the name of the victim. The allegation that the motorcycle is different as the Appellant is trying to portray lacks merit as the registration number did not change further, they were found in possession of the said motorcycle and the same was identified by PW1 as the stolen property.
26. The third ground of appeal faulted the lower court for trying the Appellant in his absence. I have carefully read the record of the lower court. It is true that the Appellant was not in during the testimony of all the three witnesses. From the record, the Appellant would make appearances during mention of the case and also during the date judgment was delivered. To me this seemed as if it was planned. I fault the trial magistrate in the manner this trial was handled. After so many absences by the Appellant, the



- right thing to do was to have him arrested and bond cancelled so that he remains in custody until the case was concluded. He was treated with leniency and that way he absented himself when witnesses testified and attended court when the case was not proceeding.
27. In the absence of evidence that the Appellant was acting deliberately to create a case for an anticipated appeal, I have no option than to lay the blame on the trial court for allowing this to happen. As the matter stands now, the Appellant was not granted a fair trial. He did not cross-examine witnesses and therefore the evidence against him remains untested on cross-examination.
 28. The right to a fair trial under Article 50 (2) of the Constitution of Kenya includes the right of an accused person to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed and the right to adduce and challenge evidence. The right to fair trial is one of the rights under the Constitution Article 25 that cannot be limited. If the Appellant absented himself deliberately, which evidence I have stated I do not have, then he must have known that the consequence of the trial magistrate failing to ensure he was present for the trial would lead to an appellate court pronouncing itself on the right to fair trial.
 29. By being absent and the trial court proceeding with the trial nonetheless, the Appellant was denied his right to a fair trial and on that ground alone, this appeal succeeds. This court, sitting on appeal, would have ordered a retrial of the Appellant. However, in my view this would lead to prejudice.
 30. It is my considered view that while all the other grounds of appeal point to the appeal lacking merit, failure by the trial court to ensure that the Appellant was arrested and brought to court for the trial or even having the charge sheet amended to try the 2nd accused person alone, has led to failure to accord the Appellant, who was the 1st accused in the lower court, a right to fair trial.
 31. I allow this appeal and order release of the Appellant from custody unless for any other lawful cause he is held in custody.
 32. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 5TH DAY OF JULY 2023.

S. N. MUTUKU

JUDGE

