



**Omusi v Republic (Criminal Appeal E21 of 2021)
[2023] KEHC 20088 (KLR) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20088 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E21 OF 2021**

A MSHILA, J

JULY 7, 2023

BETWEEN

GABRIEL ODUOL OMUSI APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal originating from the conviction and sentence by Hon. P. Gichohi-
(CM) in Kiambu dated 21/01/2021 in CR. Case No. 985 of 2018)*

JUDGMENT

1. The Appellant, Gabriel Oduol Omusi, was charged before the Chief Magistrate's Court at Kiambu in Criminal Case No 985 of 2018 with the offence of Robbery with Violence contrary to section 296(2) of the *Penal Code*. The particulars were that the Appellant on the 6th day of June, 2018 at Thindigua in Kiambu Sub-County within Kiambu County, while armed with dangerous weapons to wit pistols, jointly with others not before court robbed Antony Nyaga Bothu of Kshs 11,000/=, one silver chain and an iphone all valued at Kshs 96,000/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Antony Nyaga Bothu.
2. In Count II the Appellant was charged with Robbery with Violence contrary to Section 296(2) of the *Penal Code*. The particulars were that the Appellant on the 6th day of June, 2018 at Thindigua in Kiambu Sub-County within Kiambu County, jointly with others not before court while armed with dangerous weapon to wit a pistol, robbed Juliet Mwikali of one chef jacket and apron, one Samsung Galaxy S8 mobile phone, one iphone7, one umbrella, one power bank, one wallet, one back pack bag, one wrist watch, NHIF Card, national ID card, students card, AAR insurance card all valued at Kshs 203,800/= and at or immediately before or immediately after the time of such robbery used actual violence to the said Juliet Mwikali Kimeu.



3. In the alternative charge the Appellant was charged with Handling stolen property contrary to Section 322(1) of the *Penal Code*. The particulars were that the Appellant on the 6th day of June, 2018 at Huruma in Nairobi within Nairobi County, otherwise in the course of stealing knowingly or having reasons to believe it stolen, dishonestly was found in possession of one chef jacket and apron, two pairs of gloves, one wallet, one NHIF card, one students card and one national ID card valued at Kshs 9,400/= the property of Juliet Mwikali Kimeu.
4. The Appellant pleaded not guilty to the charges and the case went on to full trial. The prosecution called a total of 5 witnesses. At the close of the prosecution case, the trial court found the accused had a case to answer and he was placed on his defence. The Appellant elected to give a sworn statement and thereafter he closed his case. By the judgment of 21st January, 2021, the Appellant was found guilty and was convicted and sentenced to 15 years imprisonment.
5. Being aggrieved by the conviction and sentence, the Appellant lodged the current appeal. The grounds of the appeal as per the Petition of Appeal filed on 13th March, 2021 are as set out hereunder:-
 - a. That the Learned Trial Magistrate erred in both law and facts by convicting on the evidence which was full of material contradictions and inconsistencies without making any reference to the same.
 - b. That the Learned Trial Magistrate erred in both law and facts by failing to make an independent opinion on the burden of proof as required in law.
 - c. That the Learned Trial Magistrate erred in both law and facts by failing to comply by the provisions of Section 169(1) in relation to my defence statement.
 - d. That the Learned Trial Magistrate erred in both law and facts by failing to weigh the entire evidence adduced as in the light of my defence evidence as the demands.
 - e. That the Learned Trial Magistrate erred in both law and facts by failing to observe that the evidence brought forward by the prosecution fell too short of the standard needed in law hence my conviction was manifestly unsafe.
 - f. That I apply for a copy of court proceedings to enable me raise more important grounds.
6. The Appellant urged the court to allow the appeal, quash the conviction and set aside the sentence.
7. The appeal was canvassed by way of written submissions; hereunder are the parties respective submissions;

Appellant's Submissions

8. The Appellant submitted that the police had malice against the accused person as he was arrested with five others who were discharged under unclear circumstances. The prosecution was said to have failed to prove its case beyond a reasonable doubt that the Appellant was either one of the robbers or was arrested in possession of goods believed to be stolen. Reliance was placed in the case of *Andrea Obonyo & others v R* (1962) EA 542. The court was urged to find that the Appellant was not among the robbers as the same was not included in the first report by both PW1 and PW2. Reliance was placed in the case of *Terekali v Republic* (1952) EACA. The Appellant submitted that failure by the complainants to describe the robbers created a big room for mistaken identity of the Appellant. Further, he submitted



that there was nothing to link him to the offence and no chain of events can be deduced. In conclusion, the evidence adduced was said to fall short of the standard required to sustain a conviction.

Respondent's Submissions

9. The Respondent submits that the grounds raised by the Appellant do not warrant this court to disturb the findings of the trial court. It was submitted that the prosecution established that the Appellant was in the company of another person and was armed with a firearm. In any case he was found in possession of a phone which had been recently stolen from the victim. Reliance was placed in the case of *Erick Otieno Arum v Republic* (2006) eKLR. The Appellant was also unable to offer any explanation of how he came into possession of the said phone. Finally, the court was urged to uphold the lower court's decision and dismiss the appeal herein.

Trial Court's Evidence

10. Antony Nyaga Bothu (PW1) testified that he deals with transport business and that on 6/6/18 at 5.45 a.m he was waiting for a customer at an apartment gate in Thindigua when he saw a motor cycle then two men; one stood at the driver's window and the other at the passenger's window. He opened the doors of the car as the two men were shouting at him that he should open the car and that he also saw that one of them had a pistol. He testified that the one with the pistol took Kshs 12,000/= from his wallet and the other man took his iphone worth Kshs 45,000/= and his chain worth Kshs 40,000/= . He further stated that it is at this point that his customer one Juliet Mwikali stepped out from the apartment gate and that the two men took her handbag and also the watch man's phone who had stepped out when he heard the noises. He testified that the robbers asked for his car keys and they fled using their red motor cycle. He proceeded to Kasarini AP Post where he reported the matter. He also mentioned that he was able to track the robbers using the "find my phone" application on his iphone and that together with the police officer at Kasarini they proceeded to Kiambu Police Station where together with the officers there, they were able to track his phone at Huruma where they proceeded to. He testified that they followed the track to Huruma slums near the river where he identified the red motor cycle to the police who left him there and proceeded to find the iphone which was being shown to be about 200 meters away and that after twenty minutes the officers came back with five suspects and bags. They all proceeded back to Kiambu Police Station where he identified his iphone's cover and the red motor cycle as well as recording his statement.
11. In cross examination by the accused person, he confirmed that none of the suspects arrested were before the court and that he had never seen the accused person before and that he couldn't identify the people who robbed him as the incident happened very fast and that he was only able to identify the motor cycle by its red colour.
12. Juliet Mwikali Kimeu (PW2) testified that on 6/6/2018 she requested for an Uber to take her to Boma Hospitality College where she was a student. When the Uber arrived, the watchman opened the gate for her and he followed her outside where they found a man armed with a gun who took her purse and her bag that contained her college uniform, a Samsung S8, an iphone 4, a power bank and an orange wallet that contained her national ID, school ID Card and NHIF card. She testified that together with the watchman they were ordered to get inside the car, whereby the gunman removed her wrist watch and the other robber took the watchman's phone and wallet which they emptied and returned to him. Finally, they took the car keys and left. It was her testimony that she went back to the house where she narrated the incident to her husband who later accompanied her, the taxi driver and the watchman to Thindigua Police Station. She stated that she was later called to Kiambu Police Station where she was able to identify her college uniform, her chef jacket which had the college logo, white apron, S8 phone



with a brown cover, orange wallet, school and national identity card and NHIF Card. Lastly she stated that her stolen items amounted to Kshs 9,400/=.

13. Cpl David Kiptiri No 61985 (PW3) testified that on 6/6/2018 while he was at the Thindigua Police Post, Antony Nyaga a taxi driver and his passenger Juliet Kimeu reported that they had been robbed by three people and that one of them was armed with a gun. He stated that he alerted the OCS Kiambu Police Station who advised him to take the complainants there. It was his testimony that the OCS directed him to go after the robbers as Anthony Nyaga had another phone which assisted them locate his stolen phone which was being tracked to a location at Huruma. That they headed to Huruma Police Station where they reported that they were pursuing suspects. He indicated that they followed the signal up to when it was lost at Ngei 1 Estate but that they found the motor cycle used by the suspects parked at the gate which had a fake registration number KMEE 768H. He testified that together with the other officers, they entered the estate and found the door to the first house open whereby they entered and noted that suspects had escaped. They however, recovered assorted mobile phones, keys, wallets, clothes, the complainant's chef white jacket, white apron, two pairs of blue gloves, black and brown phone cover. It was his testimony that they broke the door to the second house where they recovered a brown wallet containing NHIF card, ID card and school ID all belonging to Juliet Mwikali and that they also recovered assorted phones. He further stated that they went back at 2.00 p.m where they found the Appellant in the second house and that they arrested five other people who were nearby and took them to Huruma Police Station for interrogation whereby they were later taken to Kiambu Police Station where the accused person was booked.
14. PC Chacha David Tingo No 1006897 (PW4) testified that on 6/6/2018 he was called by OCS Kiambu to his office where PC Kiptiri briefed the OCS about a robbery that involved the complainants herein. He stated that the OCS directed them to pursue the suspects as Anthony's phone which had been stolen could show its location and it's at this point that they followed the signal to Ngei Estate in Huruma where they also found a red motor cycle that was involved in the robbery with a fake registration number KMEE 769H parked at the gate. He testified that they entered the compound and found a house that was open and upon entering, they recovered a white chef jacket, white apron, phone cover. That they broke the door to the second house where they recovered a Techno and Huawei phone, a brown wallet which contained an ID card, NHIF card and national identity card all belonging to Juliet Mwikali. It was his testimony that they took the exhibits to Huruma Police Station together with five suspects who had been found near the house for purposes of interrogation. He testified that at 2.00 p.m on the same day they went back to house number two where they found Gabriel Oduol who indicated that he lived there with his two brothers. They arrested him and proceeded to Huruma Police Station and later to Kiambu Police Station with the other five suspects for interrogation which led to the accused herein being charged with the offence herein.
15. Sergeant Florence Arama No 62558 (PW5) was the Investigating Officer in this case. She testified that on 6/6/2018 she received a call from the Deputy DCIO Kiambu who informed her that she had been allocated a case for investigation where six suspects had been arrested by police officers from Thindigua and Kiambu Police Station. She testified that the following day she prepared the suspects and brought them to court to seek time to detain them so as to complete investigations which order was granted by the court. She recorded the complainants' witness statements and that they also identified some of their stolen items. It was her testimony that the Appellant's person identity card was recovered from his house and a Huawei and Black-Berry phone which he identified as his. It was her testimony that after investigations, she was satisfied that the other five suspects arrested were not involved in the case herein and subsequently the accused was the only one charged with the offence herein since the complainant's items were recovered from his house. She contended that it was the 1st complainant's iphone that led the police to the Appellant's house using its location signal. The said iphone was not recovered but



only its cover. She further testified that the motor cycle's number plate was covered with a cello-tape to show a different number KMEE 769H. She produced the photographs of all the exhibits and the certificate on behalf of the scene of crime officer as the officer was absent in court.

16. In cross-examination she clarified that the OB No that should appear in the Charge Sheet should be OB No 2 of 7/6/2018 which is the one that the Appellant was booked in with at 12.30 a.m and not OB No 57/6/6/2018 which was said to be an error by the officer who made the entry. She also termed the difference in the accused's name Oduor in the ID card and Oduol in the charge sheet as a spelling mistake.
17. Gabriel Oduor Omusi the Appellant person herein chose to give a sworn statement. He testified that on 6/6/2018 he was in his house in Huruma preparing lunch when he heard a knock and upon opening the door four people ordered him to sit down and proceeded to search his house where they recovered his Huawei phone and his wallet and that thereafter he was taken to Huruma Police Station and later to Kiambu Police Station where he met five other suspects. He contended that the other suspects were released on 11/6/2018 as they were able to raise Kshs 10,000/= that had been demanded by the police but on his part he was charged with the offence herein. It was his testimony that the complainants did not identify him and that PW3 could not tell how he came to connect him with this offence. He claimed that there was no sufficient evidence by the arresting officer to show that he had the exhibits in this case as there were no photographs. He contended that PW5 did not know the OB No which he was booked with and that he was also not booked for the items in the Charge Sheet.

Issues For Determination

18. Having considered the trial court record and the rival written submissions, the following issues arise for determination;
 - i. Whether the doctrine of recent possession was properly invoked.
 - ii. Whether the trial court considered the appellant's defence;

Analysis

19. This being a first appeal, the court is clothed with the jurisdiction to re-evaluate and re-analyze the evidence of the trial court and arrive at its own independent conclusion as was cited in the case of [*David Njuguna Wairimu v Republic*](#) [2010] eKLR where the Court of Appeal stated:

“The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.”

Whether the doctrine of recent possession was properly invoked.

20. The Appellant submitted that he was not among the robbers and that PW1 and PW2 the complainants herein never identified him to the police as such created room for mistaken identity.
21. In her judgment, the trial magistrate stated that the evidence linking the Appellant with the offence was based on the doctrine of recent possession whereby the Appellant was found in possession of recently



stolen property and was unable to offer any reasonable explanation how he came to be in possession of that property which led to the trial courts presumption that he was one of the robbers. It was held that the prosecution had established its case as against the Appellant beyond any reasonable doubt. The Appellant was found guilty of the offence of robbery with violence and he was convicted and sentenced to 15 years imprisonment.

22. In the Court of Appeal case of *William Oongo Arunda (Hitberto referred to as Patrick Oduor Ochieng) v Republic* (Criminal Appeal 49 of 2020) [2022] KECA 23 (KLR) (21 January 2022) (Judgment) the court quoted the case of *Athuman Salim Athuman v Republic* [2016] eKLR where it was held that:-

“The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. (See *Malingi v Republic* (1989) KLR 225 HC and *Hassan v Republic* (2005) 2 KLR 151). The circumstances under which the doctrine will apply were considered in *Isaac Ng’ang’a Kabiga Alias Peter Ng’ang’a Kabiga v Republic*, Cr. App. No 272 of 2005, where this Court stated:-

‘It is trite that 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 to the other.’”

23. In the case herein, PW1 and PW2 testified that they were robbed by two men who were on a motor bike and were armed with a firearm. That the robbers took an iphone and a chain belonging to PW1 and college chef uniform, Samsung S8, orange wallet, power bank, national, school and NHIF cards belonging to PW2. That they reported to the police and with the help of PW1’s iphone, they tracked the robbers. That they followed the signal which directed them to Huruma Slums. While there PW1 saw the red motor bike that the robbers had used to rob them. The police recovered various items from a house that was nearby and they also arrested five suspects from neighbouring houses. Among the items recovered, PW1 identified his iphone cover while PW2 identified her college uniform, Samsung S8 brown cover, orange wallet, school, national and NHIF cards. That later the police went back to the house where they had recovered the stolen items where they found the accused and arrested him.
24. Having re-evaluated the testimony by the prosecution and the defence, this court is satisfied that the ingredients of the doctrine of recent possession were properly applied in this case; It was established that the stolen items that PW1 and PW2 identified as having been stolen from them were found in the house that belonged to the accused a few hours after the robbery. In any case, the accused in his testimony did not offer any explanation as to how he came into possession of the stolen property.
25. It is clear from the foregoing, that PW1 and PW2 positively identified items that had been recently stolen from them and that the items were found in the house that belonged to the accused person. In the circumstances, this court reiterates that the doctrine of recent possession was properly invoked by the trial court.



Whether the trial court considered the appellant's defence;

26. With regard to whether the court considered the appellant's defence; the trial court in its judgment addressed the issue of different names on the Charge Sheet where the same was said to be a spelling mistake. The issue of the wrong OB number was also stated to have been well explained by the investigating officer. Lastly the issue that police demanded Kshs 10,000/= from the accused was dismissed as being an afterthought. In the end, therefore, it was held that the accused person's defence cast no shadow of a doubt on the prosecution case.
27. It is evident, that in analysing these discrepancies, the trial court considered the Appellant's defence. However, this court is satisfied that the said discrepancies were not prejudicial to the Appellant as the same do not go to the root of the charges against the accused person. The Charge Sheet was well read out to the accused who in turn responded.
28. In any case, these discrepancies are curable under Section 382 of the *Criminal Procedure Code* which provides thus:
- “Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice”.
29. Refer to the case of *Kefa Mugita Avina & another v Republic* [2022] eKLR where it was stated that;-
- “these discrepancies, variance between the dates on the charge sheet are curable under Section 382 of the *CPC*. It cannot vitiate the conviction.”
- This was also stated in the case of *JMA v Republic* (2009) KLR 671 where it was held interalia that :-
- “It was not in all cases in which a defect detected in the charge would render a conviction invalid. Section 382 of the *Criminal Procedure Code* was meant to cure such an irregularity, where prejudice to the appellant is not discernible.”
30. In the upshot, this ground of appeal is found to be devoid of merit and it is disallowed;
31. Upon conviction the learned trial magistrate imposed a sentence of 15 years and this court is satisfied that the sentence imposed was within the law and finds no good reason to interfere with the same.
32. The trial court it is noted took into consideration the Muruatetu case and invited the Appellant to mitigate and did not impose the death penalty; the only issue not taken into consideration was the length of time spent in custody; this court will allow the sentence to commence from the date of arrest as indicated on the Charge Sheet;

Findings And Determination

33. For the forgoing reasons this court makes the following findings and determination;
- i. This court finds the appeal to be devoid of merit and the same is hereby dismissed'
 - ii. The conviction is upheld.



iii. The sentence is upheld and to run from the 6th June, 2018.

34 Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 7TH DAY OF JULY, 2023.

A. MSHILA

JUDGE

In the presence of;

Mourice - Court Assistant

Appellant – present in person

Mr. Gacharia – for the State

