REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 44A OF 2018

CORAM: HON. R.E. ABURILI J

KENNEDY ODHIAMBO ONYANGO............1ST APPELLANT

DANIEL OTIENO OLOO...............................2ND APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(*Appeal against judgment, conviction and sentence in Siaya Principal Magistrate's Court Criminal case No 3 of 2018 by Hon James Ong'ondo, Principal Magistrate on 24/8/2018)*

JUDGMENT

Introduction

1. The Appellant herein **KENNEDY ODHIAMBO ONYANGO** and **DANIEL OTIENO OLOO** were charged before the Principal Magistrate's Court, Siaya in Criminal Case 3 of 2018 with the offence of robbery with violence contrary to section 296(2) of the Penal Code. Particulars of the offence are that on 30/12/2017 at Karapul sub-location, Siaya County, the appellants herein jointly with others not before court while armed with dangerous /offensive weapon namely a panga robbed Denis Odhiambo Oduor of one gas cylinder, one TV set make LG, one woofer, one Samsung DVD player,2 mobile phones make Tecno Pad and Itel,2 electric extension cables and a fridge guard all valued at KES.43,000/= and cash KES.3,000/= and immediately before or immediately after the time of such robbery, injured the said Dennis Odhiambo Oduor.

2. The 1st appellant faced an alternative charge of handling stolen goods contrary to section 322(1) as read with section 322(2) of the Penal Code in that on 31st December, 2017 at Karapul sub-location, Siaya County otherwise than in the course of stealing accused dishonestly retained 1 woofer make LG and 1 computer hard drive, the property of Denis Odhiambo Oduor knowing or having reasons to believe them to be stolen goods or unlawfully obtained.

3. The trial magistrate, Hon. J. Ong'ondo heard the testimony of 6 prosecution witnesses as well as the defence of the appellant and proceeded to find the appellants guilty of the offence of Robbery with violence contrary to section 269 (2) of the Penal Code. He sentenced them to serve life imprisonment.

4. Aggrieved by the said conviction and sentence, the appellants initially filed a joint petition of appeal based on the following grounds:

> **a)** ***That the trial court failed to appreciate that the prosecution case was not properly investigated and that essential witnesses were not availed to support the Prosecution case.***
>
> **b)** ***That, the trial court failed to appreciate that the evidence of identification was not sound since the same was achieved under very difficult circumstances.***
>
> **c)** ***That, the trial court failed to consider that the prosecution evidence lacked any documentary proof.***
>
> **d)** ***That, the trial court failed to observe that the data print-out from SAFARICOM Company was not availed in court.***
>
> **e)** ***That, the trial court erroneously invoked the doctrine of recent possession.***
>
> **f)** ***That, the trial court failed to consider that the Sections 137, 194, 160 CPC and 83 of the Evidence Act.[sic]***

g) *That, we humbly pray to be served with trial court proceedings and wish to attend the hearing of this appeal*.

5. The appellants subsequently filed amended grounds of appeal as listed below on 4/2/2020:

a) *THAT, the trial court failed to comply with the provisions of Section 198(4) of the CPC.*

b) *THAT, the Appellant's conviction was based on recognition evidence that does not exist on a firm first report.*

c) *THAT, the Appellant's conviction was based on contradictory evidence of the prosecution.*

d) *THAT, the Appellant conviction was based on the issue of doctrine of recent possession that does not measure to the required standard.*

e) *THAT, the appellant's conviction was based on absence of essential witnesses of the prosecution.*

Appellants' Submissions

6. The appellants filed similar submissions on 4/2/2020 that the trial court failed to comply with the provisions of Section 198(4) of the Criminal Procedure Code specifically that the trial magistrate failed to indicate the language used during the trial which amounted to a miscarriage of justice and could render the appellant's conviction unsafe and unsustainable.

7. The appellants further submitted that their conviction was based on recognition evidence that did not exist on a firm first report and as such there was need for an identification parade to be conducted which was not done.

8. It was submitted that their conviction was secured based on contradictory evidence as there was a contradiction in the evidence of PW3 and PW2 as to the identity of the appellants which contradictions proved that both the prosecution witnesses PW2 and PW3 were not credible and trustworthy.

9. The appellants further submitted that they were convicted based on the doctrine of recent possession which did not meet the required standard as there was no photographic evidence to show that the said items were recovered in the appellants' house or that the buyer was served with any receipt as required by law.

10. Further submission was that the conviction was based on absence of the essential witnesses of the prosecution and further that the trial court failed to consider both strength and weight of the appellants' unsworn defence statement and thus rejected it without credible reasons.

Analysis and Determination

11. This is a first appellate court. As expected, I have to analyze and evaluate afresh all the evidence adduced before the lower court and draw my own independent conclusions while bearing in mind the fact that I neither saw nor heard any of the witnesses as they testified. See **Okeno v Republic [1972] EA 32** where the Court of Appeal set out the duties of a first appellate court as follows:

> ***"An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya vs. Republic (1957) EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala vs. R. (1957) EA. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters vs. Sunday Post [1958] E.A 424."***

12. Similarly, in **Kiilu & Another v Republic [2005]1 KLR 174,** the Court of Appeal stated thus:

> ***"1. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw its own conclusions.***
>
> ***2. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses."***

13. The prosecution evidence as laid out in the trial Court was as follows: PW1 Sila Omondi Aluoch, a clinical officer at Siaya County Referral hospital testified and produced a medical report for Denis Odhiambo Oduor aged 30 years at the time when he attended to the patient-complainant on the 1-1-2018 after he allegedly been assaulted on 30-12-2017 at 2.00am by some people well known to him.

14. PW1 testified that the complainant was in fair general condition but had slight tenderness on the neck and swelling on the hands, injuries which were 2 days old and caused by blunt object. PW1 testified that he classified the injuries as harm.

15. In cross-examination by the appellant PW1 reiterated that the injuries were caused by a blunt object and further that the complainant did

not tell him how he was injured by what weapon.

16. PW2 Dennis Odhiambo Oduor, the complainant testified that on the 29/12/2017 whilst sleeping in his house at 2.00am he saw flash lights within his bedroom. He testified that his house doors at the back and front are steel and were all locked using padlocks however he had not locked his bed room door. It was his testimony that he saw people in his bedroom had lights and further the fluorescent bulb was on and as such he could see 4 people one of whom grabbed his hands and tied them using ropes, manila and a cable whereas they used an HDML cable to tie his legs.

17. PW2 testified that the assailants slapped his buttocks using a panga till his beige short got torn. He further stated that his assailants used paper P.V.C pieces screws to gag him and they stepped on his vest. It was his testimony that his assailants did not cover their faces and he could see 2 of them clearly as the other 2 collected items. PW2 identified the 2 assailants he could see as the appellants herein before the trial court. He further testified that the 1st appellant was the gang leader, giving direction and ordering him to give his wallet whilst slapping him with a panga as he stepped on him with boots.

18. PW2 testified that the 1st appellant tied his legs and joined others to collect and take items outside whereas the 1st appellant was in the bedroom throughout. He further testified that the whole ordeal took about 30 minutes and that the assailants switched the lights on and off.

19. PW2 testified that the 2nd appellant searched for money in the bedroom and did not find money so he came asked the 1st appellant to untie his legs so he could show them the money. He stated that he showed them his wallet which had Visa Cards; Equity, Co-operative and K.C.B and ksh. 3000/- and they took it. He testified that he was taken back to bed and in 2 minutes he heard a bang at the door.

20. PW2 testified that his attackers removed bulbs for the security light, main door and the padlock from the grill. He also noticed that the glass window had been broken. He stated that he went to the sitting room and found the following items missing:

a) T.V -LG 19" and its Remote

b) Woofer – LG (small speakers)

c) K-Gas-6kg

d) Phones; tecno, kabambe (orange)

e) TV connecting cables

f) Hard Drive 500 GB FF-P12

21. PW2 testified that he found the attackers had vandalized his Desk top and the extension cables and UPS were cut out. He testified that he then went through the front door and found bulbs had been removed in front in the grass after which he went to inform George his neighbour as well as other neighbours who helped him unsuccessfully search for the thieves. He testified that he later found a phone left by the thieves which he took to the police station on 30th in the morning at 9.00am as he recorded his statement.

22. PW2 further testified that on the 31st December 2017, at 2 am he was called to the police station where he identified some of the items recovered from the appellants. PW2 was able to identify the shoes worn by the 2nd appellant as well as the 1st appellant as he had seen their faces and heard their voices during the attack. He testified that he then proceeded to Siaya County Referral Hospital as he had headaches and pain on his hands where the attackers had tied him as well as on his neck where they stepped on his neck.

23. In cross-examination by the 1st appellant, PW2 testified that the assailants removed the padlock and took it as he was lying down and that although the issue of lights was not in in his statement to the police, he had told the police. He further stated that he went to the Police Station to identify the recovered items from the police but the police did not take him to where they had found the said items.

24. In cross-examination by the 2nd appellant, PW2 stated that he was not drunk that day and that he did not know the 2nd appellant by name but that he saw him using light which were on and as they walked with the PW2 to the rooms and lights were on.

25. PW3 George Dianga the complainant’s neighbour testified that on the 30-12-2017 at 2.30am, he was in his house when he was woken up by the complainant’s knock at his bedroom window. He testified that the complainant told him that some people had attacked and robbed him.

26. PW3 testified that the complainant led him to his house and showed him the missing items T.V set, DVD player which he had seen before were missing. He testified that in the kitchen, the gas cylinder was missing whilst in the bedroom, things were scattered all over and further that there was manila rope and the complainant’s hands had marks on the wrist. PW3 also testified that the security light outside on front part had a missing bulb.

27. PW3 testified that there was electricity power in the house. He further stated that he called another neigbour Nicholas who came and they walked within the compound in an attempt to trace any missing items. He testified that they returned and along the corridor, there was a mobile phone which they suspected belonged to one of the attackers. The following morning, at 9.15 am, they went with the complainant and reported to the Police Station and they subsequently recorded their statements.

28. In cross-examinationm, PW3 stated that the complainant did not describe the people who stole from him or robbed him and that the police did not tell him to whom the phone belonged. He stated that he accompanied the complainant to the police station and heard him mention items which had been stolen though he did not hear description of the items in detail.

29. PW4 Michael Otieno testified that on the 30/12/2017 he was at his wife's shop when at 8.00 am the 1st appellant approached him saying he had a problem. PW4 testified that he had seen the 1st appellant before buying airtime from his wife's shop. He stated that the 1st appellant told him that he had a sick child and he needed money to take the child to hospital and further that he wanted to sell something to get cash to which the 1st appellant stated that he needed Kshs. 1500/= which PW4 gave him for the 6 kg of k-gas cylinder.

30. PW4 further testified that the following day at 10.00am the 1st appellant returned with 2 police officers in a land cruiser and he was told to produce the cylinder which he did and then proceeded to record his statement.

31. Cross-examined by the 1st appellant, PW4 stated that he had known the 1st appellant by appearance for less than a year. PW4 further stated that the 1st appellant told him that the alleged sick child was at home and further that he had misplaced the receipt to the gas cylinder but promised to bring it. He further stated that the 1st appellant wanted to sell the gas cylinder for Kshs. 2500 but agreed on Kshs. 1500.

32. PW5 Evelyne Awuor Otieno testified and stated that she knew the 2nd appellant who had been her neighbour at a Karapul and she implicated the 2nd appellant, saying that he was a member of her merry go round, of attempting to sell her a 19 inch LG TV. On 30th December, 2017. The appellants did not cross-examine PW5.

33. PW6 No.83796 CPL Kaveta from Siaya Police station testified that on the 30/12/2017 at 10.00am, he received a complainant who had swelling on the face, hands and legs and who explained that on 29/12/2017 at 11.00pm, he locked his house and went to sleep and that on the 30/12/2017 while asleep he saw torch lights and 4 men who had broken into his house and entered with pangas and who assaulted him and tied him with electric cables and gagged his mouth with p.v.c. pieces. PW6 further testified that the complainant reported that his attackers demanded money, tore his khaki short and stole things from his house and left him tied.

34. PW6 testified that the complainant reported that he untied himself and then called on his neighbours with whom they discovered a phone which seemed to have been left at the scene by the attackers. PW6 stated that he arrested the 2nd appellant after recovering the phone and calling a contact saved as mother who directed PW6 to where the 2nd appellant was who in turn led PW6 to the 1st appellant herein. He further testified that the 1st appellant then showed him where he had sold K-gas cylinder to one Olumbe and further took him to his(1st appellant's house) where PW6 recovered a pink hard drive and speakers described by the complainant as having been stolen.

35. In cross-examination by the 1st appellant, PW6 stated that there was no need for parade as items were recovered from the appellants. He further stated that the 1st appellant took him to his house and that he found out that the 1st appellant lived at Karapul not at his home.

36. At the close of the prosecution's case, the 1st appellant gave a sworn statement of defence while the 2nd appellant gave unsworn testimony. According to the 1st appellant, on the 29/12/2017 he was at Stage Villa where he parked his motorcycle when at 8.00 p.m. 3 people came and called him by his name Kennedy, arrested him and took him to Siaya Police Station where he saw the complainant, PW4 and his co-accused whom he denied knowing.

37. The 1st appellant further stated that on 2/1/2018 he was charged in court though he did not commit the offence of robbery. He denied knowing how the power bank was recovered and further that the house where the power bank was recovered did not belong to him.

38. The 2nd appellant in his unsworn testimony testified that he was from Bar Olengo and aged 30 years old. He denied being at the scene of crime saying on the material date he was in Kisumu and that his phone got lost on 27/12/2017 during a fracas in Kisumu. He denied reporting the loss of his phone.

Determination

39. Having carefully considered the appellants' grounds of appeal, the evidence before the trial court and submissions for and against this appeal, the main issue for determination is whether the prosecution proved their case against the appellants beyond reasonable doubt to warrant the conviction of the appellants for the offence of robbery with violence as charged and therefore whether the sentence meted out was justified.

40. It is the appellants' defence that the trial court failed to comply with the provisions of Section 198(4) of the Criminal Procedure Code specifically that the trial magistrate failed to indicate the language used during the trial which amounted to a miscarriage of justice.

41. It is important to note that at the heart of the right to a fair hearing is the requirement that an accused person must understand all the elements of the charges facing him and all the evidence adduced against him throughout the entire trial. This is so because this is the only way that an accused person is able to cross examine witnesses and prepare his or her defence.

42. The above legal principle has been accorded both statutory and constitutional recognition. Under Article 50 (m) of the Constitution, an accused person has a right to have the assistance of an interpreter without payment if he cannot understand the language used at the trial.

43. Section 198 of the Criminal Procedure Code provides that when an accused person is present in a trial, any evidence given in a language he does not understand shall be interpreted to him in a language which he understands.

44. What clearly emerges from the above constitutional and statutory provisions is that courts have a duty to ensure that an accused person is able to follow the proceedings from the beginning to the end in a language that he or she understands. That is why the facility of free interpretation is given to an accused person as of right to ensure that he understands the proceedings even if he is not proficient in the language used by the court and other participants in the trial. It is therefore crucial that courts do note on record the language used by the court, the witnesses and the language of interpretation if any.

45. In this appeal, the appellants have not complained that they did not understand the charge preferred against them or that they were unable to follow the proceedings as on account that the trial was not conducted in a language they understood. Their only grievance is that the trial court failed to indicate the language it used.

46. I have perused the trial court record and in all the Coram and the language used for interpretation and by the witnesses is indicated.. I find no prejudice occasioned to the appellants.

47. The Court of Appeal in a number of authorities has held that the mere failure or omission to indicate on record the language used in the trial or the interpretation thereof cannot vitiate a conviction if the record demonstrates that an accused person fully understood the charges and was able to follow and participate in the proceedings. See: **George Mbugua Thiongo v Republic (2013) eKLR**; **Mwendwa Kilonzo & Another v Republic (2013) eKLR**.

48. In this case, it is clear from the trial court's record that the trial court on numerous occasions indicated the language that was being used. This is evident further in the fact that the appellant understood the charges and the evidence adduced by the six prosecution witnesses. Indeed, the trial court noted that interpretations in the court ranged from Dholuo, English and Swahili. There is no doubt that the appellants followed all the proceedings given the manner in which they participated in the trial including the way they cross-examined the witnesses. The 1st appellant was even able to express his dissatisfaction with the answers given by PW6 under cross-examination. **After the prosecution closed its case, the appellants proceeded to give their defence which was recorded by the court in English and Kiswahili respectively.**

49. The record does not show that the appellants complained to the trial court at any stage in the course of the trial that they had any difficulty with the language used. I reiterate that the trial court record shows the language used by each witness after being sworn in and even the language used by the appellants herein, and in all the court sessions, a court clerk was in attendance whose role was to inter alia provide interpretation if required. Given the foregoing, I have no doubt in my mind that the appellants fully understood whatever language that was used and they were not prejudiced in any way. That ground therefore fails. It is hereby dismissed.

50. The appellants further argued that they were not positively identified by the complainant. And that an identification parade should have been carried out to confirm their identity.

51. On the issue of identification, I have reminded myself of the guidelines in the case of **Mwaura v Republic [1987] KLR 645**, where the Court of Appeal held, inter alia, that:

> ***"In cases of visual identification by one or more witnesses, a reference to the circumstances usually requires a judge to deal with such matters as the length of time the witnesses had for seeing who was doing what is alleged, the position from the accused and the quality of light."***

52. In addition, it has been stated by the Court of Appeal in **Anjononi and Others v Republic, (1976-1980) KLR 1566** that when it comes to identification, the recognition of an assailant is more satisfactory, more assuring and more reliable than the identification of a stranger because it depends upon some personal knowledge of the assailant in some form or other.

53. The evidence of identification at night must also be tested with the greatest care using the guidelines in **Republic v Turnbull, (1976) 3 All ER 549** and must be absolutely watertight to justify conviction as held in **Nzaro v Republic, (1991) KAR 212** and **Kiarie v Republic, (1984) KLR 739**. In **Maitanyi v Republic (1986) eKLR**, the Court of Appeal stated that in determining the quality of identification using light at night, it is at least essential to ascertain the nature of the light available, what sort of light, its size and its position relative to the suspect.

54. In the present appeal, PW2 testified that the appellants and his conspirators had torches which they brandished with wanton abandon. PW2 further testified that the room was well lit by a fluorescent bulb. This was corroborated by PW3 who after the attackers had left went to the complainant's house and noticed that the house was well lit. Accordingly, it is my considered opinion that the Appellants were properly and positively identified.

55. On whether the offence was proved, section 296 (2) of the Penal Code provides as follows with respect to the offence of robbery with violence:

> ***"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."***

56. The prosecution must therefore prove theft as a central element of the offence of robbery with violence, as the offence is basically an aggravated form of theft.

57. The other elements of the offence of robbery with violence were elaborated by the Court of Appeal in **Ganzi & 2 Others v Republic [2005] 1 KLR** and in **Johanna Ndungu v Republic, Cr. App No. 116 of 2005 (unreported)** as follows:

"1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in the company with one or more other person or persons, or

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

58. I am alive in this regard to the requirement that proof of any one of the ingredients of robbery with violence is enough to base a conviction of robbery with violence under section 296 (2) of the Penal Code as was held in **Oluoch v Republic, (1985) KLR 549**.

59. In this regard the evidence given by PW2 stated was that the appellants injured him in the course of the attack. He testified that the 1st appellant hit-slapped his buttocks with a panga until the beige shorts he had on tore. The complainant further testified that the 2nd appellant stepped on his chest as was evidenced on the vest produced as PExhibit 6. CPL Kaveta, the investigations officer testified that on the 30/12/2017 the complainant who had a swollen face, hands and legs made a report of the robbery at the Police Station. PW1, the clinician who attended to the complainant on the 1/1/2018 noted that the complainant had 2 day old injuries which were classified as harm and the probable weapon used to injure him was blunt. Iam satisfied that the complainant sustained injuries as a result of the violent attack.

60. The appellants further alleged that the evidence of PW2 and PW3 were contradicting each other. I have perused the trial court record and I find no material or any contradictions alleged. The appellants furthermore did not identify any contradiction. They merely alleged that the evidence was contradictory. This is not the case. The Court of Appeal addressed itself on the issues of contradictions in the case of **Richard Munene v Republic [2018] eKLR** stated as follows:

"It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

61. Accordingly, I find that there was no contradiction in the evidence of PW2 and PW3 that would prejudice the appellants. This ground fails and is hereby dismissed.

62. The appellants also raised the issue that the prosecution failed to call crucial witnesses to prove their case specifically. I am alive to the fact there is no legal requirement in law on the number of witnesses to prove a fact. Section 143 of Evidence Act (Cap 80) Laws of Kenya provides:

"143. No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

63. However, in **Bukenya v Republic (UGC 1952),** the court addressed itself thus:

"(i) The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be inconsistent.

(ii) That Court has right and the duty to call witnesses whose evidence appears essential to the just decision of the case.

(iii) Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tendered to be adverse to the prosecution."

64. In **Donald Majiwa Achilwa and 2 other v R (2009) eKLR** the Court stated:

"The law as it presently stands, is that the prosecution is obliged to call all witnesses who are necessary to establish the truth in a case even though some of those witnesses' evidence may be adverse to the prosecution case. However, the prosecution is not bound to call a plurality of witnesses to establish a fact. Where, however, the evidence adduced barely establishes the prosecution case, and the prosecution withholds a witness, the court, in an appropriate case, is entitled to infer that had that witness been called his evidence would have tended to be adverse to the prosecution case. (See Bukenya & Others v. Uganda [1972] EA 549). That is, however, not the position here. We find no basis for raising such an adverse inference."

65. Further in **Keter v Republic [2007] 1 EA 135** the court held inter alia:

"The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

66. In the instant case, the prosecution was at liberty to call the witnesses they deemed necessary to establish and prove their case. The trial court was in my opinion not at liberty to determine which witnesses are sufficient to prove the prosecution case, as it was not shown that a particular witness who was so crucial was not called and that had such witness or witnesses been called, then he or she would have given evidence that would be adverse to the prosecution's case. Accordingly, this ground of appeal fails. It is hereby dismissed.

67. The appellants submitted that their conviction was based on the doctrine of recent possession which was not satisfied by the trial court.

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 summarised 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** where the court stated 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."***

68. Thus, once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. This burden is evidential only and does not relieve the prosecution from proving its case to the required standard. That explanation need only be a plausible (see **Malingi v Republic [1988] KLR 225**). In **Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008**, the Court of Appeal observed:

> ***"Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the Evidence Act Chapter 80, the accused has to discharge that burden."***

69. In the instant case the 1st appellant himself led PW6, the investigating officer to a home where he stayed where the complainant's pink hard disk was recovered. Further to this PW4 testified that the 1st appellant sold to him a 6 Kg gas at Ksh 1500 after negotiating from Kshs 2500 when the 1st appellant claimed that he had a sick child and wanted money to use it for treatment of the child. He also told the witness that the receipt for the gas cylinder was at home and that he would provide it later, which cylinder upon recovery by the police turned out to be the complainant's, that was stolen on the material night of the robbery. The 2nd appellant went to sell TV to PW5 at Karapul. He left the TV with PW5 and on being arrested he led the police to the house of PW5. PW5 knew the 2nd appellant well as they had been neighbours. There was no evidence of being framed.

70. Placed on their defence, the appellants denied having committed the crime but did not offer any explanation as to why the complainant's properties were in the possession of the 1st appellant just a day after the robbery.

71. Taking all these pieces of evidence and circumstances into consideration, I find and hold that the prosecution witness PW2 gave a consistent account of what transpired from the time he was attacked by the robbers until the attackers left, an account which was corroborated in part by the evidence of PW1,3,4,5 and 6.

72. The only inference that can be drawn in the circumstances is that the Appellants and the persons they were with were the ones who robbed, injured and disposed PW2 of his possessions. Consequently, I find and hold that the prosecution discharged the burden of proving beyond reasonable doubt that it was the appellants and others who violently robbed the complainant. I find this appeal against conviction devoid of merit and dismiss it.

73. On sentence, I observe that the appellants were handed mandatory maximum sentences. Having considered the circumstances under which the offence was committed and that the appellants have mitigated saying they were misled by bad groups, on the authority of Francis Muruatetu v Republic case [2017] e KLR, I resentence the appellants to serve Thirty (30) years imprisonment each to be calculated from 31/12/2017. I set aside the life imprisonment imposed.

74. The appeal against conviction is dismissed. The appeal against sentence allowed.

Dated, Signed and Delivered at Siaya this 6th day of October, 2020 virtually via Microsoft Teams. Appellants present in prison at Kisumu Maximum Prison.

R.E. ABURILI

JUDGE