



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KISII**  
**CORAM: D.S. MAJANJA J.**  
**CRIMINAL APPEAL NO. 11 OF 2018**  
**CONSOLIDATED WITH**  
**CRIMINAL APPEAL NOS. 59 & 93 OF 2018**

**BETWEEN**

OMEYIO MERABA ASIAGO.....1<sup>ST</sup> APPELLANT

JOSEPH GEKE NYAKUNDI.....2<sup>ND</sup> APPELLANT

EVANS BIRUNDU JUMA.....3<sup>RD</sup> APPELLANT

**AND**

REPUBLIC.....RESPONDENT

*(Appeal from the original conviction and sentence of Hon. M. M. Nafula, SRM*

*dated 29<sup>th</sup> January 2018 at the Magistrate's Court at Ogembo*

*in Criminal Case No. 779 of 2016)*

**JUDGMENT**

1. The appellants, **OMETION MARABA ASIAGO**, **JOSEPH GEKE NYAKUNDI** and **EVANS BIRUNDI** were charged with one count of robbery with violence contrary to **section 296(2)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. The particulars of the charge facing them was that on the night of 25<sup>th</sup> April 2016 at about 11.30pm at Getonto Village, Nyangiti Location in Sameta Sub-County within Kisii County, while armed with pangas, they jointly stole from **GEORGE OMBINYA NYANKURU** assorted items namely; a green raincoat, grey tent, one black Samsung television set, mallet hammer, deck make LG, solar lantern lamp, Techno mobile silver grey in colour, 8 pieces of table cloths, 4 male coats, 7 shirts, 8 long trousers, a pair of gumboots, black wallet, 2 small solar panels, 4 pairs of male shoes, 5 pairs of female shoes, 1 kilogram of sugar, charcoal iron box, extension cable, 1 Samsung television remote control, television and DVD cables and a Nokia charger all valued at Kshs. 150,000/- and during the time of the theft caused injuries to the said **GEORGE OMBINYA NYANKURU**.

2. The 2<sup>nd</sup> appellant and another accused faced an alternative charge of handling stolen property contrary to **section 322(1)** as read with **section 322(2)** of the *Penal Code*. It was alleged that on 26<sup>th</sup> April 2016 at Metamaiywa within Nyamira County, otherwise than in the course of stealing, dishonestly received and retained one black television set make Samsung, 2 solar panels, a deck make LG, a solar lantern, an electrical extension, one pliers, a charcoal iron box, 5 pairs of women shoes, 4 pairs of male shoes, a pair of gumboots and 4 pairs of socks knowing or having reasons to believe them to be stolen.

3. After the trial, the appellants were convicted on the main charge and each sentenced to 30 years' imprisonment. They have now appealed against the conviction and sentence. They have all filed their respective petitions of appeal together with written submissions. The 1<sup>st</sup> appellant was represented by Mr Okenye.

4. The thrust of the appellants' case that raised four principal arguments in attacking their conviction. They attacked the evidence of identification on the grounds that the circumstances of identification were not favourable for positive identification. Secondly, the prosecution did not prove the elements of recent possession of items stolen from the complainant in order to connect the appellant to the offence. Thirdly, the prosecution evidence was contradictory and inconsistent and could not support the conviction. Fourth, that the trial magistrate did not consider their respective defences.
5. Counsel for the respondent submitted that the prosecution established that the appellants were properly identified by the prosecution witnesses and that evidence of recent possession of the complainant's property foreclosed any doubt as to the appellant's participation in the robbery.
6. As this is a first appeal, I am required to re-appraise the evidence and reach my own conclusions as to whether to sustain the conviction bearing in mind that I neither heard or saw the witnesses testify (*Okeno v Republic [1972] EA 32*). In order to proceed with this task, I will outline the evidence as it emerged before the trial court.
7. The prosecution evidence was that on the night of 25<sup>th</sup> April 2016, George Ondinya Nyankuru (PW 1) and his wife, Anne Bosibori (PW 2) were at their home. PW 1 was still awake when two assailants, whom he identified as the 1<sup>st</sup> and 2<sup>nd</sup> appellants, suddenly entered the house. He told the court that one of them had a slasher and the other had a panga. He was hit on the left side on the back whereupon he fell. The assailants started demanding money while issuing threats to him. The assailants forced him to transfer Kshs. 16,000/- through his phone via MPESA to *Joseph Geke*. After he had transferred the money, they dragged him to the bedroom where PW 2 was.
8. PW 2 testified that she had been asleep when she heard the commotion in the next room but could not go out as the bedroom door was locked from outside. In a little while, PW 1 was dragged into the room by the two assailants whom she identified as the 1<sup>st</sup> and 2<sup>nd</sup> appellants. They started ransacking the bedroom looking for money and taking their personal belongings including clothes, their mobile phones, TV extension cables, TV deck, wallet, gumboots and charcoal iron box. Before leaving they tied PW 1 and PW 2. After they had left PW 1 untied himself and PW 1 and they raised alarm causing people to come and assist them. The incident was reported to the Assistant Chief who directed them to report to Itumbe Police Station. PW 1 and PW 2 were later informed in the morning that some people had been arrested on that morning and when they went to Kiogoro AP Post they found the 1<sup>st</sup> appellant.
9. PW 1 was taken to Ogembo Level 5 Hospital where he was treated for his injuries. Peter Ongonga (PW 6), a clinical officer at Ogembo Hospital, examined PW 1 on 27<sup>th</sup> April 2016 and produced the P3 medical form in evidence. He noted that PW 1's left cheek was swollen and left side of the neck was tender, the anterior of the chest was swollen and tender and so was the left forearm and left thigh. He opined that the injuries were caused by a blunt object and classified the degree of injury as harm.
10. On the same morning of 26<sup>th</sup> April 2016 at about 4.00am, Justus Bosire (PW 3) of Kiogoro was woken up by barking dogs and when he went outside, his watchman informed him that he had seen three suspicious people, two of whom had boarded a matatu to Kisii while the third person was still standing at the stage carrying a sack. He confronted the man at the stage who was the 3<sup>rd</sup> appellant and asked him for his identification. He also checked his luggage which comprised a solar panel, solar lamps and assorted clothes. He demanded to know where he had gotten the items but he attempted to run away. PW 3 arrested him and called the area chief who came with Administration Police Officers and took the 3<sup>rd</sup> appellant to Kiogoro AP Post. Thereafter, the 3<sup>rd</sup> appellant took them to the home of the 1<sup>st</sup> and 2<sup>nd</sup> appellant at Metamaya where they recovered further items.
11. AP Naom Ondiba of Itumbe Central Sub-County recalled that on 26<sup>th</sup> April 2016, he accompanied other officers to Kiogoro AP Post where they found the 3<sup>rd</sup> appellant had been arrested. They proceeded with him to Metamaywa where they arrested the 1<sup>st</sup> and 2<sup>nd</sup> appellants in their house. They recovered a wallet, assorted clothes, a Samsung TV, small solar panels, dvd, cell phones and Kshs. 10,000/- from the 2<sup>nd</sup> appellant's pocket.
12. The final prosecution witness was the investigating officer, Corporal Humphrey Osere (PW 5), who was deputed to investigate the matter. He took the statements of the witnesses who were at Kiogoro AP Camp where the appellants and another suspect had been arrested. He also took an inventory of the assorted items that had been recovered from the appellants. In addition, he requested for data from PW 1's mobile phone provider, Safaricom. He was able to confirm from records provided by Safaricom that on the material night Kshs. 10,000/- was transferred from the PW 1's phone (+254714\*\*\*045) to the 2<sup>nd</sup> appellant's phone (+254702\*\*\*504). He produced the items recovered from the appellant which were identified by PW 1 and PW 2 in evidence.
13. When put on their defence, the appellants denied the charges against them. The 1<sup>st</sup> appellant, in his sworn testimony, recalled that on the morning of 26<sup>th</sup> April 2016, he differed with the motorbike rider as he was going to Metamaywa and as they started fighting, people intervened and he was arrested by the police. The 2<sup>nd</sup> appellant testified that on the material morning while at Metamaywa, he saw the 1<sup>st</sup> appellant being beaten by many people and when he tried to intervene, he too was arrested by police officers. The 3<sup>rd</sup> appellant also testified that he was in Metamaywa where he met people who started assaulting him and he was also arrested. The appellants told the court that nothing was recovered from them when they were searched.
14. The offence of robbery with violence under **section 296(2)** of the **Penal Code** is proved when an act of stealing is committed in any of the following circumstances, that is to say, the offender was armed with a dangerous weapon or that he was in the company of one or more persons or that at immediately before or immediately after the time of the robbery the offender beats, strikes or uses other personal violence to any person (see *Dima Denge Dima & Others v Republic NRB CA Criminal Appeal No. 300 of 2007 [2013]eKLR*, *Oluoch v Republic [1985] KLR 549* and *Ganzi & 2 Others v Republic [2005] 1 KLR 52*).
15. From the totality of the evidence, the prosecution proved all the elements of robbery with violence. I am satisfied that on the material night of 25<sup>th</sup> – 26<sup>th</sup> April 2016, PW 1 and PW 2 were attacked by two assailants wielding weapons and who not only threatened but also inflicted violence on PW 1 as confirmed by the medical examination conducted by PW 6. In addition, assorted items set out in the charge

sheet were stolen from their house and subsequently recovered.

16. As I pointed out earlier, the main issue in this appeal is whether the appellants were positively identified as the assailants and or whether their participation in the robbery was proved by application of the doctrine of recent possession. I will deal with the former issue first. The incident took place in the early morning under circumstances that were not ideal for positive identification. In **Wamunga v Republic [1989] KLR 424** the Court of Appeal warned that;

***[W]here the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely be the basis of a conviction.***

17. Before acting on such evidence, the trial court must make inquiries as to the presence and nature of light, the intensity of such light, the location of the source of light in relation to the accused and time taken by the witness to observe the accused so as to be able to identify him (see **Maitanyi v Republic [1986] KLR 198** and **R v Turnbull [1967] 3 ALL ER 549**). The Court of Appeal was categorical in **Kiarie v Republic [1984] KLR 739**, that reliance on such evidence of identification must be “*absolutely watertight*” to justify conviction.

18. It is also accepted in law that evidence of recognition is stronger than that of identification because recognition of someone known to one is more reliable than identification of a stranger (see **Anjononi & Others v Republic [1980] KLR 59**). But in **Wanjohi & 2 Others v Republic [1989] KLR 415**, the Court of Appeal held that, “*recognition is stronger than identification but an honest recognition may yet be mistaken.*”

19. This was not a case of recognition. Both PW 1 and PW 2 admitted in cross-examination that they did not know the assailants prior to the incident. It is also not clear from the totality of the evidence how each of the witness was able to see the 2<sup>nd</sup> and 3<sup>rd</sup> appellant’s as the assailants. However, the evidence points to the fact the assailants were arrested on the same morning after the incident and both PW 1 and PW 2 were able to identify them at Kiogoro AP Post. Obviously, the fact that they had been arrested meant that there was no opportunity for the police to test the capacity of PW 1 and PW 2 to recall the assailants hence this conviction cannot rest on positive identification of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants.

20. The appellants’ conviction also rested on the doctrine of recent possession which entitles the court to draw an inference of guilt where an accused is found in possession of recently stolen property in unexplained circumstances. In **Arum v Republic [2006] 1 KLR 233**, the Court of Appeal set out conditions that must exist before a court can rely on the doctrine of recent possession as a basis of conviction in a criminal case. These include proof that:

- (a) The property was found with the suspect;
- (b) The property was positively the property of the complainant;
- (c) The property was stolen from the complainant;
- (d) The property was recently stolen from the complainant.

The proof as to time will depend on the easiness with which the stolen property can move from one person to another.

21. Once the primary facts are established, the accused bears the evidential burden to provide a reasonable explanation for the possession. While the law is that in a criminal trial, the prosecution bears the burden of proving the case against the accused throughout the case, in a case where one is found in possession of recently stolen property like in this case, the evidential burden shifts to him to explain his possession. That explanation need only be a plausible one but one needs to put it forward for the court’s consideration (see **Malingi v Republic [1988] KLR 225**).

22. The totality of the evidence on this issue is as follows. First, the testimony of PW 1 and PW 2 was credible and established that several assorted household and personal items were stolen from their house when they were attacked by two assailants. On the very morning of the robbery, PW 3 testified that he found the 3<sup>rd</sup> appellant with a sack containing assorted clothes and solar panels. On the same morning of the incident, the 3<sup>rd</sup> appellant led PW 3 and the police officers including PW 4 to the house where the 1<sup>st</sup> and 2<sup>nd</sup> appellants were residing and where they recovered more items belonging to PW 1. PW 1 and PW 2 positively identified these items as having been stolen from his house.

23. In their respective defences, the appellants’ merely denied that they were not found in possession of the assorted items. This defence could not stand in view of the totality of the prosecution evidence. They could not explain how these items, some of a very personal nature, could be found in their possession within a few hours of the robbery incident. Moreover, they did not assert any ownership of the items. I therefore find and hold that there was irresistible evidence to conclude that the appellants were involved in the robbery and accordingly the offence was proved.

24. The 2<sup>nd</sup> and 3<sup>rd</sup> appellant complained that they were convicted on the basis of the evidence of the 1<sup>st</sup> appellant. There was evidence of PW 3 and PW 4 that it is the 1<sup>st</sup> appellant who took them to the 2<sup>nd</sup> and 3<sup>rd</sup> appellants house where the stolen items were recovered. In other words, the statements of the 1<sup>st</sup> appellant implicating the other appellant was the evidence of an accomplice. It has been held that evidence of an accomplice is of the weakest kind and it must be corroborated in order to sustain a conviction (see **Rex v Baskerville [1916] 2 KB 658**, **Asumani Logoni s/o Muza v Rex (1943) 10 EACA 92** and **Karanja and Another v Republic [1990] eKLR**). In this case, the independent evidence was the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> appellants were equally found with property identified and belonging to PW 1 in the morning of the incident.

25. I have evaluated the evidence afresh as required by law and on the whole I am satisfied that the prosecution proved all the elements of the doctrine of recent possession. In addition, the evidence of the MPESA cash transfer from PW 1 to the 2<sup>nd</sup> appellant's phone confirmed that he was at PW 1 and PW 2's house at the time of the robbery. For the reasons I have set out above, I affirm the conviction.

26. As the mandatory death penalty was declared unconstitutional (see *Francis Karioko Muruatetu & Another v Republic SCK Pet. No. 15 OF 2015 [2017] eKLR* and *William Okungu Kittiny v Republic KSM CA Criminal Appeal No. 56 of 2013 [2018] eKLR*) the appellant were sentence to 30 years' imprisonment. The trial magistrate came to the correct conclusion that the offence was serious but I have considered the sentence in light of the sentence imposed in similar cases as it is the duty of the court to ensure that sentences imposed on accused persons in similar circumstances are consistent.

27. In *Wycliffe Wangusi Mafura v Republic ELD CA Criminal Appeal No. 22 of 2016 [2018] eKLR* where the Court of Appeal imposed a sentence of 20 years where the appellant was involved in robbing an Mpesa shop with the use of a firearm with which he threatened the attendant but was caught before he inflicted any violence on her. In *Paul Ouma Otieno alias Collera and Another v Republic KSM CA Criminal Appeal No. 616 of 2010 [2018]eKLR*, the Court of Appeal sentenced the appellants to 20 years imprisonment where the robbery was aggravated by the use of a firearm. Following these guideline judgments of the Court of Appeal, I consider the sentence of 30 years' imprisonment excessive in the circumstances and I reduce the same to 15 years' imprisonment.

28. I therefore affirm the appellant's conviction but quash the sentence and reduce it to 15 years' imprisonment for each appellant. As the appellant were in pre-trial custody, the sentence shall run from the date of arraignment, that is, **28<sup>th</sup> April 2016**.

**SIGNED AT NAIROBI**

**D.S MAJANJA**

**JUDGE**

**DATED and DELIVERED at KISII this 17th day of JANUARY 2019.**

**R. E. OUGO**

**JUDGE**

Mr Okenye, Advocate, for the 1<sup>st</sup> appellant.

2<sup>nd</sup> and 3<sup>rd</sup> appellants in person.

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions for the respondent.