



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CRIMINAL APPEAL NO.152 OF 2013**

**JUMA IDDI MUSTAFA**

**ABUBAKAR MOHAMMED WAFULA..... APPELLANTS**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

*(From original conviction and sentence in Criminal Case No. 29 of 2013 in the Senior Principal Magistrate's Court at*

*Mumias, (Hon L.M. Nafula, SPM) dated 15<sup>th</sup> August, 2013)*

**JUDGMENT**

1. This is a consolidated appeal for purposes of hearing. *Juma Iddi Mustapher* (the first appellant) had filed *Appeal No.152 of 2013*, while *Abubakar Mohamed Wafula* (the second appellant) filed *Appeal No.153 of 2013*. Both appeals having arisen from the same decision, were consolidated and ordered to proceed as *Criminal Appeal No.152 of 2013* with *Juma Iddi Mustapher* as first appellant and *Abubakar Mohamed Wafula* as the second appellant. They will hence forth be referred as such in this judgment.

The appellants were jointly charged with two counts of robbery with violence contrary to *section 296(2)* of the penal code and one alternative count of handling stolen property contrary to *section 322(1)(2)* of the same Code.

2. Particulars in relation to count 1 were, that on the 10<sup>th</sup> day of August, 2012, at about 1.00 am at Shibale Village, Township Sub-location, Nabongo Location in Mumias District within Kakamega County, jointly being armed with dangerous weapons, namely, pangas, knives, rungus and iron bars robbed *Dalmas Obina Midenyo* of one Chloride Exide battery valued at Kshs.8,000/- and one mobile phone make MBA twin sim valued at Kshs.4,500/- all valued at Kshs.12,500/- and at the time of such robbery threatened to use actual violence to the said *Dalmas Obina Midenyo*.

3. Particulars of the offence in relation to count 2 stated that on the same date, 10<sup>th</sup> August, 2012, at about the same time 1.00 am and same place jointly while armed with dangerous weapons namely pangas, knives, rungus and iron bars, robbed *Kelvin Obina* of cash Kshs.500/- and at the time of such robbery threatened to use actual violence to the said *Kevin Obina*.

4. Particulars of the alternative charge were that on the 10<sup>th</sup> July, 2012, at about 2.50 am at Shibale Village, jointly otherwise than in the course of stealing dishonestly received and retained one Chloride Exide battery and one mobile phone twin sim card make MBA knowing or having reason to believe them

to be stolen goods.

5. The appellants pleaded not guilty to both the main as well as the alternative counts, and after a trial in which the prosecution led five witnesses, and the defence sworn evidence, the trial court found them guilty of the main counts, convicted them and sentenced them to suffer death.

6. The appellants being dissatisfied with both conviction and sentence, lodged appeals to this court. The petition of appeal contains essentially five grounds of appeal namely:-

**1. THAT I pleaded not guilty to the charges,**

**2. THAT the erudite trial magistrate erred in both law and facts by failing to consider that there were various inconsistencies and contradictions in evidence adduced during trial,**

**3. THAT the erudite trial magistrate erred in both law and facts by failing to grant the appellant the benefit of essential witnesses not availed for clarity i.e. scenes of crime export and any other witnesses neighbouring the complainant.**

**4. THAT the erudite trial magistrate erred in both law and facts by failing to consider that the prosecution was insufficient, fabricative, a hearsay tale and unconstitutional conjecture on how the complainant had developed familiarity with the appellant. Wasn't genuinely and expeditiously evaluated hence perverting the course of justice.**

**5. THAT the erudite trial magistrate erred in both law and fact by failing to consider the appellant the benefit of the absence of medical report and the relevant valid documents to ascertain the allegations beyond the degree certainty (sic).**

**6. THAT the erudite trial magistrate erred by displacing the appellant sworn defence without giving tangible points for determination thereby rendering it insecure enough to warrant an acquittal."**

7. During the hearing of the appeal **Mr Kundu** appeared for the appellants while **Mr Oroni** was for the respondent. **Mr Kundu**, learned counsel for the appellants relied on the written submissions but emphasised on two key areas, namely; contradictions in the prosecution's evidence and absence of medical evidence as contained in ground 5 of the petition of appeal. On contradiction, **Mr Kundu** submitted, that whereas PW1 testified that the battery and mobile phone were recovered from the 2<sup>nd</sup> appellant, PW5 said the battery was found on the ground. Regarding the mobile phone, PW1's evidence was that it was found in the 2<sup>nd</sup> appellant's pocket, while PW5 said it was found on the table. According to learned counsel, there were further inconsistencies between the evidence of PW1 and PW4 and that of PW3 and PW5. PW1 and PW4, it was submitted, testified that the appellants were taken to Booker Police Post upon arrest, while PW3 and PW5 said they were taken to the scene and thereafter to the Police Station.

8. On medical evidence, (ground 5), learned counsel submitted that whereas PW1 and PW2 testified that they were assaulted, no medical evidence was adduced. Counsel relied on the case of **Eliud Gitau Wanjihia v Republic (Nairobi High Court Criminal Appeal No.634 of 2003)** for the proposition that where the prosecution sought to prove that there was assault during a robbery with violence, medical evidence must be adduced.

9. In the written submissions, the appellants raised the issue of identification, submitting that both PW1's and PW2's evidence was inconsistent on the identity of the attackers. The appellants further submitted that whereas they were charged with being armed with dangerous weapons namely pangas, knives, rungun, PW1 said he was hit with a stick. It was also submitted on behalf of the appellants, that the alleged stolen money of Kshs.500/- was not defined in what currency it was at the time of robbery. The essence of the submission was that the prosecution did not prove its case beyond reasonable doubt.

10. **Mr Oroni**, learned Assistant Public Prosecutor conceded this appeal submitting that the witnesses contradicted themselves in their testimony, and in his view, the appellants' conviction was unsafe going by those contradictions.

11. I have considered this appeal submission by the appellants' counsel as well as concession by the respondents' counsel. I have also perused the record of proceedings before the trial court. This being a first appeal, it is the duty of this court to re-evaluate the evidence adduced before that court, consider it a fresh and make its own conclusions. The court should however bear in mind that it neither saw nor heard the witnesses testify and give due allowance for that see **Okeno v Republic** [1972] EA 32.

12. In the case of **David Njuguna Wairiu v Republic** [2010] eKLR, the Court of Appeal relying on **Okeno v Republic** (supra) stated:-

***“The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusions of the trial court.”***

13. The evidence before court was that on 10<sup>th</sup> August, 2012 at 1.00 am, PW1 and his brother (PW2) were sleeping when the door was broken and two armed men entered the house with torches shone at them. They were ordered not to move. PW1 was hit with a stick and ordered to remain silent. They demanded money and took Kshs.500/- which was on the table. The attackers also took a battery Chloride Exide and cell phone make MBA and left. After the robbers had left, PW1 went out and found all his neighbours' doors locked from outside. He opened for them and informed them of the robbery and the fact that his brother, PW2 had identified and recognised the 2<sup>nd</sup> appellant. Police were called to the scene and together with PW1, PW2 and PW3, proceeded to the appellants' home where they recovered the battery and the cell phone from the appellants. The appellants were arrested and taken to Booker Police Post together with the recovered items. In cross examination, the witness admitted that there was no light in the house but that the assailants used torches which enabled identification and recognition of the 2<sup>nd</sup> appellant both physically and from the voice.

14. PW2, **Kelvin Obina**, told the court that on the material night, he was sleeping in PW1's house when the door to the house was broken and two people entered the house holding torches. The intruders slapped him and demanded for money. The attackers were informed that the money was on the table and turned to check the money. That gave PW2 the opportunity to recognise the 2<sup>nd</sup> appellant, a person he knew well. The assailants took a cell phone, and Chloride Exide battery and left. PW1 went out and alerted neighbours, police were called and came to the scene. PW2 informed them that he had identified and recognised one of the assailants whose home he knew. Police in the company of PW1 and PW4 proceeded to the 2<sup>nd</sup> appellant's home and recovered the cell phone and the battery which had just been stolen. The appellants were arrested and taken to the police station.

15. PW3, **No.77 CPL Vincent Bungei**, told the court that night at around 1.30 am, he was called by **Inspector Kairu** instructing him to rush to a scene of crime and assist other officers **PC Juma** and **PC Cheptarus**. He found the two officers having arrested the appellants and recovered the stolen items. Also recovered were two pangas, two torches, and knives. The appellants were escorted to Booker Police Post, and later charged in court. He produced the cell phone make MBA as PEx1, battery, PEx2, receipt for the cell phone PEx3, red torch PEx4, blue torch PEx5, panga PEx6 and knife PEx7.

16. PW4 **Jacktone Oluoch Makokha** told the court that on the material night he was sleeping when he heard a loud bang on a neighbour's door followed by a commotion. He got out of bed and tried to open his door but found it locked from outside. He called a neighbour the neighbour told him that his door too had been locked from outside. Then PW1 came out and opened for them and told them that he had been attacked and robbed. He also told them that his brother had recognised one of the attackers. PW4 telephoned police officers who came and were led by PW2 to the appellants' home, they found the appellants recovered a battery and cell phone which PW1 identified as the one that had just been stolen. Kshs.300/- was also recovered. The appellants were arrested and taken to the police station.

17. PW5, **No.55458 PC Joseph Cheptarus** testified that on that night at about 1.00 a.m. while on patrol at **Shibale** area, he received a call from PW4 regarding a robbery incident. He together with **PC Juma** proceeded to PW1's home who informed them that PW2 had identified and recognised one of the assailants. They were led to the appellants' home where they recovered the battery, cell phone and money. They also recovered a panga, a knife and two torches used during the robbery. The appellants were arrested later taken to the police post and charged.

18. After the close of the prosecution case, the appellants were put on their defence and both gave sworn testimonies. **DW1 Abubakar Mohammed Wafula** (2<sup>nd</sup> appellant), told the court that on 9<sup>th</sup> August, 2012 at about 5 pm he was at home when he received a call from one **Alice** asking him to collect his money for supply of firewood. After collecting the money, he met one **Steve** who also asked him to collect his money from a bar for firewood supply. After collecting money he bought a soda and as he drank it, his girlfriend called **Jane** joined him. They proceeded to her place of work for more drinks. As they enjoyed themselves DW1 saw two men pointing at him. He decided to leave the place and went home. Later that night, he heard a knock on the door and when he opened he found **Jane** in handcuffs in company of two police men. He was hand cuffed and taken to Booker Police Post. His cell phone dropped and was picked by the police. He was later charged in court but denied committing the offence. He told the court that he was framed up by **PC Juma** because **PC Juma** also wanted **Jane**.

19. DW2, **Juma Idd Mustapha**, (1<sup>st</sup> appellant), told the court that on 9<sup>th</sup> August, 2012 at night he was sleeping when he heard a knock on the door. He opened the door and found other people having been arrested. Police entered and searched his house but nothing was recovered. He was arrested and taken to Booker Police Post with the other people. He was later charged in court alongside DW1.

From that evidence the trial court convicted the appellant for robbery with violence and sentenced them to death prompting this appeal which the respondent's counsel conceded on grounds that there were inconsistencies in the prosecution evidence.

20. Although the appeal has been conceded, the position in law is that such concession does not bind the court, the court has no obligation to simply allow an appeal because the respondent does not oppose it as stated in the case of **Odhiambo v Republic** [2005] 1 KLR 564:

***"The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal. The court has a duty to ensure it subjects the entire evidence tendered before the trial court to a clear and fresh scrutiny and re-assess it and reach its own determination based on the evidence."***

21. The appellant has raised the issue of identification in their submissions saying that they were not properly identified because it was at night and there was no sufficient light to enable positive identification. The law in identification is now settled in this country. Where the only evidence against an accused is on visual identification or recognition, the court should critically examine that evidence to ensure that there is no margin of error before acting on it to convict the accused given the danger of a likelihood of a mistaken identity.

22. In the case of **Kamau v Republic** [1975] EA 139 the Court of Appeal stated:-

***"The court should be fully cognisant to the considerations that must attend a court's analysis of identification evidence whether single or multiple as a basis for convicting an accused person. This is due to the ever present danger of mistaken identity."***

23. The same issue was addressed by the Court of Appeal in the case of **Wamunga v Republic** [1989] KLR 424 thus:-

***"Where 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 make it the***

***basis of a conviction, recognition may be more reliable than identification of a stranger but mistakes in recognition of close relatives and friends are sometimes made.”***

24. The trial magistrate considered the evidence before her and after analysing it stated in her judgment:-

***“Going by the evidence on record, it is not in dispute that the offences were committed at night, the complainants stated that the accused persons each had torches (sic) which they shone at the complainants directly. In this circumstances then it would not be possible for the complainant to identify the accused persons. However the complainant in count 2 gave evidence that he had identified the 1<sup>st</sup> accused person from his voice. This he stated was by virtue of the fact that they had schooled together with the 1<sup>st</sup> accused person at Mayoni Primary School, this then is not just the usual identification but identification by recognition. I do believe PW2 to this end did pass this information to his brother PW1 with whom he was during the robbery and also the neighbours whom they woke up soon after the robbery. PW2 did not only recognise the 1<sup>st</sup> accused person but also volunteered knowing his home, it was on this information that the complainants, PW4 and the police officers proceeded to the 1<sup>st</sup> accused’s home and recovered the items earlier stolen... In my considered view, then this evidence overwhelmingly incriminates the accused persons on the charges preferred against them on both main counts.”***

25. The offence was committed at night and PW1 admitted that there was no power in his house. The only means of light was from the torches the assailants had. According to PW2, he was able to see the 2<sup>nd</sup> appellant and recognised him when they turned to look for the money with torches on.

26. After the robbers left, PW1 went out, called neighbours and informed them that PW2 had recognised one of the attackers. PW4 called the police and this information was passed to them. Together PW1, PW2, PW4, and the police proceeded to the 2<sup>nd</sup> appellant’s home. They did not only find the appellants in the house, but also recovered the battery and cell phone that had just been stolen a moment earlier. PW1 had receipts for the cell phone and the same was produced as an exhibit.

27. Even though it can be said that the circumstances obtaining during the robbery were difficult for a positive identification by recognition, the fact that the stolen items were recovered in the appellants’ possession less than an hour after robbery, can only lead to one conclusion that they were the robbers under the doctrine of recent possession.

28. As stated in the case of ***Kiilu & Another v Republic*** [2005] 1 KLR 174:

***“subject to well known exceptions, it is strite law that a fact may be proved by testimony of a single witness but the role does not lessen the need for testing with greatest care the evidence of a single witness respecting identification, especially when it is shown 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 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.”*** (emphasis)

29. In this appeal I find that there was other direct evidence namely recovery of the stolen items from the appellants that connected them to the robbery. And as correctly pointed out by the trial magistrate, the items were found in the appellants’ possession and there could be no other explanation except that they were the robbers in the absence of a plausible explanation on how they came into possession of those items a few hours after robbery. Under the doctrine of recent possession, as was held in the case of ***Maina v Republic Criminal Appeal No.11 of 2003***, evidence of recent possession of a stolen item alone is sufficient to found a conviction for the offence of robbery with violence.

30. The doctrine of recent possession comes into play where the stolen property is found in the possession of the suspect and is positively identified as that of the victim and further that the property was recently stolen from him or her. In the case of ***Alex Boniface Murungi v Republic***, [2014] eKLR, the Court of

Appeal referring to the case of *Erick Otieno Aru v Republic* [2006] eKLR said:-

***“The doctrine of recent possession applies where the stolen property was found with the suspect, that the property was positively identified by the complainant; that the property was stolen from the complainant; that the property was recently stolen from the complainant.”***

The position in this appeal fits in all fours to what was stated by the Court of Appeal in the above cases. And once the appellants were found in possession of stolen property, it was their duty to give a plausible explanation how they came to be in possession of that stolen property, which means the burden shifted to them. That is what the court stated in the case of *Malingi v Republic* [1989] KLR 225 thus:-

***“By application of the doctrine, the burden shifts from the prosecution to the accused to explain his possession of the items complained about. He can only be asked to explain his possession after the prosecution has proved certain basic facts; firstly that the items he had in his possession had been stolen; it had been stolen a short period prior to the possession; that the lapse of time from the time of loss to the time the accused was found with it was, from the nature of the item and 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 being a presumption of fact, is a rebuttable presumption. That is why the accused 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.”*** (emphasis)

31. In his defence, the 1<sup>st</sup> appellant stated that he was arrested and taken to the police station together with others who had been arrested because of chang’aa, while the 2<sup>nd</sup> appellant said that he had a difference with **PC Juma** over a lady, and that the charge was framed up. The appellants faced a serious charge. None of them alleged any differences with either PW1, PW2 or PW4 who were present when the appellants were arrested and recoveries made. These were the people who led the police to appellant’s home and recoveries made. The items were identified as those stolen from PW1’s house. PW1 produced a receipt to prove ownership. I am satisfied that the appellants did not offer any explanation how they came into possession of the stolen items and the learned trial magistrate was in order in rejecting their defences.

32. The other issue raised on behalf of the appellants, is on contradictions and discrepancies in the prosecution case before the trial court. Learned counsel, **Mr Kundu**, emphasised, in his submissions, that witnesses contradicted themselves on where the battery was found in the appellant’s house, that is whether it was on the floor or with the 2<sup>nd</sup> appellant and also whether the cell phone was on the bed or not.

In his evidence in chief, PW1 said:

***“My brother and I proceeded with the officers to the lower side of Shibale to the home of Abubakar. On reaching there, we found the two. Abubakar was settled on the bed with the battery on his laps ... Abubakar then removed the cell phone from his left trouser pocket and Kshs.300/-. Abubakar is the 1<sup>st</sup> accused herein.”***

On his part, PW5 said:-

***“The complainant told us he knew one of the robbers and where he hailed from. He led us to the robber’s grandmother’s house. We found the accused persons therein in the bed room. ... We found a battery besides the bedroom...”***

33. Learned counsel again pointed out that the evidence of PW1 and PW4 was that the appellants were taken to Booker Police Station on being arrested, while that of PW3 and PW5 was that they were taken to the scene first and thereafter to the police post.

34. A court of first appeal has a duty to examine the evidence and reconcile any conflicting evidence and draw its own conclusion on it. The position was aptly put in the case of *Kiilu & Another v Republic* (supra) thus:-

***“An appellant in a first appeal is entitled to expect the evidence as a whole to be submitted for 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.”***

35. In my view, the contradictions or inconsistencies alluded to by learned counsel, do not amount to fundamental discrepancies that could affect the appellants conviction or sentence. The items were found in the possession of the appellants. Whether the battery was on the lap or on the floor and whether the cell phone was in the pocket or on the bed was not material to the outcome of the case. Again whether the appellants were taken to the police station immediately or later was not a significant conflict in evidence that caused prejudice to the appellant. The fact remains that the items were found in their house, they were in that house and offered no explanation how the items came to be there.

36. In any case, in any trial, there are bound to be contradictions or inconsistencies and unless they are so fundamental as to affect the outcome of the trial, the court can safely ignore them without causing any prejudice to the accused. In the *Ugandan* case of *Twehanga M Alfred v Uganda, Criminal Appeal No.139 of 2001* [2003] UGDA 6, it was stated:-

***“With regard to contradictions in the prosecution’s case, the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution’s case.”***

37. Closer home, the Court of Appeal had the following to say on the point in the case of *Joseph Maina Mwangi v Republic* [2000] eKLR:-

***“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies must be guided by section 382 of the Criminal Procedure Code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentence.”***

38. The same position was restated in the case of *Njuki & 4 others v Republic* [2002] KLR 771 thus:-

***“Where the discrepancies in the evidence do not affect an otherwise proved case against an accused the court is entitled to ignore those discrepancies.”***

39. In my view, taking guidance from the above decisions, the contradictions alluded to by the appellants’ counsel are not fundamental as to cause prejudice to the appellants or affect their conviction and sentence. They were minor and inconsequential to this appeal.

40. Finally the appellant counsel has submitted that the prosecution did not adduce medical evidence to prove attack on the complainants. Counsel cited the case of *Eliud Gitau Wanja v Republic* (supra) to fortify his argument.

41. The appellants were charged with robbery with violence **under section 296(2)** of the Penal Code, and the prosecution was required to prove ingredients of robbery with violence, that is, the appellants were armed with offensive weapons, or were in company with others or used violence against their victim. As observed by the Court of Appeal in the case of *Oluoch v Republic* [1985] KLR 549 at page 556:-

***“Under section 296(2) of the penal Code, robbery with violence is committed in any of the following circumstances:***

**1. The offender is armed with any dangerous or offensive weapon or instrument.**

**2. The offender is in company with one or more other person or persons or**

**3. At or immediately before or immediately after the time of robbery, the offender wounds, beats, strikes or uses other personal violence to any person.”**

42. My understanding of the law as put by the Court of Appeal in the above decision, robbery with violence is committed in any one of the above situations that is the offender is armed or in company of others or uses violence against his victim and not all of them and the offence will have been proved if any one situation obtained in the case.

According to the evidence on record, the assailants were two and were armed with pangas and knives which are dangerous and offensive weapons. Secondly, they struck their victims in order to subdue them to silence. I do not therefore think that the prosecution was by law required to adduce medical evidence to show that PW1 and PW2 were beaten by the appellants in order to prove robbery with violence. That is not the spirit of **section 296(2)** of the Penal Code.

43. I am fortified by the decision in the case of **Mohammed Ali v Republic** [2-13] eKLR where the Court of Appeal considered **section 296(2)** of the Penal code and stated:-

**“The use of the word “OR” in this definition means that proof of any of the above ingredients is sufficient to establish an offence under section 296(2) of the penal Code:**

The Court of Appeal took a similar view in the case of **Daniel Njoroge Mbugua v Republic** [2014] eKLR when it stated:-

**“The use of the word “or” implies that if any of the three conditions is fulfilled, then the offence would be said to have been committed.”**

44. And in the case of **Stephen Khaega Atakha v Republic [2015] eKLR**, where it had been submitted that medical evidence had not been led to prove robbery with violence, the Court of Appeal held that failure to call a witness to produce a P3 was not fatal to the prosecution’s case since there was sufficient evidence by PW1 and PW2 even without a P3.

45. I therefore find that robbery with violence had been established by the evidence on record and that of recovery of stolen items, and for that reason, it was not necessary to call medical evidence in order to prove the offence.

46. From the foregoing, having revaluated the evidence on record and analysed it myself, the conclusion I come to is that this appeal is devoid of merit and is hereby dismissed.

**Dated at Kakamega this 8<sup>th</sup> day of September, 2016.**

**E.C. MWITA**

**JUDGE**