REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE.

HC. CRIMINAL APPEAL NO. E008 OF 2025

(From Original CM. Crim Case no. E2992 of 2023 -Kitale

BONVENTURE WAMONO, alias GILBERT OMBUI MOSE alias CORNELIUS NYONGESA TENDAH alias FREDRICK NYONGESA alias BROWN …… …… APPELLANT

- V E R S U S –

REPUBLIC …… RESPONDENT

J U D G M E N T

Bonventure Wamono, alias Gilbert Ombui Mose alias Cornelius Nyongesa Tendah alias Fredrick Nyongesa alias Brown faced a charge of robbery with violence contrary to section 296(2) of the Penal Code.

The particulars of the charge are that on 15/8/2023 at Kiungani trading Centre in Kiminini, Sub County, jointly with others not before the court, being armed with a dangerous weapon namely AK 47, Assault Rifle, robbed one **Anthony Nyalianya Wakweka** of cash Kshs.300,000/= and fourty (40) assorted mobile phones new and old of different brands in a black bag all valued at Kshs.400,000/= and immediately before the time

of such robbery wounded the said Anthony Nyalianya Wakweka.

The appellant denied the offence and the case proceeded to full trial with the prosecution calling a total of six witnesses in support of their case.

The accused was placed on his defence and testified on oath and did not call any witness.

The trial court convicted the appellant of the charge as charged and sentenced him to serve twenty (20) years imprisonment.

The appellant is aggrieved by both the conviction and sentence and filed this appeal based on the amended grounds of appeal which are as follows

1. **That the appellant was convicted on a charge sheet that was defective in that it was duplicious;**
2. **That the court failed to consider that no identification parade was conducted to test the veracity of the evidence on identification;**
3. **That the appellants right to fair trial under Article 50(2) (g) & (h) were violated;**

4. **That the evidence on possession of mobile phones was not proved to the required standard;**
5. **That the offence of robbery was not proved to the required standard.;**
6. **That the court failed to consider the appellants defence.**

The appellant prays that the appeal be allowed, conviction quashed sentence set aside and he be set at liberty.

This is the first appellate court and it behoves this court to re-examine all the evidence tendered in the trial court afresh, analyse and evaluate it and arrive at its own conclusion while bearing in mind that this court neither saw nor heard the witnesses testify. This court draws guidance from the case of **Okeno -V- Republic (1972) EA 32** "**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 –**

V- Republic (1957) EA 336) 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. (Ruwalla -V- Republic (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 findings and conclusions. I 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 Peter -V- Sunday Post (1958) EA 424"

Prosecution case:

PW1 David Mbugua Karume of Kiungani recalled that in June, 2023 one Samson Naibei told him that he had a deal and wanted a phone and money; PW1 who knew the complainant told him where the complainant resides; that the said Samson brought to him a KPR Officer by name Kabundo and they proceeded to ACK Church Kiungani where they found the appellant. He was told that the deal was to hijack the complainant and the appellant gave them his phone numbers and that he took the robbers to the complainant's gate; that on 15/8/2023, the complainant was attacked at his gate and he heard gun shots while at a changaa den and he knew the deal

ws brokered. He called the Appellant for his pay but the appellant did not honour the deal to date. Next day, he learnt that the complainant was attacked and his phone and cash stolen. He mentioned the appellants name to the DCI Officer and he was arrested on 16/8/2023.

The complainant **Antony Nyalianya Wakweba (PW2)** a teacher testified that on 15/8/2023at 7.00p.m. he locked his shop and went home. He had carried abut 15-20 phones and cash, Kshs.300,000/= and was driving KDC 498W; He stopped at the gate, opened it and when entering, two people emerged from both sides and demanded his bag. He drove at a high speed but they shot at his car window and he was shot in the left hand; He gave them the bag which had the cash and phones. Because of the security lights, he was able to see the person who shot at him but he could not identify the other person because he was masked. He was taken to Hospital and admitted for a month, was issued with a P3 form which was filled. He gave the police the IMEI numbers of the thirteen (13) phones. Later he was informed that a person was arrested with one of his phones and was shown his picture, that is Accused.

PW3 Martha Njoki Ngugi a teacher at Kiungani, recalled that on 15/5/2023 about 7.00p.m. she heard the gate being opened and saw her husband PW2 driving in. She saw two people walking besides the car and one had a gun and one demanding the bag; PW3 asked what they were doing and the gunmen shot PW2 and

PW2 threw the bag at them. The people ran off. They screamed for help and a neighbour took PW2 to hospital. PW3 said she saw the people who attacked PW2 because they had not covered their faces, but never identified the appellant as one of them.

PW4 Naftali Atemba is a Clinical Officer based at Matunda Hospital. He examined PW2 on 15/8/2023 after a shooting incident and found an open wound on the left hand and dressed the wound. He assessed the injury as grievous harm.

PW5 PC Wesley Mabibo of DCI Kitale produced ten photographs taken by PC Sumbiro who had gone on transfer P.Exh.4 & 5.

PW6 CPL. Paul Omondi of DCI Kiminini testified that on 13/8/2023, abut 7.00p.m., he received a call that a teacher had

been shot at Cherangany. He proceeded to the scene and found OCS Kiungani and Officers at the scene; that motor vehicle KDC 418W had hit the perimeter wall and the drivers' seat had blood stains and more blood on the veranda. The victim had been taken to hospital. On searching the scene, he recovered a spent cartridge of AK 47; photographs were taken of the scene. He visited the victim who recorded a statement. On 18/8/2023, he traced PW1 David Mbugua who had participated in the planning of the robbery and that the others had failed to pay him. PW1 gave him phone Nos.0725594635 as belonging to the suspect and he traced the suspect at Lessos and recovered one of the stolen phones, battery IMEI 350372917772941O8 and prepared an inventory (P.exh.1).

He obtained an MPESA statement from Safaricom which revealed the owner of the phone as Cornelius Tenda and that he had withdrawn Kshs.11,000/= on 11/8/2023 from Beeps and Kings Phibe Sematics, the complainant's business.

Defence Case: -

When called upon to defend himself, he testified on oath introducing himself as Bonventure Wanyama; that on 14/8/2023, his wife Jemimah Wanyama called him at 1.00p.m.

that the daughter had been chased from college and he was required there. He went back to Kitale on 15/8/2023 so that he could travel to Chuka on 19/8/2023. He was at home on 15th,16th, and 17th August 2023 but on 18/8/2023 the village elder Antony Wanyama called him. He told him that police were looking for him. He was informed he robbed the complainant with other people but he denied and he was charged.

The Appellants Submissions

It was the appellant's submission that the charge is defective for charging the appellant under section 268(1) of the Penal Code which relates to an offence of stealing as read with section 296(2) of the Penal Code which are ingredients for an offence of robbery with violence; that which resulted in duplicity; that as a result the appellant could not tell what offence he faced and that was prejudicial to him. He relied on the decisions of **Joseph Mwaura Njuguna -V- Republic (2013) eKLR and Joseph Onyango Owuor & Another -V- Republic (2010) eKLR** where the Court faced a similar

situation and found the charges to be duplex hence fatally defective.

The second ground of appeal is that the identification was not satisfactory because PW2 said he only saw the person who shot him while the other was masked; that the parameters required in identification set out in **Turnbull -V- Republic (1972) E ALL ER 549** were not met.

On the third ground, it was submitted that the court did not comply with Article 50 (2) (g) & (h) of the Constitution by informing him of the said rights promptly. He relied on the decisions of **JOO -V- Republic (2021) and K.O. -V- Republic (2023) eKLR** where courts held that failure to inform an accused of the said rights rendered the proceedings a nullity and he invited this court to find likewise.

Respondent's submissions

The respondents opposed the appeal and listed three issues for determination which are

1. **Whether the charge of robbery with violence was proved;**
2. **Whether the defence was duly considered;**

3. **Whether the sentence is legal.**

On Proof of the charge of robbery with violence, it was submitted that in the case of **Charles Mari Wamai – V-Republic (2003) eKLR** the court held that one of the three ingredients had to be proved in order to prove his said offence and they are

(a) The accused is armed with a dangerous or offensive weapon or instrument; or

(b) The accused is in company with one or more persons;

(c) Immediately before or after the time of the assault, he beats, strikes or uses any personal violence to the person.

Counsel submitted that the complainant was seriously injured during the robbery, the robbers were armed with an AK 47 rifle, a dangerous weapon and they were more than one person.

As to whether the appellant was identified, Counsel relied on the

decision of **Malingi -V- Republic (1989) KLR 225** on recent possession; that the appellant was found with one of the stolen

mobile phones three days after the robbery; that the call data revealed that it is the appellant who handled the said mobile phone; that the appellant did not give a plausible explanation of how he came to be in possession of the phone and he failed to rebut the rebuttable presumption under Section 111 of the Evidence Act which led to the conclusion that he was one of the robbers.

Counsel also submitted that PW1 admitted to being an accomplice of the appellant.

The Prosecution relied on section 10 of the Evidence Act which deals with Conspiracy to commit an offence. He relied on the decision of **Antony Kinyanjui Kimani -V- Republic (2011) eKLR.** Which discussed the role of an accomplice; that under section 141 of the Evidence Act, an accomplice is a competent witness and there is no requirement for corroboration. However, the courts have always required corroboration. Counsel relied on the decision of **Michael Murithi Kinyua -V- Republic (2002) eKLR** which affirmed the practice of requiring corroboration of accomplice evidence.

Counsel urged that the appellant was found in possession of a mobile phone and sim card which were paired in the said phone and that therefore the appellant was one of the robbers.

On the alibi defence, it was submitted that the appellant did not build his alibi well; that he raised his defence as an afterthought and raised too late in the day and therefore not truthful.

As regards the legality of the sentence, Counsel urged that the court erred in sentencing the appellant to twenty (20) years instead of the mandatory death sentence; that the Supreme Court in **Muruatetu II** clarified the issue of mandatory sentences as captured in the case of **Hassan Kahindi Katana & Another -V- Republic (2022) KECA 1160** Counsel urged the court to correct the error by enhancing the sentence.

Determination: -

I have considered the grounds of appeal, the evidence tendered in

the trial court and the rival submissions by the parties. The first issue I will deal with is whether the appellant's rights under section 50(2) (g) & (h) were infringed.

Article 50 of the Constitution guarantees an accused persons right to fair trial. Article 50 (2) (g) & (h) provide as follows; "**(2) Every accused person has the right to a fair trial, which includes the right—**

> **(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;**
>
> **(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;**

Both sub-Articles require that the court promptly inform the accused person of the said right. In **Joseph Kiema Philip -V-Republic (2018) eKLR,** the court held that 'promptly' means before plea is taken or soon thereafter and before the trial commences. This is to enable the accused person to make up his mind whether or not to seek services of Counsel if he can afford, and if not, seek for one under the Legal Aid Act if he

qualifies to have one allocated to him. The trial court is expected to make a record that he informed the appellant of the said right. The courts have expressed themselves of the necessity to comply with the above provisions which are necessary for the realization of a fair trial. In the cases of **JOO - V- Republic (2021) eKLR and K.O- -V- Republic (2021) eKLR** the Judges declared the convictions nullities for failure by the court to inform the accused therein of the right to Counsel.

However, the Court of Appeal has now taken a different view. In **Willian Odongo Oongo -V- Republic (2022) KEAA 23**, the Court of Appeal stated thus. "**It should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation. The constitution demands it. In the present case, the record does not show that the appellant was informed by the trial court of those rights. *However, quite apart from the fact that these matters were not raised before the trial court. From the way the appellant cross examined the prosecution witnesses and form his general conduct during the trial,***

***<u>it s not evident an injustice, nay substantial injustice, resulted from the omission by the trial court to inform the appellant of his rights under Articles 50(2)(g) and 50(2) (h) of the Constitution. The failure by the trial court to inform the appellant of his rights in this case should not therefore be a basis for vitiating his trial</u>*.**

All in all, we are satisfied that the conviction is well founded, and we have no basis for interfering with the same."

The above decision has been adopted by the Court of Appeal in other cases including that of **Herman Mwero Mwavughanga -V- Republic CRA 111/2022.** The Court of Appeal stated the operative circumstances that trigger the necessity for legal representation in Criminal cases is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused and the incapacity and inability of the accused to participate in the trial. It means that the court has to look at whether the appellant herein was able to ably take part in the proceedings or was impeded by the complexity of the case. The Court of Appeal being of supervisory jurisdiction to the High Court, this court is bound by their

decision in **Oongo Case** through the doctrine of stare decisis. I have looked at the proceedings in the lower court, and I find that the appellant actively participated in

the proceedings, by cross examining the witnesses at length, gave a sworn defence and was cross examined. The appellant did not demonstrate any difficulty in prosecuting his case and this court finds that he has not suffered any substantial injustice for failure by the trial court to inform him of his right under Article 50 (2) (g) & (h) of the Constitution.

Whether the charge sheet was defective:

The appellant was charged with offence of robbery with violence contrary to section 268(1) as read with section 296 (2) of the Penal Code. The appellant submitted that the charge is duplex. A duplex charge is one which charges more than one offence in the same count. A proper charge should be framed in accordance with section 134 of the Criminal Procedure Code which provides as follows: - **Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such**

particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

Section 268 (1) of the Penal Code provides **(1) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.** Clearly this section defines the offence of stealing.

In the case of **Joseph Njuguna Mware -V- Republic (2013) eKLR** a five bench Court of Appeal clarified what a duplex charge is when considering sections 295 of the Penal Code and 296 (2) of the Penal Code. The court said **"We reiterate what has been stated by other courts in various cases before us. The offence of robbery with violence ought to be charged under section 296(2) of the *Penal Code*. This is the section that provides the ingredients of the offence, which are either the offender is armed with a dangerous weapon, is in the company of others, or if he uses personal violence to any person. The offence of robbery with violence is totally different from the offence**

defined under section 295 of the *Penal Code*, which provides that any person who steals anything and at or immediately after the time of stealing it uses or threatens to use actual violence to any person or property in order to steal. It would not be correct to frame a charge for the offence of robbery with violence under section 295 and 296(2) as this would amount to a duplex charge"

In the **Juma -V- Republic CRA E046/2024 (2025) KEGA**, the Court observed that indeed the charge was duplex but asked itself whether that rendered the trial fatally defective. The court therefore looked at the particulars of the charge to determine whether they disclosed an offence of robbery with violence, then was not fatally defective.

In this case the particulars of the charge are as follows: -**On the 15th day of August 2023, at Kiungani trading center in Kiminini sub-county within Trans-nzoia county jointly with others not before court being armed with a dangerous weapon namely an AK 47 Assault Rifle robbed of one ANTHONY NYALIANYA WAKWEKA of cash Kshs.300,000/=(three hundred thousand) and fourty**

(40) assorted mobile phones new and old of different brands in a black bag all valued at Kshs.400,000/= (four hundred thousand) and immediately before the time of such Robbery wounded the said Anthony Nyalianya Wakweka.

In the **Juma Case** at Paragraph 38 thereof, the court said **“We have considered the law on duplicity in charges as expounded in case law and academic treatises and find an interesting trend which seems to have emerged… The Court cited with approval the case of Cherere s/o Gakuli -v- R. [1955] 622 EACA, where the predecessor of this Court reviewed the cases on the subject of the effect of a charge which is found to be duplex and concluded that "The test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity"… In that case, the court held that the appellant was left in no doubt from the time when the first prosecution witness testified, as to the**

case which he had to meet and he could not, therefore, be said to have been prejudiced in any way".

The court was of the view that was held in **Paul Katana Njuguna -V- Republic (2016) eKLR,** that not every duplicity is fatal to the case and it all depends on the circumstances of each case.

In this case the particulars of the charge set out above disclose every ingredient of the offence of robbery with violence i.e. that there was a theft; that the offender was armed with an offensive weapon i.e rifle; that the offender was with another person; and there was violence meted on the complainant. As held in the **Katana case,** I hold the same view that inclusion of section 268 (1) of the Penal Code in the charge was not fatal to the trial. The appellant was aware of the charge, cross examined witnesses and there is no evidence that there was any form of confusion as to which charge he faced. I find that the charge was not fatally defective as to render the trial a nullity.

Whether the offence of robbery with violence was proved.

In **CRA.300/2007 Dima Denge & others -V- Republic (2013) eKLR** the Court of Appeal set out the ingredients for the offence of robbery with violence as follows **"the elements of the offence under section 296(2) are three in number and they are to be read not conjunctively; but disjunctively. One element is sufficient to found an offence of robbery with violence".**

In **Johana Ndungu -V- Republic CRA 116/1995 9 (1996) eKLR** the Court of Appeal set out the ingredients for the offence of Robbery with violence that need to be proved as follows: -

(i) If the offender is armed with any dangerous or offensive weapon or instrument; or

(ii) If he is in company of one or more other person or persons; or

(iii) If at or immediately before or immediately after the time of the robbery, he wounds beats, strikes or uses any other violence on any person".

Also see **Oluoch -V- Republic (1985) KLR.** In this case, the complainant (PW2) testified that he was attacked by two people, one armed with a rifle and he was shot in the hand. The injuries were confirmed by the testimony of PW4. He was robbed of cash and several mobile phones. Only one of the ingredients needs to be proved. The next question then is whether the appellant was one of the assailants.

According to the Investigating Officer PW6, PW1 led to the arrest of the appellant because he was part of the conspiracy to rob the complainant and he is the one who pointed out the complainant's name to the robbers but he was not paid his dues. PW6 treated PW1 as a witness. PW6 did not disclose the reason why he decided to treat PW1 as a witness.

PW2's testimony was clear; He was attacked by two people. He managed to see the person who had the rifle, and he is not the appellant. he did not see the face of the other person because he was masked. The question is whether the hooded person was the appellant.

The trial court relied on the testimony of PW1 to link the appellant to the robbery under Section 141 of the Evidence Act provides that an accomplice is a competent witness. It reads

as follows **“An accomplice shall be a competent witness against an accused person and a conviction shall not be illegal merely because it proceeds upon the uncorroborated evidence of an accomplice”**

In the case of **John Bosco Ndwiga & 2 others -V- Republic (2017) eKLR,** the court elaborated on who an accomplice when in **Antony Kinyanjui Kimani v Rep [2011] eKLR** said the following**: “What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of Watete v Uganda [2000] 2 EA 559, the Supreme Court held that ‘in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial’. The same definition was restated by the same court in the case of Nasolo v Uganda [2003] 1 EA 181 where the court further stated:**

“On the authorities, there appears to be no one accepted formal definition of ‘accomplice’. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case”.

In the case of **Michael Murithi Kinyua -V- Republic (2002) eKLR the court confirmed that indeed an accomplice evidence is admissible when it said “under section 141 of the Evidence Act “Under section 141 of the *Evidence Act*, Cap 80 Laws of Kenya an accomplice is a competent witness and a conviction based on his evidence is not necessarily illegal or irregular. However, there is a firm rule of practice that the evidence of an accomplice witness requires corroboration. It is however a rule of practice only and in appropriate circumstances, the court may convict without corroboration if satisfied that the accomplice witness is telling nothing but the whole truth, and upon the court duly warning itself and the assessors, where the trial is with the aid of assessors, on the dangers of doing so.**

Before corroboration can be considered however, a court of law dealing with accomplice witnesses must first make a finding as to the credibility of the witnesses. If the witness is so discredited as not to be worthy of any belief, that is the end of his evidence, and unless there is some other evidence, the prosecution must fail. If the court decides that the witness, though an accomplice witness, is credible, then the court goes further to decide whether the court is prepared to base a conviction on the evidence of the accomplice witness without corroboration. If this is so, the court must direct and warn itself accordingly. On the other hand, if the court decides that the accomplice witness, though credible, requires corroboration, the court must look for, find, and identify the corroborative evidence."

Again in **Evans Ongochi and another -V- Republic (1994) e KLR,** the Court reiterated that "**When considering the evidence of an accomplice, the first duty of a Court is to decide whether that evidence is credible. If such evidence is not at all credible, then the issue of warning oneself before acting on it, or looking for corroboration**

for it cannot and does not arise for a lie cannot be corroborated. Nor can one act on a lie on the pretext that one has warned oneself on the dangers of acting upon such lie. It is only when it has been found as a fact that the evidence of an accomplice or any other evidence requiring corroboration is credible that one starts to look for corroboration – see Geoffrey Nguku v Republic [1982 – 1988] 1 KAR 818. If the evidence given by the accomplice is credible

and there is corroboration for it, then the question of a Court warning itself before acting on such evidence does not arise. The need for the Court to warn itself arises only on those rare occasions when the Court is prepared to base a conviction solely on the uncorroborated evidence of an accomplice."

In the cases of **Ayor & Another -V- Republic (1968) EA 303 Page 305 and Karanja & Another -V- Republic (1990) KLR 589,** the Court of Appeal observed that the court must always warn itself of the danger of convicting on the uncorroborated evidence of an accomplice before basing a conviction on such evidence. In **Kinyua -V- Republic (2002) KLR 256 page**

267 paragraph 30, the Court of Appeal again stated that in appropriate circumstances, the court may convict on the uncorroborated evidence of an accomplice if it is satisfied that the accomplice that the accomplice witness is telling the truth.

In the instant case, PW1 stated that he is the one who took the robbers to the complainant's gate. It seems that thereafter, he went to a Changaa den because he heard gun shots from there. Although PW1 told the court that he had the appellant's phone numbers, he did not disclose any of the said phone numbers to the court. The court also takes note of the fact that although PW1 said the accused is before the court, he did not positively identify him by name. It is evident that the appellant has many alias names and it was important that PW1 tells the court the name of the person he dealt with and if he is the same one that was arrested and charged for robbery with violence.

PW6, the Investigating Officer, told the court that it is PW1 who gave him the mobile number 0725594635. PW6 then obtained an

Mpesa statement from Safaricom in respect of the said number. The said number is registered in the name of 'Cornelius Tenda'. The Investigating Officer purported to connect the appellant to

the robbery when he alleged that the appellant used the said number to withdraw Kshs.11,000/= from Beeps and Kings Phibie Sematics which is the complainant's business. First of all, PW2 never told the court that his business is known as Beeps and Kings Phibie Sematics and he never complained that any cash had been withdrawn from the/his business account. Lastly, the said withdrawal of Khs. 11,000/= was made on 11/8/2023 four (4) days before the robbery that the appellant is accused of took place. The said withdrawal of cash from the account does not relate to this case.

The appellant was also linked to the robbery because he was allegedly found with one of the phones stolen from PW2. The question then, is whether the appellant was in recent possession of one of the stolen phone. The Court of Appeal in **Malingi -V- Republic (1989) KLR 225** set out what constitutes the doctrine of recent possession when it said,

> **"By the application of the doctrine the burden shifts from**
>
> **the prosecution to the accused to explain his possession of the item complained about. He can**

only be asked to explain his possession after the prosecution has proved certain basic facts.

(i) Firstly, that the item he has in his possession has been stolen;

(ii) It has been stolen a short period prior to their possession;

(iii) That the lapse of time from the time of its loss to the time the accused was found with it was, from the nature of the item and the circumstances of the case, recent;

(iv) 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 rebuttable presumption of facts 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".

Interestingly, when testifying, apart from giving a list of the stolen phones, PW2 did not positively identify the phone that

was allegedly recovered from the appellant. PW2 did not state the make or IMEI number.

PW6 told the court that he recovered a Techno IMEI 3503729177214108. The list of IMEI numbers of the stolen phones was produced as P.Exh.2(a). PW6 produced the inventory of the items he recovered as P.Exh.6. However, the said inventory is questionable because it was not dated and it was never compared to the one in the investigation diary to confirm if it was authentic because the appellant did not sign it. Further, PW6 was not specific as to where he recovered the phone, in the appellants house or body of the appellant. Besides, the IMEI number captured in the inventory is 350372917721408 which is different from the one given in PW6's testimony. I also take note, that the IMEI number captured in P.Exh.2(b) is different from that captured in PW6's evidence. The receipt reads 3503729177721408. The receipt produced as P.Exh.2(a) does not include the IMEI number of the recovered phone.

Having carefully considered the evidence regarding the phone that was recovered, and the different IMEI numbers, this court

finds that the phone was not positively identified as belonging to the complainant or that it was among the phones that were stolen from the complainant during the robbery. The doctrine of recent possession cannot hold.

As pointed out earlier, the only evidence linking the appellant to the robbery was that of PW1 and the eventual recovery of a phone allegedly stolen from the complainant. The testimony of PW1 was too weak to found a conviction and from my findings regarding the recovered phone, there was no evidence to corroborate PW1's testimony as to the appellants involvement in the robbery.

I have read the trial court's judgment and find that the court did not analyse the evidence at all. Had the court done so, it may have arrived at a different verdict. I find the conviction to be unsound. I quash it and set aside the sentence. The appellant is set at liberty forthwith unless otherwise lawfully held.

Judgment delivered, dated and signed in open court at Kapenguria this 30th day of September, 2025.

R. WENDOH

JUDGE

***In the Presence of*:-**

Appellant – in person - Virtual

Mr. Majale holding brief for Mr. Mugun for Respondent

Juma/ Hellen Court Assistants