IN THE COURT OF APPEAL AT KISUMU

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU, JJ.A)

CRIMINAL APPEAL NO. 225 OF 2020 BETWEEN

JAMES ASILI.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Busia (Muchemi, J.) dated 6th March, 2012

in
Criminal Appeal No. 39 of 2011)
****

JUDGMENT OF THE COURT

1. A background of this appeal is that the appellant was arraigned before the Senior Principal Magistrate's Court at Busia, in Criminal Case No. 1843 of 2009, alongside his co-accused, **Allan Barasa Obada**. In Count I, they faced the charge of **robbery with violence** contrary to **Section 296 (2)** of the **Penal Code**. The particulars of the offence were that on 15th November, 2009, at Busubo Village, Sigalame Sub-Location, in Samia District, within Western Province,

they, jointly with

others not before court, robbed **Calistus Wafula** of one DVD make Aucma, one mobile phone make Dorado 200, one pair of black leather shoes, assorted clothes, and cash Kshs.7,000, all valued at Kshs. 20,400, and immediately before the time of such robbery used actual violence to the said **Calistus Wafula.**

2. In the alternative, the appellant was charged with the offence of **handling stolen goods** contrary to **Section 322(2)** of the **Penal Code**. The particulars of the offence alleged that on the same date and place, the appellant, otherwise then in the course of stealing, dishonestly retained one DVD make Aucma, and assorted clothes, knowing or having reason to believe them to be stolen.

3. In count II, the appellant was charged with the offence of **being unlawfully present in Kenya** contrary to **Section 13(2)** of the **Immigration Act**. The particulars of the offence alleged that on the same date and place, the appellant was found being unlawfully present in Kenya without a permit to stay.

4. The appellant faced a third count where he was charged with

the offence of **failing to report entry to the nearest immigration officer** contrary to **Section 3(1)** as read with

Section 40 of the **Immigration Regulation**. The particulars of the offence alleged that on the same date and place, the appellant, not being an excluded person, was found to have failed to report his entry to Kenya to the nearest Immigration officer.

5. The appellant was convicted on his own guilty plea in count II and III. He was sentenced to pay a fine of Kshs.6,000 in each count, or in default, serve a custodial sentence of three (3) months.

6. The appellant denied the charges in Count I, and the alternative charge. The prosecution called a total of four (4) witnesses. The brief facts of the case according to the prosecution were as follows: The complainant (PW2), and his wife, **Susan Ajiambo** (PW1), were at their house on the night of 15th November, 2009, together with their grandmother. At about 9.30 p.m., they heard a knock on the door. The people knocking identified themselves as police officers. PW2 opened the door and two men entered the house. The men asked for the key to PW2's motorcycle. PW2 informed him that he had left the key with somebody else.

One

of the men brandished a knife and stabbed PW2 on his right elbow. PW2 managed to escape.

7. PW1 stated that the lantern in the house was on. She was able to identify the assailant who had the knife as there was sufficient light. PW1 stated that after her husband (PW2) ran away, the two assailants ran after him. PW1 stated that she went outside, climbed on top of a tree, and hid there. She testified that after sometime, the assailants came back and found the motorcycle parked outside the house. They tried to move it but were unable to. They then entered the house and stole a box which had assorted clothing and shoes, a DVD player, a mobile phone make Dorado, and cash of sum Kshs.7,000.

8. PW1 and PW2 stated that when neighbours came to their rescue, the robbers ran away. PW1 stated that they tried to chase after the assailants but one of them brandished a gun forcing them to retreat. When they went to report the matter at Sio Port Police Station the following day, they found that the appellant had been arrested in possession of the stolen items. Upon cross-examination, PW1 stated that the

appellant was not

known to her, and that she did not see him on the night of the robbery. PW2 also stated that the appellant was unknown to him, and that he was arrested at the home of his co-accused, with the stolen items. PW3**, Ignatius Okumu,** a clinical officer at Sio Port Hospital, examined the complainant and filled a P3 form. It was his evidence that the complainant sustained cut injuries to his right hand, classified as harm.

9. The investigating officer, **Sgt. Wilson Kinyamal** (PW4), stationed at Sio Port Police Station, told the trial court that he was on patrol duty on the night of the robbery. He got a report that there were four Ugandan nationals being haboured at the home of the appellant's co-accused, **Allan Barasa Obada**, and that they were suspected of being robbers. PW4, together with other officers proceeded to the home of the appellant's co- accused. As they were surrounding the house, some of the suspects, together with the appellant's co-accused managed to escape. They however managed to arrest the appellant, a Ugandan national, in the said house. They also recovered the items

that had been stolen from the complainant’s home. The

appellant's co-accused was arrested months later. He was charged together with the appellant before the trial court.

10. The appellant was placed on his defence. He elected to give sworn evidence. He stated that he was a *bodaboda* rider based in Uganda. It was his testimony that on 14th November, 2009, a client hired him to transport him to Bujwanga in Sio Port. He crossed the border into Kenya, dropped the client at 6.30 p.m., and rode back home. On the way back, he met Kenyan police officers who arrested him for being unlawfully in Kenya. They demanded money to facilitate his release, which money he stated he did not have. He was later arraigned before the trial court, where he plead guilty to being unlawfully present in the country. He was sentenced to serve three (3) months imprisonment.

11. The appellant's co-accused (DW2) denied the robbery charges.

    It was his evidence that he was arrested on 13th September, 2010, by members of the public and escorted to the police station. He was not informed the reason for his arrest. He was arraigned before the trial court the following day and charged with the offence of robbery with violence. He denied

being

involved in the robbery, and further stated that the appellant was not known to him at the time.

12. The trial court (Hon. Keago, SRM), in a judgment delivered on 1st April, 2011, found the appellant and his co-accused guilty as charged on Count I. The trial court convicted them on the application of the doctrine of recent possession, and held that the appellant and his co-accused were unable to explain how the items stolen from the complainant's house found their way to the co-accused's house, where the appellant was arrested. The appellant and his co-accused were each sentenced to death.
13. Their respective appeals to the High Court of Kenya at Busia were dismissed, and their conviction by the trial court upheld. Their death sentences were however commuted to life imprisonment.
14. The appellant is now before us on a second appeal. He challenged his conviction and sentence on the basis of the following grounds of appeal: misapplication of the doctrine of recent possession; unreliable evidence of identification; inconsistencies and contradictions in the prosecution's

evidence; failure by the prosecution to discharge its burden of

proof; and failure by the first appellate court to properly re-evaluate the evidence tendered before the trial court.

15. The appeal was canvassed through written submissions, duly filed by both parties. Mr. Menezes, counsel for the appellant, urged that the appellant's conviction was based purely on the application of doctrine of recent possession. He submitted that the said doctrine was misapplied by the trial court, as the stolen items were found in a house belonging to **Allan Barasa Obada,** and not the appellant. It was his submission that the fact that the appellant was found in the said house, did not automatically mean that he was in possession of the recovered items, as he was just a guest, and therefore had no proprietary rights over the house or items found therein.

16. Regarding the evidence of identification, counsel urged that since the appellant was not known to the prosecution witnesses prior to the robbery incident, an identification parade ought to have been conducted to ascertain whether the witnesses had identified the assailants, more so because the circumstances surrounding the robbery were not

conducive to positive identification being made.

17. Counsel further submitted that the evidence by PW1 and PW2 was inconsistent with respect to the items allegedly stolen from their house, as well whether they were able to identify their assailants. He was of the view that the prosecution failed to discharge its burden of proof as relates to the charge laid against the appellant. He faulted the first appellate court for failing to properly re-evaluate the evidence tendered before trial court, which meant therefore that it had arrived at an erroneous decision. He urged us to allow the appeal in its entirety.

18. In rebuttal, learned prosecution counsel, **Ms. Muttellah**, made submissions to the effect that the prosecution proved its case against the appellant to the required standard of proof beyond any reasonable doubt. She maintained that the prosecution's evidence established that the assailants were armed with a knife and a gun, and that they occasioned violence upon the complainant during the robbery. She asserted that the stolen items were recovered from the appellant less than an hour from the time the robbery took place. The appellant was unable to explain his presence in

the house, or why he was in possession of the said stolen items. It was her submission that the doctrine

of recent possession was properly applied in the case. She was of the view that the acquittal of the appellant's co-accused did not automatically invalidate the appellant's conviction, as each case turns on its own facts.

19. Regarding the inconsistencies in the prosecution's evidence, Ms. Muttellah submitted that the same were minor and did not dent the main evidential pillars of prosecution's case. She urged that the first appellate court properly re-evaluated the evidence before trial court, and correctly found that the appellant was rightly convicted. On sentence, learned prosecution counsel submitted that the first appellate court erred in commuting the appellant's death sentence to life imprisonment, and urged that the said sentence was unlawful.

20. This is a second appeal. The mandate of this Court on such an appeal was aptly stated in the case of ***Dzombo Mataza v Republic [2014] eKLR***, where this Court expressed itself in the

following terms;

> ***"As already stated, this is but a second appeal. Under the law we are only***

concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first

appellate court…. By dint of the provisions of section 361(1) (a) of the Criminal Procedure Code our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters of fact that should not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

21. We have carefully considered the record, judgments of both the trial and first appellate court, and the rival submissions set out above, in light of this Court's mandate. The appellant's conviction was based solely on the application of the doctrine of recent possession. Was this doctrine properly applied? This Court in the case of ***Shida Kenga Mitsanze v Republic [2016] KECA 548 (KLR)*** observed as follows, on the application of the doctrine of recent possession:

> ***"The doctrine of recent possession, as circumstantial evidence, must point to the suspect exclusively, and no co-existing factor likely to weaken the inference of the suspect's guilt must exist. See R v Kipkering Arap Koske & another (1949) 16 EACA 135. Secondly for the Court to convict on this doctrine there must be proof that the item found in the suspect's possession was stolen; that it was stolen a short period prior to its possession by the suspect; that the lapse of time from the time of its loss to***

the time the suspect was found

with it was, from the nature of the item and the 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 item; and that the owner of the item was able to positively identify it as his. Where these factors are proved, a rebuttable presumption that the suspect was either the thief or receiver of stolen item arises. See Arum v R, Criminal Appeal No. 85 of 2005."

22. It was the prosecution's evidence that the appellant was arrested in the house of his co-accused, **Allan Barasa Obada,** where he was found hiding, and that the items stolen from the complainant were recovered from the said house. The investigating officer, PW4, told the Court that he received information that four Ugandan nationals, who were unlawfully present in the Country, were being haboured by **Allan Barasa Obada** (co-accused) in his house. He stated that he went to Allan's house, and on arrival, some of the suspects escaped. He found a lady who identified herself as Allan's mother. She showed them Allan's house where they found his wife. The wife informed them that the suspects who had escaped were Ugandan nationals, and that the appellant was hiding in one of the houses. They arrested the

appellant and recovered items alleged to have stolen from the complainant.

23. From the evidence on record, it is not disputed that the house where the appellant was arrested did not belong to him. It was his co-accused's house. Further, the evidence by PW4 failed to establish that the appellant was exclusively in occupation of the said house where the stolen items were recovered. The house was said to have been occupied by the appellant's co-accused, together with other suspects who were said to have escaped. We further note that the appellant's co-accused, whose conviction on the application of the doctrine of recent possession, was discharged by this Court on appeal. In the circumstances, this Court cannot uphold the conviction of the appellant based on the same facts that his co-accused was acquitted by this Court.

24. We are satisfied that the evidence by the prosecution leaves doubt as to whether the appellant was in possession of the items recovered from the house, as he was not in exclusive possession of the said house, which belonged to his accomplice. The evidence on record established co-existing circumstances, which pointed to other persons, as having been in possession of the recovered items.

25. In the end, we find merit in the appeal lodged by the appellant.

The appeal is allowed. His conviction by the trial court is quashed, and the sentence of life imprisonment set aside. Consequently, we order that the appellant be set at liberty and released from prison forthwith, unless otherwise lawfully held.

26. Orders accordingly.

Dated and delivered at Kisumu this 21st day of November,2025.

ASIKE-MAKHANDIA

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.... JUDGE OF APPEAL

H.A. OMONDI

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. JUDGE OF APPEAL

L. KIMARU

.....

.. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.