



**Ombete v Republic (Criminal Appeal 360 of 2019)
[2026] KECA 282 (KLR) (13 February 2026) (Judgment)**

Neutral citation: [2026] KECA 282 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISII
CRIMINAL APPEAL 360 OF 2019
MS ASIKE-MAKHANDIA, HA OMONDI & P NYAMWEYA, JJA
FEBRUARY 13, 2026**

BETWEEN

DESMOND ODANGA OMBETE APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Kisumu (F. Ochieng J.) delivered on 5th February 2019 in Kisumu HCCr. Appeal No. 51 of 2018)

JUDGMENT

1. Desmond Odanga Ombete, the appellant herein, is appealing, for a second time, his conviction for the offence of robbery with violence contrary to section 296 (2) of the Penal Code and consequent sentence of life imprisonment. He was first convicted and sentenced on 22nd May 2018 by the Senior Principal Magistrate's Court at Maseno (Hon. R.S. Kipngeno SRM) in Criminal Case No. 1000 of 2013. He lodged his first appeal to the High Court in Kisumu HC Cr. App No. 51 of 2018, which was dismissed in a judgment delivered on 5th February 2019 by F. Ochieng J. (as he then was), leading to the present appeal.
2. The particulars of the offence the appellant was charged with together with a co-accused whom we were informed did not file an appeal in this Court were that on 29th July 2013 at Essuza sub location, Tongoi Location within the County of Vihiga with others not before Court, he robbed Felistus Ikalakala of items valued at Kshs 150,000/- and immediately before or after the time of such robbery assaulted the said Felistus Ikalakala. A brief summary of the evidence adduced by six prosecution witnesses during the trial is set out hereunder to contextualise the appeal.
3. On 29th July 2013, at around 1.00 am, Felistus Okalakala Andaji (PW 1) heard a loud bang on the door of her house, put on the electric lights and went to check, whereupon she encountered a group of people already in the house who had nyundos (hammers), tindos (chisels), lashes and iron bars. The



people proceeded to beat her, rob her of Kshs.32,870/-, 2 speakers, a full box of Total Oil, her husband's shoes, shirts and tops for football, sport shoes, Adidas shoes, bedsheets and blankets. The robbers stayed in the house for almost one hour and after they left, she called her neighbour, one Jeremiah, and was thereafter treated at Ebusiratsi health centre, and went to report the incident at Luanda Police station.

4. The police later arrested a suspect and organized an identification parade, however PW 1 was not able to identify any of the robbers. She was called later by the police to identify items that were recovered, and was able to identify the speaker, the sheets, the curtains, socks, sports, black shoes, and cut locks recovered at the scene with 2 padlocks. The police informed her that the items were recovered at Lela at a house that was used as a store. She also identified the appellant in court as the commander of the thieves and stated that she could not identify him at the police station because he refused to attend the parade.
5. PW1's husband, Benson Andanji Omakure (PW2) was informed the same night by his daughter that thugs had invaded PW1 and he called his neighbour Jeremiah and told him to help report the matter at the police. He travelled to the house at 4.00 am and found the door broken and PW1 who had "swellings all over". He confirmed that he took PW1 to Ebusiratsi health centre for treatment and reported the matter to Luanda police station. This account of events was corroborated by the neighbour, Jeremiah who testified as PW 3.
6. On 16th August 2013 while going home on a boda boda (motorcycle taxi), PW2 saw the appellant at Luanda wearing black boots which he identified as his from distinctive marks on the boots, questioned the appellant about the boots, and took him to Luanda police station. The police thereupon arrested the appellant and went to his house with PW 2, where they found another pair of PW 2's shoes which he also identified by blue paint on the shoes. They did not recover any of the other stolen items from the house. Gedion Olando Lwale (PW 4), the motorcycle operator, confirmed that on 16th August 2013 he saw PW 2 arguing with the appellant and telling him to remove the shoes he was wearing, and he accompanied them to the police station. He stated that he did not see any peculiar marks on the shoes the appellant was wearing.
7. CIP Were Okech, the OCS at Serem police station (PW 5) conducted the identification parade, the first one on 17th August 2013, when the appellant refused to participate in the parade claiming that the persons in the parade were not of the same height and colour, and PW 5 consequently postponed the identification parade to 18th August 2013, when the appellant again refused to participate claiming that the complainant and the witnesses were persons who knew him very well. Samuel Kabue (PW 6), the investigating officer, was at Luanda police station on 29th July 2013 when he received a report that there had been a robbery at the home of PW1, and together with other officers, proceeded to the scene at about 6.30 am and found that the house had been broken into. He also found PW 1, who told them that the thieves had stolen cash of Kshs.32,870/- and various items which they recorded in the charge sheet. PW 6 was also at the station on 16th August 2013, when PW 2 brought the appellant to the police station, and he is the one who carried out a search of the appellant's home on the same day and found a pair of shoes, which the PW 2 confirmed were his. They took away the pair of shoes and charged the Appellant.
8. While continuing with the investigations, the appellant's co-accused person led PW 6 to Lela on 5th September 2013, to search for things related to another case, whereupon they found a speaker, a blue pair of socks, bed sheet and three pieces of curtains that were identified as having been stolen from her home by the appellant. PW 6 thereupon charged the appellant's co-accused and consolidated the



two criminal cases. He stated that he did not take an inventory of the things he took away from PW1's house nor the appellant's house.

9. The appellant's defence was that it rained heavily on 21st August 2013, and he put on his gum boots and started to ply his trade as a motorcycle rider at Luanda stage, when a man he had seen before and who was with another rider asked him if the shoes he was wearing were his. The appellant stated that he confirmed that the shoes were his, and that he bought them in 2011. The man then explained that there had been a robbery at his place and he suspected that the shoes were his, and told him to accompany him to the police station to resolve the matter. The appellant stated that PW 2 demanded to be paid 150,000/= at the police station, and when he refused, he was charged with the offence.
10. It is on the basis of this evidence that the trial Court invoked the doctrine of recent possession to convict the appellant for the offence of robbery with violence, and sentence him to life imprisonment. Upon appeal to the High Court, Ochieng J (as he then was) stated that the doctrine of recent possession was properly invoked since the appellant was found in possession of shoes belonging to PW2 and was unable to offer an explanation about how they came to be in his possession, and that the said property was recovered not long after the complainant was robbed. Accordingly, that the conviction was founded upon solid evidence and the sentence was within the law.
11. We heard the second appeal filed against this judgment on this Court's virtual platform on 5th May 2025, and the appellant, Mr. Desmond Odanga Ombete, was present in person appearing virtually from Manyani Maximum Prison, and was represented by learned counsel Ms. Omolo, who held brief for learned counsel Mr. Okoth. Ms Omolo confirmed that she would rely on the supplementary memorandum of appeal dated 15th October 2024 and supplementary submissions dated 22nd October 2024 and not earlier submissions dated 22nd April 2024. It is notable in this regard that only one issue was identified for determination in the said submissions, namely: whether the doctrine of recent possession was properly invoked or applied in the circumstances of the case. Learned prosecution counsel Mr. Okang'o, appeared for the respondent and relied on his submissions dated 3rd February 2025 in this regard.
12. This being a second appeal, we can only address matters of law raised by the appellant, as explained in *Karani vs Republic* (2010) 1 KLR 73 :

“By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior Court on fact unless it is demonstrated that the trial court and the first appellate Court considered matters, they ought not to have considered or that they failed to consider matter they should have considered or that looking at the evidence as a whole they were plainly wrong, in which case such omission or commission would be treated as a matter of law.”
13. As earlier indicated, counsel for the appellant only raised one issue for determination in their submissions, being the reliance on the doctrine of recent possession by the High Court. While citing the decision of this Court in the case of *Eric Otieno Arum vs Republic*, [2006] eKLR, counsel submitted that the essential elements for the application of the doctrine of recent possession were that the property was found with the suspect, the property belongs to the complainant, the property was stolen from the complainant and the property was recently stolen; and that the elements are conjunctive and must all exist for the doctrine to properly apply to the case. Further, that the boots allegedly found belonged to PW2 and not PW1, the complainant and the prosecution failed to establish the condition which requires that the property must positively be the property of the complainant. Additionally, while citing the decision in *William Oongo Arunda* (Hitherto Referred To As Patrick



Oduor Ochieng) vs Republic [2022] KECA 23 (KLR), that the Appellant offered a reasonable explanation and provided evidence of a receipt stating that he purchased the boots.

14. Counsel for the respondent on his part commenced his submissions by stating that he would be seeking to enhance the sentence from life imprisonment to the death penalty, since the holding of the Supreme Court in Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR did not apply to offences under section 296 (2) of the Penal Code. Hence, the death penalty remained the only mandatory sentence for a conviction of robbery with violence. Counsel further submitted that both the trial Court and the first appellate Court applied the doctrine of recent possession correctly, and urged that the appellant was found in possession of shoes positively identified by PW2 as his property that was stolen during the robbery. Further, that PW2 identified the shoes by the unique features including inscribed on the sole, and a search of the appellant's house yielded other shoes belonging to PW2. In addition, that the appellant could not provide a reasonable explanation regarding how the shoes came into his possession, and this justified the inference that he was one of the perpetrators of the robbery.
15. According to counsel, both the trial and first appellate court correctly applied the principles as set out in Isaac Ng'ang'a Kahiga & another v Republic [2006] eKLR which outlined the essential elements in the doctrine of recent possession, and the fact that the shoes belonged to PW2 and not PW1, the complainant, was not fatal, since it was clear from the records that PW1 and PW2 were a couple, and PW1 told the police that the shoes belonged to her husband in her statement.
16. It is settled that the doctrine of recent possession applies where there is unexplained possession of recently stolen goods which raises an adverse inference that the possessor is guilty of their theft. The elements of the doctrine were set out in Isaiah Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs Republic (supra) as follows:

“It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in a criminal case, the possession must be positively proved.

In other words, there must be positive proof:

- i. that the property was found with the suspect;
- ii. that the property is positively the property of the complainant;
- iii. that the property was stolen from the complainant;
- iv. that the property was recently stolen from the complainant.

The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other.”

17. In this respect, a pair of boots and shoes with blue paint alleged to have been stolen during the robbery were found in the appellant's possession, and PW2 testified that he knew them very well, he had worn them for many years and he identified them by inscribed identifying marks. To this extent, the first two elements set out in Isaiah Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga vs Republic (supra) were met. However, PW2 was not present when the said shoes were stolen from the complainant, and in this respect, it was only the complainant who could positively prove that the items were stolen from



her. The evidence adduced in the trial Court by the complainant (PW1) of the items stolen from her house on the night of 29th July 2013 when she was attacked and robbed was as follows:

“I pleaded with them. I had money Kshs.32,870/= . I brought the money put it on table. They opened the purse and they took the cash. The light was not put out. They packed things from the house. There was big speaker, 2 speakers.

There was oil total full box which they took. They took my husband's shoes etc. My husband is Benson Andaji. 5 pairs of shoes; they took shirts and top for football. my husband's and mine. From the bedroom namely: sports shoes, Adidas shoes, bedsheets were stolen, blankets.

They tied the goods in the bed sheets and took them out. They stayed in the house for almost one hour. There were people in the rooms. Many other things were stolen. They left. They checked my husband's coats and they set on me. They demanded Kshs.100,000/=”

18. Upon cross-examination, PW1 stated as follows:

“The boots MFI-P7 are my exhibits. He (PW2) bought them 7 years ago. One didn't have inner sole. I didn't tell police that of the boots never had inner sole. I didn't give them description of the shoes.

These are my exhibits other shoes MFI-P8. He has been with them for more than 2 years. The shoe has sole part. The photo he took with the shoes is here. I never told police so.”

19. Of note is that there was no mention of boots or shoes with blue paint given by PW1 who was present during the robbery and who witnessed the items being taken. This is especially relevant in light of the detailed description given by PW 2 as follows in his evidence:

“I know my boots very well. I had used them for over one year. They are special safety boots that we use at Kenya Pipe Lines. They had metal at the front. When I was buying the boots I had discovered a number 44 written on one which was faded while the other side was not. I had even argued with the person selling them to me over that. One had initial C. E faded while the other didn't. Both didn't have inner soles. I questioned the person and I confirmed that the shoes he wore were mine....

At his home we entered the house. The first things I saw were my other shoes. They had a blue paint on it. The shoes are here (MFI- P8). They are what I am wearing in this photograph here. One had a hole when I was buying it with the mutumba people. We never recovered anything else.”

20. Therefore, even if PW2 identified that the shoes belonged to him, his evidence was not proof of one of the key elements required to be established for the doctrine of recent possession to apply, namely, that the said boots and shoes were the one that were stolen during the robbery, since he did not witness the robbery. Further, PW 1's evidence did not indicate that there were boots stolen, or indicate any marks on the shoes to confirm that indeed the boots and shoes found with the appellant were stolen during the robbery. In addition, no inventories were produced by the prosecution witnesses as exhibits to prove the items recovered from the appellant and their description, and the appellant did give an explanation that he bought the shoes and produced a receipt as evidence. Lastly, the evidence adduced was that other items that were stolen and identified by PW1 were found in another location and in the possession of other persons, and no evidence was adduced connecting the appellant with the location or other persons.



21. There is therefore a distinct possibility that the shoes found with the appellant may not have been among the ones that were stolen, or that they came into the appellant's possession by other means, and there was accordingly doubt created by the prosecution evidence in this regard. It is thus our conclusion that the prosecution did not establish beyond reasonable doubt that the boots and shoes found with the appellant and which PW 2 claimed to be his, were stolen from the complainant during the robbery. We therefore find that there is a legal basis to disturb the trial Court's and High Court's findings on the application of the doctrine of recent possession, and the conviction of the appellant for the offence of robbery with violence which was solely based on reliance on the said doctrine.
22. The appeal on the sentence of life imprisonment for the offence of robbery with violence therefore also succeeds. We feel compelled however to comment on the notice of enhancement of sentence by the respondent, which was given in the first paragraph of its submissions dated 3rd February 2025. These submissions were filed after the appellant had already filed and served two sets of submissions, the last set being the ones dated 22nd October 2024 . This court has had occasion to address the tenets of the law that require to be followed in enhancement of the sentence in the case of *JJW vs Republic* [2013] eKLR, and held as follows:

“... The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.”
23. We can only add that for a court to be able to warn an appellant of the risks of an enhanced sentence, it must be seized of the notice of enhancement before the hearing of an appeal. This will require the respondent at the very least to file the notice of enhancement and serve it on the appellant in good time before the hearing, for the appellant to have opportunity to consider the legal implications and respond. Therefore, even if this appeal had failed, the notice of enhancement by the respondent would in this instance have been incompetent for reasons that the appellant was not given adequate notice or opportunity to respond to it.
24. This appeal is accordingly found to have merit and hereby allowed in its entirety. We accordingly quash the appellant's conviction for the charge of robbery with violence, and set aside the sentence imposed upon him of life imprisonment. The appellant is set free forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISUMU THIS 13TH DAY OF FEBRUARY, 2026 ASIKE-MAKHANDIA

.....
JUDGE OF APPEAL

H. A. OMONDI

.....
JUDGE OF APPEAL



P. NYAMWEYA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

